GAMING CONTRACTS

&

Player Disputes

Gaming Contracts

As you have learned, most jurisdictions deem gaming to be a privileged activity that is only conducted legally under a government issued license. A key condition for licensing is that an applicant must be found "suitable" to hold a gaming license. In general, to be found suitable, an applicant must show, to the satisfaction of the regulatory body charged with issuing licenses, that the applicant:

- Has a history of complying with letter and spirit of all applicable laws and regulations
- Has no association with criminals or criminal organizations
- Has a reputation for honesty and integrity
- Has sufficient resources to conduct the planned activity
- Has sufficient business acumen or experience to conduct the planned activity successfully
- Is not influenced by criminal or corruptive elements
- Is cooperative with regulatory authorities
- Is likely to conduct successful activities in a manner that will not tarnish the reputation of the state or the industry

Contracts Requiring Licensing

In many jurisdictions, contracts may expose the contracting party to licensing or registration requirements.

Nevada - Licensing

In Nevada a contract the entitles a party to a share of gaming revenue will expose the contracting party to licensing requirements in the State of Nevada:

NRS 463.160 Licenses required; unlawful to permit certain gaming activities to be conducted without license; exceptions; separate license required for each location where operation of race book or sports pool conducted.

1. Except as otherwise provided in subsection 4 and NRS 462.155 and 463.172, it is unlawful for any person, either as owner, lessee or employee, whether for hire or not, either solely or in conjunction with others:

(a) To deal, operate, carry on, conduct, maintain or expose for play in the State of Nevada any gambling game, gaming device, inter-casino linked system, slot machine, race book or sports pool;

(b) To provide or maintain any information service;

(c) To operate a gaming salon;

(d) To receive, directly or indirectly, any compensation or reward or any percentage or share of the money or property played, for keeping, running or carrying on any gambling game, slot machine, gaming device, race book or sports pool;

NRS 463.162 State gaming license required where equipment, services or property delivered or furnished for gaming interest or revenue; exemptions.

1. Except as otherwise provided in subsections 2 and 3, it is unlawful for any person to:

(a) Lend, let, lease or otherwise deliver or furnish any equipment of any gambling game, including any slot machine, for any interest, percentage or share of the money or property played, under guise of any agreement whatever, without having first procured a state gaming license.

(b) Lend, let, lease or otherwise deliver or furnish, except by a bona fide sale or capital lease, any slot machine under guise of any agreement whereby any consideration is paid or is payable for the right to possess or use that slot machine, whether the consideration is measured by a percentage of the revenue derived from the machine or by a fixed fee or otherwise, without having first procured a state gaming license for the slot machine.

(c) Furnish services or property, real or personal, on the basis of a contract, lease or license, pursuant to which that person receives payments based on earnings or profits from any gambling game, including any slot machine, without having first procured a state gaming license.

This often becomes an issue in intellectual property licenses where an IP license holder is willing to license their IP for a percentage of revenue earned on gaming devices using such IP. If the IP holder is willing to obtain a non-restricted gaming approval or license to share in revenue, then the issue resolves itself. However, such revenue streams are generally insufficient to justify the costs of obtaining a Nevada gaming license. In such cases, the IP owner will have to decide whether it wants the percentage of gaming revenue and is willing to obtain the license, whether it will accept a flat fee license (not tied to gaming revenue), or whether it would rather not license its IP for use in gaming.

Nevada – Service Provider Registration or Licensing

In Nevada, certain "service providers" are required to either obtain a license or to be registered with the Nevada Gaming Control Board.

NRS 463.677 Legislative findings; regulations.

1. The Legislature finds that:

(a) Technological advances have evolved which allow licensed gaming establishments to expose games, including, without limitation, system-based and system-supported games, gaming devices, interactive gaming, cashless wagering systems or race books and sports pools, and to be assisted by an interactive gaming service provider or a service provider, as applicable, who provides important services to the public with regard to the conduct and exposure of such games.

(b) To protect and promote the health, safety, morals, good order and general welfare of the inhabitants of this State, and to carry out the public policy declared in NRS 463.0129, it is necessary that the Board and Commission have the ability to:

(1) License interactive gaming service providers;

(2) Register service providers; and

(3) Maintain strict regulation and control of the operation of such interactive gaming service providers or service providers, respectively, and all persons and locations associated therewith.

2. Except as otherwise provided in subsection 4, the Commission may, with the advice and assistance of the Board, provide by regulation for the:

(a) Licensing of an interactive gaming service provider;

(b) Registration of a service provider; and

(c) Operation of such a service provider or interactive gaming service provider, respectively, and all persons, locations and matters associated therewith.

3. The regulations pursuant to subsection 2 may include, without limitation:

(a) Provisions requiring:

(1) The interactive gaming service provider to meet the qualifications for licensing pursuant to NRS 463.170, in addition to any other qualifications established by the Commission and to be licensed regardless of whether the interactive gaming service provider holds any license.

(2) The service provider to be registered regardless of whether the service provider holds any license.

(b) Criteria regarding the location from which the interactive gaming service provider or service provider, respectively, conducts its operations, including, without limitation, minimum internal and operational control standards established by the Commission.

(c) Provisions relating to:

(1) The licensing of persons owning or operating an interactive gaming service provider, and any person having a significant involvement therewith, as determined by the Commission.

(2) The registration of persons owning or operating a service provider, and any persons having a significant involvement therewith, as determined by the Commission.

(d) A provision that a person owning, operating or having significant involvement with an interactive gaming service provider or a service provider, respectively, as determined by the Commission, may be required by the

Commission to be found suitable to be associated with licensed gaming, including race book or sports pool operations.

(e) Additional matters which the Commission deems necessary and appropriate to carry out the provisions of this section and which are consistent with the public policy of this State pursuant to NRS 463.0129, including that an interactive gaming service provider or a service provider, respectively, must be liable to the licensee on whose behalf the services are provided for the interactive gaming service provider's or service provider's proportionate share of the fees and taxes paid by the licensee.

