



BULLETIN

No. 2021-5

October 5, 2021

Subject: Submission of Sports Book Agreements for Review

The purpose of this Bulletin is to provide supplemental guidance on emerging trends and issues the National Indian Gaming Commission Office of General Counsel has encountered during its review of sports book agreements. This Bulletin supplements Bulletin 2020-1, "IGRA and Sports Book Operations," issued on January 29, 2020.

Bulletin 2020-1 discussed sports betting from a broad perspective, setting out various options tribes may pursue to open a sports book at their Casino. One of the sports book models discussed was the operation of tribally-owned sports book with data supplied by a third-parties. In the time since Bulletin 2020-1 was posted, the NIGC's Office of General Counsel has reviewed several draft sports book agreements, including vendor agreements, consulting contracts, and development agreements, to determine whether these agreements implicate management or violate IGRA's sole proprietary interest requirement. Many of those reviews were performed at the request of the contracting parties and resulted in the issuance of an opinion from the General Counsel that analyzes the terms of the agreement. These letters, referred to as declination letters, give guidance as to management and sole proprietary interest.

Additionally, in 1994, the NIGC issued a bulletin addressing the differences between consulting contracts and management contracts.¹ The bulletin noted that whether a contract is a consulting or management contract "depends upon the specific facts of each case," but explained that, generally, management encompasses planning, organizing, directing, coordinating, or controlling activities with respect to all or part of a gaming operation. Although not specific to sports book agreements, the principles laid out in that bulletin are still a useful resource for parties as they negotiate agreements.

¹ Bulletin No. 1994-5, *Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts Are Void)*

Although the NIGC's Office of General Counsel will continue to issue declination letters upon request, it is the Agency's intent that tribes and the parties with whom they are contracting look to this bulletin, as well as the materials referenced above, to determine whether a particular agreement implicates management. If a particular sports book related agreement adheres to the principles and analyses outlined herein, the NIGC's Office of General Counsel would likely opine that it does not need to be submitted for the Chair's approval as a management agreement or violate IGRA's sole proprietary interest requirement.²

Management and Sole Proprietary Interest Considerations

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 management contract within the meaning of IGRA and requires the Chair's approval.³ Any action by a third party that constitutes "planning, organizing, directing, coordinating, or controlling" all or any portion of a sports book can trigger concerns about whether the third party is managing the sportsbook operations.

IGRA requires Indian tribes to maintain "the sole proprietary interest and responsibility for the conduct of any gaming activity" in gaming facilities located on their Indian lands.⁴ To determine whether an agreement violates IGRA's sole proprietary interest requirement, the NIGC typically analyzes three elements: (1) the term of the contractual relationship; (2) the amount of revenue paid to the third party; and (3) the third party's right to exercise control over the conduct of the gaming activity.

A. Provisions that implicate management or raise concerns related to sole proprietary interest

The following are examples of provisions that raise potential management or SPI concerns:

- Prohibitions on management activity must be absolute. A provision that provides an exception to a prohibition against management raises management concerns. For example, although the following provision prohibits management by a vendor, it is not absolute because it begins with an exemption, "*Unless otherwise stated in this agreement, Vendor is prohibited from operating or managing the gaming activity.*"
- A contract provision will raise management concerns if it allows a vendor to draft and/or revise sports book house rules, or risk management policies. A vendor may not make vital decisions related to the Tribe's sports book. Determining risk management policies

² The information provided in this Bulletin assesses current trends in the NIGC's regulatory approach and existing positions. It may be updated as needed. Please email any comments on this topic to NIGC_outreach@nigc.gov.

³ See 25 U.S.C. § 2711

⁴ 25 U.S.C. §§ 2710(d)(2)(A), 2710(b)(2)(A).

and/or house rules for a sports book is a management function. Although a vendor may provide *recommendations* concerning house rules, the Tribe must have the ultimate authority to determine when and how to adopt and/or revise such rules. The same is true for risk management policies and internal controls.

