U.S. Department of the Interior
Office of Inspector General

Evaluation of the Bureau of Indian Affairs' Process to Approve Tribal Gaming Revenue Allocation Plans

No. 2003-I-0055

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June 2003

United States Department of the Interior

Office of Inspector General

Eastern Region Audits
381 Elden Street
Suite 1100
Herndon, Virginia 20170

June 11, 2003

Memorandum

To: Aurene M. Martin
Acting Assistant Secretary for Indian Affairs

From: William J. Dolan, Jr.
Regional Audit Manager, Eastern Region

Subject: Final Report, "Evaluation of the Bureau of Indian Affairs' Process to Approve Tribal Gaming Revenue Allocation Plans" (No. 2003-I-0055)

At the request of the Secretary, we evaluated the process the Bureau of Indian Affairs (BIA) uses to review and approve Revenue Allocation Plans (plans) submitted by Indian tribes participating in gaming operations.

BIA reviews the plans to ensure that tribes distribute gaming revenues responsibly. In accordance with the Indian Gaming Regulatory Act (IGRA), tribes are expected to distribute earnings to promote "tribal economic development, self sufficiency, and strong tribal governments" - the purpose of IGRA. Tribes must have a plan approved by the Secretary if they intend to distribute gaming revenues to tribal members - known as per capita payments.

We concluded that BIA's approval process contained weaknesses and inconsistencies, such as:

- BIA did not consistently determine whether tribes reserved adequate amounts of gaming profits for tribal government programs and economic development projects.

- BIA did not consistently document deliberations made during the review process.

We made three recommendations to improve BIA's approval process.

Our evaluation also found that no one monitors tribal compliance with or systematically enforces against non-compliance with approved plans. Although BIA reviews and approves plans, it does not have the authority to ensure that tribes actually comply with the terms of these plans. The National Indian Gaming Commission (NIGC), under authority given to it by IGRA, may monitor tribal compliance with approved plans and impose civil penalties against a tribe for making per capita payments that are not in compliance with an approved plan. The NIGC, however, does not have a mechanism for systematic monitoring of revenue distributions to

enable identification of instances of noncompliance. Our report presents three options for the Department to consider to address the lack of monitoring.

We received responses to the draft report from the Acting Assistant Secretary for Indian Affairs, with an attached memorandum from the Office of the Solicitor (Appendix 3) and from the Acting Chief of Staff for the National Indian Gaming Commission (Appendix 4). Based on the responses, we revised the report as appropriate and included additional information regarding the role of NIGC. Based on the response from the Acting Assistant Secretary, we consider the recommendations resolved but not implemented. (Appendix 5)

Since the report's recommendations are resolved, no further response to the Office of Inspector General is required. We would, however, appreciate being informed of any action taken to establish a process to monitor revenue allocation plans.

The legislation, as amended, creating the Office of Inspector General requires that we report to Congress semiannually on all reports issued, actions taken to implement our recommendations, and recommendations that have not been implemented.

If you have any questions, please do not hesitate to contact me at (703) 487-8011.

cc: Deputy Commissioner for Indian Affairs
Director, Office of Audits and Evaluation
Director, Office of Indian Gaming Management
Executive Director, National Indian Gaming Commission

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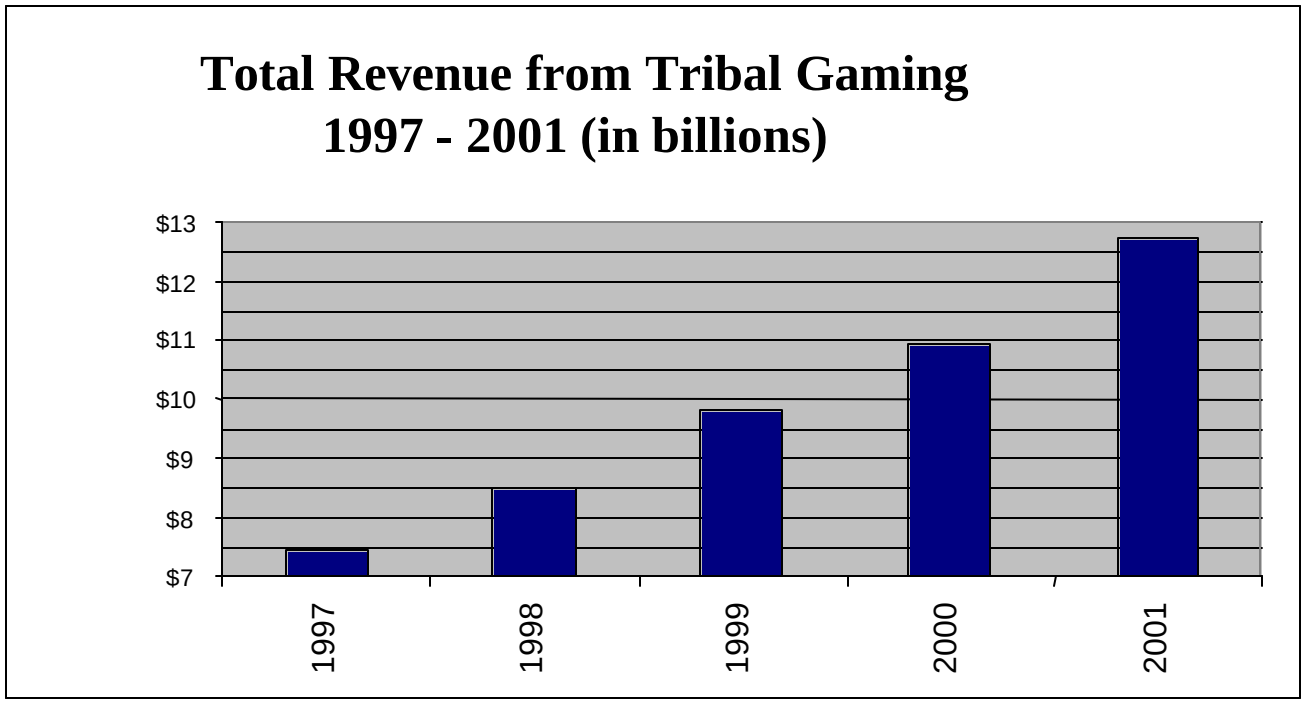
BACKGROUND