4. The Commission may not adopt regulations pursuant to this section until the Commission first determines that interactive gaming service providers or service providers, respectively, are secure and reliable, do not pose a threat to the integrity of gaming and are consistent with the public policy of this State pursuant to NRS 463.0129.

5. Regulations adopted by the Commission pursuant to this section must provide that the premises on which an interactive gaming service provider and a service provider, respectively, conducts its operations are subject to the power and authority of the Board and Commission pursuant to NRS 463.140, as though the premises are where gaming is conducted and the interactive gaming service provider or service provider, respectively, is a gaming licensee.

6. As used in this section:

(a) "Interactive gaming service provider" means a person who acts on behalf of an establishment licensed to operate interactive gaming and:

(1) Manages, administers or controls wagers that are initiated, received or made on an interactive gaming system;

(2) Manages, administers or controls the games with which wagers that are initiated, received or made on an interactive gaming system are associated;

(3) Maintains or operates the software or hardware of an interactive gaming system; or

(4) Provides products, services, information or assets to an establishment licensed to operate interactive gaming and receives therefor a percentage of gaming revenue from the establishment's interactive gaming system.

(b) "Service provider" means a person who:

(1) Is a cash access and wagering instrument service provider; or

(2) Meets such other or additional criteria as the Commission may establish by regulation.

Interactive Gaming Service Providers

In Nevada, online gaming and casino games on mobile devices are defined as “interactive gaming”, a term coined on 2001. Anyone that engages in providing “interactive gaming” for a casino operator or “interactive gaming” licensee, must obtain an interactive gaming service provider’s license. The interactive gaming service provider’s license, subjects the applicants to a full investigation along with the costs and obligations of going through such an investigation.

Other Service Providers

Regulation 5.240 Service Providers.

1. Findings. The Commission hereby finds that service providers are secure and reliable, that service providers do not pose a threat to the integrity of gaming, and that service providers are consistent with the public policy of this State as set forth in to NRS 463.0129.

2. Definitions.

(a) "Chair" means the Chair of the Nevada Gaming Control Board or the Chair's designee.

(b) "Information technology service provider" means a person who, on behalf of a licensee, provides management, support, security, or disaster recovery services for games, gaming devices, or associated equipment.

(c) "Service provider" means a person who:

(1) Is a cash access and wagering instrument service provider as defined in NRS 463.01395; or

(2) Is an information technology service provider.

3. A licensee may only use a service provider that is registered as such with the Board or a person holding a manufacturer's license issued by the Commission pursuant to NRS 463.650 to the extent the manufacturer is supporting such manufacturer's gaming products. The Board shall make a list available of all registered service providers.

4. A licensee continues to have an obligation to ensure, and remains responsible for, compliance with this regulation, the Nevada Gaming Control Act and all other regulations of the Commission regardless of its use of a service provider.

5. Except as otherwise provided in this subsection, a person may act as a service provider only if that person is registered with the Board pursuant to this section. Once registered, a service provider may act on

behalf of one or more gaming licensees. Any person holding a manufacturer's license issued by the Commission pursuant to NRS 463.650 may perform the services of a service provider without registering pursuant to this section only if such services are limited to supporting such manufacturer's gaming products.

6. Service providers, including each direct or beneficial owner of 10% or more of the service provider and any person having significant control over the operations of the service provider, as determined by the Chair, including without limitation, officers, directors, or other principals, must register with the Board. A registration issued by the Board pursuant to this section expires five years after the Chair sends notice to the service provider that the service provider is registered with the Board, and every five years thereafter if a completed application for renewal of registration is received by the Board prior to the expiration of the registration. A completed application for renewal of registration must be submitted to the Board not less than 60 days prior to the expiration of the registration.

7. A service provider shall not provide services as a service provider until the Chair notifies the service provider in writing that the service provider is registered with the Board. …

Unsuitable Contracting Parties

NRS 463.166 Contracts or agreements with certain unsuitable or unlicensed persons prohibited; termination of contract or agreement.

1. A person who has:

(a) Been denied a license by the Commission;

(b) Been found unsuitable by the Commission; or

(c) Had a license or finding of suitability revoked by the Commission,

Ê shall not enter or attempt to enter into any contract or agreement with a licensee, either directly or indirectly, through any business organization under such a person's control, that involves the operations of a licensee without the prior approval of the Commission. This provision does not prohibit any person from purchasing any goods or services for personal use from a licensee at retail prices that are available to the general public.

2. Every contract or agreement with a person that is subject to the provisions of subsection 1 shall be deemed to include a provision for its termination without liability on the part of the licensee. Failure to expressly include that condition in the contract or agreement is not a defense in any action brought pursuant to this section to terminate the agreement.

3. Any person, contract or agreement subject to the provisions of subsection 1 is subject to being enjoined pursuant to and in accordance with the provisions of NRS 463.346.

Other Jurisdictions - Licensing

New Jersey:

5:12-92 Licensing of casino service industry enterprises

a. (1) Any business to be conducted with a casino applicant or licensee by a vendor offering goods or services which directly relate to casino or gaming activity or Internet gaming activity, including gaming equipment and simulcast wagering equipment manufacturers, suppliers, repairers, and independent testing laboratories, shall require licensure as a casino service industry enterprise in accordance with the provisions of this act prior to conducting any business whatsoever with a casino applicant or licensee, its employees or agents; provided, however, that upon a showing of good cause by a casino applicant or licensee, the director may permit an applicant for a casino service industry enterprise license to conduct business transactions with such casino applicant or licensee prior to the licensure of that casino service industry

enterprise applicant under this subsection for such periods as the division may establish by regulation. Companies providing services to casino licensees regarding Internet gaming shall, notwithstanding any other provision of P.L.1977, c.110 (C.5:12-1 et seq.), be responsible for the full cost of their licensure, including any investigative costs.

