

MEMORANDUM

TO: Native American Finance Officers Association

FROM: Dorsey & Whitney LLP

DATE: January 20, 2010

RE: Lac du Flambeau Management Contract Decision

INTRODUCTION¹

On January 11, 2010, the U.S. District Court for the Western District of Wisconsin issued a twelve-page Decision and Order (the "Decision") in *Wells Fargo Bank, N.A., as Trustee v. Lake of the Torches Economic Development Corporation*, Case No. 09-CV-768 (W.D. Wis. Jan. 11, 2010) (the "LDF Case"). The Decision supplements the Court's three-sentence order filed January 6, 2010, holding that the Lake of the Torches trust indenture was a management contract within the meaning of the Indian Gaming Regulatory Act (25 U.S.C. §§ 2701, et seq., "IGRA") and, because not approved by the Chairman of the National Indian Gaming Commission (the "NIGC") as required by IGRA, is void.

We have reviewed the Indenture, the Decision, and the briefing filed in the LDF Case. Based upon our review of these documents, we reiterate our earlier conclusion that the LDF transaction appears to be atypical in key respects to most tribal gaming-related financings with which we are familiar. However, we also conclude that the Decision creates some uncertainty with respect to at least three provisions more commonly found in tribal gaming-related financings. Consequently, we anticipate that on a going-forward basis, individual tribes, tribal finance groups, lenders, and legal counsel will be seeking additional guidance from the NIGC.

The Court's decision is binding precedent only in the Western District of Wisconsin and, as with all court decisions, may be inapplicable to future cases in other venues based upon the facts of a particular dispute, the underlying transaction documents, the legal issues presented in the dispute, and the governing law in the particular jurisdiction. We caution that we cannot predict with certainty how any court considering any legal challenge to a tribal gaming-related financing agreement would apply the Decision. We also note that the LDF Case appears to have arisen in unique factual circumstances, involving an indenture containing provisions that are atypical, and where the tribal government maintained that it often had no funds to run its government in some months after the payment of debt service and could obtain no relief from its bondholders after months of out-of-court restructuring negotiations.

Please let us know if you would like to discuss this matter in further depth.

¹ **Disclaimer. This memorandum is intended for general information purposes only and should not be construed as legal advice or legal opinions on any specific facts or circumstances. An attorney-client relationship is not created or continued by sending and/or receiving this memorandum. Members of Dorsey & Whitney LLP will be pleased to provide further information regarding the matters discussed in this Memorandum.**

DISCUSSION

In this Memorandum, we provide a brief summary of the decision in Part I, followed in Part II by factual background based on the pleadings in the LDF Case. Part III discusses the District Court's Decision, and Part IV discusses the potential implications of the decision to financing agreements.

I. Brief Summary of Decision

The LDF Case involves a Trust Indenture dated as of January 1, 2008 (the "Indenture") between the Lake of the Torches Economic Development Corporation ("EDC" or "Corporation"), a tribal corporation wholly owned by the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe"), and Wells Fargo Bank, N.A., as Trustee (the "Trustee") under which the EDC issued \$50,000,000 in bonds. Wells Fargo did not originate the transaction, nor was it an investor in the bonds secured by the Indenture. Its role in the litigation is limited to that of the Trustee acting at the direction of the bondholders. In this case, Saybrook Capital LLC ("Saybrook") is the sole bondholder.

The Court considered several key elements of the Indenture, including the gross revenues and casino equipment pledged as security for the bonds, specific provisions of the Indenture giving bondholders approval over specified casino management personnel changes and capital expenditures, terms that require the EDC to hire new management or to hire, and implement the recommendations of, management consultants in the event of default, and provisions allowing for the appointment of a receiver, and determined that:

(1) the Indenture was an unapproved "management contract" and as such was void under the provisions of the IGRA;

(2) the Bondholders and the Trustee no longer had a valid waiver of the EDC's sovereign immunity because the sovereign immunity waiver was included in a contract now determined "void" by the Court;

(3) the waiver of sovereign immunity provisions of the Indenture could not be "severed" from the Indenture and survive on their own to result in a valid waiver of sovereign immunity;

(4) the impermissible management contract-related provisions of the Indenture could not be "severed" from the terms of the Indenture in order to avoid the Indenture being determined void; and

(5) the EDC was not required to exhaust its administrative remedies by seeking NIGC review of the Indenture as a prerequisite to arguing in the Court that the Indenture was an unapproved management contract.

