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## BULLETIN

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**No. 2022-4**

**June 23, 2022**

**Subject: Use of Net Gaming Revenues Bulletin (Updated)<sup>1</sup>**

### Introduction

The goals of federal Indian policy that the Indian Gaming Regulatory Act (“IGRA”) was enacted to promote 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.

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<sup>1</sup> This is an update to, and replaces, Bulletin 2005-1, dated March 8, 2005.

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 of 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. Further, the real-life examples of tribes' use of net gaming revenue contained herein are shared not to highlight specific tribes but to provide actual incidences that not only illustrate proper uses under IGRA but also demonstrate its success in promoting tribal economic development, self-sufficiency, and strong tribal governments.

#### Net Revenues Used for Public Purposes

IGRA requires that net gaming revenues from Indian gaming be used for public purposes that are consistent with those typically provided by governments. "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."<sup>2</sup> 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.<sup>3</sup>

#### A. Funding Government Operations & Providing for the Tribe's General Welfare

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<sup>2</sup> 25 U.S.C. § 2703(9); *see also* 25 C.F.R. § 502.16 (*Net revenues* means gross gaming revenues of an Indian gaming operation less—(a) Amounts paid out as, or paid for, prizes; and (b) Total gaming-related operating expenses, including all those expenses of the gaming operation commonly known as operating expenses and non-operating expenses consistent with professional accounting pronouncements, excluding management fees.).

<sup>3</sup> 25 U.S.C. § 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.

Under two of IGRA's use of net gaming revenue purposes - funding tribal government operations and providing for the general welfare of the tribe, tribes commonly allocate gaming revenues for the creation and expansion of tribal government infrastructure. The following examples typify allowable expenditures of net gaming revenues for these purposes:

- Constructing tribal administrative office buildings
- Constructing fire stations
- Constructing hospitals and health clinics
- 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 cultural center
- 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

Recent examples include: the Ho-Chunk Nation's construction of a community center and government office; the Tulalip Tribe's construction of a cultural center; the Mille Lacs Band of Ojibwe's construction of a school; and the Kalispel Tribe's investment in a museum and ceremonial grounds.<sup>4</sup>

Beyond construction of buildings is funding of police, fire, water, and environmental services. The Flandreau Santee Sioux Tribe has funded its police department with gaming revenues.<sup>5</sup> And the Tulalip Tribe was "able to take back criminal jurisdiction from the state of Washington by developing competent judicial, policing, and prosecutorial staffs."<sup>6</sup> The Nez Perce Tribe is engaged in endangered species management, and the Sandia Pueblo manages its water quality.<sup>7</sup>

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<sup>4</sup> NIGC Website, Public Affairs, Community Impact, <https://www.nigc.gov/public-affairs/community-impact/>; Journal of Economic Perspectives, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development* at 196 (August 2015).

<sup>5</sup> Journal of Economic Perspectives, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development* at 196-97.

<sup>6</sup> *Id.* at 204.

<sup>7</sup> *Id.* at 197.

Significantly, healthcare throughout Indian Country has been transformed by net gaming revenues. It is reported that over 17% of funding derived from gaming supports healthcare for Native communities.<sup>8</sup> With gaming revenue, tribes are building their own hospitals staffed by Native American doctors and nurses. Many tribes have established health clinics, dialysis centers, and fitness centers to benefit the health of their communities. In 1999, gaming revenue made it possible for the Choctaw Nation of Oklahoma to become the first tribe to build its own hospital with its own funding.<sup>9</sup> Today, the Choctaw Nation’s gaming revenue supports the health, safety, and welfare of rural communities throughout southeastern Oklahoma. Located in Talihina, Oklahoma, the Choctaw Nation Healthcare Center is a 140,000 square foot health facility, which serves as the center of health care services covering 10 ½ counties of southeastern Oklahoma, providing: hospital care, dental, laboratory, x-ray, CT and MRI scanning, mammography, ultrasound, pharmacy, primary medical care, surgical care, emergent care, physical and respiratory therapy, transportation, women’s health, pediatrics, podiatry, telemedicine, and ophthalmology.<sup>10</sup> Also on campus is a diabetic wellness facility with a fitness center.<sup>11</sup> Additional services located off-campus include behavioral health, women’s and men’s substance abuse facilities, and optometry.<sup>12</sup> Since the development of the Talihina Healthcare Center, the Choctaw Nation has added clinics throughout the Tribe’s geographic boundaries including facilities in Atoka, Broken Bow, Durant, Hugo, Idabel, McAlester, Poteau, and Stigler.<sup>13</sup> The Pokagon Band of Potawatomi is yet another example; in 2014, it opened an integrated health care facility to deliver high quality healthcare services to its citizens.<sup>14</sup>

