



June 2, 2020

VIA EMAIL

Little River Band of Ottawa Indians
c/o Rebecca Liebing, Staff Attorney
2608 Government Center Drive
Manistee, MI 49660

**Re: Review of the Retail Sports Betting Services Agreement between
the Little River Band of Ottawa Indians and Rush Street Interactive MI, LLC**

Ms. Liebing:

This letter serves as a response to the submission of the Retail Sports Betting Agreement between Little River Casino Resort, a wholly-owned and operated enterprise of the Little River Band of Ottawa Band of Indians (“Tribe”), and Rush Street Interactive MI, LLC (“Supplier”) to the National Indian Gaming Commission’s (“NIGC”) Office of General Counsel for review (referred to herein as the “RSBA”). Specifically, you have asked for my opinion whether the RSBA is a management contract requiring the NIGC Chair’s approval under the Indian Gaming Regulatory Act (“IGRA”). Also included in this letter is my opinion whether the RSBA violates IGRA’s requirement that the Tribe have the sole proprietary interest in its gaming activities.

In my review, I considered the RSBA, which is unexecuted but assumed to be in substantively final form. The RSBA delineates the Tribe will conduct sportsbook wagering using Supplier’s consulting and engineering services. After careful review, it is my opinion that the RSBA is not a management contract and does not require the approval of the NIGC Chairman, nor does it violate IGRA’s sole proprietary interest requirement.

The Retail Sports Betting Agreement:

I. Consulting and Engineering Services

The RSBA delineates Supplier will provide consulting and engineering services germane to the Tribe’s intended sportsbook operation, including advice, guidance, and other assistance pertaining to the development of the sportsbook’s design, construction, and

launch.¹ Additionally, Supplier will provide assistance with consummating agreements with third-party vendors, player wagering analysis, best practices for attracting new customers, and reasonable support for maintaining regulatory compliance.² (b) (4)

(b) (4) Supplier further will furnish all key staff to adequately provide the above-mentioned services and is responsible for its staff's wages, benefits, and worker's compensation.⁴

II. Prohibitions on Ownership and Managerial Control

The RSBA contains multiple instances where the Parties agree that none of the enumerated powers or duties is to be construed as authorizing Supplier to manage the Tribe's sportsbook.⁵ At all times throughout the term, the sportsbook is to be exclusively managed by the Tribe without interference from Supplier.⁶ The aforementioned likewise identifies Supplier possesses no proprietary interest in the sportsbook or gaming operations of the Tribe.⁷ There are express prohibitions on Supplier's ability to manage the operation, establish policies controlling the sportsbook, dictate the sportsbook's budget, bind the Tribe to a course of action, commit the Tribe to a contract, supervise the Tribe's employees, or exercise any form of control over the operation.⁸ Supplier is limited to providing advice and guidance to the Tribe, and the Tribe is vested with total discretion to follow or implement such advice and responsible for making any and all determinations regarding sports betting data, wagers to accept, altering betting lines or suspension thereof for any reason.⁹

(b) (4)

(b) (4)

¹ See RSBA at Exhibit C (brackets supplied).

² *Id.*

(b) (4)

⁴ *Id.*

⁵ See RSBA at §§ 2, 4.3, 5.1.1, and Exhibit C.

⁶ *Id.* at § 2.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

(b) (4)

IV. Reasonable Discretion to Amend Services


Supplier may, in its “reasonable discretion,” amend the services if such changes are minor and/or immaterial, “[u]nless it would cause the NIGC Declination Letter to no longer be valid, unless a supplemental NIGC Declination Letter were obtained.”¹² These include changes that alter, modify, add to, or deduct from the services or alter the sequence or accelerate or decelerate the performance of the services.¹³ After notice, the Tribe has two (2) business days to object to a proposed change, which obliges the Parties to meet and confer thereon.¹⁴ If the Parties cannot agree on the proposed change(s), they are required to initiate the dispute-resolution procedures enumerated in the RSBA.¹⁵

V. Training

The Tribe is responsible for training its own employees to operate the sportsbook and adequately staffing its operation to enable sportsbook betting.¹⁶ The Tribe has reserved plenary authority over its employees, including matters related to control, supervision, participation, salary, benefits, taxes, insurance, and liabilities incurred thereby.¹⁷ Additionally, Supplier is enumerated as an independent contractor hired by the Tribe pursuant to the RSBA.¹⁸

VI. Equipment

The Tribe is responsible for obtaining the equipment and software necessary to operate the sportsbook.¹⁹ Likewise, the Tribe is vested with the sole discretion to choose what equipment and software it desires, including third party data feeds to utilize.²⁰ (b) (4)



¹² *Id.* at § 4.2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*; *see also* § 17.2 (providing dispute resolution procedures).

¹⁶ *Id.* at § 4.3.

¹⁷ *Id.*

¹⁸ *Id.* at § 4.4.

¹⁹ *Id.* at § 5.5.1.

