



BULLETIN

No. 2021-3

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Subject: Submission of Agreements for Review

In 1993, the National Indian Gaming Commission issued Bulletin No. 1993-3, *Submission of Gaming Related Contracts and Agreements for Review*. In that bulletin, the NIGC determined that certain gaming-related contracts, such as consulting and development agreements, should be submitted to the NIGC for an opinion on whether the agreements implicate management. When the NIGC determines that no such management exists, the resulting opinion is referred to as a “declination letter.” What constitutes *management* is crucial to the NIGC’s mission and work. It informs whether: certain officials need to be licensed as *primary management officials* under IGRA and NIGC regulations;¹ certain contracts qualify as management contracts under IGRA, requiring the Chair’s review and approval²; and certain actions by third parties concerning a Tribe’s gaming facility or operation violate IGRA and NIGC regulations because they are unapproved management arrangements³.

At the time Bulletin No. 1993-3 was published, Indian Gaming, though not itself a new industry, was still relatively new to the requirements of the Indian Gaming Regulatory Act. IGRA had been passed a mere five years previously, and NIGC had only recently passed regulations implementing the Act. The NIGC had not yet developed the body of guidance clarifying what exactly constituted management or control of a gaming operation. To prevent management of a gaming operation without an approved contract, then, the NIGC sought to review the agreements that were most likely at the time to cross into the realm of management.

In the nearly 30 years since Bulletin No.1993-3 was published, however, the Tribal gaming industry has grown exponentially in both size and experience. The NIGC has also issued

¹ 25 U.S.C. § 2710(b)(2)(F); 25 C.F.R. §§ 502.19(a) (“The person having management responsibility for a management contract”) and 502.18 (“*Person having management responsibility for a management contract* means the person designated by the management contract as having management responsibility for the gaming operation, or a portion thereof.”); 25 C.F.R. part 558.

² 25 U.S.C. § 2710(d)(9) & 2711; 25 C.F.R. parts 531 and 535.

³ 25 U.S.C. §§ 2710(d)(9), 2711, & 2713; 25 C.F.R. § 573.4(a)(7).

guidance on what activities constitute management, and has reviewed thousands of agreements for management, resulting in a vast body of guidance through declination letters and enforcement actions. In 1994, the NIGC issued a bulletin addressing the differences between consulting contracts and management contracts.⁴ Although the bulletin noted that whether a contract is a consulting or management contract “depends upon the specific facts of each case,” it explained that *management* encompasses planning, organizing, directing, coordinating, or controlling activities with respect to all or part of a gaming operation.⁵ Since 1994, several courts have also issued opinions further elucidating the meaning of *management* in IGRA. NIGC has done the same through final agency decisions and enforcement actions.⁶

Although the NIGC’s Office of General Counsel will continue to issue declination letters upon request, the Agency withdrew Bulletin No. 1993-3, finding that for all of the reasons discussed above, an agency review may not always be necessary. Rather, it is the NIGC’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 contract adheres to the principles and analyses outlined below, 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.⁷

I. Management is defined by its ordinary meaning.

The term *management* is not defined in IGRA. And while NIGC regulations define *primary management official*⁸ and *management contract*,⁹ which assist in informing the meaning of *management*, they do not explicitly prescribe the term. Without such a regulatory definition,¹⁰ *management* should be construed in its ordinary or natural meaning.¹¹ Our 1994 bulletin does just that.¹² “[T]he definition of management activities[]—planning, organizing, directing, coordinating, and controlling—[is] consistent with a common understanding of such activities.”¹³

⁴ NIGC Bulletin 94-5, *Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)* (Oct. 14, 1994).

⁵ *Id.* at 2.

⁶ Also see for guidance the NIGC Office of General Counsel’s legal opinions, located on the NIGC website here: <https://www.nigc.gov/general-counsel/management-review-letters>

⁷ The information provided in this Bulletin sets forth the NIGC’s regulatory approach and existing positions and may be updated as needed. Please email any comments on this topic to NIGC_outreach@nigc.gov.

⁸ 25 C.F.R. § 502.19.

⁹ 25 C.F.R. § 502.15.

¹⁰ In 2018, the Commission consulted with the regulatory community concerning whether to issue a definition of *management*. The majority of commenters requested that the Commission extend its consultations on the topic.

