



April 23, 2019

*Via First Class Mail and Email*

Peter D. Carmen  
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**Re: Review of Agreement between Turning Stone Resort Casino, LLC  
and Bally Gaming, Inc.**

Dear Mr. Carmen:

This letter responds to your January 7, 2019 request for the National Indian Gaming Commission's Office of General Counsel to review an agreement between Turning Stone Resort Casino, LLC and Bally Gaming, Inc. 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 "First Amendment to the Purchase and License Agreement dated November 21, 2017," between Turning Stone Resort, LLC and Bally Gaming, Inc. (hereinafter the "First Amendment"), which was unexecuted but represented to be in substantially final form. After careful review, it is my opinion that the First Amendment is not a management contract and does not require the approval of the NIGC Chair. It is also my opinion that the First Amendment does not violate IGRA's sole proprietary interest requirement.

The First Amendment:

Turning Stone is a limited liability company organized under the laws of the Tribe and wholly-owned and operated by the Tribe. Turning Stone operates all three of the Tribe's casinos.<sup>1</sup> Turning Stone is preparing to open a sports book to expand its gaming portfolio. The State of New York is in the process of adopting sports betting regulations,<sup>2</sup> and Turning

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<sup>1</sup> Turning Stone Resort Casino, Yellow Brick Road Casino, and Point Place Casino.

<sup>2</sup> See "Sports Wagering at Gaming Facilities," Vol. 41 N.Y.Reg. Issue 12 (Mar. 20, 2019) (I.D. No. SGC-12-19-00007-P) (proposed rulemaking by the New York Gaming Commission).

Stone has negotiated the First Amendment to prepare for those regulations or regulations negotiated by the State and the Tribe.

The First Amendment addresses the hardware and software platforms necessary to offer sports book betting at Turning Stone's casinos and provides an option for Turning Stone to purchase Bally's sports book data feed and support services. Bally already provides non-sports book related hardware and software to Turning Stone at its three casinos pursuant to a purchase and license agreement. Bally's hardware and software make up the "technological backbone" of Turning Stone's gaming floor, marketing, and cage functions. Under the First Amendment, Bally would also develop a sports betting platform (hardware and software) and offer its sports betting Risk Analysis Services ("RAS") (aka data feed) and technology support services.

The First Amendment has an initial term of 10 years, with automatic 1-year renewals unless either party provides a 1-year notice of non-renewal.<sup>3</sup> The parties may terminate the First Amendment based on mutual consent; in the event that sports betting is prohibited; if either party could incur damages by offering sports betting; the platform cannot offer the capabilities/functions stated in the schedules; or there is a material uncured breach.<sup>4</sup>

*The Sports Betting Platform:*

Pursuant to the First Amendment, Turning Stone will purchase certain hardware<sup>5</sup> from Bally through capital leases.<sup>6</sup> Bally will install the hardware at pre-determined rates,<sup>7</sup> and is responsible for maintenance, upgrades, and repairs to the hardware.<sup>8</sup> Bally will license its sports betting software to Turning Stone for its sports betting platform, separate from Bally's RAS and technology support.

(b) (4)



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<sup>3</sup> First Amendment § 5.1.

<sup>4</sup> *Id.* § 5.2 and Schedule 5(2).

<sup>5</sup> *Id.* at Appendix 2 to Schedule 5.

<sup>6</sup> *Id.* at Schedule 5(2).

<sup>7</sup> First Amendment, Schedule 4.

(b) (4)



(b) (4)

*The RAS and Sports Book Technology Services:*

Turning Stone may also elect to purchase Bally's RAS, which consists of a data feed and benchmarking for base-level pricing for sporting events. Turning Stone is not required to purchase Bally's RAS and may purchase a data feed from other vendors. Bally's RAS will include odds on sporting events, benchmarks for sporting events, and warnings that allow Turning Stone to suspend betting.<sup>16</sup> If Turning Stone purchases Bally's RAS, Turning Stone retains control over day-to-day operations and always maintains the discretion to use or disregard the data.<sup>17</sup> The First Amendment does not give Bally any authority to direct Turning Stone on how to use the RAS. Turning Stone may adjust the line on a sporting event or suspend betting if it disagrees with Bally's RAS or for whatever reason. (b) (4)

In addition to the RAS, Turning Stone can also purchase "Sports Book Technology Support Services" from Bally, which include "technology and other resources customarily provided by Bally to operators similarly situated to [Turning Stone]" that will allow Turning Stone to efficiently manage its sport book.<sup>19</sup> These "Technology Support Services" include information about patron management (for example, alerts on a player's betting limit or analysis on a player's betting patterns), offers, media distribution, and event management.<sup>20</sup> The Technology Support Services will provide more in-depth analysis of betting trends, beyond the basic data from the RAS. Like the RAS, Turning Stone has the discretion to use or not use the information from Bally. The Technology Support Services are an optional Bally service. (b) (4)

<sup>12</sup> See Hardware Agreement between Turning Stone Resort Casino, LLC and Bally Gaming, Inc. (Jan 2, 2019).

