



The Requirements of IGRA & Pitfalls of Non-Compliance



Course Objectives

- Be able to maximize compliance with IGRA and NIGC Regulations.
- Understand the NIGC enforcement process
- Understand the NIGC Appeal Process
- Identify IGRA's Requirements in Tribal Law



Applicable Laws

- **Indian Gaming Regulatory Act**
25 U.S.C. § § 2701 to 2721
- **NIGC regulations**
25 C.F.R. parts 501-577
- **DOI regulations**
25 C.F.R. parts 290, 291
- **Tribal gaming ordinances & regulations**
<https://www.nigc.gov/general-counsel/gaming-ordinances>
- **Tribal-State Compact or “Secretarial Procedures”**
25 U.S.C. § 2710(d); 25 C.F.R. part 290



Overview of Key IGRA Req's

IGRA Requires:

- Approved gaming ordinance
- For Class III gaming, an approved Tribal-State compact
- All gaming must be on “Indian lands”
- Net gaming revenues used for 5 (possibly 6) purposes
- Facility licenses for each (gaming) place, facility or location
- A Tribe to maintain the sole proprietary interest in, and responsibility for, gaming operation



Overview of Key IGRA Req's (Cont.)

- Safely construct, maintain and operate gaming facilities to adequately protect environment, public health & safety
- Background investigations, eligibility determinations, and gaming license for every key employee and primary management
- Annual audits of each gaming operations
- Approved management contracts, if 3rd party will be managing gaming operation
- Regulation of “Individually owned gaming”

25 U.S.C. § 2710(b)(4)(A)-(B), (d); 25 C.F.R. § 522.10



Tribal Gaming Ordinances

- Class II or III gaming ordinance must be approved by NIGC Chair
- Ordinance is effective only after approval
- Must contain all provisions required by IGRA & NIGC regulations
- Disapproval can be appealed to NIGC within **30** days



Ordinance Amendments

- Amendments must be submitted to NIGC Chair for approval within **15** days of enactment
- OGC will review the entire ordinance when reviewing an Amendment.

25 C.F.R. § 522.3



Indian Lands

- Gaming must be conducted on “Indian lands”
 - Definition of “Indian lands” in IGRA & NIGC regs
 - Reservation, or
 - Trust lands or Restricted Fee Lands
 - Tribe must have jurisdiction over lands
 - Tribe must exercise governmental power over lands



Class III Gaming Compacts

- Class III gaming requires an approved Class III Tribal-State compact
 - “An agreement between a tribe and a state about class III gaming”
- Class III gaming must be conducted in full compliance with all provisions of compact
- Secretarial Procedures
 - Unusual option
 - Takes the place of a Compact



Sole Proprietary Interest

- IGRA requires the tribe to retain the sole proprietary interest in, and responsibility for, the gaming activity
 - On paper and in practice
- 3 criteria to assess compliance with SPI:
 - Term of the contractual relationship
 - Amount of revenue paid to 3rd party
 - Compare financial risk assumed with value provided to tribe
 - Control given to 3rd party over the gaming activity



Uses of Gaming Revenues

- Tribe must use its net gaming revenues for one or more of the following five purposes:
 - (1) Funding tribal government operations or programs
 - (2) Providing for general welfare of tribe and its members*
 - (3) Promoting tribal economic development
 - (4) Donating to charitable organizations
 - (5) Helping fund local government agencies

*Per Capita Payments are an exception



Per Capita Payments

- Per Capita Requirements:
 - (1) Tribe must have an approved Revenue Allocation Plan (RAP) in place
 - (2) RAP must allocate net gaming revenues to one or more of the five uses allowed by IGRA
 - (3) RAP must be approved by Secretary of the Interior
 - (4) Per capita payments must be disbursed to guardians of legally incompetent persons
 - (5) Tribal members must be notified that payments are subject to federal taxes



Background Investigations

- Tribes must conduct background investigations of all *primary management official* (PMO) and *key employee* (KE) applicants of the *gaming operation* before they can be licensed
 - Must be conducted according to requirements in tribe's gaming ordinance and NIGC regulations, Parts 556 & 558
 - NIGC Regulations specify jobs that are PMO/KE
 - Tribe can *designate* additional PMO/KE who will need a full background investigation