#### B. Providing for Tribal Members’ General Welfare

IGRA also specifies that net gaming revenues may be used for governmental programs benefitting or providing for the general welfare of individual tribal members. Tribes have developed a broad range of tribal government programs addressing needs of their tribal memberships:<sup>15</sup>

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<sup>8</sup> NIGC Website, Public Affairs, Community Impact, <https://www.nigc.gov/public-affairs/community-impact/>

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup>As an aside, per capita distributions made pursuant to the Indian Gaming Regulatory Act are subject to Federal taxation and tribes must notify members of such tax liability when payments are made. *See 25 U.S.C. § 2710(b)(3)(D)*. Payments that satisfy the Tribal General Welfare Exclusion Act of 2014’s definition of “Indian general welfare benefit” are not includible in income (not taxed).<sup>2</sup> *See* PL 113-168, 128 Stat 1883 (Sept. 26, 2014) (“‘Indian general welfare benefit’ includes any payment made or services provided to or on behalf of a member of an Indian tribe (or any spouse or dependent of such a member) pursuant to an Indian tribal government program, but only if— (1) the program is administered under specified guidelines and does not discriminate in favor of members of the governing body of the tribe, and (2) the benefits provided under such program—(A) are available to any tribal member who meets such guidelines, (B) are for the promotion of general welfare, (C) are not lavish or extravagant, and (D) are not

- Elder programs and services
- Daycare and early childhood development programs
- Foster care
- Universal health care
- Nutrition assistance programs
- Housing assistance programs
- Small business loan programs
- Emergency loan programs
- Legal aid programs
- Public defender programs
- Job and vocational training programs
- Educational programs, grants, loans and scholarships
- Drug and alcohol treatment programs
- Culture and language programs
- Youth and after-school programs
- Burial assistance programs
- Eyeglass programs
- Transportation 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 573 federally recognized tribes in existence today. But as an example, the Coeur d'Alene Tribe created many programs to enrich its youth on the reservation, including: an early childhood learning center, summer youth programs, and after-school programs.<sup>16</sup> Recognizing that the youth are the key to the future, the tribe also offers scholarships for its tribal students that seek to further their education beyond high school.<sup>17</sup> The Osage Nation too provides college scholarships.<sup>18</sup> Programs to care for specific groups of tribal members are conducted by the Tohono O'odham Nation via its elder care services and by the Fond du Lac Band through foster care.<sup>19</sup> Another illustration is the Pokagon Band's funding of a cultural revitalization program where cultural knowledge is shared via workshops, in areas such as: creating bone needles and basswood fiber cordage, quilt making, and stitching moccasins.<sup>20</sup> The San Carlos Apache

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compensation for services.”); *see also* IRS Revenue Procedure 2014-35, *Application of the General Welfare Exclusion to Indian Tribal Government Programs That Provide Benefits to Tribal Members*. The exemption for Indian general welfare benefits is inapplicable to the per capita payments an Indian tribe makes from gaming revenue pursuant to IGRA. *See United States v. Jim* (891 F.3d 1242). For question regarding the General Welfare Exclusion Act, we recommend contacting the Internal Revenue Service Office of Indian Tribal Governments. .

<sup>16</sup> NIGC Website, Public Affairs, Community Impact, <https://www.nigc.gov/public-affairs/community-impact/>

<sup>17</sup> *Id.*

<sup>18</sup> Journal of Economic Perspectives, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, *supra*.

