BULLETIN

No. 2021-4 **October 5, 2021**

Subject: Submission of Loan Documents and Financing 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.

In 2010, the United States District Court for the Western District of Wisconsin decided the case, *Wells Fargo Bank v. Lake of the Torches Economic Development Corp.*,[1] ruling that a trust indenture entered into by Lake of the Torches EDC and Wells Fargo Bank was an unapproved management agreement and, thus, void. In an effort to ease lending in Indian Country for gaming related projects, the NIGC's Office of General Counsel agreed to review financing agreements and issue declination letters when appropriate. Soon after *Wells Fargo Bank v. Lake of the Torches EDC*, the requests for declination letters significantly increased, and the majority of those requests were for the review of financing agreements.

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 exactly constitutes 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 passed, however, the tribal gaming industry has grown exponentially in both size and experience. In addition, the NIGC published

[1] Wells Fargo Bank, N.A. v. Lake of The Torches Econ. Dev. Corp., 677 F. Supp. 2d 1056 (W.D. Wis. 2010), aff'd sub nom. Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Econ. Dev. Corp., 658 F.3d 684 (7th Cir. 2011).

guidance on what activities constitute management, and has reviewed thousands of agreements for management, resulting in a vast body of guidance though declination letters and enforcement actions.[2] Similarly, in the decade since the *Lake of the Torches* case was decided, the NIGC's Office of General Counsel has reviewed hundreds of financing agreements of every sort: from simple term loan agreements to complex bond offerings. Most of those reviews resulted in the issuance of a declination letter and, as a result of the *Lake of the Torches* decision and the NIGC's reviews, the Indian Gaming and finance industries have by and large adapted their agreements to avoid management. The vast majority of financing agreements the Agency receives now do not implicate management, and those few that do are usually easily adjusted by the parties to remove such implications.

Although the NIGC's Office of General Counsel will continue to issue opinions, commonly referred to as 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 financing entities with whom they are working look to this bulletin, as well as the materials referenced above, to determine whether a particular financing 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.[3]

Management

In 1994, the NIGC issued Bulletin 94-5 – *Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)*. Now that tribes access financial markets, the concern is whether loan documents and financing agreements are management contracts. Like consulting agreements, the answer for loan documents and financing agreements depends on the specific facts of each case. With that caveat, OGC's experience has resulted in consistent views of several issues associated with these agreements, which are discussed below.

I. Security interest in gross gaming revenues

Financing documents or loan agreements that pledge as security the revenues generated by a tribe's gaming operation are gaming-related contracts or agreements.

NIGC Bulletin 94-5 states that management encompasses many activities, including, but not limited to: planning; organizing; directing; coordinating; and controlling. An agreement containing a security interest in a gaming facility's future gross revenues without further limitation authorizes management of the gaming facility. This is because in the event of default, a party with this type of security interest has the authority to decide how and when operating expenses at the gaming facility are paid, which is itself a management function.[4] Furthermore, a

[2] Bulletin No. 1994-5, *Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void*).
[3] 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.
[4] *See, e.g.*, *Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 698 (7th Cir. 2011)

party that controls gross gaming revenues potentially can control everything about the gaming facility by allocating or putting conditions on the payment of operating expenses.

This concern, however, can be alleviated by exempting operating expenses from the security interest in gross gaming revenues. By excluding operating expenses from the security interest, there is no interest in the revenues needed to cover those expenses and the secured party cannot exert control over the gaming facility in the event of a default.[5] Another option is to expressly prohibit the secured party from exercising management control over the gaming facility, including in the event of default, by adding limiting language to the agreement(s). An example of this limiting language is:

> Notwithstanding any provision in any Loan Document, none of the Lending Parties shall engage in planning, organizing, directing, coordinating, or controlling all or any portion of the Borrower's gaming operations (collectively, "Management Activities"), including, but not limited to:
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> 1. the training, supervision, direction, hiring, firing, retention, compensation (including benefits) of any employee (whether or not a management employee) or contractor;
> 2. any employment policies or practices;
> 3. the hours or days of operation;
> 4. any accounting systems or procedures;
> 5. any advertising, promotions or other marketing activities;
> 6. the purchase, lease, or substitution of any gaming device or related equipment or software, including player tracking equipment;
> 7. the vendor, type, theme, percentage of pay-out, display or placement of any gaming device or equipment; or
> 8. budgeting, allocating, or conditioning payments of the Borrower's operating expenses;
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> provided, however, that a Lending Party will not be in violation of the foregoing restriction solely because a Lending Party:
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> A. enforces compliance with any term in any Loan Document that does not require the gaming operation to be subject to any third-party decision-making as to any Management Activities; or

("without some limitation on Wells Fargo's discretion to allocate or condition the release of the Casino's gross revenues even to pay operating expenses, this provision bestows a great deal of authority in an entity other than the Tribe to control the Casino's operations.").

