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Mole Lake Band Trust Indenture Decision

Introduction[1]

On April 15, 2011, the United States District Court for the Eastern District of Wisconsin issued a 24-page decision in *Wells Fargo Bank, N.A., as Trustee v. Sokaogon Chippewa Community (Mole Lake Band of Lake Superior Chippewa Indians) and Sokaogon Gaming Enterprise Corp.,* No. 10-C-1039-WCG (the "MLB case"). In this decision, the court held that a trust indenture (the "Indenture") between Wells Fargo Bank, as Trustee (the "Trustee") and the Mole Lake Band (the "Tribe")[2] was *not* a management contract within the meaning of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA"). The MLB case stands in contrast to the well publicized decision out of the Western District of Wisconsin, *Wells Fargo Bank, N.A., as Trustee v. Lake of the Torches Economic Development Corp.,* 677 F. Supp. 2d 1056 (W.D. Wis. 2010) (the "LDF decision"), in which that court held a trust indenture to be a management contract.[3] These types of cases are all factually intensive and different facts often yield different results. We have reviewed the decision in the MLB case with an eye for key differences between the Mole Lake Band trust indenture and the Lake of the Torches trust indenture, and summarize the relevant elements of the MLB decision below.

Disscussion

Pursuant to the Indenture, the Tribe issued roughly $19 million in bonds in January of 2006.[4] It also waived its sovereign immunity to suit, both in the Indenture and by separate Tribal Council resolution. After the Tribe defaulted on its payment and certain other obligations under the Indenture, the Trustee brought suit in Wisconsin state court. The Tribe argued that federal court was the proper venue for the dispute, and the Trustee subsequently filed suit in the Eastern District of Wisconsin. As is most relevant to this discussion, the Tribe claimed that the Indenture was in fact a management contract under IGRA[5] and thus was void because it had not been approved by the Chairman of the National Indian Gaming Commission ("NIGC"). As a result, the tribe argued, its waiver of sovereign immunity was void. While the matter was pending, the Trustee requested a declination letter from the NIGC, seeking a determination that the Indenture was not a management contract. The NIGC's General Counsel agreed with the Trustee's position as to most of the points advanced by the Tribe and declined to offer an opinion as to one.

I. The Court Rejection of the Tribe's Management Contract Arguments

Relying in large part on the LDF decision, the Tribe advanced the following four arguments for why the Indenture was a management contract, which were rejected by the court.

A. Management

Referring to NIGC Bulletin No. 1994-5,[6] the court determined that the Indenture gave the Trustee no power to engage in the "planning, organizing, directing, coordinating, [or] controlling [of] ... all or part of [the Tribe's] gaming operation," that is, specifically none of the activities identified in the Bulletin as indicia of management. In contrast, in the LDF decision, the court found that various elements of that indenture, not found in the Mole Lake Indenture, resulted in "unapproved third parties [having] the authority to set up working policy for the Casino Facility's gaming operation."

B. Receivership

In the event of default, the Indenture authorized the Trustee to file suit and request the appointment of a receiver, who would direct "Pledged Casino Revenues" (net revenues after the payment of operating expenses) toward repayment obligations. The Tribe argued that this amounted to an assignment of casino management responsibilities, but the court disagreed. The Trustee did not have a security interest in the *gross* revenues of the casino (which was the case in LDF); rather, it had a security interest in the revenues of the casino after operating expenses had been paid. The court held that excluding operating expenses from the Pledged Casino Revenues ensured that the receiver could not manage the casino in the event of default.

C. Debt Service Coverage Requirement; Management Consultant

The Indenture required the Tribe to manage the casino so that the "Income Available for Debt Service" was at least 150% of the "Total Principal and Interest Requirements" for each 12-month period. If this ratio was not met, the Tribe was required to hire a consultant acceptable to the Trustee, who would "make recommendations with respect to fees, charges, operating expenses, and other matters relating to or affecting said Income Available for Debt Service." The Indenture further provided that the Tribe would "to the extent permitted by law, follow the recommendations of the Independent consultant unless the Tribal Council in good faith resolves in writing delivered to the Trustee on or before 45 days of receipt of the recommendations of the Independent consultant that such recommendations are not in the best interest of the Casino Enterprise and that a proposed alternate set of recommendations of management are likely to achieve the 150% debt service ratio." So long as the Tribe followed either the consultant's recommendations or the alternative recommendations of management accepted by the Tribal Council, the Tribe would be deemed to be in compliance with the debt service coverage ratio.

The Tribe argued, referring to a comparable provision in the LDF indenture, that this requirement gave the Trustee the power to control the management of the casino in violation of IGRA.[7] The court disagreed. The essential point, to the court, was that the Tribe was not required to accept the recommendations of the management consultant; it was only required to consider them. The Tribe was free to reject those recommendations if it concluded, in good faith, that alternative actions would be likely to achieve the required coverage ratio, and the court concluded that requiring the Tribe simply to consider a consultant's recommendations was insufficient to result in the Indenture becoming a management contract. The court contrasted this

structure with the corresponding requirement in the LDF indenture, which required that that borrower "use its best efforts to implement the recommendations of the management consultant within ninety (90) days."