History of Indian Gaming

Indian gaming began in the late 1970s when the Seminole tribe of Florida opened a high stakes bingo hall. As more tribes began to engage in gaming operations, states began filing lawsuits opposing tribal gaming. However, the Supreme Court in *California v. Cabazon Band of Mission Indians*[1] (in 1987) ruled that where state law did not expressly prohibit a type of gambling, tribes could offer gaming under their own regulatory scheme.

In October 1988, Congress passed the Indian Gaming Regulatory Act[2] (IGRA or Act). Provisions of the Act that address Indian tribal per capita payments and selected authority of the NIGC are presented in Appendix 1. Congress intended the Act to establish (1) a statutory basis for operating and regulating tribal gaming, (2) Federal standards for gaming operations on Indian lands, and (3) the National Indian Gaming Commission (NIGC) as the Federal regulatory authority responsible for overseeing the Indian Gaming Industry.

Gaming has become an important source of income for many tribes. Tribal gaming revenues have steadily increased from about $7.5 billion in 1997 to $12.7 billion in 2001, as illustrated in the following chart:



[1] 480 U.S. 202 (1987).
[2] 25 U.S.C. §§ 2701-2721 (1988)

Legislation

IGRA requires that the Bureau of Indian Affairs (BIA), through authority delegated by the Secretary of the Interior, review and approve Revenue Allocation Plans. These plans must detail how tribes intend to allocate profits to fund one or more of the following:

- Tribal government operations or programs.
- The general welfare of the tribe and its members (which includes payments to individual tribe members – per capita payments).
- Tribal economic development.
- Charitable organizations or operations of local government agencies.

Only tribes that use profits to make per capita payments are required to submit these plans. Tribes that use earnings solely for government, economic, and charitable purposes are not required to submit plans because the Act assumes that all funds are directed toward these areas, promoting tribal government and self-sufficiency.

IGRA[3] also authorizes the NIGC to approve all tribal gaming ordinances including those regarding the use of gaming revenues pursuant to an approved revenue allocation plan. Since the approved gaming ordinance identifies the authorized uses of any gaming revenue, we believe that NIGC can impose civil penalties against tribes for making per capita payments that violate the approved plan or making per capita payments without an approved plan.

Regulations

In March 2000, BIA issued formal regulations[4] for tribes to follow when preparing their allocation plans. Tribes must include:

- A percentage breakdown of how profits will be distributed.
- Information showing that the plan complies with IGRA.
- Provisions to protect the interests of minors and other legally incompetent persons.
- A mechanism to notify tribal members of tax liabilities for per capita payments.

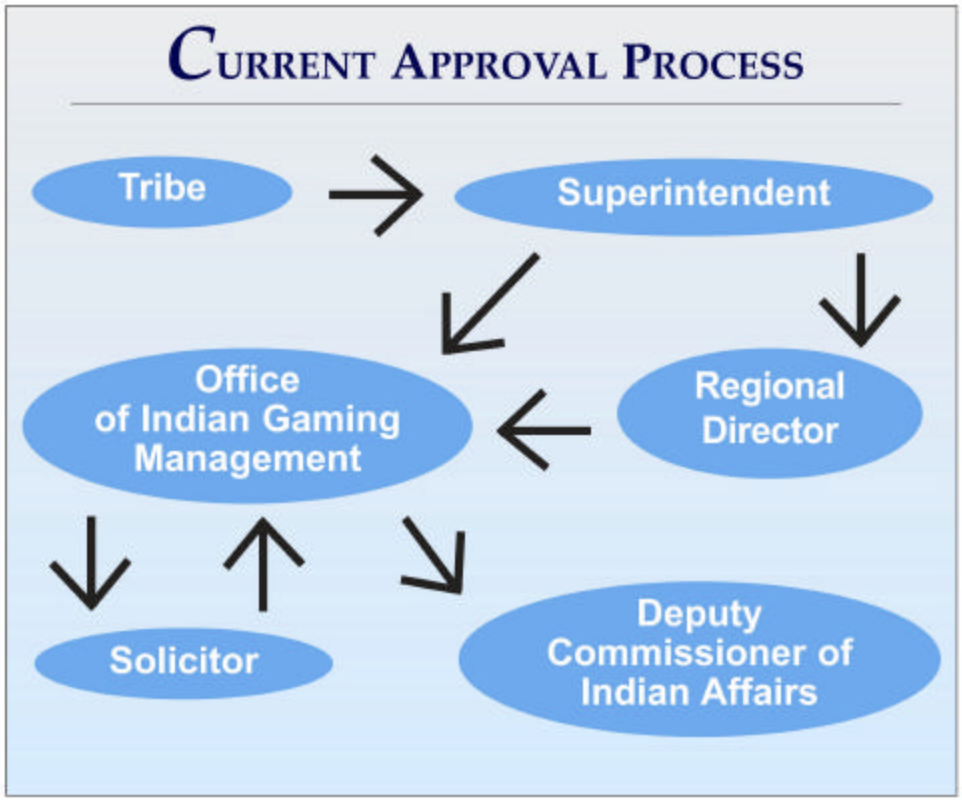
The regulations do not require tribes to submit information to BIA showing actual distributions of gaming profits.