<sup>19</sup> *Id.*

<sup>20</sup> NIGC Website, Public Affairs, Community Impact, <https://www.nigc.gov/public-affairs/community-impact/>

Tribe has invested in artifact repatriation.<sup>21</sup> And the Cherokee Nation has initiated a language revitalization program.<sup>22</sup> Lastly, the Sisseton-Wahpeton Oyate have created a comprehensive jobs-support program, addressing vocational and job training, employment assistance, child care, a works program, and food assistance.<sup>23</sup>

### C. Promoting Tribal Economic Development

In addition, pursuant to IGRA, net gaming revenues can be used to promote tribal economic development. “Typically, [this] begins with [tribes] developing adjacent hotels, conference halls, amphitheaters, and other amenities . . . [to their] gaming facilities.”<sup>24</sup> Tribes have also invested in nearby retail businesses and outlet malls.<sup>25</sup> Some tribes have invested in other sectors such as banking, commercial real estate, and federal facilities management.<sup>26</sup> For the Blue Lake Rancheria, net gaming revenue has provided investment capital, allowing for diversification and development of the Rancheria’s economy and improving the health and environment of the region’s population.<sup>27</sup> The Rancheria partnered with California, academia, the federal government, and industry to install a community-scale microgrid with solar photovoltaic (PV) power and advanced energy storage as its backbone.<sup>28</sup> For day-to-day activities, the microgrid provides cleaner and far less expensive power -- but in emergencies, the Rancheria can disconnect from the larger grid and generate emergency power for as long as needed.<sup>29</sup> Looking to the future, the Rancheria is exploring a community water system, starting first with an emergency water treatment and storage venture.<sup>30</sup>

### D. Funding Local Government Operations & Donating to Charities

Finally, net gaming revenues may be provided to local government agencies to help fund operations or donated to charitable organizations. Recent contributions to local governments and charities include:

- The Saginaw Chippewa Tribe provided surrounding non-Indian communities in Michigan (both local and state governments) more than \$64 million annually for police and fire protection, social and health services, and housing. Committing a semi-annual 2% distribution from funds derived from gaming, the Tribe has contributed over \$230 million to schools, local businesses, and other vital

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<sup>21</sup> Journal of Economic Perspectives, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, *supra*.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*; [http://www.swo-nsn.gov/?page\\_id=803](http://www.swo-nsn.gov/?page_id=803)

<sup>24</sup> Journal of Economic Perspectives, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development* at 197.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (the Citizen Potawatomi Nation, the San Manuel Band of Mission Indians, and the Winnebago Tribe, respectively).

<sup>27</sup> NIGC Website, Public Affairs, Community Impact, <https://www.nigc.gov/public-affairs/community-impact/>

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

community programs since 2015. These programs include community learning centers and youth and community services.;

- In March of 2017, the Blue Lake Rancheria surpassed \$1.5 million in educational donations to the local school, student scholarships, and workforce development in its community.;
- In 2016, the Pokagon Band of Potawatomi entered into two voluntary agreements with a city to collaborate on numerous municipal improvement projects, community programs, and poverty reduction services including: expanding the city's sewer and water system to a nearby tribal village and casino development, restoring a local creek, and contributing funding to a YMCA women's shelter, a boys and girls club, and a children's hospital.;
- The Ho-Chunk Nation has donated its gaming revenue to numerous organizations and entities including local fire and rescue centers, local school districts, youth programs and public libraries.; and
- For over two decades the tribal leadership of the Coeur d'Alene has been making donations throughout the state of Idaho and beyond. Donations in 2015 were approximately \$1.1 million. Over the last 20 years, the Coeur d'Alene Tribe has donated more than \$22 million to classrooms, schools, and nonprofit organizations across Idaho and the inland Northwest.<sup>31</sup>

Thus, net gaming revenues strengthen not only tribal communities but local communities. Additionally, tribal gaming supports hundreds of charitable organizations throughout the United States. Given the significance of these contributions, the NIGC details examples of them on its website - <https://www.nigc.gov/public-affairs/community-impact/>

#### Revenue Allocation Plans – Payments to Individual Tribal Members

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 net gaming revenue 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").<sup>32</sup> In the RAP, the tribe describes how it will allocate and distribute net gaming revenues for public purposes and to individual tribal members on a per capita basis.<sup>33</sup> "*Per capita payment* means 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. This definition does not apply to payments which have been set aside by the

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<sup>31</sup> NIGC Website, Public Affairs, Community Impact, <https://www.nigc.gov/public-affairs/community-impact/>

<sup>32</sup> 25 U.S.C. § 2710(b)(3); *see also* § 2710(d)(1)(A)(ii); 25 C.F.R. § 290.13.

