March 19, 2010

Via Facsimile and U.S. Mail

Peter Yucupicio, Chairman
Pascua Yaqui Tribe
7474 S. Camino De Oeste
Tuscon, AZ 85757

Re: Opinion regarding loan documents between Pascua Yaqui Tribe and Bank of America N.A.

Dear Chairman Yucupicio:

This letter responds to your request on behalf of the Pascua Yaqui Tribe ("Tribe") for the National Indian Gaming Commission's Office of General Counsel ("OGC") to review the draft financing documents specified below (collectively, the "Loan Documents"). Specifically, you have asked for our opinion regarding whether the Loan Documents are management contracts requiring the NIGC Chairman's review and approval under the Indian Gaming Regulatory Act and whether the Loan Documents violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming operations. After careful review, it is my opinion that the Loan Documents are not management contracts requiring the review and approval of the Chairman and do not violate IGRA's sole proprietary interest requirement.

In my review, I considered the following submissions, all undated and unexecuted drafts, which were represented to be in substantially final form:

- Credit agreement, an agreement for a construction loan, revolving loans, swing line loans, and letters of credit by Bank of America N.A. and other lenders (the "Administrative Agent" and "Lenders") to the Tribe;
- Security agreement granted by the Tribe in favor of the Administrative Agent and Lenders ("Security Agreement");
- Escrow agreement between the Tribe and Administrative Agent ("Escrow Agreement");
- Two deposit control agreements between the Tribe and Administrative Agent ("Waterfall Deposit Control Agreement" and "Collection Deposit Control Agreement").

I also considered a March 2, 2010 opinion of the Tribe's special legal counsel.

Briefly, by way of background, I understand that the Tribe is planning to build a new hotel; upgrade and expand its existing hotel; build a new parking structure, conference center, food and beverage space, and warehouse at the Casino Del Sol; and refinance certain debt. The financing for all of this will be provided in various forms by the Lenders. Bank of America will

act as administrative agent for the Lenders and itself provide[ ]loans and a line of credit. The various loans and letters of credit carry interest rates ranging from the prime rate plus [ ]for base rate loans or LIBOR plus[ ]for Eurodollar rate loans and are secured by the gross revenues of the Tribe's gaming operations and a pledge of substantially all personal property, including accounts, of the Tribe's gaming operations.

64

Under the Loan Documents, the Tribe is required to deposit gross gaming revenues into an account controlled by the Administrative Agent. However, the Tribe will withdraw amounts to pay gaming operation expenses included in the Tribe's monthly budget, provided no event of default exists. Additionally, there are multiple provisions within the Loan Documents that preclude the Lenders or Administrative Agent from engaging in any management activities of the gaming operations.

Authority

Management Contract

The authority of the NIGC to review and approve gaming-related contracts is limited by IGRA to management contracts and collateral agreements to management contracts to the extent that they implicate management. *Catskill Development LLC v. Park Place Entertainment Corp.*, No. 06-5860, 2008 U.S. App. LEXIS 21839 at *38 (2nd Cir. October 21, 2008) ("a collateral agreement is subject to agency approval under 25 C.F.R. § 533.7 only if it 'provides for management of all or part of a gaming operation'"); *Machal Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d 659, 666 (W.D. La. 2005) ("collateral agreements are subject to approval by the NIGC, but only if that agreement 'relate[s] to the gaming activity'"). *Accord, Jena Band of Choctaw Indians v. Tri-Millennium Corp.*, 387 F. Supp. 2d 671, 678 (W.D. La. 2005); *United States ex rel. St. Regis Mohawk Tribe v. President R.C.-St. Regis Management Co.*, No. 7:02-CV-845, 2005 U.S. Dist. LEXIS 12456, at *3-*4, *9-*10 (N.D.N.Y. June 13, 2005), *aff'd on other grounds*, 451 F.3d 44 (2nd Cir. 2006).

The NIGC has defined the term *management contract* to mean "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15. *Collateral agreement* is defined as "any contract, whether or not in writing, that is related either directly or indirectly, to a management contract, or any rights, duties or obligations created between a tribe (or any of its members, entities, organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)." 25 C.F.R. § 502.5.