[3] 25 U.S.C. § 2710
[4] 25 CFR 290.4

REVIEW AND APPROVAL OF PLANS

Process for Approval

The distribution plan approval process was centralized in the Office of Indian Gaming Management (OIGM), an entity within BIA, in 1999. As shown below, Indian tribes submit plans to OIGM through their Agency Superintendents or Regional Directors for review. OIGM analyzes the plan, obtains a legal review by the Solicitor and forwards it to the Deputy Commissioner of Indian Affairs for approval.



Note: According to the OIGM, some Revenue Allocation Plans are submitted by the Agency Superintendent while other plans are submitted through the Regional Director because some Regions do not have designated staff to conduct these reviews.

OIGM does not systematically review every tribe's proposed use of net gaming revenues and, therefore, does not assess the adequacy of profit distribution. OIGM officials examine a tribe's financial health[5] only when a tribe proposes to use 50 percent or more of its earnings for per capita payments. OIGM has not, however, established standards for measuring a tribe's financial health when evaluating proposed distribution of profits. The Solicitor's Office

[5] A review of sufficient depth is needed to determine whether the plan reserves enough revenue for funding government operations and programs, providing for the "general welfare" of the tribe or its members, promoting economic development, donating to charitable organizations, or helping to fund local government operations.

(Solicitor) reviews the plans to ensure that they comply with IGRA, but the Solicitor does not perform an assessment of the tribe's financial health.

After OIGM and the Solicitor review a plan, the Deputy Commissioner signs either a letter of approval or a written notice informing the tribe why the plan does not conform to the regulations and how to bring the plan into compliance. The BIA will work informally with tribes to modify plans to obtain approval.

If a tribe decides to change how it distributes gaming profits, the tribe must submit an amendment to the existing plan to BIA for approval. After BIA approves a plan, however, it does not monitor tribal compliance nor does it have the authority to enforce penalties if a tribe does not comply.

As of December 2001, of 207 Indian tribes that conducted gaming operations, 75 submitted gaming-profit distribution plans, acknowledging that they intend to use a portion of their earnings for per capita payments (Appendix 2 contains a list of these tribes). However, BIA has no assurance that it knows the actual number of tribes making per capita payments. Tribes submit plans at their own will, and BIA has no way of ensuring that all tribes making per capita payments actually submit plans.

Weaknesses in Process

BIA's process for reviewing and approving Revenue Allocation Plans is not consistently performed and contains flaws.

Assessing a tribe's economic health

BIA is required, by regulation, to determine whether plans reserve adequate amounts of money to fund tribal government programs and economic development. However, BIA does not effectively make this determination because it does not require sufficient information about a tribe's financial condition. BIA only requests additional information when a tribe intends to use over 50 percent of its earnings for per capita payments. In order to make an accurate assessment of each tribe's financial conditions, BIA needs to secure adequate financial information from all tribes seeking per capita distribution plan approval.

There were 75 plans submitted to BIA for approval through September 2002, 73 of which were approved. Of the 73 approved plans, only 24 contained any information that might assist in evaluating a tribe's economic health. Of these 24, only 5 provided comparative information about gaming profits, tribal enrollment levels, and tribal operations budgets – all of which are essential for a reasoned evaluation of a tribe's economic health.

During our evaluation, however, we did find an excellent example of a plan that provided BIA with sufficient information for approval. One Michigan tribe provided BIA with historical and projected tribal enrollment; gaming revenues; tribal budgets; historical and projected tribal services provided; other potential sources of tribal revenue; balances, earnings, and projected

earnings from capital investment reserve accounts; and capacity of gaming operations and other related facilities. This allowed BIA to adequately evaluate the proposed distribution of earnings.

Documenting the deliberative process

BIA did not always document its deliberative process for reviewing and approving plans. During the review process, BIA did not use checklists to ensure that plans met all regulatory requirements nor did it consistently maintain records containing reasons for approving a plan.

For example, an Idaho tribe's file contained only the tribal ordinance and BIA's approval letter. Neither of these documents indicated that BIA had performed a substantive review of the plan.

In addition, we found that BIA did not:

- Have a tracking system in place to document when a plan was received, reviewed, and approved, or when a tribe was contacted about issues regarding its plan.

- Document standard operating procedures.