<sup>33</sup> 25 C.F.R. §§ 290.2 (definition of revenue allocation plan), 290.4, 290.12.

tribe for special purposes or programs, such as payments made for social welfare, medical assistance, education, housing or other similar, specifically identified needs.”<sup>34</sup> The responsibility for reviewing and approving RAPs is assigned by IGRA to the Secretary of the Interior, not the NIGC.<sup>35</sup>

Tribes are not required to make per capita payments from net gaming revenues to individual tribal members.<sup>36</sup> If they choose to do so however, they must comply with both IGRA and the administrative regulations of the BIA.<sup>37</sup> 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) Ensure 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.<sup>38</sup>

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.<sup>39</sup> 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 IGRA and BIA regulations, 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.<sup>40</sup>

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<sup>34</sup> 25 C.F.R. § 290.2.

<sup>35</sup> 25 U.S.C. § 2710(b)(3)(B).

<sup>36</sup> 25 C.F.R. § 290.8.

<sup>37</sup> 25 U.S.C. § 2710(b)(3); 25 C.F.R. part 290.

<sup>38</sup> 25 U.S.C. § 2710(b)(3); 25 C.F.R. § 290.12.

<sup>39</sup> 25 C.F.R. § 290.14.

<sup>40</sup> 25 U.S.C. § 2710(b)(3)(D); 25 C.F.R. § 290.12(b)(4).



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.<sup>41</sup> This requirement ensures that tribal members are afforded a process for challenging and appealing the distribution and allocation of gaming revenues under a RAP, giving them some recourse if they disagree with how tribal gaming revenues are spent and providing the tribe itself an opportunity to review the propriety of the spending as well.<sup>42</sup>

Please note that if a RAP is revised or amended by a tribe, it must be submitted to Interior for approval.<sup>43</sup>

As discussed previously, the NIGC shares regulatory authority and responsibility for the proper use of gaming revenues with the tribes, tribal councils, and tribal gaming commissions. Tribal regulatory bodies are the primary regulators of their tribe's uses of gaming revenues. In light of tribal sovereignty and in recognition of the primary authority of tribal regulators, when the NIGC exercises and discharges its regulatory authority and responsibilities under IGRA, it is committed to maintaining a respectful and meaningful government-to-government relationship with tribes and their authorized government leaders and regulators. Therefore, tribal members' concerns about their tribe's allocation of net gaming revenues should first be brought to their tribal regulators and tribal remedies exhausted in a tribal court, forum, or administrative process prior to requesting action by the NIGC.<sup>44</sup>

### Misuses of Gross and Net Gaming Revenues

There are two primary ways in which tribes can misuse their gaming revenues and run afoul of IGRA.

#### A. Distributing Net Gaming Revenue for Personal Uses Outside of a RAP or a Government Program

Impermissible use of net gaming revenues occurs when gaming funds are directly distributed to individual tribal members (or select members) for their personal use without a RAP or outside of a government program.<sup>45</sup> Simply put, unless these payments are issued through a tribal governmental program, tribes need an approved RAP prior to

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<sup>41</sup> 25 C.F.R. § 290.12(b)(5); 25 C.F.R. §§ 290.22 and 290.23.

<sup>42</sup> 25 C.F.R. §§ 290.22 and 290.23.

<sup>43</sup> 25 C.F.R. § 290.24.

<sup>44</sup> See 25 C.F.R. § 290.23.

<sup>45</sup> See, e.g., NOV-09-37 (2009) (notice of violation issued for distributing per capita payments of net gaming revenue to tribal members without an approved RAP), <https://www.nigc.gov/images/uploads/enforcement-actions/NOV-09-37.pdf>; NOV-10-01 (2010) (notice of violation issue for distributing payments of net gaming revenue to select tribal members outside of government programs), <https://www.nigc.gov/images/uploads/enforcement-actions/NOV-10-01.pdf>.

distributing them to tribal members or select group(s) of members.<sup>46</sup> BIA regulations explicitly state: “you are in violation of IGRA if you make per capita payments to your tribal members from net gaming revenues without an approved tribal revenue allocation plan. If you refuse to comply, the DOJ or NIGC may enforce the per capita requirements of IGRA.”<sup>47</sup> Importantly, the RAP must be approved by Interior prior to the per capita payments being made.<sup>48</sup>

For example, in one tribal court case, revenue payments were not based on or distributed pursuant to a bona fide tribal government program.<sup>49</sup> Forty percent of gaming revenues, or approximately \$2 million, was being distributed through a betterment project to individual tribal members from a certain district, based solely upon membership in the 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, 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.<sup>50</sup> 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.

