

National Indian Gaming Commission

NOTICE OF PROPOSED CIVIL FINE ASSESSMENT

Ref: CFA-17-03

To: A. J. Not Afraid Jr., Chairman
Crow Tribe
129 Butchetcher Ave
P.O. Box 340
Crow Agency, MT 59022

LaVerne Old Elk, Chairperson
Crow Tribe Gaming Commission
P.O. Box 580
Crow Agency, MT 59022

1. Under the Indian Gaming Regulatory Act (IGRA) and NIGC regulations, the NIGC Chairman may issue a Notice of Violation (NOV) to any person for violations of any provision of the IGRA, NIGC regulations, or any provision of a tribal gaming ordinance or resolution approved by the Chairman. 25 U.S.C. § 2713(a)(1) & (a)(3), 25 C.F.R. § 573.3(a).
2. On August 3, 2017, the NIGC Chairman issued NOV-17-03 to the Crow Tribe of Montana for failure to submit annual audits, financial statements, and Agreed Upon Procedures (AUP) reports for the Apsaalooke Nights Casino and Center Lodge Bingo (aka Edison Real Bird Racing Complex).
3. NIGC regulations permit a party to appeal an NOV within thirty days of issuance. 25 C.F.R. §§ 584.3 and 585.3. The Tribe has appealed the Notice of Violation and that appeal is pending before the Commission.
4. IGRA authorizes the Chairman to issue civil fines for violations of IGRA, NIGC regulations, or tribal regulations, ordinances, or resolutions approved by the Chairman. 25 U.S.C. 2713(a)(1).
5. NIGC regulations require the Chairman to issue a proposed civil fine within 30 days of issuance of the notice of violation when practicable. Where there is an ongoing violation, however, each new day of each violation raises the maximum fine amount by over \$50,000. NOV-17-03 stated that submission of the required documents would cure the on-going violation and, "in any event, the documents must be submitted to the NIGC within 90 calendar days of service of this NOV." That 90 day period ended on November

1, 2017. One of the factors the Chair is to consider when determining a civil fine amount is the good faith of a respondent in attempting to achieve rapid compliance after notice of a violation. It was therefore not practicable to issue the proposed civil fine assessment until the scope of the violation, including the Tribe's ability and willingness to cure, could be determined. Although the time to cure set forth in the NOV has come and gone without fully correcting the underlying violation, the Chairman is issuing this Proposed CFA based on the factors discussed below.

6. The Chairman has authority to levy and collect appropriate civil fines, not to exceed \$50,276 per violation, against a tribe, management contractor, or individual operating Indian gaming for any violation of any provision of IGRA and NIGC regulations. 25 U.S.C. § 2713(a)(1); 25 C.F.R § 575.4. If noncompliance continues for more than one day, the Chairman may treat each daily act or omission as a separate violation. 25 C.F.R § 575.4 (a)(2).
7. NIGC regulations provide that within 15 days after service of a notice of violation, or such longer period as the Chairman may grant for good cause, the respondent may submit written information about the violation to the Chairman. 25 C.F.R. § 575.5.
8. The Tribe has not submitted any additional information for the Chairman to consider when determining the amount of the civil fine.
9. In arriving at the proposed civil fine, the Chairman considered the factors set forth in 25 C.F.R. § 575.4 as follows:
 - a. Economic benefit of noncompliance. The Tribe has saved approximately \$75,000 on the cost of an audit for Center Lodge Bingo and the cost of someone to maintain the books and appropriately separate the revenue between the two facilities as required by generally accepted accounting principles and 25 C.F.R. § 571.12. Additionally, for the past six months, the Tribe has benefitted from the use of approximately \$192,000 it would have otherwise used to obtain the required audit and AUP reports.
 - b. Seriousness of the violation. It is the declared policy of the IGRA to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences; to ensure that the Indian tribe is the primary beneficiary of the gaming operation; and to assure that gaming is conducted fairly and honestly by both the operator and players. 25 U.S.C. § 2702. Accordingly, the IGRA requires an outside annual audit of the gaming, 25 U.S.C. § 2710(b)(2)(C), and NIGC regulations clarify that each tribe "shall engage an independent certified public accountant to provide an annual audit of the financial statements of each gaming operation on Indian lands." 25 C.F.R.

