May 27, 2010

Via Facsimile, E-mail, and U.S. Mail

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Re: Review of financing documents for the Sokaogon Chippewa Community and request for declination letter

Dear Messrs. Larson, Reynolds, and Williams:

This letter responds to the February 2, 2010 request on behalf of Wells Fargo Bank, National Association ("Wells Fargo" or "the Trustee"), which sought this office's review of certain financing documents of the Sokaogon Chippewa Community ("the Tribe"). I respond as well to the March 26, 2010 letter in reply on behalf of the Tribe. Both the Tribe and Wells Fargo have asked for an opinion about whether these documents constitute management contracts requiring the NIGC Chairman's approval pursuant to the Indian Gaming Regulatory Act. Both have also provided detailed analyses of the question, but they reach opposite conclusions. Wells Fargo is of the opinion that the financing documents are not management contracts, and the Tribe is of the opinion that they are.

After careful review of the documents and the parties submissions, after having multiple conversations with the parties, and taking into consideration their on-going litigation over this specific issue, I am unwilling to provide a definitive opinion regarding whether these documents are management contracts. I note, however, that my reluctance to do so is based on a single provision that is subject to multiple interpretations. The remaining provisions that the Tribe has identified as management, such as the specific remedy allowing the appointment of a receiver, are, for the reasons explained at length below, not management in my opinion.

In my review, I considered the following documents, all between the Tribe and Wells Fargo as the Trustee (collectively, the "Bond Documents"):

- Trust Indenture dated January 1, 2006, ("the Trust Indenture");
- Guaranty and Pledge Agreement dated December 1, 2005 ("the Guaranty and Pledge Agreement");
- General Obligation Taxable Gaming Bond Series 2006A; and
- General Obligation Taxable Gaming Bond Series 2006B.

Authority

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-Millenium 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* as "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 to 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. Management encompasses activities such as planning, organizing, directing, coordinating, and controlling. *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 a 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.*,677 F.Supp.2d 1056, 1060-1061.

Analysis

I am aware of the recent decision in *Wells Fargo v. Lake of the Torches* and the court's holding that a bond trust indenture was a management contract. *Id.* at 1060-1061. In *Lake of the Torches* the court found the bond trust indenture at issue to be a management contract, in part because it gave the bondholders ongoing discretionary control over management decisions such as the annual amount to be spent on capital expenditures and the hiring or firing of management personnel or a management company. *Id.* at 1059-1060. The court also found management in the bondholders' right to require the tribe to hire a management consultant, their right to veto any management consultant chosen by the tribe, the tribe's obligation to use its best efforts to implement the consultant's recommendation, and some of the bondholders' rights upon default, *e.g.* the appointment of a receiver and the right to require new management be hired. *Id.* at 1060. The court ultimately found that these terms 'taken collectively and individually' made the bond trust indenture at issue a management contract. *Id.* at 1060.

Also of import to the court in *Lake of the Torches* was the fact that the security for the bonds at issue was the gross gaming revenues of the Lake of the Torches Economic Development Corporation ("Lake of the Torches"), which is the tribal entity that wholly owns the Lake of the Torches Resort Casino, a successful tribal gaming operation. *Id.* at 1059.

Both the Tribe and Wells Fargo have pointed to several provisions of the Trust Indenture that are similar to those examined by the court in *Lake of the Torches*. I note that the Trust Indenture, which was drafted in 2006, contains many of the same headings, corresponding section numbers, definitions, and provisions as the bond trust indenture at issue in *Lake of the Torches*, which was drafted in 2008. However, there are also significant differences.

