



June 12, 2019

*Via First Class Mail*

Peter D. Carmen  
Chief Operating Officer  
Oneida Indian Nation  
5218 Patrick Road  
Verona, NY 13478

**Re: Review of Agreement between Turning Stone Resort Casino, LLC and Caesars Entertainment Services, LLC**

Dear Mr. Carmen:

This letter responds to your January 7, 2019 request for the National Indian Gaming Commission's Office of General Counsel to review an agreement between Turning Stone Resort Casino, LLC and Caesars Entertainment Services, LLC. 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 Tribe have the sole proprietary interest in its gaming activity.

In my review, I considered the "Branding and Marketing Alliance Agreement" between Turning Stone Resort, LLC and Caesars Enterprise Services, LLC ("17348042.19" in lower left corner)" (hereinafter the "BMAA"), which was unexecuted but represented to be in substantially final form. After careful review, it is my opinion that the BMAA is not a management contract and does not require the approval of the NIGC Chair. It is also my opinion that the BMAA does not violate IGRA's sole proprietary interest requirement.

The Branding and Marketing Alliance Agreement:

Turning Stone is a limited liability company organized under the laws of the Tribe and wholly-owned and operated by the Tribe. Turning Stone operates all three of the Tribe's casinos.<sup>1</sup> Turning Stone is preparing to open a sports book to expand its gaming portfolio. The State of New York is in the process of adopting sports betting regulations,<sup>2</sup> and Turning Stone

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<sup>1</sup> Turning Stone Resort Casino, Yellow Brick Road Casino, and Point Place Casino.

<sup>2</sup> See "Sports Wagering at Gaming Facilities," Vol. 41 N.Y. Reg. Issue 12 (Mar. 20, 2019) (I.D. No. SGC-12-19-00007-P) (proposed rulemaking by the New York Gaming Commission).

has negotiated the BMAA with Caesars Enterprise Services, LLC (“Caesars”) to prepare for those regulations or regulations negotiated by the State and the Tribe.

Pursuant to the BMAA, Turning Stone patrons will be able to convert loyalty points and loyalty tiers to Caesars points and tiers at pre-determined rates and levels. Caesars patrons can likewise convert Caesars loyalty points and tiers for Turning Stone loyalty points and tiers.<sup>3</sup> Turning Stone and Caesars will cross-license their trademarks to promote the point/tier swap.<sup>4</sup> Turning Stone and Caesars will also create “custom marketing campaigns” to promote each other’s gaming facilities by using each other’s marks and intellectual property.<sup>5</sup> The promotions are limited to the “Marketing Alliance.” Turning Stone is not branding its casinos as Caesars casinos.

(b) (4)

Caesars will also provide sports book services to Turning Stone.<sup>9</sup> Turning Stone will brand its sports book using Caesars’s trademarks and logos.<sup>10</sup> Caesars will provide recommendations to Turning Stone about hardware and software needed for the sports book,<sup>11</sup> and consultation and advice about the design and construction of the sports book.<sup>12</sup>

The BMAA contemplates Turning Stone operating its sports book according to pre-determined Operating Standards and Brand Standards. The Operating Standards provide minimum standards for Turning Stone to follow for the branded sports book. (b) (4)

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(b) (4)

The Operating Standards do not provide

(b) (4)



Caesars with discretion to direct or control Turning Stone's sports book. Turning Stone is required to engage an independent reviewer, chosen by Turning Stone, to confirm each operating guideline is met or exceeded.<sup>13</sup>

The Brand Standards provide general themes and character for the Caesars sports book brand. The Brand Standards define the logos, for example the spacing, arrangement, and orientation on signs, menus, and mailings; color schemes; typography; and acceptable photography.<sup>14</sup> The BMAA prohibits any amendment to the Operating Standards and Brand Standards that would infringe on the Turning Stone's sole proprietary interest and any amendment that would constitute management of Turning Stone's gaming activity.<sup>15</sup>

Turning Stone may purchase Caesars's sports betting Risk Analysis Services ("RAS"), which will include odds, suggested pricing models, warnings, and suggestions to suspend betting for the sports book.<sup>16</sup> Turning Stone has the discretion to use the data from Caesars's RAS. Turning Stone may also use a RAS from another provider.<sup>17</sup> Regardless of the origin of the RAS, Turning Stone must ensure the Operating Standards and Brand Standards are maintained.<sup>18</sup>

(b) (4)

The initial term of the BMAA is (b) (4) years.<sup>21</sup> Caesars has the option to extend the BMAA for up to (b) (4) (up to (b) (4) years) depending on how well the sports book performs.<sup>22</sup>