§ 571.12. The financial statements are required to be prepared in accordance with generally accepted accounting principles and generally accepted accounting standards, *id.*, and the audit is required to be submitted within 120 days after the end of each fiscal year of the gaming operation. 25 C.F.R. § 571.13.

Submission of the annual independent audit report by an independent accountant is critical to the NIGC's mission to protect the integrity of Indian gaming. An accountant's ability to conduct an audit in accordance with generally accepted auditing standards and render an opinion on the financial statements prepared in conformity with generally accepted accounting principals provides assurance as to the security of tribal gaming revenues. The audited financial statements and accompanying AUP reports are evidence of, among other things, the integrity of the gaming operation and, more specifically, of the adequacy of the books and records, and the functioning of the internal financial controls. Further, 25 C.F.R. § 571.12 is explicit: the annual submission must be for each fiscal year end and the financial statements must be audited and certified by an independent certified public accountant. Only after the financial statements of a gaming operation have been audited and the results certified by a certified public accountant can the NIGC confidently rely on the data. Such confidence is necessary to assure that NIGC is able to effectively analyze the risk level of the operation.

- c. History of violations. NOV-17-03 is the only NOV issued against the Tribe in the past five years.
- d. Negligence or willfulness. March 27, 2017: NIGC Senior Compliance Officer James McKee sent a 30-day reminder email of audit and AUP reports being due to Chairman Not Afraid, TGRA Chair Old Elk, and Apsaalooke Nights Casino General Manager Hogan. *See*, Email from James McKee, Senior Compliance Officer, NIGC to multiple recipients (March 30, 2017, 2:08 PM).

April 21, 2017: Jon Hento, the independent auditor performing the outside audit for Apsaalooke Nights, contacted McKee to inform him the audit would be late. *See*, Email from James McKee, Senior Compliance Officer, NIGC, to Linda Durbin, Region Director, NIGC (April 21, 2017, 1:52 PM).

May 12, 2017: NIGC Region Director Linda Durbin emailed Apsaalooke Nights Casino GM Keteri Hogan requesting an audit report submission timeline. *See*, Email from Linda Durbin, Region Director, NIGC, to Keteri Hogan, General Manager, Apsaalooke Nights Casino (May 12, (9:07 AM).

May 16, 2017: Hento contacted McKee and stated that he is still working on the audited financial statement for Crow. *See*, Email from James McKee, Senior

Compliance Officer, NIGC, to Linda Durbin, Region Director, NIGC (May 16, 2017, 3:51 PM).

June 5, 2017: McKee contacted GM Hogan regarding the audit reports. Hogan stated that the audit report is nearly completed but needing last year's audit from Joseph Eve who will not release to the Tribe until it receives full payment of \$64,000. She expected to pay Joseph Eve at the end of June and finalize the 2016 audit reports within one to two weeks afterward. McKee warned of a possible Letter of Concern being issued. *See*, Email from James McKee, Senior Compliance Officer, NIGC, to Linda Durbin, Region Director, NIGC (June 5, 2017, 12:51 PM).

June 15, 2017: NIGC Director of Compliance sent a Letter of Concern to the Tribe for failure to submit financial statements, audits and AUP reports. The Letter of Concern required the Tribe to submit a plan of action by June 26, 2017, and that plan was to detail how the Tribe would submit the audits, financial statements, and AUP reports by July 17, 2017. *See*, Letter of Concern from Dustin Thomas, Acting Director of Compliance, NIGC, to A.J. Not Afraid, Chairman, Crow Tribe (June 15, 2017).

June 27, 2017: McKee contacted Crow Tribe TGRA Chairwoman LaVern Old Elk who stated that she believed the audit would be completed the next day (June 28), that the Tribe had recently used \$22,000 for prize money in a contest that she believed should have gone toward the audit, and that the Tribal Gaming Commission had not seen a draft of the audit report. McKee and Old Elk agreed to set up a conference call for updates the following day. *See*, Email from James McKee, Senior Compliance Officer, NIGC, to Linda Durbin, Region Director, NIGC (June 27, 2017, 3:47 PM).

