National Indian Gaming Commission

NOTICE OF VIOLATION

NOV-09-37

Ralph Sampson, Jr., Chairman of the Yakama Nation Tribal Council
140 Fort Road
Toppenish, WA 98948
Fax: 509-865-5528

Wallace Yallup, Chairman of the Yakama Nation Tribal Gaming Corporation
580 Fort Road
Toppenish, WA 98948
Fax: 509-856-5528

Roger Fiander, Chairman of the Yakama Nation Gaming Commission (Agent for Service of Process)
580 Fort Road
Toppenish, WA 98948
Fax: 509-865-7867

1. Notification of Violation

The Chairman of the National Indian Gaming Commission (NIGC) hereby gives notice that the Confederated Tribes and Bands of the Yakama Nation of Washington (Nation), located in Toppenish, Washington and operators of the Yakama Legends Casino (Casino), located at 580 Fort Rd, Toppenish, Washington, have violated the Indian Gaming Regulatory Act (IGRA), 25 U.S.C.§ 2701 et seq., National Indian Gaming Commission (NIGC) regulations, 25 C.F.R. § 501 et seq., and the Yakama Gaming Ordinance by distributing per capita payments of net gaming revenue to its tribal members without an approved tribal revenue allocation plan (RAP).

Moreover, the Nation has violated the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 et seq., National Indian Gaming Commission (NIGC) Regulations, 25 C.F.R. § 501 et seq., and the Yakama Gaming Ordinance by distributing these payments to its tribal members for unrestricted use for which the tribe as a whole is not the beneficiary. This is an impermissible use of gaming revenues under IGRA because these payments were not for the general welfare of the Indian tribe and its members. Direct payments to individual tribal members made without an approved RAP, or made outside of a tribal government program based on a tribal

community need; that has specific eligibility criteria; and a direct relationship to that need, are not permissible.

2. Authority

Under IGRA and NIGC regulations, the Chairman of the NIGC may issue a Notice of Violation (NOV) to any person for violation of any provision of the IGRA, NIGC regulations, or a tribal gaming ordinance or resolution approved by the Chairman. 25 U.S.C. § 2713; 25 C.F.R. § 573.3.

3. Applicable Federal Laws, Regulations and Tribal Ordinance Provisions

A. Net revenues from any class II and III 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 the tribe has received approval from the Bureau of Indian Affairs (BIA) for such a distribution. 25 U.S.C. § 2710 (a)(3)(A-D); (d)(1)(A)(ii).

B. The term "net revenues" is defined in IGRA, NIGC regulations and the Yakama Nation Gaming Ordinance as "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees." 25 U.S.C. § 2703(9), 25 C.F.R. § 502.16, Yakama Indian Nation Gaming Ordinance of 1994, § 2, Definitions (m).

C. If a tribe does not have an approved tribal revenue allocation plan that provides for per capita payments to its members, the tribe may only use net gaming revenues to fund tribal government operations or programs; to provide for the general welfare of the tribe and its members; to promote tribal economic development; to donate to charitable organizations; or to help fund operations of local government agencies. 25 U.S.C. § 2710 (b)(2)(B); 25 C.F.R. § 290.9.

D. The appropriate BIA official will review and approve tribal revenue allocation plans pursuant to BIA regulation. 25 C.F.R § 290.2 and 290.5.

E. A tribal revenue allocation plan is not effective without the appropriate BIA official's written approval pursuant to BIA regulation. 25 U.S.C. § 2710(b)(3)(B); 25 C.F.R. § 290.11.

F. A tribe may make per capita payments only after the appropriate BIA official approves the tribe's revenue allocation plan pursuant to BIA regulation. 25 U.S.C. § 2710(b)(3)(B); 25 CFR §§ 290.10, 290.11, and 290.13.

G. Except as provided pursuant to IGRA, all revenues generated from any class II or class III Gaming Activities are the property of the Nation. No individual member shall be deemed to have any interest in such profits or net revenues and payments from tribal accounts under other tribal programs, including those related to health, welfare, education, elderly care, and housing, shall not be deemed to be per capita payments. The Nation acknowledges the requirements of IGRA, 25 U.S.C. § 2710 (b)(3) regarding gaming revenues. Yakama Indian Nation Gaming Ordinance of 1994, §7 Gaming Revenues.