- Provisions concerning the term of the agreement may raise sole proprietary interest concerns if they allow for automatic or indefinite renewal terms. Although there is no set cap on how long a consulting or vendor agreement may last, a long contract term raises sole proprietary interest concerns.
- Requirements that a tribe or operation implement the recommendations of another party, such as a consultant, as to its gaming facility constitutes management by these entities or individuals. Thus, for example, if an agreement requires a tribe to bring in a consultant to review its operation on an annual basis, and requires the tribe to implement the consultant's recommendation, that provision would raise management concerns. A tribe can, however, agree as part of the contract that it will do certain specific things or will do those things as a consequence of another event occurring, or will refrain from taking specific actions. So, for example, a Tribe can agree in a contract that it will place 10 kiosks in its sports book lounge, but cannot agree that it will place as many sports book kiosks in its sports book lounge as the vendor deems appropriate. Moreover, detailing specific, objective criteria for the selection of consultants, auditors, advisors, or other employees for the gaming operation in an agreement or agreements does not transform the agreement into a management contract.
- Signage, advertising, and marketing - Provisions that allow a vendor to make advertising and marketing decisions related to the sports book are problematic. A vendor may not control how a sportsbook is advertised, and/or marketed, and may not unilaterally make decisions related to the location of interior and/or exterior signage for the sports book. However, a tribe and vendor may agree upon predetermined criteria regarding the placement of marketing materials and advertising.

B. Contract Provisions that Raise Concerns Related to Implementation

Other types of provisions, although not necessarily objectionable on their face, may nevertheless raise management or sole proprietary interest concerns during implementation. The following are examples of provisions that may become problematic as the sportsbook develops and becomes operational:

- **Kiosks** - A growing number of tribal gaming operations utilize full-service kiosks for sports book wagering. Such kiosks receive betting data from the vendor and display it on self-sustained machines. Although this option is convenient, it poses unique *de facto* management risks. To prevent management by a vendor, the agreement must make clear that the tribe has the sole discretion to make all final determinations as to when and how

to use, or not use, the sports betting data supplied to the kiosks. The tribe must be able to alter lines and suspend betting, and must ensure that it has ultimate control over the kiosks and data.

- **Shortfalls** - Some agreements provide that a vendor will cover sports book shortfalls and will only be reimbursed when the sports book is profitable. Although such a provision may be beneficial to a tribe, the shared risk between the tribe and vendor suggests a partnership. In and of itself, such a provision may be acceptable, but in the context of the agreement as a whole, it may become problematic as it indicates that the vendor relationship extends beyond simply providing a service.
- **Compensation** The compensation paid to sports book vendors has generally been higher than compensation for other types of vendor services. The NIGC does not make determinations as to whether a business decision by a tribe is good or bad, and recognizes that the tribe is in the best position to determine the value it places on the services for which it is contracting. That being said, the fee is one of the elements the NIGC must look to in determining whether a sole proprietary interest violation has occurred. The Agency understands sports betting is a new amenity that requires specialized and technical knowledge and involves unique risks. The NIGC will continue to defer to tribes as to the reasonableness of fees where appropriate but those fees must be related to a service being provided and must be within the realm of reasonableness. For example, a 50/50 split of net gaming revenue suggests a partnership rather than provision of a service to the Tribe. It should also be noted that if compensation paid to a vendor is based on terms that do not align with the definition of net gaming revenue in the NIGC regulations,⁵ the NIGC will convert such compensation arrangements to determine the percentage of net revenue as defined under IGRA.⁶

The NIGC will continue to monitor this area as the industry matures to ensure that compensation paid to sports book vendors is commensurate with the services rendered. As the NIGC has found in the past, a high fee coupled with a long term or provisions that give the vendor or consultant control indicates a sole proprietary interest violation.

- **Investment in Sportsbook Buildout and Setup** - In some agreements, a vendor will provide a sizeable payment to a tribe to set up a sports book within a portion of the tribe's existing casino. This payment raises concerns regarding whether the contract establishes a joint venture rather than merely providing services of a technical expert. Such a payment

⁵ See 25 C.F.R. § 502.16.