²⁰ *Id.*

(b) (4)



(b) (4)

(b) (4)

VIII. Indemnification

The RSBA provides indemnification procedures.²⁶ (b) (4)

(b) (4)

in the event of a claim from a third party, the indemnifying party shall have the sole right to control the defense and disposition of claims tendered to it; however provided that the indemnified party may be represented by counsel of its choosing and the indemnifying party may not settle or admit liability of the indemnified party without its consent.²⁹

IX. Fees

(b) (4)

(b) (4)

(b) (4)

²⁹ *Id.* at § 9.4.

(b) (4)

X. Term

(b) (4)

Management Contracts:

The NIGC has defined the term “management contract” to mean “any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation.”³⁴ The NIGC’s regulations do not define “management,” but the Agency has clarified the term encompasses activities including planning, organizing, directing, coordinating, and controlling a gaming operation.³⁵ The performance of all or one of these activities with respect to all or part of a gaming operation constitutes management for the purpose of concluding whether an agreement is a management contract requiring the Chair’s approval.³⁶

A “primary management official” includes “any person who has the authority ...[t]o set up working policy for the gaming operation.”³⁷ Further, management employees are “those who formulate and effectuate management policies by expressing and making operative the decisions of their employer.”³⁸ The determination of whether employees are considered management is uncontrolled by his or her specific job title but analyzed by the actual job responsibilities, authority, and relationship to management.³⁹ An employee may qualify as management if the employee possesses the actual authority to take discretionary actions – a *de jure* manager – or, in select circumstances, where the employee acts as a *de facto* manager by directing the gaming operation through others possessing actual authority to manage the operation.⁴⁰

(b) (4)

25 C.F.R. § 502.15.

³⁵ See NIGC Bulletin 94-5 (“*Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void.)*”).

³⁶ *Id.*

³⁷ 25 C.F.R. § 502.19(b)(2).

³⁸ *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 288 (1974) (further citations omitted).

³⁹ See *Waldau v. Merit Sys. Prot. Bd.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994) (citing *Bell Aerospace*, 416 U.S. at 290 n. 19) (further citations omitted).

⁴⁰ *Waldau*, 416 U.S. at 1399 (citing *N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980)). It is uncommon to see *de facto* management in the terms of an agreement, as it is typically an activity arising in the day-to-day implementation of a consulting agreement. For example, if a tribe is required to make the ultimate decision on whether to accept the advice of a consultant but no one within its staff possesses the expertise or experience to render such, the consultant may become a *de facto* manager by making management decisions through a management official.

Management Analysis:

When analyzing contracts and agreements, we look for indicia of management of all or part of an operation. Here, the RSBA does not provide Supplier any indicia of management over the Tribe's sportsbook operation. The scope of the services is well-defined, and there appears to be a mutual understanding that the Tribe retains full managerial power over the sportsbook. This is evidenced by language protecting the Tribe's right to manage the sportsbook operation by: (1) codifying the Tribe's right to final decision-making power over any decision or service enumerated by the RSBA, and (2) prohibiting Supplier from exercising discretion, undue direction, or committing the Tribe to a course of action on the sportsbook. The Tribe retains the right to select and use its desired equipment and data feeds and train its own employees to operate the sportsbook.

(b) (4)

Supplier is also identified as an independent contractor of the Tribe.

Sole Proprietary Interest:

IGRA requires a tribe to have the sole proprietary interest in and be responsible for the conduct of any gaming activity.⁴¹ "Proprietary interest" is undefined in IGRA or the NIGC's implementing regulations; however, Black's Law Dictionary defines a "proprietary interest" as an "interest held by a property owner together with all appurtenant rights ..."⁴² An "owner" is "one who has the right to possess, use, and convey something."⁴³ "Appurtenant" means "belonging to; accessory or incident to ..."⁴⁴ Moreover, case law defines "proprietary interest" as "the one who has an interest in, control of, or present use of certain property."⁴⁵

To determine whether an agreement violates the sole proprietary interest requirement, the NIGC analyzes three criteria: (1) the term of the relationship, (2) the amount of revenue paid to the third party, and (3) a third party's right to exercise control over all or part of the

⁴¹ See 25 U.S.C. § 2710(b)(2)(A); see also 25 C.F.R. §§ 522.4(b)(1) and 522.6(c) (absent conditions not at issue here, gaming ordinances may only be approved when the Tribe has the sole proprietary interest in its gaming operation).

⁴² Black's Law Dictionary (10th ed. 2014).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *Evans v. United States*, 349 F.2d 653, 658 (5th Cir. 1965).

gaming activity.⁴⁶ Accordingly, if a party, other than the tribe, receives a high level of compensation for a long period of time and possesses some aspect of control, an improper proprietary interest may exist.

Sole Proprietary Interest Analysis:

Term of the Relationship:

The RSBA has a (b) (4) term, beginning (b) (4)

The General Counsel has reviewed other agreements with (b) (4) (and longer) and concluded such agreements on their faces did not violate IGRA's sole proprietary interest requirement.