(2) In addition to the requirements of paragraph (1) of this subsection, any casino service industry enterprise intending to manufacture, sell, distribute, test or repair slot machines within New Jersey, other than antique slot machines as defined in N.J.S.2C:37-7, shall be licensed in accordance with the provisions of this act prior to engaging in any such activities; provided, however, that upon a showing of good cause by a casino applicant or licensee, the director may permit an applicant for a casino service industry enterprise license to conduct business transactions with the casino applicant or licensee prior to the licensure of that casino service industry enterprise applicant under this subsection for such periods as the division may establish by regulation; and provided further, however, that upon a showing of good cause by an applicant required to be licensed as a casino service industry enterprise pursuant to this paragraph, the director may permit the casino service industry enterprise applicant to initiate the manufacture of slot machines or engage in the sale, distribution, testing or repair of slot machines with any person other than a casino applicant or licensee, its employees or agents, prior to the licensure of that casino service industry enterprise applicant under this subsection.

(3) Vendors providing goods and services to casino licensees or applicants ancillary to gaming, including, without limitation, junket enterprises and junket representatives, and any person employed by a junket enterprise or junket representative in a managerial or supervisory position, non-casino applicants or

licensees required to hold a casino hotel alcoholic beverage license pursuant to section 103 of P.L.1977, c.110 (C.5:12-103), lessors of casino property not required to hold a casino license pursuant to section 82 of P.L.1977, c.110 (C.5:12-82), and licensors of authorized games shall be required to be licensed as an ancillary casino service industry enterprise and shall comply with the standards set forth in paragraph (4) of subsection c. of this section.

b. Each casino service industry enterprise required to be licensed pursuant to paragraph (1) of subsection a. of this section, as well as its owners; management and supervisory personnel; and employees if such employees have responsibility for services to a casino applicant or licensee, must qualify under the standards, except residency, established for qualification of a casino key employee under this act.

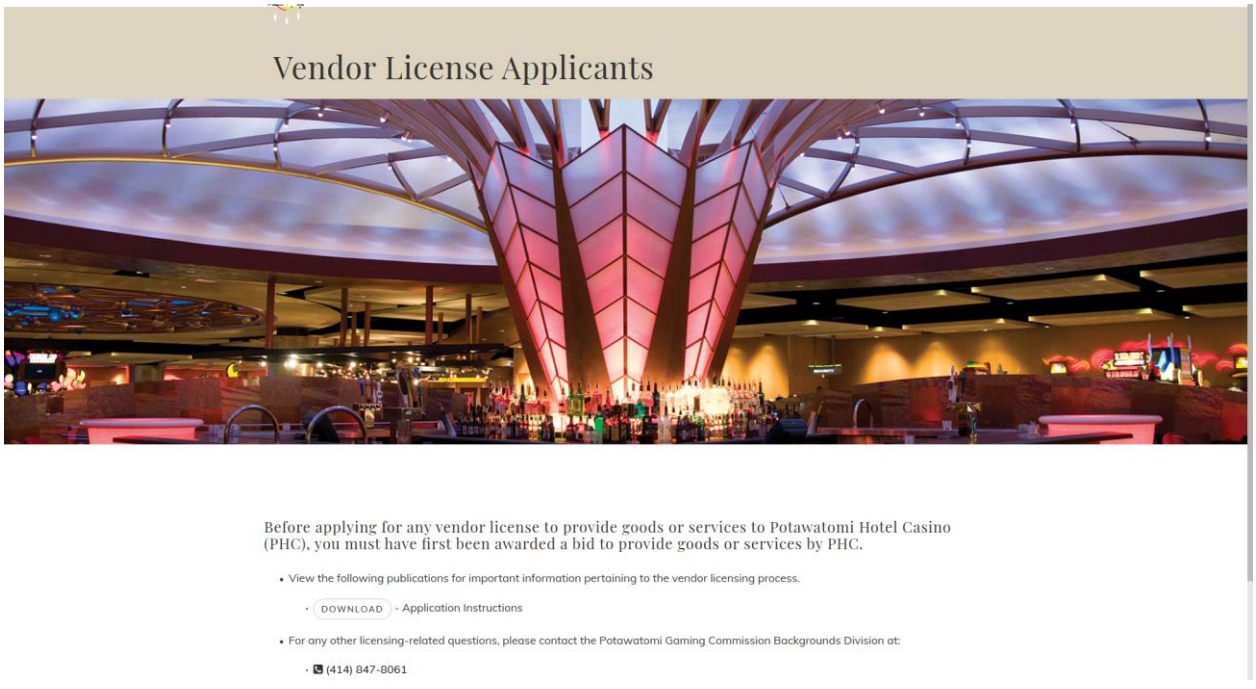
c. (1) Any vendor that offers goods or services to a casino applicant or licensee that is not included in subsection a. of this section including, but not limited to casino site contractors and subcontractors, shopkeepers located within the approved hotels, gaming schools that possess slot machines for the purpose of instruction, and any non-supervisory employee of a junket enterprise licensed under paragraph (3) of subsection a. of this section, shall be required to register with the division in accordance with the regulations promulgated under this act, P.L.1977, c.110 (C.5:12-1 et seq.).

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the director may, consistent with the public interest and the policies of this act, direct that individual vendors registered pursuant to paragraph (1) of this subsection be required to apply for either a casino service industry enterprise license pursuant to paragraph (1) of subsection a. of this section, or an ancillary casino service industry enterprise license pursuant to paragraph (3) of subsection a. of this section, as directed by the division, including, without limitation, in-State and out-of-State sending tracks as defined in

section 2 of the "Casino Simulcasting Act," P.L.1992, c.19 (C.5:12-192); shopkeepers located within the approved hotels; and gaming schools that possess slot machines for the purpose of instruction. The director may also order that any enterprise licensed as or required to be licensed as an ancillary casino service industry enterprise pursuant to paragraph (3) of subsection a. of this section be required to apply for a casino service industry enterprise license pursuant to paragraph (1) of subsection a. of this section. The director may also, in his discretion, order that an independent software contractor not otherwise required to be registered be either registered as a vendor pursuant to subsection c. of this section or be licensed pursuant to either paragraph (1) or (3) of subsection a. of this section.

