



BULLETIN

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Subject: IGRA and Sports Book Operations

The purpose of this bulletin is to provide guidance for tribes considering the operation of any sports books on Indian lands. Before conducting any type of Class III gaming on Indian lands, a tribe must have a compact approved by the Department of the Interior. Sports betting is defined as Class III gaming,¹ so each tribe should review its compact to determine whether sports betting is allowed. If a tribe does not have an approved compact that allows for sports betting, the tribe and respective state must adopt or amend the compact to include sports betting on Indian lands.

Options for Sports Books:

Once a tribe ensures that sports betting is permitted in its compact, that tribe should then consider how it wants to operate its sports book. There are four options or models for tribes to consider: a sports book wholly operated by the tribe; a tribally-owned sports book with data from third parties; a managed sports book, or an individually-owned sports book.

The first option a tribe may consider is to own and operate a sports book entirely on its own. Under this model, a tribe would take bets, pay the winners, and collect from the losers. The tribe would also administer the technical aspects of the book, such as deciding on which games to take bets, determining the odds for each wager, deciding when to adjust the odds, and determining what bets to take and when to stop taking them. Think of this option as a closed-loop sports book where the tribe makes all decisions and generates all information required for the sports book in-house.

The second option is for a tribe to own its sports book, but enter into a consulting or vendor agreement for information and recommendations on setting odds and taking bets. Given the infancy of sports books on Indian lands, this option is a popular model for tribes as they establish sports books and a viable option for those that want to maintain control and management over their sports books. There is, however, a danger that this type of arrangement can veer into management or violate a tribe's sole proprietary interest. As discussed below,

¹ 25 U.S.C. §2703(8); 25 C.F.R. § 502.4(c).

IGRA and NIGC regulations require management agreements to be submitted to the NIGC Chair for approval. An unapproved management agreement is void,² and managing without an approved contract is a substantial violation of IGRA and may result in a civil fine assessment or closure order.³ Additionally, tribes are required to maintain the sole proprietary interest in their gaming operation.⁴ Failure to do so may also result in a civil fine assessment.⁵

A third option is for a tribe to hire an outside company to manage and operate its sports book. Under this option, the tribe maintains ownership and ultimate authority over its gaming facility, but allows an outside company to manage the day-to-day business of the sports book under the terms of a management contract. Pursuant to IGRA and NIGC regulations, a management contract must be submitted to the NIGC for the Chair's review and approval.⁶ As part of that review, any person or entity with management responsibility or a direct or indirect financial interest is subject to a background investigation and must be found suitable by the NIGC Chair.⁷ The maximum fee that can be paid to the management company is 30% of the net gaming revenue, though that fee may be as high as 40% if the Chair finds the higher fee is justified.⁸ The maximum term for the management agreement is five years, but may be extended to as long as seven if the Chair finds the longer term is justified.⁹ A Chair may find that a higher fee or longer term is justified if the capital investments and income projections require the additional fee or term.¹⁰ Finally, the National Environmental Policy Act¹¹ may apply, in which case the preparation of an environmental assessment or environmental impact statement may be necessary. The NIGC has adopted a categorical exclusion for certain management agreements,¹² but the categorical exclusion may not be applicable to every project. Given all of these requirements, the management contract review and approval process may take months, depending on the complexity of the agreement itself, the parties' engagement in the process, and the workload of the NIGC.

The fourth option is for the tribe to allow a non-tribal entity to operate an individually-owned sports book on the tribe's Indian lands. Under this option, the tribe does not play any part in the management or operation of the sports book, but maintains a regulatory role. Individually owned gaming is unlike tribally-owned and operated gaming in a number of respects. Primarily, the laws and regulations of the surrounding state have a much larger role in this type of gaming. The tribe must apply licensing standards that are at least as restrictive as those imposed by state law,¹³ the tribe cannot license any individual that would not be eligible for a state license,¹⁴ and

² 25 C.F.R. § 533.7.

³ 25 U.S.C. § 2713; 25 C.F.R. §§ 573.4(a)(7), 25 C.F.R. part 575.

⁴ 25 U.S.C. § 2710(b)(2)(a).

⁵ 25 U.S.C. § 2713; 25 C.F.R. part 575.

⁶ 25 U.S.C. § 2711(a)(1).

⁷ 25 U.S.C. § 2711(e)(1); 25 C.F.R. § 533.6(b), (c).

⁸ 25 U.S.C. § 2711(c).

⁹ 25 U.S.C. § 2711(b)(5).

¹⁰ 25 U.S.C. § 2711(b)(5), 2711(c)(2).