Though NIGC regulations do not define *management*, the term has its ordinary meaning. Again, management encompasses activities such as planning, organizing, directing, coordinating, and controlling. *See* attached *NIGC Bulletin No. 94-5*: "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)." Accordingly, the definition of *primary management official* is "any person who has the authority to set up working policy for the gaming operation." 25 C.F.R. § 502.19(b)(2). Further, management employees are "those who formulate and effectuate management policies by expressing and making operative

the decision of their employer." *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974). Whether particular employees are "managerial" is not controlled by an employee's job title. *Waldo v. M.S.P.B.*, 19 F. 3d 1395 (Fed. Cir. 1994). Rather, the question must be answered in terms of the employee's actual job responsibilities, authority and relationship to management. *Id.* At 1399. In essence, an employee can qualify as management if the employee actually has authority to take discretionary actions – a *de jure* manager – or recommends discretionary actions that are implemented by others possessing actual authority to control employer policy – a *de facto* manager. *Id.* at 1399 *citing N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980).

If a contract requires the performance of any management activity with respect to all or part of the gaming operation, the contract is a management contract within the meaning of 25 U.S.C. § 2711 and requires the NIGC Chairman's approval. Management contracts not approved by the Chairman are void. 25 C.F.R. § 533.7; *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Dev. Corp.*, No. 09-CV-768, 2010 U.S. Dist. LEXIS 1714 at *8-*9 (W.D. Wisc. January 11, 2010).

Sole Proprietary Interest

No agreement may give a proprietary interest in any Indian gaming activity to any entity other than the tribe itself, except for certain individually owned gaming operations not at issue here. 25 U.S.C. § 2710(b)(2)(A); 25 U.S.C. § 2710(b)(4). Among IGRA's requirements is that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). Under this section, if any entity other than a tribe possesses a proprietary interest in the gaming activity, gaming may not take place. *See also* 25 C.F.R. § 522.4(b)(1).

Proprietary interest is not defined in the IGRA or the NIGC's implementing regulations. However, it is defined in Black's Law Dictionary, 7th Edition (1999), as "the interest held by a property owner together with all appurtenant rights..." *Owner* is defined as "one who has the right to possess, use and convey something." *Id. Appurtenant* is defined as "belonging to; accessory or incident to..." *Id.* Reading these definitions together, a proprietary interest is ownership, with the right to possess, use, and convey something.

Additionally, the NIGC has provided a non-exhaustive list of arrangements that would violate the sole proprietary interest clause:

- an agreement whereby a vendor pay the tribe for the right to place gambling devices that are controlled by the vendor on the gaming floor;
- a security agreement whereby a tribe grants a security interest in a gaming operation, if such an interest would give a party other than the tribe the right to control gaming in the event of default by the tribe; and
- stock ownership in a tribal gaming operation, even by tribal members.

58 FR 5802, 5804 (Jan. 22, 1993).

Analysis

Management Contract

I am aware of the recent decision in *Wells Fargo v. Lake of the Torches* and the court's holding that any agreement in which receivership is a possible remedy upon default is a management contract. *See Wells Fargo v. Lake of the Torches*, at *11-*12. The court there found a bond trust indenture to be a management contract in part because it contained a specific provision allowing for the appointment of a receiver upon default. *Id.* Moreover, the court specifically rejected Wells Fargo's argument that a receiver would not exercise managerial control because its sole function would be to ensure that the gaming operation deposited its revenues and paid its liabilities. *Id.* Specifically, the court stated: "[b]y forcing the Corporation [Lake of the Torches] to deposit its revenues and pay its liabilities, the receiver would in fact be exerting a form of managerial control since those monies could not be used for other purposes related to the operation of the Casino facility." *Id.* at *12. While I generally agree with the court's analysis, I do not think the circumstances here are the same.

None of the Loan Documents set out the appointment of a receiver as a specific remedy upon default. However, the Credit Agreement provides that the Administrative Agent shall upon default "exercise on behalf of itself, the Lenders and the L/C [letter of credit] Issuer all rights or remedies available to it, the Lenders and the L/C Issuer under the Loan Documents or applicable law,..." Credit Agreement § 9(d). Additionally, the Lenders, "shall have, in any jurisdiction where enforcement hereof is sought...all rights and remedies of a secured party under the Uniform Commercial Code as enacted in any jurisdiction, [and] all rights and remedies under the Tribal UCC..." Security Agreement § 9. Those rights and remedies include the appointment of a receiver. However, to say that a clause that merely reserves to a creditor the rights available under the law makes the Loan Documents management contracts would produce undesirable results – many, if not most, financing agreements for Indian casinos would be deemed management contracts. It would also seem to go well beyond the intent of the parties, who have structured straightforward loan agreements.