RECOMMENDATIONS

We recommend that the Assistant Secretary for Indian Affairs improve its approval process by:

1. Amending the applicable regulations to require tribes to submit sufficient financial information, modeled after the Michigan tribe, including: historical and projected tribal enrollment; gaming revenues; tribal budgets; historical and projected tribal services provided; other potential sources of tribal revenue; balances, earnings, and projected earnings from capital investment reserve accounts; and capacity of gaming operations and other related facilities.

2. Developing and publishing a standard to determine what is "adequate" funding for each tribe's government and economic development programs.

3. Developing and producing written operating procedures for reviewing plans, including forms, surnames, documentation of tribal contacts, modifications to plans, and final disposition of plans.

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MONITORING INDIAN TRIBAL COMPLIANCE WITH PLANS

Neither the BIA nor the NIGC is monitoring Indian tribes to determine whether tribes comply with approved revenue allocation plans or whether tribes are making per capita distributions of gaming revenues without an approved plan. IGRA does not specifically provide the BIA a mechanism to ensure that tribes making per capita payments actually submit plans or make payments in compliance with approved plans. While IGRA does provide the NIGC authority to enforce Indian tribal compliance with the requirements of the Act, including the revenue allocation plan requirements, NIGC does not have a mechanism for monitoring revenue distributions.

An example of problems that can occur when tribes make per capita payments without approved plans is found in a U.S. District Court case.[6] A South Dakota tribe had made per capita payments to tribal members without a distribution plan approved by the Secretary (or BIA). Several members who were excluded from the payments filed suit against the tribe. The court ruled that all of the tribe's gaming profits be held until the Secretary approved a plan, which prevented the tribe from using gaming profits for government projects and economic development, as well as per capita payments.

Without a process for systematic monitoring of tribal revenue distributions, the Secretary's approval of the plan serves little practical purpose. The approval process is one of voluntary self-compliance.

SUMMARY OF RESPONSES TO THE DRAFT REPORT

Acting Assistant Secretary for Indian Affairs Response

The March 25, 2003, response agreed with the three recommendations. It stated that proposed amendments to the regulations requiring tribes to submit sufficient financial information would be developed within 60 days of publication of the final report, that a standard to determine what is adequate funding for tribal government and economic development programs would be formulated in conjunction with the proposed amendment, and that operating procedures for reviewing plans would be prepared pursuant to completion of the other two actions. In response to a suggestion in our draft report that consideration be given to amending IGRA to give the Secretary of the Interior authority to enforce compliance with approved plans, the response stated that such an amendment may not be necessary because "the National Indian Gaming Commission (NIGC) already has the authority to enforce compliance with provisions of IGRA." and that "BIA would not have the financial resources to monitor compliance" if provided the statutory authority to do so. Finally, the response requested that the "Related Matters" section of the report referring to media coverage and future evaluations be deleted from the final report.

[6] *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738 (1992).

Attached to the response from the Acting Assistant Secretary for Indian Affairs was a January 30, 2003, memorandum from an Attorney-Advisory in the Office of the Solicitor to the Director, Office of Indian Gaming Management. The January 30, 2003, memorandum stated that the Secretary "might consider seeking an amendment to IGRA in order to clarify her authority to monitor tribal compliance or enforce against non-compliance with RAPs [Revenue Allocation Plans]. If so, the regulations could be amended to require tribes to submit proof of actual distribution of gaming profits." The memorandum stated further that all "tribes who dispense per cap payments are required to submit a RAP . . . if they don't the regulation states that '[I]f you refuse to comply, the DOJ or NIGC may enforce this requirement'." In addition, the memorandum clarified that the Office of the Solicitor does not perform an assessment of a tribe's financial health when it reviews proposed plans and amendments.

National Indian Gaming Commission's Response

In a March 10, 2003, response, the National Indian Gaming Commission's Acting Chief of Staff stated, "the report should more fully describe the potential involvement of the National Indian Gaming Commission's oversight of revenue allocation plans." In that regard, the response noted that while NIGC has civil enforcement authority against noncompliant tribes, it does "not have a mechanism for systematic monitoring of revenue distributions." The Acting Chief of Staff also stated the Secretary "is in the best position to interpret an approved RAP and make a determination as to whether or not a particular distribution complies with the plan." The Acting Chief of Staff added that "the Department may wish to consider instituting a reporting requirement to facilitate monitoring" and that NIGC is willing to discuss a cooperative arrangement for pursuing cases of misuse of gaming revenue identified by the Department.

Office of Inspector General's Reply

Based on the responses, we modified the report as appropriate. In particular, we added to the report information about NIGC's authority to monitor compliance with the Act and removed the suggestion that consideration be given to seeking an amendment to the Act. We also changed the report to address the technical issues raised by BIA regarding the definition of net revenues, the approval process, the role of the Solicitor, and amendments to approved revenue allocation plans.

Regarding the NIGC's comments, the scope of this assignment was the processes and functions used by the BIA in reviewing and approving plans. We agree that IGRA provides NIGC and DOJ the authority to enforce the requirements pertaining to revenue allocation plans. We believe, however, that the enforcement authority is not supported by systematic mechanism for monitoring compliance and therefore is not effectively exercised.