Safe Construction & Operation of Gaming Facilities

- Tribe must safely construct, maintain and operate gaming facilities to adequately protect environment, public health & public safety

25 U.S.C. § 2710(b)(1)(E), (d)(2)(A); 25 C.F.R. §§ 522.4(b)(7) & 522.6



Facility Licenses

- Tribe must issue license for each place, facility, or location at which Class II or Class III gaming is conducted
- The Tribe must provide notice to NIGC Chair that license is being considered **120 days** before opening of new facility, place or location
- Once license is issued, copy must be submitted to NIGC Chair within **30 days**



Annual Audits & Financial Statements

- Annual audit must be conducted by *independent* Certified Public Accountant (CPA) conducted of each gaming operation
- Audit must be based on annual financial statements of each gaming operation
- Two copies of the annual audit must be submitted to NIGC within **120 days** of end of fiscal year

28 U.S.C. § 2710(b)(2)(C)-(D); 25 C.F.R. §§ 522.4(b)(4), 522.6, 571.12-13



Agreed-Upon Procedures

- Agreed-Upon Procedures (AUPs) must be performed *annually* by independent CPA to verify that the Class II gaming operation is in compliance with Class II minimum internal control standards (MICS)
- CPA will prepare a report of their findings and present it to the Tribe
- Tribe must submit AUP reports to NIGC **120 days** after the end of the fiscal year.



Annual Fees

- Annual fees must be paid by each tribal gaming operation to NIGC
 - Fee rate set annually by NIGC and Published on or before March 1.
 - Paid quarterly
 - Based on the gross gaming revenue for the prior fiscal year.
- Fee payments are calculated by each gaming operation in a “Quarterly Statement.”
- For current fee rate, go to:
<http://www.nigc.gov/finance/Annual-fees>



Annual Fees & Quarterly Statements

- Quarterly statements must be submitted to NIGC with each quarterly fee payment
- Quarterly statements must show:
 - Gaming operation's gross gaming revenues for previous fiscal year
 - Calculation of fees owed
 - All amounts used in calculation
- Calculate your tribe's quarterly fee amount, go to: <http://www.nigc.gov/images/uploads/2016WorksheetQuarterFinal.pdf>



Management Contracts

- A “management contract” is:
 - Contract, subcontract or collateral agreement between:
 - Indian tribe and contractor or
 - Contractor and subcontractor
 - That provides for management of all, or part of, a gaming operation.
- A “collateral agreement” is:
 - Contract that is related to management contract, either directly or indirectly
 - Any rights, duties or obligations created between tribe and management contractor or subcontractor



Management Contracts

- Must be submitted to NIGC Chair for review within **60 days** of execution by parties.
- Is effective only when approved by NIGC Chair
- Tribe may not allow Contractor to operate under management contract terms before approval

25 U.S.C. §§ 2710(d)(a), 2711; 25 C.F.R. Part 531, 533



Management Contracts

- Chair will approve contract if:
 - Length of term does not exceed 5 years or 7 years if “good cause” is shown.
 - Fees must be reasonable “in light of surrounding circumstances” and can’t exceed 30% of net revenues
 - May exceed 30%, but not 40% in rare circumstances.
 - Complete Background investigations of:
 - Persons with management responsibility for management contract
 - Directors of corporation that is party to the management contract
 - Persons or entities with financial interest in management contract



Management Contracts

- Management contracts, and amendments are void if not approved by NIGC Chair.
- After approval, can be void if:
 - Non-compliance with NIGC-approved contract terms
 - Management violates standards of NIGC management contract regulations
 - There are changes to persons *with a financial interest in or management responsibility* for a management contract that have not been approved by NIGC Chair in accordance with NIGC regulations



Criminal Violations

- Some IGRA violations are also criminal violations
 - Casino employee embezzles money from a casino
 - Casino employee participates in a money laundering
 - Gaming operation defrauds a tribe

- If NIGC has information that federal, state or tribal law has been violated, NIGC must share it with appropriate law enforcement officials

