July 28, 2020

VIA FIRST CLASS MAIL AND EMAIL

James A. Bransky
General Counsel
Little Traverse Bay Bands of Odawa Indians
9393 Lake Leelanau Drive
Traverse City, MI 49684

Re: Sports Wagering Services Agreement between Little Traverse Bay Bands of Odawa Indians and Bookmakers Company US, LLC

Dear Mr. Bransky:

This letter responds to your February 17, 2020 request, on behalf of the Little Traverse Bay Bands of Odawa Indians ("Band"), for the National Indian Gaming Commission's Office of the General Counsel to review an agreement between the Band and Bookmakers Company US, LLC dba USBookmaking ("USB"). Specifically, you have asked for my opinion whether the agreement is a management contract requiring the NIGC Chair's approval under the Indian Gaming Regulatory Act. You also asked for my opinion whether the agreement violates IGRA's requirement that the Band have the sole proprietary interest in its gaming activity.

In my review, I considered the Sports Wagering Services Agreement (labeled "Sports Wagering Services Agreement – Little Traverse Bay Bands of Odawa Indians" in the footer, no date, 20 total pages), which included the following attached exhibits:

- Exhibit 4(B)(1) – Book area CAD drawing (blank except "To be Determined");
- Exhibit 4(B)(2) – Equipment and software supplied by the Operator;
- Exhibit 4(B)(3) – Guide for installation of the equipment and the opening of the retail book;
- Exhibit 10(A) and10(B) – Service Provider Insurance (blank); and
- Exhibit 11(A) and 11(B) – Operator Insurance (blank).

These documents (collectively the "Agreement") are unexecuted but represented to be in substantially final form. The documents contemplate an agreement between the Band and USB in which USB will offer wagering odds and wagering opportunities to the Band, among other tasks, for the operation of a sports book. After careful review, it is my opinion that the Agreement is not a management contracts and do not require approval of the NIGC Chair. It is also my opinion that the Agreement does not violate IGRA's sole proprietary interest requirement.

Management Contracts

The NIGC has defined *management contract* to mean "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."[1] Though NIGC regulations do not define management, the Agency has explained that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling a gaming operation.[2] The performance of any one of these activities with respect to all or part of a gaming operation, constitutes management for the purpose of determining whether an agreement for the performance of such activities is a management contract requiring the Chair's approval.[3]

A "primary management official" includes "any person who has the authority ... [t]o set up working policy for the gaming operation."[4] Further, management employees are "those who formulate and effectuate management policies by expressing and making operative the decision of their employer."[5] The determination of whether employees are considered management is not controlled by the specific job title of the employee's position but by examining the employee's actual job responsibilities, authority and relationship to management.[6] An employee may qualify as management if the employee possesses the actual authority to take discretionary actions - a *de jure* manager - or, in certain circumstances, where the employee acts as a *de facto* manager by directing the gaming operation through others possessing actual authority to manage the gaming operation.[7]

Management Analysis

When analyzing the Agreement, we look for indicia of management of all or part of the gaming operation by USB. Here, the scope of services for the sports wagering are finite and well-defined in the Agreement. The functions and responsibilities of each party are predetermined for both the pre-opening phase and the operational phase.[8] The Agreement specifically prohibits USB from making any management decisions at the Band's sports book facility.[9] Specifically, the Agreement provides that none of the provisions permit or authorize USB to:

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[1] *See* 25 C.F.R. § 502.15.
[2] NIGC Bulletin No. 94-5, "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void.")
[3] *Id*.
[4] 25 C.F.R. § 502.19(b)(2).
[5] *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267,288 (1974).
[6] *See Waldao v. M S.P. B.*, 19 F.3d 1395, 1399 (Fed. Cir., 1994).
[7] *Id*. 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 that arises in the day-to-day implementation of a consulting agreement. If, for example, a tribe is required to make the ultimate decision on whether to accept the advice of a consultant, but has no one on staff with the expertise or experience to make such a determination, the consultant may become the *de facto* manager in the sense that he or she is simply executing management decisions through a tribal management official.
[8] *See* Agreement, §§ 3, 4.
[9] *Id*. at § 3(A)(4).

> (i) operate or manage any gaming conducted at Operator's Casino or sports betting facility or to establish the costs of operating or administering the same; (ii) hire, terminate or determine wages salaries or benefits for any employee of the Operator's Casino or sports betting facility; (iii) establish policies and procedures for the operation or management of the Operator's Casino or sports betting facility; (iv) direct or supervise any other person employed to work at or about the Operator's Casino or sports betting facility regarding the operation or management of the sports betting facility; (v) bind the Operator or to act as an agent of the Operator with regard to the operation and management of the sports betting facility; (vi) plan, organize, direct, coordinate or control any part of any gaming operation within the meaning of IGRA, the regulations promulgated thereunder, or case law construing the provisions thereof; (vii) undertake any other activity that constitutes "management" of gaming operations; or (viii) take any other action that could reasonably be construed as managing or operating the sports betting facility or Operator's Casino or that would otherwise violate the purpose and intent of this Agreement.[10]

