

Lac du Flambeau Tribe and Lake of the Torches Settle Long-Standing Bond Litigation

By Jeffrey Heimann,
TFA Capital Partners



In February 15, 2017, the Lac du Flambeau Band of Lake Superior Chippewa announced the settlement of all litigation related to its \$50 million bond transaction issued in January 2008.

For many that participate in the finance area of Indian Country, the first time they heard of Lac du Flambeau or its casino, Lake of the Torches Resort Casino, was in January 2010 after a federal judge ruled that the indenture between Lake of the Torches Economic Development Corporation and Wells Fargo Bank, National Association was invalid. (Wells Fargo's involvement was solely in its capacity as "trustee" – meaning it was given fiduciary powers by the bondholder, an entity owned by Saybrook Tax-Exempt Investors, LLC, to enforce the terms of the bond indenture – however, many did not understand this and improperly associated Wells Fargo as being the lender.)

The news that the validity of \$50 million of bonds was in doubt jarred an already jittery Native American finance market. Nearly every lender in the sector sought immediate legal help to evaluate if their loans contained language or provisions that were akin to a management agreement under the Indian Gaming Regulatory Act – the basis of the court invalidating the indenture. And since this event, nearly every Tribal loan and bond has been reviewed by the National Indian Gaming Commission for the purpose of receiving a declination letter to give the lenders comfort that their loan documents do not provide for any management control over the gaming operations. While the Tribal capital markets were shaken up a bit, as the economy recovered from the Great Recession so did Tribes' access to capital.

A significant question around the long-term impact of the invalidation of the Lake of the Torches bonds, then, became one centered on the Lac du Flambeau Tribe itself. If given the opportunity, would the Tribe walk away from remaining obligations under the original \$50 million bond transaction?

Having first worked with the Tribe in May 2009 in connection with its initial restructuring negotiations with Saybrook (the sole bondholder), the author of this article benefits from inside knowledge of the Tribe's position – and its suspicions of negligence by key participants in the original bond offering. Namely, the Tribe never had the intention of walking away entirely from its obligations in connection with the bonds. Rather, like any corporate bond issuer would do in a similar situation if forced to, the Tribe used the negotiating leverage available to it in litigation to force all parties to



come to the table and reach a consensual agreement that reset the financial responsibility according to the roles of each party. In the event of an impasse, a corporate bond issuer can seek relief from creditors in bankruptcy court; however, a Tribe does not have that option.

Specifically, the Tribe always maintained significant irregularities existed in the original bond transaction, including its partnership in a commercial casino project in Mississippi that the increased proceeds of the bond deal funded. When the ill-advised project failed to materialize, the Tribe was left in a dire financial position and unable to meet the governmental needs of the Tribe. The Tribe's litigation counsel, Hansen Reynolds LLC, and its Indian Law counsel, Hogan Adams PLLC, unearthed significant documents and obtained concessions from key players in the bond transaction that helped to establish that parties other than the Tribe shared responsibility for the problems resulting from the bond transaction and successfully challenged the validity of key bond transaction documents. These efforts were instrumental in the settlement negotiations led by the Tribe's settlement counsel, Resolution Strategies LLP.

While the time frame for achieving the settlement was excruciatingly long and the litigation was costly for all parties, settlements that ended the disputes and court proceedings related to the bond transaction were agreed to among the Tribe, Saybrook, Dentons US LLP (Saybrook's counsel), Stifel Nicolaus & Company (the bond underwriter), and Godfrey & Kahn, S.C. (bond and issuer's counsel) just as the complex matter was going to jury trial.

The settlements totaled \$75.5 million, including \$27 million paid for by the Tribe and the remaining amount split among the other parties. Saybrook also effectively contributed towards the settlement by settling for less than the amount it claimed was due in principal and interest on the bonds. Important to note, the Tribe's share was approximately the same amount as its existing outstanding indebtedness at the time of the bond transaction; indeed, the Tribe was committed to reaching a settlement where all parties to the litigation contributed

financially towards the settlement. The global nature of the settlement is instrumental in the Tribe's efforts to restore its reputation in the financial community.

"Throughout this journey, we remained committed to reaffirming our sound financial footing and restoring our good standing in the financial community," Tribal president Joseph Wildcat, Sr. said in a press release announcing the settlement. "We were far too trusting in our business interactions when this began nearly 10 years ago."

Because the details regarding the case were kept under wraps during the pendency of the litigation, a question to a bank or investor about his or her institution's potential interest in lending or investing in a Lac du Flambeau enterprise was almost universally "No." The feedback we receive now is different.

We are witnessing first-hand the bank and bond market's willingness to listen and understand the situation and be open to the idea of a lending or investing relationship with the Tribe. While it may take a few years for the Tribe to fully reestablish its relationships in the financial community, we are encouraged by what we know and the positive responses we are hearing about the Tribe's action in funding its share of the settlement.

"Our decision to take responsibility for paying \$27 million to settle all litigation gives us closure," Wildcat Sr. continued. "It frees us from uncertainty. It frees us to rebuild trust with our Members and reestablish trust with the financial markets. It frees us to pursue economic prosperity. Throughout this process, we've worked with our financial advisors, TFA Capital Partners, to ensure our Members and operations are protected with this settlement." ■

For additional information, please contact

Jeffrey Heimann
310-341-2518
jheimann@tfacp.com