November 30, 2010

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

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Re: Review of financing documents for Port Madison Enterprises, an agency of the Suquamish Tribe

Dear Mr. Ramirez:

This letter responds to your October 29, 2010 request on behalf of Port Madison Enterprises, an agency of the Suquamish Tribe (the Tribe), for the National Indian Gaming Commission's (NIGC's) Office of General Counsel to review the draft equipment 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 Chairwoman's approval pursuant to the Indian Gaming Regulatory Act (IGRA). After careful review, it is my opinion that the Loan Documents are not management contracts and do not require the approval of the Chairwoman.

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

- Business loan agreement marked "PME Comments 11-11-10" (the Loan Agreement) between Port Madison Enterprises (the Borrower), and Bank of America N.A. (the Bank);
- Security agreement marked "PME Comments 10-21-10" (the Security Agreement) pledging the gaming revenues of the Borrower to the Bank; and
- Non-impairment agreement marked "PME Comments 10-21-10" (Non-Impairment Agreement) between the Tribe and the Bank.

The Loan Documents represent a straightforward transaction in which the Borrower, as an agency of the Tribe, seeks to refinance its existing debt through the use of a line of credit secured by letters of credit.

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)." 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.* 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*, 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 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, which is 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 and letters of credit, the Borrower grants to the Bank a security interest in "[a]ll revenues of the Pledgor [the Borrower] (including, without limitation, Gaming Revenues of the Gaming Enterprise)." *See* Security Agreement, § 1(a).

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, 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 7(m) states:

> Notwithstanding any provision in this Agreement, any other Loan Document or the Non-Impairment Agreement, or any other right to enforce the provisions of this Agreement, any other Loan Document or the Non-Impairment Agreement, neither the Bank nor any other grantee 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:
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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;
>
> (iii) the hours or days of operation;
>
> (iv) any accounting systems or procedures;
>
> (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 Pledgor's operating expenses;
>
> provided, however, that upon the occurrence of a default, neither the Bank nor any other Grantee will be in violation of the foregoing restriction solely because it: (i) enforces compliance with any term in this Agreement, any other Loan Document or the Non-Impairment Agreement, 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 obligation be applied to satisfy valid terms of this Agreement, any other Loan Document or the Non-Impairment Agreement; or (iii) otherwise forecloses on all or any portion of the Collateral securing the obligations.

A provision nearly identical to the limiting provision above is also present in the Loan Agreement (§ 11.18), and the Non-Impairment Agreement (§ 4.10). As such, the pledge of all of the Borrower's gaming revenues in the Loan Documents is distinguishable from the concerns expressed by the court in *Lake of the Torches*.

Next, none of the Loan Documents set out the appointment of a receiver as a specific remedy upon default. Instead, the Loan Agreement provides 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 this Agreement, as well as all rights and remedies available at law or in equity." *See* Loan Agreement, § 10. In addition, the Security Agreement includes remedies available "pursuant to the Uniform Commercial Code and any other applicable law (including without limitation the Tribe's Secured Transactions Ordinance)." *See*, Security Agreement, § 6(b). However, the exercise of any remedy upon default is subject to the limitations of Section 7 (m) quoted above. *Id.* at § 6.

Further, the language of the Loan Agreement itself provides that its provisions be read so as to avoid such an interpretation:

> NOTWITHSTANDING ANY OTHER POSSIBLE CONSTRUCTION OF ANY PROVISION(S) CONTAINED IN THIS AGREEMENT, IN ANY OTHER LOAN DOCUMENT OR THE NON-IMPAIRMENT AGREEMENT, THE PARTIES HERETO AGREE THAT WITHIN THE MEANING OF THE INDIAN GAMING REGULATORY ACT: (A) THIS AGREEMENT, ANY OTHER LOAN DOCUMENT OR THE NON-IMPAIRMENT AGREEMENT, INDIVIDUALLY AND COLLECTIVELY, DOES NOT AND SHALL NOT PROVIDE FOR THE MANAGEMENT OF ALL OR ANY PART OF THE BORROWER'S GAMING ENTERPRISE BY ANY PERSON OTHER THAN THE BORROWER OR DEPRIVE THE BORROWER OF THE SOLE PROPRIETARY INTEREST AND RESPONSIBILITY FOR THE CONDUCT OF THE GAMING ENTERPRISE; AND (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 THIS AGREEMENT, ANY OTHER LOAN DOCUMENT OR THE NON-IMPAIRMENT AGREEMENT IN A MANNER THAT WOULD CONSTITUTE MANAGEMENT OF ALL OR ANY PART OF THE GAMING ENTERPRISE OR THAT WOULD DEPRIVE THE BORROWER OF THE SOLE PROPRIETARY INTEREST AND RESPONSIBILITY FOR THE CONDUCT OF THE GAMING ENTERPRISE.

Loan Agreement § 11.20. The above provision is also present in the Security Agreement (§ 8), and the Non-Impairment Agreement (§ 4.12). Beyond the intent and structure of the Loan Documents, it is unclear, following *Lake of the Torches*, that a receiver without any limitation is a right or remedy "available at law or in equity." *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.

Finally, you asked for my opinion as to whether the Loan Documents violate IGRA's requirement that the Tribe have the sole proprietary interest in the Borrower's gaming enterprise, Clearwater Casino. It is my opinion that they do not. The interest rate of the line of credit in the Loan Agreement is to be set at the Borrower's choice of "a Base rate or LIBOR rate plus a commercially reasonable applicable margin." *See*, Letter from Rion Ramirez, General Counsel for the Borrower, to Lawrence S. Roberts, General Counsel, (October 29, 2010); Loan Agreement § 1.6. Moreover, the parties have agreed that the financial terms of the Loan Documents are consistent with current standards in the financial markets. *See* Letter from Rion Ramirez, General Counsel for the Borrower, to Lawrence S. Roberts, General Counsel, (October 29, 2010). The Loan Documents also do not transfer any ownership interest in the Borrower's gaming enterprise.

Conclusion

Based on our review, it is my opinion that the Loan Documents 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 Melissa Schlichting at (202) 632-7003.

Sincerely,

Lawrence S. Roberts
General Counsel

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