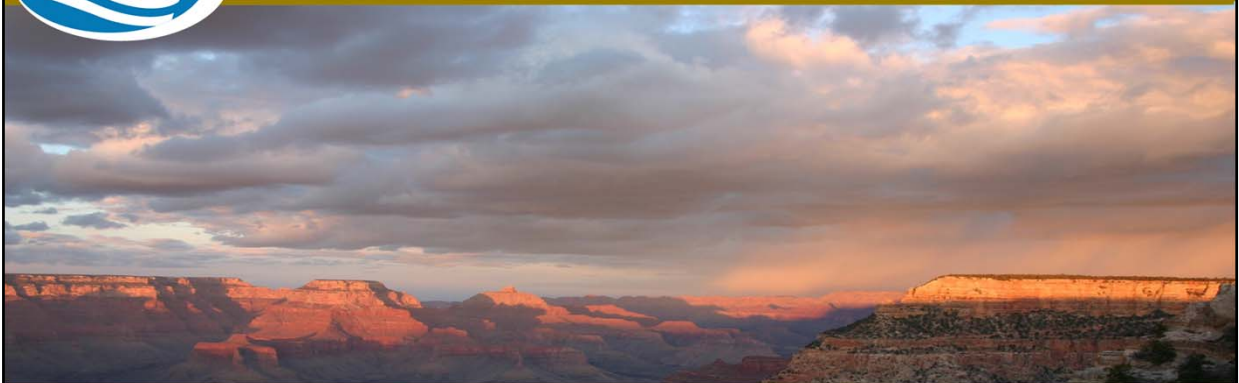


OGC-103 Legal Opinions Course Participant Guide



National Indian Gaming Commission



OGC-103 Legal Opinions

June 2017

KEY POINTS:

My Notes

OGC-103 Legal Opinions Course Participant Guide



Course Objectives

Learn about legal advisory opinions issued by NIGC's Office of General Counsel (OGC)

- What they are
- Topics they cover
- Reasons to request one
- How you request one
- What happens to your request, once received
- Content of opinion letters
- Snapshot of legal analysis done by OGC

2

KEY POINTS:

My Notes

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Knowledge Reviews & Course Evaluations

Knowledge Review Purpose

- Check for immediate understanding and retention
- Used to improve courses
- Provide your name & email address
- Completed twice:
 - at the end of the course
 - 90 days after course via email

Course Evaluation Purpose

- Allow participants to provide immediate feedback on their experience
- Encouraged to include ideas and recommendations
- Will be used to improve the course

3

KEY POINTS:

At the end of this course you will take knowledge review.

You will also be asked to provide input to improve the course, by completing a course evaluation form.

My Notes

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Participating with Poll Everywhere



Poll Everywhere

1



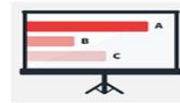
Leader asks a question

2



Participants respond

3



Responses are displayed immediately!

NOTE: Polls are not active until they are displayed on the screen

4

KEY POINTS:

Throughout the presentation we will be asking you several poll question and we would like to practice using the Poll Everywhere.

Your participation is voluntary and your responses are anonymous.

My Notes

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Using Your Phone to Participate

Text **NIGC** to **22333**
to join the session.

**NOTE: Polls are not active
until they are displayed on
the screen**



KEY POINTS:

We're going to have a practice poll question so you get used to using Poll Everywhere.
Text **NIGC** to **22333** to join the session.

My Notes

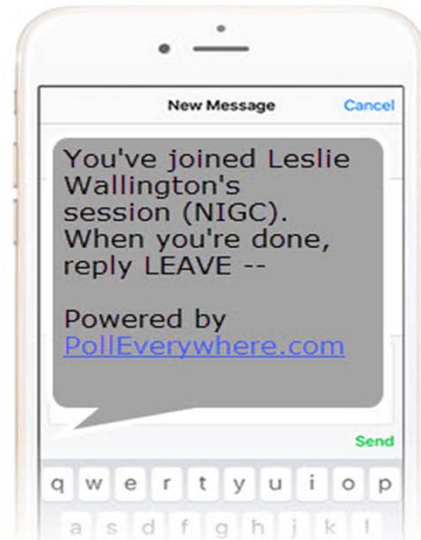
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Response from Poll Everywhere

1. You will receive a text message confirming that you are in the polling session.
2. Do **NOT** select the PollEverywhere.com link.
3. Now you can enter your response to the poll as a text message.

NOTE: Polls are not active until they are displayed on the screen



KEY POINTS:

After your first text sent to 22333 you will receive a confirmation message. Do NOT select the link included here. Simply respond to the poll listed on the PowerPoint.

My Notes

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How did you travel to the conference?

- A. Plane
- B. Train
- C. Car
- D. Foot/Bicycle

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KEY POINTS:

USING POLL EVERYWHERE:

Text **NIGC** to **22333** to join the session.
Then text your response to the question:

How did you travel to the conference?

- A. Plane
- B. Train
- C. Car
- D. Foot/Bicycle

Poll Title: How did you travel to the conference?
https://www.polleverywhere.com/multiple_choice_polls/TaL3p8OxVVN0C3T

My Notes

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History of OGC Legal Opinions

IGRA enacted in **1988**, to establish the National Indian Gaming Commission (NIGC)

NIGC is responsible for implementing IGRA and enforcing its provisions



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KEY POINTS:

- Indian lands (1993-today)
- Game classification (1992-today)
- Declination letters (1993-today)

There have been hundreds of submissions to the NIGC since then

My Notes

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History of OGC Legal Opinions

- OGC began issuing opinions in 1990 and continues to do so today
- In 1993, NIGC issued bulletin inviting tribes and their contractors to submit gaming-related agreements to NIGC
 - NIGC would review agreements to determine whether they require NIGC's approval because it allows management activity

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KEY POINTS:

[The evolution of Indian gaming]

