

Exhibit "A"



July 22, 2022

VIA EMAIL

Mark Fulton, President
Cherokee Nation Entertainment, LLC
777 West Cherokee Street
Catoosa, Oklahoma 74915

Re: Review of the Sports Book Agreement between the Cherokee Nation Entertainment, LLC and Crown OK Gaming, LLC

Dear President Fulton:

This letter responds to the December 13, 2021, request on behalf of Cherokee Nation Entertainment, LLC the economic development agency of the Cherokee Nation of Oklahoma (CNE) for the National Indian Gaming Commission Office of General Counsel to review the Sports Book Agreement between Cherokee Nation Entertainment, LLC and Crown OK Gaming, LLC (Crown OK). Specifically, you have asked for my opinion on whether the Sports Book Agreement is a management contract requiring the NIGC Chairman's approval under the Indian Gaming Regulatory Act. You also asked for an opinion whether the agreement violates IGRA's requirement that a tribe have the sole proprietary interest in its gaming operation.

In my review, I considered the following document submitted on behalf of Cherokee Nation Entertainment, LLC, which was unexecuted, but was represented to be in substantially final form:

- Retail Sportsbook Agreement, marked as 6-29-22 between Crown OK Gaming, LLC and Cherokee Nation Entertainment, LLC.

Sports Book Agreement:

The Sports Book Agreement will govern on-reservation sports wagering at retail sportsbooks to be located at three Cherokee Nation gaming operations in Oklahoma. Cherokee Nation Entertainment, LLC will operate the retail sportsbooks at the three operations.

The term of the Sports Book Agreement is (b) (4).¹ Crown OK Gaming, LLC will receive (b) (4) of the revenue remaining after (b) (4).

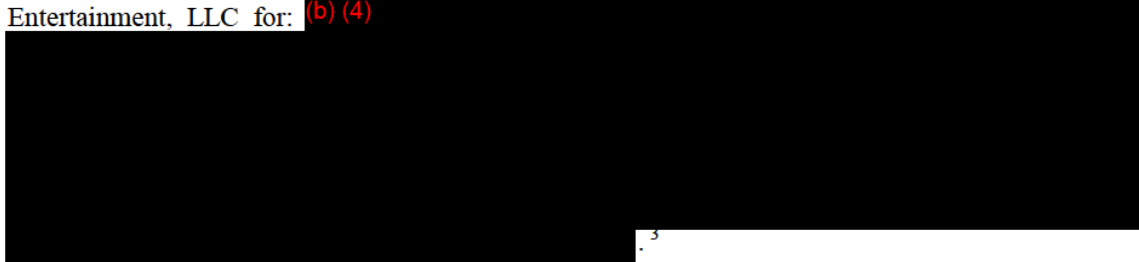
¹ Sport Book Agreement § 4(a).

² Sports Book Agreement Exhibit A, Defined Terms.

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Crown OK Gaming, LLC will support Retail Sportsbook Betting Systems at Cherokee Nation Entertainment, LLC's direction and will provide advisory services to Cherokee Nation Entertainment, LLC for: (b) (4)



Cherokee Nation Entertainment, LLC is responsible for all day-to-day operations of the Sportsbook including (b) (4)

(b) (4)³ Cherokee Nation Entertainment, LLC maintains the right to set and adjust wagering lines, select which games to offer for wagering purposes, and decide when to start and stop accepting wagers. The scope of services provided by Crown OK Gaming, LLC is well-defined. Cherokee Nation Entertainment, LLC has the discretion to accept or reject Crown OK Gaming, LLC's advice and support, much of which is offered only at the direct request of Cherokee Nation Entertainment, LLC. The Agreement includes the sportsbook-specific prohibition on management, and the Agreement states that Cherokee Nation Entertainment, LLC has the ultimate responsibility for the retail sportsbook.⁵

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."⁶ 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)."⁷

While NIGC regulations do not define "management," the Agency has clarified that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.⁸ A "primary management official" includes "any person who has the authority ... [t]o set up working

³ Sports Book Agreement § 7..

⁴ Sports Book Agreement § 7(a).

⁵ *Id.* § 10.

⁶ 25 C.F.R. § 502.15.

⁷ 25 C.F.R § 502.5.

⁸ See NIGC Bulletin NO. 94-5, "Approved Management Contracts v. Consulting Agreements (unapproved Management Contracts are Void)."

