June 2, 2010

Via facsimile and U.S. Mail

Robert Garcia, Chairman
Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians
1245 Fulton Avenue
Coos Bay, OR 97420
Fax: (541) 888-0302

Re: Review of financing documents for the Confederated Coos, Lower Umpqua and Siuslaw Indians and request for declination letter.

Dear Chairman Garcia:

This letter responds to your April 22, 2010 request for the National Indian Gaming Commission's Office of General Counsel to review the documents specified below (collectively, the "Loan Documents"). You have asked whether the Loan Documents are management contracts requiring the NIGC Chairman's approval pursuant to the Indian Gaming Regulatory Act and whether the Loan Documents violate IGRA's requirement that a tribe have the sole proprietary interest in its gaming operations. After careful review, it is my opinion that the Loan Documents are not management contracts and do not require the approval of the Chairman. It is also my opinion that the Loan Documents do not violate IGRA's sole proprietary interest requirement.

In my review, I considered the following submissions:

- Indenture between Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians (Tribe) and Wells Fargo Bank, National Association, dated October 27, 2006 (Indenture).

- Undated and unexecuted draft of the First Supplemental Indenture between the Tribes and Wells Fargo, submitted on May 6, 2010 (First Supplemental Indenture).

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 (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 NIGC regulations do not define *management*, the term has its ordinary meaning. 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; *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp.*, 677 F. Supp. 2d 1056 (W.D.W.I. 2010).

Sole Proprietary Interest

No agreement may give a proprietary interest in any Indian gaming activity to any entity other than the tribe itself, except for certain individually owned gaming operations not at issue here. 25 U.S.C. § 2710(b)(2)(A); 25 U.S.C. § 2710(b)(4). 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. §27109(b)(2)(A). Under this section, if any entity other than a tribe possesses a proprietary interest in the gaming activity, gaming may not take place. *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.* Reading these definitions together, a proprietary interest is ownership, with the right to possess, use, and convey something.

Additionally, the NIGC has provided a non-exhaustive list of arrangements that would violate the sole proprietary interest clause.

- An agreement whereby a vendor pays the tribe for the right place gambling devices that are controlled by the vendor on the gaming floor;
- A security agreement whereby a tribe grants a security interest in a gaming operation, if such an interest would give a party other than the tribe the right to control gaming in the even of default by the tribe; and
- Stock ownership in a tribal gaming operation, even by tribal members.

58 F.R. 5802, 5804 (Jan. 22, 1993).

Analysis

To begin with, I am aware of the recent decision in *Wells Fargo v. Lake of the Torches*, 677 F. Supp. 2d 1056 (W.D.W.I. 2010), and the court's holding there that a bond trust indenture was a management contract. *Id.* at 1060-61. This was based in part on the grant to the bondholders of 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 1059-61. The court also found the bond trust indenture was management because the bondholders could require the Lac du Flambeau Tribe to hire a management consultant, and could exercise approval authority over its choice of consultant. The Lac du Flambeau Tribe was then required to "use its best efforts to implement" the consultant's recommendations if the defined debt service ratio was not met. *Id.* at 1059-60. The court ultimately found these and other terms, "taken collectively and individually," made the bond trust indenture a management contract. *Id.* at 1060-61.

Here, the Loan Documents require the Tribe to engage an independent consultant if the debt service coverage ratio falls below a specified level. *See* First Supplemental Indenture § 2.9. The Loan Documents define *Independent Consultant* to mean:

> a firm (but not an individual) which (1) does not have any direct financial interest or any material indirect financial interest in the Tribe or any Affiliate of the Tribe, (2) is not serving, or directly or indirectly controlled by any Person serving, the Tribe or any Affiliate of the Tribe as an officer, employee, promoter, underwriter, trustee, partner, director or Person performing similar functions, (3) is designated by the Tribe, (4) is qualified to pass upon questions relating to the financial affairs or facilities of the type or types operated by the Tribe or any Component of the Tribe and (5) has a favorable reputation for skill and experience in the financial affairs of such facilities.

