

National Indian Gaming Commission

NOTICE OF PROPOSED CIVIL FINE ASSESSMENT

CFA 18-03

To: Ev Ann White Feather, Tribal Secretary
Cheyenne River Sioux Tribe
P.O. Box 590
Eagle Butte, SD 57625

1. Pursuant to the Indian Gaming Regulatory Act and National Indian Gaming Commission regulations, the NIGC Chair may issue a Notice of Violation to any person for violations of any provision of IGRA, NIGC regulations, or any provision of a tribal gaming ordinance or resolution approved by the NIGC Chair.¹
2. On October 24, 2018, the NIGC Chair issued NOV 18-03 to the Cheyenne River Sioux Tribe (“Tribe”) for the failure to submit annual audited financial statements for fiscal year 2017 for the Cheyenne River Sioux Tribe Bingo Operation (“CRST Bingo”).
3. NIGC regulations permit a party to appeal a notice of violation within 30 days of issuance.² The Tribe appealed NOV 18-03 on November 2, 2018.³
4. IGRA authorizes the NIGC Chair to issue civil fines for violations of IGRA, NIGC regulations, or tribal regulations, ordinances, or resolutions approved by the NIGC Chair.⁴ If the NIGC Chair issues a civil fine assessment, the NIGC Chair must do so within 30 days of issuance of a notice of violation, when practicable.⁵
5. NIGC regulations provide that within 15 days after service of a notice of violation, or a longer period as the NIGC Chair may grant for good cause, a respondent may submit written information about the violation to the NIGC Chair.⁶
6. In a letter dated November 2, 2018, the Tribe’s Chairman Harold Frazier provided the following facts for the NIGC Chair to consider:
 - a. The Tribe objected to and appealed NOV 18-03 based on violations of the U.S. Constitution, treaties between the United States government and the Tribe, IGRA,

¹ 25 U.S.C. § 2713(a)(3); 25 C.F.R. § 573.3(a).

² 25 C.F.R. §§ 584.3(a), 585.3.

³ See Letter from Harold Frazier, Chairman, Cheyenne River Sioux Tribe, to Jonodev Chaudhuri, NIGC Chair (Nov. 2, 2018).

⁴ 25 U.S.C. § 2713(a)(1).

⁵ 25 C.F.R. § 575.5(b).

⁶ 25 C.F.R. § 575.5(a).

and NIGC regulations. The Tribe requested the NIGC Chair reconsider NOV 18-03.

- b. The Tribe asserted that for decades the Tribe has conducted bingo as a past-time for its people, and the Tribe considers bingo to be Class I gaming under IGRA when conducted at the Tribe's annual fair and rodeo. According to the Tribe, bingo provides traditional entertainment for those with limited mobility, social interaction, modest prizes, and no appreciable net gaming revenue.
 - c. The Tribe asserted that CRST Bingo operated through September 2017, but solely for tribal member entertainment and earned only minimal revenue. The Tribe considers CRST Bingo to be a small and charitable bingo operation. The Tribe closed CRST Bingo at the end of September 2017 for renovations.
 - d. The Tribe asserted that the Dakota Access Pipeline protests in 2017 and 2018 created an exigent situation that required the Tribe to focus significant resources on the well-being of its tribal members and others to prevent hardship and injury. The Tribe used the CRST Bingo hall as an emergency shelter to protect visitors from inclement weather.
 - e. The Tribe asserted that due to a field mice infestation, CRST Bingo equipment and records were damaged, making it difficult to perform administrative functions.
 - f. The Tribe asserted that its circumstances have made it difficult to provide complete records to its outside auditor, Moss Adams LLP. Moss Adams is currently working with staff from the tribal Treasurer's Office and has informed the Tribe that it will provide the fiscal year 2017 audit of CRST Bingo within 45 days, presumably from the date of Chairman Frazier's November 2, 2018 letter.
 - g. The Tribe asserted that CRST Bingo will not open until the Tribe submits the fiscal year 2017 audit to the NIGC.
7. On November 8, 2018, Mark Van Norman, representative for the Tribe, requested a seven day extension to submit mitigating circumstances concerning NOV 18-03.
 8. On November 9, 2018, the NIGC Chair granted the Tribe's request for a seven day extension to submit mitigating circumstances.
 9. On November 16, 2018, Chairman Frazier submitted a letter and memorandum to the NIGC Chair. The letter stated the Tribe's continued objection to NOV 18-03, reiterating the points from Chairman Frazier's November 2, 2018 letter. In the memorandum, the Tribe submitted the following information for the NIGC Chair to consider in determining the amount of the civil fine:

