



## **MEMORANDUM**

TO: Tribal Leaders and Finance Officers

DATE: January 21, 2010

RE: The Lac du Flambeau Decision

This memorandum is posted to inform you about a case concerning a Tribal bond issuance that has recently been decided and, in theory, has potential implications for any Tribe that currently has financing or may be seeking financing for a Tribal project.

### **The Decision**

On January 6, 2010, the United States District Court for the Western District of Wisconsin (the "Court") issued an order in the case of *Wells Fargo Bank, National Association, as Trustee v. Lake of the Torches Economic Development Corporation*. This order invalidates the trust indenture for \$46,615,000 of bonds issued by a tribal corporation of the Lac du Flambeau Band of Lake Superior Chippewa Indians ("LDF") for the refinancing of the Lake of Torches Casino and other LDF debt. In this order, the Court ruled that the indenture amounted to a management contract and is void due to failure to seek the required National Indian Gaming Commission approval.

Some have suggested that this case may have dire consequences for all Tribes seeking financing. We have consulted with some of the top attorneys in Indian country and believe that this case is "sui generis" or unique in its facts and are hopeful that it will not have widespread application to the Native American community.

### **The Risk of Existing Tribal Trust Indentures or Financing Agreements Being Invalidated as Management Contracts**

The Indian Gaming Regulatory Act prohibits Tribes from entering into management agreements for casinos without review and prior approval by the Chairman of the NIGC. A financing arrangement risks being invalidated in its entirety if it includes provisions that could be construed as providing the lender with rights of management. The Court concluded that



the bond indenture in the LDF financing does not comply with NIGC guidelines related to impermissible elements of management control.

Some have suggested that this case could lead to other Tribal trust indentures and financing agreements being invalidated as management contracts. We at NAFOA do not think this is the case. The trust indenture in the LDF case includes several critical provisions not commonly found in Tribal gaming financings.

One highly experienced Indian country attorney we consulted has suggested that “the trust indenture is like none [he has] ever seen and clearly does not conform with the standards set by the NIGC.” For example, according to the pleadings in this case, the indenture included provisions: 1) requiring bondholder approval of changes to specified senior management of LDF’s casino operation; 2) permitting bondholders to direct LDF to hire new management in the event of default by LDF; 3) upon certain financial covenant violations, requiring LDF to retain an independent gaming management consultant and thereafter use “best efforts” to implement the recommendations of such consultant; and 4) permitting the appointment of a receiver over casino revenues and casino equipment in the event of a default by LDF. The Court concluded that these provisions, among others, overstep NIGC rules concerning a lender’s ability to assert management powers within a financing agreement.

We believe that few trust indentures or other financing agreements in Indian country are likely to have provisions similar to the ones mentioned

above and we think this will limit the applicability of this case to other Tribes. Thus, it is our hope that Tribes and their lenders need not be concerned about the validity of their financing agreements.

We do however have some concerns about the broad language used by the Court in this case. In addition to the provisions noted above, the Court included references to some commonly used provisions often found in trust indentures and loan agreements. We are hopeful that the National Indian Gaming Commission will provide some guidance so as to avoid confusion



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about which of the provisions, taken together or separately, would constitute a management contract if included in a trust indenture or loan agreement.

We will dedicate a substantial portion of the upcoming NAFOA conference in New Orleans on March 16-17<sup>th</sup>, 2010, to the risks Indian country finance currently faces due to Tribal defaults, including the implications of this case.

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