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Introduction

The goals of federal Indian policy that the Indian Gaming Regulatory Act ("IGRA") was enacted to promote include tribal economic development, tribal self-sufficiency and strong tribal governments. Implicit in these goals is the concept of tribal self-determination. That is, it should be the tribe that determines its future, not outsiders, and certainly not just federal officials. Thus, decisions about how tribal gaming revenues are to be utilized should be made and implemented by tribes, through their duly authorized tribal governments.

In writing IGRA, Congress did, however, specify several broad categories for appropriate tribal expenditures of gaming revenues. These categories are discussed below.

Tribal governments determine the appropriate uses of net gaming revenues consistent with IGRA's designated categories. The National Indian Gaming Commission ("NIGC") acknowledges that tribal governments are well aware of the requirements for the uses of net revenues from Indian gaming under IGRA, and that tribal governments, in general, have committed gaming revenues to fund essential government services, including education, health care, police and fire protection, water and sewer services, and elderly and child care. For most tribal governments, this Bulletin will reinforce existing practices.

As might be expected, however, the NIGC often receives comments and complaints from tribal members with respect to their tribes' expenditures of tribal gaming revenues. While the NIGC is committed to a government-to-government relationship with tribes, and most of our dealings are directly with tribal governments through their tribal gaming commissions, tribal councils and other tribal governmental entities, when appropriate, we attempt to assist in the resolution of misunderstandings and disputes that can, and do, develop between tribal members and tribal entities regarding Indian gaming issues, such as expenditures of gaming revenues. Because tribes' utilization and expenditures of tribal gaming revenues are so fundamental to the purpose for tribal gaming and to its

continued success, the NIGC has deemed it appropriate to compile and share the information in this Bulletin to encourage tribes to employ policies and procedures in their expenditure of tribal gaming revenues that comply with IGRA and will minimize complaints and misunderstanding among the tribal membership and interested outside parties. The NIGC recognizes and respects that tribal governments are in the best position to determine tribal needs and priorities, and to incorporate tribal culture, traditions and values in the processes and programs that they develop, utilize and support with the expenditures of tribal gaming revenues. It is in this spirit that the information in this Bulletin is provided.

Net Revenues Used for Government Purposes and for Payments to Individual Tribal Members

IGRA requires that net gaming revenues from Indian gaming be used for public purposes that are consistent with those typically provided by governments. The five public purposes specified by IGRA for a tribe's use of net revenues from its tribal gaming operations are:

1) To fund tribal government operations or programs;
2) To provide for the general welfare of the Indian tribe and its members;
3) To promote tribal economic development;
4) To donate to charitable organizations; and
5) To help fund operations of local government agencies.

25 USC § 2710(b)(2)(B); *see also* 25 U.S.C. §§ 2710(d)(1)(A)(ii) and 2710(d)(2); 25 C.F.R. §§ 522.4, 522.6. The term "net revenues" is defined in IGRA as "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees." 25 U.S.C. § 2703(9); 25 C.F.R. § 502.16.

Direct distributions of payments to individual tribal members, outside of a government program, are not allowed under IGRA. However, there is an exception to this limitation. Tribes may distribute gaming proceeds to individual tribal members if the tribe has a Revenue Allocation Plan, or "RAP," that authorizes per capita payments and has been formally approved by the Secretary of the Interior ("Secretary"). 25 U.S.C. §§ 2710(b)(3); *see also* 2710(d)(1)(A)(ii). It is in the RAP that a tribe describes how it will allocate and distribute net gaming revenues for public purposes and to individual tribal members on a per capita basis. 25 C.F.R. § 290.2. "Per capita payment," within this context, is defined as "the distribution of money or other thing of value to all members of the tribe, or to identified groups of members, which is paid directly from the net revenues of any tribal gaming activity." 25 C.F.R. § 290.2. The responsibility for reviewing and approving RAPs is delegated by federal regulations to the Bureau of Indian Affairs ("BIA") and the Secretary of the Interior, and not the NIGC. 25 C.F.R. Part 290.