- Indian gaming, under IGRA, has evolved dramatically since 1988
- During the early years, many tribes had difficulty getting a loan from a traditional lending institution, such as a bank or savings & loan
- Today, loans to tribes from traditional lending institutions for gaming-related purposes are commonplace
 - The loans often involve significant amounts of capital
 - The loans are typically used to develop, build and expand tribal gaming facilities
- Today, nearly all of OGC's legal opinions are declination letters for loan agreements between tribes and a 3rd party, usually a bank

My Notes

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Role of OGC, General Counsel & OGC Attorneys

- OGC receives all requests for legal opinions
 - Can be e-mailed to legal_opinions@nigc.gov
- OGC may initiate legal opinion without outside request



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KEY POINTS:

- OGC provides legal advice to the NIGC Commission and to NIGC staff
 - Including NIGC regional office staff, who work in the seven NIGC regional offices which are located throughout Indian country
- OGC works closely with NIGC auditors and compliance officers
- OGC collaborates with other federal agencies, particularly the Department of Interior and the Department of Justice
- OGC also works closely with tribal attorneys, officials, regulators and non-tribal 3rd parties, such as banks and other lenders
 - To facilitate and ensure compliance with IGRA and the NIGC regulations
- Once a request for an opinion is received, it is assigned to an OGC attorney
- The OGC attorney will communicate with the requester at the outset and throughout the process
- The OGC attorney drafts the legal opinion
- OGC's General Counsel & Assoc. General Counsel review and edit the legal opinion drafts
 - There are usually many drafts written and reviewed by many people until the opinion is in its final form
- OGC's General Counsel signs the final version before it is issued
- OGC-initiated legal opinions are rare.
 - May happen if the NIGC needs a legal analysis done for a fact situation concerning one of the three legal topics

My Notes

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General Information

- OGC legal opinions are issued as a “legal opinion letter”
- Address specific legal issues & facts presented by tribe or 3rd party or both
- Final opinions are not limited to factual information submitted by a requester with the initial request

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KEY POINTS:

- They are addressed to person requesting legal opinion
- They are signed by OGC General Counsel
- Contain legal opinion and analysis of law and facts upon which opinion is based
- Additional legal issues may be identified and addressed by OGC
- OGC may request additional records, documents or other factual information from the requester
- OGC may work with BIA regional offices to obtain relevant BIA records
- OGC may conduct independent research for additional records and other factual information

My Notes

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NIGC's General Counsel is required by IGRA to issue legal opinions.

A. True

B. False

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If you see this message in presentation mode, install the add-in or get help at [PollEv.com/app](https://www.polleverywhere.com/app)

Poll Title: NIGC's General Counsel is required by IGRA to issue legal opinions.
https://www.polleverywhere.com/multiple_choice_polls/LXLMK58sqSowOUa

My Notes

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What OGC Legal Opinions Are & Are Not

- Legal *opinions*, not legal *decisions*
- Not “final agency action”
- Voluntary process, not mandatory
- Not negotiation between OGC & tribe or 3rd party

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KEY POINTS:

- OGC legal opinions are advisory only, and are not binding
- They are legal opinions signed by the NIGC’s General Counsel -- not final agency actions under the Administrative Procedures Act (APA)
 - This means the NIGC can’t be sued under the APA for a decision that is arbitrary, capricious or contrary to law
- OGC legal opinions are not final decisions by the NIGC Chair or full Commission
 - This means an opinion can’t be challenged using the NIGC’s internal grievance process
 - This means an opinion can’t be appealed to federal district court
- And if initiated internally by the NIGC, the opinions are legal advice that the OGC attorneys are providing to the Chair or to another division of the NIGC
- They are issued as a courtesy to tribes and 3rd parties
 - It is one of the services provided by the NIGC to the regulated community
 - It is free of charge
- They are not required by IGRA or the NIGC regulations
- They are not required by the NIGC
- OGC is simply providing a legal opinion
- OGC is simply applying the law to the facts

My Notes



Three Types of Legal Opinions

- **Declination letter**
 - Typically involves review of gaming-related agreements and other related documents
- **Game classification opinion**
 - Typically involves review of a game that is being, or may be, offered for play by a tribe
- **Indian lands opinions**
 - Typically involves review of a specific parcel of tribal land



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KEY POINTS:

My Notes



Reasons to Request an Opinion

- Helps tribes and 3rd parties identify and correct compliance problems *before*
 - Financial agreements are finalized
 - Gaming machines are purchased or leased
 - Gaming is conducted on certain Indian lands
- Ensures compliance with IGRA and avoid NIGC enforcement action



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KEY POINTS:

- OGC may identify potential or existing compliance issues
- If problems are identified by OGC, requester will be able to:
 - Be proactive in addressing problems and fixing them
 - Change draft documents before they are executed
 - Refrain from gaming on lands that aren't "Indian lands"
 - Refrain from offering games that don't qualify as Class II or III games
- Gives tribes and 3rd parties an opportunity to get a legal analysis from OGC attorneys
 - They are experts on the application of IGRA & the NIGC regulations and Indian gaming issues
- Before actions are taken
- Before substantial amounts of time, money and effort are expended

My Notes



Reasons to Request an Opinion

- Provides clarity about issues that may be legally & factually complicated or are issues of first impression

KEY POINTS:



17

KEY POINTS:

Issues of first impression are ones that present an application of law to unique facts never before analyzed under IGRA

My Notes



Content of Request & Attachments

- Is usually for opinion on a topic that falls within one of three categories
- Should clearly state legal opinion sought and legal issues you want addressed
- Must identify who is making request

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KEY POINTS:

- The categories are: declination letter, Indian lands opinion or game classification opinion
- Request should include all legal theories and analysis, if possible
- Request should include cites to laws, regulations and case law you think applies
- If not a tribal leader, then requester should identify his or her relationship to tribe
- A request should also include:
 - All documents, records, reports and other information you want considered
 - All materials that provide factual support for a favorable opinion
 - All “relevant” documents
 - Declination letters = drafts of financial documents
 - Indian lands opinions = maps, BIA records, deeds
 - Game classification opinions = technical reports

