

# The Role of the National Indian Gaming Commission in the Regulation of Tribal Gaming

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Good morning ladies and gentlemen. Thank you for the opportunity to describe the role of the National Indian Gaming Commission (NIGC) in the regulation of gaming by Indian tribes. As a federal employee, I must state that these are my views and do not necessarily represent the views of the NIGC.

I currently am an attorney in the Office of General Counsel of the NIGC, after having worked for several years in the Solicitor's Office, Division of Indian Affairs. Today I will present a brief overview of the industry, describe the specifics of the NIGC's regulatory responsibilities, and discuss some of the challenges facing the NIGC. Before I begin, however, it is important to distinguish between the NIGC and the National Indian Gaming Association (NIGA). The NIGC is the regulator, whereas NIGA is an organization composed of gaming tribes.

## I. OVERVIEW OF THE INDUSTRY AND ITS REGULATION

Indian gaming generated \$12.7 billion in 2001 and accounts for about a quarter of the gaming market in the United States.<sup>1</sup> As recently as 1997, the annual revenues were \$7.4 billion, only slightly more than half of the 2001 revenues.<sup>2</sup>

Many tribes have used their gaming profits to fund education, improve health and elder care, enhance police and fire departments, build housing and roads, develop environmental programs, launch commercial ventures, and buy back reservation lands. Tribal casinos also contribute to local economic development by creating jobs for non-Indians in the surrounding

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1. NIGC, TRIBAL GAMING REVENUES, at <http://www.nigc.gov> (last visited Jan. 27, 2003).

2. *See id.*

communities, by increasing tourism, and by giving a share of their profits to local authorities to pay for roads, schools, and law enforcement. However, not all tribes benefit equally from gaming: some tribes choose not to undertake gaming operations, while others are not so geographically situated as to make gaming profitable. For the fiscal year ending in 2000, 62% of all tribal gaming revenues were generated by only 12% of the gaming operations.<sup>3</sup>

The NIGC operates on a fixed annual budget of \$8 million that is funded by fees paid by gaming tribes. The NIGC tracks nearly 300 tribal gaming operations run by over 200 tribes in twenty-seven states. The NIGC is the primary federal regulator of tribal gaming. Under the Indian Gaming Regulatory Act enacted in 1988,<sup>4</sup> the Secretary of the Interior has certain responsibilities, such as approving Tribal-State compacts, authorizing procedures for Class III gaming when a state refuses to compact with a tribe, taking land into trust for gaming, and approving tribal plans for the distribution of gaming revenue to individual members. The Department of Justice also has involvement in Indian gaming through its authority to enforce civil and criminal prohibitions on illegal gaming activities.

## II. HISTORY

The NIGC came into existence after Congress passed the Indian Gaming Regulatory Act (IGRA) in 1988.<sup>5</sup> Congress had contemplated an act to regulate Indian gaming for several years and attempted to balance the competing interests of the Indian tribes and the states. In IGRA, Congress set up the jurisdictional framework that presently governs Indian gaming. An impetus for enactment of IGRA was the 1987 Supreme Court decision *California v. Cabazon Band of Mission Indians*.<sup>6</sup> The Supreme Court found that Indian tribes located in states that otherwise allow gaming have a right to conduct gaming on Indian lands unhindered by state regulation.<sup>7</sup>

## III. GOALS OF THE INDIAN GAMING REGULATORY ACT

IGRA has three main purposes:

- (1) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences;
- (2) to ensure that the Indian tribe is the primary beneficiary of the

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3. *See id.*

4. 25 U.S.C. §§ 2701–2721 (1988). For an overview of the Act see <http://www.nigc.gov> (last visited Jan. 27, 2003).

5. *See* 25 U.S.C. § 2704 (1988).

6. 480 U.S. 202 (1987).

7. *See id.*

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gaming operation; and

- (3) to assure that gaming is conducted fairly and honestly by both operators and players.<sup>8</sup>

As you can see, the NIGC is charged with both protecting tribal gaming revenues as well as ensuring the integrity of the industry. Most often, depending on with whom you talk, the NIGC can be both a friend and an enemy.

At its core, Indian gaming is a function of sovereignty exercised by tribal governments; as tribes, consistent with IGRA, play a front-line role in the regulation of Indian gaming. In addition, the federal government maintains a government-to-government relationship with the Indian nations. Thus, while the NIGC is committed to strong regulation of Indian gaming, it also is our philosophy to be user friendly. By this, we mean that the NIGC should be responsive, efficient, and committed to education and training, when it comes to compliance with the law. Additionally, we make certain that the NIGC consults with tribes on matters of mutual concern, such as the development of regulations.

