March 16, 2021

VIA EMAIL

Ann Hines Davis
Law Office of Ann Hines Davis, PLLC
95 Depot Street
Waynesville, North Carolina 28786

Re: Review of Eastern Band of Cherokee Indians Consulting Agreements with American Wagering, Inc.: Harrah's Cherokee Casino and Harrah's Cherokee Valley River Casino

Dear Ms. Davis:

This letter responds to your January 28, 2021 request, on behalf of the Eastern Band of Cherokee Indians, for the National Indian Gaming Commission, Office of the General Counsel, to review two essentially identical proposed Consulting Agreements between the Tribe's Tribal Casino Gaming Enterprise and American Wagering Inc. ("Consultant"); one for the Harrah's Cherokee Casino Resort, and the other for Harrah's Cherokee Valley River Casino & Hotel. The agreements are undated and do not contain identifying draft numbers, but were submitted on January 28, 2021. For the purposes of this letter, the term "Tribe" is used interchangeably to refer to the Tribe and/or the Casino. The draft Consulting Agreements stipulate that the Consultant will provide each casino consulting services and other certain tasks to help the Tribe develop and operate land-based sports betting facilities ("Sports Betting Facility") located and operated within the Casinos.

You have requested my opinion whether the Consulting Agreements constitute a management contract requiring the NIGC Chairman's approval under the Indian Gaming Regulatory Act. Additionally, you have requested my opinion whether the agreements violate IGRA's requirement that a tribe possess and maintain the sole proprietary interest in its gaming operation. After careful review, it is my opinion that the Consulting Agreements are not management contracts and do not require the approval of the NIGC Chairman. It is also my opinion that the Consulting Agreements do 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."[1] *Collateral agreement* is defined as "any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or 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)."[2]

While NIGC regulations do not define "management," the NIGC has clarified that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.[3] A "primary management official" includes "any person who has the authority . . . [t]o set up working policy for the gaming operation."[4] Further, management employees are "those who formulate and effectuate management policies by expressing and making operative the decision of their employer."[5] Whether a particular employee is "managerial" is not controlled by an employee's actual job responsibilities, authority, and relationship to management.[6] 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.[7]

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.[8] Management contracts that have not been approved by the Chair are void.[9]

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[1] 25 C.F.R. § 502.15.
[2] 25 C.F.R. § 502.5.
[3] *See* NIGC Bulletin No. 94-5, "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)."
[4] 25 C.F.R. § 502.19(b)(2).
[5] *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).
[6] *See Waldau v. M.S.P.B.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994).
[7] *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 the consultant is simply executing management decisions through a tribal management official.
[8] 25 U.S.C. § 2711.
[9] 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).

Management Analysis

The Consulting Agreements specifically prohibit the Consultant from making any management decisions at either of the Tribe's Sports Betting Facility(s) or at the Casino, and state that the Consultant is being engaged "solely in a consulting and advisory capacity."[10] More specifically, the Agreements state that none of the provisions permit or authorize, nor should they be construed to permit or authorize, Consultant to:

> (i) operate or manage any gaming conducted at the Casino or the Sports Betting Facility or to establish the costs of operating or administering the same; (ii) hire, terminate or determine wages, salaries or benefits for any employee of . . . the Sports Betting Facility or the Casino; (iii) establish policies and procedures for the operation or management of the Sports Betting Facility or the Casino; (iv) direct or supervise . . . any other person employed to work at or about the Sports Betting Facility or Casino regarding the operation or management of the Sports Betting Facility; (v) bind [Casino] or to act as an agent of [Casino] with regard to the operation and management of the Sports Betting Facility; (vi) plan, organize, direct, coordinate or control any part of any gaming operation within the meaning of the Indian Gaming Regulatory Act, the regulations promulgated thereunder, or case law construing the provisions thereof ("IGRA"); (vii) undertake any other activity which constitutes "management" of gaming operations; or (viii) take any other action that could reasonably be construed as managing or operating the Sports Betting Facility or Casino or that would otherwise violate the purpose and intent of this Agreement.[11]

In addition, the Consulting Agreement expressly states that the Tribe "shall have *complete and absolute discretion* with respect to the implementation of Consultant's advice; provided, however, that Consultant shall not be liable for [Casino]'s implementation decisions that differ from Consultant's recommendations . . .."[12] (Emphasis added). Further, the Consulting Agreement states that the Casino "shall have sole responsibility over the gaming operations of the Sports Betting Facility, *including, the ultimate authority to set the lines for each game being wagered on* and shall have manual and/or electronic access to do so."[13] (Emphasis added). In short, while the Tribe will have access to Consultant's full sports betting menu,[14] it is the Tribe that ultimately decides which games it will or will not accept wagers on, and/or whether or not it wants to change the lines on a particular game, regardless of Consultant's recommendations.

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[10] *See* Consulting Agreement § 2(b).

[11] *Id.*

[12] *Id.* at § 2(a).

[13] *Id.* at § 2(f).

[14] *See* Exhibit A to Consulting Agreement.

The Consulting Agreements require that all Sports Betting Facility employees will be hired by the Tribe,[15] including the Customer Contract Manager, who will be the primary point of contact between the Casino and Consultant.[16]

Because the Consulting Agreements do not grant Consultant any management authority, it is my opinion that they are not management agreements requiring approval of the NIGC Chairman.