Tribes are not required to make per capita payments from net gaming revenues to individual tribal members. If they choose to do so, however, they must comply with both IGRA and the administrative regulations of the BIA. 25 U.S.C. § 2710(b)(3); 25 C.F.R. Part 290. Tribes that elect to make per capita payments to individual tribal members from net revenues are required to take the following steps before making the payments:

1) Prepare a plan to allocate gaming revenues to one or all of the five public purposes specified in Section 2710(b)(2)(B) of IGRA;

2) Submit the plan to the BIA and have it approved by the Secretary as "adequate," particularly with respect to a tribe's funding of tribal government operations and programs, and promotion of tribal economic development;

3) Insure that the plan protects the interests of minors and other legally incompetent persons and makes per capita payments for them in amounts necessary for their health, education and welfare, under a plan approved by the tribe and the Secretary; and

4) Notify tribal members, when per capita payments are made, that the payments are subject to federal withholding and taxation as personal income.

25 U.S.C. § 2710(b)(3).

If tribes choose to make per capita payments to individual members, they must be made to *all* enrolled members, unless there is reasonable justification for limiting payments to a group of enrolled members and excluding the remaining enrolled members. 25 C.F.R. § 290.14. For example, a tribe may limit per capita payments to individual tribal members 65 years or older because of this group's greater financial needs due to not working and increased health care expenses. Importantly, according to 25 C.F.R. 290.12(b)(4), if tribes choose to make per capita payments, they are then required to notify members of the tax liability for the payments, and then withhold taxes for all recipients in accordance with the Internal Revenue Service ("IRS") regulations found in 26 C.F.R. Part 31.

Under the BIA's regulations, tribes making per capita payments to individual members are required to establish and use a tribal court system, forum or administrative process for the resolution of disputes concerning the allocation of net gaming revenues and the distribution of per capita payments. 25 C.F.R. § 290.12(b)(5). This requirement insures that tribal members are afforded a process for challenging and appealing the distribution and allocation of gaming revenues under a RAP. It gives tribal members the ability to have some recourse if they disagree with how tribal gaming revenues are being spent.

The NIGC shares regulatory authority and responsibility for the proper use of gaming revenues with the tribes, tribal councils and tribal gaming commissions. When exercising and discharging its regulatory authority and responsibilities under IGRA, the NIGC is committed to maintaining a respectful and meaningful government-to-government relationship with tribes and their authorized government leaders.

Permissible Uses of Gaming Revenues

Tribes typically allocate a substantial portion of their gaming revenues to the "general welfare" of the tribe and its members; to "tribal economic development"; and/or to "government operations or programs." When tribes establish government programs to benefit individual members, those programs should: 1) be created in response to a recognized need within the tribal community; 2) have eligibility criteria to determine which members qualify to participate in the program; and 3) not discriminate by including some members and excluding others without reasonable justification. Payments made and services offered should be made equally available to all those who meet program standards.

Government programs are set up to serve one or more needs or requirements of the tribal community. A fundamental part of any government program is the criteria established to determine which tribal members are eligible to participate in a program. The criteria are tied to the needs and requirements of the tribal membership, and are often tied to income levels and the financial needs of a group of members. Criteria can be based on needs other than financial ones, however, such as educational, medical or housing needs. Criteria can also reflect a historical lack of prosperity for a group of members like tribal elders, who missed out on the financial benefits of gaming for most of their lives.

Tribes have developed a broad range of tribal government programs using objective criteria based on the requirements and needs of the tribal membership. Examples of these are:

Elder programs
Daycare and early childhood development programs
Universal health care
Nutrition assistance programs
Housing assistance programs
Small business loan programs
Emergency loan programs
Legal aid programs
Public defender programs
Job training programs
Educational grants, loans and scholarships
Drug and alcohol treatment programs
Culture and language programs
After-school programs for youth
Burial assistance programs

Eyeglass programs
Programs offering culturally-based, alternative health care and treatments

The above list is not exhaustive, as there are hundreds of different government programs currently being offered by the more than 500 federally recognized tribes in existence today.