OPTIONS FOR THE DEPARTMENT OF THE INTERIOR REGARDING REVENUE ALLOCATION PLANS

As concluded in this report, currently there is a requirement that tribes submit revenue allocation plans for review and approval, without a systematic mechanism for monitoring compliance to this requirement. Based on our review of the responses to the draft evaluation report, we submit the following options to address this issue. In consultation with gaming tribes the Department could:

1. Enter into an agreement with NIGC to implement an oversight process for tribal compliance with revenue allocation plan requirements. This would require the Department to identify a source of funding for the agreement because the NIGC Chairman advised us that NIGC currently lacks the resources to finance this process. The Chairman also said that it is NIGC's policy to consult with tribes before considering an effort such as this.

2. Require all gaming tribes to submit an annual independent audit report to the Secretary. The audit would determine whether a tribe made per capita payments and, if so, complied with an approved revenue allocation plan. Currently, gaming tribes that receive Federal financial assistance for the operation of Indian programs have two audit reporting requirements: (1) an annual independent audit of the financial statements of each gaming operation is required (25 CFR 571.13) to be submitted to NIGC and (2) an annual or biennial audit of a tribe's financial statements and a schedule of its Federal assistance is required (Office of Management and Budget Circular A-133) to be submitted to the cognizant Federal audit agency. It may be possible to incorporate into the scope of one of these audits a review of tribal compliance with revenue allocation plan requirements.

3. Seek relief from the requirement for the submission and approval of tribal gaming revenue allocation plans.

Future Evaluations

We have tentatively identified a number of other areas in which IGRA fails to confer to the Secretary the requisite authority to meet the Department's responsibilities under the Act. We are undertaking further evaluations to clearly identify the gaps in authority that prevent the Secretary from carrying out her responsibilities most effectively and ensuring that the intent of the statute is met. We will issue a comprehensive report with recommendations when those evaluations are completed.

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OBJECTIVE, SCOPE, AND METHODOLOGY

Our objective was to determine whether BIA's approval process ensures that Revenue Allocation Plans fulfill the purposes of the Indian Gaming Regulatory Act. This evaluation was performed in response to a request from the Secretary. We reviewed BIA's processes and procedures used to review and approve plans. We also interviewed officials from the BIA's Office of Indian Gaming Management, the Solicitor's Office, the National Indian Gaming Commission, and the National Indian Gaming Association. In addition, we analyzed statistics regarding tribal gaming and per capita distributions, and we reviewed about 6,235 pages of documents containing BIA Revenue Allocation Plan files. We did not obtain information directly from the tribes or review tribal accounting records to determine actual payments made.

We conducted our evaluation in accordance with the President's Council on Integrity and Efficiency's Quality Standards for Inspections. Accordingly, we conducted tests and reviews of records that we considered necessary under the circumstances.

Neither the OIG nor the General Accounting Office has issued public reports within the last five years addressing the BIA's administration of Revenue Allocation Plans.

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Indian Gaming Regulatory Act
Provisions Addressing Tribal Per Capita Payments From Net Gaming Revenues
(25 USC §§ 2710, 2713)

Note: Sections (a) through (b)(1) of 25 USC § 2710, were omitted by the OIG as not applicable to the subject of this report.

Section 2710 Tribal Gaming Ordinances

(b)(2) The Chairman [of the National Indian Gaming Commission] shall approve any tribal ordinance or resolution concerning the conduct or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that-

Section (A) omitted.

(B) Net revenues from any tribal gaming are not to be used for purposes other than:
- (i) To fund tribal government operations or programs;
- (ii) To provide for the general welfare of the Indian tribe and its members;
- (iii) To promote tribal economic development;
- (iv) To donate to charitable organizations; or
- (v) To help fund operations of local government agencies;

Sections (C) through (F)(ii)(III) omitted

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if:
- (A) The Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);
- (B) The plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);
- (C) The interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and
- (D) The per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

Sections (4) (A) through (c) omitted.

(d)(1) Class III gaming activities shall be lawful on Indian lands only if such activities are-
(A) authorized by 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) of this section, and
(iii) is approved by the Chairman

Section 2713 – Civil Penalties

(a) Authority; amount; appeal; written complaint

(1) Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this chapter, any regulation prescribed by the Commission pursuant to this chapter, or tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(3) Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this chapter, by regulations prescribed under this chapter, or by tribal regulations, ordinances, or resolutions, approved under section 2710 or 2712 of this title, that may result in the imposition of a fine under subsection (a)(1) of this section, the permanent closure of such game, or the modification or termination of any management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission. The allegation shall be set forth in common and concise language and must specify the statutory or regulatory provisions alleged to have been violated, but may not consist merely of allegations stated in statutory or regulatory language.

(b) Temporary closure; hearing

(1) The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this chapter, of regulations prescribed by

the Commission pursuant to this chapter, or of tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

(2) Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. Not later than sixty days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation.

(c) Appeal from final decision

A decision of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court pursuant to chapter 7 of title 5.

(d) Regulatory authority under tribal law

Nothing in this chapter precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not inconsistent with this chapter or with any rules or regulations adopted by the Commission.