H. The Yakama Nation Gaming Ordinance provides the same five permitted uses of gaming revenue as does 25 U.S.C. § 2710 (b)(2)(B). See 3 (C). Yakama Nation Gaming Ordinance of 1994, § 7, Gaming Revenues.

4. Circumstances of the Violation

A. The Nation is a federally recognized Indian tribe with tribal headquarters in Toppenish, Washington.

B. Since approximately 1998, the Nation has operated a casino pursuant to IGRA and the Yakama Gaming Ordinance. The Ordinance, which authorizes both class II and class III gaming, was approved by the NIGC Chairman on September 12, 1994.

C. On December 10, 2008, the Nation submitted a RAP for approval to the U.S. Department of the Interior (DOI), BIA, Yakama Agency Superintendent, Guy "Bud" Rogers, in Toppenish, Washington. The plan proposed that forty percent (40%) of net gaming revenue be allocated for per capita distribution after consideration of the need to fund tribal government operations and programs and in accordance with 25 C.F.R. Part 290. Yakama Nation proposed RAP § 6.

E. On December 11, 2008, at the Yakama Nation Annual General Council meeting, BIA Superintendent Rogers commented on a motion on the floor for discussion. The motion was to approve a one-time economic stimulus in the amount of $2,000 to all members "to provide for the general welfare of our tribal members and to promote our tribal economic development." BIA Superintendent Rogers said:

> What I said was that I thought that this money could be considered to be in the realm of economic development based on what the Nation is doing currently with this economic stimulus but I did say that I did not have the authority to rule on it and that I would have to check with the people in Washington, D.C. which I could do tomorrow

morning and so I am, I don't really have the authority to rule on it but that's my opinion.

Tape 3 of 4, Budget and Finance Committee Q's and A's, Yakama Nation Annual General Council, December 11, 2008.

D. On December 11, 2008, BIA Superintendent Rogers submitted a memorandum to the DOI, Director of the Office of Indian Gaming, forwarding the Nation's RAP submission and requesting review "as quickly as possible." BIA Superintendent Rogers' memorandum stated that " no previous tribal revenue allocation plans, etc are in existence…."

F. On December 16, 2008, BIA Superintendent Rogers responded to the Tribe in writing regarding the Nation's submission of the proposed RAP. He advised Chief Sampson that Nancy Pierskalla, a Management Analyst at DOI Office of Indian Gaming, had identified an issue in the definition of "full-time student" in the submission. Specifically, Management Analyst Pierskalla "wanted the statement to be more specific to clarify if the students would be those over 18 years of age…if this definition included minors, several additional changes would be required prior to RAP approval and she could not guarantee she could recommend approval of it today."

G. On December 16, 2008, BIA Superintendent Rogers sent an e-mail to Management Analyst, Nancy Pierskalla, and Paula Hart, DOI Acting Director of the Office of Indian Gaming. In the e-mail, he stated that the "Yakama Nation highly desires to distribute their planned Yakama Nation economic stimulus funds prior to Christmas….At your earliest convenience, please let us know when you are able to approve this plan as modified defining the Enrolled FULL-TIME Student will (sic) as students over 18 years of age who have reached majority as defined by the tribe. As set forth in the fax, the Tribal Attorney is drafting the exact language of the definition of this term which is to be sent to you later today…Ms Pierskalla will be on vacation beginning tomorrow, as will I."

H. On December 18, 2008, DOI Acting Director, Office of Indian Gaming, Paula Hart sent BIA Superintendent Rogers an e-mail, entitled " Request to Approve the Confederated Tribes and Bands of the Yakama Nation Revenue Allocation Plan of Gaming Net Revenue." In her e-mail, Acting Director Hart stated "I just received a call from NIGC that the Tribe was preparing to distribute the money under this plan. As of today we have not received the changes requested. Is there any news on that request?"