June 29, 2017: Conference call with Durbin, McKee, Tribal Gaming Commission Chair Old Elk, GM Hogan and Crow legal counsels Dennis Bear Don't Walk, Alan Fedman, and Sam Kohn. They discussed the late audit report and Hogan stated she had a call in to the independent auditor requesting a status update. *See*, Email from James McKee, Senior Compliance Officer, NIGC, to multiple recipients, NIGC (June 29, 2017, 4:59 PM).

July 11, 2017: McKee met with GM Hogan during a site visit and discussed the status of audit reports.

July 19, 2017: McKee contacted GM Hogan who told him that Attorney David Freeman is submitting an action plan to NIGC regarding audit and AUP reports. *See*, Email from James McKee, Senior Compliance Officer, NIGC, to Linda Durbin, Region Director, NIGC (July 19, 2017, 2:25 PM).

July 26, 2017: McKee met with accountant Deb Sustrich on a site visit who told him that the Tribe has still not paid for its 2015 audit reports that are needed to

complete the 2016 report. *See*, Site Visit report, undated, referencing July 26, 2017, and July 11, 2017 site visits.

August 3, 2017: NIGC Chair called Crow Chairman A.J. Not Afraid to inform him that a Notice of Violation was being issued.

August 3, 2017: NIGC Chair issued a Notice of Violation for failure to submit financial statements, audits, and AUP reports. *See*, Notice of Violation 17-03 to A.J. Not Afraid, Chairman, Crow Tribe, from Jonodev O. Chaudhuri, Chairman, NIGC (August 3, 2017).

August 3, 2017: McKee and Durbin spoke to the Tribal Gaming Commission attorney, Alan Fedman, regarding the NOV for non-submission of audit and AUP reports. *See*, Email from James McKee, Senior Compliance Officer, to self (August 4, 2017, 8:02 AM).

August 4, 2017: McKee wrote a follow-up letter to Chairman Not Afraid for the site visits on July 11 and 26, 2017, noting that the status of the audit reports was discussed during the visit. *See*, Letter from James McKee, Senior Compliance Officer, NIGC, to A.J. Not Afraid, Chairman, Crow Tribe (August 4, 2017).

October 30, 2017: The Tribe, through its independent auditor, submitted audited financial statements with an adverse opinion for the Apsaalooke Nights Casino.

October 31, 2017: The Tribe's auditor informed NIGC that the Tribe claimed Center Lodge Bingo was not open during fiscal year 2016 and had no revenues. This is the first time anyone informed NIGC that one of the two facilities was not open. The statement also contradicts evidence from Compliance Officer McKee who visited the facilities twice in 2016.

The Tribe's failure to submit the required audit and AUP reports in spite of NIGC's best efforts to work with the Tribe suggests, at best, severe negligence on the part of the Tribe, and, at worst, a willful disregard of IGRA, NIGC regulations, and the Tribe's own gaming ordinance.

- e. Good faith. A civil fine may be reduced based upon the degree of good faith of a respondent in attempting to achieve rapid compliance after notice of a violation. In this matter, the Tribe only submitted the independent audit report and AUP report for one of the required facilities – Apsaalooke Nights Casino – thereby only partially curing the underlying violation. Moreover, the independent audit report submitted contained an adverse opinion based, in part, on the fact that Casino Management was not able to ensure that all accounts payable to the casino are reported and was unable to provide sufficient, appropriate audit evidence for transactions related to the gaming revenue and expenses.

As for the required independent audit report and AUP for Center Lodge Bingo, the NIGC inquired of the auditor as to whether they also planned to submit a

report and financial statement for that facility. The Audit firm responded that they had been informed that the Center Lodge Bingo facility was not open during Fiscal Year 2016. The NIGC conducted site visits at the bingo facility on two occasions during FY 2016 and observed evidence of gaming being conducted at the facility on both occasions.