First, the most significant difference between the Trust Indenture and the bond trust indenture in *Lake of the Torches* is that the Trust Indenture exempts operating expenses from the security interest granted in the gross revenue of the casino. In the Trust Indenture, the Tribe grants "[a] first priority lien on and pledge of all right, title and

interest in and to the Gross Revenues of the Casino Facility remaining *after* payment of Operating Expenses." *See* Trust Indenture at p.18, Granting Clause I. By contrast, the bond trust indenture in *Lake of the Torches*, pledged "[a]ll right, title and interest in and to the Gross Revenues of the Corporation, and investment earnings on the Gross Revenues of the Corporation." *Lake of the Torches,* at 1059, (quoting the bond trust indenture at 2, granting clause I).

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 the event of default, a party with a security interest in a gaming facility's gross revenues has the authority to decide how and when operating expenses are paid, which is itself a management function. Furthermore, a party that controls gross revenues potentially controls everything about the gaming facility by allocating or putting conditions on the payment of operating expenses.

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. *See* Letter from Penny J. Coleman, Acting General Counsel, to Kent Richey, Esq. (January 23, 2009). Such limiting language is unnecessary, however, where an agreement exempts operating expenses from the pledge of gaming revenues or where a pledge of net gaming revenues excludes operating expenses. Excluding operating expenses from the gaming revenues in which a party is granted a security interest ensures that the secured party cannot manage the gaming facility should the tribe default.

Unlike the indenture in *Lake of the Torches*, the Trust Indenture excludes operating expenses from the gaming revenues pledged as security for the debt. Because the pledge of revenues in the Trust Indenture excludes operating expenses, the Trustee has no security interest in the operating expenses and cannot exert control over the gaming operation in the event of default. Therefore, the pledge of gross revenues after payment of operating expenses does not make the Trust Indenture a management contract.

Second, the provisions of the Trust Indenture relating to capital expenditures, Sections 5.04 and 6.15, are significantly different than the analogous provisions of the bond trust indenture in *Lake of the Torches*. There, the capital expenditures provision was found to be management because it required the written consent of a majority of the bondholders in order for the tribe to spend more than 25% of what was spent on capital expenditures the previous year. *Id.* at 1059-1060. The court based its finding of management in part on the bondholders' discretionary control over the capital expenditures. *Id.* at 1060.

A financing agreement is a management contract if it requires a third party to approve or accept a tribe's management decisions about its gaming activity. This is so because the management decision is ultimately left to the discretion of, and is therefore under the control of, the third party. For example, an agreement that requires a tribe to obtain the consent of its lenders before making capital expenditures for the casino is a

management contract. Such was the case in *Lake of the Torches*, and I agree with the court's finding there.

Here, by contrast, the Trust Indenture specifies the amount of money to be set aside by the Tribe for capital expenditures on a monthly basis, and it requires the Tribe to spend a minimum of $1,000,000 on capital expenditures every two years. *See* Trust Indenture §§ 5.04 and 6.15. Unlike the bond trust indenture at issue in *Lake of the Torches,* this does not give the Trustee or the bondholders any discretionary control over the Tribe's capital expenditures. The Tribe is not required to obtain their consent or approval for capital expenditures, and the Trustee and bondholders cannot exercise any discretionary control over the expenditures.

The Tribe's March 26 letter argues that the requirement that a minimum amount be spent on capital expenditures is management because it takes away the Tribe's discretion to use the money for "other more urgent purposes, such as marketing, or even debt service payments" and "constitutes control by the Trustee over the Casino's ability to buy new equipment which is a Casino Operation." I disagree. The Trustee is not controlling capital expenditure. The Tribe has already made the management decision to make minimum capital expenditures, and it embodied its decision in the Trust Indenture as part of the consideration granted to investors in its bonds. Finding management by the Trustee in this would produce absurd results.

For example, the Tribe's obligation to make monthly principal and interest payments also removes its discretion to use that money for other purposes. In fact, payments on the debt service and to the capital expenditures fund are due on the same day each month. *See* Trust Indenture § 5.04. If, as the Tribe's attorneys suggest, any restriction of the Tribe's discretion to use gaming revenue as it sees fit constitutes management, then all contracts requiring payment from the gaming operation or from gaming revenue would be management contracts, and the Chairman would have to approve all of them.