My Notes

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After Issuance

Once issued, letter is sent to requester



Once issued, all letters are posted on NIGC website with required redactions

After FOIA exemptions & Privacy Act provisions are applied



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KEY POINTS:

My Notes



Declination Letters

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KEY POINTS:

My Notes

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IGRA Guidance on Declination Letters

- IGRA allows a tribe to enter into a contract with a 3rd party for the **management and operation** of its gaming facilities
But only if contract is first approved by the NIGC Chair
- IGRA also requires a tribe to maintain the **sole proprietary interest** in, and responsibility for, its gaming operation

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KEY POINTS:

- OGC is frequently asked to review drafts of agreements or contracts between tribes and 3rd parties to ensure:
 - They are not management contracts that require approval by the NIGC Chair, *and*
 - They do not violate IGRA's requirement that a tribe have the sole proprietary interest in, and responsibility for, its gaming operation
- OGC will issue a declination letter if satisfied that an agreement:
 - Does not give a 3rd party management responsibility over any part of the gaming operation *and*
 - Does not violate the sole proprietary interest requirement
- Either or both legal opinions will be rendered in the letter, depending on the specific request
 - Almost all requesters seek both legal opinions
 - Both are important to ensure full compliance with IGRA
 - The legal analysis and relevant facts for both issues overlap and are intertwined
- It's important to note, if there is no approved management contract in place, then 3rd party cannot manage all or any part of the gaming operation
- If an agreement authorizes management activity by a 3rd party, and gives a proprietary interest in a tribe's gaming operation to a 3rd party, then:
 - The agreement is void, if not approved by the NIGC Chair
 - The agreement will also violate a tribe's gaming ordinance and could be the basis for an NIGC enforcement action

My Notes

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Reasons to Request a Declination Letter

To reassure lenders, consultants, builders, vendors and other 3rd party contractors that drafts of gaming-related agreements, submitted before they are executed, do not violate IGRA

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KEY POINTS:

- To take advantage of OGC's expertise in reviewing and analyzing financial and other agreements for compliance with IGRA
- To get a legal opinion that agreements comport with IGRA and do not require the NIGC Chair's approval
- To help tribes assess whether, under the agreements, they retain the sole proprietary interest in their gaming operation
- They may be investing substantial amounts of time and money
- *Before* critical agreements are executed
 - Identify and address any problematic provisions

My Notes

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History of Declination Letters

- Bulletin No. 1993-3, Submission of Gaming-Related Contracts and Agreements for Review
- Since 1993, hundreds of tribes have taken the NIGC up on its invitation to review documents
- Today, the bulk of submissions from tribes and 3rd parties are no longer consulting, development and employment agreements

They are financing documents

1993

23

KEY POINTS:

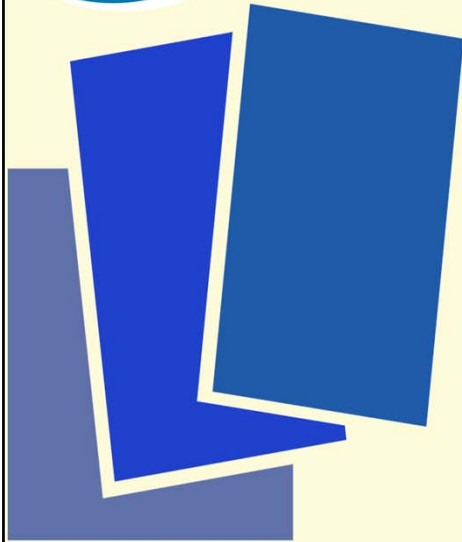
- The Bulletin was issued in response to NIGC's receipt of "several requests for guidance on whether particular gaming related agreements require the approval of the NIGC . . ."
- With its 1993 Bulletin, the NIGC invited tribes and their contractors to submit gaming-related agreements to the NIGC for review -- if they were uncertain about whether certain agreements required NIGC approval
- Consulting agreements, leases or sales of gaming equipment were the examples given in the 1993 Bulletin of appropriate submissions
- The NIGC promised to review each submission and determine whether the agreement required approval of the NIGC
 - If NIGC approval was found to be required, the NIGC promised to notify the tribe to formally submit the agreement for approval
- Through this process, the NIGC hoped to "provide timely and uniform advice to tribes and their contractors"
- Since 2010, more than 500 declination letters have been signed and issued by OGC
- Since 2010, the bulk of documents received for review are financing agreements
- Since IGRA's passage in 1988, the financing of Indian gaming has evolved dramatically
 - For two decades, tribes interested in gaming were unable to get a loan from a traditional lending institution, like a bank
 - Today, a variety of gaming-related loans are readily available to tribes from national and local traditional lending institutions
 - This shift in the availability of financing to tribes is reflected in the kinds of gaming-related contracts and agreements that tribes and 3rd parties now submit to the NIGC for review and guidance
 - Since 2010, nearly all contracts and agreements submitted to the NIGC by tribes or lenders for review are loan agreements between a tribe or a tribal gaming operation and a bank or other lending institution

My Notes

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Initial Request & Document Submissions



- Identify, with specificity, legal opinions sought
- Include drafts of documents, *not* executed documents
- Typical submissions include drafts of:
 - Loan agreements and related documents

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KEY POINTS:

- Initial request should:
 - Include all relevant documents in draft form
 - List and identify, in the body of the cover letter, all relevant draft documents that have been submitted
 - Identify and submit all exhibits, schedules and any other documents that are incorporated by reference in any of the documents
 - Briefly summarize the nature and purpose of documents
 - Identify all parties to any agreements
 - If declination letter is needed by set date, include in request
- Requester should be identified by his or her full title and place of employment
 - And his or her relationship to a tribe, i.e. the tribe's lawyer, lender, lender's lawyer, etc.
- OGC will not give an opinion on executed documents
 - We submit executed documents to Compliance and work with them to determine whether there is a violation of IGRA or our regulations
- The "related documents" submitted with a loan agreement typically include:
 - Credit Agreements
 - Security Agreements
 - Deposit Account Control Agreements
 - Promissory Notes *and*
 - Fee Letters
- Less frequent submissions include drafts of:
 - Development Agreements
 - Employment Agreements
 - Leases or Sub-leases
 - Other agreements or contracts