¹¹ 42 U.S.C. § 4321 *et seq.*

¹² *See* Protocol for Categorical Exclusions Supplementing the Council on Environmental Quality Regulations Implementing the Procedural Provisions of the National Environmental Policy Act for Certain National Indian Gaming Commission Actions and Activities, 82 Fed. Reg. 35,542 (July 31, 2017).

¹³ 25 U.S.C. § 2710(b)(4); 25 C.F.R. § 522.10(e).

¹⁴ 25 C.F.R. § 522.10(f).

state law standards apply with respect to purpose, entity, pot limits, and hours of operation.¹⁵ In addition to those restrictions, the operator of an individually owned gaming operation must pay 60% of the net revenues to the licensing tribe, as well as fees to the NIGC.¹⁶ IGRA and NIGC regulations also require that individually owned gaming be permitted by the licensing tribe's gaming ordinance.¹⁷

Sports betting is a data heavy industry that requires constant processing of a significant amount of sports related statistics. As discussed above, a tribe may consider hiring a third-party vendor to provide such services. The NIGC encourages tribes considering entering into a vendor or consulting agreement to send proposed contracts to the Office of General Counsel for review.

The Office of General Counsel regularly reviews proposed agreements, such as financing documents, consulting contracts, and vendor agreements, to provide a non-binding opinion whether an agreement implicates management or violates IGRA's sole proprietary interest requirement. These opinion letters, known as "declination letters," are a valuable compliance tool for tribes that are considering entering in to a contract with a third party to receive sports book related services.¹⁸ The Office of General Counsel has reviewed several sports book agreements. Below are some of the unique aspects of a sports book operation on Indian lands that tribes should be aware of and consider.

Management Contracts:

NIGC regulations define the term "management contract,"¹⁹ and NIGC Bulletin 94-5 addresses some characteristics of a management contract.²⁰ Additionally, the Office of General Counsel has also issued declination letters providing further insight into the characteristics of a management contract.²¹ Generally, if a contract requires or permits the performance of any management activity with respect to all or any part of a gaming operation, the contract is a

¹⁵ 25 C.F.R. § 522.10(f).

¹⁶ 25 U.S.C. § 2710(b)(4)(B)(i)(III-IV); 25 C.F.R. § 522.10(c), (d).

¹⁷ 25 U.S.C. § 2710(b)(4); 25 C.F.R. § 522.10.

¹⁸ The Office of General Counsel provides advisory opinions on certain discrete legal questions from the gaming industry or other interested parties. The overwhelming majority of these requests seek declination letters from the General Counsel. As a general matter, legal opinions are issued by the General Counsel as a courtesy, and neither IGRA nor NIGC regulations require the General Counsel to issue a legal opinion on any matter. Further, a legal opinion provided by the General Counsel is not agency action and the issuance of a legal opinion is a voluntary process, both for the party making the request and the Office of General Counsel. Documents submitted to the Office of General Counsel for review should be submitted *prior* to their execution, as the General Counsel is not inclined to provide a legal opinion on executed documents. Executed agreements that may violate IGRA will be referred to the NIGC Compliance Division. For further information about requesting a legal opinion from the Office of General Counsel, see "Helpful Hints for Submitting Requests for a Legal Opinion to the NIGC Office of General Counsel (Dec. 2013) available at <https://www.nigc.gov/images/uploads/game-opinions/SubmittingRequestforLegalOpinionDec12013.pdf>.

¹⁹ See 25 C.F.R. § 502.15; see also 25 C.F.R. § 502.5 (definition of "collateral agreement").

²⁰ See NIGC Bulletin No. 94-5, "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)," (Oct. 14, 1994), available at <https://www.nigc.gov/images/uploads/bulletins/1994-5mgmtvconsult.pdf>.

²¹ See generally NIGC Office of General Counsel Declination Letters available at <https://www.nigc.gov/general-counsel/management-review-letters>.

management contract within the meaning of IGRA and requires the Chair's approval.²² An unapproved management contract is void.²³

Management Analysis Applied to Sports Betting Agreements:

If a third party has any explicit or implicit authority to manage all or any part of a gaming operation, the agreement is likely a management contract. The same reasoning applies to sports book agreements. The Office of General Counsel reviews sports book agreements to ensure that the scope of services to be provided under the contract is well defined, compensation is tied to specific work performed, and the third party does not have the ability to manage any aspect of the sports book.

