October 29, 2010

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

Jim Shore
General Counsel
Seminole Tribe of Florida
6300 Stirling Rd.
Hollywood, FL 33024
Fax: (954) 967-3487

Re: Review of financing documents for the Seminole Tribe of Florida

Dear Mr. Shore:

This letter responds to your October 11, 2010 request on behalf of the Seminole Tribe of Florida ("Tribe") for the National Indian Gaming Commission's ("NIGC") Office of General Counsel to review the financing documents specified below (collectively, the "Financing Documents"). Specifically, you have asked for my opinion as to whether the Financing Documents are management contracts requiring the NIGC Chairwoman's approval pursuant to the Indian Gaming Regulatory Act ("IGRA") and whether they violate IGRA's requirement that a tribe have the sole proprietary interest in its gaming operations. After review, it is my opinion that the Financing Documents are not management contracts and do not 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:

2002 Indenture and Related Documents

- March 1, 2002 master indenture ("Master Indenture") entered into by the Tribe and U.S. Bank National Association ("US Bank");
- supplement to the Master Indenture dated March 4, 2004;
- supplement to the Master Indenture dates October 12, 2005;
- Seminole Tribe Senior Obligation No. 6, dated October 12, 2005;

- draft third supplement to the Master Indenture;

2005 Indenture and Related Documents

- October 12, 2005 indenture entered into by the Tribe and US Bank ("2005 Indenture");
- supplement to the 2005 Indenture dated May 26, 2006;
- supplement to the 2005 Indenture dated April 17, 2007;
- supplement to the 2005 Indenture dated August 28, 2009;
- depository agreement between the parties dated October 12, 2005;
- draft fifth supplement to the 2005 Indenture;
- draft sixth supplement to the 2005 Indenture;

2007 Indenture and Related Documents

- September 27, 2007 indenture entered into by the Tribe and US Bank ("2007 Indenture");
- supplement to the 2007 Indenture dated February 21, 2008;
- distribution agreement between the parties dated September 28, 2007;
- proposed supplement to the 2007 indenture;

Credit Agreement and Related Documents

- March 5, 2007 credit agreement entered into by the Tribe, various financial institutions, and Merrill Lynch Capital Corporation ("Credit Agreement");
- April 17, 2007 amendment to the Credit Agreement; and
- draft second amendment to the Credit Agreement.

The Financing Documents embody a series of complex transactions beginning with the Tribe's initial bond offering in 2002. Since entering into the Master Indenture, the Tribe has issued additional bonds to fund its general government and business operations. Those bonds have been issued under the Master Indenture, the 2005 Indenture, or the 2007 Indenture. The Tribe is also a party to a credit agreement that was entered into to finance the purchase of the Hard Rock brand. The Tribe now proposes to make a new bond offering through a supplement to the 2005 Indenture and will amend all of the indentures and the Credit Agreement to remove provisions that could be construed as management.

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., 547 F.3d 115,130-131 (2nd Cir. 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.

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.* *Appurtenant* is defined as "belonging to; accessory or incident to . . . " *Id.*

Analysis

I am aware of *Wells Fargo v. Lake of the Torches*, 677 F. Supp. 2d 1056 (W.D. Wis. 2010), in which the court held that a bond trust indenture was a management contract. *Id.* at 1060-61. The court pointed to several factors leading to its finding. First, the indenture 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 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, such as the appointment of a receiver and the right to require new management be hired. *Id.* at 1060. Also of import to the court 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"), the tribal entity that wholly owns the Lake of the Torches Resort Casino. *Id.* at 1059. The court found that these terms "taken collectively and individually" made the bond trust indenture at issue a management contract. *Id.* at 1060.

The Financing Documents here are distinguishable from concerns expressed in *Lake of the Torches* in that they permit no entity other than the Tribe to exercise management control or discretion.

Here, the Master Indenture, the 2005 Indenture, and the Credit Agreement each require the Tribe to hire an independent consultant if the debt ratio falls below a certain threshold. Master Indenture, § 3.09(b); 2005 Indenture, § 6.01(b); Credit Agreement, § 7.2(b). The 2005 Indenture and Credit Agreement also require that, at the Bondholders or Lender's request, the Tribe will hire an independent consultant to determine the reasonableness of the Tribe's operating expense budget. 2005 Indenture, § 6.10(d); Credit Agreement, § 7.10(e).

