October 16, 2017

VIA FIRST CLASS MAIL & FACSIMILE

Carol Evans
Chairwoman
Spokane Tribe of Indians
P.O. Box 100
Wellprint, WA 99040
Fax: (509) 458-6575

Re: Sales of Washington State Lottery tickets & games on Tribal Trust lands

Dear Chairwoman Evans:

Thank you for your letter, dated July 17, 2017, advising that the Spokane Tribe of Indians is interested in allowing the sale of Washington State Lottery tickets and games at its convenience stores, located on the Tribe's Indian lands. Prior to initiating such sales, you requested an advisory legal opinion addressing two questions:

1) whether the sale of Washington State Lottery tickets and games on tribal trust lands is permissible under IGRA; and

2) whether compensation of 5% of all ticket and draw game sales to the Tribe violates the sole proprietary interest requirement of IGRA, 25 U.S.C. § 2710(b)(2)(A)?

As detailed below, the sale of Washington State Lottery tickets and games on tribal trust lands constitutes Class III gaming under IGRA and is permissible in certain circumstances. To be lawful under IGRA, the sales of such tickets[1] and operation of such games must be authorized by an NIGC approved tribal gaming ordinance[2] and be conducted in conformance with a tribal-state compact that is in effect. In addition, such gaming is subject to the individually-owned gaming standards set forth in IGRA and NIGC regulations, which provide that a Tribe receive 60% of the net gaming revenue.

[1] By the Tribe or any other operator, including the State.
[2] The Office of General Counsel recommends that the Tribe update its ordinance for this purpose, which was last updated and approved in 1996. *See* Letter to Warren Seyler, Chairman, Spokane Business Council, from Harold A. Monteau, NIGC Chairman (March 25, 1996);
https://www.nigc.gov/images/uploads/gamingordinances/spokanetribe-spokaneord032596.pdf

I. Applicable Law

a. Federal law – Statutory, regulatory, caselaw, and tribal-state compact

i. Lotteries

Lotteries constitute Class III gaming under IGRA. Class III gaming includes all forms of gaming that are not Class I or Class II gaming.[3] Since lotteries are not included in the Class II definition, they are Class III. Moreover, NIGC regulations define lotteries as Class III gaming.[4]

ii. Indian lands

All gaming under IGRA is limited to "Indian lands," as IGRA explicitly provides that "[a]n Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction" and that "Class III gaming activities shall be lawful on Indian lands."[5] IGRA defines the term "Indian lands" as:

> (A) all lands within the limits of any Indian reservation; and
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> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.[6]

iii. Individually-owned gaming

As to Class II and III gaming on Indian lands, IGRA mandates that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity."[7] Excepted from this requirement is individually-owned gaming on Indian lands,[8] about which IGRA states:

> A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements

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[3] 25 U.S.C. § 2703(8).

[4] 25 C.F.R. § 502.4(d).

[5] 25 U.S.C. § 2710(b)(1); 2710(d)(1); *see also* 25 U.S.C. § 2710(b)(1)(" A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted."); 25 C.F.R. § 522.4(b)(6) ("A tribe shall issue a separate license to each place, facility, or location on Indian lands where a tribe elects to allow class II gaming") and 25 U.S.C. § 2710(d)(2)(A)("If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands …").

[6] 25 U.S.C. § 2703(4); *see also* 25 C.F.R. § 502.12.

[7] 25 U.S.C. § 2710(b)(2)(A); *see also* 25 C.F.R. §§ 522.4(b)(1) and 522.6(c).

[8] *See* 25 U.S.C. § 2710(b)(2)(A) ("except as provided in paragraph (4) [the individually-owned gaming mandate], the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity."); *see also* 25 C.F.R. § 522.4 (b)(1) ("The tribe shall have the sole proprietary interest in and responsibility for the conduct of any gaming operation unless it elects to allow individually owned gaming under either § 522.10 or § 522.11 of this part").