- a. The Tribe asserted that gaming at CRST Bingo is offered primarily for social activity and entertainment for tribal members. CRST Bingo does not generate a profit and is subsidized by the Tribe.
- b. The Tribe asserted that in 2016, the Tribe, its members, and visitors protested the Dakota Access Pipeline. The Tribe offered its pow-wow grounds, fairgrounds, and eventually the CRST Bingo hall to shelter tribal members and visitors protesting the Dakota Access Pipeline. The CRST Bingo hall was used as a shelter in early 2017.
- c. The Tribe asserted that due to the increased traffic at CRST Bingo, the doors to the hall were damaged and allowed mice to enter. The increased traffic and mice damaged some of the equipment and records at CRST Bingo, making it difficult to file a timely fiscal year 2017 audit. As a result of the damage, the Tribe closed CRST Bingo in September 2017.
- d. The Tribe asserted that it established the Cheyenne River Economic Development Corporation to operate CRST Bingo, which has professional staff.
- e. The Tribe asserted that it has contracted with Moss Adams LLP to perform the fiscal year 2017 audit. The Tribe expects to submit the fiscal year 2017 audit by the end of December 2018.

10. In arriving at the proposed civil fine, the NIGC Chair considered the Tribe's written submissions and the following factors set forth in 25 C.F.R. § 575.4:

- a. Economic benefit of noncompliance. The Tribe has benefited economically from the violation to the extent the Tribe did not hire and pay an independent auditor to complete and timely submit the fiscal year 2017 audit for CRST Bingo.
- b. Seriousness of the violation. One of the policy purposes of IGRA is 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.⁷ Accordingly, IGRA requires an annual audit of the gaming,⁸ 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 for each fiscal year."⁹

The financial statements must be prepared in accordance with generally accepted accounting principles, and the audit must conform to generally accepted

⁷ 25 U.S.C. § 2702(2).

⁸ 25 U.S.C. § 2710(b)(2)(C).

⁹ 25 C.F.R. § 571.12(b).

accounting standards.¹⁰ NIGC regulations further require a tribe to submit a copy of the financial statements and audits, with any management letter(s) and other documents/reports setting forth the results of the annual audit(s), to the NIGC within 120 days after the end of each gaming operation's fiscal year.¹¹

The submission of the annual audit report by an independent accountant is critical to the NIGC's mission to protect the integrity of Indian gaming. An accounting firm'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 principles provides assurance as to the security of tribal gaming revenues. The audited financial statements are evidence of, among other things, the integrity of the gaming operation and, more specifically, of the adequacy of the books, records, and internal financial control functions. Only after the financial statements of a gaming operation have been audited by a certified public accountant can the NIGC confidently rely on the data. Failure to conduct the required audits and submit reports leaves a gaming operation vulnerable to financial improprieties.

History of violations. NOV 18-03 is the only notice of violation issued against the Tribe in the last five years.

- c. Negligence or willfulness. The Tribe knew, or should have known, that the fiscal year 2017 audit was due by January 28, 2018, 120 days after CRST Bingo's fiscal year end. NIGC's audit regulations were first adopted in 1993 and updated in 2009, and have always required a gaming operation to submit an annual independent audit within 120 days of a gaming operation's fiscal year end.¹² Further, the Tribe and the NIGC Chair entered into a settlement agreement in 2016 (SA 16-02) because the Tribe failed to submit annual audits for fiscal years 2011-2015. The settlement agreement listed the due date for each fiscal year in which the Tribe failed to submit an audit for CRST Bingo. The audits were due on or before January 30, 2012 (FY 2011); January 28, 2013 (FY 2012); January 28, 2014 (FY 2013); January 28, 2015 (FY 2014); and January 28, 2016 (FY 2015). Lastly, the Tribe submitted a timely audit for CRST Bingo for fiscal year 2016.

Once the due date for the fiscal year 2017 audit passed, NIGC staff contacted the Tribe on several occasions. On February 6, 2018, NIGC Compliance Officer James McKee spoke by telephone with Jessica Four Bear, the Tribe's legal counsel, regarding the overdue fiscal year 2017 audit. On February 6, 2018, NIGC

¹⁰ 25 C.F.R. § 571.12(a, b).

¹¹ 25 C.F.R. § 571.13(a).

¹² See Compliance and Enforcement Procedures Under the Indian Gaming Regulatory Act, 58 Fed. Reg. 5,833, 5,844 (Jan. 22, 1993) (to be codified at 25 C.F.R. §§ 571.12, 571.13); see also Amendments to Various National Indian Gaming Commission Regulations, 74 Fed. Reg. 36,926, 36,939 (July 27, 2009) (to be codified at 25 C.F.R. §§ 571.12, 571.13).