¹¹ NIGC Commission Final Decision, *In re: The March 26, 2008 disapproval of a management contract between New Gaming Systems Inc. and Sac & Fox Nation of Oklahoma* at 9 (May 22, 2008) (NIGC Commission Final Decision re: New Gaming Systems) (“the Commission long ago emphasized a plain-meaning understanding of ‘management’”).

¹² NIGC Bulletin 94-5, *supra* at 2.

¹³ *Sharp Image Gaming, Inc. v. Shingle Springs Band of Miwok Indians*, 15 Cal. App. 5th 391, 436 (Ct. App. 2017), *reh'g denied* (Oct. 16, 2017), *review denied* (Dec. 20, 2017), *petition for certiorari pending*.

II. *Management* may be total, meaning of an entire facility or operation.

A management relationship may be all encompassing, meaning that a third-party assumes management of the entire operation or facility. As described by the Seventh Circuit Court of Appeals, in such situations, a third-party has “wholesale responsibility over the daily operations or maintenance of the Casino,” “operat[ing], for a fee, the day-to-day staffing and supervision of the games, other offerings and security at the gaming facility.”¹⁴ The NIGC’s position is similar, describing management of a casino as “responsib[ility] for day-to-day operations, for hiring and firing casino employees, [and] for placement of the games on the casino floor”¹⁵ Oftentimes, this includes the development of, changes to, and responsibility for a facility or operation’s employment, accounting, or financial policies and procedures as well as setting its days and hours of operation.¹⁶

III. *Management* may be partial, involving only one or more aspects of an operation.

Management also may be partial. Courts have accepted our interpretation¹⁷ of *management* as planning, organizing, directing, coordinating, and controlling all—or only a part of—a gaming operation.¹⁸ To constitute *management*, a Tribe need not relinquish all of its decision-making authority to a third-party.¹⁹ And a third-party need not be involved in the overall management of the casino as long as it is given “the right to manage, or the opportunity to manage,” parts of the gaming operation.²⁰

Each section below discusses aspects of gaming operations where courts and/or the NIGC have found control of them—alone or in combination—by third parties is *management*. The only caveat being that if these activities occur and are finalized prior to the facility or operation’s opening, *management* may not exist. When a facility or operation is still developing (or in the development phase) and not operating, a Tribe’s retention of third parties to devise, create, or undertake these activities is more likely to be a fee-for-service arrangement. On the other hand, operational control indicates *management*.²¹ Thus, when third parties are involved in such activities for a functioning facility or operation, Tribes should ask themselves (as described in the 1994 bulletin) whether third parties involved in these areas are undertaking finite tasks with

¹⁴ *Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 695 & 697 (7th Cir. 2011).

¹⁵ NIGC Commission Final Decision, *In the matter of Edward Street and Oakland Enterprises, LLC* at 6 (Sept. 6, 2006); *see, e.g.*, NOV-07-02 at 7-12 (May 16, 2007) (unapproved management contractor managed the blackjack and gaming machine operations); NOV-06-08 at 3, 7-8 (March 8, 2006) (unapproved management contract “doing business as” Tribe’s casino, handling all the daily operations, and controlling the gaming revenue and employees).

¹⁶ *See, e.g.*, NOV-11-01 at 5 & 10 (May 14, 2011) (unapproved management contractor set opening hours and times and adopted employee policies for the OTB).

¹⁷ *See* NIGC Bulletin 94-5, *supra* at 2; *Compare with* 25 C.F.R. § 502.15 (“*Management contract* means any contract [that] provides for the management of all or part of a gaming operation.”).

¹⁸ *Sharp Image Gaming, Inc.*, *supra* at 436; *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wash. App. 799, 824, *aff'd on other grounds*, 181 Wash. 2d 272 (2014); *First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1175 (10th Cir. 2005); *New Gaming Sys., Inc. v. Nat'l Indian Gaming Comm'n*, 896 F. Supp. 2d 1093, 1102–03 (W.D. Okla. 2012).

¹⁹ *Sharp Image Gaming*, *supra* at 438-39; *New Gaming Sys.*, *supra* at 1105.

²⁰ *New Gaming Sys.*, *supra* at 1103.

²¹ Letter to Nicolas C. Fonseca, Chairman, Shingle Springs Band of Miwok Indians, from Philip N. Hogen, NIGC Chairman re: Chairman’s decision regarding agreements at 9 (April 23, 2009).

specific dates of completion at fixed rates/fees or whether there is an open-ended and ongoing relationship with compensation based upon a percentage fee.²² The former is reflective of consulting; the latter, managing.