Neither provision turns the Financing Documents into management contracts. First, by definition under both provisions, the independent consultant is independent of the bondholders or other creditors, the lender, and the Tribe. Master Indenture, Article I;

2005 Indenture, Article I; Credit Agreement, Article I. For example, the 2005 Indenture defines *Independent Consultant*, as

> a firm (but not an individual) which (a) is in fact independent, (b) does not have any direct financial interest or any material indirect financial interest in the Tribe, the Trustee, any Holder, any holder of Parity Debt or Subordinated Debt, any counterparty to any Financial Products Agreement or Hard Rock or the matter for which its services are being engaged, (c) is not a member or employee of the Tribe, (d) is not connected with the Tribe, the Trustee, any Holder, any holder of Parity Debt or Subordinated Debt, any counterparty to any Financial Products Agreement or Hard Rock, as an officer, employee, promoter, trustee, partner, director or person performing similar functions and (e) is a certified public accounting firm or a nationally recognized professional management consultant, and designated by the Tribe, qualified to pass upon questions relating to the financial affairs of organizations similar to the Tribe or facilities of the same type as the Casino Facilities and having the skill and experience necessary to render the particular opinion or report required by the provision hereof in which such requirement appears.

Second, under the Master Indenture, the independent consultant's authority is limited to non-gaming business Master Indenture, § 3.09(b). Third, the selection of the independent consultant is solely up to the Tribe, and the bondholders have no right to approve or veto the Tribe's choice. Master Indenture, Article I; 2005 Indenture, Article I; Credit Agreement, Article I. Fourth and finally, the Tribe has no obligation to follow the independent consultant's recommendation. Master Indenture, § 3.09(b); 2005 Indenture, §§ 6.01(b) and 6.10(d); Credit Agreement, §§ 7.2(b) and 7.10(e). In short, neither consultant provision here gives the bondholders or lender any discretion or control over the Tribe's management decisions.

Beyond bondholder approval of the consultant, the *Lake of the Torches* court found that the requirement that the Lake of the Torches use its "best efforts" to implement the recommendations of the consultant was management. *Lake of the Torches,* 677 F. Supp. 2d at 1059-60. The Financing Documents here present a different scenario in that they expressly limit the consultant to non-gaming business. In any event, in addition to the limitations on the bondholders' and lender's authority just discussed, the financing documents contain no "best efforts" provision. Again, then, the discretion to make operational changes regarding the gaming operation remains with the Tribe, and the requirement to hire an independent consultant does not transform the Financing Documents into gaming management contracts.

Similarly, the Financing Documents' provisions concerning insurance are consistent with the holding in *Lake of the Torches*. The Master Indenture, 2005 Indenture, and Credit Agreement each require the Tribe to engage an insurance consultant – annually in the case of the Master Indenture and bi-annually in the 2005 Indenture and the Credit Agreement – to review and make recommendations about insurance coverage.

Master Indenture, § 3.09(c); 2005 Indenture, § 6.06(d); Credit Agreement, § 7.6(d). Each Agreement defines *Insurance Consultant* differently, but each specifies objective criteria that must be applied by the Tribe in choosing its insurance consultant rather than requiring a particular consultant or firm. Master Indenture, Article I; 2005 Indenture, Article I; Credit Agreement, Article I. A representative example comes from the 2005 Indenture, which defines *Insurance Consultant* as:

> [A] firm (but not an individual) which (a) is in fact independent, (b) does not have any direct financial interest or any material indirect financial interest in the Tribe, the Trustee, any Holder, any holder of Parity Debt or Subordinated Debt, any counterparty to any Financial Products Agreement or Hard Rock or the matter for which its services are being engaged, (c) is not a member or employee of the Tribe, (d) is not connected with the Tribe, the Trustee, any Holder, any holder of Parity Debt or Subordinated Debt, any counterparty to any Financial Products Agreement or Hard Rock, as an officer, employee, promoter, trustee, partner, director or person performing similar functions, (e) is designated by the Tribe and (e) is experienced in recommending insurance coverage for facilities such as the Casino Enterprises and possesses the skill and experience necessary to render the particular opinion or report required by the provision hereof in which such requirement appears....