I. Also on December 18, 2008, NIGC Region Director for the Portland, Oregon office, Mark Phillips, had a telephone conversation with Yakama Gaming Commission Chairman, Roger Fiander. Director Phillips

informed Chairman Fiander that "the distribution was not authorized without an approved revenue allocation plan (RAP) and, therefore, the NIGC would object to any such distribution." Further, NIGC Region Director Phillips read to Chairman Fiander the "specific chapters of IGRA regarding distributions to individual Nation members and explained that IGRA was very clear on the distributions of gaming revenue to individual tribal members." Chairman Fiander acknowledged that a RAP had been submitted to the BIA but had not yet been approved.

J. On December 24, 2008, BIA Superintendent Rogers responded to the December 18 e-mail from Acting Director Hart. Mr. Rogers indicated, "[a]s I stated in my email attached [December 16, 2008, fax to Ms Pierskalla and to Ms. Hart], I was on annual leave ...My last day at work was Tuesday, December 16, 2008 and I returned yesterday, Tuesday December 24, 2008. Prior to my leaving, I told the Tribal Officials they could either send the recommended change [to the per capita plan] directly to you folks, or give the change to the Deputy Superintendent who would then forward it to you all. I was told the Tribe chose to send the minor recommended change directly to you and the Yakama agency did not receive a copy. Since all of the folks involved here are on Christmas vacation, I have not been able to discuss the matter with them."

K. In an e-mail dated December 30, 2008 to BIA Superintendent Rogers, Acting Director Hart acknowledged receipt of the "minor correction from the Tribe right before Christmas" and the fact that Management Analyst Pierskalla was still on holiday vacation.

L. "The Yakama Nation Legends Casino Independent Auditor's Report and Financial Statements with Supplemental Information" was addressed to the Yakama Nation Legends Casino Board of Directors and signed on January 27, 2009, by Moss Adams, LLP, an independent outside CPA firm. The report, for the fiscal year ending September 30, 2008, was submitted to the NIGC on January 28, 2009.

M. On page 15 of the audit report under "Notes to the Financial Statement," Note 11 states "On December 11, 2008, the Nation approved an economic stimulus distribution to its membership of $2,000 per member. Based on existing membership on that date, the distribution totaled approximately $20.4 million. The Casino's Cash reserves were used to fund this distribution, which will be recorded as a transfer to the Nation during fiscal 2009."

N. Concerning the distribution of net revenue made on or about December 19, 2008, Yakama Nation Chairman Ralph Sampson stipulated on March 3, 2009 that: "On or about December 19, 2008, the Yakama Nation paid $2,000.00 to each of its approximately 10,213 enrolled Yakama Tribal

members. The payments were made from a Yakama Nation bank account containing funds derived almost entirely from Yakama Legends Casino net gaming revenue."

O. On February 23, 2009, George Skibine, DOI Deputy Assistant Secretary of Indian Affairs sent a letter to the Nation's Chairman, Ralph Sampson, advising him that the RAP submitted on December 11, 2008 was now approved. Consequently, the Nation did not possess a RAP which had been approved in writing by the Secretary of the Department of the Interior or his delegate on or about December 19, 2008 when the distribution of net gaming revenues was made to its individual tribal members.

P. On February 25, 2009, NIGC Field Investigator Gary Peterson was advised by Joe Kincaid, Internal Revenue Service Group Manager for Indian Tribal Governments that tribes are required to issue an IRS FORM 1099 to each recipient of over $600 in non-employee compensation, which is the category that per capita payments fall into.

Q. On June 30, 2009, NIGC Field Investigator Gary Peterson contacted a confidential informant (CI), who is a Yakama Tribal member. The CI confirmed receipt of a check from the Yakama Tribe for $2,000 in December 2008. The CI further stated that in March 2009 the Tribe provided an IRS FORM 1099 for the $2,000 distribution, which required the filing of an amended tax return as the FORM 1099 had not been sent in a timely manner.

R. Therefore, the Yakama Nation made per capita payments from Yakama Legends Casino net gaming revenue to all enrolled Yakama Nation members on or about December 19, 2008 without an approved revenue allocation plan in violation of IGRA, 25 U.S.C. § 2710(b)(3).