Additionally, purchases with net gaming revenue or cash payments of it that are used for personal reasons and not for tribal business purposes, or for the tribe as a whole, are prohibited. These include buying such items as personal cars, boats, houses and clothing,<sup>51</sup> or other personal items.<sup>52</sup> Unauthorized expenditures also include such things as non-business trips,<sup>53</sup> 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.

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<sup>46</sup> 25 C.F.R. §§ 290.2 (definition of *per capita payment*), 290.10, 290.11, 290.13; 25 U.S.C. § 2710(b)(3)(B).

<sup>47</sup> 25 C.F.R. § 290.10.

<sup>48</sup> 25 C.F.R. § 290.13.

<sup>49</sup> *Avis Little Eagle v. Standing Rock Sioux Tribal Council*, Standing Rock Sioux Tribal Court Memorandum Opinion, TRO-03-131 (2003).

<sup>50</sup> *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738 (S.D.S.D. 1992).

<sup>51</sup> NIGC Settlement Agreement (Aug. 17, 2007) (purchase by the Casino of Pendleton jackets provided to tribal officials outside of a marketing promotion or any other legitimate business purpose), [https://www.nigc.gov/images/uploads/enforcement-actions/20070817\\_Ltr\\_to\\_Settlement\\_Agreement\\_-\\_Nisqually\\_Indian\\_Tribe.pdf](https://www.nigc.gov/images/uploads/enforcement-actions/20070817_Ltr_to_Settlement_Agreement_-_Nisqually_Indian_Tribe.pdf)

<sup>52</sup> See e.g., NOV-10-01, *supra* (including jewelry, vehicle related purchases, and home security services).

<sup>53</sup> NIGC Settlement Agreement (Aug. 17, 2007) (purchase of a Super Bowl Travel package for a former tribal official).

B. Payments of Gross Gaming Revenue from the Casino that Do Not Qualify as Operating Expenses

Tribal gaming operations must take care to use gross gaming revenues for goods and services, including leasing of equipment, vehicles, and land, so that they qualify as legitimate operating expenses. As discussed previously, IGRA defines “net revenues” as “gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.”<sup>54</sup> NIGC regulations interpreting that definition provide:

*Net revenues* means gross gaming revenues of an Indian gaming operation less—  
(a) Amounts paid out as, or paid for, prizes; and  
(b) Total gaming-related operating expenses, including all those expenses of the gaming operation commonly known as operating expenses and non-operating expenses consistent with professional accounting pronouncements, excluding management fees.<sup>55</sup>

Therefore, in line with this regulation, we look to the Generally Accepted Accounting Principles (“GAAP”) for the contours of what qualifies as an operating expense. According to GAAP:

Operating expenses are primary recurring costs associated with central operations (other than the cost of goods sold) that are incurred in order to generate sales. Operating expenses are normally reported in the following two categories:

- a. Selling expenses
- b. General and administrative expenses

Selling expenses are those expenses directly related to the company’s efforts to generate sales (e.g., sales salaries, commissions, advertising, delivery expenses, depreciation of store furniture and equipment, and store supplies). General administrative expenses are expenses related to the general administration of the company’s operations (e.g., officers and office salaries, office supplies, depreciation of office furniture and fixtures, telephone, postage, accounting and legal services, and business licenses and fees).<sup>56</sup>

In short, gaming operations may treat their purchases, leases, and payments for services as operating expenses if they are made in an effort to generate sales or to conduct the normal day-to-day operations of a gaming facility (services, materials, supplies, equipment, salaries). For instance, sporting and entertainment tickets purchased by a

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<sup>54</sup> 25 U.S.C. § 2703(9).

<sup>55</sup> 25 C.F.R. § 502.16.