Tribal Jurisdictions:

Many tribal jurisdictions require all vendors to obtain some form of licensing prior to having an effective contract with the tribe.



In addition, in all Tribal Jurisdictions, any management contract must be approved by the Federal National Indian Gaming Commission, otherwise it is void-ab-initio. Read the following court opinion and be prepared to discuss it in class:

677 F. Supp. 2d 1056 (2010)

WELLS FARGO BANK, N.A., as Trustee, Plaintiff,

v.

LAKE OF THE TORCHES ECONOMIC DEVELOPMENT CORPORATION, Defendant.

Case No. 09-CV-768.

United States District Court, E.D. Wisconsin.

January 11, 2010.

*1057 Michael J. Gonring, Pamela M. Heinrich, Raymond D. Jamieson, Quarles & Brady LLP, Milwaukee, Wl, for Plaintiff.

DECISION AND ORDER

RUDOLPH T. RANDA, District Judge.

This matter was filed on December 21, 2009 and assigned to the Honorable Barbara Crabb, Chief United States District Judge for the Western District of Wisconsin. The plaintiff, Wells Fargo Bank, N.A. ("Wells Fargo"), alleged that the defendant, Lake of the Torches Economic Development Corporation ("Lake of the Torches EDC," or the "Corporation"), breached a Trust Indenture agreement, creating a "very real danger that Lake of the Torches EDC will

refuse to pay interest or principal on the $46,615,000 principal amount of bonds that it has issued." Wells Fargo also filed an expedited motion for the appointment of a receiver.

On January 5, Judge Crabb recused herself, and the case was transferred to the undersigned for further proceedings. On January 6, the Court issued an order dismissing the case. The Court found that the "Trust Indenture is a management contract that was executed without prior approval from the National Indian Gaming Commission. Without prior approval, the entire contract is void *ab initio*" (internal citations omitted). The Court indicated that a written opinion would follow, which is issued herein.

BACKGROUND

Wells Fargo is a national banking association with trust powers, with its principal place of business in Sioux Falls, South Dakota. Well Fargo's Corporate Trust Division has its principal place of business in Minneapolis, Minnesota. The Lake of the Torches EDC is a corporation chartered by the Lac du Flambeau Band of Lake Superior Chippewa Indians (the Tribe).

Lake of the Torches EDC is a single purpose, wholly-owned entity of the Tribe, established under tribal law in Wisconsin to own and operate the Lake of the Torches Resort Casino (the "Casino Facility"). Several years ago, the Tribe sought to expand its revenue base by participating in a project to build a riverboat casino, hotel and bed-and-breakfast in Natchez, Mississippi called the Grand Soleil Project. In order to refinance and consolidate certain Lake of the Torches EDC debt associated with the operation of the Casino Facility, and also to fund participation in the Grand Soleil Project, the Corporation issued bonds and entered into a Trust Indenture with Wells Fargo on January 1, 2008. Saybrook Capital LLC ("Saybrook") is the sole holder of Lake of the Torches EDC bonds under the Trust Indenture.

Unfortunately, the Grand Soleil Project has been plagued by problems since it began and is still not operational. The Tribe struggled to make bond payments and was forced to reduce or eliminate many programs that are important to the health and welfare of the Tribal members. *1058 The failure of the Grand Soleil Project to materialize exacerbated the economic stress caused by the Bonds. The expected revenue from the project was intended to fund repayment of the Bonds.

Under the Trust Indenture, the Trustee (Wells Fargo) has an obligation in the event of default or breach to "enforce[]... its rights and the rights of the Bondholders as due diligence, prudence and care would require and to pursue the same with like diligence, prudence and care." The Trust Indenture was intended to give the Trustee oversight of Lake of the Torches EDC funds relating to its Casino Facility operations.

The Trust Indenture requires mandatory daily deposits of Lake of the Torches EDC funds relating to its Casino Facility operations. Section 5.01 of the Trust Indenture requires that all gross revenues from the Casino Facility be deposited, on a daily basis, into a designated trust fund: "The Corporation shall make daily deposits of Gross Revenues ... into the Revenue Fund or a Deposit Account controlled by the Trustee from which transfers will be made into the Revenue Fund upon order of the Trustee." Lake of the Torches EDC may only draw funds from the Operating Account to pay for Lake of the Torches EDC operating expenses: "Funds on deposit in the Operating Reserve Account may be withdrawn by the Corporation upon written certification from the Authorized Representative that the funds being withdrawn are needed and will be used by the Corporation to pay Operating Expenses of the Corporation."

On November 30, 2009, Tribe Treasurer Barry LeSieur and Tribe Vice President Dee Mayo, acting on behalf of the Lake of the Torches EDC, requested that $4,750,000 be transferred

from the Lake of the Torches EDC Operating Reserve Account to the Lake of the Torches EDC Master Account at Chippewa Valley Bank. LeSieur and Mayo certified that the purpose of the transfer was to pay operating expenses of Lake of the Torches EDC. The funds were transferred pursuant to that request on December 1, 2009.

On December 7, 2009, Saybrook sent a letter to the Lake of the Torches EDC and the Tribe questioning the necessity of the transfer of funds for operating expenses and advising of Saybrook's request to the Trustee to demand documentation and evaluate the legitimacy of the transfer of funds. On December 8, December 9, and December 11, the Trustee made further requests for documentation as required by Sections 6.06 and 6.07 of the Trust Indenture. The Trustee alleges that Lake of the Torches EDC did not provide a substantive response to these demands and did not produce the documents required by these sections of the contract.

