July 18, 2019

VIA FIRST CLASS MAIL AND EMAIL

Lee Bergen
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Re: Sports Book Service Agreement between Laguna Development Corporation and National Sports Book Management, Ltd.

Dear Mr. Bergen:

This letter responds to your June 6, 2019 request, on behalf of the Laguna Development Corporation ("LDC") and the Pueblo of Laguna ("Pueblo"), for the National Indian Gaming Commission's Office of the General Counsel to review an agreement between Laguna Development Corporation and National Sports Book Management, Ltd ("NSBM"). Specifically, you have asked for my opinion whether the agreement is a management contract requiring the NIGC Chair's approval under the Indian Gaming Regulatory Act. You also asked for my opinion whether the agreement violates IGRA's requirement that the Pueblo have the sole proprietary interest in its gaming activity.

In my review, I considered the Sports Book Service Agreement and the LDC Addendum (collectively "Agreements") between the LDC and NSBM, which are unexecuted but represented to be in substantially final form. The documents contemplate an agreement between the LDC and NSBM in which NSBM will provide an electronic sports book system, consulting services and certain tasks to help the Pueblo develop and operate a sports-betting facility located and operated within the Pueblo's gaming operations on Indian lands. After careful review, it is my opinion that the Agreements are not management contracts and do not require approval of the NIGC Chair. It is also my opinion that the Agreements do not violate IGRA's sole proprietary interest requirement.

Management Contracts

The NIGC has defined *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] Though NIGC regulations do not define *management*, the Agency has explained that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling a gaming operation.[2] The performance of any one of these activities with respect to all or part of a gaming operation, constitutes management for the purpose of determining whether an agreement for the performance of such activities is a management contract requiring the Chair's approval.[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] The determination of whether employees are considered management is not controlled by the specific job title of the employee's position but by examining the employee's actual job responsibilities, authority and relationship to management.[6] 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]

Management Analysis

When analyzing the Agreements, we look for indicia of management of all or part of the gaming operation by NSBM. Here, the scope of services for the Sports Book are finite and well-defined in the Agreements. The functions and responsibilities of each party are predetermined for both the Pre-Opening Phase and the Operational Phase.[8] The Agreements specifically prohibit NSBM from making any management decisions at the Pueblo's sports book facility.[9] Further, the Agreements provide that NSBM "shall not engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the [Pueblo's] gaming operations…"[10] The Agreements require that all sports book staff are employees of the Pueblo. LDC will conduct

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[1] *See* 25 C.F.R. § 502.15.
[2] NIGC Bulletin No. 94-5 ("*Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void.*"))
[3] *Id.*
[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 Waldo 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 he or she is simply executing management decisions through a tribal management official.
[8] *See* Sports Book Service Provider Agreement, § 4 - 5.
[9] *Id.* at § 9.
[10] *Id.*

the background investigations and licensing of all Book staff and will be responsible for all salary compensation, wages, benefits and workers compensation.[11]

The Agreements also provide that LDC "reserves the right not to accept wagers on an event or a class of events" offered at the Sports Book.[12] It is also my understanding, based on discussions with the Pueblo's counsel, that LDC also reserves the right to alter or modify betting lines on any event or class of events offered at the Sport Book.[13] Therefore, while the LDC will have access to NSBM's full sports betting services, LDC makes the final decision as to which games it will or will not accept wagers. LDC also has the final decision whether or not to change the lines on a particular game, regardless of NSBM's recommendations. Additionally, the Agreements state that that parties do not intend the Agreement to be a management contract.[14] Further, they provide that NSBM's services are provided as an independent contractor to LDC.[15]

Because the Agreements do not grant NSBM with any management authority, it is my opinion that they are not management agreements requiring approval of the NIGC Chair.