First Amended Indenture, § 2.1, *Independent Consultant.*

Unlike *Lake of the Torches,* the Loan Documents here do not require the Tribe to obtain the bondholder's approval of the independent consultant. Rather, the Loan Documents merely require that the Tribe hire an independent consultant should certain circumstances arise. The decision of whom to hire remains with the Tribe and the bondholders have no control over, and exercise no discretion in, the decision. Therefore, the provision does not make the Loan Documents a management contract.

Beyond bondholder approval of the consultant, the *Lake of the Torches* court found that the requirement in the debt service ratio provision 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. While I generally agree with the court's reasoning on that point, the Loan Documents here present a different scenario. The debt service coverage ratio provision in the Loan Documents requires the Tribe to hire an independent consultant, but it does not require the Tribe to follow or implement the consultant's recommendation. First Amended Indenture, § 2.9. The discretion to make any and all management decisions and operational changes remains with the Tribe, and thus the requirement to hire an independent consultant does not make the Loan Documents a management contract.

Next, similar issues arise out of the Loan Documents' provisions concerning insurance. In addition to requiring the Tribe to maintain a minimum level of insurance, the Loan Documents require the Tribe to hire an insurance consultant at least once every two years to review and make recommendations regarding the gaming operation's insurance coverage. *See* Indenture § 6.6(d). The Loan Documents define *Insurance Consultant* to mean, "an Independent Consultant qualified to survey risks and to recommend insurance coverage for the Gaming Operations." *Id.* at §1.1 *Insurance Consultant.*

Nothing in the Loan Documents gives the bondholders the authority to choose or approve the insurance consultant, and nothing requires the Tribe to use its "best efforts" to implement its recommendations. The Loan Documents only require the Tribe to hire an insurance consultant. *See* Indenture § 6.6(d). Because the Tribe retains the discretion to decide whom to hire as an insurance consultant, and the Tribe also decides whether to implement the recommendations of the insurance consultant, the requirement to hire the consultant does not make the Loan Documents a management contract.

The Tribe also agrees to maintain insurance "in such amounts as is customarily carried by similar businesses with such deductibles, retentions, self-insured amounts and coinsurance provisions as are customarily carried by similar businesses of similar size." *Id.* at § 6.6(a). The Loan Documents allow for the Tribe to comply either by purchasing insurance policies or by adopting an alternative risk management program such as becoming self-insured. *Id.* at § 6.6(b); First Supplemental Indenture §2.10. Both options, however, have conditions that must be met for the insurance requirement to be satisfied.

If the Tribe decides to purchase insurance policies, the Loan Documents require that those policies be issued by a reputable insurer meeting certain objective qualifications, such as the amounts and kinds of coverage and the insurer's rating for claims-paying ability. Indenture § 6.6(b). If, on the other hand, the Tribe decides that an alternative risk management program, such as self-insurance, is reasonable, it must hire an insurance consultant. *See* First Supplemental Indenture § 2.10. The Loan Documents provide that the Tribe:

> shall have the right to adopt alternative risk management programs which the Tribe determines to be reasonable...all as may be determined, in writing, as reasonable and appropriate risk management by the Insurance Consultant, applying the standards set forth in Section 6.6(a), and reviewed by the Insurance Consultant every year thereafter which such determination shall not be withheld if the Insurance Consultant reasonably determines that such proposed alternative risk management program will not have a Material Adverse Effect."

First Supplemental Indenture, § 2.10.

Because the tribe ultimately has the choice to meet the Loan Agreement's insurance requirement by either purchasing an insurance policy or having an alternative risk management program, the condition that the Tribe obtain a written determination from an insurance consultant prior to implementing the alternative risk management program does not make the Loan Documents a management contract.