<sup>13</sup> First Amendment at § 3.3.

<sup>14</sup> *Id.* § 3.4(a), (c).

<sup>15</sup> *Id.* § 3.6.

<sup>16</sup> First Amendment, Schedule 8.

<sup>17</sup> *Id.* § 3.1(b).

<sup>18</sup> First Amendment, Appendix 1 to Schedule 5.

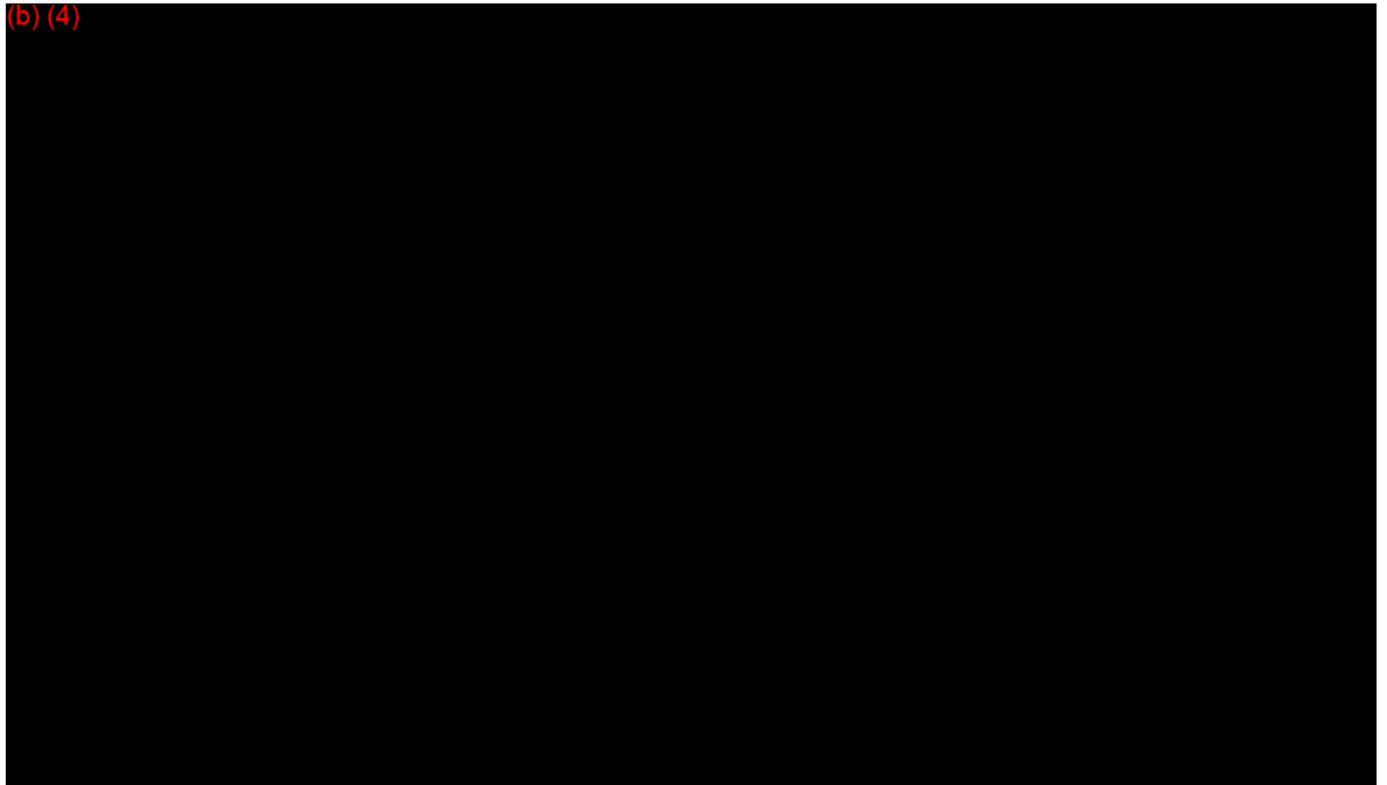
<sup>19</sup> First Amendment § 3.1(b).

