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RE: Tribal Gaming Commission Overview

Effective regulatory oversight requires that there be a separation between the regulation and operation of tribal gaming activities. For example, if a tribe owns and operates its own gaming facility, the governmental entity must be structured to ensure that the regulation of gaming is *separate* from the operation of gaming. An effective regulatory scheme should work to ensure that all gaming within a tribe's jurisdiction is operated in accordance with tribal laws and regulations.

## ***REGULATORY FUNCTIONS OF A TRIBAL GAMING COMMISSION*** <sup>1</sup>

Items 1 - 12 are requirements contained in the Indian Gaming Regulatory Act and the National Indian Gaming Commission's regulations. The remaining activities are additional and related functions a tribal gaming commission might perform.

1. Develop licensing procedures for all employees of the gaming operation pursuant to 25 CFR §§ 558.1(b).
2. Issue, suspend, revoke, and renew licenses of primary management officials and key employees upon completion of background investigations and after following the procedures contained in 25 CFR Parts 556 and 558.
3. Conduct background investigations on primary management officials and key employees according to requirements that are at least as stringent as those in 25 CFR Parts 556 and 558 pursuant to 25 CFR §§ 522.4(b)(5).
4. Forward completed employment applications for primary management officials and key employees to the NIGC pursuant to 25 CFR §§ 558.3. These applications should include the Privacy Act notice and the notice regarding false statements contained in 25 CFR §§ 556.2 and 556.3.
5. Forward completed investigative reports on each background investigation for each primary management official or key employee to the NIGC prior to issuing a license pursuant to 25 CFR §§ 556.5.
6. Review a person's prior activities, criminal record, if any, and reputation, habits and associations to make a finding concerning the eligibility of a key employee or primary management official for employment in a gaming operation pursuant to 25 CFR §§ 558.2.

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<sup>1</sup>NIGC Bulletin No. 94-3 (April 20, 1994).

7. Notify the NIGC if, after conducting a background investigation on a primary management official or a key employee, the tribe does not license the individual pursuant to 25 CFR §§ 556.5(d)(1).
8. Retain applications and reports of background investigations of primary management officials and key employees for no less than three years from termination of employment pursuant to 25 CFR §§ 558.1(c).
9. Issue separate licenses to each place, facility, or location on Indian lands where a tribe elects to allow gaming pursuant to 25 CFR §§ 522.4(b)(6).
10. Ensure that gaming facilities are constructed, maintained and operated in a manner that adequately protects the environment and the public health and safety pursuant to 25 CFR §§ 522.4(b)(7).
11. Obtain annual independent outside audits and submit these audits to the NIGC pursuant to 25 CFR §§ 522.4(b)(3). The scope of these audits should include all gaming related contracts that result in purchases of supplies, services or concessions for more than \$25,000 in any year pursuant to 25 CFR §§ 522.4(b)(4).
12. Ensure that net revenues from any gaming activities are used for the limited purposes set forth in the tribal gaming ordinance pursuant to 25 CFR §§ 522.4(b)(2).
13. If the tribe authorizes individually owned gaming, issue licenses according to the requirements contained in the tribal gaming ordinance pursuant to 25 CFR §§ 522.10 and 522.11.
14. Promulgate tribal gaming regulations pursuant to tribal law.
15. Monitor gaming activities to ensure compliance with tribal law/regulations.
16. Interact with other regulatory and law enforcement agencies regarding the regulation of gaming.
17. Conduct investigations of possible violations and take appropriate enforcement action with respect to the tribal gaming ordinances and regulations.
18. Provide independent information to the tribe on the status of the tribe's gaming activities.
19. Take testimony and conduct hearings on regulatory matters, including matters related to the revocation of primary management official and key employee licenses.
20. Establish or approve minimum internal control standards or procedures for the gaming operation, including the operation's credit policies and procedures for acquiring supplies and equipment.
21. Establish any supplementary criteria for the licensing of primary management officials, key employees, and other employees that the tribe deems necessary.
22. Establish standards for and issue licenses or permits to persons and entities who deal with the gaming operation such as manufacturers and suppliers of machines, equipment and supplies.
23. Maintain records on licensees and on persons denied licenses including persons otherwise prohibited from engaging in gaming activities within the tribe's jurisdiction.

24. Perform audits of business transactions to ensure compliance with regulations and/or policy.
25. Establish or approve rules of various games, and inspect games, tables, equipment, machines, cards, dice, and chips or tokens used in the gaming operation. Establish or approve video surveillance standards. Establish standards/criteria for gaming machines and facilitate the testing of machines for compliance.
26. Resolve patron disputes and other problems pursuant to the tribal gaming ordinance.

As recognized by the Supreme Court, the IGRA provides that Indian tribes are to be the primary regulators of gaming in Indian country. 25 U.S.C. §§§§ 2701(5) and 2710(a)(2). The enactment of IGRA resulted in a complex regulatory structure that delegates primary regulatory responsibility to the Tribes, and additional regulation to the NIGC and, if a Tribe consents, to the States. Finally, the Gaming Commission shall ensure that gaming facilities are constructed, maintained and operated in a manner that adequately protects the environment and the public health and safety pursuant to 25 CFR §§ 522.4(b)(7).

