



BULLETIN

No. 2021-6

October 5, 2021

Subject: Sole Proprietary Interest

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 recommended that certain gaming-related contracts, such as consulting and development agreements, be submitted to the NIGC for an opinion on whether the agreements implicated management and needed to be submitted to the NIGC Chair for approval as management contracts. As these contract reviews developed, the NIGC began to include an analysis of whether the agreement also met IGRA's requirement that a Tribe maintain the sole proprietary interest in its gaming activity.

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 5 years previously, and NIGC had only recently passed regulations implementing the Act. The NIGC had not yet developed the body of guidance clarifying what the sole proprietary interest requirement entailed.

In the nearly thirty years since Bulletin No. 1993-3 was issued, the NIGC has completed thousands of these reviews, many of which resulted in an opinion from the NIGC's Office of General Counsel, called a "declination letter." Per Bulletin No. 1993-3's instruction, it has become commonplace for Tribes to submit contracts for a declination letter as part of the contracting process. Because the *sole proprietary interest* requirement is a part of the declination letter review, and one of the cornerstones of IGRA, the Agency issues this bulletin to provide guidance to the regulated community. This bulletin explains the *sole proprietary interest* requirement, its bases, and NIGC's interpretation of it.

Although the NIGC's Office of General Counsel will continue to issue declination letters upon request, the NIGC 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 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 contract adheres to the principles and analyses outlined below, the NIGC's Office of General Counsel would likely opine that it does not indicate a violation of IGRA's sole proprietary interest requirement.¹

I. What is the sole proprietary interest requirement?

Before Tribes can engage in, license, or regulate Class II or III gaming, they must adopt a gaming ordinance and obtain approval of it from the NIGC Chair.² IGRA directs the Chair to approve the ordinance if, among other things,³ it “provides that . . . the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity.”⁴ But what does that mean? First, only a Tribe may possess a *proprietary interest* in its gaming, no one else.⁵ A *proprietary interest* is “[a] property right, specifically, the interest held by a property owner,” including rights of possession in, control of, or present use of property — here, a business.⁶ In short, “the tribe must be the sole owner of the gaming enterprise,”⁷ and not share its ownership rights in it. Second, a Tribe must also have “the exclusive control and responsibility for” the gaming activity.⁸

The only exception from the requirement is for individually-owned gaming (meaning, individuals beyond the Tribe owning the gaming).⁹ NIGC regulations make this plain: “[t]he tribe shall have the sole proprietary interest in and responsibility for the conduct of any gaming operation unless it elects to allow individually owned gaming. . . .”¹⁰ Thus, the requirement is in place “unless a tribe elects to license individual owners” of gaming operations on its land.¹¹

II. Why is the requirement important?

¹ The information provided in this Bulletin may be updated as needed. Please email any comments on this topic to NIGC_outreach@nigc.gov.

² See 25 U.S.C. § 2710(b)(1)(B); 25 U.S.C. § 2710(d)(1)(A).

³ 25 U.S.C. § 2710(b)(2)(B) – (F).

⁴ 25 U.S.C. § 2710(b)(2)(A); see also 25 U.S.C. § 2710(d)(1)(A)(ii) (requirement applies to Class III ordinances).

⁵ See *Bettor Racing, Inc. v. Nat'l Indian Gaming Comm'n*, 47 F. Supp. 3d 912, 925–26 (D.S.D. 2014), *aff'd*, 812 F.3d 648 (8th Cir. 2016); S. Rep. 100-466, 1988 U.S.C.C.A.N. 3071-3106, 3078; ENTERPRISE, Black's Law Dictionary (7th ed. 1999) (“a business venture or undertaking”).

⁶ INTEREST, Black's Law Dictionary (10th ed. 2014) (proprietary interest & property interest); *Evans v. United States*, 349 F.2d 653, 658 (5th Cir. 1965).

