February 23, 2010

Via Facsimile and U.S. Mail

Kent E. Richey
Faegre & Benson LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

Re: Opinion regarding loan documents between Shakopee Mdewakanton Sioux Community and Three Affiliated Tribes of the Fort Berthold Reservation.

Dear Mr. Richey:

This letter responds to your request on behalf of the Shakopee Mdewakanton Sioux Community ("Community") for the National Indian Gaming Commission's ("NIGC's") Office of General Counsel ("OGC") to review the proposed loan to the Three Affiliated Tribes of the Fort Berthold Reservation ("Tribe"). Specifically, you have asked for our opinion regarding whether this loan agreement and its related documents are management contracts requiring the NIGC Chairman's review and approval under the Indian Gaming Regulatory Act ("IGRA"). After careful review, it is my opinion that the loan agreement and collateral documents are not management contracts requiring the review and approval of the Chairman.

In our review, we considered the following submissions:

- Loan Agreement;
- Form of Promissory Note; and
- Depository Agreement between Three Affiliated Tribes of the Fort Berthold Reservation and First National Bank & Trust Co. of Williston. (Collectively, the "Loan Documents.")

We also considered a January 26, 2010 opinion of the Community's legal counsel.

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-Millennium 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* to mean "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 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. Again, management encompasses activities such as planning, organizing, directing, coordinating, and controlling. *See* attached *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 the 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.*, No. 09-CV-768, 2010 U.S. Dist. LEXIS 1714 at *8-*9 (W.D. Wisc. January 11, 2010).

Analysis

I am aware of the recent decision in *Wells Fargo v. Lake of the Torches* and the court's holding that any agreement in which receivership is a possible remedy upon default is a management contract. *See Wells Fargo v. Lake of the Torches*, at *11-*12. The court there found a bond trust indenture to be a management contract in part because it contained a specific provision allowing for the appointment of a receiver upon default. *Id.* 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.* Specifically, the court stated: "[b]y forcing the Corporation [Lake of the Torches] 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.* at *12. While I generally agree with the court's analysis, I do not think the circumstances here are the same.

None of the Loan Documents set out the appointment of a receiver as a specific remedy upon default. However, the Loan Agreement provides that the Community may upon default "exercise or enforce any and all other rights or remedies available by law," Loan Agreement § 7(s)(c), as can the Bank, on behalf of the Community, under the Depository Agreement. Depository Agreement § 5.3. Those rights and remedies include the appointment of a receiver as the Tribe has adopted a Uniform Commercial Code modeled after the State of North Dakota's Uniform Commercial Code. Three Affiliated Tribes Resolution #07-230-VJB. However, to say that a clause that merely reserves to a creditor the rights available under the law makes the Loan Documents management contracts would produce undesirable results – many, if not most, financing agreements for Indian casinos would be deemed management contracts. It would also seem to go well beyond the intent of the parties, who have structured a straightforward loan agreement.

More significantly, the Loan Documents themselves state that their provisions are to be read so as to exclude management:

> NOTWITHSTANDING ANY OTHER POSSIBLE CONSTRUCTION OF ANY PROVISION HEREIN, THE LENDER ACKNOWLEDGES AND AGREES (A) THAT IT NEITHER HAS, NOR SHALL IT ASSERT, ANY RIGHTS TO MANAGE THE CASINO FACILITIES; (B) THAT IT WILL NOT INTERFERE WITH THE BORROWER'S RIGHT TO DETERMINE STANDARDS OF OPERATION AND EFFICIENT MANAGEMENT OF THE CASINO FACILITIES, INCLUDING, BUT NOT LIMITED TO, BUDGETING MATTERS AND POLICIES RELATING TO GAMING AND CASINO SERVICES; AND (C) THAT ITS LIEN IS RESTRICTED TO THE PLEDGED FINANCIAL ASSETS, WHICH DO NOT CREATE A MORTGAGE LIEN ON THE CASINO FACILITIES.

Loan Agreement § 8.28. The Depository Agreement contains a substantively identical provision. Depository Agreement § 7.15. The Loan Documents also expressly limit the remedies available on default to exclude the exercise of management by the Community:

> [N]otwithstanding any provisions in any Loan Document, Lender shall not engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Borrower's gaming operations (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 Borrower's operating expenses; provided however, that upon the occurrence of an Event of Default, Lender will not be in violation of the foregoing restriction solely because Lender:
    i. 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
    ii. requires that all or any portion of the revenues securing the Obligations be applied to satisfy valid terms of the Loan Documents; or
    iii. otherwise forecloses on all or any portion of the Project securing the Obligations.

Loan Agreement § 8.28. The Depository Agreement contains a substantively identical provision, § 7.15.

Accordingly, the Loan Documents are fairly read to preclude the appointment of a receiver that would exert management control over the gaming facilities. Therefore, unlike the agreement in *Lake of the Torches*, the Loan Documents here lack the receivership provision that was one of the bases of the court's finding management there.

I also note that the Loan Agreement pledges the revenues of the Tribe's casino operations as security. Loan Agreement § 1.1 and Depository Agreement § 1.1. Previously, 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. Under the Loan Documents, however, the security interest extends only to net, not gross, revenue.

While the Tribe is required to deposit casino revenues with a depository, it retains the right to determine how much of those revenues are to be first placed in a casino operating account to pay casino operating costs. Depository Agreement § 3.1(b). Only after the casino operating account is fully funded are the remaining revenues pledged to secure the loan. *Id.* at § 3.2(a); *also See* Loan Agreement § 1.1 (definition of Pledged Revenues) and Depository Agreement § 1.1 (definition of Net Casino Revenue and Pledged Revenues). As the security interest does not extend to the casino operating expenses, these provisions preclude the Community's security interest from providing management authority upon default. The Tribe retains the right to determine the budgeted operating expenses for any given month and the ability to revise the budgeted expenses to the extent reasonably necessary. Depository

Agreement § 2.4. This ensures that the Tribe maintains management control over the decisions affecting the casino facility.

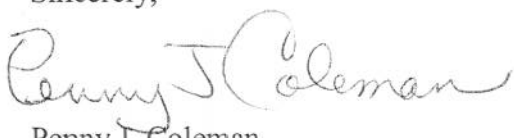
Conclusion

The Loan Documents can be fairly read to preclude management in the event of default. Nothing in the provisions of the Loan Documents addressing remedies or security interests gives the Community, or any third party, the discretion or authority to manage any part of the Three Affiliated Tribes' gaming operations. Therefore, it is my opinion that the Loan Documents are not management contracts requiring the approval of the NIGC Chairman. I note, however, that the Loan Documents have been submitted to us as undated and unexecuted drafts that are in substantially final form, and to the extent that 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 contained herein may fall within FOIA Exemption 4(c), which applies to confidential 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 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 Dorinda Strmiska at (202) 632-7003.

Sincerely,



Penny J. Coleman
Acting General Counsel

cc: Paula Hart, Office of Indian Gaming Management, Bureau of Indian Affairs (w/ incoming)
Willie Hardacker, Counsel, Shakopee Mdewakanton Sioux Community
Donsia Strong Hill, Counsel, Three Affiliated Tribes of the Fort Berthold Reservation
Richard Helde, Counsel, Three Affiliated Tribes of the Fort Berthold Reservation