The Court's Decision is binding precedent only in the Western District of Wisconsin and is based on an Indenture that included the following atypical provisions: (a) bondholder approval over changes in specific management personnel; (b) a requirement that, if the EDC's debt service coverage ratio fell below a specified level, upon notice from the bondholders the EDC must hire a management consultant, approved by the bondholders, and use its best efforts to follow the consultant's recommendations; and (c) bondholder ability to require new management in the event of a default and to approve the replacement management. However, in considering

the case before it, the Court analyzed and referenced several other provisions in the Indenture – a pledge of gross gaming revenues and security interest in casino equipment, capital expenditure restrictions, and receivership remedies – that appear more commonly in gaming-related finance agreements. The Court stated, after discussing the specifically identified terms of the Indenture, that “[t]aken collectively and individually, these terms in the Trust Indenture give unapproved third parties the authority to set up working policy for the Casino Facility’s gaming operation.” The Court failed to discuss whether any particular provision, standing on its own, would be sufficient to render the Indenture an unapproved management contract or whether a combination of some of the referenced provisions taken collectively would result in the Indenture being an unapproved management contract.

In addition, the Court held that the “illegal management contract” provisions were unseverable and the waiver of sovereign immunity provisions in the Indenture did not survive. Waivers of sovereign immunity are common features in loan documents, as are severability provisions. The Trustee (presumably acting at the direction of Saybrook) did not brief and argue that the illegal management contract provisions were severable from the Indenture – rather the Court reached that conclusion on its own. It is uncertain whether the Court might have reached the same outcome if it had the benefit of a full briefing by the parties on this important issue.

II. Background Facts ²

The EDC owns and operates the Lake of the Torches Resort Casino (the “Casino”) in Lac du Flambeau, Wisconsin. In 2008, to refinance debt and fund a new project in Mississippi, EDC issued \$50,000,000 in bonds pursuant to the terms of the Indenture. At the time of the litigation, the sole holder of the bonds was Saybrook. ³

Under the Indenture, the EDC pledged and assigned all right, title and interest in and to the “Pledged Revenues,” consisting of the Gross Revenues of the EDC and investment earnings on those Gross Revenues. “Gross Revenues” are defined in the Indenture as all receipts from the operation of the casino facility and all monies received by the EDC from a project under development in Mississippi, which the Bonds were to fund in part. The EDC also pledged the Casino’s equipment, all right, title, and interest in and to the EDC’s accounts, deposit accounts, general intangibles, chattel paper, instruments and investment properties, and the proceedings of each of the foregoing and all books, records and files related to all or any portion of the Pledged Revenues (all such properties, collectively, constitute the “Trust Estate” under the Indenture).

The Indenture established a “Revenue Fund” through which the EDC was required to make daily deposits of Gross Revenues (except Gross Revenues required for current cash requirements).⁴ The Revenue Fund has four sub-accounts: (1) Expense Account; (2) Insurance and Tax Account; (3) Operating Reserve Account; and (4) Surplus Account. Under the terms of

² The summary in this section is based upon a review of the pleadings in the LDF Case and the Indenture. We have not independently investigated or verified any of these facts.

³ We do not yet know if Saybrook was the initial investor nor whether the provisions in question were included at the request of the initial investors or at the request of the underwriter, Stifel Nicolaus & Company Incorporated.

⁴ See Trust Indenture § 5.01.

the Indenture, the EDC was permitted to withdraw funds from the Operating Reserve Account to pay for operating expenses by submitting a written certification to the Trustee that the funds being withdrawn were needed and would be used solely to pay Operating Expenses of the Casino. At the end of every month, the sums required for debt service on the bonds were to be deducted from designated accounts.

Based on the pleadings in the case, the EDC and Saybrook had been in negotiations throughout 2009 with respect to a possible restructuring of the EDC's obligations under the Indenture. On November 30, 2009, the EDC requested, pursuant to the required certification process under the Indenture, that \$4,750,000 be transferred from the Operating Reserve Account to another account. Such transfer was made by the Trustee on December 1, 2009. Saybrook questioned the necessity of the transfer and requested documentation of the need for the sum. According to the Trustee, the EDC did not respond to Saybrook's request or to a subsequent request of the Trustee for specific documentation. In December, the EDC stopped making daily deposits into the Revenue Fund.

