



August 22, 2022

**VIA EMAIL**

Grett L. Hurley, Staff Attorney  
Lummi Indian Business Council  
2665 Kwina Road  
Bellingham, WA 98226

**Re: Sports Betting Development and Consulting Services Agreement**

Dear Mr. Hurley:

This letter responds to your request of January 25, 2022, for the National Indian Gaming Commission's Office of General Counsel to review a contract between the Lummi Commercial Company (Tribe or Manager) and Betfred Sports (Washington) LLC (Betfred). Specifically, you have asked for my opinion whether the document is a management contract requiring the NIGC Chairman'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 Sports Betting Development and Consulting Services Agreement (Agreement) submitted on August 15, 2022, marked on the bottom left corner as 65342614.v1,<sup>1</sup> which was unexecuted but represented to be in substantially final form. My opinion is limited to this Agreement and does not extend to any documents referenced in the Agreement, should they exist or come into existence in the future. After careful review, it is my opinion that the Agreement is not a management contract and does not require the approval of the NIGC Chairman. It is also my opinion that the Agreement does not violate IGRA's sole proprietary interest requirement.

**Management Contracts**

The NIGC defines *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>2</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

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<sup>1</sup> Note that the electronic file is named "Silver Reef – Sports Betting Agreement – v14 – 08.15.22."

<sup>2</sup> 25 C.F.R. § 502.15.

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>3</sup>

While NIGC regulations do not define “management,” the NIGC has clarified that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.<sup>4</sup> A “primary management official” includes “any person who has the authority ... [t]o set up working policy for the gaming operation.”<sup>5</sup> Further, management employees are “those who formulate and effectuate management policies by expressing and making operative the decision of their employer.”<sup>6</sup> Whether a particular employee is managerial is not controlled by an employee’s actual job responsibilities, authority, and relationship to management.<sup>7</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>8</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 the meaning of IGRA and requires the Chair’s approval.<sup>9</sup> Management contracts that have not been approved by the Chair are void.<sup>10</sup>

## Management Analysis

The Agreement does not contain any provisions that permits Betfred to manage the Tribe’s gaming operation and provides that “Betfred shall not manage or direct or participate in the management or direction of the operation of the On-Site Operation and shall not act as an agent of Manager, enter any contract on behalf of Manager, or otherwise bind Manager in any way in regard to the management of the On-Site Operation.”<sup>11</sup> Betfred’s employees “shall not have authority to exercise any discretion with regards to the management of the On-Site Operation...”<sup>12</sup> And while Betfred may advise the Tribe on “employment matters related to the On-Site Operation and provide training” to employees of the Tribe, the Tribe “shall retain total discretion in regard to employment

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<sup>3</sup> 25 C.F.R. § 502.5.

<sup>4</sup> See NIGC Bulletin No. 94-5, “Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void).”

<sup>5</sup> 25 C.F.R. § 502.19(b)(2).

<sup>6</sup> *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

<sup>7</sup> See *Waldau v. M.S.P.B.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994).

<sup>8</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.

<sup>9</sup> 25 U.S.C. § 2711.

<sup>10</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>11</sup> Sports Betting Development and Consulting Services Agreement (Agreement), § 2.3(b).

<sup>12</sup> *Id.*, § 2.7.

matters.”<sup>13</sup> In addition, the agreement specifically provides that the Tribe “has sole discretion to accept, reject, and/or determine the course of implementation of any advice of or consultations by Betfred, including, without limitation, choosing what wagers to accept, setting the lines for such wagers, and processing the payment and payout of such wagers.”<sup>14</sup> In short, it is the Tribe that ultimately makes all decisions regarding the sports book.

The scope of the additional services is well defined. With regard to the On-Site Operation, Betfred will: provide computing equipment necessary for the On-Site Operation;<sup>15</sup> maintain the technology and systems used with the On-Site Operation in good working order, except for ordinary wear and tear; provide advice and consultation services in connection with the On-Site Operations and Sportsbook Space; provide all payment settlement obligations to the Customers of the On-Site Operation; and in the event that the payment settlement obligation to the Customers exceed amounts deposited into the account maintained by the Manager for the On-Site Operation, Betfred shall immediately contribute capital into such account(s) in an amount sufficient to ensure that all payment settlement obligations are timely paid, subject to reimbursement by the Manager.<sup>16</sup>

Betfred’s fee is a percentage of the sports book revenue, a factor that may indicate an incentive to exert management control, but other factors like the lack of explicit control by Betfred, the Tribe’s discretion to adopt recommendations, outweigh the consideration for the percentage fee and indicates that the Agreement does not allow Betfred to manage any or all of the Tribe’s gaming operations. 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.”<sup>17</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>18</sup> An “owner” is “one who has the right to possess, use, and convey something.”<sup>19</sup> “Appurtenant” means “belonging to; accessory or incident to ....”<sup>20</sup> Case law similarly defines “proprietary interest” as “one who has an interest in, control of, or present use of certain property.”<sup>21</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

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<sup>13</sup> *Id.*, § 2.7.

