September 14, 2010

Via Facsimile and U.S. Mail

James Edwards, Chairman
Berry Creek Rancheria of Maidu Indians of California
5 Tyme Way
Oroville, CA 95966
Fax: (530) 534-1151

Re: Review of financing documents for the Berry Creek Rancheria of Maidu Indians of California

Dear Chairman Edwards:

This letter responds to your July 26, 2010, request on behalf of the Berry Creek Rancheria of Maidu Indians of California (the Tribe or Borrower) for the National Indian Gaming Commission's (NIGC's) Office of General Counsel to review the draft financing documents specified below (collectively the "Financing Documents"). Specifically, you have asked for my opinion about whether the Financing Documents are management contracts requiring the NIGC Chairwoman's approval pursuant to the Indian Gaming Regulatory Act (IGRA) and whether the Financing Documents violate the IGRA's requirement that a tribe have the sole proprietary interest in its gaming operations. After careful review, it is my opinion that the Financing Documents are not management contracts that require the approval of the Chairwoman. It is also my opinion that the Financing Documents do not violate IGRA's sole proprietary interest requirement.

In my review, I considered the following submissions, all undated and unexecuted revised drafts that were represented to be in substantially final form and were received from Christine Swanick, legal counsel for Bank of America, on August 13, 2010, and revised on September 13, 2010:

- Amended and Restated Security Agreement (the Security Agreement) between the Tribe and Bank of America, N.A. (the Bank); and
- Second Amended and Restated Business Loan Agreement (the Loan Agreement) between the Tribe and the Bank.

The Financing Documents represent a transaction involving the refinancing of existing debt through a line of credit secured by the revenues of the Gold Country Casino and Hotel (the Tribe's gaming enterprise). *See* Loan Agreement, § 1.1; Security Agreement, § 1(a). The Loan Agreement further provides the Tribe with the option of

electing the method by which the interest rate is to be set. The options available to the Tribe for election are based on the then current commercial rates set by the Federal Reserve Bank of New York, the advertised "prime rate" of the Bank, or the London Inter-Bank Offered Rate (LIBOR). Loan Agreement, §§ 1.4, 1.5, and 1.6.

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 its regulations do not define *management*, NIGC has explained that 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)." 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.

Sole Proprietary Interest

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); *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.* A*ppurtenant* is defined as "belonging to; accessory or incident to . . ." *Id.*

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 there was a management contract. *Id.* at 1060-1061. In *Lake of the Torches,* the court found the bond trust indenture 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. 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, which is the tribal entity that wholly owns the Lake of the Torches Resort Casino. *Id.* at 1059. 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, specifically 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.

Here, as security for the line of credit made available pursuant to the Loan Agreement, the Tribe grants to the Bank a security interest in the collateral the Tribe provided, which includes all of the Tribe's pledged revenues and deposit accounts. *See* Security Agreement, § 1. *Pledged Revenues* is defined in the Security Agreement as "all

cash, money, receipts, revenues and rents from the operation of any portion of the Gaming Facilities, including without limitation receipts from (a) Class II and Class III gaming (as such terms are used in the IGRA). . .." *Id.* at § 1(c). Thus the security for the financing provided here includes the gross revenue of the Gold Country Casino and Hotel.

The bond trust indenture at issue in the *Lake of the Torches* case did not contain any limiting language and was therefore found to be management. Here, the Security Agreement has adopted limiting language similar to that proposed by the Acting General Counsel in 2009. *See* Letter from Penny J. Coleman, Acting General Counsel, to Kent Richey, Esq. (January 23, 2009). Section 8(k) states:

> Notwithstanding any provision in this Agreement or any other right to enforce the provisions of any Loan Documents, the Bank shall not engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Pledgor's gaming operations (collectively, "Management Activities"), including, but not limited to:
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> (i) the training, supervision, direction, hiring, firing, retention, compensation (including benefits) of any employee (whether or not a management employee) or contractor;
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> (ii) any working or employment policies or practices;
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> (iii) the hours or days of operation;
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> (iv) any accounting systems or procedures;
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> (v) any advertising, promotions or other marketing activities;
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> (vi) the purchase, lease, or substitution of any gaming device or related equipment or software, including player tracking equipment;
>
> (vii) the vendor, type, theme, percentage of pay-out, display or placement of any gaming device or equipment; or
>
> (viii) budgeting, allocating, or conditioning payments of the Gaming Enterprise's operating expenses;
>
> *provided however,* that upon the occurrence of a default, the Bank will not be in violation of the foregoing restriction solely because the Bank:
>
> (A) 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; or
>
> (B) requires that all or any portion of the revenues securing the Obligations be applied to satisfy valid terms of the Loan Documents; or

> (C) otherwise forecloses on all or any portion of the Collateral securing the Obligations.