Saybrook requested the Trustee to declare the principal and interest immediately due, which the Trustee did on December 18, 2009. On December 21, 2009, Saybrook (acting through its Trustee) brought an action in the Court to enforce the Indenture and to seek the appointment of a receiver for the Trust Estate. The Trustee (presumably acting at the direction of Saybrook) alleged that the EDC had breached the Trust Indenture through: (1) failure to deposit daily all Gross Revenues; (2) use of funds for unauthorized purpose; (3) failure to provide records for inspection; and (4) failure to provide financial statements.

III. Detail of the Court's Decision

A. Management Contract Indicia

The Court provided an overview of IGRA's requirements with respect to management contracts. It restated sections of IGRA that require management contracts for the management of tribal gaming operations to be approved by the Chairman of the NIGC and which provide that unapproved management contracts are void.⁵ It also recited the definition of a 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."⁶ It then also considered the definition of a "primary management official" as any person who has the authority to "set up working policy for the gaming operations."⁷

The Court then considered the collateral pledged by the EDC – the Gross Revenues of the Casino, the Casino's equipment and other personal property – and the following key provisions of the Indenture⁸ (restated in the footnote below in full):

⁵ 25 U.S.C. § 2711(a)(1), 25 U.S.C. § 2710(d)(9), and 25 C.F.R. § 533.7.

⁶ 25 C.F.R. § 502.15.

⁷ 25 C.F.R. § 502.19(b)(2)

⁸ The Court described the key provisions discussed here in summary fashion in its Decision. It did not recite the full text of the cited Indenture provisions in its Decision, and it is unclear from such treatment

whether or to what extent the Court relied on the full text of each provision in reaching its conclusions. For the reader's benefit, we are providing the full text of the cited Indenture provision in this Memorandum:

Section 6.18 Capital Expenditures. During any fiscal year, the Corporation shall not incur capital expenditures that exceed [by] 25% [of] the prior year's capital expenditures without receiving the written consent of the Holders of not less than 51% of the outstanding principal amount of the Series 2008 Bonds, which consent will not be unreasonably withheld. [The printed version of the Indenture that we have seen reads "that exceed 25% of the prior fiscal year's capital expenditures". That copy has been marked by someone to read "that exceed by 25% the prior fiscal year's capital expenditures". The latter reading makes more sense, but the record is not clear how the provision actually operates. In its Decision, the Court adopted the unmarked, printed reading.]

Section 6.19 Management Consultant If the Debt Service Coverage Ratio falls below 2.00 to 1 and, if required in writing by the Holders of not less than 51% of the outstanding principal amount of the Series 2008 Bonds, the Corporation will promptly retain an Independent management consultant with sufficient experience in and knowledge of the gaming industry approved by the Bondholder Representative. Such Independent management consultant shall conduct a review and provide a report, a copy of which shall be provided to the Trustee, the Bondholder Representative, and any Holder of the Bonds upon request, which make recommendations as to improving the operations and cash flow of the Casino Facility. The Corporation agrees to use its best efforts to implement the recommendations of the management consultant within ninety (90) days from the date that the final management consultant report is delivered to the Corporation.

Section 6.20 Replacement of Key Management Personnel. The Corporation agrees that it will not replace or remove and will not permit the replacement or removal of the Casino Facilities' General Manager, Controller, or Chairman or Executive Director of the Gaming Commission for any reason without first obtaining the prior written consent of 51% of the Holders of the Bonds.

Section 8.02 Acceleration of Maturity; Other Remedies. Upon the occurrence of an Event of Default, the Trustee may, and upon written request of the Holders of twenty-five percent (25%) in aggregate principal amount of Bonds outstanding hereunder shall, by notice in writing delivered to the Corporation declare the principal of all Bonds hereby secured then outstanding and the interest accrued thereon immediately due and payable, and such principal and interest shall thereupon become and be immediately due and payable subject, however, to the right of the Holders of a majority in aggregate principal amount of Bonds then outstanding hereunder, by written notice to the Corporation and to the Trustee, to annul such declaration and destroy its effect at any time if all covenants with respect to which default shall have been made shall be fully performed or made good, and all arrears of interest upon all Bonds outstanding hereunder and the reasonable expenses and charges of the Trustee, its agent and attorneys, and all other indebtedness secured hereby (except the principal of any Bonds which have not then attained their stated maturity and interest accrued on such Bonds since the last interest payment date) shall be paid, or the amount thereof shall be paid to the Trustee for the benefit of those entitled thereto.