A. Working policies, procedures, and practices

NIGC regulations provide that a *primary management official* is “[a]ny person who has authority . . . [t]o set up working policy for the gaming operation.”²³ Relying upon that regulation, the Tenth Circuit Court of Appeals found that setting up working policy for a gaming operation by developing employment procedures constitutes *management*.²⁴ We concur in that view.

B. Training, supervision, direction, hiring, firing, retention, and compensation of any employee or contractor

As the NIGC has previously explained: “an employee's specific job title or the position does not provide conclusive evidence of management[;] [r]ather, management must be found in the employee’s actual job responsibilities, authority, and relationship to actual management.”²⁵ NIGC regulations specifically provide that a *primary management official* is “[a]ny person who has authority . . . [t]o hire and fire employees.”²⁶ Therefore, doing that constitutes *management*.²⁷

Training, supervising, and making decisions regarding retaining and compensating employees or contractors also may be *management*. The Tenth Circuit Court of Appeals found that a third-party providing personnel to supervise specific gaming facilities and to “‘supervise, train, and instruct’ the Tribe's employees for the first three months after the opening of the operation” equated to “management services.”²⁸ The NIGC Chair also has concluded that a third-party’s appointment of or “direction to [a] casino’s general manager” and other types of supervisors was *management*.²⁹ Exerting control over casino employees has been found to

²² NIGC Bulletin 94-5, *supra* at 3; *see, e.g.*, NOV-07-02 at 7 (May 16, 2007) (unapproved management contractor received 60% and Tribe 40%).

²³ 25 C.F.R. § 502.19(b)(2).

²⁴ *First Am. Kickapoo Operations, supra* at 1172–73, 1175; *see, e.g.*, NOV-11-01 at 5 & 10 (May 14, 2011) (unapproved management contractor adopted employee policies and handbook for OTB); NOV-07-02 at 9 (May 16, 2011) (unapproved management contractor wrote policies and procedures for accounting).

²⁵ NIGC Commission Final Decision re: New Gaming Systems at 9 (citing *Waldo v. M.S.P.B.*, 19 F.3d 1395, 1399 (Fed.Cir. 1994)).

²⁶ 25 C.F.R. § 502.19(b)(2).

²⁷ *See, e.g.*, NOV-12-01 at 13-14 (Aug. 22, 2012) (“Respondents’ *de jure* and *de facto* management of the hiring and firing of Casino managers and control over employee job changes”); NOV-11-01 at 5 & 10 (May 14, 2011) (unapproved management contractor hired, fired, and paid all OTB employees); NOV-07-02 at 11 (unapproved management contractor made hiring decisions); NOV-06-08 at 8 (March 8, 2006) (unapproved management contractor controlled casino’s employees).

²⁸ *First American Kickapoo Operations, supra* at 1173.

²⁹ Letter to Nicolas C. Fonseca, Chairman, Shingle Springs Band of Miwok Indians, from Philip N. Hogen, NIGC Chairman, *supra* at 9; NOV-07-02 at 11 (May 16, 2007); Letter to Senators McCain, Dorgan, and Inouye from NIGC Chair Hogen re: Contract review and IGRA’s sole proprietary interest requirement at 5 (Feb. 1, 2005).

constitute *management* as well, including: hiring, firing, job promotions, position changes, employee policies, salaries, payroll, payment of employment taxes, and personnel matters.³⁰

Further, courts have determined that a third-party's ability to select an auditor, in the event of non-agreement with the Tribe on who would conduct the audit, was "indicia of control over the Tribe's gaming operations,"³¹ and a third-party's "right[] to participate in the selection of [an] accounting firm that will perform the annual "'independent certified audit,'" when taken together with its other rights, transferred management responsibility to the third-party.³²

C. Hours or days of operation

The NIGC Chair has found that setting the operating hours and days is a management function.³³

D. Accounting systems or procedures

Choosing a facility or operation's accounting system is also a management function³⁴, "because such systems enable player reward programs and, in some instances, ticket redemption."³⁵ And, handling the accounting for the operation is a management activity.³⁶

E. Advertising, promotions or marketing activities

In a letter to Congress, the NIGC Chair explained that directing casino marketing and advertising is a significant management responsibility.³⁷ The NIGC Chair also has issued several notices of violation against third parties for managing without an approved management contract, in part on the bases that they developed, implemented, or controlled the operations' promotions and advertising, including the substance of such matters and the personnel working on them.³⁸

F. Gaming devices, equipment, or software – purchasing, leasing, substituting and/or choosing the vendor, type, theme, percentage of pay-out, display or placement

³⁰ NOV-12-01 at 13, 19-26 (Aug. 22, 2012); NOV-06-08 at 8 (March 8, 2006).