> described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.[9]

This provision is applicable to Class III gaming as well, because it is directly incorporated into the requirements for Class III tribal gaming ordinances in IGRA.[10] Further, Congress clearly contemplated individually-owned Class III gaming on Indian lands, as it explicitly stated: "If any Indian tribe proposes to engage in, *or to authorize any person or entity to engage in, a class III gaming activity on Indian lands ....*"[11]

NIGC regulations interpret IGRA to require that tribal ordinances allowing individually-owned gaming provide for the tribe to receive not less than 60 percent of the net revenues of such gaming.[12]

iv. Tribal-State compacts & incorporation of Washington State law into the Tribe's compact

Class III gaming under IGRA is also subject to the terms and conditions of the tribal-state compact relevant to the particular tribe and state.[13] Pursuant to the statute, such terms and conditions may include: the application of criminal and civil laws and regulations of the tribe or state regarding the licensing and regulation of the Class III gaming; the allocation of criminal and civil jurisdiction between the parties necessary for the enforcement of such laws; an assessment by the state to defray costs of regulating; operational standards for the gaming, including licensing; and any other matter directly related to the operation of the gaming.[14]

The Tribe's and Washington State's compact provides: "[t]he sale of Washington State lottery tickets on Spokane Indian lands shall be subject to the provisions of [Revised Code of

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[9] 25 U.S.C. § 2710(b)(4)(A).

[10] 25 U.S.C. §§ 2710(d)(1)(A)(ii)("Class III gaming activities shall be lawful on Indian lands only if such activities are-- (A) authorized by an ordinance or resolution that--(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands, (ii) meets the requirements of subsection (b) ..."); 2710(d)(2)(A)("If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).").

[11] 25 U.S.C. § 2710(d)(2)(A).

[12] 25 C.F.R. § 522.10(c). *See also Crosby Lodge, Inc. v. Nat'l Indian Gaming Comm'n*, 803 F. Supp. 2d 1198, 1208 (D. Nev. 2011) (upholding § 522.10(c) as a reasonable interpretation of IGRA – "Because IGRA's plain text suggests that the entirety of subsection (b) are necessary requirements for non-tribal class III gaming licenses, the NIGC's interpretation of the statute, requiring a sixty percent net revenue payment to the Tribe, is reasonable. A reasonable interpretation of the statute shall not be disturbed or overturned by the court.").

[13] 25 U.S.C. § 2710(d)(2)(C).

[14] 25 U.S.C. § 2710(d)(3)(C)(i)-(iii), (vi),(vii).

Washington] 67.70, [Washington Administrative Code] 315, and the Tribal Ordinance."[15] Under this state law, the State Lottery Commission has the power to license agents to sell or distrihute lottery tickets.[16] Such agents may include federally recognized Indian tribes or businesses operated upon lands subject to those tribes' jurisdiction, if the tribal councils associated with these tribes and lands enact ordinances which agree to certain conditions,[17] including that:

> all matters relating to the issuance and revocation of [the] license, as well as the manner in which the sale of lottery tickets is conducted by the licensee, shall be governed exclusively by the laws of the state of Washington, and no inconsistent tribal laws, ordinances, or rules exist or will be enacted.[18]

Further, every two years, the State Lottery Commission must set the amount of compensation to be paid to licensed agents.[19] This amount, however, can be modified by Commission resolution "based upon changes in the revenue stream and/or program requirements."[20] Licensed agents may receive additional compensation through Commission approved programs, including, but not limited to: additional discounts, games, awards, and bonuses.[21] At this time, it appears that the base amount of compensation paid to licensed agents is five percent (5%) of their ticket and draw game sales.[22]

The State Lottery Commission is also charged with apportioning total revenues accruing from the sale of lottery tickets to the state's general fund, the lottery administrative account, and to the payment of prizes, ensuring that payment of prizes "shall not be less than forty-five percent [45%] of the gross annual revenue from such lottery."[23]

v. Federal caselaw – State lotteries on Indian lands

IGRA's application to the operation of state lotteries on Indian lands has been the subject of two opposing federal opinions – both in the 9th Circuit, which includes Washington State. Importantly, the one opinion that held that IGRA was inapplicable to state lotteries on Indian lands was vacated.