### ***Tribal Gaming Commission Structure***

According to the National Indian Gaming Commission (NIGC), the “ideal gaming commission”<sup>2</sup> has the following characteristics:

1. The Tribe’s gaming ordinance, would assure that the gaming commission (the “commission”) was an *independent body*, solely *responsible for the regulation* of the tribe’s gaming, and separated completely from the tribe’s role as owner and operator of tribal gaming operation. The commission monitors the operation for compliance with the tribally prescribed rules of the games and tracking of revenues, reviews the qualification and issues licenses for those employed in the gaming operation, and takes appropriate enforcement action when necessary, and no more.
2. The commission would have a *permanent, stable source of funding*. This can occur in a variety of ways, including an annual line-item in the tribal budget, funded from a variety of sources, or through fees or assessments on the gaming revenues. But unless or until the Commission knows its doors are going to stay open, and that the resources it needs to operate will continually be available, it cannot concentrate on its regulatory role as it should, and make the fair, and often difficult decisions it must, on day-in and day-out basis. Of course any funding scheme must be implemented in the context of existing commitments, and the terms of existing contracts and compacts cannot be disrupted by the adoption of new funding plans, unless all parties are agreeable.
3. The ideal commission would have a relatively small membership, most of which would be composed by part-time lay members of the tribal community. The commission’s narrow function is to implement and enforce the rules and policies which the Tribe will have adopted. A commissioner ought to be selected on the basis of integrity and

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<sup>2</sup>September 18, 1996 Memorandum from the National Indian Gaming Commission (NIGC) to the Colville Confederated Tribes regarding “Profile of the ‘Perfect’ Tribal Gaming Commission.” All these ideas are not required by the NIGC but are based on the experiences of the NIGC and may assist the Tribe’s regulatory efforts.

qualifications, not popularity, as the nature of the job is such that large community representation is not necessary to best perform this role.

4. The organization of the commission would be such that *continuity of the commission membership*, as members rotate on and off the commission, is maintained. As a regulatory body, the commission ought to strive to be non-partisan and non-political. Stability and continuity, can be fostered by long, staggered terms, and avoiding wholesale changes in the commission's membership. Mid-term removal of commission members ought to be only for cause, following a procedure allowing for due process.
5. The commission would be *adequately supported by qualified, professional, adequately compensated staff*. Issuing licenses, conducting background investigations, and overseeing a gaming operation is a lot of work. Commissioners, who may be part-time, and who are concerned with making and maintaining policy, should not be expected to attend to all the details of the regulation for which they are responsible, but should be able to delegate the mechanics of that regulation to a competent staff, dedicated to the integrity of the gaming enterprise they help oversee.
6. To instill confidence in all who deal with the gaming commission, the *commission and its staff should be subject to the same background investigation and standards* as the highest level licencing category for which they are responsible. If a commission is going to have the credibility it needs to demand high standards and strict compliance, the gaming public, the gaming employees and licensees, and the tribal ownership of the enterprise must have no doubts about the qualifications or integrity of those given that regulatory responsibility.
7. Avoid even the appearance of impropriety with respect to the relationship of the gaming commission and the enterprise and licensees it regulates, the members of the gaming commission should be prohibited from gaming in the operations and facilities it regulates. While the commissioners may have an interest in and experience with gaming as players, playing in the regulated facilities will only raise questions in the minds of the public which observes that play, and will create temptations on behalf of licensees and commissioners alike. This can easily be avoided by the prohibition of the commissioners' play in tribal facilities.
8. *Abundance of common sense*. The membership of the commission and its staff should be absolutely dedicated to maintaining the integrity of the tribe's gaming operation, and the fair play in the facility. Nevertheless, the commission should approach its regulation with a "lets make it work" attitude, avoiding an over-technical application of rules and regulations, and seeking the cooperation and compliance of those it regulates, and imposing harsh remedies only after less onerous solutions have failed. A good commission would not seek to justify its existence by the number of violations it cited.
9. The members and staff would *sign and abide by a confidentiality agreement*, whereby they would agree not to disclose, unless so required to do so in the course of heir duties, the sensitive and confidential information which comes before them in the course of their regulatory work. To be successful, a commission must expect complete candor from those making application to it for permission to engage in gaming, and this cannot be expected unless those dealing with the commission can count on the fact that any and all such information will not be disclosed or leaked. Violations of such confidentiality

agreements would be dealt with by severe sanctions.

10. Regular and open communication with the tribal leadership and tribal membership regarding its role and activities. Certainly there are many details that are inappropriate to publish or to disclose, but the general aspects of the commission's regulation and oversight of the tribe's gaming is of vital interest to the tribe, and regular reports should be made to the tribal council and membership, and discussion held to inform the council and membership of the health and direction of the gaming operation from a regulatory aspect. Misunderstandings of the commission's role can be anticipated and avoided, and it will contribute to the overall success of the tribe's efforts to achieve economic development through its gaming operation.