My Notes

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OGC Review Process

- All documents submitted in connection with request will be reviewed by OGC
- Assigned attorney will communicate with requester, tribe and 3rd parties



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KEY POINTS:

- Whether submitted with initial request or submitted later
- Review will include any changes made to draft documents by requester before review is concluded
- To address problematic provisions
- To review revisions
- To request missing documents
- To answer any questions

My Notes

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Time Considerations

- Assigned OGC attorney will ask requester if there are any time considerations we should be aware of
- Any missing documents will cause delay while OGC attorney waits to receive them
- Other factors will impact the time needed for OGC to complete its review



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KEY POINTS:

- Any looming deadlines must be communicated to OGC as soon as possible
- OGC will try to accommodate a deadline request as best as possible, but reviews typically take 4-6 weeks under the best of circumstances, so plan accordingly
- Typical missing documents are ones that:
 - Are central to the agreements
 - Are referenced in the agreements
 - The requester wants encompassed within the scope of the legal opinion, but hasn't submitted yet
- Factors impacting OGC's ability to meet a requester's proposed deadline, include:
 - The number and complexity of changes recommended by OGC
 - The number of parties, including the tribe, who must agree to the changes
 - Whether the tribe and 3rd parties accept OGC's recommendations or challenge them
- During OGC's review process, providing red-lined versions of the original documents that show any subsequent changes made during the review process, is extremely helpful and a big time-saver

My Notes


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GRA defines "management".

True

False

Start the presentation to activate live content
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Poll Title: IGRA defines "management".
https://www.polleverywhere.com/multiple_choice_polls/6TC49f6bBDjkyqz

My Notes

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Legal Analysis

- What is definition of “management activity”?
 - Neither IGRA nor NIGC regulations define “management”
- NIGC Bulletin No. 94-5 describes indicia of management
- NIGC regulations define “primary management official”

PLANNING

DIRECTING

ORGANIZING

COORDINATING

CONTROLLING

28

KEY POINTS:

The legal analysis begins with IGRA

- Whether provisions in loan agreements and related documents, individually or collectively
 - Allow or require any management activity by 3rd party *or*
 - Violate IGRA’s sole proprietary interest requirement
- If the agreement requires, or allows, performance of any management activity of all or part of a tribe’s gaming operation, then the agreement is a management contract within meaning of 25 USC § 2711
 - And requires the NIGC Chair’s approval
- Courts have held that, to be a management contract, document must “grant to a party other than the tribe some authority with regard to a gaming operation”

May rely on its ordinary meaning

- The definition of “manage” is:
 - To exercise executive, administrative and supervisory direction of
 - To direct or carry on business or affairs
- The definition of “management” is:
 - The act of managing
 - The conducting or supervising of something (a business) *or*
 - The collective body of those who manage or direct an enterprise
- Activities such as planning, organizing, directing, coordinating and controlling
- Any person “who has authority . . . to set up a working policy for a gaming operation”
 - 25 CFR § 502.19

My Notes

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Results of Legal Analysis

If, during legal analysis, OGC finds provisions that allow or require 3rd party management activity or give 3rd party a proprietary interest in a tribe's gaming operations, then:

- OGC will share specific concerns with requester and answer any questions
- OGC will ask requester to change or eliminate all problematic provisions



KEY POINTS:

- If no changes are recommended, a declination letter will be issued
- If changes are recommended, and made, a declination letter will be issued
- If changes are recommended, but not made, no declination letter will be issued
- If no declination letter is issued, the tribe may, alternatively, choose to undergo the NIGC's management contract review process
- If no declination letter is issued, but the documents are executed without a declination letter, then
 - The parties run the risk of operating under agreements that may be found to be void under IGRA
 - The parties run the risk of an NIGC enforcement action and the resulting penalties
- The parties may be conducting gaming in violation of IGRA, the NIGC regulations and/or the tribe's gaming ordinance

My Notes

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Content of OGC Declination Letter

- Each document reviewed will be listed
- Legal issues addressed by OGC will be spelled out
- Legal opinion will be provided for each issue considered
- Limitations of legal opinions included at end of letter
- Will include notice that letter will be posted on NIGC's website

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KEY POINTS:

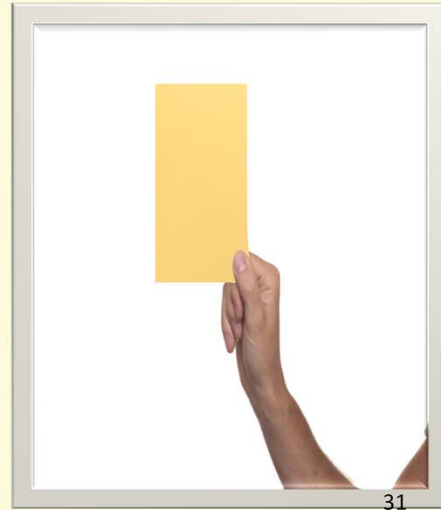
- Opinion applies only to existing documents
 - Not to future documents incorporating extensions, modifications, supplements or other changes to the documents
- Opinion does not apply to any missing documents
- If documents change in any material way, opinion won't apply to changes
- Declination letter will be posted only *after* NIGC's FOIA Officer:
 - Informs requester of opportunity to request that certain information be redacted or withheld under FOIA's exemptions;
 - Reviews and considers any requests received from requester; *and*
 - Redacts or withholds text if justified under FOIA and/or the Privacy Act
- Letter will be redacted in accordance with FOIA and the Privacy Act before it is posted
- NIGC frowns upon requesters asking that an entire letter be withheld
 - To withhold entire letter would be contrary to NIGC's policy of transparency and FOIA's presumption of openness
 - Also, one of the purposes of all OGC opinions is to better inform the industry generally, which does not happen if opinions are withheld

