

NATIONAL
INDIAN
GAMING
COMMISSION

JUL 19 1995

John Stevens, Tribal Governor
Indian Township Passamaquoddy Reservation
P.O. Box 301
Princeton, ME 04668

Cliv Dore, Tribal Governor
Pleasant Point Passamaquoddy Reservation
P.O. Box 343
Perry, ME 04667

Dear Governor Stevens and Governor Dore:

This letter respond to your request for review and approval of the Ordinance of the Passamaquoddy Tribe Governing the Conduct of Class II Gaming Activities which was certified by the tribal clerk on May 15, 1995. The submission requirements established in 25 C.F.R. § 522.2 were submitted on July 13, 1995. I conclude that the Tribe has now met all of the statutory and regulatory requirements and therefore approve the Tribe's gaming ordinance.

Under the Indian Gaming Regulatory Act (IGRA) and the regulations promulgated by the National Indian Gaming Commission (NIGC), the Chairman has 90 days to review and approve or disapprove a new ordinance. 25 C.F.R. § 522.4. If the Chairman fails to take action within the 90-day period, the ordinance is considered to be approved to the extent it is consistent with IGRA. 25 C.F.R. § 522.9. Even though the issue of the applicability of IGRA to the Tribe is presently pending in Federal district court (See, Passamaquoddy Tribe v. State of Maine, Civ. No. 95-25-P-B (D. Maine), the statutory time-frame requires that the Chairman act on or before the expiration of the 90 days. See, Kickapoo Tribe of Indians of the Kickapoo Reservation v. Babbitt, 827 F. Supp. 37 (D.D.C. 1993); reversed on different grounds, 43 F.3d 1491 (D.C. Cir. 1995). As a result, we are required to act without the benefit of the Federal court's views.

Before we could complete our substantive review of the ordinance, we had to determine whether the Passamaquoddy Tribe is subject to NIGC jurisdiction. If the Tribe is not subject to NIGC jurisdiction, the NIGC is not authorized to approve or disapprove a conforming ordinance.

The issue governing NIGC jurisdiction is whether the provision in the Maine Indian Claims Settlement Act (Maine Act), that

subsequent Federal legislation that would affect or preempt the laws of Maine shall not apply unless specifically made applicable to Maine, 25 U.S.C § 1735(b), precludes a finding that the Passamaquoddy Tribe is subject to IGRA. We conclude that IGRA governs the Tribe's gaming. The Tribe meets the requirements of IGRA. IGRA is later in time, specific to gaming and in direct conflict with the Maine Act. Consequently, Congress impliedly repealed those aspects of IGRA which conflict with the Maine Act.

Under the terms of the Maine Act, the Tribe's land claims in the State of Maine were settled. The Act grants general jurisdiction to the State. It further provides for exclusive tribal jurisdiction, directly and by reference to the State Implementing Act, over hunting and fishing, lesser criminal offenses and juvenile offenses committed on the reservation by tribal members, certain specified civil actions including domestic relations between tribal members, and Indian child custody proceedings. 25 U.S.C. §§ 1724-1725; 30 M.R.S.A. §§ 6206-6207, 6209-6210. The Act does not reference gaming or any of the inherent authorities of an Indian tribe. It does provide, however, that:

[t]he provisions of any federal law enacted after the date of enactment of this Act for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, . . . as provided in this Act and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted federal law is specifically made applicable within the State of Maine.

25 U.S.C. § 1735(b).

Eight years after enactment of the Maine Act, Congress passed IGRA. IGRA governs gaming by Indian tribes which have jurisdiction over Indian lands. 25 U.S.C. § 2710(d)(3)(A). Indian tribe is defined as:

any Indian tribe, band, nation or other organized group or community of Indians which - (A) is recognized as eligible by the Secretary [of the Interior] for the special programs and services provided by the United States to Indians because of their status as Indians, and (B) recognized as possessing powers of self-government.

25 U.S.C. §2703(5). To be classified as Indian lands, the land must either be on the tribe's reservation or the tribe must exercise governmental powers over the lands. 25 U.S.C. § 2703(4).

There can be little doubt that the Tribe meets the criteria established in IGRA. The Tribe is listed on the Secretary's annual list of federally-recognized tribes. See, 60 Fed. Reg. 9250 (February 16, 1995). It exercises jurisdiction and governmental authority over the long list of responsibilities specifically enumerated in the Maine Act and the State Implementing Act. Further, because the Maine Act does not explicitly abrogate the inherent jurisdiction of the Tribe over its lands, the Tribe retains concurrent jurisdiction over those matters also governed by the State. See, State of Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994). See also, Bryan v. Itasca County, 426 U.S. 373 (1976).