⁶ The NIGC requests that requests for an opinion include a pro forma financials so that the NIGC can analyze and gain an accurate understanding of cost allocation and compensation pursuant to the agreement. This information is also critical to ensuring that the vendor compensation is reasonable, and is not such a high percentage of NGR as defined under IGRA as to raise sole proprietary interest concerns.

alone, even if sizeable, is not necessarily problematic, but it can pose SPI concerns if the vendor's compensation is tied only to the investment and not to services the vendor will render to the tribal entity, especially if there are other factors that suggest a partnership.

- **Acceptance or Denial of Wagers** - “The Vendor shall make the initial decisions regarding the acceptance or denial of any wager at the sportsbook, and the Tribe shall have the final decision-making authority. If the Vendor denies any wager, but the Tribe accepts the wager, the Tribe shall be responsible for any profit or loss resulting from such wager.” This type of provision may be acceptable if the Tribe has pre-approved criteria for the acceptance and/or denial of wagers. Without standards, however, the provision grants discretion to the vendor to make decisions, as opposed to recommendations, which allows the vendor to control when wagers are accepted or rejected.

A variation in an agreement we recently reviewed defined “Sports Book GGR” as “for any particular period, total gross gaming revenues derived from the Sports Books (i.e., the total of all sums wagered (excluding voided or cancelled sports wagers) in the Sports Books less the total of all sums actually paid out as winnings on such wagers), *but specifically excluding in such calculations any payouts as winnings on wagers that are the result of Tribal Entity utilizing its discretion to set odds, pricing or events th[at] deviate from those recommended by [Vendor] as part of Vendor’s] Services.*” Pursuant to this provision, the vendor’s share of NGR may not be increased by excluding from the calculation prizes paid based on management decisions the Tribal Entity makes. This penalizes the Tribal Entity for its Sports Book management decisions and it incentivizes the Tribal Entity to accept all of the Vendor’s “recommendations,” which makes the Vendor a *de facto* manager.

- **Training** – Sports betting is a relatively new form of gaming, and decisions regarding the setting of odds, choice of events, changes in odds, and other sports book functions requires specialized skills and knowledge. If a Tribe does not employ staff with specialized knowledge regarding sports book operations, a vendor could inadvertently assert undue control and influence while a Tribe trains and/or retains such personnel. The NIGC understands that there is a certain amount of lead time required to gain the proper knowledge and expertise to operate a sports book. However, if a vendor offers training to a Tribal entity’s employees, the Tribe must control the type and manner of training. In the end, the operation must be managed by the Tribe, with the vendor exerting no management control or influence whatsoever.

C. Provisions that may be Helpful to Mitigate against Management or SPI Concerns

- Agreements should include language that clearly indicates that the vendor will not engage in management activities, i.e., any action that constitutes “planning, organizing, directing, coordinating, or controlling” all or any portion of a sports book. In addition, an agreement that the NIGC recently reviewed affirmatively provided that “[r]egarding

wagers governed by this Agreement, [the Tribal Gaming Enterprise] shall retain the ability to decide which sports betting wagers it will or will not accept and/or whether or not [it] wishes to change the lines of a particular game for the Sports Book, and [the Tribe] shall retain the ability to decide which sports betting wagers it will or will not accept and/or whether or not [it]wishes to change the lines of a particular game for the Game Offering, regardless of [the Vendor's] recommendations.”

- If an agreement uses terms that could suggest management in describing vendor services – for example “oversight” or “training” – be sure to clearly detail the third party’s authority regarding each term and provide clear limitations where necessary. For example, if any oversight is provided by a third party, the agreement should clearly state that such oversight will apply only to the technical aspects of the sports book, not gaming as a whole. Or, if any training will be provided by a third party, the nature of the training should likewise be described with limiting language indicating to whom training will be provided, as well as the purpose, scope, and duration of such training.
- Agreements should provide for what happens to equipment and branding at the end of the term or if the Agreement is terminated.