November 29, 2010

Via facsimile
and First Class Mail

Ms. Danelle Smith
Fredericks Peebles & Morgan
3610 N 163rd Place
Omaha, NE 68116
Fax: 402-333-4761

Re: Loan documents between Winnebago Tribe and PNC Bank N.A.

Dear Ms. Smith:

This letter responds to your November 8, 2010 request for a review to determine whether financing documents related to the Winnebago Tribe's (Tribe) loan transaction with PNC Bank N.A. ("Bank" or "Administrative Agent") are management contracts within the meaning of IGRA. After reviewing the documents, it is my opinion that they do not allow for management by PNC Bank and, therefore, do not require approval by the NIGC Chairwoman.

The following documents ("Loan Documents"), dated November 3, 2010, were submitted for review:

1) Credit Agreement
2) Deposit Account Control Agreement with Liberty National Bank
3) Deposit Account Control Agreement with PNC Bank N.A.
4) Security Agreement
5) Real Estate Mortgage (for a 7.138 acre parcel of land used for portion of the parking area)
6) Assignment of Construction Contract
7) Assignment of Architects Agreement
8) Environmental Certificate
9) Tax Certificate

The Loan Documents represent a straightforward [ ] credit transaction in which the Tribe seeks to finance a four-story hotel; an exterior remodeling of its casino; the addition of a parking lot; and associated electrical, water, and wastewater infrastructure. 64

Authority

IGRA provides NIGC with authority to review and approve 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*, the 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)." 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.

Analysis

I am aware of the recent decision in *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 there was a management contract. *Id.* at 1060-1061. The court found the bond trust indenture to be a management contract in part because it concluded that 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 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 to 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 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 Credit Agreement, the Tribe grants to the Bank a security interest in the collateral that

includes all of the Tribe's pledged revenues and deposit account. *See* Security Agreement, § 2. The Security Agreement defines *Pledged Revenues* as:

> all receipts, revenues and rents from the Gaming Operations, the lease or sublease of space associated with the Gaming Operations, the disposition of all or any portion of any Gaming Operations, and any other activities carried on within the Gaming Operations; *provided*, however, that the Pledged Revenues **do not include amounts paid or accrued for prizes or amounts paid for operating costs of the Gaming Operations in the ordinary course of business** or credits for the exchange of goods or merchandise, uncollected credit transactions, any trust lands or trust assets of the Debtor or any Affiliate, including, without limitation, any assets revenues or receipts of any Person other than the Debtor, or any amounts released to the Debtor in the form of Distributions or transfers pursuant to the terms of the Loan Documents or any other amounts received, or to be received by Debtor or its Affiliates which are not derived from Gaming Assets.

Id. at § 1 (emphasis added). As shown above, the Security Agreement expressly excludes operating revenues from the security interest granted to creditors. Accordingly, the Bank here lacks the opportunity to exercise management authority through control of the operating budget because it does not have a right to secure operating funds in the event of default.

In this same vein, in *Lake of the Torches*, the court found that the bond trust indenture did not contain any limiting language on the trustee's use of operating expenses in the event of default and was therefore found to be management. Here, however, beyond removing operating expenses from the security interest granted to the Bank, the Credit 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 14.13 states:

> In addition to the limitations set forth above, and notwithstanding any provision in any Loan Document, neither the Administrative Agent nor any Lender nor anyone acting on their behalf shall engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Pledgor's or the Tribe's gaming operations (collectively, "Management Activities"), including, but not limited to:

(a) the training, supervision, direction, hiring, firing, retention, compensation (including benefits) of any employee (whether or not a management employee) or contractor;

(b) any 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 neither the Administrative Agent nor any Lender shall be deemed in violation of the foregoing restriction solely because they:

(1) enforce compliance with any term in the Loan Documentsthat does not require the Gaming Operations to be subject to any third-party decision-making as to any Management Activities;

(2) require that all or any portion of the Gaming Revenues securing the Loans and other Obligations be applied to satisfy valid terms of the Loan Documents; or

(3) otherwise foreclose on all or any portion of the Collateral securing the Loans and Obligations.

This provision is incorporated by reference into the Security Agreement (§ 11.14) and the Real Estate Mortgage (§ 27). As such, the pledge of the Tribe's gaming revenues here is distinguishable from the concerns expressed by the court in *Lake of the Torches*.

The court in *Lake of the Torches* also found a specific provision allowing for the appointment of a receiver, without further limitation, to be management. *Wells Fargo v. Lake of the Torches* at 1060. Here, the Security Agreement does not

specifically identify a receiver as a remedy available to the Administrative Agent on default. Rather, it eliminates the possibility of a receiver by making the available remedies subject to the limiting language above and applicable gaming laws. *See*, Security Agreement, § 7. The same is true of the Credit Agreement (§ 7.1).

That is, not only are the remedies sections expressly limited by reference to section 14.13 and its prohibition on management, the language of the Credit Agreement requires that its provisions be read so as to avoid interpreting it to provide for a remedy that would effect management:

> NOTWITHSTANDING ANY OTHER POSSIBLE CONSTRUCTION OF ANY PROVISION HEREIN, OR UNDER ANY OTHER LOAN DOCUMENT, EACH LENDER ACKNOWLEDGES AND AGREES (A) THAT IT NEITHER HAS, NOR SHALL IT ASSERT, ANY RIGHTS TO MANAGE THE GAMING OPERATIONS; (B) THAT IT WILL NOT INTERFERE WITH THE BORROWER'S RIGHT TO DETERMINE STANDARDS OF OPERATION AND EFFICIENT MANAGEMENT OF THE GAMING OPERATIONS, INCLUDING, BUT NOT LIMITED TO BUDGETING MATTERS AND POLICIES RELATING TO GAMING AND CASINO SERVICES; AND (C) ITS LIEN IS RESTRICTED TO THE PLEDGED PROPERTY AND THE COLLATERAL DESCRIBED IN THE SECURITY AGREEMENT.

Credit Agreement § 14.13. The above provision is also incorporated by reference in the Security Agreement (§ 7) and the Real Estate Mortgage (§ 27).

Beyond the intent and structure of the Loan 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 Loan 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.

Conclusion

The Loan Documents specifically exclude the possibility of management by anyone other than the Tribe. Nothing in the provisions of the Loan Documents

gives to the Bank or any third party the discretion or authority to manage any part of the Tribe's gaming enterprise. Therefore, based on our review, it is my opinion that the loan documents here are not management contracts requiring the approval of the NIGC Chairwoman. As you know, the loan documents have been submitted as undated and unexecuted drafts that are represented to be in substantially final form. If 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 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 Jennifer Ward at (202) 632-7003.

Sincerely,

Lawrence S. Roberts
General Counsel

cc: Townsend Hyatt
Orrick, Herrington & Sutcliffe LLP
1120 NW Couch St
Suite 200
Portland, OR 97209
Fax: (503) 943-4801