³¹ 15 Cal. App. 5th 391, 441 (Ct. App. 2017), *reh'g denied* (Oct. 16, 2017), *review denied* (Dec. 20, 2017), *petition for certiorari pending*.

³² *New Gaming Sys.*, *supra* at 1105.

³³ NOV-11-1 at 5 (May 14, 2011).

³⁴ *New Gaming Sys.*, *supra* at 1103.

³⁵ NIGC Commission Final Decision re: New Gaming Systems at 11 (May 22, 2008).

³⁶ NOV-06-08 at 8 (March 8, 2006); NOV 06-06 at 3 (Feb. 2, 2006).

³⁷ Letter to Senators McCain, Dorgan, and Inouye from NIGC Chair Hogen, *supra* at 5.

³⁸ NOV-12-01 at 14-15, 18-23, 27-28 (Aug. 22, 2012); NOV-07-02 at 5, 12-13 (May 16, 2007); NOV 06-08 at 8 (March 8, 2006); *see, e.g., Sharp Image Gaming*, *supra* at 439 ("The provision in the [agreement] providing that [the third-party] would maintain the responsibility for promotions and 'provide direction for the General Manager in this department' was alone sufficient to find management of part of the gaming operation.").

Selecting and providing gaming equipment is “an essential aspect of casino operations.”³⁹ So is choosing the mix of machines or tables (e.g., vendor and type) and configuring a casino floor.⁴⁰ In addition, third parties who have planned, directed, or controlled a Tribe’s contractual relationships with its gaming vendors have been found to have managed part of a gaming operation without an approved management contract.⁴¹ In the same vein, decisions regarding game theme, percentage of pay-out, and game displays may also be *management*.⁴²

G. Budgeting or revenue allocation

Also in the aforementioned letter to Congress, the NIGC Chair cited developing a casino’s budget as an example of a significant management responsibility.⁴³ Moreover, the NIGC Chair has issued notices of violation to third parties for managing without an approved contract in part due to developing or controlling a casino’s budget.⁴⁴

H. Maintenance of a gaming facility or operation;

Oversight of maintenance employees is yet another example of a management function and has been included as one of the bases for issuing a managing without an approved contract notice of violation.⁴⁵

I. Supervision of construction or improvements for a gaming facility or operation

Finally, a third-party’s control over renovations, improvements, or expansion of an operation may also indicate *management*.⁴⁶

³⁹ *Sharp Image Gaming, supra* at 440–41; *see also* Letter to Senators McCain, Dorgan, and Inouye from NIGC Chair Hogen *supra* at 5 (noting that deciding which games to offer is a significant management responsibility).

⁴⁰ NIGC Commission Final Decision re: New Gaming Systems at 10; *New Gaming Sys., supra* at 1102-03; *Sharp Image Gaming, supra* at 440–41; *see, e.g.,* NOV-07-02 at 8 (May 16, 2007) (unapproved management contractor supplied blackjack equipment, decided on the number of tables and their placement, the number of and which machines to remove to make room for the tables, and blackjack’s rules).

⁴¹ NOV-12-01 at 15-16, 29-30 (Aug. 22, 2012); NOV 06-08 at 8 (March 8, 2006).

⁴² *See, e.g., Sharp Image Gaming, supra* at 440–41 (noting that “if the Tribe wanted to change the payout at anytime, it was dependent upon [the third-party] to change the software payout percentages.”).

⁴³ Letter to Senators McCain, Dorgan, and Inouye from NIGC Chair Hogen, *supra* at 5.

⁴⁴ NOV-12-01 at 16-17, 30-32 (Aug. 22, 2012); NOV-11-01 at 10 (May 14, 2011).

⁴⁵ NOV-07-02 at 11 (May 16, 2007).

⁴⁶ *See, e.g.,* NOV-07-02 at 5 (May 16, 2007) (unapproved management contractor renovated and expanded the Tribe’s operation, paying for the cost of doing so); NOV-06-08 at 8 (March 8, 2006) (unapproved management contractor had his construction company renovating operation); *First Am. Kickapoo Operations, supra* at 1174 (noting that NIGC OGC’s legal opinion relied in part on the third-party’s supervision of construction and improvements to opine that the contract was a management contract).