10. Pursuant to IGRA, 25 U.S.C. § 2713(a), and NIGC regulations, 25 C.F.R. §§ 575.3 and 575.4, fines for continuing violations may be assessed in an amount up to \$50,276 per day per violation.
11. If noncompliance continues for more than one day, the Chairman may treat each daily illegal act or omission as a separate violation. 25 C.F.R. § 575.4(a)(2).
12. On the date NOV 17-03 was issued, the Tribe was 95 days late in submitting the AUP report and financial statements and audits for Apsaalooke Nights Casino and Center Lodge Bingo. (25 C.F.R. §§ 543.23(d)(2) and 571.13) Each day of non-submission for each report was a separate violation.
13. The maximum fine amount for failure to submit the AUP reports is \$4,776,220 for each facility or \$9,552,440 for both.
14. The maximum fine amount for failure to submit the financial statements and audits is \$4,776,220 for each facility or \$9,552,440 for both.
15. Therefore, the total maximum fine for the late AUP reports and financial statements and audits for Apsaalooke Nights Casino and Center Lodge Bingo, as cited in NOV 17-03 is \$19,104,880.
16. The Chairman, having carefully reviewed the above factors as well as the scope of the Tribe's gaming, assesses a fine in the amount of \$75,000 on the Tribe for late and non-submission of annual AUP Reports, financial statements and audits for Apsaalooke Nights Casino and Center Lodge Bingo (aka Edison Real Bird Racing Complex).
17. Interest shall be assessed at rates established from time to time by the Secretary of the Treasury on amounts remaining unpaid after their due date. 31 U.S.C. § 3717.
18. After balancing the factors, the Chairman believes a \$75,000 fine is appropriate. The Tribe has presented no evidence of extenuating circumstances under 25 C.F.R. § 575.5. The AUP Reports, financial statements and audits are due at the same time every year, and the statute allows the Tribe 120 days after the close of the fiscal year for preparation of the audit. Despite NIGC's best efforts to convey the seriousness of the violation—phone calls, site visits, multiple letters, and finally, a Notice of Violation, the Tribe did not correct the violations within the time permitted in the Notice of Violation. Without

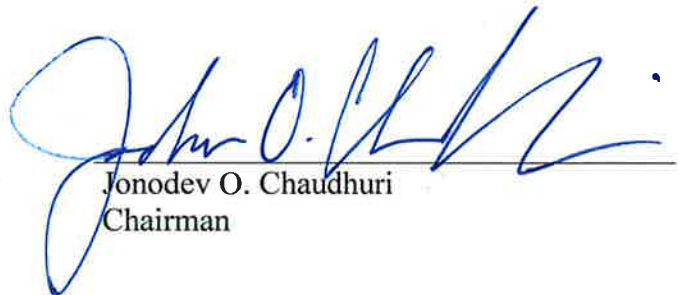
the submission, NIGC cannot properly analyze the operations' regulatory compliance or technical assistance needs. In light of the Tribe's history of compliance, the Chairman finds a fine of \$75,000 appropriate to balance the economic benefit for such willful and excessive delinquency in meeting a serious statutory requirement.

19. Pursuant to 25 C.F.R. § 584.3, within 30 days after service of this Notice of Proposed Civil Fine Assessment, the Tribe may appeal the proposed fine to the full Commission by submitting a notice of appeal to the following:

NIGC Attn: Office of General Counsel
1849 C Street NW
Mail Stop #1621
Washington, DC 20240

22. The Tribe has a right to assistance of counsel in such an appeal. A notice of appeal must identify this Notice of Proposed Civil Fine Assessment. Within 10 days after filing a notice of appeal, the Tribe must file with the Commission a supplemental statement that sets forth with particularity the relief desired and the grounds therefore and that includes, when available, supporting evidence in the form of affidavits. If the Tribe wishes to present oral testimony or witnesses at the hearing, the Tribe 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, and whether a closed hearing is requested and why. The Tribe 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.

Dated this 27th day of November, 2017.



Jonodev O. Chaudhuri
Chairman

CERTIFICATE OF SERVICE

I certify that this **NOTICE OF PROPOSED CIVIL FINE ASSESSMENT** (CFA 17-03) has been sent by facsimile and certified mail this 27 day of November, 2017, to:

A. J. Not Afraid Jr., Chairman
Crow Tribe
129 Butchete Ave
P.O. Box 340
Crow Agency, MT 59022

LaVerne Old Elk, Chairperson
Crow Tribe Gaming Commission
P.O. Box 580
Crow Agency, MT 59022



Anya Lewis
Legal Staff Assistant