Security Agreement, § 8(k). The above limiting provision is also present in the Loan Agreement. *See Loan Agreement*, § 10.16. As such, the Pledged Revenues in the Security Agreement is distinguishable from the agreement at issue in *Lake of the Torches*, and does not make the Financing Documents management contracts.

The court in *Lake of the Torches* also found a specific provision allowing for the appointment of a receiver upon default to be management. *Wells Fargo v. Lake of the Torches* at 1060. 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.* The court stated: "[b]y forcing the Corporation 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.*

Here, the Financing Documents do not set out the appointment of a receiver as a specific remedy upon default. Instead, the Financing Documents reserve to the Bank remedies generally available to secured creditors. The Loan Agreement states that in the event of default, "the Bank shall have all rights, powers and remedies available under any instruments and agreements required by or executed in connection with the Agreement, as well as all rights and remedies available at law or in equity." *See* Loan Agreement, § 9. Similarly, the Security Agreement states that in the event of default, the Bank may "enforce the security interest given hereunder pursuant to the Uniform Commercial Code and any other applicable law." *See* Security Agreement, § 6(b). Presumably, those rights and remedies would include the appointment of a receiver. However, to say that such general remedies clauses make the Financing Documents into management contracts would produce undesirable results — presumably many financing agreements for Indian casinos could be deemed management contracts. What is more, such a reading would seem to go well beyond the intent of the parties, who have structured straightforward loan agreements.

The Financing Documents expressly limit the remedies available to the Bank upon default and expressly prohibit the Bank from exercising any remedy that would constitute the management of all or part of the Tribe's gaming enterprise. In addition to the language quoted at length above, *see* Security Agreement, § 8(k) and *Loan Agreement*, § 10.16, the Loan Agreement states:

> NOTWITHSTANDING ANY OTHER POSSIBLE CONSTRUCTION OF ANY PROVISION(S) CONTAINED IN THIS AGREEMENT OR IN ANY OTHER LOAN DOCUMENT, THE PARTIES HERETO AGREE THAT WITHIN THE MEANING OF THE INDIAN GAMING REGULATORY ACT: . . . (B) NONE OF THE BANK OR ANY OF ITS 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 THE PLEDGOR OF THE SOLE PROPRIETARY INTEREST AND RESPONSIBILITY FOR THE CONDUCT OF THE GAMING OPERATIONS.

See Loan Agreement, § 10.17. The identical language appears in the Security Agreement. *See* Security Agreement § 9.

Beyond the intent and structure of the Financing Documents, it is unclear, following *Lake of the Torches*, that a receiver without any limitation is an available remedy under "applicable law" here. *Lake of the Torches* found that an explicit receivership provision, at least without removing operating expenses from the receiver's purview, "would in fact be . . . a form of managerial control." *Id.* at 1060. In short, the Financing Documents are fairly read to preclude the appointment of a receiver that would exert management control over the gaming facilities. They lack the receivership remedy that was one of the bases upon which the court in *Lake of the Torches* found management.

Finally, you asked for my opinion as to whether the Financing Documents violate IGRA's requirement that the Tribe has the sole proprietary interest in the Tribe's gaming enterprise, Gold Country Casino and Hotel. It is my opinion that they do not. The interest rate of the line of credit in the Financing Documents is to be set at the Tribe's choice of prevailing market rates. The Financing Documents also do not transfer any ownership interest in the Tribes' gaming enterprise.

Conclusion

The Financing Documents exclude the possibility of management by anyone other than the Tribe. Nothing in the provisions of the Financing Documents addressing remedies or the pledge of gross revenues gives to the Bank or any third party the discretion or authority to manage any part of the Tribe's gaming enterprise. Therefore, it is my opinion that the Financing Documents are not management contracts requiring the approval of the NIGC Chairwoman. That said, because the Financing Documents have been submitted as undated and unexecuted drafts that are represented to be in substantially final form. If the Financing 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 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,

Lawrence S. Roberts
General Counsel

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