Section 8.01(c) of the Trust Indenture provides that a failure to "observe or perform, in any material respect, any covenant, condition, agreement or provision" of the Indenture Agreement (including Sections 5.01, 6.06 and 6.07) constitutes an Event of Default. Section 8.02 provides that upon the occurrence of an Event of Default, the Trustee may "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 ..." Furthermore, the Trustee is entitled to the appointment of a receiver pursuant to Section 8.04.

On December 18, 2009, Saybrook requested the Trustee to declare the principal and interest of all bonds due immediately based on multiple Events of Default. The Trustee in turn notified

the Lake of the Torches EDC that the principal and *1059 interest of all bonds are due immediately. On December 21, the Trustee brought the instant, lawsuit, alleging four claims for breach of the Trust Indenture: (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.

ANALYSIS

In 1988, Congress passed the Indian Gaming Regulation Act ("IGRA"). The IGRA establishes "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The IGRA was also enacted to "shield [Indian tribes] from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. § 2702(2). The IGRA effects these goals in part by providing for federal oversight of contracts between tribes and non-tribal entities for the management of tribal gaming operations. Tribes may enter into contracts for the management of gaming operations only with the approval of the National Indian Gaming Commission ("NIGC") Chairman. *See* 25 U.S.C. § 2711(a)(1); 25 U.S.C. § 2710(d)(9). Unapproved management contracts are void. *See* 25 C.F.R. § 533.7; *First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.,* 412 F.3d 1166, 1176 (10th Cir.2005) ("Lacking the formality of NIGC approval, an agreement to manage does not become a contract: it is void"). It is undisputed that the Trust Indenture was not approved by the NIGC. Therefore, if the Court determines that the contract is a management contract, the contract is void.

The IGRA regulations define "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. The regulations also define "primary management official" as any person who has authority to "set up working policy for the gaming operation." 25 C.F.R. § 502.19(b)(2). Accordingly, the regulations demonstrate that a "necessary condition for a management contract is that it grant to a party other than the tribe some authority with regard to a gaming operation." *Machal, Inc. v. Jena Band of Choctaw Indians,* 387 F. Supp. 2d 659, 665 (W.D.La.2005) (citing *First Am. Kickapoo*).

The security provided for the Bonds was the existing Casino Facility in Lac du Flambeau. The Corporation pledged "[a]ll right, title and interest in and to the Gross Revenues of the Corporation, and investment earnings on the Gross Revenues of the Corporation." Trust Indenture at 2, Granting Clause I. The Gross Revenues of the Corporation include all receipts from the operation of the Casino Facility. *Id.* § 1.01. The Corporation also pledged the Casino's equipment and "[a]ll right, title, and interest in and to the Corporation's accounts, deposit accounts, general intangibles, chattel paper, instruments and investment property and the proceedings of each of the foregoing and all books, records and files relating to all or any portion of the Pledged Revenues." *Id.* at 2, Granting Clause II.

The Trust Indenture provides that the Corporation cannot "incur capital expenditures that exceed 25% of the prior fiscal year's capital expenditures without receiving the written consent of [at least 51% of the bondholders], which consent will not be *1060 unreasonably withheld." *Id.* at § 6.18. It provides for the appointment of a "Management Consultant" at the direction of a majority of the bondholders if the "Debt Service Ratio" falls below a certain

level. *Id.* at § 6.19.[1] It further provides that the Corporation will not "replace or remove and will not permit the replacement or removal of the [Casino's] 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 [bondholders]." Trust Indenture, § 6.20. All of these provisions give the bondholders the opportunity to exert significant control over the management operations of the Casino Facility. *See* Affidavit of Kevin Washburn,[2] ¶ 8; *First Am. Kickapoo,* 412 F.3d at 1173 (provision to "supervise, train and instruct" Casino employees allowed contractor to set up working policy for the Casino); 25 C.F.R. § 531.1(b)(4) (hiring, firing, training and promoting employees); 25 C.F.R. § 531.1(b)(1) (maintenance and improvement of gaming facility).

The Trust Indenture contains additional terms that give the bondholders management control when the Corporation defaults. In the case of a specified "Event of Default," the majority of the bondholders "shall have the right to require, in writing, the Corporation to hire new management and shall have the right to consent, in writing, to the management personnel and/or company that the Corporation recommends as replacement management." Trust Indenture, § 8.02. An Event of Default also triggers the Trustee's right to the appointment of a receiver "of the Trust Estate and of the revenues, issues, payments and profits thereof ... with such powers as the court making such appointment shall confer." *Id.,* § 8.04. The "Trust Estate" includes the assets pledged by the Corporation to secure the bonds all revenues, equipment, and accounts of the Casino Facility Wells Fargo argues that a receiver would not exercise oversight over the management of the Casino Facility, but would only ensure that the Corporation deposited its revenues and paid its liabilities. By 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 terms of the indenture seem to presuppose substantial control by a receiver over key financial decisions. These are among 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." Washburn Aff., ¶ 9.

Taken 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. Even though many of the provisions are contingent, "the regulations' definition of a management contract as an agreement that provides *1061 for the management of `all or part' of a gaming operation suggests a definition of management that is partial rather than absolute, contingent rather than comprehensive." *First Am. Kickapoo* at 1175. The Court has no choice but to conclude that the Trust Indenture is a "management contract." *See, e.g., United States ex rel. Bernard v. Casino Magic Corp.,* 293 F.3d 419, 424-25 (8th Cir.2002) (series of agreements that gave the contractor "a percentage ownership interest in the Tribe's indebtedness" and "mandated the Tribe's compliance" with the contractor's recommendations was a management contract); *Machal,* 387 F.Supp.2d at 667-70 (finding a series of agreements to be management contracts).