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policy for the gaming operation.”⁹ Further, management employees are “those who formulate and effectuate management policies by expressing and making operative the decision of their employer.”¹⁰ Whether a particular employee is managerial is not controlled by an employee’s actual job responsibilities, authority, and relationship to management.¹¹ 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.¹²

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.¹³ Management contracts that have not been approved by the Chair are void.¹⁴

Management Analysis:

The Sports Book Agreement does not permit any management of any gaming activity by Crown OK Gaming, LLC. The scope of services provided by Crown OK Gaming, LLC is well-defined. Cherokee Nation Entertainment, LLC has the discretion to accept or reject Crown OK Gaming LLC’s advice and support and retains the authority to operate the retail sportsbook. The Agreement includes the sportsbook-specific prohibition on management as discussed above, and the Agreement states that Cherokee Nation Entertainment, LLC has the ultimate responsibility for the retail sportsbook. Accordingly, the Agreement does not raise any management concerns.¹⁵ NIGC regulations also require that all tribal gaming ordinances include a provision to this effect.¹⁶

Sole Proprietary Interest:

IGRA requires that a tribe have the sole proprietary interest in, and responsibility for, the conduct of any gaming activity.¹⁷ Under this section of the Act, if any entity other than a tribe

⁹ 25 C.F.R. § 502.19(b)(2).

¹⁰ *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

¹¹ See *Waldau v. M.S.P.B.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994).

¹² *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.

¹³ 25 U.S.C. § 2711.

¹⁴ 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).

¹⁵ See NIGC Bulletin 94-5.

¹⁶ See 25 C.F.R. § 522.4(b)(1).

¹⁷ 25 U.S.C. § 2710(b)(2)(A); see also 25 C.F.R. §§ 522.4(b)(1), 522.6(c).

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possesses a proprietary interest in the gaming activity, gaming may not take place.¹⁸ In reviewing sole proprietary interest, the OGC typically 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.¹⁹ Final agency actions by the NIGC and OGC legal opinions have found an improper proprietary interest in agreements under which a third party receives a high level of compensation for a long period of time and possesses some aspect of control.²⁰

Sole Proprietary Interest Analysis:

The term of the Sportsbook Agreement is (b) (4).²¹
The term by itself does not raise a proprietary interest concern.

Cherokee Nation Entertainment, LLC and Crown OK Gaming, LLC have worked diligently to ensure that there is no opportunity for Crown OK Gaming, LLC to control the Retail Sportsbook. The Sports Book Agreement does not grant any control to Crown OK Gaming, LLC over the Cherokee Nation Entertainment, LLC Retail Sportsbooks. Cherokee Nation Entertainment, LLC retains control over the Retail Sports Books and will have the sole authority to determine the lines and when to accept and stop bets. Accordingly, the Agreement does not pose any issues of control.

Crown OK Gaming, LLC will receive (b) (4) of the revenues remaining from the Retail Sportsbooks after (b) (4).²² The definition of (b) (4).

Overall, it is my opinion that the Agreement does not grant Crown OK Gaming, LLC a proprietary interest in the Cherokee Nation Entertainment, LLC Retail Sports Books. The Agreement does not grant Crown OK Gaming, LLC the ability to control the sportsbook, and once the term expires, the parties can renegotiate their relationship. Cherokee Nation Entertainment, LLC is aware of the financial projections for its Retail Sports Books and has made the decision that this is in the best interests of the Gaming operation, and by extension, the Tribe. Unlike a situation where a third party is receiving a share of net gaming revenue and providing little or no ongoing services to the Tribe, here Crown OK Gaming, LLC will provide on-going Sportsbook benefits and services to the Cherokee Nation Gaming Operations throughout the term of the Agreement. Therefore, despite giving (b) (4) of the remaining revenues to Crown OK Gaming, LLC, in this instance, the fee alone does not grant a proprietary interest in the Tribe's gaming operations.

¹⁸ *Id.*

¹⁹ *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).

²⁰ *City of Duluth*, 830 F. Supp.2d at 723-24.

²¹ Sports Book Agreement § 4(a).

²² Sports Book Agreement § 11.

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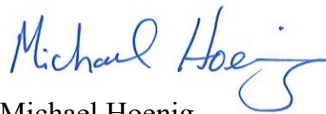
It is important to note that the Office of General Counsel reviews each agreement on its own terms. We did so here with the Sports Book Agreement. This opinion does not mean that every agreement with a similar fee or term, including future agreement proposed by Cherokee Nation Entertainment, LLC, will necessarily result in a favorable declination letter opinion.

It is my understanding that the draft Sports Book Agreement is represented to be in substantially final form, if the Agreement changes in any material way prior to execution or is inconsistent with assumptions made herein, this opinion shall not apply. This opinion is limited to the Sports Book Agreement 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.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), 5 U.S.C. § 552(b)(4), please be advised that any withholding should be analyzed under the standard set forth in *Food Marketing Institute v. Argus Leader Media*.²⁴ Any claim of confidentiality should also be supported with "a statement or certification by an officer or authorized representative of the submitter."²⁵ 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. *Id.*

If you have any questions, please contact NIGC Staff Attorney Heather McMillan Nakai at (202) 527-5577.

Sincerely,



Michael Hoenig
General Counsel

²³ 25 C.F.R. § 517.7(c).

²⁴ 139 S. Ct. 2356 (2019).

²⁵ 25 C.F.R. § 517.7(d).