The U.S. District Court for the District of Idaho held that IGRA and its statutory requirements apply to the play of state lotteries on Indian lands. Specifically, in 1994, the U.S. District Court for the District of Idaho held that the State of Idaho was prohibited by IGRA from

[15] Tribal-State Compact for Class III Gaming between the Spokane Tribe and State of Washington, Appendix B at B-1 (April 30, 2007).
[16] Revised Code of Washington (RCW) 67.70.040 (1)(i).
[17] Washington Administrative Code (WAC) 315-04-230(1).
[18] WAC 315-04-230(1)(a).
[19] RCW 67.70.040 (1)(j); WAC 315-08-010 (1)(b)(i) and (v).
[20] WAC 315-08-010 (2).
[21] WAC 315-04-190 (3) & (3)(a); 315-04-010 (lottery retailer means licensed agent).
[22] http://www.walottery.com/licensing/ (5% commission on all Scratch ticket and Draw Game sales).
[23] RCW 67.70.040 (1)(k); *See also* WAC 315-08-010 (1)(b)(ii).

operating its lottery on an Indian reservation without the authorization of such activity in a tribal gaming ordinance and a tribal-state compact.[24] In so doing, the court found that:

> Congress enacted IGRA in order to provide a framework to guide states and Indian tribes in their efforts to reach agreement both as to the extent of Class III gaming to be conducted on tribal lands and how those activities are to be conducted. The purpose of IGRA, its clear language, and its legislative history make clear that the extent to which state gaming regulations and/or regulatory systems shall apply on Indian reservations is to be carefully negotiated between these sovereign entities through the compact negotiation process.
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> It is obvious that the state lottery is a Class III gaming activity. IGRA expressly provides that Class III gaming activities shall be *lawful* on Indian lands *only if such activities are* (1) authorized by an ordinance or resolution of the tribe that meets the requirements of the statute and is approved by the commission chairman; (2) located in a state that permits such gaming for any purpose by any person, organization, or entity; and (3) conducted in conformance with a tribal-state compact entered into by the tribe and the state. 25 U.S.C. § 2710(d).[25]

Because there was no tribal-state compact nor a tribal ordinance authorizing Class III gaming on the reservation, the court held that in the absence of them "neither the Tribe nor any non-tribal entity, including the State of Idaho, may conduct Class III gaming on the reservation."[26] Thus, Idaho could not operate its lottery on the tribe's Indian lands without a compact and a tribal ordinance that permitted Class III gaming by non-tribal entities.[27]

On appeal, the 9th Circuit Court of Appeals affirmed "substantially" the district court's judgment, for the reasons set forth in its opinion, but also based on the holding in *Rumsey Indian Rancheria of Wintun Indians v. Wilson.*[28] In *Rumsey,* the 9th Circuit held that the Indian Gaming Regulatory Act allows Class III gaming activities on Indian lands only if the gaming activities are located in a State that permits such gaming for any purpose.[29] The court concluded that since Idaho did not permit Class III gaming activities, the tribe had no right to engage in Class III gaming.

The contrary view was taken by the U.S. District Court for the Eastern District of Washington, which held that IGRA is inapplicable to state lotteries on Indian lands and that the state operated lottery was not preempted by IGRA or other federal law.[30] The 9th Circuit Court

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[24] *Coeur d'Alene Tribe v. State*, 842 F. Supp. 1268 (D. Idaho 1994) *aff'd sub nom. Coeur D'Alene Tribe v. State of Idaho*, 51 F.3d 876 (9th Cir. 1995).
[25] *Coeur d'Alene Tribe v. State*, 842 F. Supp. 1268, 1282 (D. Idaho 1994) *aff'd sub nom. Coeur D'Alene Tribe v. State of Idaho*, 51 F.3d 876 (9th Cir. 1995) (emphasis added).
[26] *Id.*
[27] *Id. at* 1283.
[28] *Coeur D'Alene Tribe v. State of Idaho*, 51 F.3d 876 (9th Cir. 1995).
[29] 41 F.3d 421 (9th Cir.1994).
[30] *Confederated Tribes & Bands of Yakama Indian Nation v. Lowry*, 968 F. Supp. 531, 532-33 (E.D. Wash. 1996) *vacated sub nom. Confederated Tribes & Bands of Yakama Indian Nation v. Locke*, 176 F.3d 467 (9th Cir. 1999). In 1997, the Yakama Indian Nation sued Washington State, contending that the state operated lottery on its reservation violated IGRA, specifically 25 U.S.C. §§ 2710(b)(4) and (d)(1)(A)(ii), because the state lottery qualified as Class III

of Appeals vacated the judgment of the district court though, instructing that the suit be dismissed solely on the ground that it was barred by the 11th Amendment and expressing no opinion on the question whether the operation of the state lottery on Indian lands violated IGRA.[31]