25 U.S.C. § 2716(b)



Tips for Compliance

- Be proactive
 - Know the laws that apply to you and your gaming operation and where to find them.
- Be assertive
 - Take advantage of NIGC expertise, services and on-line resources
- Seek assistance
 - For compliance issues contact NIGC Regional staff
 - For legal questions contact OGC.
- Learn from other examples
 - www.nigc.gov/general-counsel



Tips for Compliance

- Be informed & use on-line tools
- Visit NIGC website
 - Review relevant bulletins
 - Print and use:
 - Model Gaming Ordinance & Checklist
 - Fee schedule, worksheet & calculation tool
 - MICS worksheet & audit checklists
 - AUP Report formats
 - Management Contract checklists
 - Review upcoming trainings and attend one
 - Access IGRA and NIGC & DOI regulations



Tips for Compliance (SPI)

- Be vigilant
 - Pay attention to telltale signs of possible SPI violations
 - Low risk to 3rd party, high compensation, long term
 - 3rd party right to control tribal regulatory and management decisions
 - Veto power given to 3rd party over tribal laws/regulations
 - 3rd party access to gaming operation books, records, financial statements and/or reports
- Follow your gut instincts
 - Before acting on a suspicion, investigate



Tips For Compliance (Deadlines)

- Gaming Ordinances & Amendments - **15** days after enactment

- Background Investigations – **90** days before work begins

- Notice of Results – **60** days after applicant begins work

- Licensing of PMO/KE Notices – **30** days after decision.

- Facility License Notices - **120** days before issuance.
 - Notice of license issuance – within **30** days of issuance
 - Notice of license not being issued – within **30** days of denial
 - Notice of revocation/reinstatement of license – within **30** days
 - Facility License Renewal Notice – within 30 days of issuance



Tips For Compliance (Deadlines)

- Annual audit report & financial statements
 - 120 days after end of fiscal year
- Annual Agreed-Upon-Procedures report
 - 120 days after end of fiscal year
- Annual fees/Quarterly Statements
 - March 30, June 30, September 30, December 31
- Management Contracts
 - 60 days of execution
- Management Contract Amendments
 - 60 days of execution



Obtain Req'd Approvals

- Tribal Gaming Ordinances
- Ordinance Amendments
- Management Contracts
- Management Contract Amendments
- Tribal-State Compacts
- Revenue Allocation Plans (RAPs)



NIGC Enforcement Actions

- NIGC can take enforcement action for any violation of applicable law, including violations of:
 - IGRA
 - NIGC regulations
 - Tribal gaming ordinances & regulations

25 U.S.C. § 2705; 25 C.F.R. §§ 573.1 and 573.3



Letter of Concern

- NIGCC may issue a Letter of Concern (LOC) before taking enforcement action.
- LOC will include:
 - Preliminary assessment of violation
 - Specific facts supporting assessment
 - Steps to cure the violation.



Chair's Enforcement Authority

- Chair's Enforcement Action:
 - Notice of Violation
 - NIGC Chair can issue NOV and civil fine for any violation of IGRA, NIGC regulations or tribal gaming ordinance
 - Proposed Civil Fine
 - Civil fine not to exceed \$50,276 per day, per violation
 - Temporary Closure Order
 - Chair can issue temporary closure order for any of 13 substantial violations of IGRA, NIGC regulations or tribal ordinances or regulations



Appeals

- A Tribe or other Recipient of NOV, Proposed CFA or TCO may appeal that action.
- When must an appeal be filed?
 - Within **30** days of receiving NOV, CFA or TCO
 - Within **10** days of filing appeal, appellant must file a witness list and brief outline of appeal with NIGC
- Party may request that appeal is either:
 - Decided by full Commission on written submissions
 - Heard before Presiding Official



Appeals

- When will a decision be issued?
 - Within **90** days of recommended decision issued by Presiding Official
 - Within **90** days of briefing, if appeal is only on written submissions to Commission
 - Exception: Decisions on TCO made within **30** days
- Settlement may be an alternative outcome



Appeals to Federal Court

- Decisions on appeals issued by the Commission are Final Agency Action.
- Final agency actions may be appealed to a federal district court



Questions

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