The Agreement also provides that the Band will exclusively manage and provide all personnel required for the operation of the sports book.[11] While USB will provide initial training for the sports book supervisors, assistants, and ticket writers the agreement explicitly states that they will be employees of the Band.[12]

In addition, the Agreement provides that:

> The [Band] has the right to rely on [USB]'s services but has complete and absolute discretion regarding implementing [USB]'s recommendations. The [Band] has sole responsibility over the gaming operations and sports betting facility, including the ultimate authority to set the lines for each game being wagered on. The [Band] solely decides which games it will or will not accept wagers, and whether or not it wants to change the lines on a particular game, regardless of [USB]'s recommendations.[13]

Therefore, it is my understanding that the Band will have access to USB's sports wagering services and recommendations, but the Band will make the final decisions as to what games it will accept wagers for, and the lines it will set regardless of USB's recommendations.

Because the Agreement does not grant USB with any management authority, it is my opinion that they are not management agreements requiring approval of the NIGC Chair.

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[10] *Id*.
[11] *Id*. § 4(D).
[12] *Id*.
[13] *Id*. § 4(J).

Sole Proprietary Interest

IGRA requires that a tribe have the sole proprietary interest in and responsibility for the conduct of any gaming activity.[14] Under this section of the Act, if any entity other than a tribe possesses a proprietary interest in the gaming activity, gaming may not take place.[15] NIGC regulations also require that all tribal gaming ordinances include a provision to this effect.[16]

Proprietary interest is typically reviewed based on three criteria: 1) the term of the relationship; 2) the amount of revenue paid to the third party; and 3) the right of control provided to the third party over the gaming activity.[17] Final agency actions by NIGC and OGC legal opinions have found an improper proprietary interest in agreements under which a party, other than a tribe, receives a high level of compensation, for a long period of time, and possesses some aspect of control.[18]

Term of the Relationship

Analysis of sole proprietary interest requires an examination of the term of the business relationship. A contract for a long period of time can indicate management. Here, the Agreement run for a three (3) year term beginning when the Agreement is ratified.[19] There are no provisions to extend the Agreement beyond three years. Accordingly, the relatively short term does not create a concern for IGRA's sole proprietary interest requirement.

Revenue Paid to a Third Party

The Agreement provide USB with 16% of "Monthly Win" from the sports book.[20] "Monthly Win" is defined as net sum held by the Book at the close of the month after all winning wagers are paid from the Handle, and excludes promotional wagers.[21] In addition, the Band is required to cover all "data feed"[22] costs and "league fees".[23] It is my understanding that at this time USB does not currently use any data feeds, and if data feeds are needed in the future USB will consult directly with the Band on contracting with the data feed supplier.[24] In addition, the Band would retain ultimate

[14] 25 U.S.C. § 2710(b)(2)(A); *see also* 25 C.F.R. §§ 522.4(b)(l), 522.6(c).
[15] *Id*.
[16] *See* 25 C.F.R. § 522.4(b)(l).
[17] *See 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 proprietary interest provision); *see also Bettor Racing, Inc. v. National Indian Gaming Commission*, 812 F.3d 648, 652 (8th Cir. 2016).
[18] *City of Duluth*, 830 F.Supp.2d at 723-24.
[19] Agreement, § 1.
[20] Agreement, § 2(A).
[21] *Id*. § 2(E).
[22] *Id*. § 2(A).
[23] *Id*. § 2(G).
[24] *See* email from James Bransky, Band Counsel, to Joshua Proper, NIGC Staff Attorney (July 24, 2020).

authority to agree to the fee and license the data feed supplier.[25] Based on information from USB forwarded from the Band's counsel, the data feeds generally consists of 3-10% of the revenue generated from the source of the feed, but is generally around 5 percent.[26] It is also my understanding that there is currently no league fees levied on sports wagering.[27]

The Band provided financial projections for the first year of the sports book.[28] The projections for both properties are simplified below:

Gross Revenue	1,120,000
Cost Related to revenue	
US Bookmaking Fee	179,200
Data Feeds	56,000
Salaries, Wages, and benefits	122,400
Operating Expenses	240,800
Net Income	521,600

Looking at the terms in the Sports Book Agreement the tribe is required to pay 16% on gross revenue from the sports book.[29] However, when that fee is compared to the projected financials for the first year, the fee of $179,200 is 25.5% of the net revenue of $700,800.[30] While 25% of the net revenue of the sports book is a substantial amount, when it is coupled with the short term of the Agreement and the emerging sports book market the fee seems more reasonable. In addition, it is likely that the sports book addition will increase other revenues to the Band as patrons spend at the facility. For all these reasons, the fee contemplated in the Agreement does not raise a sole proprietary interest concern.