<sup>20</sup> *Id.*

*Fees:*

Bally will receive fees for setting up the platform (fixed)<sup>21</sup> and fees for offering the sports betting platform (percentage fee of the sports book revenue) in its various forms. The following chart is a summary of the percentage fee structure for the platform and services:<sup>22</sup>

(b) (4)



(b) (4)

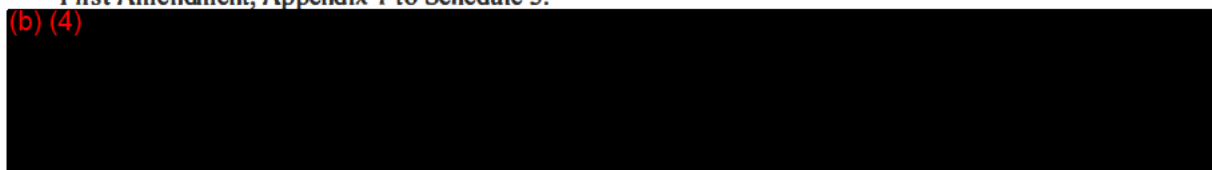


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<sup>21</sup> First Amendment § 2.3, Schedule 4.

<sup>22</sup> First Amendment, Appendix 1 to Schedule 5.

(b) (4)





(b) (4)

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.”<sup>29</sup> 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).”<sup>30</sup>

While NIGC regulations do not define “management,” the Agency has clarified that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.<sup>31</sup> A “primary management official” includes “any person who has the authority ... [t]o set up working policy for the gaming operation.”<sup>32</sup> Further, management employees are “those who formulate and effectuate management policies by expressing and making operative the decision of their employer.”<sup>33</sup> Whether a particular employee is managerial is not controlled by an employee’s actual job responsibilities, authority, and relationship to management.<sup>34</sup> 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.<sup>35</sup>

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

(b) (4)

<sup>29</sup> 25 C.F.R. § 502.15.

<sup>30</sup> 25 C.F.R. § 502.5.

<sup>31</sup> See NIGC Bulletin No. 94-5, “Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void).”

<sup>32</sup> 25 C.F.R. § 502.19(b)(2).

<sup>33</sup> *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

<sup>34</sup> See *Waldau v. M.S.P.B.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994).

<sup>35</sup> *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.

the meaning of IGRA and requires the Chair's approval.<sup>36</sup> Management contracts that have not been approved by the Chair are void.<sup>37</sup>

Management Analysis:

On its face, the First Amendment does not permit any management by Bally. The scope of services for the sports betting platforms is finite and well-defined. The functions and capabilities of the platforms are pre-determined by the schedules and phases.<sup>38</sup> Bally will receive a percentage of the net gaming revenue from Turning Stone's sports book, but Bally's fees are tied to specific work performed. The percentage fee increases and decreases based on the selected services and phases. The rates for each additional service are pre-determined.

Regarding any planning, organizing, directing, coordinating, and controlling, the First Amendment does not contain any language that generally prohibits management activities. However, the First Amendment does not grant Bally the ability to plan, organize, direct, or control all or part of Turning Stone's gaming operations. Instead, Bally will construct and offer the platform according to pre-determined specifications. Bally has the ability to change hardware and software without Turning Stone's consent, but only when (1) required by applicable law; or (2) the change does not change the functionality of the platform and does not increase costs to Turning Stone. Material changes – those not required by law or that change the functionality of the platform - require Turning Stone's written consent.<sup>39</sup> Bally may provide the RAS and Technology Services, but Turning Stone retains the discretion to use or not use the data and services. Turning Stone is not required to implement the data or services.<sup>40</sup> Turning Stone may adjust the line or suspend betting for a sporting event if it disagrees with Bally's data feed or for whatever reason. Accordingly, it is my opinion that the First Amendment is not a management agreement and does not need to be submitted to the NIGC Chairman 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."<sup>41</sup> "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 ...."<sup>42</sup> An "owner" is "one who has the right to possess, use, and convey something."<sup>43</sup> "Appurtenant" means

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<sup>36</sup> 25 U.S.C. § 2711.

<sup>37</sup> 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).

<sup>38</sup> First Amendment, Schedules 1-3.

<sup>39</sup> *Id.* at Schedule 5, subsection 2.

<sup>40</sup> *Id.* at Schedule 8.

<sup>41</sup> 25 U.S.C. § 2710(b)(2)(A); *see also* 25 C.F.R. § 522.4(b)(1).

<sup>42</sup> BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>43</sup> *Id.*

“belonging to; accessory or incident to ....”<sup>44</sup> Case law similarly defines “proprietary interest” as “one who has an interest in, control of, or present use of certain property.”<sup>45</sup>

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.<sup>46</sup> 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.

