



July 29, 2021

Gabe Aguilar
President
Mescalero Apache Tribe
P.O. Box 227
101 Central Avenue
Mescalero, New Mexico 88340

Re: Review of Consulting Agreement between the Casino Apache Travel Center and American Wagering, Inc.

Dear President Aguilar:

This letter responds to your March 20, 2020 request for the National Indian Gaming Commission's Office of General Counsel to review an agreement between the Casino Apache Travel Center, an enterprise wholly owned by the Mescalero Apache Tribe, and American Wagering, Inc. Specifically, you have asked for my opinion whether the agreement is a management contract requiring the NIGC Chairman'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 following submissions:

- Consulting Agreement, undated, 15 pages (version May 24, 2021)
 - Exhibit A – Consultant Tasks
 - Exhibit B – Tribe Responsibilities
- Mescalero Apache Casino 2021 Sportsbook Revenue and Expense Forecast

The Consulting Agreement was unexecuted but represented to be in substantially final form. After careful review, it is my opinion that the Consulting Agreement is not a management contract and does not require the approval of the NIGC Chairman. It is also my opinion that the Consulting Agreement does not violate IGRA's sole proprietary interest requirement.

Background:

The Tribe operates three casinos in New Mexico. In 2019, the Tribe began offering sports betting at one of the casinos, the Inn of the Mountain Gods Casino & Resort, using sports betting services provided by American Wagering. The Tribe also operates the Casino Apache Travel Center, a Class II and III gaming facility near the Inn of the Mountain Gods. The Tribe intends to

offer sports betting at the Travel Center with sports betting services provided by American Wagering.

On May 8, 2019, the General Counsel issued a declination letter for the Tribe's sports betting agreement with American Wagering for the Inn of the Mountain Gods Casino. The agreement for services at the Inn of the Mountain Gods is nearly identical to the proposed Consulting Agreement for the Travel Center. The General Counsel concluded that the Inn of the Mountain Gods agreement was not a management contract because the agreement included a prohibition on American Wagering performing any management activities; the prohibition was tailored to sports betting services; the Tribe has the complete discretion to implement American Wagering sports betting advice, the Tribe has the authority to set the lines for each game; the Tribe has manual and/or electronic access to change lines, and the Tribe decides on which games the Tribe would accept wagers.¹

The General Counsel also concluded that the Inn of the Mountain Gods agreement did not violate IGRA's sole proprietary interest requirement. The term was fixed at (b) (4) years with an option to renew. The agreement did not transfer any control to American Wagering and limited American Wagering's role to providing consulting and advisory services. The fee paid to American Wagering for the sports betting services was (b) (4) from the sportsbook defined as the amounts wagered from sports betting, less payouts from the sportsbook, and less certain operating expenses from the sportsbook.² If the quarterly revenues for the sport book were negative, American Wagering would not receive a fee. American Wagering's services were finite and defined by the agreement. The Tribe performed due diligence and surveyed the market for available vendors. The Tribe determined that the rate was competitive for an entity with American Wagering's experience and expertise. Sports betting was also new. The Tribe was one of the first tribes to offer sports wagering in New Mexico and saw value to be first to market. The Tribe can renegotiate a different rate at the end of the term in (b) (4).

Travel Center Consulting Agreement:

The Tribe and American Wagering are proposing a similar relationship for the Travel Center. American Wagering will provide the same services for a sportsbook at the Travel Center, and the Tribe will have nearly the same responsibilities, discretion, and control over the sportsbook.

¹ Letter from Michael Hoenig, NIGC General Counsel, to John D. Wheeler, John D. Wheeler & Assoc., 3-4 (May 8, 2019).

² Operating expenses included (b) (4)

The Agreement will commence on the date that sports betting is offered to patrons at the Travel Center and will expire on (b) (4), for a term of approximately ⁹⁰ years.³ The Travel Center will pay American Wagering (b) (4) of the “Net Revenues” from the Travel Center sportsbook. “Net Revenues” are defined as the sports betting wagers minus payouts and minus operating expenses related to the sportsbook. Operating expenses include (b) (4)

However, the Travel Center plans to first install a self-serve betting kiosk and therefore does not anticipate any payroll expenses for the Travel Center’s sportsbook. (b) (4)

If the net revenue from the sportsbook is negative, American Wagering will not receive a fee.