II. Analysis

a. The sale of Washington State lottery tickets and other games on Indian lands come within the purview of IGRA

The first question presented is whether IGRA applies to and permits the sale of Washington State lottery tickets and games on the Tribe's tribal trust lands. The answer is – yes. As an initial matter, tribal trust lands qualify as "Indian lands" for purposes of IGRA if the title to such lands is held in trust by the United States for the benefit of any Indian tribe or individual.[32] Here, the Tribe's trust lands are Indian lands if they are so held. Second, under IGRA, all Class II and III gaming that takes place on Indian lands is Indian gaming.[33] More specifically, lotteries played on Indian lands are Class III gaming under IGRA.[34] This follows from the nature of Indian gaming itself and IGRA's regulatory structure.

Indian gaming is one expression of Indian tribes' sovereign ability to regulate their own affairs on their own land. As applied to gaming, that sovereign power, of course, predates IGRA. With the passage of IGRA, Congress placed certain limitations on tribes' ability to run gaming operations, the most obvious of which is the requirement for a tribal-state compact before Class III gaming is permissible.[35] IGRA also imposed a regulatory structure on Indian gaming. A few of many possible examples are that gaming may only be conducted pursuant to an approved gaming ordinance that contains certain minimum requirements;[36] that third-party management contracts are subject to certain limitations and approval by the NIGC Chairman;[37] and that certain employees are subject to background investigations and suitability determinations.[38] IGRA's legislative history thus states:

> In determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities on Indian lands, the Committee has sought to preserve the principles which have guided the evolution of Federal Indian law for

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gaming and, as such, could only be operated lawfully if it was authorized by an NIGC approved tribal gaming ordinance and an operative tribal-state compact. In addition, the Tribe claimed that Washington failed to comply with IGRA requirement, § 2710(b)(4)(B), by not paying the Tribe 60% of net revenues.

[31] *Confederated Tribes & Bands of Yakama Indian Nation v. Locke*, 176 F.3d 467, 470 (9th Cir. 1999).

[32] 25 U.S.C. § 2703(4)(B); *see also* 25 U.S.C. § 2703(5) (definition of "Indian tribe"); 25 C.F.R. §§ 502.12(b)(1), 502.13 (definition of "Indian tribe").

[33] *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032 (2014) (finding that "on Indian lands" are the "three words reflecting IGRA's overall scope"). State law, of course, does not apply to gaming on Indian lands because Congress preempted the field with the passage of IGRA. *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 547 (8th Cir. 1996); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994).

[34] 25 U.S.C. § 2703(8); 25 C.F.R. § 502.4(d).

[35] 25 U.S.C. §§ 2710(d)(1)(C), 2710(d)(3).

[36] 25 U.S.C. §§ 2710(b)(1)-(2), 2710(d)(1))(A).

[37] 25 U.S.C. §§ 2710(b)(1)-(2), 2710(d)(1))(A).

[38] 25 U.S.C. § 2710(2)(F).

> over 150 years. In so doing, the Committee has attempted to balance the need for sound enforcement of gaming laws and regulations with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land. The Committee recognizes and affirms the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished.
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> Consistent with the principles, the Committee has developed a framework for the regulation of gaming activities on Indian lands.[39]

Notwithstanding these limitations and this regulatory structure, Indian gaming remains an expression of tribal sovereignty, and Indian tribes remain the primary regulators of gaming activities on Indian lands. As such, within IGRA's regulatory structure, tribes may license and regulate gaming operations on Indian lands owned by non-tribal entities or by individuals.

A tribe may, subject to certain requirements and limitations, "provide for the licensing or regulation of class II gaming activities *owned by any person or entity other than the Indian tribe* and conducted on Indian lands...."[40] Likewise, a tribe may "authorize *any person or entity* to engage in a class III gaming activity on Indian lands of the Indian tribe...."[41] This plain and unambiguous language makes no distinction between types of non-tribal persons or entities eligible to game on Indian lands, including states.