<sup>14</sup> *Id.*, § 2.3(b).

<sup>15</sup> *Id.*, § 2.2 (b).

<sup>16</sup> *Id.*, § 2.3(c).

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

<sup>18</sup> BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>19</sup> *Id.*

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

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

activity.<sup>22</sup> 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:*

Unless sooner terminated, the initial term of the Agreement is 5 years after the Commencement Date.<sup>23</sup> Either party may extend the term for one additional 5-year term, by providing notice, where the non-requesting party may accept or reject such extension.<sup>24</sup> If the non-requesting party fails to accept or reject such extension within 30 days, the term shall be deemed extended.<sup>25</sup>

Either party may terminate the Agreement by written mutual agreement.<sup>26</sup> The Agreement may also be terminated, under certain conditions, for cause, including: breach of any representation, warranties, or obligations of the Agreement that cannot be cured or cannot be cured within 30-days of notice; performs or fails to perform any action that results in the aggrieved party being advised by any Governmental Entity that the aggrieved party's relationship with that Governmental Entity has been or might be compromised by such act or failure to act; the operations in the Agreement are prohibited by any Governmental Entity; the other party is or becomes an Unsuitable Party; Government Approval is withdrawn; the appointment of a receiver; assignment for the benefit of creditors; filing of a voluntary petition in bankruptcy; the attachment, execution, or other judicial seizure of all or substantially all of the other party's assets; written admission of the other party's inability to pay its debts as they become due; and filing of any answer admitting or failing to contest a material allegation of a petition in any proceedings seeking reorganization, arrangement, composition, readjustment, liquidation, or dissolution or where any of these proceedings are not dismissed within 90 days of commencement.<sup>27</sup> Following termination, there is a 90-day wind-down period where Betfred shall cooperate in good faith to do whatever is reasonably necessary to transition the Services to another provider.<sup>28</sup>

#### *Amount of Revenue Paid to a Third Party:*

The Tribe provided the financial projections below for the On-Site Operation.<sup>29</sup> With regard to the Onsite Operation, the Agreement provides that Betfred will receive 40% of Net Revenue, as

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<sup>22</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>23</sup> Agreement, § 10.1(a).

<sup>24</sup> *Id.*, § 10.1(b)

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*, § 10.2.

<sup>27</sup> *Id.*, § 10.3.

<sup>28</sup> *Id.*, § 10.4.

<sup>29</sup> Note: These numbers differ slightly due to rounding.

the term is defined by the Agreement.<sup>30</sup> The Tribe’s calculations, which it indicated were calculated using IGRA’s definition of Net Revenue,<sup>31</sup> included the Scientific Games Setup Fee paid by Betfred and Betfred’s \$500,000 contribution to the buildout of the Sportsbook Space. These calculations showed that the Tribe will receive 72% of the Net Revenue.

	Year 1*	Year 2	Year 3	Year 4	Year 5	Total 5 Years
<b>Handle Retail</b>	\$ 17,140,000	\$ 26,090,000	\$ 47,090,000	\$ 47,790,000	\$ 60,640,000	\$ 198,750,000
<b>Hold Retail 8%</b>	\$ 1,371,200	\$ 2,087,200	\$ 3,767,200	\$ 3,823,200	\$ 4,851,200	\$ 15,900,000
<b>Tax</b>	\$ (40,000)	\$ (70,000)	\$ (120,000)	\$ (120,000)	\$ (150,000)	\$ (500,000)
<b>NGR</b>	\$ 1,331,200	\$ 2,017,200	\$ 3,647,200	\$ 3,703,200	\$ 4,701,200	\$ 15,400,000
<b>Operating Expenses</b>						
Staff Costs	\$ (300,000)	\$ (310,000)	\$ (310,000)	\$ (320,000)	\$ (320,000)	\$ (1,560,000)
SG Maintenance (\$32K per month x 12)	\$ (384,000)	\$ (384,000)	\$ (384,000)	\$ (384,000)	\$ (384,000)	\$ (1,920,000)
SG State Setup fee (Paid by Betfred)	\$ (1,430,000)	\$ -	\$ -	\$ -	\$ -	\$ (1,430,000)
Capex Fee (Paid by Betfred)	\$ (500,000)	\$ -	\$ -	\$ -	\$ -	\$ (500,000)
<b>Net Income</b>	\$ (1,282,800)	\$ 1,323,200	\$ 2,953,200	\$ 2,999,200	\$ 3,997,200	\$ 9,990,000
<b>Silver Reef Revenue Share (.6)</b>	\$ 388,320	\$ 793,920	\$ 1,771,920	\$ 1,799,520	\$ 2,398,320	\$ 7,152,000