More significantly, the Loan Documents themselves state that their provisions are to be read so as to exclude management:

> NOTWITHSTANDING ANY OTHER POSSIBLE CONSTRUCTION OF ANY PROVISION(S) CONTAINED IN THIS AGREEMENT OR IN ANY OTHER LOAN DOCUMENT, IT IS AGREED THAT WITHIN THE MEANING OF THE INDIAN GAMING REGULATORY ACT: (A) THE LOAN DOCUMENTS, INDIVIDUALLY AND COLLECTIVELY, DO NOT AND SHALL NOT PROVIDE FOR THE MANAGEMENT OF ALL OR ANY PART OF BORROWER'S GAMING OPERATIONS BY ANY PERSON OTHER THAN BORROWER OR DEPRIVE BORROWER OF THE SOLE PROPRIETARY INTEREST AND RESPONSIBILITY FOR THE CONDUCT OF THE GAMING OEPRATIONS; AND (B) NONE OF ADMINISTRATIVE AGENT, SWING LINE LENDER, L/C ISSUER OR ANY LENDER (OR ANY OF THEIR SUCCESSORS, ASSIGNS OR AGENTS) WILL EXERCISE ANY REMEDY OR OTHERWISE TAKE ANY ACTION UNDER OR IN

CONNECTION WITH ANY LOAN DOCUMENT IN A MANNER THAT WOULD CONSTITUTE MANAGEMENT OF ALL OR ANY PART OF THE GAMING OPERATIONS OR THAT WOULD DEPRIVE BORROWER OF THE SOLE PROPIETARY INTEREST AND RESPONSIBILITY FOR THE CONDUCT OF THE GAMING OPERATIONS.

Security Agreement § 19. The Loan Documents also expressly limit the remedies available on default to exclude the exercise of management by the Administrative Agent or Lenders:

> Notwithstanding any provisions in any Loan Document, or any other right to enforce the provisions of any Loan Document, none of the Secured Creditors shall engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Borrower's gaming operations (collectively, "Management Activities"), including, *but not limited to*:
>
> (a) the training, supervision, direction, hiring, firing, retention or compensation (including benefits) of any employee (whether or not a management employee) or contractor;
> (b) any working or employment policies or practices;
> (c) the hours or days of operation;
> (d) any accounting systems or procedures;
> (e) any advertising, promotions or other marketing activities;
> (f) the purchase, lease, or substitution of any gaming device or related equipment or software, including player tracking equipment;
> (g) the vendor, type, theme, percentage of pay-out, display or placement of any gaming device or equipment; or
> (h) budgeting, allocating, or conditioning payments of the Borrower's operating expenses; provided however, that upon the occurrence of an Event of Default, a Secured Creditor will not be in violation of the foregoing restriction solely because it:
>
> i. enforces compliance with any term in any Loan Document that does not require the gaming operation to be subject to any third-party decision-making as to any Management Activities;
> ii. requires that all or any portion of the revenues securing the Obligations be applied to satisfy valid terms of the Loan Documents; or
> iii. otherwise forecloses on all or any portion of the Collateral securing the Obligations.

Credit Agreement § 11.25. The Escrow Agreement, Waterfall Account Control Agreement and the Collection Account Control Agreement all contain substantively identical provisions, § 4.15; § 12(g); and § 12(g), respectively.

Accordingly, the Loan Documents are fairly read to preclude the appointment of a receiver that would exert management control over the gaming facilities. Therefore, unlike the agreement in *Lake of the Torches*, the Loan Documents here lack the receivership provision that

was one of the bases of the court's finding management there. *Wells Fargo v. Lake of the Torches*, at *11-*12.

I also note that the *Lake of the Torches* court based its finding of management in part on the bondholders' discretionary control over the amount of capital expenditures that could be incurred. The court found that the requirement that the Tribe obtain bondholder consent prior to incurring capital expenditures in excess of 25% of the previous year's capital expenditures is management. *Wells Fargo v. Lake of the Torches*, at *9.