A similar concern related to the Tribe's control over its gaming operations arises because the Loan Documents grant the Trustee the right to require all depository banks to make daily transfers to an account controlled by the Trustee whenever the debt service coverage ratio is not met. *See* First Supplemental Indenture § 2.5. This could result in management by the Trustee if it has control over the casino's operating expenses. The Loan Documents, however, require that in such circumstances, the Trustee first deposit

funds in the Operating Account in the amount necessary to cover the *Operating Cost Set Aside Amount*, which is defined as operating expenses: "the projected cash flow reasonably required for payment of Operating Costs." Indenture § 1.1 *Operating Cost Set Aside Amount*. Further, while this provision could be read in isolation to allow the Trustee to refuse the release of money for operating expenses if he disagrees with the Tribe's determination that a given amount is necessary, language in the Loan Documents ensures that the Tribe, and not the Trustee, will make operating expense decisions. The Trustee or his representative is prohibited from "budgeting, allocating, or conditioning payments of the Borrower's operating expenses." First Supplemental Indenture § 2.15. Accordingly, absent any control by the Trustee over operating expenses, the provisions concerning daily deposits do not make the Loan Documents management agreements.

The provisions discussed thus far are designed to prevent default by the Tribe. But the Loan Documents also include protections for the bondholders should any of the events of default listed in the Indenture occur. The court in *Lake of the Torches* addressed several provisions similar to those in the Loan Documents, finding them to be management. These include a security interest in gross gaming revenue, which the court found to be management. *Lake of the Torches*, 677 F. Supp. 2d at 1059-60.

The Loan Documents pledge the gross gaming revenue of the Tribe's gaming operations as collateral. *See* Indenture § 1.1 *Collateral*; § 10.3. While previous 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, in January 2009, we provided guidance in the form of limiting language that would prevent a pledge of gross gaming revenues from resulting in a management contract. *See* January 23, 2009 letter from Penny Coleman, NIGC Acting General Counsel, to Kent Richey. The bond trust indenture at issue in the *Lake of the Torches* case did not contain any limiting language. The Loan Documents, though, have adopted limiting language that expands upon that contained in our January 2009 letter, which states:

> The Trustee and the Bondholders shall not have recourse to any property with respect to the obligations under the bonds and this indenture except the Collateral. Notwithstanding any other possible construction of any provision herein, the Trustee and Bondholders acknowledge and agree that this indenture and the bonds do not create, (A) any rights on the part of the Trustee or the Bondholders to manage the gaming operations, (B) Any rights on the Trustee or the Bondholders to interfere with the Tribe's and/or the Tribal Gaming Commission's right to determine standards of operation and efficient management of the gaming operations (including, but not limited to, operating budgeting matters of the gaming business and policies relating to gaming and gaming operations services) or any rights to have access to the secured areas in the gaming operations; or (C) any lien or right of recourse against any property other than the Collateral or any interest therein, whether tangible or intangible, legal or beneficial, vested or contingent, or any occupancy or other rights or entitlements

therein or related thereto. The liens of the Trustee and the Bondholders are strictly limited to the Collateral specifically referred to in this indenture and specifically pledged to the payment of the bonds. The bonds and the Tribe's obligations under this indenture are not general obligations of the Tribe or any affiliate or component of the Tribe.

In addition to the limitations set forth above, and notwithstanding any other provision in any Transaction Document, neither the Trustee nor the Bondholders nor anyone acting on their behalf shall engage, nor shall they cause any receiver appointed pursuant to Section 10.4 of this Indenture to engage, in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Gaming Operations (collectively, "Management Activities"), including, but not limited to:

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

(ii) any 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;

(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 Tribe's operating expenses (it being understood that the collection and disbursement of the Tribe's revenues by a receiver shall not constitute Management Activities under this clause (viii) so long as such receiver disburses to the Operating Account, from funds received by the receiver and legally available therefore, amounts necessary to fund the Operating Costs Set Aside Amount each month and, if there has been a shortfall in the amount transferred to the Operating Account in the previous month, the amount of such shortfall; *provided* that no such disbursements shall be required to be made in the event of any exercise of the rights and remedies of the Trustee and the Bondholders under Sections 10.2 and 10.3 of this Indenture);

provided, however, that neither the Trustee nor any Bondholder shall be deemed in violation of the foregoing restriction solely because they:

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

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

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

First Supplemental Indenture § 2.15. With the inclusion of the above language, the pledge of gross revenue does not transform the Loan Documents into a management contract because it prevents the bondholders from exerting any management control over the Tribe's gaming operations in the event of a default.