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Revenue Allocation Plans Submitted to BIA
As of September 2002

Approved Plans	Tribe	Date of Last Action
1	Absentee Shawnee of Oklahoma	29-Aug-00
2	Agua Caliente Band of Cahuilla Indians of California	11-Jan-02
3	Alturas Rancheria of California	5-Mar-02
4	Barona Band of Mission Indians of California	28-Dec-00
5	Berry Creek Rancheria of California	14-Feb-01
6	Big Sandy Rancheria of California	24-Jul-01
7	Big Valley Rancheria of California	27-Sep-01
8	Cahuilla Band of California	19-Mar-02
9	Chitimacha Tribe of Louisiana	3-Nov-98
10	Coeur d' Alene Tribe of Idaho	21-Mar-01
11	Colorado River Indian Tribe of Arizona	30-Jun-97
12	Coushatta Tribe of Louisiana	14-Apr-95
13	Cow Creek Band of the Umpqua Tribe of Oregon	29-Nov-00
14	Coyote Valley Tribe of California	19-Sep-95
15	Eastern Band of Cherokee Indians of North Carolina	10-Aug-01
16	Elk Valley Rancheria of California	9-Jan-01
17	Flandreau Sioux Tribe of South Dakota	29-Apr-99
18	Fond du Lac of Minnesota	23-Nov-01
19	Forest County Potawatomi of Wisconsin	10-Aug-01
20	Fort McDowell Mohave-Apache Indian Community of Arizona	27-Oct-98
21	Grand Ronde Community of Oregon	9-Nov-99
22	Grand Traverse Band of Michigan	2-Jun-00
23	Ho Chunk Nation of Wisconsin	11-Jan-02
24	Hopland Rancheria of California	1-Oct-97
25	Jackson Rancheria of California	19-Dec-95
26	Kalispel Tribe of Washington	11-Jan-02
27	Kickapoo Tribe of Kansas	24-Jul-01
28	Kootenai Tribe of Idaho	30-May-01
29	Lac du Flambeau Tribe of Wisconsin	26-Jun-00
30	Lac Vieux Desert Band of Michigan	14-Dec-94
31	Little Traverse Bay Bands of Michigan	11-Jan-02
32	Lower Sioux Indian Community of Minnesota	18-Jan-02
33	Menominee Tribe of Wisconsin	9-Dec-94
34	Middletown Rancheria Tribe of Pomo Indians of California	18-Dec-97
35	Mille Lacs Band of Minnesota	17-Dec-01
36	Mississippi Band of Choctaw Indians of Mississippi	19-Jun-96
37	Mohegan Tribe of Indians of Connecticut	16-Jul-01
38	Morongo Band of Cahuilla Mission Indians of California	4-Oct-96
39	Muckleshoot Indian Tribe of Washington	28-Dec-00
40	Oneida Tribe of Wisconsin	25-Jul-01

41	Pala Band of California	10-Aug-01
42	Pauma Band of California	1-Apr-02
43	Prairie Island Indian Community of Minnesota	7-Aug-96
44	Puyallup	10-Apr-98
45	Quechan Tribe of Arizona	18-Oct-00
46	Redding Rancheria of Pomo Indians of California	21-Oct-94
47	Robinson Rancheria of Pomo Indians of California	30-Jun-98
48	Rumsey Rancheria of Wintun Indians of California	19-Dec-95
49	Sac and Fox Nation of the Mississippi of Iowa	30-May-95
50	Sac and Fox Nation of Oklahoma	13-May-97
51	Saginaw Chippewa Tribe of Michigan	28-Mar-01
52	Salt River Pima Maricopa of Arizona	10-Oct-01
53	Santa Rosa Indian Community of California	15-Aug-00
54	Santa Ynez Band of Chumash Mission Indians of California	16-May-95
55	Seminole Tribe of Florida	18-Aug-93
56	Shakopee Mdewakanton Sioux Community of Minnesota	12-Nov-93
57	Sherwood Valley Rancheria of California	27-Jul-98
58	Shoshone-Bannock Tribes of Idaho	11-Jan-02
59	Siletz Tribe of Oregon	20-Nov-01
60	Sokaogon Chippewa Tribe of Wisconsin	15-Aug-94
61	Squaxin Island Tribe of Washington	14-Dec-01
62	St. Croix Tribe of Wisconsin	7-Jan-98
63	Stockbridge Munsee Tribe of Wisconsin	25-May-01
64	Table Mountain Rancheria of California	19-Dec-95
65	Tohono O'odham Nation of Arizona	25-Oct-00
66	Tonto Apache Tribe of Arizona	9-Aug-01
67	Tunica Biloxi Indians of Louisiana	14-Apr-94
68	Umatilla Tribe of Oregon	22-Nov-00
69	Upper Sioux Tribe of Minnesota	26-Jun-96
70	Viejas Band of Mission Indians of California	18-Dec-95
71	Winnebago Tribe of Nebraska	14-Jan-94
72	Yavapai Prescott Tribe of Arizona	12-Sep-95
73	Yselta del Sur	2-Jul-97

Subtotal of Approved Plans: 73

Denied Plans

1	Chicken Ranch	30-Nov-00
2	San Pasqual Band	5-Oct-01

Subtotal of Denied Plans: 2

Total Plans: 75

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

MAR 25 2003

Memorandum

To: Assistant Inspector General for Audits

From: Assistant Secretary - Indian Affairs

Subject: Comments on Draft Advisory Report - "Evaluation of the Bureau of Indian Affairs Approval Process for Indian Gaming Revenue Allocation Plans" (Assignment No. E-EV-BIA-0071-2002)

Following are our comments on the above-referenced Draft Advisory Report. The Draft Advisory Report makes four recommendations. We address these in the order they are presented in the Draft Advisory Report.