Sole Proprietary Interest

IGRA requires that a tribe have the sole proprietary interest in and responsibility for the conduct of any gaming activity.[16] Under this section of the Act, if any entity other than a tribe possesses a proprietary interest in the gaming activity, gaming may not take place.[17] NIGC regulations also require that all tribal gaming ordinances include a provision to this effect.[18]

Proprietary interest is typically reviewed based on three criteria: 1) the term of the relationship; 2) the amount of revenue paid to the third party; and 3) the right of control provided to the third party over the gaming activity.[19] Final agency actions by NIGC and OGC legal opinions have found an improper proprietary interest in agreements under which a party, other than a tribe, receives a high level of compensation, for a long period of time, and possesses some aspect of control.[20]

Term of the Relationship

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[11] *Id.* at § 5(d).
[12] *Id.* at § 5(a).
[13] *See* email from Lee Bergen, LDC Counsel, to Suzanne Nunn, NIGC Staff Attorney, dated July 17, 2019.
[14] *Id.* at, § 8.
[15] *Id.* at §22.
[16] 25 U.S.C. § 2710(b)(2)(A); *see also* 25 C.F.R. §§ 522.4(b)(1) and 522.6(c).
[17] *Id.*
[18] *See* 25 C.F.R. §§ 522.4(b)(1).
[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.

Analysis of sole proprietary interest requires an examination of the term of the business relationship. A contract for a long period of time can indicate management. Here, the Agreements run for a two-year term beginning on the Commencement Date. Upon completion of the first year, an additional one year is added to the end of the term.[21] There are no provisions to extend the Agreement beyond three years. Accordingly, the relatively short term does not create a concern for IGRA's sole proprietary interest requirement.

Revenue Paid to a Third Party

The Agreements provide NSBM with 25% of "Gross Win" on all authorized forms of wagering made via any device into the Sports Book System while made in either of the Pueblo's casinos.[22] "Gross Win" is defined as Total Write (less) Total Payout (less) Agreed Upon Taxes & Fees.[23] The definition of Gross Win does not include gaming-related operating expenses like employee wages, utilities, insurance and depreciation.

In addition, the Agreements state definite and finite tasks to be performed by NSBM. Prior to the opening of the Book, NSBM will provide consultation on Book design and operation including accounting and reporting system development and operating policies and procedures.[24] NSBM will also provide training on the Sports Book system & software to all Book staff.[25] Post opening, NSBM will provide fixed odds sports book, post opening lines & risk management for Book events and/or daily win/loss statements; five P.O.S. wagering terminals; two self-serve sports book kiosks; and on-going training programs for Book staff.[26] For all these reasons, the fee contemplated in the Agreements do not raise a sole proprietary interest concern.

Third Party's Right to Exercise Control over Gaming Activity

The Agreements do not contain any provisions that transfer the right of control over the Pueblo's gaming operations. They specifically provide that NSBM is providing its services as an independent contractor and is prohibited from engaging in any management activity.[27] In addition, they state that no provisions contained in the Agreements is intended to create a joint venture or partnership; nor is either party is an agent, legal representative, subsidiary, employee or servant of the other.[28] Further, there are no provisions that allow NSBM to "step into the shoes" of LDC or the Pueblo including in the event of default or breach. Therefore, it is my opinion that the Agreements do not grant a controlling interest in the Pueblo's casinos or Sport Book operation.

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[21] Sports Book Service Provider Agreement, §2(b).
[22] *Id.* at § 3(b).
[23] *Id.* at Exhibit B.
[24] *Id.* at § 4(a).
[25] *Id.*
[26] *Id.* at § 5.
[27] *Id.* at § 9.
[28] *Id.* at § 23.

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

Conclusion

It is my opinion that neither the Sports Book Service Provider Agreement nor the LDC Addendum are management contracts requiring the approval of the NIGC Chair. Additionally, the Agreements, on their face, do not violate IGRA's requirement that the Pueblo maintain the sole proprietary interest in its gaming operation.

It is my understanding that the 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 Sports Book Service Provider Agreement and the LDC Addendum. 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. *See* 25 C.F.R. § 517.7(c). 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*, No. 18-481, 2019 WL 2570624, at *7 (U.S., June 24, 2019). Any claim of confidentiality should also be supported with "a statement or certification by an officer or authorized representative of the submitter." *See* 25 C.F.R. § 517.7(d). 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 Suzanne Nunn at (202) 632-7003.

Sincerely,

Michael Hoenig
General Counsel