If an Event of Default occurs under Section 8.01(a), (b), or (j) the Holders of not less than 51% of the outstanding principal amount of the Series 2008 Bonds shall have the right to require, in writing, the Corporation to hire new management and shall have the

- Section 6.18: limiting capital expenditures to 25% of the prior year's capital expenditures unless written consent of the majority Bondholders is obtained;
- Section 6.19: upon request by the majority Bondholders, requiring the EDC to engage an independent management consult and use its best efforts to implement the consultant's recommendations if debt service coverage ratio fell below a specified level;
- Section 6.20: prohibiting the EDC from replacing or removing key management personnel for any reason without first obtaining the prior written consent of the majority Bondholders;

Section 8.02: upon an Event of Default, providing the majority Bondholders with the right to require the hiring of new management and the right to consent to replacement management;

- Section 8.04: upon an Event of Default, and upon the filing of a suit or other commencement of judicial proceedings to enforce the rights of the Trustee and the Bondholders, providing the Trustee with "as a matter of right" the appointment of a receiver or receivers of the Trust Estate with such powers as the court making such appointment shall confer.

The Court held that, with respect to, Sections 6.18, 6.19, and 6.20 "[a]ll of these provisions give the bondholders the opportunity to exert significant control over the management operations of the Casino Facility." With respect to Sections 8.02 and 8.04, the Court found that such sections give the bondholders "management control when the Corporation defaults." Further, in response to the Trustee's argument that a receiver would only ensure that the EDC deposited its revenues and paid its liabilities, the Court held: "[b]y forcing the Corporation 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."

The Court quoted the Affidavit of Kevin Washburn (an expert hired by the EDC and a former general counsel of the NIGC) with approval, stating that "[t]he terms of the indenture

right to consent, in writing, to the management personnel and/or company that the Corporation recommends as replacement management.

If the Corporation fails to pay the principal of and interest due on the Series 2008 Bonds at maturity on October 1, 2012: (i) the Corporation shall be required to apply 100% of the Corporation's earnings before depreciation, amortization, interest, and taxes toward payment of principal and interest on the Series 2008 Bonds, (ii) a default rate of interest equal to fifteen percent (15%) per annum shall apply to the principal balance of all outstanding Series 2008 Bonds, and (iii) the guaranty of the Tribe under the Tribal Agreement shall become effective and the Trustee may enforce its rights thereunder.

Section 8.04 Appointment of Receivers. Upon the occurrence of an Event of Default, and upon the filing of a suit or other commencement of judicial proceedings to enforce the rights of the Trustee and the Holders of Bonds under this Indenture, the Trustee shall be entitled, as a matter of right, to the appointment of a receiver or receivers of the Trust Estate and of the revenues, issues, payments and profits thereof, pending such proceedings, with such powers as the court making such appointment shall confer.

seem to presuppose substantial control by a receiver over key financial decisions. These are the most important decisions in managing a gaming operation and, because they involve large sums of money, are among the management decisions of greatest interest to NIGC regulators.”

The Court then stated “[t]aken collectively and individually, these terms in the Trust Indenture give unapproved third parties the authority to set up working policy for the Casino Facility’s gaming operation,” and determined that the Indenture was an unapproved management contract. As an unapproved management contract, the Court then concluded that the Indenture was void under the terms of IGRA.⁹

B. Sovereign Immunity

The Court then determined that the waiver of sovereign immunity of the EDC included in the Indenture was invalid because the Court had concluded that the Indenture was void *ab initio*. Quoting from a Ninth Circuit case¹⁰, the Court stated “[s]ince the entire contract is inoperable without [federal] approval, the waiver is inoperable and, therefore the tribe remains immune from suit.”

C. Separability and Severability

The Indenture included a “separability” provision, which provides “[i]n case any one or more of the provisions contained in this Indenture or the Bonds shall be held to be invalid, illegal or unenforceable in any respect, such validity, illegality or unenforceability shall not affect any other provisions of this Indenture, but this Indenture shall be construed as if such invalid or illegal or unenforceable provision had never been contained herein.”¹¹ The Trustee had argued that the waiver of sovereign immunity provisions of the Indenture should be severed from the Indenture and therefore remain valid. The Court declined to consider severing such provisions, because even if such provisions could be separated from the Indenture, there would be no remaining obligations to enforce because the Court had concluded that the Indenture was void.