Recommendation No. 1: The Secretary should consider amending the Indian Gaming Regulatory Act (IGRA) to give her authority to oversee or enforce tribal compliance with approved plans or ensuring that tribes making per capita payments actually submit plans.

Response: The Secretary cannot amend IGRA. She can only recommend such an amendment to Congress. We are not convinced that such an amendment is necessary because the National Indian Gaming Commission (NIGC) already has the authority to enforce compliance with provisions of IGRA. The Bureau of Indian Affairs (BIA) would not have the financial resources to monitor compliance with 25 U.S.C. § 2710(b)(3) if given statutory authority to do so. We believe that it is best if enforcement authority is concentrated in one regulatory agency, the NIGC.

Recommendation No. 2: Applicable regulations should be amended to require tribes to submit sufficient financial information.

Response: The regulation at 25 CFR 290.12(b)(2) requires a proposed revenue allocation plan to contain "detailed information" to enable the BIA to determine whether the plan complies with IGRA, but the regulation does not specify what this information should consist of. We concur with the Draft Advisory Report's recommendation. We propose that proposed amendments to the regulations be developed by the Director, Office of Indian Gaming Management (OIGM), within 60 days of publication of the Final Report. Publication of a proposed rule will follow after consultation with Indian tribes.

Recommendation No. 3: Develop and publish a standard to determine what is "adequate" funding for each tribe's government and economic development programs.

Response: We concur with the Draft Advisory Report's recommendation. We propose that the standard be articulated in an amendment to the current regulations in 25 CFR Part 290, and published at the same time as the proposed amendment under recommendation No. 2 above.

Recommendation No. 4: Develop and produce written operating procedures for reviewing plans.

Response: The OIGM does retain an internal surname document which indicates staff surname. In the past, Revenue Allocation Plans (RAP) were approved by the Regional Offices. RAPs approved before the approval authority was rescinded and placed with the Deputy Commissioner for Indian Affairs do not always have a surname copy with the record. Currently, a controlled routing sheet is maintained by the BIA Controlled Correspondence Tracking System which indicates the offices and individual surnames of OIGM, Solicitor's Office, and the Deputy Commissioner. The OIGM has an internal tracking system of a RAP which indicates the date received, due date, action taken and date. Written operating procedures could be developed as a part of the Indian Affairs Manual for Indian Gaming, but a decision in this regard should wait until after implementation of the BIA reorganization. The OIGM will develop operating procedures after the regulations are amended pursuant to recommendations 2 and 3, above.

Technical Comments

We disagree with the statement in footnote 3 on page 2 that OIGM's definition of "net revenues" is different from the definition of "net revenues" in IGRA. What is the basis for this statement? We recommend that it be taken out of the Report.

The Current Approval Process chart on page 3 indicates the RAP flowing through the Superintendent and Area Director. Some RAPs are submitted by the Superintendent and others through the Regional Director (not Area Director). This is because not all Regions have designated staff to conduct these reviews.

The role of the Office of the Solicitor is mischaracterized on page 3. The Solicitor's Office reviews all RAPs for compliance with IGRA. *See* attached comments from Office of the Solicitor.

The last paragraph on page 3 states that if a tribe decides to change how it distributes gaming profits, a new plan must be submitted to BIA for approval. Only an amendment to the existing plan must be submitted for approval when a tribe wants to change its distribution of gaming profits. The BIA will review the amendment for compliance with IGRA.

On page 6, we recommend that the entire "RELATED MATTERS" Section be deleted. The section on "Media Coverage" is irrelevant and cites a Time Magazine article that we believe

contains inaccuracies and flaws. In addition, that article did not specifically address the subject of this Draft Advisory Report. The section on "Future Evaluations" appears not to be germane to the subject of the Draft Advisory Report either, and implies, without specifics, that IGRA is flawed in other respects. We question whether such an inference is appropriate at this stage and in this particular report.

In Appendix 1, there is an error in the CITE which reads 25 U.S.C. Sec. 2709. This should be 2710(b).

In Appendix 1, under (2)(B), "To help fund operations of local government agencies", should be listed as (v).

If you have any questions, please do not hesitate to contact me at (202) 219-7163.

Attachment

cc: Director, Office of Audits and Evaluation
Director, Office of Indian Gaming Management
Chairman, National Indian Gaming Commission

To: George Skibine, Director of Indian Gaming Management Staff
From: John Jasper, Attorney-Advisor
Re: Inspector General's Report on Revenue Allocation Plans (RAPs)
Date: January 30, 2003

This week I received the IG's Report and found much of it to be helpful. For example, I agree that the Secretary might consider seeking an amendment to IGRA in order to clarify her authority to monitor tribal compliance or enforce against non-compliance with RAPs. If so, the regulations could be amended to require tribes to submit proof of actual distribution of gaming profits, as suggested in the last sentence on page 2 of the IG Report. That might assuage some of the concerns on the first page of the transmittal letter where it states that, "BIA did not consistently determine whether tribes were reserving adequate amounts of gaming profits for tribal government programs and economic development projects." As you know, BIA makes no such determination because, as the IG correctly points out, it lacks authority to do so.