#### IV. OVERVIEW OF REGULATION

Indian gaming consists of three layers of regulation: tribal, state, and federal. Tribes provide the first level of regulation for their gaming operations, while state involvement occurs when Tribal-State compacts provide for some level of state regulation. The third level of regulation is provided by the NIGC.

Tribal governments often delegate gaming regulatory authority to tribal gaming commissions under the tribal gaming ordinances that are submitted and approved by the NIGC. Tribal gaming commissions also may be established or delegated authority under Tribal-State compacts entered into to govern Class III gaming. The NIGC encourages tribes to establish independent tribal gaming commissions and works closely with tribes to advise them on the responsibilities of those commissions.

#### V. GAME CLASSIFICATION AND REGULATION

IGRA classifies Indian gaming into three categories and designates the governmental entity or entities with regulatory authority for each category:

CLASS I: Class I gaming is gaming conducted on Indian lands at traditional ceremonial celebrations.<sup>9</sup> Regulatory jurisdiction for Class I gaming is retained solely by the Indian tribe.

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8. NIGC, MISSION AND RESPONSIBILITIES, at <http://www.nigc.gov> (last visited Jan. 27, 2003).

9. See 25 U.S.C. § 2703 (1988).

CLASS II: Class II gaming includes bingo, instant bingo, and other games similar to bingo, such as pull-tabs, lotto, punch-boards, tip jars, and certain card games.<sup>10</sup>

CLASS III: Class III gaming is everything else—all forms of gaming that are not Class I or Class II gaming.<sup>11</sup>

The Tribal-State compacting process set out in IGRA primarily governs the regulation of Class III gaming. The provisions subject to compact negotiation include criminal and civil jurisdiction, state assessments to cover the costs of any state regulation, standards of operation, licensing, and any other subjects that are directly related to Indian gaming activities.<sup>12</sup>

Sometimes tribes that cannot obtain compacts with states will push the limits of Class II gaming or even engage in Class III gaming, which is a violation of IGRA. Distinguishing between Class II and Class III gaming involves complex factual and legal issues. While the NIGC has no formal process to identify Class II games, we do issue advisory opinions when resources permit. Such determinations are difficult, as a variety of software-based games can proliferate overnight. Disputes over game classification issues frequently become matters for federal courts to decide.

In general, the NIGC has the authority to monitor gaming activities, inspect and examine gaming premises, examine and photocopy gaming books and records, receive annual audit reports of gaming operations, approve tribal gaming ordinances, approve gaming management contracts between tribes and third-party managers, conduct background investigations as necessary, issue closure orders, impose and collect civil fines, and issue regulations that are needed to carry out its responsibilities.

## VI. SPECIFICS OF THE NIGC'S REGULATORY ROLE

The NIGC works to establish a cooperative relationship with tribes and, as part of this effort, the NIGC engages in several activities.

### A. Monitors all tribal gaming operations on a continuing basis and, when required, investigates

The eyes and ears of any regulatory agency are primarily those staff members who go on-site to observe the regulated operations. To fulfill its role, the NIGC relies on its field investigators, which are located in five regional offices, to maintain close contact with the regulated community. Through these field investigators the NIGC is able to observe tribal gaming activities and to render technical assistance to tribal gaming regulators and

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10. *See id.*

11. *See id.*

12. *See* 25 U.S.C. § 2710 (1988).

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operators in the areas of (1) auditing and accounting, (2) security and investigations, (3) gaming operations and internal controls, and (4) environment, health, and public safety.

B. Reviews and approves tribal gaming ordinances

Under IGRA, the Commission has the responsibility to approve tribal gaming ordinances and amendments to the ordinances. In fulfilling these obligations, the Commission has approved nearly 300 gaming ordinances.

C. Reviews and approves management contracts

If a tribe chooses to engage the services of a third party to manage its gaming operations, the NIGC must first approve a written agreement setting forth the terms of that relationship. The Chairman has the authority to find a management contractor unsuitable if the NIGC has information before it that would support such a determination.<sup>13</sup>

The NIGC is frequently asked to review other contracts affecting the operation of Class II and Class III gaming. These contracts range from straight financing agreements to lease agreements, employment agreements, and consulting agreements. All are reviewed to see if they constitute a “management contract” requiring Commission approval. In addition, those agreements found not to be “management contracts” are forwarded to the Bureau of Indian Affairs for review as to the applicability of 25 U.S.C. § 81.<sup>14</sup>

D. Conduct background investigations on employees

Essential to a background investigation is the submission of fingerprint cards for employees of tribal gaming operations. The NIGC has entered into memoranda of understanding for the purpose of processing fingerprint cards with 169 Indian tribes, and the NIGC processes approximately 3,000 fingerprint cards each month. Since 1992, the NIGC has processed more than 165,000 fingerprint cards, and it currently maintains records on nearly 95,000 individuals.