Another area of concern related to control of the facility arises from the Loan Documents' provision permitting the appointment of a receiver. First Supplemental Indenture § 2.13. The provision in the Supplemental Indenture is similar to that found in the bond trust indenture examined in *Lake of the Torches*, and states: "the Trustee shall be entitled, as a matter of right, to the appointment of a receiver of the Collateral..." *Id.*

The Court in *Lake of the Torches* found this to be management. *Lake of the Torches*, 677 F. Supp. 2d at 1060-61. The court noted that the receiver would have control over the trust estate, which was defined to include all of the gross gaming revenues of the gaming operation without limitation. *Id.* I agree. In previous opinions, I have questioned whether a court could appoint a receiver to a tribal gaming operation because such an appointment would usurp the tribe's ability to manage and control its gaming enterprise. The concern is closely analogous to those I have expressed about pledges of gross revenues.

If, upon default, a third party has the ability to condition the payment of operating expenses, then that third party effectively has control over a tribe's gaming operation and its management decisions. Based on that, I have opined that an agreement providing for a security interest in gross gaming revenue is a management contract. I have also opined, however, that agreements with pledges of gross revenue are not management contracts if they also contain detailed language expressly prohibiting the lenders' or trustees' ability to manage upon default. In short, a security interest in gross gaming revenue, without further limitation, makes a finance agreement a management contract.

Similarly, the appointment of a receiver may give a third party substantial management control over a tribe's gaming operation. I see no reason why a receiver's authority could not be limited to preclude management, either with appropriate limiting language or by removing operating expenses from the receiver's authority altogether. As with gross revenue, then, a provision allowing for the appointment of a receiver over gross gaming revenues, without further limitation, is management.

In this case, while the Loan Documents expressly contemplate the appointment of a receiver, they limit the authority granted a receiver by prohibiting the exercise of management activities. *See* First Supplemental Indenture § 2.13. Specifically, the Loan Documents provide that "the rights of the receiver shall be limited to the extent set forth in Section 15.15 hereof." *Id.* Section 15.15 requires the receiver to first distribute funds necessary to pay the operating expenses. Thus, the Loan Documents prohibit the receiver from exercising authority over operating expenses. It is my opinion that limited in this way, the Trust Indenture's receivership provision is not management

All of that said, in addition to an opinion that the Loan Documents are not a management contract, you asked for my opinion as to whether the Loan Documents grant any person a proprietary interest in the Tribe's gaming facilities in violation of IGRA. It is my opinion that they do not. The bonds were offered and sold at prevailing market rates. The Indentures do not transfer any ownership interest in the Tribe's facilities, nor do they give the bondholders or any of their representatives any right to control the facility. The Loan Documents, therefore, do not violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming facilities.

Conclusion

In sum, the Loan Documents specifically exclude the possibility of management by anyone other than the Tribe. Nothing in the provisions of the Loan Documents addressing remedies, the debt service coverage ratio, or the pledge of gross revenues gives to the Bank or any third party the discretion or authority to manage any part of Tribe's gaming operations. Therefore, it is my opinion that the Loan Documents are not management contracts requiring the approval of the NIGC Chairman and do not infringe on the Tribe's sole proprietary interest in its gaming operations.

I note, however, that the First Supplemental agreement was submitted to us as an undated and unexecuted draft in substantially final form. To the extent that the Loan Documents change in any material way prior to closing, this opinion shall not apply.

Other Related Matters

Recently, we have seen financing agreements similar to the Loan Documents where the default provisions have conflicted with net gaming revenue allocations in tribal revenue allocation plans (RAP). In some instances, tribes have, presumably inadvertently, violated their RAP by complying with the default provisions on their financing agreements. If the Tribe decides to adopt a RAP at some point in the future, it should take into consideration the terms of this Loan Documents to ensure consistency with the RAP provisions.

I also 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 Michael Hoenig at (202) 632-7003.

Sincerely,

Penny J Coleman

Penny J. Coleman
Acting General Counsel