For example, in the second model discussed above, a vendor may provide sports betting data and services to a tribe so the tribe can assess its risk and set the betting lines on sporting events accordingly. The sports betting data supplied by the third-party vendor includes, but is not limited to, setting and adjusting odds, deciding which sporting events to offer, deciding when to suspend betting, alerts on player betting limits, and analysis on betting patterns. To prevent management, the *tribe* must make the final determination as to when and how to use or not use the sports betting data. The tribe must also be able to alter the line or suspend betting for whatever reason, including instances where the tribe disagrees with the third party's data. Essentially, the third party should only *provide* information to the tribe and should not have any control over how the tribe uses that information. The tribe must exercise complete control over the use of the sports betting data and always be the final decision maker as to its use.

Sole Proprietary Interest:

IGRA requires a tribe to possess "the sole proprietary interest and responsibility for the conduct of any gaming activity."²⁴ "Proprietary interest" is not defined in IGRA or the NIGC's regulations. Black's Law Dictionary defines a "proprietary interest" as an "interest held by a property owner together with all appurtenant rights..."²⁵ An "owner" is "one who has the right to possess, use, and convey something."²⁶ "Appurtenant" means "belonging to; accessory or incident to"²⁷ Case law similarly defines "proprietary interest" as "one who has an interest in, control of, or present use of certain property."²⁸

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

²² 25 U.S.C. § 2711.

²³ 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).

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

²⁵ BLACK'S LAW DICTIONARY (10th ed. 2014).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See Evans v. United States*, 349 F.2d 653, 659 (5th Cir. 1965).

activity.²⁹ 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 Applied to Sports Betting Agreements:

The terms for sports book agreements vary depending the unique needs of the parties. The Office of General Counsel has issued declination letters for sports book agreements with terms ranging from less than 5 years to more than 15 years. The longer the term, the higher the risk for a violation of the sole proprietary interest requirement. However, sometimes longer terms are balanced by other contract terms. For example, a longer term, when paired with a zone of exclusivity, or high initial capital costs, may not violate IGRA's sole proprietary interest requirement.

Generally, tribes pay a percentage of the sports book revenues to third-party vendors in exchange for sports book data and services. The NIGC has seen a variety of fee structures. But, in general, the higher the fee, the higher the risk for a proprietary interest. The NIGC understands that sports books are relatively new amenities to tribal gaming operations and there can be a premium to be first to market. The NIGC also understands that there can be an economic benefit to locking in rates in case rates fluctuate. Also, the NIGC understands that although a fee may be based on a percentage of the sports book revenues, a tribe may receive benefits that extend beyond the sports book. For example, a tribe may receive incremental revenue in other areas of its gaming floor by virtue of the operation of a sports book, and/or increased marketing exposure by virtue of a tribe's relationship with a well-known third-party vendor, as well as access to patron information. The NIGC recommends that tribes perform their due diligence to ensure a third party's fee is reasonable compared to competitors in the industry.

The operation of a sports book may or may not make sense for tribes depending on their compact, the market, and other considerations. However, if a tribe decides to open a sports book and purchase data from a third party, it is important that the third-party vendor does not have explicit or implicit control over the sports betting operation. Instead, sports book agreements should include express provisions that only the tribe may accept or reject the sports book data and recommendations from the third party. The agreements should also prohibit third parties from controlling the sports book or acting on behalf of the tribe.

The Office of General Counsel reviews each agreement on its own terms. Even though the Office of General Counsel has issued declination letters with the contract terms and conditions discussed above, this does not mean that the Office of General Counsel will reach the same conclusion for every agreement with similar terms.

²⁹ 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).

Freedom of Information Act:

All advisory opinions generated by the Office of General Counsel, including advisory opinions about sports book agreements, are releasable to the public after a review has been conducted for material exemptions pursuant to Freedom of Information Act.³⁰ The Office of General Counsel provides declination letters as a courtesy to the tribal gaming industry. Declination letters are not required by IGRA. The Office of General Counsel provides declination letters to accomplish two primary functions: (1) to assist the parties involved in the agreements, and (2) to inform the tribal gaming industry at-large. Therefore, when parties to the agreements request redactions to a declination letter that, in effect, result in an opinion that provides little to no additional guidance to the tribal gaming industry, the declination process is undermined. Accordingly, submitters should keep these concepts in mind when submitting documents for declination review. If a declination letter is issued, submitters should only propose redactions when necessary to protect commercial and/or proprietary information.

If you have any questions about the declination letter process, please contact the Office of General Counsel at 202-632-7003.

³⁰ 5 U.S.C. § 552. The NIGC posts the General Counsel's advisory opinions to the NIGC's website at <https://www.nigc.gov/general-counsel/legal-opinions>.