⁷ S. Rep. 100-466, 1988 U.S.C.C.A.N. 3071-3106, 3078; ENTERPRISE, Black's Law Dictionary (7th ed. 1999) (“a business venture or undertaking”).

⁸ *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1150 (8th Cir. 2013); *Bettor Racing, Inc. v. Nat'l Indian Gaming Comm'n*, 47 F. Supp. 3d at 925, *aff'd*, 812 F.3d 648 (8th Cir. 2016).

⁹ 25 U.S.C. § 2710(b)(2)(A).

¹⁰ 25 C.F.R. §§ 522.4(b)(1), 522.6(c).

¹¹ 58 FR 5802-01.

The *sole proprietary interest* requirement is essential to Congress' purpose for the statute: ensuring that Tribes are the primary beneficiaries of their gaming operations.¹² Meaning, tribes must receive the primary benefit of their gaming revenue.¹³ What constitutes the *primary benefit* is informed by Congress's other directives in IGRA as to the payment of gaming revenues.¹⁴ Individually-owned operators must provide tribes 60% of net revenues.¹⁵ And management contractors may not receive more than 30% of net revenues as a fee unless certain circumstances exist that allow for them to receive 40%.¹⁶ So the "majority share" of net gaming revenue going to a party other than the Tribe may indicate an unlawful interest.¹⁷

Further, Indian gaming is tribal governmental gaming,¹⁸ and tribes must not only own their gaming operations, but also control them to "promot[e] tribal economic development, self-sufficiency, and strong tribal government[s]."¹⁹ In other words, "[t]ribes are not permitted to transfer the right to operate [their gaming] to an entity other than the tribe."²⁰ Nor may they transfer the right to regulate it.²¹ Consequently, control over gaming or its regulation by another party²² may violate the *sole proprietary interest* requirement.²³ As aptly stated by the 8th Circuit Court of Appeals, "Congress placed a high priority on the control of gaming ... to prevent the appropriation of the benefits of gaming by [others]."²⁴

In light of these principles, the *sole proprietary interest* requirement is germane to the legality of management contracts; development and finance agreements; gaming device lease agreements; gaming compacts;²⁵ memoranda of agreements with municipalities; and actions by third parties as to tribal gaming facilities and operations.

III. How is sole proprietary interest determined?

¹² *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d 1207, 1210 (8th Cir. 2015).

¹³ *BETTOR RACING, INC. and J. Randy Gallo, Plaintiffs-Appellants, v. NATIONAL INDIAN GAMING COMMISSION, Defendant-Appellee, Flandreau Santee Sioux Tribe, Intervenor-Defendant.*, 2015 WL 1956293 (C.A.8), 25 (hereinafter, U.S. Appellate Brief – *Bettor Racing, Inc. v. NIGC*).

¹⁴ *Id.*

¹⁵ 25 U.S.C. § 2710(b)(4)(B)(i)(III).

¹⁶ 25 U.S.C. § 2711(c).

¹⁷ *See, e.g.*, U.S. Appellate Brief – *Bettor Racing, Inc. v. NIGC* at 26; *see also* Letter to Senators McCain, Dorgan, and Inouye from NIGC Chairman Hogen re: Contract review and IGRA's sole proprietary interest requirement at 5-6 (Feb. 1, 2005).

¹⁸ 25 U.S.C. § 2701(1).

¹⁹ *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d at 1150; 25 U.S.C. §§ 2702(1).

²⁰ *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 93 F. Supp. 2d 850, 854 (W.D. Mich. 2000), *aff'd*, 271 F.3d 235 (6th Cir. 2001); *see also* 58 FR 5802-01.

²¹ *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F. Supp. 2d 712, 723 (D. Minn. 2011), *aff'd in part, rev'd in part and remanded*, 702 F.3d 1147 (8th Cir. 2013).

²² Not including tribally chartered or created entities established by a Tribe to run, oversee, or regulate its gaming.