S. Moreover, the Yakama Nation made this money distribution to each of the approximately 10,213 enrolled Yakama Tribal members outside a bona fide government program. The payments were made without: directions or restrictions as to how the money was to be used; criteria for eligibility beyond enrollment as a tribal member; a direct relationship to an identified tribal need; and an explanation as to how the distribution would advance or address that need. See AR Exhibit No. 4, NIGC Bulletin No. 2005-1, "Use of Net Gaming Revenues," January 18, 2005.

T. Pursuant to IGRA, in the absence of an approved revenue allocation plan, gaming revenues may be used only in ways that benefit the tribe as a whole. The statutory restrictions on use cannot be avoided by simply calling the distribution an "economic stimulus" payment. It is impermissible for a tribe to make direct payments to individual tribal

members without an approved RAP, outside of a bona fide government program. 25 U.S.C. § 2710(b)(2)(B); (b)(3); *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738 (S.D.S.D. 1992); AR Exhibit No. 4, NIGC Bulletin No. 2005-1, "Use of Net Gaming Revenues," January 18, 2005.

U. Therefore, the distribution on or about December 19, 2008 of $2,000 to each Nation member does not qualify as a legitimate use of net gaming revenue. Consequently, the distribution is a violation of IGRA, 25 U.S.C. § 2710(b)(2)(B) and the Tribe's Gaming Ordinance. Yakama Indian Nation Gaming Ordinance of 1994, § 7 "Gaming Revenues".

6. Measures Required to Correct the Violation

There is no remedial action that can correct the 2008 per capita distribution of net gaming revenues made to the Nation's tribal members in the absence of an approved revenue allocation plan. Moreover, the 2008 distribution of $2,000 to each Nation member does not qualify as a legitimate use of net gaming revenue for the purposes of a bona fide government program, to provide for the general welfare of the Nation, or to promote economic development. To that end, there is no remedial action that can correct this misuse of net gaming revenue.

7. Appeal

Within thirty (30) days after service of this Notice of Violation, The Nation may appeal to the Commission under 25 C.F.R. Part 577 by submitting a notice of appeal, and, if desired, request for hearing to the National Indian Gaming Commission, 1441 L Street, NW, Ninth Floor, Washington, DC 20005. The Nation has a right to assistance of counsel in such an appeal. A notice of appeal must reference this Notice of Violation.

Within ten (10) days after filing a notice of appeal, the Nation must file with the Commission a supplemental statement that states with particularity the relief desired and the grounds therefore and that includes, when available, supporting evidence in the form of affidavits. If the Nation wishes to present oral testimony or witnesses at the hearing, the Nation must include a request to do so with the supplemental statement. The request to present oral testimony or witnesses must specify the names of proposed witnesses and the general nature of their expected testimony, whether a closed hearing is requested and why. The Nation may waive its right to an oral hearing and instead elect to have the matter determined by the Commission solely on the basis of written submissions.

8. Fine-Submission of Information

The violation cited above may result in the assessment of a civil fine against Nation in an amount not to exceed $25,000 per violation per day. Under 25 C.F.R. § 575.5(a), the Nation may submit written information about the violation to the Chairman within fifteen (15) days after service of this notice of violation (or such longer period as the Chairman may grant for good cause). The Chairman shall consider any information submitted in determining the facts surrounding the violation and the amount of the civil fine, if any.

Dated this 11 of September, 2009.

PHILIP N. HOGEN
Chairman

MARIA GETOFF
Senior Attorney

Certificate of Service

I certify that this **Notice of Violation** was sent by facsimile transmission and certified U.S. mail, return receipt requested, on this 1st day of September, 2009 to:

Roger Fiander, Chairman of the Yakama Nation Gaming Commission (Agent for Service of Process)
580 Fort Road
Toppenish, WA 98948
Fax: 509-865-7867

Ralph Sampson, Jr., Chairman of the Yakama Nation Tribal Council
140 Fort Road
Toppenish, WA 98948
Fax: 509-865-5528

Wallace Yallup, Chairman of the Yakama Nation Tribal Gaming Corporation
580 Fort Road
Toppenish, WA 98948
Fax: 509-856-5528

Dena Wynn

Dena Wynn