Sole Proprietary Interest

IGRA also requires a tribe to possess "the sole proprietary interest [in] and responsibility for the conduct of any gaming activity."[17] To determine whether an agreement violates the sole proprietary interest requirement, the NIGC typically analyzes three elements: (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.[18] 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.

Term of the Relationship

The term of the Consulting Agreements is fixed. The initial term commences on the first day of the first month that the Sports Betting Facilities commence operations as active sports betting businesses, and will expire (b) (4) .[19] Thereafter, the Agreements shall automatically renew (b) (4) pursuant to the same terms and conditions as set forth in the Agreement, unless a party provides written notice of non-renewal at least (b) (4) prior to the expiration of the initial term or the renewal term.[20] Thus, though the term is lengthy, the Tribe is only contractually obligated (b) (4) . Furthermore, the lengthy term benefits the Tribe. As explained by the Tribe's counsel, it is cumbersome to switch companies in the sport betting industry and William Hill is the industry and gave the Tribe what it considers to be a very good deal.

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[15] *See* Exhibit B to Consulting Agreement.
[16] *See* Consulting Agreement § 2(c).
[17] 25 U.S.C. § 2710(b)(2)(A); *see also*, 25 C.F.R. § 522.4(b)(1).
[18] *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); *Bettor Racing v. National Indian Gaming Com'n,* 812 F.3d 648, 652 (8th Cir. 2016).
[19] (b) (4)

Amount of Revenue Paid to a Third Party

The Consulting Agreements compensate Consultant at (b) of all "Net Revenue" from the Sports Betting Facility, (b) (4) [21] "Operating Expenses" is defined as:

(b) (4)

The Consulting Agreements make clear that (b) (4) [3]

In addition, the Consulting Agreements provide for the performance of finite tasks by Consultant. Specifically, Consultant agrees to provide the following to the Tribe: (b) (4) [24]

[21] (b) (4)

The (b) (4) of net revenue consultation fee is consistent with other sports betting consulting fees we see, and the parties have negotiated an arms-length contract. Notably, the net revenue definition includes (b) (4) . Additionally, sports books are relatively new additions to tribal gaming, and the Tribe's facilities will be the first Indian gaming casinos to offer sports book betting in its region. There is value in being first to market for sports book betting. While the (b) (4) is lengthy, it is not in and of itself a concern. For these reasons, and given the list of deliverables, the consulting fee does not raise sole proprietary interest concerns.

Third Party's Right to Exercise Control over Gaming Activity

The Consulting Agreements do not transfer any exercise of control from the Tribe to Consultant. Specifically, the Tribe retains control of the gaming operations, and the Tribe "has, and shall continue to have, the sole proprietary interest in, and ultimate responsibility for, the Sports Betting Facility and the gaming operations conducted by [the Tribe]."[25] In addition, the Consulting Agreements state that "[n]othing in this Agreement is intended to grant Consultant any proprietary interest in, or responsibility for (i) the Sports Betting Facility or the Casino, [or] (ii) the gaming operations conducted by [the Tribe],…."[26] As set forth above, the Consulting Agreements specifically limit Consultant's role to consulting and advising and list several activities that Consultant may not perform, including hiring and determining wages of any employees of the Sports Betting Facility or the Casino.

Finally, the Consulting Agreements make clear that Consultant is not a joint venturer with, or servant, employee, partner or agent of, the Tribe, and that Consultant does not have any "authority to make commitments of any form or enter into agreements on behalf of the Tribe."[27] Therefore, it is my opinion that the Consulting Agreements, in their present form, do not grant a controlling interest in the Tribe's Casino or Sports Betting Facilities.

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

Conclusion

It is my opinion that the Consulting Agreements are not management agreements requiring the approval of the NIGC Chairman. Additionally, the Consulting Agreements, on their face, do not violate IGRA's requirement that the Tribe maintain the sole proprietary interest in its gaming operation.

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[25] Consulting Agreement § 4(a).
[26] *Id.* at § 4(b).
[27] *Id.* at § 11(f).

It is my understanding that the Consulting Agreements are represented to be in substantially final form with respect to terms affecting this opinion. If such terms change in any material way prior to closing, or are inconsistent with assumptions made herein, this opinion shall not apply. Further, this opinion is limited to the Consulting Agreements. This opinion does not include or extend to any other agreements or documents 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.[28] If you object on the grounds that the information qualifies as confidential commercial information subject to withholding under Exemption 4 of the Freedom of Information Act,[29] please be advised that any withholding should be analyzed under the standard set forth in *Food Marketing Institute v. Argus Leader Media*.[30] Any claim of confidentiality should also be supported with "a statement or certification by an officer or authorized representative of the submitter."[31] Please submit any written objection to FOIASubmitterReply@nigc.gov within thirty (30) calendar days of the date of this letter. After this time elapses, the letter will be made public and objections will no longer be considered.[32] 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 http://www.justice.gov/oip/doj-guide-freedom-information-act-0.

If you have any questions, please contact Maria Getoff, Senior Attorney at (703) 338-7748.

Sincerely,

Michael Hoenig
General Counsel

[28] 25 C.F.R. § 517.7(c).
[29] 5 U.S.C. § 552(b)(4).
[30] 139 S.Ct.2356 (2019).
[31] 25 C.F.R. § 517.7(d).
[32] *Id.*