August 7, 2020

VIA EMAIL

Joseph H. Webster, Partner
Hobbs Straus Dean & Walker, LLP
1899 L Street NW, Suite 1200
Washington, DC 20036

Re: Review of Agreement between Hannahville Indian Community and Churchill Downs Interactive Gaming

Dear Mr. Webster:

This letter responds to your April 22, 2020 request for the National Indian Gaming Commission's Office of General Counsel to review agreements between the Hannahville Indian Community d/b/a Island Resort & Casino and Churchill Downs Interactive Gaming, LLC (CDIG). 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 Tribe have the sole proprietary interest in its gaming activity.

In my review, I considered the Development and Consulting Services Agreement, including Exhibits B – E, received on June 19, 2020 ("Agreement"). The Agreement is unexecuted but represented to be in substantially final form. This opinion shall not apply if the Agreement changes in any material way prior to execution or is inconsistent with assumptions made herein. Further, this opinion is limited to the Agreement and does not include or extend to any other agreements.

It is my opinion that the Agreement is not a management contract and does not require the 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 a "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] A "collateral contract" is defined as "any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)."[2]

While NIGC regulations do not define "management," the Agency has clarified that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.[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] Whether a particular employee is managerial is not controlled by an employee's actual job responsibilities, authority, and relationship to management.[6] Essentially 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]

If a contract requires or permits the performance of any management activity with respect to all or part of the gaming operation, the contract is a management contract within the meaning of IGRA and requires the Chair's approval.[8] Management contracts that have not been approved by the Chair are void.[9]

Management Analysis:

Here, the Agreement does not provide CDIG with a management role over the Tribe's gaming activities. CDIG is engaged as an independent contractor to provide sports book vendor

[1] 25 C.F.R. § 502.15.
[2] 25 C.F.R. § 502.5.
[3] *See* NIGC Bulletin No. 94-5, "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)."
[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 Waldau v. M.S.P.B.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994).
[7] *Id*. at 1399 (c*iting 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 the 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] 25 U.S.C. § 2711.
[9] 25 C.F.R. § 533.7; *see also Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 688 (7th Cir. 2011).

services, as well as development and consulting services.[10] The Agreement expressly provides that CDIG "may not (i) manage or administer any gaming activities in the Book, including by planning, organizing, or dictating any operational activities in the Book; (ii) adopt or establish any policies or procedures falling under such management or administration; (iii) adopt or dictate the Book's budget, spending priorities, or allocation of resources or incurring of costs, charges, or expenses; (iv) bind the Tribe or otherwise act as its agent with respect to all or any portion of the Book's activities; (v) commit the Tribe to any contractual obligations in relation to the Book; (vi) hire, supervise, manage, direct, or discharge any personnel employed to provide services at the Book; or (vii) otherwise exercise any control which would constitute "management" under the Indian Gaming Regulatory Act (the "*IGRA*"), the NIGC's regulations, or the NIGC's prior opinions and declination letters…."[11] Finally, the Agreement makes clear that with respect to CDIG's consultation services, "[t]he Tribe shall have and exercise total discretion in determining whether, how, and to what extent to implement any advice rendered by [CDIG]."[12] Accordingly, it is my opinion that the Agreement is not a management agreement and does not need to be submitted to the NIGC Chair for review and approval.

Sole Proprietary Interest:

IGRA requires a tribe to possess "the sole proprietary interest and responsibility for the conduct of any gaming activity."[13] "Proprietary interest" is not defined in IGRA or the NIGC's implementing regulations. Black's Law Dictionary defines a "proprietary interest" as an "interest held by a property owner together with all appurtenant rights …."[14] An "owner" is "one who has the right to possess, use, and convey something."[15] "Appurtenant" means "belonging to; accessory or incident to …."[16] Case law similarly defines "proprietary interest" as "one who has an interest in, control of, or present use of certain property." [17]

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 any part of the gaming activity.[18] Accordingly, if a party other than the tribe receives a high level of compensation, for a long period of time, and possess some aspect of control, an improper proprietary interest may exist.

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[10] Agreement § 4.3.
[11] Agreement § 4.5.
[12] *Id*.
[13] 25 U.S.C. § 2710(b)(2)(A); *see also* 25 C.F.R. § 522.4(b)(1).
[14] BLACK'S LAW DICTIONARY (10th ed. 2014).
[15] *Id*.
[16] *Id*.
[17] *See Evans v. United States*, 349 F.2d 653, 659 (5th Cir. 1965).
[18] *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 proprietary interest provision).

Sole Proprietary Interest Analysis:

Term of the Relationship:

The period of time for which CDIG is contractually bound to the gaming activity is not unduly lengthy. The Agreement provides (b) (4) In general, agreements with 10-year terms have been found to not violate IGRA's sole proprietary interest requirement with respect to the term of the contractual relationship.

Amount of Revenue Paid to a Third Party:

The Agreement provides CDIG with a high level of total compensation through two sources of revenue. (b) (4) Finally, the Agreement provides for cross-licensing of the brand intellectual property of the Tribe and CDIG for purposes of promoting the Tribe's book and casino business.[28]

A high level of compensation paid to a third party can indicate that the third party's interest goes beyond compensation for goods and services and has become proprietary. Here, in the business judgment of the Tribe, (b) (4) The Tribe solicited multiple bids and selected CDIG "based on its reputation,

(b) (4)

[28] *Id*. § 8.2.

standard of service delivery, competitive pricing, among other factors."[29] In addition, the Tribe asserts (b) (4)

For these reasons, the amount of revenues to be paid to CDIG do not compel finding that the Agreement raises a sole proprietary interest concern.

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

The Agreement expressly reserves the right to exercise control over the gaming activity to the Tribe. As previously noted, the Agreement provides that "[t]he Tribe shall have and exercise total discretion in determining whether, how, and to what extent to implement any advice rendered by [CDIG]."[30] The Agreement explicitly reserves to the Tribe the "ultimate discretion in the Book to, among other things, choose what wagers to accept and set the lines for such wagers, and manage and process such wagering by, for example, accepting payments, issuing wager documentation, and making payments…" to patrons.[31] Accordingly, the Agreement does not provide CDIG with a right to exercise control over the gaming activity that could implicate sole proprietary interest concerns.

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 Tribe maintain the sole proprietary interest in its gaming operation.

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.[32] 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),[33] please be advised that any withholding should be analyzed under the standard set forth in *Food Marketing Institute v. Argus Leader Media*.[34] Any claim of confidentiality should also be supported with "a statement or certification by an officer or authorized representative of the submitter."[35] 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.[36] If you need any additional guidance regarding potential grounds for withholding, please see the United

[29] E-mail from Joseph H. Webster, Attorney for Tribe, to Austin Badger, NIGC (July 13, 2020).
[30] Agreement § 4.5.
[31] *Id.*
[32] *See* 25 C.F.R. § 517.7(c).
[33] 5 U.S.C. § 552(b)(4).
[34] 139 S. Ct. 2356 (2019).
[35] *See* 25 C.F.R. § 517.7(d).
[36] *Id.*

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 Senior Attorney Austin Badger at (202) 632-7003 or by email at austin_badger@nigc.gov.

Sincerely,

Michael Hoenig
General Counsel