

OGC-104 Requirements of IGRA and the Pitfalls of Non-Compliance Participant Guide



The Requirements of IGRA & Pitfalls of Non-Compliance



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KEY POINTS

My Notes



Course Objectives

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

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Knowledge Reviews & Course Evaluations

Knowledge Review Purpose

- Check for immediate understanding and retention
- Used to improve courses
- Provide your name & email address
- Completed twice:
 - at the end of the course
 - 90 days after course via email

Course Evaluation Purpose

- Allow participants to provide immediate feedback on their experience
- Encouraged to include ideas and recommendations
- Will be used to improve the course

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KEY POINTS:

At the end of this course you will take knowledge review.

You will also be asked to provide input to improve the course, by completing a course evaluation form.

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Applicable Laws

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

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KEY POINTS

The NIGC only investigates and enforces specific laws.

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Overview of Key IGRA Req's

IGRA Requires:

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

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These three violations can be considered pre-requisites to conducting gaming.

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Overview of Key IGRA Req's (cont).

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

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

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Tribal Gaming Ordinances

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

25 U.S.C. § 2710; 25 C.F.R. Parts 522 and 528

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KEY POINTS

A tribe cannot conduct gaming until it has a tribal gaming ordinance that has been approved by the Chair of the NIGC.

My Notes



Ordinance Amendments

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

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Any amendments to the tribal gaming ordinance must also be approved by the Chair of the NIGC.

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Indian Lands

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

25 U.S.C. §§ 2703(4), 2710(b)(2), 2710(d)(1); 25 C.F.R. § 502.12

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Class III Gaming Compacts

- Class III gaming requires an approved Class III Tribal-State compact
 - “An agreement between a tribe and a state about class III gaming”
 - Class III gaming must be conducted in full compliance with all provisions of compact
 - Secretarial Procedures
 - Unusual option
 - Takes the place of a Compact
- 25 U.S.C. §§ 2710(d)(1)(C), 2710(d)(3)(B) & (d)(8)(A) 25 C.F.R. part 291**

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KEY POINTS

To conduct Class III gaming a tribe must enter into a compact with the state it is in that is then approved by the Secretary of the Interior.

My Notes



Sole Proprietary Interest

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

25 U.S.C. § 2710(b)(2)(A), § 2702(2)

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Uses of Gaming Revenues

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

*Per Capita Payments are an exception

25 C.F.R. § 522.4(b)(2)_{1,2}

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Per Capita Payments

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

25 U.S.C. § 2710(b)(3), § 2710(d)(1)(A)(ii); 25 C.F.R. part 290, § 522.4(b)(2)(ii)

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Background Investigations

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

25 C.F.R. §§ 522.4(b)(5), 502.14, 502.19

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Safe Construction & Operation of Gaming Facilities

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

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

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Facility Licenses

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

25 USC § 2710 (b)(2)(E); 25 C.F.R. §§ 522.5(b)(6), 559.2(a), 559.3

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Annual Audits & Financial Statements

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

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

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Agreed-Upon Procedures

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

25 C.F.R. § 542.3(f)

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Annual Fees

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

25 U.S.C. § 2717; 25 C.F.R. § 514

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Annual Fees & Quarterly Statements

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

25 U.S.C. § 2717; 25 C.F.R. § 514

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Management Contracts

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

25 C.F.R. § 502.15, 502.5; NIGC Bulletin 94-5

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Management Contracts

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

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

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Management Contracts

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

25 C.F.R. part 537, § 533.6

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Management Contracts

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

25 U.S.C. § 2711; 25 C.F.R. parts 531, 533, 535 & 537

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Criminal Violations

- Some IGRA violations are also criminal violations
 - Casino employee embezzles money from a casino
 - Casino employee participates in a money laundering
 - Gaming operation defrauds a tribe
- If NIGC has information that federal, state or tribal law has been violated, NIGC must share it with appropriate law enforcement officials

25 U.S.C. § 2716(b)

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Tips for Compliance

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

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Tips for Compliance

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

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Tips for Compliance (SPI)

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

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Tips For Compliance (Deadlines)

- Gaming Ordinances & Amendments - **15** days after enactment
- Background Investigations – **90** days before work begins
- Notice of Results – **60** days after applicant begins work
- Licensing of PMO/KE Notices – **30** days after decision.
- Facility License Notices - **120** days before issuance.
 - Notice of license issuance – within **30** days of issuance
 - Notice of license not being issued – within **30** days of denial
 - Notice of revocation/reinstatement of license – within **30** days
 - Facility License Renewal Notice – within 30 days of issuance

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Tips For Compliance (Deadlines)

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

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KEY POINTS

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Obtain Req'd Approvals

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

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NIGC Enforcement Actions

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

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

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KEY POINTS

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Letter of Concern

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

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Chair's Enforcement Authority

- Chair's Enforcement Action:

- Notice of Violation

- NIGC Chair can issue NOV and civil fine for any violation of IGRA, NIGC regulations or tribal gaming ordinance

- Proposed Civil Fine

- Civil fine not to exceed \$50,276 per day, per violation

- Temporary Closure Order

- Chair can issue temporary closure order for any of 13 substantial violations of IGRA, NIGC regulations or tribal ordinances or regulations

25 U.S.C. § 2713; 25 C.F.R. parts 573 and 575

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Appeals

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

25 C.F.R. parts 580, 584 & 585

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Appeals

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

25 U.S.C. § 2713(b)(2)-(c); 25 C.F.R. §§ 583.6, 584.14

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Appeals to Federal Court

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

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Knowledge Review

- Legibly write your name and email address
- Do your best
- We will go over the answers at the end
- Be on the lookout for the survey email 90 days from today

QUESTIONS	
1-	<input checked="" type="radio"/> A <input type="radio"/> B <input type="radio"/> C <input type="radio"/> D
2-	<input type="radio"/> A <input type="radio"/> B <input type="radio"/> C <input checked="" type="radio"/> D
3-	<input type="radio"/> A <input checked="" type="radio"/> B <input type="radio"/> C <input type="radio"/> D
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6-	<input checked="" type="radio"/> A <input type="radio"/> B <input type="radio"/> C <input type="radio"/> D

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KEY POINTS

Our last task is to complete the knowledge review and the course evaluation. We use the information from both to evaluate the effectiveness of the course and to make improvements so please provide specific written feedback if applicable.

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Questions

NIGC Office of General
Counsel
(202) 632-7003



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Course Evaluation

- Provide an honest assessment of your experience
- Written suggestions and comments are greatly appreciated and allow us to improve your experience



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