The Court's finding that the Trust Indenture is an unapproved management contract destroys the Court's jurisdiction over the defendant. In the absence of a clear waiver, suits against tribes (and tribal corporations) are barred by sovereign immunity. *See Altheimer & Gray v. Sioux Mfg. Corp.,* 983 F.2d 803, 812 (7th Cir.1993) (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991)); *Kiowa*

Tribe of Oklahoma v. Mfg. Tech., Inc., 523 U.S. 751, 753, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). The Trust Indenture contains a waiver provision, whereby the Corporation "expressly waives its sovereign immunity" in relation to "a suit to enforce the obligations of the Corporation under the Indenture, the Bond Resolution, the Security Agreement, or Bond Purchase Agreement." Trust Indenture, § 13.02. However, the entire contract is void *ab initio,* so the waiver in the Trust Indenture is also invalid. *See A.K. Mgt. Co. v. San Manuel Band of Mission Indians,* 789 F.2d 785, 789 (9th Cir.1986) ("the waiver of sovereign immunity is clearly made part of the Agreement, and is not operable except as part of that Agreement. *Since the entire contract is inoperable without BIA approval, the waiver is inoperable and, therefore, the tribe remains immune from suit*") (emphasis added).

Wells Fargo argues that the waiver provision is separable from the unenforceable provisions of the Trust Indenture. *See* Trust Indenture, § 14.04 (Separability of Indenture Provisions). As an initial matter, the Court agrees with the Tenth Circuit's observation that it "may be questioned whether any part of a contract determined to be void ab initio, including the severability provisions, may be enforced." *First Am. Kickapoo,* 412 F.3d at 1178 n. 5. In any event, the argument is a non-starter. Even if the waiver provision could be saved, the remainder of the Trust Indenture is void, so there would be no remaining obligations to enforce under the contract.[3]

Wells Fargo argues that only the NIGC Chairman may determine whether a contract is void under the IGRA. This argument misapprehends the nature of the administrative scheme and the consequences which flow from the failure to gain approval of a purported management contract. Wells Fargo brought this action to enforce the Trust Indenture and sought immediate *1062 appointment of a receiver, thus bringing the issue of the validity of the

contract squarely before the Court. If a contract with an Indian tribe is a management contract, then the Court has no choice but to find such a contract void if it was not approved by the Chairman. *See* 25 C.F.R. § 533.7. "The regulations' requirement that management contracts be approved to be valid creates no ontological mystery whereby a contracts springs fully-fashioned from nothingness, but rather identifies a formality necessary before an agreement to manage a tribal gaming operation can become a contract to so manage." *First Am. Kickapoo* at 1176.

In *United States ex rel. St. Regis Mohawk Tribe v. President R. C.-St. Regis Mgt. Co.,* 451 F.3d 44 (2d Cir.2006), the Second Circuit dismissed a Tribe's request for a declaratory judgment that an unapproved management contract was void. The court dismissed because the Tribe failed to exhaust their administrative remedies. "By proceeding directly to the district court in an action nowhere authorized under IGRA, the Tribe impermissibly sought a determination outside the administrative review scheme drafted by Congress." *Id.* at 51. *St. Regis* is inapposite because it arose in a completely different procedural posture. In the instant case, Wells Fargo seeks to *enforce* a management contract, but the Court cannot give effect to such a contract in the absence of prior approval from the NIGC Chairman. In other words, the Court may determine whether a contract is a management contract when the issue becomes ripe for adjudication. *See Casino Magic Corp.,* 293 F.3d at 424-26; *First Am. Kickapoo* at 1172-75.

Similarly, Wells Fargo argues that the Corporation should be estopped from arguing the invalidity of the Trust Indenture because the Corporation failed to exhaust its administrative remedies. This argument ignores the Tribe's pursuit of an NIGC opinion as part of an ongoing effort to renegotiate the Bond payments with the Trustee, an effort that predates this

litigation. *See* Declaration of William Beson, ¶¶ 12-14. Moreover, Wells Fargo's purported reliance upon the Tribe's initial failure to pursue an NIGC opinion was completely unreasonable. *See Lewis v. Washington,* 300 F.3d 829, 834 (7th Cir.2002) (equitable estoppel requires reasonable reliance). Given the size of the transaction and the complicated nature of the regulatory scheme, it is a bit surprising that Wells Fargo did not insist upon NIGC review and approval. "Because the regulatory landscape appears uncertain to the untrained observer and because transactional attorneys seek to minimize risk and uncertainty, it is common for parties to obtain NIGC review of transactional documents for the finance of Indian gaming operations, even when the parties assert that the financing arrangement does not constitute a management contract." Washburn Aff., ¶ 6; *see also In re SRC Holding Corp.,* 352 B.R. 103, 176 (Bkrtcy. D.Minn.2006).

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT this case is DISMISSED. The Clerk of Court is directed to enter judgment accordingly.

SO ORDERED.

NOTES

[1] "Such independent management consultant shall conduct a review and provide a report... 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 ..."

[2] Kevin Washburn is a former General Counsel for the NIGC and is currently the Dean of the University of New Mexico School of Law. Dean Washburn reviewed the Trust Indenture and opined that "if the NIGC had been given an opportunity to review the Trust Indenture, it

would very likely have found that the indenture as written constitutes a management contract, and it would have asserted jurisdiction over the agreement." Affidavit, ¶ 7.

[3] Wells Fargo did not argue that the illegal management provisions could be severed from the remainder of the Trust Indenture. The "rule of severability" provides that a contract may survive if an illegal clause can be severed from the remainder of the contract without defeating the primary purpose of the bargain. *See Dawson v. Goldammer,* 295 Wis. 2d 728, 722 N.W.2d 106, 110 (Ct.App. 2006). Because many of the "Event of Default" provisions are illegal, the contract cannot be severed. *See First Am. Kickapoo* at 1178 (declining to sever provisions when the entire contract is meant to be a "package deal").