Consequently, this matter raises the identical issue decided in Narragansett. In Narragansett, the court concluded that the Narragansett Tribe has concurrent jurisdiction over, and exercised governmental power with respect to settlement lands, and, therefore, was entitled to invoke IGRA and, to the extent that there was a jurisdictional conflict between the Narragansett Settlement Act and IGRA, the former was repealed.

The court based its reasoning on fundamental principles of statutory construction. The court found that:

In the absence of a contrary legislative command, when two acts of Congress touch upon the same subject matter the courts should give effect to both, if that is feasible. * * * However, 'if the two [acts] are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first.' (citation omitted) Even absent outright repugnancy, a repeal may be implied in cases where the later statement covers the entire subject 'and embraces new provisions, plainly showing that it was intended as a substitute for the first act.' (citation omitted)

Narragansett at 703-704.

In applying these basic principles, the Maine Act does not fundamentally differ from the Rhode Island legislation. IGRA leaves undisturbed the key elements of the settlement in Maine. It also largely leaves intact the grant of jurisdiction to the State. The only change to the grant of jurisdiction deals specifically with gaming. Like the Rhode Island legislation, therefore, to the extent there is a conflict between the Maine Act and IGRA, the former was repealed.

Finally, to the extent that Section 1735(b) of the Maine Act may be distinguished from the Rhode Island legislation, we conclude that IGRA is sufficiently specific to apply its terms to the Passamaquoddy Tribe. In a similar case, the Supreme Court

concluded that a provision of the Administrative Procedure Act (APA) did not govern deportation of aliens even though Section 12 of the APA provides that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly." The Court found that "[e]xemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in § 12 of the Act that modifications must be express." Marcello v. Bonds, 349 U.S. 302, 310 (1955). Nevertheless, although the subsequent legislation did not mention the APA, the court reasoned that "[u]nless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present statute expressly supersedes the hearing provisions of that Act." Id. Here too, unless we are to require magical passwords from Congress, we are not obliged to conclude that earlier legislation precludes the application of IGRA to the Tribe.

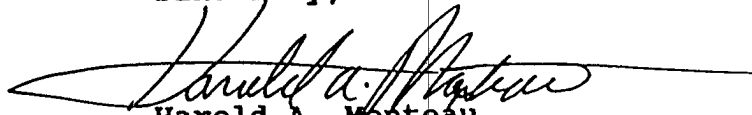
Having concluded that IGRA applies to the Tribe, we conducted a substantive review of the Tribe's gaming ordinance and found that it is consistent with IGRA and its implementing regulations.

Under IGRA and the regulations of the NIGC, the Chairman is directed to review ordinances with respect to the requirements of the IGRA and the implementing regulations. Thus, the scope of the Chairman's review and approval is limited to the requirements of IGRA and the NIGC regulations. Provisions other than those required under IGRA or the NIGC regulations that may be included in a tribal ordinance are not subject to review and approval. Also, such approval does not constitute approval of specific games. It is important to note that the gaming ordinance is approved for gaming only on Indian lands as defined in IGRA.

With the Chairman's approval of the Tribe's gaming ordinance, the Tribe is now required to conduct background investigations on its key employees and primary management officials. The NIGC expects to receive a completed application for each key employee and primary management official pursuant to 25 C.F.R. § 556.5(a) and an investigative report on each background investigation before issuing a license to a key employee or primary management official pursuant to 25 C.F.R. § 556.5(b).

Thank you for submitting the ordinance of the Passamaquoddy Tribe.

Sincerely,


Harold A. Monteau
Chairman

JUL 13 1995

**ORDINANCE
OF THE PASSAMAQUODDY TRIBE
Governing the Conduct of Class II Gaming Activities**

I. PURPOSE

The Joint Tribal Council, the governing body of the Passamaquoddy Tribe, having the authority to enact tribal ordinances, hereby enacts this ordinance in order to set the terms for the conduct of Class II gaming activities within Passamaquoddy Indian Territory.

II. GAMING AUTHORIZED

Class II gaming as defined in the Indian Gaming Regulatory Act ("IGRA"), P.L. 100-497, 25 U.S.C. Section 2703(7) and by the regulations issued by the National Indian Gaming Commission and published at 25 C.F.R. Part 502 are hereby authorized to be conducted within Passamaquoddy Indian Territory by the Passamaquoddy Tribe (the "Tribe"), or for the Tribe by a person or persons under contract with the Tribe for that purpose, under the terms of IGRA.

