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 Further Assurances Agreement

Dear Chairman Garcia:

This letter responds to your April 23, 2010 request for the National Indian Gaming Commission's Office of General Counsel to review the Further Assurances Agreement (Agreement) entered into by the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians (Tribe) and Wells Fargo Bank. You have asked whether the Agreement is a management contract requiring the NIGC Chairman's approval and whether it violates IGRA's requirement that a tribe have the sole proprietary interest in its gaming operation.

The Tribe entered into the Agreement to reassure the holders of [ ] in Gaming Enterprise Revenues Bonds that the Tribe will honor its obligations should a "triggering event" occur under its Indenture and First Supplemental Indenture, which are the subject of a separate opinion letter, also dated today. After careful review, it is my opinion that the Agreement is not a management contract and does not require the approval of the Chairman. It is also my opinion that the Agreement does not violate IGRA's sole proprietary interest requirement.

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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 on going 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.

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Pursuant to the Indenture and Supplemental Indenture, the Tribe issued [redacted] in bonds. The Further Assurances Agreement is designed to assure the bondholders that the Tribe will honor its obligations and debts under the Indentures with Wells Fargo if they are found to be void or are otherwise unenforceable. For that reason,

the Agreement is focused on the collateral and establishes the rights and duties of a collateral agent if the tribe files for bankruptcy; is declared insolvent or bankrupt by a court of competent jurisdiction; or if any court of competent jurisdiction assumes custody or control of the Tribe or any part of the gaming operations or assets.

Like the Indenture and First Supplemental Indenture, the Further Assurances Agreement pledges gross gaming revenue as collateral. Under the Agreement, the Tribe appoints a collateral agent on behalf of the bondholders to receive the collateral in the event of a triggering event. The collateral agent then distributes the collateral according to the agreement. First, the Trustee and collateral agent fees are paid with the rest applied to the principal of the obligations. Further Assurances Agreement ¶ 7(b). The collateral consists of the gaming revenues, accounts receivable of the gaming operations, each account of the gaming operations, and all the accounts established under the Indenture and Supplemental Indenture. Indenture § 1.1, *Collateral.*

The court in *Lake of the Torches* found a similar pledge of gross gaming revenue to be management. 677 F. Supp. 2d at 1059-60. 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. The bond trust indenture at issue in the *Lake of the Torches* case did not contain any limiting language. The Further Assurances Agreement here, though, has adopted language that expands upon that contained in our January 2009 letter and states:

> The collateral agent and the holders of the obligations 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 this Agreement, neither the Collateral Agent nor the holders of the Obligations nor anyone acting on their behalf shall, nor shall they cause any receiver 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) orcontractor;

(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 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 Tribe to fund the Operating Costs Set Aside Amount for 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 Collateral Agent or the holders of the Obligations as specified in Section 2(b) hereof );

*provided, however,* that neither the Collateral Agent nor any holder of the Obligations shall be deemed in violation of the foregoing restriction solely because they:

(1) enforce compliance with any term in this Agreement 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 Obligations be applied to satisfy valid terms of this Agreement; or

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

Further Assurances Agreement, ¶ 10.

With the inclusion of the above limiting language, the pledge of gross revenue does not transform the Agreement into a management contract because it prohibits the collateral agent from exerting any management control over the Tribe's gaming operations.

The Further Assurance Agreement also permits the appointment of a receiver. *Id.* at ¶ 6. The court in *Lake of the Torches* ruled that a similar receivership provision was management. *Lake of the Torches*, 677 F. Supp. 2d at 1059. In that case, Wells Fargo argued that a receiver would not exercise management over the Tribe's facility, but merely ensure that the casino corporation deposited revenue and paid liabilities. The court disagreed, finding that making deposits and paying liabilities were aspects of management. Granting a receiver control over those decisions would allow the receiver to exert a form of managerial control since those monies could not be used for other purposes related to the operation of the Casino Faiclity." *Id.* at 1060. Previous OGC opinions have also questioned whether court appointment of a receiver would be contrary to IGRA because the appointment could usurp the tribe's ability to own, operate, and regulate its gaming enterprise.

Ultimately, whether a receivership provision constitutes management depends on how it is structured. A provision for the appointment of a receiver, without further limitation, is management because the receiver has control of operating expenses and management decisions.

In this case, however, the Agreement limits the authority granted under the receivership provision by prohibiting any receiver from exercising any of the management activities. *Id.* at ¶ 6. Specifically, the Agreement states: "in no event shall the Collateral Agent or the receiver have the right to manage, operate or direct the operation of the Gaming Operations." *Id.* The rights of the receiver are further expressly limited by the language from ¶ 10 quoted at length above. These limitations on the receiver satisfy our concerns about the provision and the allowance of a receiver in this case does not make the Agreement a management contract.

In addition to an opinion that the Agreement is not a management contract, you asked for my opinion as to whether the Agreement grants any person a proprietary interest in the Tribe's gaming facilities in violation of IGRA. It is my opinion that it does

not. The Agreement reinforces the Tribe's existing obligations under its bond indentures. It does not transfer any ownership interest in the Tribe's facilities, nor does it give the collateral agent, the bondholders, or any of their representatives any right to control the facility. The Agreement, therefore, does not violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming facilities.

Conclusion

The Further Assurances Agreement has no indicia of management, and the parties have specifically agreed to exclude the possibility of management. Nothing in the provisions of the Agreement addressing the pledge of gross revenues gives collateral agent or any other third party the discretion or authority to manage any part of Tribe's gaming operations. Therefore, it is my opinion that the Further Assurances Agreement is not a management contract requiring the approval of the NIGC Chairman and does not infringe on the Tribe's sole proprietary interest in its gaming operations.

Other Related Matters

Recently, we have seen financing agreements similar to the Further Assurances Agreement 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 Agreement 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