American Wagering will provide the following services at the Travel Center:

- Sports betting pricing information and risk management consulting services, subject to the direction of the Tribe;
- Consultation with the Tribe on the layout, design, and construction of the Sports Betting Facility;
- Two (2) teller terminals (b) (4) and one self-service wagering kiosk;
- Wagering odds software, odds display systems, and a shuttle PC to drive the odds TVs;
- Consultation on house rules and internal controls for the Sports Betting Facility;
- Recommendations for appropriate staffing levels for the Sports Betting Facility; and
- Access to Consultant’s full sports betting menu.⁶

The Travel Center intends to operate one self-serve betting kiosk. If successful, the Travel Center will open teller windows later.

If the Travel Center is in material default, American Wagering may terminate the Agreement and collect any outstanding fees.⁷ The Agreement does not allow American Wagering to have a receiver appointed to direct the Travel Center how to operate the sportsbook.⁸ The agreement contains the following provision that prohibits American Wagering from managing the sportsbook at the Travel Center and is specific to sports betting functions:

³ Consulting Agreement § 1(a).

⁴ *Id.* § 3(a).

⁵ See 25 C.F.R. § 502.16. In order for operating expenses to reduce the net gaming revenue in the Agreement, the expense must be 100% attributable to the sportsbook. Consulting Agreement § 3(a).

⁶ Consulting Agreement, Exh. A.

⁷ *Id.* § 1(b)(iii-iv).

⁸ See generally *id.* § 9.

Consultant is engaged hereunder solely in a consulting and advisory capacity. Nothing contained in this Agreement permits or authorizes, nor shall anything be construed to permit or to 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 Casino Apache or any other person employed to work at 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 Casino Apache's employees or 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 Apache or to act as an agent of Casino Apache 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.⁹

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."¹⁰ 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)."¹¹

While NIGC regulations do not define "management," the Agency has clarified that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.¹² A "primary management official" includes "any person who has the authority ... [t]o set up working policy for the gaming operation."¹³ Further, management employees are "those who formulate and effectuate management policies by expressing and making operative

⁹ *Id.* § 2(b).

¹⁰ 25 C.F.R. § 502.15.

¹¹ 25 C.F.R. § 502.5.

¹² See NIGC Bulletin No. 94-5, "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)."

¹³ 25 C.F.R. § 502.19(b)(2).

the decision of their employer.”¹⁴ Whether a particular employee is managerial is not controlled by an employee’s actual job responsibilities, authority, and relationship to management.¹⁵ 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.¹⁶

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.¹⁷ Management contracts that have not been approved by the Chair are void.¹⁸

Management Analysis:

The Agreement does not permit any management of gaming activity by American Wagering. The scope of services provided by American Wagering is well-defined. The Travel Center has the discretion to accept or reject the sports betting recommendations received from American Wagering, including changing lines on events and suspending events. The Travel Center is not required to implement the data or services provided by American Wagering.¹⁹ The Agreement includes an express prohibition on management²⁰ and states that the Travel Center has the ultimate responsibility for its sportsbook. Accordingly, it is my opinion that the Agreement is not a management contract that requires approval by the NIGC Chairman.

Sole Proprietary Interest:

IGRA requires a tribe to possess “the sole proprietary interest and responsibility for the conduct of any gaming activity.”²¹ “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 . . .”²² An “owner” is “one who has

¹⁴ *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

¹⁵ *See Waldau v. M.S.P.B.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994).

¹⁶ *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.

¹⁷ 25 U.S.C. § 2711.

¹⁸ 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).

¹⁹ Consulting Agreement § 2(a).

²⁰ *Id.* § 2(b).