My Notes



Withdrawing Request

- Before opinion is issued
- If circumstances change and requester no longer needs opinion



KEY POINTS:

- If adverse judicial decision is issued that impacts or moots need for legal analysis
- If tribe abandons gaming project before completion

My Notes

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Common Problems

- Provisions that authorize 3rd party to:
 - Engage in a management activity
 - Exercise control over a management activity
- Provisions that give 3rd party:
 - Decision-making power and authority for all or part of any management activity



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KEY POINTS:

- Engage in management by participating in tribe's governmental processes
 - Right to veto any amendments to tribe's gaming ordinance
 - Right to veto any new laws or regulations enacted by tribe
 - Right to review and object to tribe's licensing decisions
- Exercise control over some or all of the gaming revenues *before* an event of default

In addition,

- Provisions that take away some, or all, of a tribe's decision-making power and authority over a management activity
 - Can't require lender's consent or approval for decision
 - Can't give lender veto power over decision made by tribe
- Provisions that allow a court to appoint a receiver as a remedy for default on a loan by a tribe
 - This is management
 - Receiver will have authority to make significant financial decisions related to gaming facility and gaming revenues
 - The collection and depositing of revenues
 - The payment of liabilities
 - A federal court in *Wells Fargo v. Lake of Torches* found that the appointment of a receiver to carry out the terms of a bond indenture, i.e. the deposit of revenues and payment of liabilities, where tribe's debt is secured by gross gaming revenues, is management

Also,

- Fees, interest and other costs that are unreasonably high when considered together
- Compensation to 3rd party that can't be justified by the benefits to tribe and/or the services rendered to tribe by 3rd party
- The good news is provisions that may make management a possibility, but do not directly permit management, can be easily cured with language that prohibits a creditor from engaging in management activities
 - 2009 *Muscogee Creek* language
 - Other limiting language approved by NIGC

My Notes

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What are the two primary areas of concern for OGC when performing a declination letter review?

- Management and sole proprietary interest
- Number of games and location of casino
- Minimum internal controls and tribal internal controls

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Poll Title: What are the two primary areas of concern for OGC when performing a declination letter review?
https://www.polleverywhere.com/multiple_choice_polls/JQ8TiNkz3yEIFw7

My Notes

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Which NIGC Bulletin provides guidance on "management"?

- Bulletin 88-1
- Bulletin 94-5
- Bulletin 99-5

Start the presentation to activate live content
If you see this message in presentation mode, install the add-in or get help at [PollEv.com/app](https://www.polleverywhere.com/app)

Poll Title: Which NIGC Bulletin provides guidance on "management"?
https://www.polleverywhere.com/multiple_choice_polls/RAZdVZ0XRrYJ1ku

My Notes



Indian Land Opinions

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KEY POINTS:

My Notes

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Indian Lands Opinions

- It's a legal opinion, in letter form
- Addresses whether a particular parcel of land qualifies as Indian lands eligible for gaming under IGRA



36

KEY POINTS:

My Notes



History of Indian Lands Opinions

- First Indian lands opinion was issued in 1993 with approximately 75 opinions issued since
- Most issued by OGC and initiated at the request of a tribe
- Currently, there are 497 gaming operations that are located on “Indian lands” eligible for gaming under IGRA

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KEY POINTS:

- However, some are issued by Interior’s Solicitor’s Office, not OGC
 - When a tribe submits a trust application for a land parcel to DOI and expresses an intention to game on the land
 - Many of the early Indian lands opinions were issued by Solicitor’s Office
- The location of the land, and the legal status of the land, have been documented by the NIGC for each tribal gaming operation
 - With the assistance of tribes and BIA regional offices
- Most tribal gaming operations have been in place for many years on the same “Indian lands”

My Notes

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Reasons to Request an Indian Lands Opinion

Achieve certainty about land's legal status before financing, building, opening and operating a gaming facility



Obtain legal justification from NIGC for gaming being conducted by a tribe on its land under IGRA

Favorable opinion can be used by tribe



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KEY POINTS:

- Whether land is eligible for gaming under IGRA is one of the prerequisites to conducting Indian gaming
 - It is a critical preliminary determination for a tribe that intends to conduct gaming on certain lands
 - To get some clarity about the NIGC's position on the land before investing money and resources on a new facility
 - To use defensively to counter legal challenges and threats from outside entities

My Notes

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Content of Initial Request & Attachments

- **Should provide basic description of land**
 - **Location**
 - **Location in relation to tribe's reservation**
- **Should include history of land at issue**
 - **And tribe's homelands generally**
- **Should include theory of why land qualifies as "Indian lands" under IGRA**

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KEY POINTS:

- Like all legal opinion requests, it must be in writing
- Should describe requester's relationship to tribe
 - Particularly if requester is not a tribal leader
- Should include the following materials:
 - Grant deed for the land
 - Legal description of the land
 - From BIA and/or county records
 - Land survey records
 - Maps of the land
 - Relevant BIA records, including:
 - Notices of Decision (for taking land into trust)
 - Preliminary Title Reports
 - Maps, including US Geological Survey maps
 - Relevant Federal Register Notices
 - Initial Reservation Proclamation, Federal Recognition, etc.