Sole Proprietary Interest Analysis:

*Term of the Relationship:*

The First Amendment has a 10-year term. The General Counsel has reviewed other agreements with 10-year terms (and longer) and concluded that those agreements did not violate IGRA’s sole proprietary interest requirement. Further, Turning Stone, not Bally, is requesting a 10-year term to obtain the entire benefits of its partnership with Bally. Unlike other services from vendors that are sold at fixed rates plus costs, the Bally sports book platforms and similar services offered by competitors are only offered on a percentage fee basis.<sup>47</sup> To avoid fluctuations in fees, Turning Stone desires to lock in the rates for a 10-year term. Also, a relationship with Bally will create a fully integrated back-of-house platform across Turning Stone’s sports book and non-sports book gaming.<sup>48</sup> Accordingly, in this instance, the unique circumstances justify the 10-year term for the First Amendment. The term does not create a concern for IGRA’s sole proprietary interest requirement.

*Amount of Revenue Paid to a Third Party:*

The First Amendment provides a fee structure where baseline and optional services have pre-determined percentage rates. Turning Stone is also required to make a minimum monthly payment to Bally in the event the percentage fee does not reach the minimum threshold. Based on projections provided by Turning Stone, Bally’s fee will mostly be comprised of minimum fee payments as the sports book becomes an established part of Turning Stone’s gaming operations. Accordingly, Bally may receive a fee from Turning Stone’s sports book revenues that is higher than the pre-determined percentage fee simply based on monthly minimum payments. Of course, if Turning Stone earns more from its sports book, Bally’s total fee will also increase but its fee as a percentage of net revenue will decrease.

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<sup>44</sup> *Id.*

<sup>45</sup> See *Evans v. United States*, 349 F.2d 653, 659 (5th Cir. 1965).

<sup>46</sup> 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).

<sup>47</sup> See Letter from Peter Carmen, COO Turning Stone, to Michael Hoenig, NIGC General Counsel, p. 4 (Jan. 7, 2019).

<sup>48</sup> *Id.*

Overall, Bally's fees seem reasonable. It appears the parties have negotiated an arms-length contract and Turning Stone was diligent to find competitive rates. Turning Stone stated that it surveyed the market for available vendors and found Bally's rates to be competitive. (b) (4)

Further, sports books are relatively new additions to tribal gaming, and Turning Stone will be one of the first Indian casinos to offer sports book betting in its region. Turning Stone sees value in being first to market for sports book betting. And, although Bally's fee is initially a substantial portion of Turning Stone's net revenue from the sports book, as discussed above, it is based on a negotiated flat-fee for services and Bally's fee as a percentage of net revenue will decrease as sports book revenues increase. For all of these reasons, the fee contemplated in the First Amendment does not raise a sole proprietary interest concern.

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

Both the hardware and software platforms, including the three phases, are pre-determined. Bally and Turning Stone have agreed to a pre-determined list of hardware, and the scope and functionalities of the software platform are also pre-determined. Bally has no discretion to change the platform's capabilities. If Turning Stone decides to use Bally's RAS, the events/leagues offered are also pre-determined. Further, if Bally provides the RAS and Technology Services, Turning Stone has the discretion to accept or reject the information and Turning Stone bears the risk of loss from wagers. Accordingly, there are no issues of control in the First Amendment.

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

It is my understanding that the draft is represented to be in substantially final form, and if the First Amendment changes in any material way prior to closing or is inconsistent with assumptions made herein, this opinion shall not apply. Further, this opinion is limited to the First Amendment listed above. This opinion does not include or extend to any other agreements not submitted 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 this disclosure, please provide a written statement explaining the grounds for the objection and highlighting the information that you believe should be withheld.<sup>49</sup> 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),<sup>51</sup> please be advised that the information was voluntarily submitted and, as such, that any withholding should be analyzed in accordance with the

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<sup>49</sup> See *id.*

<sup>50</sup> 25 C.F.R. § 517.7.

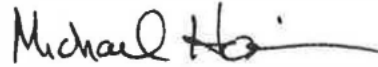
<sup>51</sup> 5 U.S.C. § 552(b)(4).



standard set forth in *Critical Mass Energy Project v. NRC*.<sup>52</sup> Any claim of confidentiality should also be supported with "a statement or certification by an officer or authorized representative of the submitter."<sup>53</sup> 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.<sup>54</sup> 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 Steve Iverson at (202) 632-7003 or by email at [steven\\_iverson@nigc.gov](mailto:steven_iverson@nigc.gov).

Sincerely,



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General Counsel

cc: Ray Halbritter (emailed to [pcarmen@oneida-nation.org](mailto:pcarmen@oneida-nation.org))  
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<sup>52</sup> 975 F.2d 871 (D.C. Cir. 1992).

<sup>53</sup> 25 C.F.R. § 517.7(c).

<sup>54</sup> *Id.*