Amount of Revenue Paid to Third Party:

(b) (4)

Third Party's Right to Exercise Control over Gaming Operation:

The scope of the RSBA pertaining to control is clear. Supplier is unauthorized to exercise any discretion, decision-making power, or control over the sportsbook. Instead, Supplier will only provide consulting services and is prohibited from management activities. It may immaterially amend its services, but the Tribe is allowed a period of notice and opportunity to object to any such proposed change. Supplier's attempt to implement a change amounting to exercising control or management would arguably be material, based on the numerous prohibitions concerning Supplier's ability to manage the gaming operation. In the event the Parties cannot reconcile a scenario wherein Supplier desires to amend its services, there is a procedure for dispute resolution enumerated in the RSBA. Likewise, Supplier is identified as an independent contractor with no stake in the management of the operation, and all decisions germane to the services articulated by the RSBA are reserved to the Tribe.

⁴⁶ See NIGC NOV-11-02, (July 12, 2011); see also *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F. Supp. 2d 712, 723 (D. Minn. 2011), *aff'd in pertinent part*, 702 F.3d 1147 (8th Cir. 2013) (discussing NIGC adjudication of IGRA's proprietary interest provision).

Upon review of these three criteria – term, revenue, and control – it is my opinion that the RSBA does not violate IGRA’s requirement that the Tribe retain the sole proprietary interest in its gaming operation. It is important to note the Office of General Counsel reviews each agreement on its own terms. This opinion should not be construed to be applicable to any other proposed agreements, even those with similar or identical terms.

Additional Considerations:

The RSBA contemplates a specific instance requiring further attention to clarify the scope of this opinion and the OGC’s position on issues related to Indian gaming. The RSBA identifies that “gaming taxes,” include those contemplated by federal and state law⁴⁷ (b) (4)

Such taxes and fees are required by legislation recently enacted by the State of Michigan in order for the Tribe to lawfully receive internet wagers initiated by persons located off of Indian lands but accepted by the Tribe on Indian lands. The RSBA implicitly references such taxes and fees^{(b) (4)} remitting all gaming taxes imposed or accessed by “[c]ompetent [a]uthorities,” which definition includes any regulatory or governmental authority having jurisdiction over any of the activities contemplated by the RSBA or any of the Parties.⁴⁹

While gaming occurring off of “Indian lands,” as defined by IGRA, is not subject to IGRA’s provisions or the NIGC’s jurisdiction, gaming activity occurring on Indian lands is.⁵⁰ IGRA sets forth the role the state may play in Indian gaming⁵¹ and the permissible uses of gaming revenue.⁵² It also explicitly prohibits the application of state taxes on IGRA gaming revenue.⁵³ In reaching a determination that the fees paid to Supplier under the RSBA do not violate IGRA’s sole proprietary interest requirement, I do not opine on the permissibility of those fees or taxes under IGRA or any other federal law.

It is my understanding that the RSBA is in substantially final form, and if it is amended in any material way and/or inconsistent with assumptions made herein, this opinion shall not apply. Further, this opinion is limited to the RSBA mentioned *supra*. This opinion does not include or extend to any other agreements not submitted or before me for review.

Please note that it is my intent that this letter be released to the public through the NIGC’s website. If you have any objection to such disclosure, please provide a written

⁴⁷ RSBA at § 1.20.

(b) (4)

⁴⁹ *Id.* at § 1.7.

⁵⁰ 25 U.S.C. § 2702(3).

⁵¹ 25 U.S.C. § 2710(d)(3)(C).

⁵² 25 U.S.C. § 2710(b)(2)(B).

⁵³ 25 U.S.C. § 2710(d)(4).

Letter to Little River Band of Ottawa Indians

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statement explaining the grounds for the objection, highlighting the information you believe should be withheld.⁵⁴ If you object on the grounds that the information qualifies as confidential commercial information subject to withholding under Exemption Four of the Freedom of Information Act (“FOIA”),⁵⁵ please be advised that the information was voluntarily submitted and, as such, that any withholding should be analyzed in accordance with the standard set forth in *Food Marketing Institute v. Argus Leader Media*.⁵⁶ Any claim of confidentiality should also be supported with “a statement or certification by an officer or authorized representative of the submitter.”⁵⁷ Please submit any written objection to FOIASubmitterReply@nigc.gov **within thirty (30) days of the date of this letter**. After this time elapses, this Letter will be made public and objections will no longer be considered.⁵⁸ If you need any additional guidance regarding potential grounds for withholding, please see the United States Department of Justice’s Guide to the Freedom of Information Act at <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>.

If you have any questions, please contact NIGC Staff Attorney James A. Lewis at (202) 632-7013 or by email at James_Lewis@nigc.gov.

Sincerely,



Michael Hoenig
General Counsel

⁵⁴ 25 C.F.R. § 517.7(c).

⁵⁵ 5 U.S.C. § 552(b)(4).

⁵⁶ 139 S.Ct. 2356 (2019).

⁵⁷ 25 C.F.R. § 517.7(c).

⁵⁸ *Id.*