#### 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."<sup>23</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 between a tribe (or any of its members, entities, or organizations)

(b) (4)

and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor).”<sup>24</sup>

While NIGC regulations do not define “management,” the Agency has clarified that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.<sup>25</sup> A “primary management official” includes “any person who has the authority ... [t]o set up working policy for the gaming operation.”<sup>26</sup> Further, management employees are “those who formulate and effectuate management policies by expressing and making operative the decision of their employer.”<sup>27</sup> Whether a particular employee is managerial is not controlled by an employee’s actual job responsibilities, authority, and relationship to management.<sup>28</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>29</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>30</sup> Management contracts that have not been approved by the Chair are void.<sup>31</sup>

#### Management Analysis:

The BMAA does not contain any provisions that permit Caesars to manage Turning Stone’s gaming operations, and the BMAA includes language that generally prohibits Caesars from engaging in any management activities.

The scope of the services provided by Caesars and the exchange of marketing services between Turning Stone and Caesars are well-defined. Caesars will license its brand for Turning Stone’s sports book and provide the RAS and support services related to the sports book. Turning Stone and Caesars will allow players to exchange points and tiers, will cross-license each other’s brands for advertising, and will exchange patron information to allow for cross-

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<sup>24</sup> 25 C.F.R. § 502.5.

<sup>25</sup> See NIGC Bulletin No. 94-5, “Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void).”

<sup>26</sup> 25 C.F.R. § 502.19(b)(2).

<sup>27</sup> *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

<sup>28</sup> See *Waldau v. M.S.P.B.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994).

<sup>29</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>30</sup> 25 U.S.C. § 2711.

<sup>31</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).



marketing. Further, the Brand and Operating Standards are well-defined and do not grant Caesars any discretion to control Turning Stone's gaming operations. Caesars may modify the Brand and Operating Standards, but any amendment cannot infringe on Turning Stone's sole proprietary interest or constitute management of Turning Stone's gaming activity. The Brand and Operating Standards do not otherwise permit Caesars to manage Turning Stone's casinos.

Turning Stone may opt to use Caesars's RAS for the sports book, but Turning Stone retains discretion to use the data. Turning Stone may use different information or decide not to run a certain event. Turning Stone may adjust the line on a sporting event or suspend betting if Turning Stone disagrees with Caesars's RAS or for whatever reasons. The only limiting factor is that Turning Stone must conduct the sports book in a manner that does not denigrate the Caesars brand, meaning Turning Stone must comply with the Caesars Brand and Operating Standards.

Caesars's fee is (b) (4), a factor that may indicate management. But, other factors like the lack of control by Caesars, (b) (4) and a well-defined scope of services and standards outweigh the consideration for the (b) (4) fee and indicate the BMAA does not allow Caesars to manage any or all of Turning Stone's gaming operations. Accordingly, it is my opinion that the BMAA is not a management agreement and does not need to be submitted to the NIGC Chairman 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>32</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>33</sup> An "owner" is "one who has the right to possess, use, and convey something."<sup>34</sup> "Appurtenant" means "belonging to; accessory or incident to ...."<sup>35</sup> Case law similarly defines "proprietary interest" as "one who has an interest in, control of, or present use of certain property."<sup>36</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 activity.<sup>37</sup> Accordingly, if a party, other than the tribe receives a high level of compensation, for

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<sup>32</sup> 25 U.S.C. § 2710(b)(2)(A); *see also* 25 C.F.R. § 522.4(b)(1).

<sup>33</sup> BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *See Evans v. United States*, 349 F.2d 653, 659 (5th Cir. 1965).

<sup>37</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).

a long period of time, and possess some aspect of control, an improper proprietary interest may exist.

Sole Proprietary Interest Analysis:

*Term of the Relationship:*

The initial term of the BMAA is (b) (4) years. The agreement may be extended (b) (4) (b) (4). Turning Stone may prevent extension if the sports book does not perform well. Assuming the sports book performs well and Caesars exercises the extensions, the BMAA could last up to (b) (4) years.

The Office of General Counsel has not issued a favorable declination opinion for a contract with such a lengthy initial term. We have reviewed other agreements with 10- and 12-year initial terms and concluded that those agreements did not violate IGRA's sole proprietary interest requirement. Here, Turning Stone is advocating for a long-term contract and views the length of the BMAA as a positive aspect of its relationship with Caesars. Turning Stone represents that it benefits from the longer term because it has negotiated exclusivity to use a powerful, internationally-recognized brand in an already competitive market in upstate New York. (b) (4)

(b) (4) The longer term and exclusivity with Caesars creates more stability for Turning Stone as it invests in sports gambling in New York, a relatively expensive and new form of gaming for Turning Stone. (b) (4) (b) (4)

(b) (4) (b) (4) Based on Turning Stone's justifications, the term of the BMAA by itself does not create a sole proprietary interest concern.