Further, if the Tribe could not pledge collateral for a loan, credit, or debt, then the Tribe could not obtain financing at all. Here, the parties bargained for and agreed to the covenants set forth in the Trust Indenture, and although the Tribe agreed to limit its discretion over the minimum amount of capital expenditures, the Trust Indenture does not vest in the Trustee, the bond holders, or any third-party, any discretion over capital expenditures.

In a similar vein, the Tribe's March 26 letter argues that the requirement that the Tribe submit a "Draw Request" to the Trustee in order to withdraw funds from the capital expenditures fund grants the Trustee the discretion to decide whether the capital expenditures funds are released. In support of its argument the Tribe includes two "Draw Requests" that were not funded by the Trustee.

When reviewing contracts submitted to the Office of General Counsel for a determination as to whether they are management contracts, I can only render an opinion

about provisions within the four corners of the documents. I cannot opine about actions of the parties following the execution of a contract, even those taken under the auspices of the contract. Of course, any entity that manages a tribal gaming facility without an approved management contract is in violation of the IGRA, and the NIGC Chairman can bring an enforcement action against it.

In looking at the provisions of the Trust Indenture that require the Tribe to submit a "Draw Request," I see no opportunity for the Trustee to exercise discretion or control over the funds. The Trust Indenture provides that "[d]isbursement *shall* be made by the Trustee upon request of the Tribe or Casino Enterprise, through submission of a Draw Request." *See* Trust Indenture § 5.04 (emphasis added). When the Tribe is in default, however, Section 8.05 of the Trust Indenture prohibits the Trustee from transferring any funds to the Tribe from the capital expenditures fund. *Id.* at § 8.05. Based on these provisions, the Trustee has no discretion to withhold or deny the transfer of capital expenditure funds to the Tribe when the Tribe is not in default, and also has no discretion to transfer capital expenditure funds to the Tribe if it is in default.

I note, however, that both "Draw Requests" offered as evidence of the Trustee's discretionary control over the capital expenditures fund were submitted after the Tribe had failed to make its monthly principal and interest payments on the debt and was thus in default. *See* Complaint, ¶ 29; *Wells Fargo Bank v. Sokaogon Gaming Enterprise and the Sokaogon Chippewa Community,* Case No. 09CV-79, State of Wisc. Circuit Court, Forest County (filed August 4, 2009). That being the case, the Trustee had no choice and no discretion as to whether to fund the Tribe's draw requests and was in fact prohibited from doing so by the terms of the Trust Indenture.

For all of the reasons above, it is my opinion that the capital expenditures provisions of the Trust Indenture do not make it a management contract.

Third, the debt service coverage covenant in the Trust Indenture has an analogous provision in *Lake of the Torches*. *See* Trust Indenture § 6.13. The covenant is subject to multiple interpretations and gives me pause.

In *Lake of the Torches,* the debt service ratio provision provided that when the debt service coverage ratio fell beneath a threshold level, and if 51% of the bondholders required it, then "the Corporation will promptly retain an Independent management consultant with sufficient experience in and knowledge of the gaming industry approved by the Bondholder Representative." *Lake of the Torches,* at 1059-1060, (citing the bond trust indenture at § 6.19). The gaming operation was then required to "use its best efforts to implement the recommendations of the management consultant." *Id.* The court found that these "provisions give the bondholders the opportunity to exert significant control over the management operations of the Casino Facility" and the bond trust indenture was therefore a management agreement. *Id.* at 1060. I agree with this reasoning.

Here, like the debt service ratio provision in *Lake of the Torches*, the debt service coverage covenant also requires the Tribe to hire an independent consultant should the

debt service coverage ratio not be met. *Id.* However, rather than requiring the approval of the bondholder representative, the independent consultant must be "acceptable to the Trustee." *See* Trust Indenture § 6.13.