Here, however, while the Credit Agreement fixes a maximum budget for capital expenditures—[redacted] for new construction; [redacted] per year for maintenance; and [redacted] per year for maintenance after completion—the Administrative Agent and Lenders have no authority to review or approve how or on what the Tribe makes these capital expenditures. *See* Credit Agreement § 7.13. Therefore, because the Credit Agreement and other Loan Documents do not provide the Administrative Agent or Lenders with any discretionary control over capital expenditures, the provisions concerning capital expenditures do not make the Loan Documents management contracts. b4

I note finally that the Security Agreement pledges the gross gaming revenue of the Tribe's gaming operations as security. Previous OGC opinions have posited that an agreement containing a security interest in a gaming facility's future gross revenues, without further limitation, authorizes management of the gaming facility. In January 2009, we provided guidance in the form of limiting language that would prevent a pledge of gross gaming revenues from resulting in a management contract. The Credit Agreement has adopted our proposed limiting language in Section 11.25. The Escrow Agreement, Waterfall Account Control Agreement and the Collection Account Control Agreement all contain substantively identical provisions, § 4.15; § 12(g); and § 12(g), respectively. As such, the pledge of gross revenues in the Loan Documents does not make them management contracts.

Sole Proprietary Interest

The Agreements do not violate IGRA's sole proprietary interest provision. An area of concern when analyzing whether an entity other than the Tribe has a proprietary interest in a gaming operation is the compensation paid by the Tribe. The question is whether the compensation paid to the vendor is so large that it indicates an ownership interest rather than a reasonable measure of value for services provided or risks taken.

Here, the Agreements provide for repayment of the loans in principal and interest. Credit Agreement § 2.08 and 2.09. The interest is equal to prime plus [redacted] for loans denominated in dollars and LIBOR plus [redacted] for loans from Eurcland banks, the range in rate resulting from various facts such as timing and the leverage ratio. b4

Additionally, upon an event of default, neither the Administrative Agent nor the Lenders obtain a right to control the gaming operations under the Security Agreement or any other Loan Document. *See* Security Agreement § 19; Credit Agreement § 11.25; Escrow Agreement § 4.15;

Waterfall Account Control Agreement §12(g); and Collection Account Control Agreement § 12(g). Nothing about the transaction indicates it is anything other than a loan, and the proprietary interest in the gaming remains solely with the Tribe. Therefore, the interest provisions in the Credit Agreement do not provide the Lenders an ownership interest and do not violate the sole proprietary interest requirements under IGRA.

Conclusion

The Loan Documents can be fairly read to preclude management in the event of default. Nothing in the provisions of the Loan Documents addressing remedies, capital expenditures or pledge of gross revenues gives to the Administrative Agent, the Lenders, or any third party, the discretion or authority to manage any part of the Pascua Yaqui Tribe's gaming operations. Therefore, it is my opinion that the Loan Documents are not management contracts requiring the approval of the NIGC Chairman, nor do they violate IGRA's sole proprietary interest requirement. I note, however, that the Loan Documents have been submitted to us as undated and unexecuted drafts that are in substantially final form, and to the extent that the Loan Documents change in any material way prior to closing, this opinion shall not apply.

I anticipate that this letter will be the subject of Freedom of Information Act (FOIA) requests. Since we believe that some of the information contained herein may fall within FOIA Exemption 4(c), which applies to confidential proprietary information, the release of which could cause substantial harm, I ask that you provide me with your views regarding release within ten days.

I am also sending a copy of the submitted agreements to the Department of Interior Office of Indian Gaming for review under 25 U.S.C. § 81. If you have any questions, please contact NIGC Staff Attorney Dorinda Strmiska at (202) 632-7003.

Sincerely,

Penny J Coleman

Penny J. Coleman
Acting General Counsel

cc: Paula Hart, Office of Indian Gaming Management Bureau of Indian Affairs (w/ incoming)
Kimberly Van Amburg, Assistant Attorney General, Pascua Yaqui Tribe
Luis A. Ochoa, Special Counsel for Pascua Yaqui Tribe
Don Schulke, Senior Vice President, Bank of America, N.A.
Kent Richey, Special Counsel for Bank of America