I disagree with the comment on page 3, that the "Office of the Solicitor scrutinizes a tribe's financial health [only when a 50% per cap payment is proposed]." Actually, the Solicitor's Office never scrutinizes a tribe's financial health in the context of a RAP. Lawyers scrutinize the IGRA statute and RAP regulations to insure the RAP complies with the law. Financial audits are outside the scope of the Solicitor's duties. If auditors are hired by BIA, the lawyers will be available to render legal advice to them but we don't scrutinize a tribe's financial health .

I agree with the finding on top of page 4, that tribes seem to submit RAPs at their own will, even though IGRA and the RAP regulations require otherwise. All tribes who dispense per cap payments are required to submit a RAP, as you know. If they don't, the regulation states that, "[I]f you refuse to comply, the DOJ or NIGC may enforce" this requirement. Whether or not the BIA has ever referred a case for prosecution to DOJ or the NIGC is unknown, but perhaps it could pursue this possibility. If more than half of the gaming tribes are not submitting RAPs, it is reasonable to expect that some are making per cap payments and are in violation of IGRA Therefore, I disagree with the conclusion in Issue One on page 4, because it claims that the enforcement "authority and a mechanism" do not exist. It does, we simply haven't used it yet, as far as I know. I doubt it'd be difficult to identify the tribes in violation, but getting the DOJ or the NIGC to do something about it might be. Also, I disagree with the example used in Issue One. Its premise is that an approved RAP would've solved the eligibility problem in the Santee Sioux case. The RAP reg makes clear that each tribe, not the BIA, determines its membership.

Finally, I agree with Issue Two that BIA could require more detailed financial information. The Michigan example could be established as the bar that all tribes must rise to, however, enforcement remains an obstacle. Amending the regulation is easy enough but convincing DOJ or the NIGC to prosecute is another matter. As to the IG's comment that the BIA should more thoroughly document its decision-making process, I don't have any information on how files are kept. All-in-all, the IG Report seems a useful tool.

Maybe we can start by listing RAP-less tribes who we know distribute per caps, then see if the NIGC will do anything about it. Let me know what you think.

March 10, 2003

Roger La Rouche
Assistant Inspector General for Audits
Department of the Interior
MS-5341-MIB
1849 C Street NW
Washington, D.C., 20240

Dear Mr. La Rouche:

The purpose of this letter is to provide comment on your Draft Advisory Report "Evaluation of the Bureau of Indian Affairs Approval Process for Indian Gaming Revenue Allocation Plans".

First I should point out a couple of typographical errors:

- In footnote 4 the correct citation is "25 CFR Part 290."
- In footnote 5 the word "sufficient" is misspelled.

More generally, for completeness the report should more fully describe the potential involvement of the National Indian Gaming Commission in oversight of revenue allocation plans (RAPs).

The Chairman of the National Indian Gaming Commission approves all tribal gaming ordinances. Such ordinances must contain provisions describing permissible use of gaming revenues pursuant to 25 U.S.C. § 2710(b)(2)(B). Approved tribal gaming ordinances also contain language, required by 25 U.S.C. § 2710 (b)(3), to the effect that the tribe will make per capita payments only pursuant to a revenue allocation plan approved by the Secretary of the Interior.

In 25 U.S.C. § 2714 the Chairman of the National Indian Gaming Commission is given authority to impose civil penalties (fines and closure) against tribal operators and managers of Indian gaming activities for any violation of a tribal gaming ordinance. Because the permissible uses of gaming revenue are spelled out in a tribe's approved gaming ordinance, it is the Commission's view that the Chairman of the National Indian Gaming Commission can impose civil penalties against a tribe for making per capita distributions that do not comport with an approved RAP. In fact, the Commission has on occasion taken action to address improper distribution of gaming revenue.

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REGIONAL OFFICES Portland, OR; Sacramento, CA; Phoenix, AZ; St. Paul, MN; Tulsa, OK

Because this point is not clearly made in the Draft Report, the potential role of the National Indian Gaming Commission in addressing the RAP issue is not fully explored.

Clearly the Secretary of the Interior is in the best position to interpret an approved RAP and to make a determination as to whether or not a particular distribution complies with the plan. At the same time, the National Indian Gaming Commission has the means to take action when a violation has occurred, and may be able to assist the Secretary's compliance effort.

Notwithstanding our willingness to act on reports of improper uses of gaming revenues, we do not have a mechanism for systematic monitoring of revenue distributions. If the Department of the Interior is interested in ensuring across-the-board compliance with approved RAPs, the Department may wish to consider instituting a reporting requirement to facilitate monitoring. We would be willing to discuss a cooperative arrangement for pursuing those cases of misuse of gaming revenue that have been identified by the Department of the Interior.

Thank you for sharing the Draft Report with us and allowing us an opportunity to provide comment. If you have any need for additional information or would like to discuss the issue further, please feel free to contact me. My direct line is (202) 632-1015.

Sincerely,

Richard B. Schiff
Acting Chief of Staff

Status of Recommendations

Recommendation	Status	Action Required
1 through 3	Resolved; not implemented	No further response to the Office of Inspector General is necessary. The recommendations will be referred to the Assistant Secretary for Policy, Management and Budget for tracking of implementation.

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