Although the word *approve* is not used, *acceptable* implies that the Trustee must approve of the Tribe's selection of an independent consultant. The definition of *accept* is "to admit and agree to; accede to or consent to; receive with approval; adopt; agree to." *Black's Law Dictionary* (Abridged 6th Ed.1995). As such, one could read the phrase "acceptable to the Trustee" to mean that the Trustee must approve of or agree to the Tribe's selection of an independent consultant. Such an interpretation would mean the provision calls for the Trustee's management.

However, in this instance the term *acceptable* is further qualified by illustration: a "consulting firm recognized for its experience in the field of tribal casino gaming or a firm of certified public accountants." Trust Indenture, § 6.13. By illustrating what is "acceptable to the Trustee," one could also read the covenant to mean the Trustee's approval is not required when the Tribe's selected independent consultant meets the specified objective criteria, *i.e.* a firm of certified public accountants, or a firm with experience in the field of tribal casino gaming. Read that way, the provision is not management.

The ambiguity extends further. Unlike the 'Debt Service Ratio' provision at issue in *Lake of the Torches,* the Trust Indenture does not require the Tribe to implement the recommendations of the independent consultant. It states instead:

> The Tribe agrees that the Casino Enterprise will, to the extent permitted by law, follow the recommendations of the Independent consultant unless the Tribal Council in good faith resolves in a writing delivered to the Trustee . . . that such recommendations are not in the best interests of the Casino Enterprise and that a proposed alternative set of recommendations of management are likely to achieve the 150% debt service coverage ratio in this Section. So long as an Independent consultant shall be employed and the Casino Enterprise accepts and follows the recommendations of the Independent consultant or such alternate recommendations of the Tribal Council the Tribe shall be deemed to be in compliance with the covenants provided . . ., notwithstanding that the Income Available for Debt Service realized may have been less than 150% of Total Principal and Interest Requirements.

Trust Indenture, § 6.13 (emphasis added). As such, the ultimate decision whether the independent consultant's recommendations are implemented remains with the Tribe because the Tribe can come up with its own set of alternative recommendations and opt to follow them instead.

Legal counsel for Wells Fargo argues that this choice resolves the question of management here. Counsel contends that because the Tribe may choose whether to

follow the independent consultant's recommendations, it does not matter whether the Tribe, the bondholders, or the Trustee selects the independent management consultant. It is not at all clear to me, however, that the Tribe has an unfettered choice here.

If the Casino falls below a certain debt service overage ratio, the Tribe must pay for the services of an independent consultant, which is not an inexpensive proposition. Trust Indenture, § 6.13. If the Tribe chooses not to follow the consultant's recommendations, it must, pay for alternative recommendations, presumably from another consultant, and because the Casino is not making its debt service coverage ratio, it is already under some financial distress.

If the Tribe is unable to raise the debt service ratio to the required threshold after implementing its alternate recommendations, the Tribe can avoid default only by continuing to employ the independent consultant and continuing to implement its alternative recommendations. *Id.*

The Commission, through Bulletin 94-05, observed that even though a tribe, as the owner of the gaming operation, has the ultimate authority to make decisions, "[t]he exercise of such decision-making authority by the tribal council or a board of directors does not mean that an entity or individual reporting to such body is not 'managing' all or part of the operation." NIGC Bulletin 94-05. In explaining the differences between management and consulting in Bulletin 94-05, the Commission clarified that an agreement that provides no finite tasks or assignments to be performed; has an open-ended date of completion; and, does not tie compensation to specific work or objectives to be met, is more likely to be construed as a management contract. *Id.*

Therefore, although the Tribe retains the ultimate authority to decide whether to implement the independent consultant's recommendations, the provision also suggests management by a third party consultant. This along with the ambiguous phrase "acceptable to the Trustee" makes it unclear whether the covenant makes the Trust Indenture a management contract, and I offer no opinion one way or the other.