On its own, the Court also determined that the illegal management control provisions could not be severed from the Indenture. In reaching such conclusion, the Court determined that “[b]ecause many of the Event of Default provisions are illegal, the contract cannot be severed.” It based its conclusion on a theory that a contract can survive if an illegal clause can be severed from a contract without defeating the primary purpose of the bargain, but that, in this case, severance of the illegal provisions would defeat the primary purpose of the contract.

D. NIGC Determination and Exhaustion

With regard to other arguments made by the parties, the Court found that the Court itself could determine whether the Indenture was invalid for lack of NIGC approval and the EDC did not have to exhaust remedies before the NIGC as a prerequisite to raising the defense of invalidity in response to the Trustee’s suit. The Court also found that the Trustee’s reliance on the Tribe’s failure to seek prior approval from NIGC with respect to the management contract

⁹ 25 C.F.R. § 533.7.

¹⁰ *A.K. Mgt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986).

¹¹ Indenture, Section 14.04.

status of the Indenture (and the lenders' own failure to submit the Indenture) when the transaction was negotiated and implemented was "unreasonable" and surprising.

IV. Potential Implications to Tribal Gaming Financing Agreements

A. Applicability of Decision

The Court's Decision is binding precedent only in the Western District of Wisconsin and, as with all court decisions, may be inapplicable to future cases in other venues based upon the facts of a particular dispute, the underlying transaction documents, the legal issues presented in the dispute, and the controlling law of the particular jurisdiction. As with any court decision, however, it may be cited by any party in the future as persuasive authority. The Decision also may be appealed by the parties to it.

B. Terms of Financing Agreements

As noted above, the terms of the Indenture, which provided Bondholder's with approval over management personnel changes, allowed Bondholders to direct a tribe to hire new management, and required the EDC to hire a management consultant approved by the Bondholders and use "best efforts" to follow such recommendations, are atypical in tribal gaming financing agreements. Thus, it is not surprising that such provisions would cause an agreement to be considered a "management contract."

With respect to the EDC's pledge of gross casino revenues and gaming equipment, such collateral is commonly pledged by tribes in gaming-related financing agreements. Additionally, it is not uncommon in our experience for loan documents to address capital expenditures and provide some limitations as to the purpose of such expenditures or the reasonableness of the sums so expended. As to receivership provisions, it is not unusual for bond indentures to include appointment of receivers as a remedy; additionally, commercial loan agreements also may include the ability of a creditor to seek a receiver. The LDF Indenture is unique in that the powers of a receiver under the LDF Indenture included rights to enforce provisions of the Indenture giving the bondholders the ability to make decisions with respect to casino management personnel and consultants (see Sections 6.19, 6.20 and 8.02 of the Indenture, previously discussed). In addition, there is no language in the LDF Indenture that generally limits remedies to those generally recognized by law, including applicable gaming laws. Nonetheless, the LDF Court's analysis is couched in broad language, finding that a receiver's role in forcing a tribal corporation to deposit revenues and pay its liabilities (at least under the provisions of the LDF Indenture) "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." We note that this particular sentence of the Court's Decision is confusing because, after paying liabilities associated with the casino operations, it is unclear what "other purposes" there would be "related to the operation of the Casino Facility."

We cannot predict how a future court applying the Decision to a case would interpret the Decision's statements with respect to gross gaming revenue pledges, capital expenditure limitations and receivership provisions, if at all. We would expect that such a future court would consider how closely a given agreement's terms tracked the LDF terms found illegal, how many of the challenged terms were present in a given agreement, how the agreement itself was structured, the collateral pledged, and the unique facts and equities of a given case. Recall that the LDF Indenture required daily deposits of gross revenues into a collection account, which was then applied to debt service, and the balance released to the Casino for operating

expenses. An agreement that required the deposit of net revenues rather than gross revenues, or an agreement that applied to gross revenues but allowed operating expenses to be paid by the tribal casino pursuant to a depository agreement, might well be considered distinguishable from the LDF Court's concern that a receiver was exerting managerial control over the operation of a casino.

C. Waiver of Sovereign Immunity and Severability Issues

With respect to the Court's findings on severability, we note that Saybrook (through the Trustee) did not argue in its pleadings that those provisions of the Indenture that the Court found to be IGRA-offending be separated or severed from the Indenture. The Court raised this issue and reached its conclusions on its own. It is possible that a future Court considering the severability issue could reach a different conclusion if the issue were fully briefed and argued by the contract party seeking the survivability of the contract. Second, with respect to the Court's holding that the waiver of sovereign immunity provision could not be separated from the Indenture, the Court's Decision did not fully analyze whether the waiver could be severed from the Indenture. Instead, it concluded that even if it were severed, there would be no obligations to enforce because the Indenture was void. Such analysis did not consider that Saybrook may have had non-contract bases for relief. Again, it is possible that another court considering another case would reach a different conclusion.