Third Party's Right to Exercise Control over Gaming Activity

The Agreement does not contain any provisions that transfer the right of control over the Band's gaming operations. The Agreement specifically provides that USB is providing its services as an independent contractor,[31] and is not authorized to engage in any management activity.[32] In addition, the Agreement states that it does not create any fiduciary relationship between the Band and USB and nothing in the Agreement is intended "to make either Party a general or special agent, legal

[25] *Id*.
[26] *See* email from James Bransky, Band Counsel, to Joshua Proper, NIGC Staff Attorney (Mar. 6, 2020).
[27] *See* email from James Bransky, Band Counsel, to Joshua Proper, NIGC Staff Attorney (Mar. 6, 2020).
[28] *See* email from James Bransky, Band Counsel, to Joshua Proper, NIGC Staff Attorney (Mar. 10, 2020).
[29] Agreement, § 2(A).
[30] The term "net revenues" is defined in IGRA as "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees." 25 U.S.C. § 2703(9); *see also* 25 C.F.R. § 502.16.
[31] Agreement, § 18.
[32] *Id*. § 3(A)(4).

representative, subsidiary, joint venturer, partner, employee, or servant of the other Party, for any purpose."[33] Further, there are no provisions that allow USB to "step into the shoes" of the Band, including in the event of default or breach. Therefore, it is my opinion that the Agreement does not grant a controlling interest in the Band's casinos or Sport Book operation.

Upon review of these three criteria - term, compensation, and control - it is my opinion that the Agreement does not violate IGRA's requirement that the Band maintain the sole proprietary interest in its gaming operation.

Conclusion

It is my opinion that the Sports Wagering Services Agreement is not a management contract requiring the approval of the NIGC Chair. Additionally, the Agreement, on its face, does not violate IGRA's requirement that the Band maintain the sole proprietary interest in its gaming operation.

The Agreement contemplates mobile gaming that requires additional attention to clarify the scope of this opinion. In 2019, the Lawful Sports Betting Act became law in the State of Michigan.[34] The Michigan sports betting act authorized internet sports betting, but also excluded from its purview internet sports betting conducted exclusively on Indian lands.[35] It is my understanding that the mobile sports betting, contemplated in the Agreement will be conducted exclusively on the Band's Indian lands.[36] As such, this opinion does not include or extend to any mobile gaming that is conducted under the Michigan sports betting act.

It is my understanding that the Agreement is represented to be in substantially final form with respect to terms affecting this opinion. If such terms change in any material way prior to closing, or are inconsistent with assumptions made herein, this opinion shall not apply. Further, this opinion is limited to the Sports Wagering Services Agreement. This opinion does not include or extend to any other agreements or documents not submitted for review.

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[33] *Id*. § 18.
[34] Mich. Comp. Laws Ann. § 432.401 *et seq*.
[35] *See* Mich. Comp. Laws Ann. $ 432.404 ("(4) This act does not apply to internet sports betting conducted exclusively on Indian lands by an Indian tribe under a facility license issued in accordance with a tribal gaming ordinance approved by the chair of the National Indian Gaming Commission. For purposes of this act, internet sports betting is conducted exclusively on Indian lands only if the individual who places the internet sports betting wager is physically present on Indian lands when the internet sports betting wager is initiated and the internet sports betting wager is received or otherwise made on equipment that is physically located on Indian lands, and the internet sports betting wager is initiated, received, or otherwise made in conformity with the safe harbor requirements described in 31 USC 5362(10)(C).").
[36] The financial projections for the sports book provided a compact fee of 8% as an operating expense. *See supra* note 28. This is consistent with the 8% revenue sharing contained in the gaming compact with the Band and the State of Michigan for class III gaming that is conducted on the Band's Indian lands. In addition, there is neither expenses for license fees, nor a breakdown of costs related to the higher fees required for internet sports books that are regulated under the state of Michigan. *See* Mich. Comp. Laws Ann. §§ 432.406(9) (requiring license fee of $100,000), 432.414(1)(2) (requiring fees of 8.4% of adjusted gross revenue paid to the state).

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 this disclosure, please provide a written statement explaining the grounds for the objection and highlighting the information that you believe should be withheld.[37] 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),[38] please be advised that any withholding should be analyzed under the standard set forth in *Food Marketing Institute v. Argus Leader Media*.[39] Any claim of confidentiality should also be supported with "a statement or certification by an officer or authorized representative of the submitter."[40] Please submit any written objection to FOIASubmitterReply@nigc.gov within thirty (30) days of the date of this letter. After this time elapses, the letter will be made public and objections will no longer be considered.[41]

If you have any questions, please contact NIGC Staff Attorney Joshua Proper at (202) 632-0294.

Sincerely

Michael Hoenig
General Counsel

[37] *See* 25 C.F.R. § 517.7(c).
[38] 5 U.S.C. § 552(b)(4).
[39] 139 S. Ct. 2356 (2019).
[40] *See* 25 C.F.R. § 517.7(d).
[41] *Id*.