Tribes also commonly allocate gaming revenues for the creation and expansion of tribal government infrastructure under the government operations or general welfare provisions of IGRA. The following examples typify allowable expenditures of gaming revenues for these purposes:

Constructing tribal administrative office buildings
Installing a telecommunications center, including computers
Building and improving roads
Creating a tribal justice center, including trial and appellate courts, a law enforcement agency, a corrections facility, a prosecutors' office and a public defender office
Constructing a youth recreation complex
Constructing a fitness center
Constructing a community swimming pool
Constructing a retirement center for tribal elders
Establishing tribal credit unions
Creating a museum
Creating a library with computers available for members' use
Establishing utilities for the provision of water and sewer services
Establishing a waste treatment facility

In developing government programs that provide benefits to individual tribal members, it is important for tribes to consider and determine whether the benefits received by members will be subject to federal withholding and taxation. Bona fide tribal government programs can often be structured so that there is no tax liability for payments and services received by members. As discussed later in this Bulletin, tribes interested in achieving some certainty and assurances regarding the tax consequences of any tribal government program may wish to contact the IRS for guidance.

Impermissible Uses of Gaming Revenues

There are a number of ways in which tribes can misuse their gaming revenues and run afoul of federal law, including IGRA and the Internal Revenue Code ("IRC"). Many of these stem from an overly broad interpretation of what constitutes the "general welfare" of the tribe.

Generally speaking, gaming revenues used in ways in which the tribe as a whole is not the beneficiary is an impermissible use of revenues under IGRA. It cannot be said, for

example, that payments are for the "general welfare of the Indian tribe and its members" when tribes make direct payments to individual tribal members without an approved RAP or outside of a government program. A government program is one that is based on a need or requirement of the tribal community; that has specific eligibility criteria; and that does not discriminate. Whether the payments take the form of cash, gifts or services, if they occur without a RAP or outside of a government program, they are not permissible.

Impermissible use of gaming revenues also occurs when gaming funds are directly distributed to select individual tribal members for their personal use without a RAP or outside of a government program. Purchases or cash payments that are being used for personal reasons and not for tribal business purposes, or for the tribe as a whole, fall into this category. These include buying such items as personal cars, boats, houses andclothing, or other personal items. Unauthorized expenditures also include such things as non-business trips, visits to health spas, residential landscaping and payment of outstanding bills of tribal members. They also include payments to businesses or clubs that are owned by tribal members and may be located on tribal lands, but are not titled to or owned by the tribe.

Other impermissible uses can occur if a tribe creates a fund with gaming revenues, from which cash payments are made to individual tribal members without any objective criteria based on the needs and requirements of the tribal membership. An example of this is when an individual tribal leader is given a portion of gaming revenues for members residing in his or her district, and then gives it to some, but not all members for medical, emergency or other reasons, without using any eligibility criteria to determine who is entitled to receive a payment. A variation on this situation occurs when a tribal government makes loans to select individual tribal members, or to businesses owned by individual tribal members, with no eligibility criteria or expectation of repayment.

An example of how one tribe's distribution of gaming revenues to tribal members was found to be impermissible is reported in *Avis Little Eagle v. Standing Rock Sioux Tribal Council*, Standing Rock Sioux Tribal Court Memorandum Opinion, TRO-03-131 (2003). In that case, revenue payments were not based on or distributed pursuant to a bona fide tribal government program. Forty per cent of gaming revenues, or approximately $2 million, was being distributed through the Inyan Wakagapi Betterment Project to individual tribal members from a certain district, based solely upon membership in the Standing Rock Sioux Tribe. The Tribal Court characterized the payments as "simple cash payments to individual enrollees of a particular district with no strings attached" – in other words, per capita payments. Similarly, in *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738 (S.D.S.D. 1992), a federal district court ruled that calling gaming revenue payments made to individual tribal members "interim payments," "Reservation Lifestyle Betterment Grants," or "On-Reservation Lifestyle Betterment Grants" did not change the true nature of the payments. The Court held that they were really per capita payments, not exempted from IGRA's requirements for per capita payments. ("Just as a rose by any other name is still a rose, a per capita payment by any other name is still a per capita payment"). Both courts ordered that the payments from gaming revenues be stopped.