My Notes

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Time Considerations



- No statutory time limits
- Even if substantial materials are submitted with initial request, more information is almost always required
- Multiple reviews and edits of opinion drafts take time

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KEY POINTS:

- OGC often needs additional records, documents, maps or other information for its legal analysis
 - Obtaining the missing materials can cause delay
 - Some records, documents and maps are hard to locate
 - Particularly historical ones
- Many attorneys are involved in reviewing and editing a draft legal opinion
- All drafts are reviewed and edited by at least one OGC supervisor and the General Counsel
- OGC also seeks concurrence from the Dept. of Interior Solicitor's office to ensure that both agencies with some jurisdiction over the land agree on its status
- Final version of Indian lands opinion will have been reviewed and edited multiple times

My Notes

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Legal Analysis – IGRA’s Basic Requirements

Two basic requirements must always be satisfied for land to be eligible for gaming under IGRA:

Land must meet IGRA’s definitions of “Indian lands”

AND

Tribe must have jurisdiction over the land

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KEY POINTS:

These two basic requirements apply to all Indian lands determinations

My Notes

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Legal Analysis – IGRA's Basic Requirements

- An additional requirement applies only to a tribe's trust land or restricted fee land located outside of its reservation boundaries
 - A tribe must exercise governmental power over the land

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KEY POINTS:

- 3rd requirement applies to *all* trust or restricted fee land not within a reservation
 - Not just trust land acquired after 1988
- Analysis is done on case-by-case basis
 - No set formula for satisfying this requirement

My Notes

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Legal Analysis – IGRA Applied to Tribe's Land

- Special requirements apply to trust land acquired by Secretary of Interior for tribe after 1988
 - General rule is that gaming cannot occur on post-1988 trust land
 - Unless one of the exceptions in 25 USC 2719 is met
 - There are 9 exceptions
 - 7 exceptions apply to all trust lands
 - 2 exceptions apply only to trust lands in OK

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KEY POINTS:

- Exceptions to general rule that gaming *cannot* occur on post-1988 trust land are:
 - If trust land is within a tribe's reservation boundaries
 - As they existed in 1988
 - If trust land is contiguous to the boundaries of a tribe's reservation
 - As they existed in 1988
 - If land is within tribe's last reservation
 - In state where the tribe is currently located
 - Two-part determination by Secretary of Interior and Governor
 - Settlement of a land claim
 - Initial reservation of newly recognized tribe
 - Restoration of lands for restored tribe
- Special Oklahoma exceptions to general rule
 - If tribe had no reservation in 1988, its trust land is located in OK, and the trust land is:
 - Within the boundaries of the tribe's former reservation
 - As defined by the Sec'y of Interior
 - Contiguous to other land held in trust or restricted status by the U.S. for the tribe in OK

My Notes

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Legal Analysis – IGRA’s Basic Requirements

- First, location & status of land at issue is determined
- If land is within reservation’s boundaries, it is “Indian lands” under IGRA
- If not, a more in-depth analysis is required to determine whether land is “Indian lands” under IGRA and the tribe has jurisdiction over the land

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KEY POINTS:

- The location and status of a tribe’s land signal which sections of IGRA & the NIGC regulations apply. Possibilities are:
 - On current reservation
 - Not on current reservation
 - In trust for tribe
 - In trust for tribal member
 - Restricted fee for tribe
 - Restricted fee for tribal member
 - Tribal fee land
 - Individual fee land
- Land within a tribe’s reservation’s boundaries is “Indian lands” even if the land is non-tribally owned fee land
 - Jurisdiction is presumed
 - The legal analysis is simple and straightforward
- But reservation land is only one type of “Indian lands” as defined in IGRA
 - IGRA also permits gaming by a tribe on its trust and restricted land regardless of whether it is on or off reservation, but imposes the additional requirement that the tribe must exercise governmental power over the land

My Notes

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Content of Opinion Letter

- Legal description of land
- History of land and tribe relevant to legal analysis
- List of all documents submitted by requester and considered by OGC
- Detailed legal analysis
- Legal opinion

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KEY POINTS:

- History of a tribe and its land
- Treaties, if any
- Relocations from original homelands, if any
- Factual support for legal opinion
- Application of relevant sections of IGRA, the NIGC regulations, a tribe's gaming ordinance, the BIA regulations, a tribe's constitution and other laws
- Application of relevant case law and judicial decisions
- Cites to previous OGC Indian lands legal opinions, DOI Sol's Office legal opinions and Interior (IBIA) appellate decisions
- Includes specific sections of IGRA and other laws/regulations that were applied
- Identifies and explains the legal theory justifying the opinion
- Tribal records, historical documents and maps
- BIA records, reports, maps and other materials
- Information from other sources

My Notes



Common Issues

- Most issues concern post-1988 trust land
 - “Restored lands” for a “restored tribe” exception
 - Land taken into trust as settlement of a land claim
 - Whether trust land is within a tribe’s reservation boundaries
 - As they existed in 1988

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KEY POINTS:

- Must meet one of the exceptions in 25 USC § 2719 to qualify for gaming under IGRA which can be challenging.
- There are numerous previously issued OGC legal opinions that analyze whether post-1988 trust land qualifies for one of the exceptions to the general rule that gaming is prohibited on post-1988 trust land
 - These opinions can be found on the NIGC website
 - Each opinion is identified by the legal theory applied
 - For post-1988 trust land, this includes whichever exception was applied

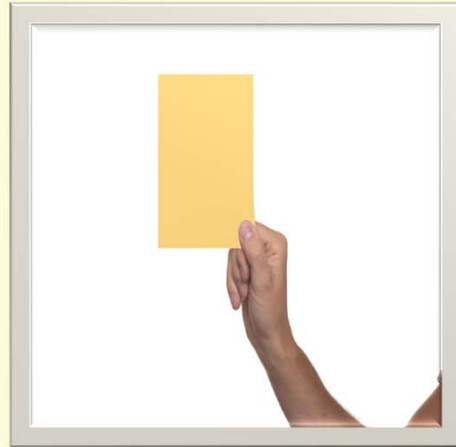
My Notes

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Withdrawing an Opinion

Most requests for Indian lands opinions can be withdrawn



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KEY POINTS:

Can usually be withdrawn at request of tribe that requested the opinion

My Notes

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What information should you submit if you are requesting an Indian lands opinion?