²³ *See Bettor Racing, Inc. v. Nat'l Indian Gaming Comm'n*, 47 F. Supp. 3d at 929, *aff'd*, 812 F.3d 648 (8th Cir. 2016); *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F. Supp. 2d at 723.

²⁴ *In re Sac & Fox Tribe of Mississippi in Iowa/Meskewaki Casino Litig.*, 340 F.3d 749, 760 (8th Cir. 2003); *see also Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 700 (7th Cir.2011) ("One of IGRA's principal purposes is to ensure that the tribes retain control of gaming facilities . . . and of the revenue from these facilities.").

²⁵ Interior, not the NIGC, is charged with the review and approval of compacts. 25 U.S.C. § 2710(d)(3)(B) & (d)(8).

Three criteria are used to assess if a Tribe has the *sole proprietary interest* in its gaming operation: 1) the term of the relationship with a third party; 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.²⁶ In certain instances, these criteria in the aggregate support a violation of the requirement.²⁷ In others, simply one element²⁸ or two²⁹ is sufficient. Examples of violations of the requirement include:

- 1) a vendor controlling gaming devices in a Tribe's gaming facility or operation or any agreement providing such a right;³⁰
- 2) a third party possessing a security interest in a Tribe's gaming operation if such interest gives the party the right to control—in the event of default—the gaming operation or its operating revenue;³¹
- 3) tribal members owning stock in a Tribe's gaming operation;³²
- 4) an unrecognized tribal group or faction controlling a Tribe's gaming operation;³³
- 5) a third party's right to seek the judicial appointment of a receiver over the gaming operation or its operating revenue;
- 6) a third party having control or the right to control a Tribe's gaming regulations;³⁴
- 7) a management contractor receiving a percentage of net revenue that exceeds the statutory maximum (30% or, in some cases, 40%);³⁵
- 8) even if below the statutory maximum for management contracts, a third party receiving a large share of a Tribe's gaming revenue that is not justified by the risk or debt assumed, the nature of services or financing provided, or the limitations on the Tribe's ability to obtain such services or financing;³⁶

²⁶ See *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F. Supp. 2d at 723; see also *City of Duluth v. Nat'l Indian Gaming Comm'n*, 89 F. Supp. 3d 56, 64 (D.D.C. 2015) (affording deference to agency's interpretation).

²⁷ *Id.*; NOV-11-02.

²⁸ *Id.* at n.12.

²⁹ *Bettor Racing, Inc. v. Nat'l Indian Gaming Comm'n*, 47 F. Supp. 3d at 929 (D.S.D. 2014) (revenue and control considered), *aff'd*, 812 F.3d 648 (8th Cir. 2016); NOV-07-02.

³⁰ 58 FR 5802-01.

³¹ *Id.*; Letter to Kent E. Richey, Faegre & Benson LLP, from NIGC Acting General Counsel re: Opinion regarding pledge of gross revenue from gaming operations (Jan. 23, 2009).

³² *Id.*

³³ See *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d at 760.

³⁴ See, e.g., *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F. Supp. 2d at 723 n.12; NIGC NOV-11-02 at 7-8.

³⁵ *Bettor Racing, Inc. v. Nat'l Indian Gaming Comm'n*, 812 F.3d 648, 651-652 (8th Cir. 2016).

³⁶ See, e.g., *id.*

9) a management contractor possessing exclusive control over a tribal gaming enterprise and being the sole owner of it³⁷ —or, in other words, operating a Tribe’s gaming enterprise as the proprietor;³⁸and

10) a joint venture or partnership between a tribe and a third party.

³⁷ *Bettor Racing, Inc. v. Nat'l Indian Gaming Comm'n*, 47 F. Supp. 3d at 928-29 (D.S.D. 2014), *aff'd*, 812 F.3d 648 (8th Cir. 2016).

³⁸ U.S. Appellate Brief – *Bettor Racing, Inc. v. NIGC* at 26.