E. Initiate enforcement actions to ensure the integrity of Indian gaming operations

The NIGC is a very small agency that must enforce the provisions of IGRA and the regulations primarily by working with tribal gaming commissions in order to achieve compliance with the law. Only as a last resort will the NIGC turn to its assortment of enforcement tools.

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13. See 25 U.S.C. § 2711(e) (1988).

14. See 25 U.S.C. § 2711 (1988).

Among matters for which the NIGC may seek enforcement are those relating to the operation of gaming facilities without a tribal license, failure of gaming operations to perform background investigations on key employees and primary management officials, failure to submit audit reports, operating on land which has not been approved for gaming, offering Class III gaming without a Tribal-State compact, management by contractors whose agreements have not been approved by the NIGC, and inadequate maintenance of gaming operations that could threaten the health and safety of the public.

There are difficulties that can be encountered in an enforcement action. As most enforcement actions are appealed, they affect the limited resources of the NIGC by triggering the administrative hearing process. The final agency decision after the hearing is likely to result in a challenge in federal court, which virtually assures protracted litigation.

## VII. ISSUANCE OF REGULATIONS

IGRA specifically authorizes the NIGC to issue regulations that are required to fulfill its role.<sup>15</sup> Under this authority, the NIGC has undertaken several major regulatory initiatives.

### A. Minimum Internal Control Standards

On July 29, 2002, revisions to the regulations concerning the Minimum Internal Control Standards (MICS) became final.<sup>16</sup> The MICS are intended to protect and preserve the integrity of Indian gaming by preventing the potential risk of loss at tribal casinos due to customer or employee access to cash and cash equivalents within the casino. The MICS reduce the risk of loss to tribal gaming operations because they contain, among other things, standards and procedures that govern cash handling and counting, documentation, game integrity, auditing, and surveillance. The MICS also establish minimum standards and procedures for Class II and Class III games such as bingo, pull tabs, card games, manual and computerized Keno, pari-mutuel wagering, table games, and gaming machines. In short, the MICS provide strict rules which track money from the time it enters the casino until the time it leaves.

Under the MICS, the annual independent audit of a tribal gaming operation provided to the NIGC will include comments on that tribal gaming operation's compliance with the tribe's MICS program. Many tribes' internal controls already meet or exceed the NIGC's MICS, and many have state-of-the-art surveillance and machinery to conduct the

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15. See 25 U.S.C. § 2706(b)(10) (1988).

16. See 25 C.F.R. § 542.3 (2002). See also NIGC, MINIMUM INTERNAL CONTROL STANDARDS, FINAL RULE, at <http://www.nigc.gov> (last visited Jan. 27, 2003).

counting of money.

#### B. Self-Regulation

The NIGC promulgated rules regarding Tribal Self-Regulation for Class II operations.<sup>17</sup> These voluntary procedures permit a tribe to obtain a Class II self-regulation certificate if it meets certain criteria, such as: (1) documentation of how tribal net gaming revenues were used; (2) adequate systems for accounting; (3) adequate systems for investigation, enforcement, and prosecution of violations; (4) adequate minimum internal control standards; and (5) an independent tribal regulatory body.

The issuance of a self-regulation certificate will allow a tribe a reduction in the fees it pays to the NIGC. However, notwithstanding the regulatory role of tribal gaming commissions, the NIGC will maintain oversight authority and continue to be responsible for enforcing compliance with IGRA, its implementing regulations, and tribal gaming ordinances.

#### C. Health and Safety

IGRA also requires that tribes include provisions within their tribal gaming ordinances relating to the adequate protection of the environment, public health, and safety. The NIGC plays an oversight role in assuring the safety of the public in tribal gaming facilities, and the threat of imminent harm justifies the issuance of an interpretive rule. The NIGC developed this rule with the assistance of a tribal advisory committee, and the rule became effective on August 12, 2002.<sup>18</sup>

These are just a few of the regulations that the NIGC has promulgated since its inception. Among its additional regulations, the NIGC also maintains regulations for debt collection<sup>19</sup> and for responding under the Freedom of Information Act.<sup>20</sup>

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17. See 25 C.F.R. pt. 518 (1998). See also NIGC, SELF REGULATION OF CLASS II GAMING, at <http://www.nigc.gov> (last visited Jan. 27, 2003).

18. See 25 C.F.R. pt. 580 (2002). See also NIGC, ENVIRONMENT, PUBLIC HEALTH AND SAFETY, at <http://www.nigc.gov> (last visited Jan. 27, 2003).

19. See 25 C.F.R. pt. 513 (2001).

20. See 25 C.F.R. pt. 517 (1993). See also NIGC, FREEDOM OF INFORMATION ACT PROCEDURES, at <http://www.nigc.gov> (last visited Jan. 27, 2003).