III. OWNERSHIP OF GAMING

The Tribe shall have the sole proprietary interest in and responsibility for the conduct of any gaming operation authorized by this ordinance.

IV. USE OF GAMING REVENUE

A. Net revenues from gaming authorized under this Ordinance shall be used only for the following purposes:

1. to fund tribal government operations or programs;
2. to provide for the general welfare of the Passamaquoddy Tribe and its members;
3. to promote tribal economic development;
4. to donate to charitable organizations; or
5. to help fund operations of local governmental agencies.

B. If the Tribe elects to use net revenues from Class II gaming to make per capita payments to tribal members, it shall authorize such payments only upon approval of a plan submitted to the Secretary of the Interior under 25 U.S.C. § 2710(b)(3).

V. AUDIT

A. The Tribe shall cause to be conducted annually an independent audit of all gaming operations conducted under the terms of this Ordinance, and shall submit the resulting audit reports to the National Indian Gaming Commission.

B. All gaming related contracts that result in the purchase of supplies, services, or concessions in excess of \$25,000 annually, except contracts for professional legal or accounting services, shall be specifically included with the scope of the audit required by this section.

VI. PROTECTION OF THE ENVIRONMENT AND PUBLIC HEALTH AND SAFETY

Facilities for the conduct of gaming under this Ordinance shall be constructed, maintained and operated in a manner that adequately protects the environment and the public health and safety.

VII. LICENSES FOR KEY EMPLOYEES AND PRIMARY MANAGEMENT OFFICIALS

The Tribe shall ensure that the policies and procedures set out in this section are implemented with respect to key employees and primary management officials employed at any Class II gaming facility operated within Passamaquoddy Indian Territory:

A. **Definitions.** For purposes of this Ordinance, the following definitions apply:

1. **Key Employee** includes:

(a) A person who performs one or more of the following functions in connection with any Class II gaming conducted under this Ordinance;

- (1) Bingo caller;
- (2) Counting room supervisor;
- (3) Chief of security;
- (4) Custodian of gaming supplies or cash;
- (5) Floor manager; or
- (6) Approver of credit.

- (b) If not otherwise included, any other person whose total cash compensation from tribal gaming operations is in excess of \$50,000 per year; or
- (c) If not otherwise included, the four most highly compensated persons in any gaming operation conducted under this Ordinance.

2. **Primary management official** means:

- (a) The person designated by a management contract as having management responsibility for the gaming operation, or a portion thereof;
- (b) Any person who has the authority:
 - (1) to hire or fire employees; or
 - (2) to set up working policy for the gaming operation; and
- (c) The chief financial officer or other person who has financial management responsibility.

B. Application Forms.

1. The following notice shall be placed on the application form for a key employee or a primary management official before that form is filled out by an applicant:

In compliance with the Privacy Act of 1974, the following information is provided: Solicitation of the information on this form is authorized by 25 U.S.C. § 2701 *et seq.* The purpose of the requested information is to determine the eligibility of individuals to be employed in a gaming operation. The information will be used by National Indian Gaming Association members and staff who have need for the information in the performance of their official duties. The information may be disclosed to appropriate federal, tribal, state, local or foreign law enforcement and regulatory agencies when relevant to civil, criminal or regulatory investigations or prosecutions or when pursuant to a requirement by a tribe or the National Indian Gaming Commission in connection with the hiring or firing of an employee, the issuance or revocation of a gaming license, or investigations of activities while associated with a tribe or a gaming operation. Failure to consent to the disclosures indicated in this notice will result in a tribe's being unable to hire you in a primary management official or key employee position.

The disclosure of your Social Security Number (SSN) is voluntary. However, failure to supply a SSN may result in errors in processing your application.

2. Existing key employees and primary management officials shall be notified in writing that they shall either:

- a. complete a new application form that contains a Privacy Act notice; or
- b. sign a statement that contains the Privacy Act notice and consent to the routine uses described in that notice.

3. The following notice shall be placed on the application form for a key employee or a primary management official before that form is filled out by an applicant:

A false statement on any part of your application may be grounds for not hiring you, or for firing you after you begin work. Also, you may be punished by fine or imprisonment. (U.S. Code, Title 18, Section 1001.)

