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A Reminder About Federal Approvals . . .

On January 11, 2010, the U.S. District for the Western District of Wisconsin declared that a bond indenture evidencing a \$50 million tribal debt is void. The result is – at least arguably – that the tribe has no obligation to repay the debt.

On its face, the case, *Wells Fargo Bank, National Association, as Trustee, v. Lake of the Torches Economic Development Corporation*, is a blow to tribal creditors. Given a closer look, the court's decision is not as undermining as it may seem. And it is a great reminder of a basic premise in federal Indian law – get requisite federal approval, or suffer the consequences.

The documents at issue in *Lake of the Torches* evidenced financing for a tribal casino. As such, they were subject to scrutiny under the Indian Gaming Regulatory Act, which provides strictly that “management contracts” for tribal casinos must be approved by the National Indian Gaming Commission. The key is the definition of “management contract.” Simply put, an agreement is deemed to be a management contract requiring NIGC approval if it grants a third party authority over the tribe's gaming operation.

In *Lake of the Torches*, the bond indenture provided for a pledge of all casino revenues and liens on all of the company's property. It also limited the company's right to incur certain capital expenditures, provided for the appointment of a “management consultant” by the bondholders and restricted the company's right to remove key personnel without the bondholders' consent. Moreover, if the company defaulted, the bondholders could require the company to hire new management and could have a receiver of the gaming operation appointed.

Provisions like these are quite common in secured lending transactions; however, when the secured transaction is with a tribe or tribal corporation, they may trigger unintended consequences. In *Lake of the Torches*, given the bondholders' rights under the indenture, the court concluded that the indenture was a management contract for which federal approval was required. Unhappily for the bondholders, since such approval was not obtained (or, for that matter, even sought), the court concluded that the indenture is void.



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Page 2 of 2

Understandably, the creditor community has been taken aback by *Lake of the Torches*. On the positive side, the result is very fact-driven; and the impact of the decision should be limited to casino financing. Non-casino loans or bonds should not be affected. Nonetheless, *Lake of the Torches* is a clear reminder that courts are not shy about declaring void tribal contracts that have not been properly approved by federal authorities.

The requirement for federal approval in IGRA is just one of many in federal law. In fact, requiring federal approval of contracts with tribes is more of the rule than the exception. Nonetheless, whether federal approval is required can be a point of contention both with tribes and with the Bureau of Indian Affairs; and it may impact negotiations and delay a transaction unless addressed early on. We recommend consulting with Indian law counsel as you develop your business or credit proposal - before you transact your business – to ensure that obtaining necessary approvals and other issues that may sidetrack your transaction are addressed appropriately.