*Amount of Revenue Paid to a Third Party:*

Caesars's fee, (b) (4) is a substantial fee at first glance. However, as we will discuss in further detail, although the fee is based on (b) (4) (b) (4). Caesars's fee does not create a sole proprietary interest concern when compared to Turning Stone's estimated combined sports book revenues and the incremental revenues gained as a result of offering sports book at Turning Stone's casinos and the marketing alliance with Caesars for non-

(b) (4)



(b) (4)



Other factors indicate that Caesars fee is reasonable. It appears the parties have negotiated an arms-length contract and Turning Stone was diligent to find competitive rates. Turning Stone stated that it surveyed the market for available vendors and found Caesars's rates to be competitive. Further, sports books are relatively new additions to tribal gaming, and Turning Stone will be one of the first tribal casinos to offer sports book betting in the northeast region. Turning Stone sees value in being first to market for sports book betting. Accordingly,

(b) (4)



(b) (4) Caesars's fee as a (b) (4) and incremental revenue is reasonable. For all of these reasons, the fee contemplated in the BMAA does not raise a sole proprietary interest concern.

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(b) (4)



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

The BMAA does not contain any provision permitting Caesars to control Turning Stone's gaming operations. If Turning Stone decides to use Caesars's RAS, Turning Stone retains discretion to use the data in its sports book. Turning Stone may use different information or decide not to run a certain event. Turning Stone may adjust the line on a sporting event or suspend betting if it disagrees with Caesars's RAS or for whatever reasons.

The Brand and Operating Standards either do not relate to gaming or provide Turning Stone with sufficient discretion to choose how to comply with the standards. While Caesars may amend the standards, the BMAA prohibits Caesars from amending the standards to create a management role or deprive the Tribe of its sole proprietary interest. Otherwise, the BMAA does not provide Caesars with control over Turning Stone's gaming facilities. Accordingly, there are no issues of control in the BMAA.

Upon review of these three criteria – term, compensation, and control – it is my opinion that the BMAA does not violate IGRA's requirement that the Tribe maintain the sole proprietary interest in its gaming operation. It is important to note that the Office of General Counsel reviews each agreement on its own terms. We did so here with the BMAA. This opinion does not mean that every agreement with a similar fee or term, including future agreements proposed by the Tribe, will necessarily result in a favorable declination letter opinion.

It is my understanding that the draft of the BMAA is represented to be in substantially final form, and if the BMAA changes in any material way prior to closing or is inconsistent with assumptions made herein, this opinion shall not apply. Further, this opinion is limited to the BMAA. 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.<sup>43</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>44</sup> please be advised that the information was voluntarily submitted and, as such, that any withholding should be analyzed in accordance with the standard set forth in *Critical Mass Energy Project v. NRC*.<sup>45</sup> Any claim of confidentiality should also be supported with "a statement or certification by an officer or authorized representative of the submitter."<sup>46</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

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<sup>43</sup> 25 C.F.R. § 517.7.

<sup>44</sup> 5 U.S.C. § 552(b)(4).

<sup>45</sup> 975 F.2d 871 (D.C. Cir. 1992).

<sup>46</sup> 25 C.F.R. § 517.7(c).



Letter to Peter Carmen, COO Oneida Indian Nation  
Review of Agreement between Turning Stone Resort Casino, LLC and  
Caesars Entertainment Services, LLC.  
Page 9 of 9

will no longer be considered.<sup>47</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 Staff Attorney Steve Iverson at (202) 632-7003 or by email at [steven\\_iverson@nigc.gov](mailto:steven_iverson@nigc.gov).

Sincerely,

A handwritten signature in blue ink that reads "Michael Hoenig". The signature is fluid and cursive, with a long horizontal line extending from the end.

Michael Hoenig  
General Counsel

cc: Ray Halbritter (emailed to [pcarmen@oneida-nation.org](mailto:pcarmen@oneida-nation.org))  
Meghan Beakman (emailed to [mbeakman@oneida-nation.org](mailto:mbeakman@oneida-nation.org))  
Carolyn Spoletini (emailed to [csadler-spoletini@caesars.com](mailto:csadler-spoletini@caesars.com))  
John C. Wilson (emailed to [jcwilson@caesars.com](mailto:jcwilson@caesars.com))

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<sup>47</sup> *Id.*