2005 Indenture, Article I.

Nothing in the 2005 Indenture or the Credit Agreement gives the Bondholders or Lenders the authority to approve or veto the Tribe's selection of the Insurance Consultant. Although the Master Indenture specifies that the Consultant be a firm "which is not unacceptable to the Master Trustee," the amendment to the Master Indenture specifically eliminates the Master Trustee's authority to approve the Insurance Consultant. Master Indenture, Article I; Proposed Third Supplement to the Master Indenture, § 3. Accordingly, provided the amendment to the Master Indenture is adopted, the provisions requiring the Tribe to hire an insurance consultant do not make the 2005 Indenture or Credit Agreement management contracts.

Once hired, the insurance consultant's role is to make insurance coverage recommendations for the Tribe's various gaming operations. If the consultant recommends additional insurance coverage for a facility, the Tribe is required to increase the coverage accordingly, Master Indenture, § 3.09(c); 2005 Indenture, § 6.06(d); Credit Agreement, § 7.6(d), but only if the insurance is available at "commercially reasonable rates." *Id.* In the alternative, the Tribe has the option to forgo purchasing insurance and instead adopt an alternative risk management program such as self-insurance, if it determines such a program is a more reasonable option. In short, the Financing Documents allow the Tribe to choose how it will comply with the requirement.

Because the Tribe has the choice to meet the Financing Documents' insurance provisions either by purchasing an insurance policy or by adopting an alternative risk

management program that meets objective criteria, the condition that the Tribe abide by the Insurance consultant's minimum coverage recommendation does not make the Financing Documents management.

I note also that the Financing Documents pledge the gross gaming revenue of the Tribe's gaming operations as collateral. *See* Master Indenture, § 3.03; 2005 Indenture, Article I; 2007 Indenture, Article I; Credit Agreement, Article I. The district court in *Lake of the Torches* concluded that a pledge of gross gaming revenue without limiting language to be management. *Lake of the Torches*, 677 F. Supp. 2d at 1060-61.

Here, the Tribe has proposed amendments to the Financing Documents that adopts limiting language proposed by the Acting General Counsel in 2009. See Letter from Penny J. Coleman, Acting General Counsel, to Kent Riche, Esq. (January 23, 2009). The Amendments state:

> Notwithstanding any other possible construction of any provision contained in the [Specified Documents[1]], it is agreed that within the meaning of IGRA: (A) the specified documents, individually and collectively , do not and shall not provide for the management of all or any part of the gaming business by any person other than the Tribe and (B) none of the [Specified Parties[2]] will exercise any remedy or otherwise take any action under or in connection with any specified document in a manner that would constitute management of all or any part of the gaming business.
>
> Notwithstanding any provision in any Specified Document and in furtherance and not in limitation of the two immediately preceding paragraphs, no Specified Party shall engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any

[1] Each document cross-references other applicable documents to ensure that the limiting language here applies to all of them. Specifically, the Specified Documents in the proposed amendment to the Master Indenture include the Master Indenture and the Credit Documents. The Specified Documents in the proposed amendment to the 2005 Indenture include the 2005 Indenture, the Bonds, the Depository Agreement, and the MIT2002 Senior Obligations Documents. The Specified Documents in the proposed amendment to the 2007 Indenture include the 2007 Indenture, the Bonds, and the Distribution Agreement. The Specified Documents in the proposed amendment to the Credit Agreement include the Credit Agreement, the 2005 Indenture, the Depository Agreement, and the MTI2002 Senior Obligations Documents.

[2] Each document includes parties unique to that particular agreement or indenture to ensure that the limiting language here applies to all relevant parties. Specifically, the Specified Parties in the proposed third supplement to the Master Indenture include the Master Trustee, any holder, any subordinate holder, any beneficial owner, any receiver or Power Plant or any of their respective successors, assigns or agents. The Specified Parties in the proposed fifth and sixth supplements to the 2005 Indenture and the proposed second supplement to the 2007 Indenture are the Trustee, the Depository (as defined in the depository agreement), any holder, any receiver, or any beneficial owner (or any of their respective successors, assigns or agents). The Specified Parties listed in the proposed second amendment to the Credit Agreement include the Administrative Agent, any lender, any participant, the Trustee, any receiver or the Depository (as defined in the Depository Agreement)(or any of their respective successors, assigns or agents).

portion of the Gaming Business (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 Tribe's Operating Expenses; *provided, however,* that upon the occurrence of an Event of Default, no Specified Party will be in violation of the foregoing restriction solely because it:

(i) enforces compliance with any term in any Specified Document that does not require the Gaming Business to be subject to any third-party decision making as to any Management Activities; or

(ii) requires that all or any portion of the Collateral (including the Pledged Revenues) securing the obligations arising under or evidenced by the Specified Documents be applied to satisfy valid terms of the Specified Documents; or

(iii) otherwise forecloses on all or any portion of the Collateral securing such obligations.