Compliance

There are a number of ways that tribes can avoid impermissible uses of gaming revenues. Foremost among them is by establishing tribal government programs with eligibility criteria for participation in the programs, and then implementing the programs in non-discriminatory ways.

A starting point in determining whether a program falls within IGRA's permissible purposes is to look at other, similar programs that are customarily offered by other governments – tribal, federal, state and local. Examples of such programs are listed above and include housing assistance, educational scholarships and nutrition assistance. Such government programs always address the needs and requirements of the tribal community, have eligibility criteria and do not discriminate.

Programs that are structured so that payments for services are made to the providers, instead of to individual tribal members, clarify the purpose and use of the payments. An example of this is when a tribal member qualifies for a tribe's higher education scholarship program, and payments are then made directly to the school instead of to the student. Structuring program payments in this way eliminates the potential for making direct payments to tribal members beyond established per capita amounts or without an approved RAP.

The tribal court system, forum or administrative process required by the BIA's administrative regulations plays an important role in the uses of gaming revenues by tribal governments. These judicial, or quasi-judicial, mechanisms serve as a check on improper distributions of gaming revenues to individual members and allocations of revenues to programs, as well as a vehicle for challenges by members. By establishing an internal tribal review process, the propriety of payments and programs can be challenged by tribal members and evaluated by the tribe itself.

Although there is little in IGRA regarding the specifics of acceptable government programs, the IRS provides some guidance. Not surprisingly, there is substantial overlap between the spending of gaming revenues that violates IGRA and spending that triggers tax liability under the IRC. The IRS has a specific department, the Office of Indian Tribal Governments, which was created to deal with tax issues emanating from tribal gaming, as well as other issues involving tribal governments, entities and enterprises. Its website, www.irs.gov/tribes, includes topics such as "Reporting of Per Capita Distributions by Tribal Members" and "Frequently Asked Questions." The Office also publishes a quarterly newsletter that deals with current tribal taxation issues.

At the request of a tribe, the IRS will informally discuss with tribes proposed distributions of gaming revenues to individual tribal members to see if they trigger tax liability. The IRS will also review and evaluate existing or proposed tribal programs for potential tax liability. Reviewing proposed gaming revenue distributions with the IRS can help a tribe avoid the possibility of exposing individual tribal members to unforeseen

tax liability. Regional and national contacts for arranging these kinds of informal discussions are listed on the IRS website referenced above.

If, after talking to the Office of Indian Tribal Governments at the IRS, a tribe wants more certainty about its tax liability, it can request a private letter ruling from the IRS Office of Chief Counsel. To receive rulings, a tribe submits specific facts about its programs to the IRS, and then has a discussion with the IRS if there is a disagreement on the tax consequences of the tribe's program. The ruling only applies to the particular tribe seeking the ruling. These rulings become public, but all identifying information is removed to maintain the privacy of the tribe requesting the ruling. To date, the IRS Office of Chief Counsel has issued approximately ten private letter rulings regarding tribal government programs or per capita payments to tribal members. There is currently a $6,000 fee for a private letter ruling. The Office of Indian Tribal Governments is available to assist tribes in navigating the submission process for these rulings.

An example of when an IRS private letter ruling might be useful to a tribe is demonstrated by the following fact situation. Tribal leadership asked its membership how much each member had spent on housing, transportation, etc., and then subtracted the combined amounts from the per capita payments being reported to the IRS. The IRS determined that the plan was structured to get around reporting and withholding on individual per capita payments, and, as a consequence, individual tribal members had large amounts of income taxes assessed against them. If the tribe had requested a private letter ruling before setting up its program, it would have been warned that the payment structure would result in taxes for its members. The tribe could have then revised its program to meet both the needs of the members and the requirements of the Tax Code.

In conclusion, the NIGC is hopeful that this Bulletin will be a helpful guide to tribes in their ongoing efforts to strengthen their tribal governments and effectively meet the needs of tribal members. If you have any questions regarding the use of gaming revenues, please contact the NIGC's Office of General Counsel or your NIGC Regional Office.