REGULATION 7A

PATRON DISPUTES

7A.010 Construction. This regulation should be liberally construed to achieve fair, just, equitable, and expedient resolutions of all disputes governed by NRS 463.363 and 463.364.
(Adopted: 8/90.)

7A.015 Definitions. As used in this regulation unless the context requires otherwise, "Hearing Officer'' means a member of the Nevada Gaming Control Board, designated by the Board Chair, or a hearing examiner appointed by the Board.
(Adopted: 9/92.)

7A.020 Service. Except as otherwise provided in this regulation:
1. All pleadings, notices, and other papers required by this regulation to be served may be served by personal delivery or first class mail. Service shall be deemed sufficient if it is mailed to the last known address of the person to be served. If a pleading, notice, or other paper is sent by the Board or hearing officer by first class mail, it shall be deemed to have been received by the licensee or the patron 5 days after it is deposited with the United States Postal Service with the postage thereon prepaid.
2. A party serving a pleading, notice or other paper required by this regulation to be served must file with the Board a proof of service in the form of a certificate signed by the party or the party's representative which specifies the date the notice or other paper was mailed or when personal service was effectuated.
(Adopted: 8/90. Amended: 9/92.)

7A.030 Initiation of hearing procedure; notice of hearing.
1. Proceedings to review a decision made by an agent of the Board pursuant to NRS 463.362 must be initiated by the filing and service of a petition in accordance with NRS 463.363.
2. A copy of the petition must be served on the respondent.
3. The respondent may file and serve a written response within 15 days after being served with a copy of the petition.
4. After the time for respondent to file and serve a written response to the petition has expired, the Board or the hearing officer shall determine the date, time and place of the hearing on the petition.

5. Notice of the hearing must be served by the Board on each of the parties at least 20 days before the hearing, unless the Board or hearing officer reasonably determine that a lesser notice period is appropriate.

(Adopted: 8/90. Amended: 9/92.)

7A.040 Prehearing motions. Unless otherwise ordered by the Board or hearing officer, all prehearing motions must be filed and served at least 10 days before the hearing.

(Adopted: 8/90.)

7A.050 Nature of hearing.

1. The hearing to review a decision made by an agent of the Board pursuant to NRS 463.362 must be conducted:

(a) By one or more members of the Board, as designated by the Board Chair, or by a hearing examiner appointed by the Board.

(b) At such times and places, within or without this state, as may be convenient for the Board or hearing officer.

(c) In public, unless the Board or hearing officer orders otherwise.

2. Unless the Board or hearing officer reasonably determines that a different procedure is appropriate, the hearing must be conducted in accordance with the following procedures:

(a) The petitioner may present an opening statement on the merits and the respondent may then make a statement of the defense. The respondent may reserve his or her statement of the defense for the presentation of his or her case.

(b) After the petitioner's opening statement, if made, and the respondent's statement of the defense, if not reserved, the petitioner shall present his or her case in chief in support of the petition.

(c) Upon conclusion of the petitioner's case in chief, the respondent may move for dismissal of the petition. The Board or the hearing examiner when designated by the Board pursuant to NRS 463.361(2)(b), may grant, deny or reserve decision on the motion, with or without argument.

(d) In the event the hearing is conducted before a hearing officer and a motion to dismiss is made at the conclusion of the petitioner's case in chief, the hearing officer, in his or her discretion, may hear argument on the motion and in those cases not being heard by the hearing examiner pursuant to NRS 463.361(2)(b), may suspend the hearing to refer the motion to the Board for decision.

(e) If no motion to dismiss is made, or if such motion is denied or decision is reserved thereon, the respondent shall then present his or her case in defense.

(f) Upon conclusion of the respondent's case, the petitioner may present rebuttal evidence.

(g) After the presentation of the evidence by the parties, the petitioner may present a closing argument. The respondent may then present his or her closing argument and the petitioner may then present a rebuttal argument. Thereafter the matter will stand submitted for decision.

3. All or part of the hearing may be conducted by telephone.

4. The hearing must be recorded by the Board or hearing officer on audio tape or other means of sound reproduction, unless it is reported stenographically for a party at the party's own expense, in which case the party must provide the original hearing transcript to the Board or hearing officer.

5. Unless otherwise ordered by the Board or hearing officer, the parties may submit written memoranda of points and authorities at any time before the hearing. The Board or hearing officer may order or allow the parties to file written memoranda of points and authorities after the conclusion of the hearing.

(Adopted: 8/90. Amended: 9/92.)

7A.060 Presentation of evidence.

1. Oral evidence may be taken only upon oath or affirmation administered by the Board or hearing officer.

2. Affidavits may be received in evidence as provided in subsection 3 of NRS 463.313.

3. Each party may:

(a) Call and examine witnesses;

(b) Introduce exhibits relevant to the issues of the case, including the transcript of testimony of any investigative hearing conducted by or on behalf of the Board;

(c) Cross-examine opposing witnesses on any matter relevant to the issues of the case, even though the matter was not covered in a direct examination;

(d) Impeach any witness, regardless of which party first called the witness to testify; and

(e) Offer rebuttal evidence.

4. If a party does not testify on his or her own behalf the party may be called and examined as if under cross-examination.

(Adopted: 8/90.)

7A.070 Admissibility of evidence.

1. The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence may be admitted and is sufficient in itself to support a finding if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a civil action.

2. The parties or their counsel may by stipulation agree that certain evidence be admitted even though such evidence might otherwise be subject to objection.

3. Irrelevant and unduly repetitious evidence should not be admitted.

(Adopted: 8/90.)

7A.080 Subpoenas. At the request of a party, subpoenas must be issued by the Board as provided in subsection 1 of NRS 463.3125.

(Adopted: 8/90.)