4. The Tribe shall notify in writing existing key employees and primary management officials that they shall either:

- a. complete a new application form that contains a notice regarding false statements; or
- b. sign a statement that contains the notice regarding false statements.

C. Background Investigations.

1. The Tribe shall request from each primary management official and from each key employee all of the following information:

- a. Full name, other names used (oral or written), social security number(s), birth date, place of birth, citizenship, gender, all languages (spoken or written);
- b. Currently, and for the previous 5 years: business and employment positions held, ownership interests in those businesses, business and residence addresses, and drivers license number(s) and issuing jurisdiction;
- c. The names and current addresses of at least three personal references, including one personal reference who was acquainted with the applicant during each period of residence listed under paragraph (1)(b) of this section;

- d. Current business and residence telephone numbers;
- e. A description of any existing and previous business relationships with Indian tribes, including ownership interests in those businesses;
- f. A description of any existing and previous business relationships within the gaming industry generally, including ownership interests in those businesses;
- g. The name and address of any licensing or regulatory agency with which the person has filed an application for a license or permit related to gaming, whether or not such license or permit was granted;
- h. For each felony for which the applicant is subject to an ongoing prosecution or has been convicted, the charge, the name and address of the court involved, and the date and disposition if any;
- i. For each misdemeanor conviction or ongoing misdemeanor prosecution (excluding minor traffic violations) within 10 years of the date of the application, the name and address of the court involved and the date and disposition;
- j. For each criminal charge (excluding minor traffic charges), whether or not there is a conviction, if such criminal charge is within 10 years of the date of the application and is not otherwise listed pursuant to paragraph (1)(h) or (1)(i) of this section, the criminal charge, the name and address of the court involved and the date and disposition;
- k. The name and address of any licensing or regulatory agency with which the person has filed an application for an occupational license or permit, whether or not such license or permit was granted;
- l. A current photograph;
- m. Any other information the Tribe deems relevant; and
- n. Fingerprints consistent with procedures adopted by the Tribe and regulations of the National Indian Gaming Commission and/or the Federal Bureau of Investigation.

2. The Tribe shall conduct an investigation sufficient to make a determination under subsection D of this section. In conducting a background investigation, the Tribe or its agent shall promise to keep confidential the identity of each person interviewed in the course of the investigation.

3. The Tribe's investigation of each applicant for a license under this section will include a request for criminal records information from the Federal Bureau of Investigation (FBI). Criminal records information will be accessed through the National Indian Gaming Commission until such time as access by the Tribe directly or through an agency of the State of Maine is authorized.

D. Eligibility Determination.

The Tribe shall review a person's prior activities, criminal record, if any, and reputation, habits and associations to make a finding concerning the eligibility of each applicant for employment as a key employee or primary management official in the Tribe's Class II gaming operation. If the Tribe determines that employment of the person poses a threat to the public interest or to the effective regulation of gaming, or creates or enhances dangers of unsuitable, unfair or illegal practices and methods and activities in the conduct of gaming, the tribal gaming operation shall not employ that person as a key employee or primary management official.

E. Procedures for Forwarding Applications and Reports for Key Employees and Primary Management Officials to the National Indian Gaming Commission.

1. When a key employee or primary management official begins work at a gaming operation authorized by this Ordinance, the Tribe shall forward to the National Indian Gaming Commission a completed application for employment and conduct the background investigation and make the determination referred to in subsection D of this section.

2. The Tribe shall forward the report referred to in Subsection F of this section to the National Indian Gaming Commission within 60 days after an employee begins work as a key employee or primary management official, or within 60 days of the approval of this Ordinance by the Chairman of the National Indian Gaming Commission.

3. The gaming operation shall not employ any person for more than 90 days as a key employee or primary management official of a gaming operation conducted under this Ordinance unless that person holds a valid license issued by the Tribe.

F. Report to the National Indian Gaming Commission.

1. Pursuant to the procedures set out in subsection E of this section, the Tribe shall prepare and forward to the National Indian Gaming Commission a report of the background investigation of each person who is approved by the Tribe for or holds a position as a key employee or primary management official of a

gaming operation conducted under this Ordinance. An investigative report shall include all of the following:

- a. Steps taken in conducting a background investigation;
 - b. Results obtained;
 - c. Conclusions reached; and
 - d. The bases for those conclusions.
2. The Tribe shall submit, with the report, a copy of the eligibility determination made under subsection D of this section.
3. If a license is not issued to an applicant, the Tribe:
- a. Shall notify the National Indian Gaming Commission; and
 - b. May forward copies of its eligibility determination and investigative report (if any) to the National Indian Gaming Commission for inclusion in the Indian Gaming Individuals Records System.
4. With respect to all persons hired as a key employee or a primary management official, the Tribe shall retain applications for employment and reports (if any) of background investigations for inspection by the Chairman of the National Indian Gaming Commission or his or her designee for no less than three (3) years from the date of termination of employment.