<sup>56</sup> 2019 *Wiley GAAP – Interpretation and Application of Generally Accepted Accounting Principles*, Joanne M. Flood at 56.

casino but not used in a manner to generate gaming operation revenue do not constitute a proper operating expense.<sup>57</sup>

Moreover, purchases by gaming operations of goods, services, and leases, as well as investments in capital improvements, must be made at their fair market values. To be clear, such purchases and investments should not be disguised transfers of gross gaming revenues to third parties. IGRA was enacted to ensure that tribes are the primary beneficiaries of their gaming operations.<sup>58</sup> IGRA fulfills this purpose by requiring that gross gaming revenues be used either as operating expenses for the gaming operation or transferred to the tribal government as net gaming revenue.

One of the most egregious misuses of gross gaming revenues involved a tribal casino's rental of land for use as a parking lot. The tribe rented the lot for seven (7) years, originally for four hundred dollars (\$400) a month then five hundred dollars (\$500) a month.<sup>59</sup> The land was sold to someone else.<sup>60</sup> The casino's CEO was involved in the land sale, providing the deposit from his personal account. And he was also involved in negotiating the lease of the land on behalf of the casino; plus, he instructed a casino employee to sign the new lease. Shockingly, the new cost was twenty-five thousand dollars (\$25,000) and one-percent (1%) gross gaming revenue of the casino per month.<sup>61</sup> Thus, the tribe's casino paid an increase of \$24,500 per month along with 1% of the casino's gross gaming revenues for leasing the same parcel of land – resulting in a transfer of \$1,257,432.44 of gross gaming revenue to a third party.<sup>62</sup> The NIGC concluded that the new lease did not qualify as a bona fide operating expense as the highest rationally justifiable rent or fair market value would have been three thousand (\$3,000) a month.<sup>63</sup> Consequently, the lease amount beyond such an amount was simply a pretext for transferring gross gaming revenue to a third party in violation of IGRA and NIGC regulations.<sup>64</sup>

To prevent intentional or inadvertent misuses of gross gaming revenue, the NIGC recommends that tribes do the following in regard to their gaming operations:

- Establish and maintain a financial records system as required by 25 C.F.R. § 571.7(a). To do that consider obtaining the assistance of a qualified auditing firm to devise a system for maintaining permanent books and records, including inventory of gaming machines, equipment, and supplies, and other gaming related

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<sup>57</sup> NIGC Settlement Agreement (Aug. 17, 2007), *supra*.

<sup>58</sup> 25 U.S.C. § 2702(2).

<sup>59</sup> Settlement Agreement, SA-17-01, <https://www.nigc.gov/images/uploads/enforcement-actions/SA1701.pdf>

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*; *Id.* at 4, ¶ 26 (“The Casino paid three times more than the purchase price the Tribes had initially agreed to pay for the Land, ten times more than the Land's appraised value, and a minimum of \$56,400 dollars more per month than the Casino had paid to lease the Land in the prior 8 years for nearly the same usage with significantly less fiscal responsibility.”).

<sup>63</sup> *Id.* at 5-6, ¶¶ 14, 18-19, 24-25, and 27-30.

<sup>64</sup> *Id.* at 6, ¶¶ 15-20.

expenditures and/or disbursements sufficient to establish the amount of gross and net income, deductions and expense, receipts and disbursements, and other information required in any financial statement, report, or other accounting prepared pursuant to the IGRA and NIGC regulations;

- Establish minimum internal control standards for accounting and auditing as required by 25 C.F.R. §§ 543.23 and 523.24;
- Develop and mandate an annual budget approval process;
- Issue written procurement policies for goods and services, including limitations on expenditures that require advance approval from tribal boards, legislative bodies, or tribal leadership;
- Issue donation policies, identifying what type of donations may be made by the gaming operation without advance approval from tribal boards, legislative bodies, or tribal leadership;
- Issue written credit card policies for credit cards issued by the gaming operation to casino employees and/or tribal officials, prohibiting personal use with them;
- Establish an audit plan for credit card statements and use by casino employees and/or tribal officials;
- Issue policies or procedures for entering leases for, and purchases of, equipment, vehicles, and land, including documentation or appraisals confirming that they are within the fair market value of the same;
- Issue a written policy and procedure for distributions of net gaming revenue from the gaming operation to the Tribe, defining gaming operation operating expenses, the frequency of distributions, and the manner of the distributions; and
- Establish an audit plan to review and substantiate gaming operation operating expenses.

In conclusion, the NIGC is hopeful that this Bulletin will be a helpful guide to tribes. 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.