This view is supported by a decision from the U.S. District Court of the District of Idaho that found that IGRA applied to a state lottery on Indian lands. As described above, the court concluded that the state lottery on an Indian reservation was a Class III game and to be lawful, it had to be conducted pursuant to an approved NIGC tribal ordinance and a tribal-state compact that authorizes the state's activity.[42]

The contrary opinion – that IGRA does not apply to state operated gaming on Indian lands – of the U.S. District Court for the Eastern District of Washington was vacated.[43] In our view, this opinion has no legal precedence.[44] And, even if the opinion is considered to have some informational or persuasive value, because the Circuit court did not address the issue of IGRA's

[39] S. Rep. 100-446 at 5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075-3076.
[40] 25 U.S.C. § 2710(b)(4)(A) (emphasis added).
[41] 25 U.S.C. § 2710(d)(2)(A) (emphasis added).
[42] *Coeur d'Alene Tribe v. State*, 842 F. Supp. 1268, 1282 (D. Idaho 1994) *aff'd sub nom. Coeur D'Alene Tribe v. State of Idaho*, 51 F.3d 876 (9th Cir. 1995).
[43] *Confederated Tribes & Bands of Yakama Indian Nation v. Locke*, 176 F.3d 467, 470 (9th Cir. 1999).
[44] *See O'Connor v. Donaldson*, 422 U.S. 563, 577 n. 12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect ...."); *Cousineau v. United States*, 493 F.2d 692, 694 n.1 (9th Cir. 1974) ("The vacated opinions are, of course, of no legal precedence."); *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n. 2 (9th Cir. 1991) ("A decision may be reversed on other grounds, but a decision that has been vacated has no precedential authority whatsoever."); *United States v. James*, 8 F.3d 32 (9th Cir. 1993) (finding that a vacated opinion has no precedential effect); *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 319 (D.C. Cir. 1988) ("it is elementary that a vacated district court decision is not binding precedent and should not be cited as such").

application in its vacating order,[45] the 9th Circuit's substantial affirmance of the U.S. District Court for the District of Idaho's judgment in *Coeur d'Alene Tribe v. State* – described above - negates that value.[46] In any event, the vacated opinion is not binding on the NIGC or the Tribe, as neither the Tribe, the United States, nor the Agency was a party to it.[47] Therefore, the NIGC Office of General Counsel follows the view of the U.S. District Court of the District of Idaho.

Moreover, the view that IGRA applies to all gaming activities on Indian lands has been a longstanding one of the NIGC Office of General Counsel. In a prior legal opinion concerning the White Earth reservation in Minnesota, the NIGC Office of General Counsel addressed the question of IGRA's applicability to gaming by non-tribal entities on Indian lands. The legal opinion states in relevant part:

> We note that IGRA's jurisdiction is not limited to gaming conducted by tribal entities or members. Rather, IGRA's jurisdiction runs with the land and allows gaming, even by non-tribal entities, that is conducted on Indian lands. 25 U.S.C. § 2710(b)(4)(A) ("A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described [below]... and are at least as restrictive as those established by State law...").
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> *Because IGRA's applicability is determined by the character of the land on which gaming is conducted rather than by who is conducting the gaming*, we note that the situation at hand is not governed by the line of cases analyzing whether tribes have jurisdiction over non-members on non-Indian owned fee land within the reservation. The primary case in this line of cases is *Montana v. United States*, 450 U.S. 544 (1981).... Because Congress has made IGRA's application dependent upon whether the gaming is conducted on Indian lands, not upon on whether the gaming is conducted by Indian or non-Indian people, we need not engage in a jurisdiction analysis under *Montana*.[48]

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[45] *See DHX, Inc. v. Allianz AGF MAT, Ltd.*, 425 F.3d 1169, 1176 (9th Cir. 2005) ("a vacated opinion still carries informational and perhaps even persuasive or precedential value")(citing *U.S. v. Joelson*, 7 F.3d 174, 178 n. 1 (9th Cir.1993) (stating that a certain vacated Court of Appeals opinion "has no precedential effect" but citing the vacated opinion for its informational and persuasive value)); *Endsley v. Luna*, 750 F. Supp. 2d 1074, 1110 n. 6 (C.D. Cal. 2010) *aff'd*, 473 F. App'x 745 (9th Cir. 2012) ("the Ninth Circuit and others have taken the position that a vacated judgment retains precedential authority on those issues not addressed in the order vacating it. *See, e.g., Santos v. Gates*, 287 F.3d 846, 855 n. 11 (9th Cir.2002) (a vacated opinion "remains good law with respect" to an issue not addressed in the order vacating it)").