- The legal description of the land
- The tribe's ties to the land
- Theory why your tribe thinks the land is Indian lands
- All of the above

Start the presentation to activate live content
If you see this message in presentation mode, install the add-in or get help at [PollEv.com/app](https://www.polleverywhere.com)

Poll Title: What information should you submit if you are requesting an Indian lands opinion?
https://www.polleverywhere.com/multiple_choice_polls/xdETISaugamkR00

My Notes



Game Classification Opinions

49

KEY POINTS:

My Notes

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Definition



A legal advisory opinion issued by NIGC's General Counsel as to whether a game is Class II or Class III

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KEY POINTS:

- Focus is usually on proposed gaming machines, devices or activities
- Provides guidance to tribes, game developers and game manufacturers about whether a particular game is Class I, II or III and can be legally played under IGRA
 - Can help determine whether Tribal-state compact is needed
- On the tribal side, usually requested by tribal officials, tribal attorneys, tribal gaming commissions, gaming corporations or gaming operations
- On the non-tribal side, usually requested by game developers, game manufacturers or their attorneys

My Notes

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History of Game Classification Opinions

- First game classification opinion was issued by NIGC's General Counsel in 1992
- NIGC's General Counsel has signed a majority of these opinions

1992

JANUARY							FEBRUARY							MARCH							APRIL						
Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa
3	4	5	6	7	8	9	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19		
10	11	12	13	14	15	16	13	14	15	16	17	18	15	16	17	18	19	20	16	17	18	19	20	21	22		
17	18	19	20	21	22	23	20	21	22	23	24	25	22	23	24	25	26	27	23	24	25	26	27	28	29		
24	25	26	27	28	29	30	27	28	29	30	31	27	28	29	30	31	24	25	26	27	28	29	30				
31																											

MAY							JUNE							JULY							AUGUST						
Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa
1	2	3	4	5	6	7	8	9	10	11	12	13	1	2	3	4	5	6	1	2	3	4	5	6			
8	9	10	11	12	13	14	15	16	17	18	19	20	8	9	10	11	12	13	8	9	10	11	12	13			
15	16	17	18	19	20	21	12	13	14	15	16	17	15	16	17	18	19	20	15	16	17	18	19	20			
22	23	24	25	26	27	28	19	20	21	22	23	24	19	20	21	22	23	24	22	23	24	25	26	27			
29	30	31					26	27	28	29	30	31	26	27	28	29	30	31	29	30	31						

SEPTEMBER							OCTOBER							NOVEMBER							DECEMBER						
Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa
4	5	6	7	8	9	10	1	2	3	4	5	6	1	2	3	4	5	6	1	2	3	4	5	6			
11	12	13	14	15	16	17	8	9	10	11	12	13	8	9	10	11	12	13	8	9	10	11	12	13			
18	19	20	21	22	23	24	15	16	17	18	19	20	15	16	17	18	19	20	15	16	17	18	19	20			
25	26	27	28	29	30	31	22	23	24	25	26	27	22	23	24	25	26	27	22	23	24	25	26	27			

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KEY POINTS:

- Since 1992, more than 100 game opinions have been issued
- Analyzing everything from pull-tabs to electronic bingo machines to card games to progressively linked games

My Notes

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Relevant IGRA Section

- IGRA created three classes of gaming
- They are described in 25 USC § 2703

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KEY POINTS:

- IGRA divides the world of Indian gaming into three classes of gaming.
 - Class I gaming encompasses *social games* – for small value prizes or in connection with tribal ceremonies or celebrations
 - Class II includes the following games: (a) bingo (paper or electronic); (b) pull tabs when played in the same location as bingo, and (c) non-banked card games authorized or not explicitly prohibited by the state
 - All other games are Class III. Class III games include, but are not limited to the following: baccarat, *chemin de fer*, blackjack, slot machines
- IGRA permits electronic or electromechanical facsimiles of any game of chance as a Class III game
- Implemented by NIGC regulations at 25 CFR §§ 502.2-502.4
- IGRA gaming can be conducted by tribes under IGRA
 - If the gaming is located within a state that permits such gaming for any purpose by any person
 - For class III gaming, if there is a valid Tribal-state compact in place

My Notes



In General

Game classification opinions:

- Assist in classifying games that may arise as new games are developed and technology advances
- Are used by the NIGC to delineate between Class II and III games
- Bring clarity to the Indian gaming industry

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KEY POINTS:

My Notes

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Reasons to Request a Game Classification Opinion

- To be proactive
- BUT, if game is already being played, or machine is already on floor, then to ensure compliance with IGRA

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KEY POINTS:

- A tribe may want to request a GO:
 - To obtain OGC opinion *before* placing game on casino floor
 - *Before* contracting with vendor for leasing or purchasing gaming machines
- A game developer or manufacturer may want one
 - To obtain OGC opinion *before* marketing, selling or leasing game to tribe

My Notes

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Content of Request & Attachments

- Be specific as to legal opinion sought
- Include all relevant records, reports and other information with initial request

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KEY POINTS:

- Identify and describe particular gaming machine, device or activity at issue
- Clearly articulate question or questions you want answered
- Specifics about game design
- Specifics about how game is played
- Results of any scientific testing
- Results of any additional testing done after initial request for legal opinion
- Copies of any expert opinions, and accompanying reports, obtained from independent laboratories for game
- Additional records, reports and other information requested by OGC for legal analysis

My Notes



Time Considerations



- No statutory time limits
- The more complete the submission, the faster the OGC response

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KEY POINTS:

- Timeliness of OGC's response depends on whether all materials necessary for a complete review and analysis by OGC attorney have been submitted to NIGC
- Very often, technical specifications, test results and other information are missing from initial request

My Notes

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Content of OGC Opinion Letter

- Provides opinion as to whether a game is Class II or III or doesn't fall within either definition
- Describes, in detail, characteristics of the game that was submitted for review

Includes discussion of:

- Relevant parts of IGRA & NIGC regulations
- Legal analysis done
- Resulting legal opinion
- Factual basis supporting legal opinion

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KEY POINTS:

- Helps avoid future misunderstandings or miscommunication about particular game at issue
- Legal analysis may reference prior OGC game opinions, federal judicial decisions and other court cases to support its ultimate legal opinion
- If necessary, discusses IGRA's technologic aid provisions, Class III facsimiles and the Johnson Act

My Notes



Common Issues

When key elements of definition of either
Class II or III gaming are not met



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KEY POINTS:

- For example, established characteristics of bingo are missing
- Examples of when part of a gaming activity is off of Indian lands
 - Server is on reservation, but wager is made off-reservation
 - Wager is made on reservation, but ball drop occurs off-reservation

My Notes

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If you are unsure about a game or technology, when is the best time to seek a game classification opinion?