Fourth, the Trust Indenture provides for the appointment of a receiver in case of default, and the identical provision is in the bond trust indenture examined in *Lake of the Torches*. *See* Trust Indenture § 8.04. Both state:

> Upon the occurrence of an Event of Default, and upon the filing of a suit or other commencement of judicial proceedings to enforce the rights of the Trustee and the holders of Bonds under this Indenture, the Trustee shall be entitled, as a matter of right, to the appointment of a receiver or receivers of the Trust Estate and the revenues, issues, payments and profits thereof, pending such proceedings, with such powers as the court making such appointment shall confer.

Id. at § 8.04.

The court in *Lake of the Torches* found this to be management. *Lake of the Torches,* at 1060. The court noted that the receiver would have control over the trust estate, which was defined to include all of the gross gaming revenues of the gaming operation without limitation. *Id.* I agree. In previous opinions, I have questioned whether a court could appoint a receiver for a tribal gaming operation because such an appointment would usurp the tribe's ability to manage and control its gaming enterprise. The concern is closely analogous to those I have expressed about pledges of gross revenues.

If, upon default, a third party has the ability to condition the payment of operating expenses, then that third party effectively has control over a tribe's gaming operation and its management decisions. As such, I have opined that an agreement providing for a security interest in gross gaming revenue is a management contract. I have also opined, however, that agreements with pledges of gross revenue are not management contracts if they also contain detailed language expressly prohibiting the lenders' or trustees' ability to manage upon default. In short, a security interest in gross gaming revenue, without further limitation, makes a finance agreement a management contract.

Similarly, the appointment of a receiver may give a third party substantial management control over a tribe's gaming operation. I see no reason why a receiver's authority could not be limited to preclude management, either with appropriate limiting language or by removing operating expenses from the receiver's authority altogether. As with gross revenue, then, a provision providing for the appointment of a receiver over gross gaming revenues, without further limitation, is management.

It is in this way that the Trust Indenture and the *Lake of the Torches* bond trust indenture differ. The *Lake of the Torches* bond trust indenture defines the term *Trust Estate* to mean "the Collateral," and it defines *Collateral* to mean "the assets of the Corporation in which a security interest has been granted to the Trustee to secure the bonds pursuant to the Granting Clauses and/or the Security Agreement." *See* Exhibit A to Plaintiff Wells Fargo Bank's Rule 15(a) Motion for Leave to Amend Complaint, *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Dev. Corp.*, No. 09-CV-768, (W.D. Wisc. December 21, 2009), Bond Trust Indenture, filed February 8, 2010. Appointing a receiver over the *Lake of the Torches* trust estate would give the receiver control over operating expenses and management authority over the casino.

Here, by contrast, the Trust Indenture defines *Trust Estate* as:

> [T]he revenues to be derived from the Casino Facility, pledged and assigned under Granting Clause I of this Indenture; the revenues, moneys, investments, contract rights, general intangibles and instruments and proceeds and products and accessions thereof as set forth in Granting Clause II of this Indenture; and additional property held by the Trustee pursuant to Granting Clause III of this Indenture.

Id. at § 1.01 Definition of *Trust Estate.* In turn, Granting Clause I exempts from the pledge of a security interest in gross gaming revenue the payment of operating expenses. *See* Trust Indenture at p.18, Granting Clause I. Thus, the Trust Indenture limits the authority of the receiver to the Trust Estate, which by definition excludes operating expenses. It is my opinion that, limited in this way, the Trust Indenture's receivership provision is not management.

In its March 26 letter, the Tribe identifies three other provisions of the Trust Indenture that it argues make the Trustee a manager. I disagree.

Selection of auditor and audit expense.

The Tribe argues that ¶8(b) of the Guaranty is management because it provides the Trustee with the power to audit the casino at the casino's expense. This is not management. In order for the Trustee to be able to order an audit, the casino must first fail to provide unaudited monthly financial statements within 30 days of a written request from the Trustee or bondholders. The Trustee's ability to order an audit depends solely on the action, or inaction, of the casino.