<sup>30</sup> *Id.*, Article 1 - Definition of Betfred Revenue Share; Article 1 - Definition of Net Revenue - Net Revenue “means, with respect to the On-Site Operation, Gross Revenue , less (1) winnings paid on sports wagering, (2) Taxes arising from Gross Revenue, and (3) promotions, credits, bonuses, rebates and similar payments returned to any one or more Customers (not to exceed 15% of Net Revenue without considering this subsection (3) for purposes of that calculation), (4) Cost of Sales, and (5) SG Costs.”

<sup>31</sup> 25 U.S.C. § 2703(9); 25 C.F.R. § 502.16.

<b>Betfred</b>	\$	\$	\$	\$	\$	\$
Revenue Share (.4)	(1,930,000) <sup>32</sup>	529,280	1,181,280	1,199,680	1,598,880	2,579,120

While the \$1,430,000 Scientific Games Setup Fee and the \$500,000 contribution to the buildout of the Sportsbook Space are Betfred’s costs for doing business with the Tribe, for purposes of our analysis, neither should be incorporated into the net revenue calculation as they are not gaming revenue nor operating expenses of the gaming operation. We also removed the amounts allocated for Taxes. Once adjusted, it appears that Betfred’s Revenue Share is approximately 47% of IGRA’s definition of Net Revenue in year 1, 40% in year 2, 36% in year 3 and 4, and 35% in year 5.

Net Revenue as defined in the Agreement includes Taxes, which were included in the Tribe’s financial projections. and are deducted from revenue prior to calculating Betfred’s Revenue Share. Taxes include certain items that the Tribe believes may be considered operating expenses. As the Tribe did not break out Taxes, we revised the calculations to include Taxes. If Taxes are included as an operating expense, Betfred’s Revenue Share increases slightly to approximately 50% of IGRA’s definition of Net Revenue in year 1, 42% in year 2, 38% in year 3 and 4, and 37% in year 5.

Based on the above calculation, it appears that Betfred’s Revenue Share, in terms of IGRA’s definition of Net Revenue, is between 47-50% in year 1, 40-42% in year 2, 36-38% in year 3 and 4, and 35-37% in year 5. The fee for the On-Site Operation coupled with the short term does not raise sole proprietary interest concerns.

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

The Agreement does not contain any provision permitting Betfred to control the Tribe’s gaming operation. The Agreement expressly states that “Betfred shall not manage or direct or participate in the management or direction of the operation of the On-Site Operation”<sup>33</sup> and Betfred’s employees “shall not have authority to exercise any discretion with regards to the management of the On-Site Operation...”<sup>34</sup> Therefore, it is my opinion that the Agreement, in its present form, does not grant a controlling interest in the Tribe’s gaming facility.

It is my understanding that the draft of the Agreement is represented to be in substantially final form, and if the Agreement changes in any material way prior to execution or is inconsistent with assumptions made herein, this opinion shall not apply. Further, this opinion is limited to the Agreement. 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

<sup>32</sup> Note: This number, \$1,930,000, is produced when you add the \$1430,000 SG Setup fee paid by Betfred and the \$500,000 that Betfred is contributing to the buildout. Once these numbers are backed out of the calculation, Betfred will receive \$258,880 in year 1, which is a partial year.

<sup>33</sup> *Agreement*, § 2.3(b).

<sup>34</sup> *Id.*, § 2.7.

the grounds for the objection and highlighting the information that you believe should be withheld.<sup>35</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>36</sup> please be advised that any withholding should be analyzed under the standard set forth in *Food Marketing Institute v. Argus Leader Media*.<sup>37</sup> Any claim of confidentiality should also be supported with “a statement or certification by an officer or authorized representative of the submitter.”<sup>38</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>39</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 Senior Attorney Esther Dittler at (202) 853-7511 or by email at [esther.dittler@nigc.gov](mailto:esther.dittler@nigc.gov).

Sincerely,

A handwritten signature in blue ink that reads "Michael Hoenig". The signature is written in a cursive style with a large, sweeping flourish at the end.

Michael Hoenig  
General Counsel

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<sup>35</sup> 25 C.F.R. § 517.7(c).

<sup>36</sup> 5 U.S.C. § 552(b)(4).

<sup>37</sup> 139 S. Ct. 2356 (2019).

<sup>38</sup> 25 C.F.R. § 517.7(d).

<sup>39</sup> *Id.*