D. NIGC Guidance

The NIGC is an executive branch federal agency established within the Department of the Interior. Under IGRA, the Chairman of the NIGC is the only official within the NIGC who is empowered to "approve management contracts" under the terms of IGRA.¹² Federal regulations define "Chairman" as the Chairman or his designee.¹³ There is no formal process established under IGRA or NIGC regulations for the Chairman or NIGC staff to consider the terms of a contract which is not intended by the parties to be a management contract. IGRA and federal regulations only establish a clear detailed process for parties to submit to the NIGC a "management contract" for approval. Additionally, other than the regulations' definition of a "management contract" and some early NIGC "bulletins" on the topic,¹⁴ there is no regulation or a single source NIGC guidance document that comprehensively considers criteria that may cause tribal gaming-related financing agreements to be considered "management contracts."

Despite the lack of a formal process, the Office of the General Counsel of the NIGC has issued advisory opinions addressing when the terms of tribal gaming-related finance agreements may constitute management contracts. Such opinions are opinions of NIGC staff,

¹² 25 U.S.C. § 2705(4).

¹³ 25 C.F.R. § 502.1.

¹⁴ See NIGC Bulletin 93-3, dated July 1, 1993, which provided that the NIGC and BIA have determined that certain gaming-related agreements, such as consulting agreements or leases or sales of gaming equipment, should be submitted to the NIGC for review; and NIGC Bulletin 94-5, in which the Commission said, in part, "Management encompasses many activities (e.g., planning, organizing, directing, coordinating, and controlling). The performance of any one of such activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether any contract or agreement for the performance of such activities is a management contract that requires approval."

not formal actions of the NIGC, and have been issued on a fact specific basis in response to the request of an Indian tribe or a financial institution with respect to identified financing agreements. These opinions typically are private documents specific to a transaction and are not made publicly available by the NIGC (although such may be available through a Freedom of Information Act Request). Parties seeking review by NIGC staff of such financing agreements typically refer to this process as “seeking a declination letter.”

We are aware of several such opinions issued by the Office of General Counsel. We are also aware that the conclusions reached in the advisory opinions, particularly with respect to creditor controls over gross or net revenues, have not been consistent. Nevertheless, legal counsel endeavor to follow the guidance of these opinions in structuring transactions in Indian country. One of the most recent opinion letters was issued by the NIGC on January 23, 2009. Such opinion letter addressed a financing secured by a pledge of gross revenues of a tribal gaming operation required to be deposited in accounts in which the administrative agent for lenders had control. In the opinion, the Acting General Counsel of the NIGC stated that a “security interest in a gaming facility’s future gross revenues, without further limitation, authorizes management of the gaming facility.” Further, the opinion stated, “a party that controls gross revenue potentially can control everything about the gaming facility by allocating or putting conditions on the payment of operating expenses.” The opinion then considered the terms of a negative covenant to be included in the loan document which would prohibit a lender from engaging in certain specified management activities and determined such covenant addressed her concerns. The opinion concluded that if the lender was prohibited from exercising management control or discretion by the terms of the agreement, such lender would not and could not decide whether and to what extent the “monies the Tribe retains would be used for operating expenses.”

While the Court’s Decision in the LDF Case arguably went beyond the Acting General Counsel’s recent expressed concerns with respect to controlling the “operating expenses” of a casino, for the time being the guidance provided by the NIGC’s Acting General Counsel in the January 2009 letter may be useful and instructive with respect to existing and future transactions. The benefit of including such language in a loan document is that if a loan document were later submitted to the NIGC for review and the loan document included the language described in the NIGC letter, assuming there were no other management control provisions in the agreement, the NIGC staff would be hard pressed to conclude that such a loan document is a management contract requiring the Chairman’s approval for validity.

We expect that tribal finance groups, individual tribes and lenders, and legal counsel in the field of Indian gaming finance plan to address the Decision with NIGC and seek guidance as to both specific transactions and general guidance for future transactions. As a result, tribes and lenders contemplating transactions may wish to consider either submitting their transaction documents for NIGC review, incorporating the January 2009 guidance letter into their documents, or both.

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