- Never, just wing it
- After the game is installed
- Before the game is installed

Start the presentation to activate live content
If you see this message in presentation mode, install the add-in or get help at PollEv.com/app

Poll Title: If you are unsure about a game or technology, when is the best time to seek a game classification opinion?
https://www.polleverywhere.com/multiple_choice_polls/UhtokOUI9BBxlih

My Notes

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House-banked card games are in which class of gaming under IGRA?

- Class I
- Class II
- Class III
- Class IV

Start the presentation to activate live content
If you see this message in presentation mode, install the add-in or get help at PollEv.com/app

Poll Title: House-banked card games are in which class of gaming under IGRA?
https://www.polleverywhere.com/multiple_choice_polls/SHqQboE7TPnUrGM

My Notes



Summary

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KEY POINTS:

My Notes



Conclusion

The long-term impact of NIGC legal opinions is:

- Greater clarity for tribes
- Greater clarity for 3rd parties and
- Greater clarity for the Indian gaming industry

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KEY POINTS:

- Today tribes routinely enter into loan agreements -- with banks and other traditional lending institutions -- that *don't* constitute management contracts requiring approval by the NIGC Chair
 - Tribes accomplish this by routinely submitting draft agreements to the NIGC for review *before* they are executed
 - The feedback received from OGC enables tribes to proactively change or eliminate provisions that allow management activity and give unreasonable compensation to 3rd parties
- Today, there is a clearer understanding of the requirement that a tribe retain the sole proprietary interest in, and responsibility for, its gaming operation
 - No joint ventures, no shared ownership, no payment of gaming revenues for nothing in return or for something of disproportionate value
 - No managing by 3rd party of *any* part of the gaming operation without an approved management contract in place
- Today, there is a clearer understanding and delineation of the differences between Class II and III gaming activity, machines and devices
 - This is especially true for electronic bingo machines, pull-tabs and table games

My Notes

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How to Request an Opinion

Requests for legal advisory opinions must be made in writing and either:

- E-mailed to OGC at legal_opinions@nigc.gov or
- Mailed to OGC at:
National Indian Gaming
Commission 1849 C Street, NW
Mail Stop #1621
Washington, DC 20240

See NIGC's website home page for "How to Request a Legal Opinion"

<https://www.nigc.gov/images/uploads/game-opinions/SubmittingRequestforLegalOpinionDec112013.pdf>

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KEY POINTS:

Requests for legal advisory opinions must be made in writing and either:

- E-mailed to OGC at legal_opinions@nigc.gov or
- Mailed to OGC

My Notes

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How to Access Previously Issued OGC Legal Opinions

Many of OGC's previously issued legal opinions can be accessed from the NIGC website

- **Declination letters:** <http://www.nigc.gov/general-counsel/management-review-letters>
- **Game classification opinions:** <https://www.nigc.gov/general-counsel/game-classification-opinions>
- **Indian lands opinions :** <https://www.nigc.gov/general-counsel/indian-lands-opinions>

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KEY POINTS:

- Many of OGC's previously issued legal opinions can be accessed from the NIGC's website
- It is always helpful to review legal opinions that have been previously issued by OGC to see how IGRA has been interpreted and applied to different fact situations
 - OGC frequently cites to its previous legal opinions when issuing a new opinion

My Notes

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Generally, the declination letter review process takes:

- Two to four weeks.
- Four to six weeks.
- Eternity.

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Poll Title: Generally, the declination letter review process takes:
https://www.polleverywhere.com/multiple_choice_polls/rx4ZLKkyUMNnx1H

My Notes

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Three examples of Legal Opinions that the NIGC issues are:



Start the presentation to activate live content
If you see this message in presentation mode, install the add-in or get help at [PollEv.com/app](https://www.polleverywhere.com/app)

Poll Title: Three examples of Legal Opinions that the NIGC issues are:
https://www.polleverywhere.com/free_text_polls/S39akThYdUEZwAT

My Notes



Knowledge Review

- Legibly write your name and email address
- Do your best
- We will go over the answers at the end
- Be on the lookout for the survey email 90 days from today

QUESTIONS	
1-	<input checked="" type="radio"/> A <input type="radio"/> B <input type="radio"/> C <input type="radio"/> D
2-	<input type="radio"/> A <input type="radio"/> B <input type="radio"/> C <input checked="" type="radio"/> D
3-	<input type="radio"/> A <input checked="" type="radio"/> B <input type="radio"/> C <input type="radio"/> D
4-	<input type="radio"/> A <input checked="" type="radio"/> B <input type="radio"/> C <input type="radio"/> D
5-	<input type="radio"/> A <input type="radio"/> B <input checked="" type="radio"/> C <input type="radio"/> D
6-	<input checked="" type="radio"/> A <input type="radio"/> B <input type="radio"/> C <input type="radio"/> D

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KEY POINTS

Our last task is to complete the knowledge review and the course evaluation. We use the information from both to evaluate the effectiveness of the course and to make improvements so please provide specific written feedback if applicable.

My Notes

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Questions

If you have any questions, please feel free to contact the NIGC at:

(202) 632-7003

and ask to speak with an attorney



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KEY POINTS:

My Notes



Course Evaluation

- Provide an honest assessment of your experience
- Written suggestions and comments are greatly appreciated and allow us to improve your experience



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KEY POINTS

Our last task is to complete the knowledge review and the course evaluation. We use the information from both to evaluate the effectiveness of the course and to make improvements so please provide specific written feedback if applicable.

My Notes