[46] *Coeur d'Alene Tribe v. State*, 842 F. Supp. 1268, 1282 (D. Idaho 1994) *aff'd sub nom. Coeur D'Alene Tribe v. State of Idaho*, 51 F.3d 876 (9th Cir. 1995); *See, e.g., Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991) ("Although the Supreme Court vacated our prior opinion, it expressed no opinion on the merit of these holdings. They therefore continue to have precedential weight, *and in the absence of contrary authority*, we do not disturb them.") (emphasis added).

[47] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.").

[48] NIGC Office of General Counsel, White Earth Legal Opinion at pp. 8-9 (March 14, 2005) (emphasis added).

Finally, the NIGC Office of General Counsel implicitly addressed the question of IGRA's applicability to the operation of state lotteries on Indian lands in 2008 when it reviewed the Nez Perce compact with Idaho, which allowed the state to operate its lottery on the tribe's reservation.[49] OGC tacitly concluded that IGRA applied to the state lottery operation in confirming that the tribe received the requisite amount of net gaming revenue from the state lottery sales[50] as required by IGRA[51] and in cautioning the parties to abide by other IGRA obligations.[52]

Therefore, in light of the foregoing, all gaming sales and operations on Indian lands constitute gaming activity subject to IGRA.

b. IGRA's requirements for the sale of state lottery tickets and games on Indian lands

i. Compensation for individually-owned gaming

The second question posed is whether compensation of 5% of all ticket and draw game sales to the Tribe violates the sole proprietary interest requirement of IGRA, 25 U.S.C. § 2710(b)(2)(A)? As explained above, IGRA applies to the sale of state lottery tickets and games on the Tribe's Indian lands. When such sales occur by the Tribe, the State, or any other entity, the individually-owned gaming mandate of IGRA is implicated because the State, not the Tribe, owns that gaming.[53] The sole proprietary interest requirement of IGRA, however, is explicitly excepted from the individually owned gaming mandate and is not pertinent here.[54] As explained above, the individually-owned gaming mandate applies to both Class II and Class III gaming.[55] Further, NIGC regulations interpreting that mandate require that the State provide the Tribe 60% of the net gaming revenue[56] from such sales.[57]

The Tribe's compact, incorporating certain Washington state law and regulations, does not negate the 60% net gaming revenue requirement. First, the compact itself is a creature of IGRA. Second, IGRA preempts the field, and would nullify any contradictory state law

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[49] 2008 Class III Gaming Compact between the Nez Perce Tribe and the State of Idaho.
[50] Letter to Jeffrey R. Anderson, Director, Idaho Lottery, and Samuel N. Penney, Chairman, Nez Perce Tribe from Penny J. Coleman (Nov. 14, 2008) at 1.
[51] *See* 25 U.S.C. §§ 2710(b)(4)(A), (b)(4)(B)(i)(III), (d)(1)(2)(A)(ii), and (d)(2)(A).
[52] Letter to Jeffrey R. Anderson, Director, Idaho Lottery, and Samuel N. Penney, Chairman, Nez Perce Tribe from Penny J. Coleman, *supra* at 2 (OGC reminded the parties of the obligation under IGRA to construct, maintain, and operate the state lottery retail outlets in a manner that adequately protects the environment and health and public safety as well as to provide notice to the Commission, prior to the opening of any retail outlet, in accordance with the NIGC's facility license regulations.).
[53] 25 U.S.C. § 2710(b)(4)(A).
[54] *See* 25 U.S.C. § 2710(b)(2)(A) ("except as provided in paragraph (4) [the individually-owned gaming mandate], the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity."); *see also* 25 C.F.R. § 522.4 (b)(1) ("The tribe shall have the sole proprietary interest in and responsibility for the conduct of any gaming operation unless it elects to allow individually owned gaming under either § 522.10 or § 522.11 of this part").
[55] 25 U.S.C. § 2710(b)(4)(A); 25 U.S.C. §§ 2710(d)(1)(A)(ii) and (d)(2)(A).
[56] *See* 25 C.F.R. § 502.16 (defining "net revenue").
[57] 25 C.F.R. § 522.10(c).