7A.090 Depositions. The testimony of any material witness residing within or without this state may be taken by deposition in the manner provided by the Nevada Rules of Civil Procedure and may be used at the hearing.

(Adopted: 8/90.)

7A.100 Official notice. The Board or hearing officer may take official notice of any generally accepted information or technical or scientific matter within the field of gaming, and of any other fact which may be judicially noticed by the courts of this state. The parties must be informed of any information, matters or facts so noticed and must be given a reasonable opportunity, on request, to refute such information, matters or facts by evidence or by written or oral presentation of authorities. The manner of such refutation shall be determined by the Board or hearing officer.

(Adopted: 8/90.)

7A.110 Amended or supplemental pleadings. The Board or hearing officer may, before submission of the case for decision, permit the filing of an amended or supplemental petition or response, including an amended or supplemental pleading that conforms to the evidence presented during the hearing. A request for permission to file an amended or supplemental pleading may be made orally during the hearing or in writing. If the request is in writing, a copy must be served on the opposing party. The Board or hearing officer thereafter shall provide the opposing party a reasonable opportunity to make objections thereto. If an application for leave to file an amended or supplemental pleading is granted, the Board or hearing officer must permit the parties to introduce additional evidence with respect to any new matter contained in the pleading.

(Adopted: 8/90.)

7A.120 Continuances. Continuances of the hearing date may be granted upon a showing of good cause by the party requesting the continuance.

(Adopted: 8/90.)

7A.130 Communications with the Board.

1. Unless required for the disposition of ex parte matters authorized by statute or regulation:

(a) Neither a party nor a party's representative shall communicate, directly or indirectly, with any Board member or the hearing examiner regarding any matter related to the hearing, except upon notice and opportunity to all parties to participate.

(b) Neither a member of the Board nor the hearing examiner shall communicate, directly or indirectly, with any party or any party's representative regarding any matter related to the hearing, except upon notice and opportunity to all parties to participate.

2. This section does not preclude:

(a) Any member of the Board or the hearing examiner from consulting with the Board's counsel concerning any matter related to the hearing.

(b) A party or a party's counsel conferring with the hearing examiner, any member of the Board, or the Board's counsel on procedural matters.

(Adopted: 8/90.)

7A.140 Default. The unexcused failure of a party to appear at the hearing may constitute a default and an admission of any facts that may have been alleged by the opposing party. The Board or hearing officer may take action based on such default or admission or on any other evidence without further notice to the defaulting party. If the Board or hearing officer takes action based on an admission, the record must include the evidence upon which the action is based.

(Adopted: 8/90.)

7A.150 Contempt. If any person in proceedings before the Board or hearing officer under this regulation disobeys or resists any lawful order or refuses to respond to a subpoena, or refuses to take the oath or affirmation as a witness, or thereafter refuses to be examined, or is guilty of misconduct during the hearing or so near the place thereof as to obstruct the proceeding, the Board or hearing officer may certify the facts to the district court in and for the county where the proceedings are held. At the request of the Board, the court shall then issue an order directing the person to appear before the court and show cause why he or she should not be punished for contempt. The court order and a copy of the statement of the Board or hearing officer must be served on the person cited to appear. Thereafter the court has jurisdiction of the matter, and the same proceedings must be had, the same penalties may be imposed and the person charged may purge himself or herself of the contempt in the same way as in the case of a person who has committed a contempt in the trial of a civil action before a district court.

(Adopted: 8/90.)

7A.160 Burden of proof. The petitioner bears the burden of showing by a preponderance of the evidence that the decision made by an agent of the Board pursuant to NRS 463.362 should be reversed or modified.

(Adopted: 8/90.)

7A.170 Decision of the Board or the hearing examiner.

1. After the hearing, the Board or the hearing examiner in those cases being heard pursuant to NRS 463.361(2)(b), shall render a written decision on the merits that sustains, modifies or reverses the initial decision of its agent.
2. The decision of the Board or the hearing examiner must contain findings of fact and a determination of the issues presented.
3. In a case that is not processed pursuant to the provisions of NRS 463.361(2)(b), and where the hearing was conducted by a single Board member or hearing examiner, the Board shall consider the recommendation of the Board member or hearing examiner and the record of the hearing before rendering its decision. In such a case, the Board may remand the matter to the Board member or hearing examiner for the purpose of taking or considering additional evidence.
4. A copy of the decision must be served on each party. The decision must be accompanied by proof of service in the form of a certificate signed by an agent or employee of the Board and stating the date and manner of service. The decision is effective and final upon service on all parties. If the decision is sent by mail, it shall be deemed to have been served upon the licensee or the patron 5 days after it is deposited with the United States Postal Service with the postage thereon prepaid.

(Adopted: 8/90. Amended: 9/92.)

7A.180 Rehearing.

1. The Board or the hearing examiner if the hearing was conducted pursuant to NRS 463.361(2)(b) may, upon motion made within 7 days after the decision is served on all parties, order a rehearing upon such terms and conditions as it may deem just and proper, provided a petition for judicial review of the decision has not been filed.
2. A motion for rehearing must not be granted except upon a showing that:

(a) The Board or the hearing examiner has misconstrued applicable law; or

(b) There exists additional evidence which is material and reasonably calculated to change the decision, and sufficient reason existed for the party's failure to present such additional evidence at the hearing.

3. On rehearing under subsection 2(b) of this section, rebuttal evidence to the additional evidence may be admitted and considered by the Board or hearing officer.

4. After rehearing, the Board or the hearing examiner may modify the decision consistent with applicable law or any additional evidence and rebuttal evidence taken.

(Adopted: 8/90. Amended: 9/92.)

7A.190 Judicial review. Judicial review of a final decision of the Board or the hearing examiner may be had in accordance with NRS 463.366 to 463.3668, inclusive.

(Adopted: 8/90. Amended: 9/92.)

End – Regulation 7A