G. Granting a Gaming License.

1. If, within a thirty (30) day period after the National Indian Gaming Commission receives a report, the National Indian Gaming Commission notifies the Tribe that it has no objection to the issuance of a license pursuant to a license application filed by a key employee or a primary management official for whom the Tribe has provided an application and investigative report to the National Indian Gaming Commission, the Tribe may issue a license to such applicant.

2. The Tribe shall respond to a request for additional information from the Chairman of the National Indian Gaming Commission concerning a key employee or a primary management official who is the subject of a report. Such a request shall suspend the 30-day period under paragraph G(1) of this section until the Chairman of the National Indian Gaming Commission receives the additional information.

3. If, within the thirty (30) day period described above, the National Indian Gaming Commission provides the Tribe with a statement itemizing objections to the issuance of a license to a key employee or to a primary management official for whom the Tribe has provided an application and investigative report to the National Indian Gaming Commission, the Tribe shall reconsider the application, taking into account the objections itemized by the National Indian Gaming Commission. The Tribe shall make the final decision whether to issue a license to such applicant.

H. License Suspension.

1. If, after the issuance of a gaming license, the Tribe receives reliable information indicating that a key employee or a primary management official is not eligible for employment under subsection D above, the Tribe shall suspend, if the information is from the National Indian Gaming Commission, or may suspend, if the information is from another source, such license, and shall notify in writing the licensee of the suspension and the proposed revocation of his or her tribal license.

2. The Tribe shall notify the licensee of a time and a place for a hearing on the proposed revocation of a license.

3. After a revocation hearing, the Tribe shall decide to revoke or to reinstate a gaming license, including the effective date of that decision. The Tribe shall notify the National Indian Gaming Commission of its decision.

VIII. Licensing Actions

1. The Tribe shall issue a separate license to each place, facility, or location within Passamaquoddy Indian Territory where Class II gaming is authorized to be conducted under this Ordinance.

2. All licensing decisions made by the Tribe under this Ordinance shall be made by the Joint Tribal Council of the Passamaquoddy Tribe, or by those officials of the Tribe who may hereafter be designated by the Joint Tribal Council to exercise such authority. Any hearing held under Part VII of this Ordinance for the revocation of a tribal gaming license shall be held by the Tribal Governors of the Indian Township and Pleasant Point Reservations, and a videotape, audio recording or written transcript of the hearing shall be made available to all members of the Joint Tribal Council, or, if license revocation authority has been delegated pursuant to this section, to those officials designated by the Joint Tribal Council for that purpose.

IX. Repeal

To the extent that they are inconsistent with this Ordinance, all prior tribal gaming Ordinances are hereby repealed.

CERTIFICATION

I, the undersigned Clerk of the Joint Tribal Council of the Passamaquoddy Tribe, do hereby certify

(1) that public hearings were held by the Joint Tribal Council on April 13, 1995 at the Pleasant Point Reservation and at the Indian Township Reservation to receive public comment on the foregoing Ordinance of the Passamaquoddy Tribe Governing the Conduct of Class II Gaming Activities, and that seven days advance notice of the hearings was conspicuously posted at both reservations;

(2) that a meeting of the Joint Tribal Council of the Passamaquoddy Tribe was duly noticed and held at the Indian Township Reservation, Indian Township, Maine, on April 13, 1995 after the completion of the aforesaid public hearings, and that a quorum of the Joint Tribal Council of the Passamaquoddy Tribe consisting of either the Governor or the Lt. Governor of each reservation and not fewer than eight voting members, including at least four voting members from each Reservation, was present at the said meeting; and

(3) that the foregoing Ordinance of the Passamaquoddy Tribe Governing the Conduct of Class II Gaming Activities was circulated in writing to all members of the Joint Tribal Council present prior to being voted upon at the meeting, and that the said Ordinance was duly adopted by the affirmative vote of 9 members, who at the time of the vote constituted a majority of the 9 members of the Joint Tribal Council then present and voting.

Dated: May 15 1995

ATTEST: Mary J. Lola
Mary J. Lola, Clerk
Joint Tribal Council

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