



October 20, 2020

Rodney Butler, Chairman
Mashantucket Pequot Tribal Nation
2 Matt's Path
P.O. Box 3060
Mashantucket, CT 06338-3060

Re: Strategic Gaming Agreement

Dear Chairman Butler:

Thank you for your August 31, 2020 letter. You asked the National Indian Gaming Commission's Office of General Counsel for an opinion whether the Indian Gaming Regulatory Act applies to the gaming activity contemplated in the Strategic Gaming Agreement. The Agreement will be executed by the Mashantucket Pequot Tribal Nation and Crown CT Gaming, LLC, a subsidiary of DraftKings, Inc. You provided a copy of the Agreement to the NIGC.

IGRA applies to gaming activity that occurs on Indian lands. IGRA does not apply to gaming activity that occurs off of Indian lands, and the NIGC has no jurisdiction over such activity. As such, to the extent that the activities conducted pursuant to the Agreement occur off of Indian lands, IGRA does not apply to those activities and the NIGC has no jurisdiction over them.

However, the Agreement contemplates that gaming activities could occur on Indian lands. For example, Section 7(a) states,

(b) (4)

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(b) (4)

Section 7(a) contemplates DraftKings using space at the Nation's casino to host the hardware, software, and other equipment necessary to operate the online sportsbook. The remainder of Section 7 also anticipates that gaming activity could occur on Indian lands.² Accordingly, I cannot provide an opinion that the Agreement is not subject to IGRA. If any gaming activity occurs on Indian lands, including the use of servers for the online sportsbook, then the Agreement would be subject to IGRA and NIGC's jurisdiction.³

Your August 31, 2020 letter also requests an opinion whether the Agreement is a management contract and whether the Agreement violates 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."⁴ A "collateral agreement" 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)."⁵

While NIGC regulations do not define "management," the Agency has clarified that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.⁶ A "primary management official" includes "any person who has the authority ... [t]o set up working policy for the gaming operation."⁷ Further, management employees are "those who formulate and effectuate management policies by expressing and making operative

¹ Strategic Gaming Agreement § 1(c-d) (boldface in original).

² *See id.* §§ 7(b)-7(e) (discussing ownership and maintenance of the equipment at the Hosting Space, access to the Hosting Space, maintenance of the Hosting Space, relocation of the Hosting Space, and a warranty disclaimer of the equipment at the Hosting Space).

³ The NIGC Office of General Counsel met with the Nation's General Counsel and informed the Nation that Section 7 allowed for gaming activity to occur on Indian lands and therefore IGRA would apply to that activity. The Nation has chosen to keep Section 7 as originally written to allow the Nation to comply with future laws and regulations adopted by the State of Connecticut.

⁴ 25 C.F.R. § 502.15.

⁵ 25 C.F.R. § 502.5.

⁶ *See* NIGC Bulletin No. 94-5, "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)."

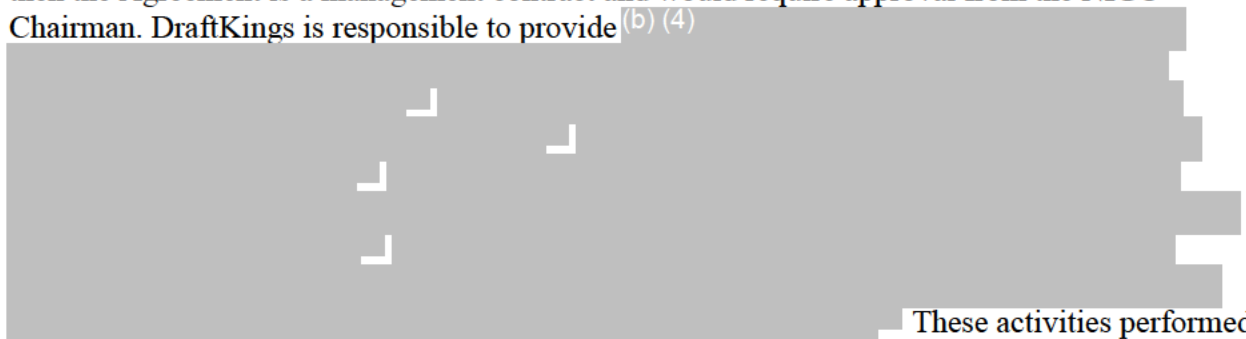
⁷ 25 C.F.R. § 502.19(b)(2).