D. Capital Expenditures Fund

The Indenture required the Tribe to spend at least $1 million every two years on improvements to its casino, and to ensure these expenditures by making monthly deposits of $41,667 into a capital expenditures fund maintained with the Trustee. It also provided that the Trustee's consent was required for the Tribe to withdraw money from the fund. Pointing to comparable provisions in the trust indenture at issue in the LDF case, the Tribe argued that this not only dictated how much was spent on improvements, but also limited the Tribe's discretion on what those improvements would be, because the Trustee's consent was required for the Tribe to withdraw money for capital expenditures.

The court found otherwise. Whereas, in the LDF case, that indenture required the consent of a majority of bondholders for that borrower to make capital expenditures in excess of a certain amount, the MLB Indenture simply memorialized the Tribe's agreement that it would spend a certain amount of money on capital expenditures. The Tribe was not required to obtain the Trustee's (or bondholders') consent to make capital expenditures, and the Trustee had no control over how the Tribe spent the money in the fund – only that it spend a certain amount of money on capital expenditures every two years. The Trustee had no discretion to refuse a withdrawal request unless the Tribe was in default, in which case it was required to refuse the request.

II. Other Features of the Opinion

A. No *Chevron* Deference to NIGC Bulletin or Declination Letter

As the court noted, although IGRA's implementing regulations define a "management contract," see 25 C.F.R. § 502.15, neither IGRA nor its implementing regulations define what "management" is. NIGC Bulletin 94-5, cited above, discusses the general difference between management contracts and consulting agreements. But an NIGC Bulletin, unlike IGRA's implementing regulations, is not subject to agency rule-making procedures. Neither is a declination letter of the NIGC's General Counsel. As a result, the court refused to grant so-called *Chevron* deference[8] to either Bulletin 94-5 or the declination letter; instead, it held that both could be considered by the court merely to the extent that they were persuasive. In its analysis of the Indenture provisions, the court repeatedly referred to the declination letter and noted where the General Counsel of the NIGC had reached the same conclusion as the court.

This treatment, particularly of the declination letter, should be kept in mind in future transactions. It is common to seek such letters in situations of uncertainty, and they can be useful in determining the views of NIGC staff on questions presented. But they are only opinions of NIGC staff, and are not binding either on the Commission itself or on any court. In the final analysis, the question of whether a contract complies with IGRA is a question that is

answered by the court.[9]

B. Additional Arguments Advanced by the Tribe and Rejected by the Court

In addition to the management contract arguments – the court's rejection of which is the most notable feature of the decision – the Tribe advanced several other arguments for dismissal that the court found lacking. Briefly:

1. Lack of Subject Matter Jurisdiction. The Tribe urged that the federal courts lacked jurisdiction over the dispute. The court disagreed, holding that the issue of whether the Indenture was a valid contract – as the Trustee would have to prove to prevail – necessarily turned on an interpretation of IGRA, and thus presented a federal question.

2. *Abstention.* The Tribe argued that the court should abstain from hearing the case because the Trustee's earlier-filed state court action involved the same issues.[10] However, since the Tribe had argued in the state court action that dismissal of that action was proper because the Trustee's claims should have been brought in federal court, the court refused to abstain, citing judicial estoppel.

3. *Encumbrance of Indian Lands.* Finally, the Tribe claimed that the Indenture (and the associated waiver of sovereign immunity) was void because it contained a negative pledge as to certain tribal fee lands and that this negative pledge encumbered Indian lands, thus requiring the approval of the Secretary of the Interior before it could become effective.[11] The court held that because the land at issue was fee land, not trust land, secretarial approval of the Indenture was not required.

Conclusion

This decision is a district court decision (as is the existing decision in the LDF decision), and the LDF case is presently on appeal. However, a comparison of the trust indentures at issue in the two cases shows that there are steps counsel negotiating Indian gaming finance agreements might take to reduce the risk that a financing agreement may be determined to be a management contract.

[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.

[2] The Sokaogon Gaming Enterprise Corporation guaranteed the obligations of the Tribe under the Indenture

[3] The LDF decision is currently on appeal to the United States Court of Appeals for the Seventh Circuit.

[4] Dorsey & Whitney LLP represented the placement agent in the Mole Lake Band's financing and drafted the Indenture.

[5] *See* 25 U.S.C. § 2711.

[6] *Available at* http://www.nigc.gov/Reading_Room/Bulletin_No._1994-5.aspx.

[7] According to the decision, this provision was the one provision as to which the General Counsel of the NIGC, in the declination letter, refused to reach a conclusion.

[8] *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984),

[9] *See United States ex rel. Shakopee Mdewakanton Sioux Cmty. v. Pan Am. Mgmt. Co.*, 616 F. Supp. 1200 (D. Minn. 1985).

[10] *See generally Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995); *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942).

[11] *See* 25 U.S.C. § 81.