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

²² BLACK’S LAW DICTIONARY (10th ed. 2014).

the right to possess, use, and convey something.”²³ “Appurtenant” means “belonging to; accessory or incident to”²⁴ Case law similarly defines “proprietary interest” as “one who has an interest in, control of, or present use of certain property.”²⁵

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.²⁶ 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:

Regarding the term, the Agreement will last approximately (b) (4) which does not raise a sole proprietary interest concern. Regarding control, the Agreement also does not grant any control to American Wagering over the Travel Center’s sportsbook. As stated above, the Travel Center has the ultimate authority over the sportsbook, can accept or reject the services provided by American Wagering, and will have the ability to change lines and suspend events. Accordingly, there are no issues of control.

Regarding the fee, American Wagering will receive (b) (4) of the net gaming revenues as defined by the NIGC from Travel Center’s sportsbook. Based on financial projections provided by the Tribe for 2021, the Tribe anticipates the following revenues from the single kiosk at the Travel Center and the following fee to American Wagering:

| | |
|---|---------|
| Wagers (Handle) | (b) (4) |
| Payouts | (b) (4) |
| Gross Revenue (Hold (5%)) | (b) (4) |
| Expenses | (b) (4) |
| Net Revenue | (b) (4) |
| Distribution to Tribe | (b) (4) |
| Distribution to American Wagering | (b) (4) |
| American Wagering’s Fee as % NIGC Net Revenue | (b) (4) |

American Wagering’s fee could be higher than (b) (4) of net gaming revenues if the Travel Center were to add retail terminals and add payroll as an operating expense.

²³ *Id.*

²⁴ *Id.*

²⁵ See *Evans v. United States*, 349 F.2d 653, 659 (5th Cir. 1965).

²⁶ 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).

In 2019, the General Counsel opined that a (b) (4) of net revenue fee to American Wagering did not grant a proprietary interest the Tribe's sportsbook at the Inn of the Mountain Gods Casino. However, for the sportsbook at the Travel Center, the Tribe did not seek quotes from other vendors because, according to the Tribe's counsel, the Tribe has a good working relationship with American Wagering. Also, according to the Tribe, using American Wagering would also be less expensive than the Tribe trying to launch a kiosk at the Travel Center on its own. Moreover, the Tribe can renegotiate the fee for the Travel Center and the Inn of the Mountain Gods when both agreements expire in the (b) (4)

That said, the sports betting market has matured since 2019. There are several vendors providing sports betting services to tribal casinos, and unlike 2019, the Tribe is not competing to be the first to market with this product.

Overall, it is my opinion that the Agreement does not grant American Wagering a proprietary interest in the Travel Center's sportsbook. The short term and lack of control mean that the Tribe will own and operate the sportsbook, and the Tribe can renegotiate the fee after (b) (4). American Wagering is providing valuable and ongoing services to the Travel Center.²⁷ While American Wagering's fee is relatively high, the fee alone in this instance does not grant a proprietary interest to American Wagering in the Tribe's gaming operation. Accordingly, the Agreement does not grant a proprietary interest to American Wagering.

It is my understanding that the draft Consulting Agreement is represented to be in substantially final form, and if the Consulting 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 Consulting 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.²⁸ 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),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

²⁷ Compare NIGC NOV-11-02 (finding that a third party acquires a proprietary interest in a tribe's gaming operation when the third party acquires an interest in gaming revenue for little or no service or assets provided).

²⁸ See 25 C.F.R. § 517.7(c).

²⁹ 5 U.S.C. § 552(b)(4).

³⁰ 139 S. Ct. 2356 (2019).

³¹ See 25 C.F.R. § 517.7(d).

Letter to President Aguilar, Mescalero Apache Tribe
Review of Consulting Agreement between the Casino Apache Travel Center and American
Wagering, Inc.
July 29, 2021
Page 8 of 8

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.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 <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.

Sincerely,

A handwritten signature in blue ink that reads "Michael Hoenig". The signature is written in a cursive style with a large, stylized "H" and "O".

Michael Hoenig
General Counsel

CC: John Wheeler

³² *Id.*