requirements if they did exist.[58] But, a review of such law shows that they do not.[59] The conditions in Washington State law agreed to by tribes do not involve compensation[60] and are in line with allowable compact provisions, speaking to operational standards for the lottery, the application of laws regarding licensing and regulation of the lottery, and the enforcement of them.[61]

ii. Other IGRA requirements

For this gaming to be lawful, other requirements apply. As discussed previously, individually-owned gaming must be authorized by an NIGC approved tribal ordinance[62] and a tribal-state compact that is in effect.[63] In addition, and the Tribe must use that income in accordance with IGRA; the State must pay an annual fee to the NIGC; the licensing standards for such gaming must be as restrictive as those established by State law; licenses for people or entities must be denied if they would not be eligible to receive a State license to conduct the same activity; and State law standards must apply to the purpose, entity, pot limits and hours of operation.[64]

Moreover, other mandates of IGRA and NIGC regulations must be abided by, including the requirements to: submit annual audits for the gaming operation to the NIGC; ensure that the construction, maintenance, and operation of the gaming adequately protects the environment, public health and safety; and the facility license standards.[65]

III. Conclusion

IGRA applies to the operation of state lotteries and the sale of state lottery tickets and games on Indian lands. To be lawful, such gaming must be authorized by an NIGC approved tribal gaming ordinance that provides for individually-owned gaming and a tribal-state compact that is in effect. To comply with IGRA, Washington State must pay the Tribe 60% of the net gaming revenue of such ticket and game sales.

Please be advised that this legal opinion is advisory in nature only and that it may be

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[58] *See Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 547 (8th Cir. 1996); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994).
[59] *See* RCW 67.70.040 (j) (allowing the State Lottery Commission to set the manner and amount of compensation to be paid to licensed agents but not putting any limits on that compensation) and 67.70.040 (k)(the only statutory limitation is that the payment of prizes to winning tickets shall not be less than 45% of the gross annual revenue from the lottery), WAC 315-04-230, WAC 315-04-190 (Compensation), WAC 315-08-010 (Directing the State Lottery Commission to set "[t]he total amount of moneys which may be expended from the state lottery account," including the payment of retailer compensation but allowing the Commission to amend by resolution such amounts based upon changes in the revenue stream and/or program requirements).
[60] WAC 315-04-230(1).
[61] WAC 315-04-230(1)(a) ("all matters relating to the *issuance and revocation of [the] license, as well as the manner in which the sale of lottery tickets is conducted* by the licensee, shall be governed exclusively by the laws of the state of Washington, and no inconsistent tribal laws, ordinances, or rules exist or will be enacted.") (emphasis added).
[62] 25 U.S.C. §§ 2710(b)(4)(A); 2710(d)(1)(A)(ii); 2710(d)(2)(A).
[63] 25 C.F.R. § 522.10; *Coeur d'Alene Tribe v. State*, 842 F. Supp. 1268, 1282 (D. Idaho 1994) *aff'd sub nom. Coeur D'Alene Tribe v. State of Idaho*, 51 F.3d 876 (9th Cir. 1995).
[64] 25 C.F.R. § 522.10.
[65] 25 U.S.C. §§ 2710(b)(2)(C), (E), and (F); 25 C.F.R. § 559.

superseded, reversed, revised or reconsidered by a subsequent General Counsel or Acting General Counsel. Moreover, this advisory legal opinion is not binding upon the NIGC Chairman or Commission, who are free to disagree with it in any action that comes before them or via the Chairman's prosecutorial discretion. In sum, this advisory legal opinion does not constitute agency action or final agency action for purposes of review in federal district court and is issued solely as a matter of courtesy to the Tribe.[66] If you have any questions, please contact Jo-Ann M. Shyloski, Of Counsel, at 202-632-7003.

Sincerely,

Michael Hoenig
General Counsel

[66] *See Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024, 1031 (10th Cir. 2017) ("IGRA's text, statutory structure, legislative history, and associated regulations all establish that Congress did not intend judicial review of NIGC General Counsel opinion letters."); https://www.nigc.gov/general-counsel/legal-opinions