Proposed Third Supplement to the Master Indenture, § 3; Proposed Fifth Supplemental Indenture to the 2005 Indenture, § 7; Proposed Supplemental Indenture No. 2 to the 2007 Indenture, § 2; Proposed Second Amendment to Credit Agreement, Article II.

With the inclusion of this limiting language, the pledges of gross gaming revenue do not make the Financing Documents management contracts.

A concern similar to that of a pledge of gross revenues arises because the Financing Documents grant a trustee or administrator the authority to require that under

varying specified circumstances, depository banks make contributions to an account controlled by the trustee or administrative agent. Master Indenture, § 3.10; 2005 Indenture, § 5.02; 2007 Indenture, § 5.02; Credit Agreement, § 6.18. For example, the 2005 Indenture permits this scenario if the debt service coverage ratio as of the last day of the fiscal quarter was less then 3.0:1.0. *Id.* However, the Financing Documents also segregate operating expenses from other proceeds and require that operating expenses be funded as budgeted by the Tribe. Master Indenture, § 3.10; 2005 Indenture, § 5.02; 2007 Indenture, § 5.02; Credit Agreement, §7.10(e).

The Tribe also proposes to amend each of the Financing Documents to specifically prohibit the "Specified Parties," which include the bondholders' and creditors' trustee and administrative agent, from "budgeting, allocating, or conditioning payments of the Tribe's Operating Expenses." Proposed Third Supplement to the Master Indenture, § 3; Proposed Fifth Supplemental Indenture to the 2005 Indenture, § 7; Proposed Supplemental Indenture No. 2 to the 2007 Indenture, § 2; Proposed Second Amendment to Credit Agreement, Article II. As such, a third party does not have the ability to exercise control over operating expenses.

The court in *Lake of the Torches* also found a provision allowing for the appointment of a receiver, without further limitation, to be management. *Wells Fargo v. Lake of the Torches Economic Dev. Corp.*, 677 F. Supp. 2d at 1059-60. In this case, however, operating expenses are determined by the Tribe and then segregated from other expenses, and the proposed amendments to the Financing Documents limit the authority that may be granted a receiver by specifically including "any receiver" in the list of specified parties prohibited from "budgeting, allocating, or conditioning payments of the Tribe's Operating Expenses." Proposed Third Supplement to the Master Indenture, § 3; Proposed Fifth Supplemental Indenture to the 2005 Indenture, § 7; Proposed Sixth Supplement to the 2005 Indenture, § 9.3(b)(viii); Proposed Supplemental Indenture No. 2 to the 2007 Indenture, § 2; Proposed Second Amendment to Credit Agreement, Article II. Further, where the 2005 Indenture and the 2007 Indenture specifically give the bondholder's the right to appoint a receiver, they limit that receiver's authority by including the caveat that "in no event shall the Trustee or the receiver have the right to manage, operate or direct the operation of the Gaming Operations." 2005 Indenture, § 9.04; 2007 Indenture, § 9.04. As such, the Financing Documents lack the type of receivership provision at issue in *Lake of the Torches*.

Finally, you asked for my opinion as to whether the Financing Documents violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming enterprises. It is my opinion that they do not. The terms of the financing encompassed in the Financing Documents was and is being offered at prevailing market rates and do not transfer any ownership interest in the Tribe's gaming enterprises.

Conclusion

If the proposed amendments are adopted, the Financing Documents specifically exclude the possibility of management. Nothing in the provisions of the Financing

Documents gives the Bondholders or any third party the discretion or authority to manage any part of Tribe's gaming operations. Therefore, it is my opinion that the Financing Documents are not management contracts requiring the approval of the NIGC Chairwoman. I note, however, that the various proposed amendments and the proposed sixth supplemental indenture to the 2005 Indenture have been submitted to us as undated and unexecuted drafts that are in substantially final form, and to the extent that they 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 a copy of the submitted Financing Documents to the Department of the Interior Office of Indian Gaming for review under 25 U.S.C. § 81. If you have any questions, please contact NIGC Staff Attorney Michael Hoenig at 202-632-7003.

Sincerely,

Lawrence S. Roberts
General Counsel