[5] *See, e.g., Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wash. App. 799, 827–29, *aff'd on other grounds,* 181 Wash. 2d 272, (2014) (finding the security interest excluded the casino's daily cash-on-hand requirements and operating expenses and, therefore, the Tribe retained control over managing the casino).

B. requires that all or any portion of the revenues securing the Loan be applied to satisfy valid terms of the Loan Documents; or

C. otherwise forecloses on all or any portion of the property securing the Loan.

This language prevents the secured party from deciding whether and to what extent the monies the tribe retains are used for operating expenses. But it permits the secured party in the event of default to: put the borrower on a revised schedule of payments, provide the borrower with a sum certain to pay operating expenses, or demand payment in full and cause the bankruptcy or insolvency of the gaming operation.

II. Appointment of a Receiver

Similarly, the appointment of a receiver may give a third party substantial management control over a tribe's gaming operation.[6] In its broadest sense, a receiver appointed by a court pursuant to a contract or in equity will be vested with the authority to completely manage the operation. In addition, as with a security interest in gross gaming revenues, a provision providing for the appointment of a receiver over gross gaming revenues without further limitation is management. Yet, a receiver's authority can be limited to preclude management, either by appropriate limiting language as set forth above or by removing operating expenses from the receiver's authority.

III. Consent from outside parties

Also, an agreement that requires the consent or approval of anyone other than the tribe or its gaming operation prior to the tribe or gaming operation taking any management actions—such as hiring or firing a management company or its general manager—is effectively management of the operation. For instance, if a lender decides not to consent to or approve the hiring or firing of a manager or management employee[7], then the lender, not the tribe, has the ultimate control over the management of the gaming operation. Another example is requiring consent of a party to expend revenues on capital expenditures.[8] Further, a party that has the right to veto a management decision potentially can control everything about the gaming facility by putting conditions on its consent or approval.

Though, if a tribe makes a management decision that is reflected in the agreement or agreements— such as the qualifications necessary for the general manager or spending a specific minimum amount on capital expenditures during a set period of time— and those decisions are embodied in the agreement or agreements as part of the consideration granted to the other party,

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[6] In the *Lake of the Torches* case, the U.S. District court held that the Indenture provision providing for the appointment of a court-appointed receiver in the event of default made the Indenture a management contract subject to IGRA. *Wells Fargo Bank, N.A. v. Lake of The Torches Econ. Dev. Corp.*, 677 F. Supp. 2d at 1061. Upon review, the 7th Circuit found that because other provisions of the Indenture established it as a management contract, the court did not need to opine on the issue. *See Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d at 699 n. 14.

[7] *See, e.g.*, *id.* at 698-99.

[8] *See, e.g.*, *id.* at 698.

they do not transform the agreement or agreements into a management contract.[9] That is because the tribe made these management decisions, not the other party.[10] And, those decisions afford no discretion to the other party over the general manager's qualifications or capital expenditures.

IV. Mandatory implementation of others' recommendations

Likewise, if a tribe must implement the recommendations of another party, a consultant, or others as to its gaming facility, doing so is management by these entities or individuals. That being said, a tribe can agree upfront in the agreement or agreements that it will do certain, specific things or will do those things as a consequence of another event occurring - or will refrain from taking action. Plus, 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 them into management contracts.

V. Insurance purchases and proceeds

In the same vein, agreements where a tribe and another party agree upfront that the tribe or its gaming operation will purchase a specific type and amount of insurance and/or assign objective criteria to the selection of an insurer do not implicate management. Additionally, agreements that provide how insurance proceeds will be distributed in the event that a claim is paid and/or grant a party a security interest in those proceeds do not give the party management authority over the gaming facility or operation.

However, when a party has a security interest in the insurance proceeds and when an event of default occurs or when the tribe fails to obtain and/or maintain the insurance specifically required by an agreement (which is usually a default event), the secured party may procure and maintain the insurance required by the agreement. This action by the secured party is not management because the tribe in the agreement made the management decision to purchase and maintain the specific type and amount of insurance. And, if the tribe fails to do so, the secured party's exercise of that authority is simply protecting its security interest.

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[9] *See, e.g., Wells Fargo Bank, N.A. v. Sokaogon Chippewa Cmty.*, 787 F. Supp. 2d 867, (E.D. Wis. 2011) ("[T]he fact that the Indenture requires the Tribe to set aside a certain amount for capital expenditures does not give the Trustee control of capital expenditures; it simply means that the Tribe has already agreed that that is the amount it will set aside for that purpose.").

[10] *Id.* at 881 ("[W]hile the Tribe agreed that it would spend a certain amount of money on capital expenditures every two years, the Trustee was granted no power to control *how* the Tribe spent such money. The Capital Expenditure provision thus does not turn the Indenture into a management contract.").