the decision of their employer.”⁸ Whether a particular employee is managerial is not controlled by an employee’s actual job responsibilities, authority, and relationship to management.⁹ 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.¹⁰

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 Chairman’s approval.¹¹ Management contracts that have not been approved by the Chairman are void.

Management Analysis:

If gaming activity occurs on Indian lands pursuant to the Agreement and IGRA applies, then the Agreement is a management contract and would require approval from the NIGC Chairman. DraftKings is responsible to provide^{(b) (4)}



These activities performed by DraftKings are management activities. Therefore, it is my opinion that if gaming activity occurs on Indian lands pursuant to the Agreement, then the Agreement is a management contract under IGRA and must be submitted for review and approval by the NIGC Chair.

⁸ *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

⁹ See *Waldau v. M.S.P.B.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994).

¹⁰ *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.

¹¹ 25 U.S.C. § 2711.

¹² Strategic Gaming Agreement § 1(c).

¹³ *Id.* § 1(c)(ii).

¹⁴ *Id.* § 1(c)(iii).

¹⁵ *Id.* §§ 1(d), 4(a), 4(c).

¹⁶ *Id.* at §§ 4(a), 4(j).

Sole Proprietary Interest:

IGRA requires a tribe to possess “the sole proprietary interest and responsibility for the conduct of any gaming activity.”¹⁷ “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”¹⁸ An “owner” is “one who has the right to possess, use, and convey something.”¹⁹ “Appurtenant” means “belonging to; accessory or incident to”²⁰ Case law similarly defines “proprietary interest” as “one who has an interest in, control of, or present use of certain property.”²¹

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.²² 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 length of the agreement is (b) (4), which does not by itself weigh in favor of finding that the Agreement violates IGRA’s sole proprietary interest requirement.

Amount of Revenue Paid to a Third Party:

DraftKings will receive a substantial fee under the Agreement. (b) (4)
(b) (4) DraftKings will receive (b) (4) of the net
revenues from the online sportsbook. (b) (4)

(b) (4) DraftKings’ share will likely exceed the Nation’s share. The high fee weighs in favor of finding that the Agreement violates IGRA’s SPI requirement.

¹⁷ 25 U.S.C. § 2710(b)(2)(A); *see also* 25 C.F.R. § 522.4(b)(1).

¹⁸ BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See Evans v. United States*, 349 F.2d 653, 659 (5th Cir. 1965).

²² *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).

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

As stated above, the Nation can consult with DraftKings, but DraftKings retains decision-making authority for the sportsbook, marketing, and player incentives. DraftKings control over the online sportsbook weighs in favor of finding that the Agreement violates IGRA's SPI requirement.

Upon review of these three criteria – term, compensation, and control – it is my opinion that if gaming activity occurs on the Nation's Indian lands under the Agreement, then the Agreement violates 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.²³ 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),²⁴ please be advised that any withholding should be analyzed under the standard set forth in *Food Marketing Institute v. Argus Leader Media*.²⁵ Any claim of confidentiality should also be supported with "a statement or certification by an officer or authorized representative of the submitter."²⁶ 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.²⁷ 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.

Sincerely,



Michael Hoenig
General Counsel

cc: Jody Cummings, General Counsel, Mashantucket Pequot Tribal Nation

²³ See 25 C.F.R. § 517.7(c).

²⁴ 5 U.S.C. § 552(b)(4).

²⁵ 139 S. Ct. 2356 (2019).

²⁶ See 25 C.F.R. § 517.7(d).

²⁷ *Id.*