What is more, this kind of audit is not the annual independent audit of the gaming activity that IGRA requires tribes to file annually with NIGC. 25 U.S.C. § 2710(b)(2)(C). The choice of auditor and responsibility for that audit is a management function. This audit allows the Trustee and bondholders to understand the casino's finances and, presumably, the Tribe's ability to service its debt. The Trustee and bondholders cannot use the audit for any management purpose, nor can they require the Casino to rely on the audit to affect any management decisions. The fact that the Tribe must pay for the audit is immaterial. This provision is, in short, one of a number that give the Trustee's a tool to safeguard the bondholder's investments and that give the Trustee the right to charge fees and costs associated with the enforcement of the Guaranty and Trust Indenture. This provision is, therefore, not management.

Trustee control over gaming operation funds and investments.

Next, the Tribe argues that the Trust Indenture's provisions requiring the Tribe to deposit the original bond proceeds and the pledged revenues into accounts controlled by the Trustee is management. I disagree. The bond proceeds have already been spent and were spent in accordance with the purpose of the bond financing – construction of a new gaming facility. Further, if the Trustee truly had control over the gaming operation's funds, as the Tribe suggests, the Trustee would not need to seek a receiver nor enforcement of the Trust Indenture. Further still, the pledged revenues deposited in accounts controlled by the Trustee come only after payment of all operating expenses. As discussed above, control over net revenue does not allow a third party to have control over the gaming operation and is not management.

Trust Indenture unlawfully encumbers Tribal lands.

Lastly, the Tribe argues that the covenant that prohibits the Tribe from selling or pledging fee simple tribal lands violates 25 U.S.C. § 81. It appears that the Tribe is arguing that § 81 requires approval of the Trust Indenture because it encumbers the Tribe's fee lands. If so, the Tribe should address its concern directly to Interior's Office of Indian Gaming, which is responsible for reviewing any gaming-related agreements that fall within § 81. Although the Secretary of Interior's authority to approve management contracts for gaming under § 81 was transferred to the NIGC Chairman by IGRA, 25 U.S.C. § 2711(h), the remainder of the Secretary's authority under that section was not. The question is outside of NIGC's jurisdiction.

Conclusion

I understand that, as was the case in *Lake of the Torches*, Wells Fargo is the Tribe's trustee under the Trust Indenture, and as trustee, Wells Fargo has filed an action against the Tribe and is seeking the appointment of a receiver. I note that as in *Lake of the Torches,* Wells Fargo did not seek NIGC review and approval of the Bond Documents prior to their execution, but in light of the court's ruling in *Lake of the Torches* I am not surprised that Wells Fargo now seeks a determination that the Bond Documents are not management contracts subject to the NIGC Chairman's review and approval.

Generally, the Office of General Counsel refrains from opining on matters that are currently in litigation. However, given the recent decision in *Lake of the Torches*, the similarity between the Bond Documents here and the bond trust indenture there, and the need to provide guidance to others, I believe the issuance of an opinion letter in these circumstances is warranted.

For the reasons stated above, it is my opinion that the provisions for capital expenditures, the appointment of a receiver, audits, deposits, and restrictions on fee lands, do not collectively or by themselves make the Bond Documents into management contracts. The only provision that gives me pause is debt service covenant provision, and I offer no opinion about it.

I anticipate that this letter will be the subject of Freedom of Information Act ("FOIA") requests. Since I believe that some of the information in this letter may fall within FOIA exemption 4(c), which applies to confidential and 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 of 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 Melissa Schlichting at (202) 632-7003.

Sincerely,

Penny J Coleman

Penny J. Coleman
Acting General Counsel

cc: Paula Hart, Director, Office of Indian Gaming (w/ incoming)