Region Director Linda Durbin sent a letter to Chairman Frazier summarizing CO McKee's discussion with Ms. Four Bear about the overdue audit.

On April 5, 2018, CO McKee had a telephone call with the Tribe's Administrative Officer, Kenneth Little Thunder, and asked about the status of the late audit. CO McKee sent a follow-up email to Mr. Little Thunder summarizing their conversation on the same day.

On May 3, 2018, the NIGC Chair sent a satisfaction letter for SA 16-02 to Chairman Frazier which emphasized that the Tribe was still required to comply with IGRA, NIGC regulations, and the Tribe's gaming ordinance, and that the satisfaction letter did not have any bearing on the Tribe's failure to submit its fiscal year 2017 audit.

On June 6, 2018, the NIGC Compliance Director Dustin Thomas issued a Letter of Concern to Chairman Frazier regarding the late fiscal year 2017 audit. Director Thomas asked the Tribe to submit the late audit or a corrective action plan by June 20, 2018.

On June 29, 2018, RD Durbin called the Chairman Frazier's office. RD Durbin was informed that Chairman Frazier was out of the office on travel.

On July 3, 2018, RD Durbin sent a copy of the June 6, 2018 Letter of Concern to Tribal Treasurer Benita Clark.

On July 16, 2018, Jessica Four Bear, now the Executive Director of the Cheyenne River Economic Development Corporation – the tribal entity that began managing CRST Bingo in June 2018– sent an email to Director Thomas. Ms. Four Bear stated the fiscal year 2017 audit was not yet completed, but asked whether the Tribe could do anything to come into compliance.

On July 30, 2018, Ms. Four Bear sent an email to the NIGC and attached a corrective action plan addressed to Director Thomas. In the corrective action plan, Ms. Four Bear stated the fiscal year 2017 audit was in progress and would be available within three to four weeks. Also in the corrective action plan, Ms. Four Bear stated that the Tribe planned to reopen CRST Bingo during the Tribe's annual fair and Labor Day celebrations between August 30 and September 3, 2018.

On August 7, 2018, CO McKee had a telephone call with the Ms. Four Bear. Ms. Four Bear stated the fiscal year 2017 audit would be completed "any day now." Ms. Four Bear also indicated that the Tribe still planned to offer gaming at CRST Bingo over the Labor Day weekend.

On August 27, 28, and 31, 2018, RD Durbin called and left telephone messages for Ms. Four Bear regarding the late audit and the potential re-opening for the Labor Day weekend. Ms. Four Bear did not respond to RD Durbin's calls and messages.

On September 6, 2018, Ms. Four Bear informed CO McKee by email that the fiscal year 2017 audit would be done "any day now."

On October 24, 2018, the NIGC Chair had a telephone call with Chairman Frazier where the NIGC Chair advised that he was about to issue NOV 18-03 for the Tribe's failure to submit the fiscal year 2017 audit for CRST Bingo.

On October 24, 2018, the NIGC Chair issued NOV 18-03.

As of the date of this Proposed Civil Fine Assessment, the Tribe has not submitted the fiscal year 2017 audit for CRST Bingo. The Tribe estimates it will submit the audit by December 30, 2018.

The Tribe's failure to timely submit the required audit despite the NIGC's best efforts to inform and remind the Tribe about the overdue audit, suggests, at best, a severe negligence on the part of the Tribe, or, at worst, a willful disregard of IGRA, NIGC regulations, and the Tribe's gaming ordinance.

- d. Good faith. A civil fine may be reduced based on the degree of good faith of the Tribe in attempting to achieve rapid compliance after notification of the violation. NOV 18-03 required the Tribe to submit the fiscal year 2017 audit by November 2, 2018, a deadline that was reasonable based on the representations made by tribal officials to the NIGC throughout 2018. The Tribe did not submit the audit by November 2, 2018. As of the date of this Proposed Civil Fine Assessment, the Tribe has not submitted the fiscal year 2017 audit. However, the Tribe is attempting compliance by engaging an independent CPA firm to perform the fiscal year 2017 audit for CRST Bingo. The Tribe estimates it will submit the audit by December 30, 2018.

11. Regarding Chairman Frazier's assertions that bingo is a Class I game, IGRA and NIGC regulations specifically define bingo as a Class II game,¹³ and the NIGC has consistently regulated bingo as a Class II game. Because CRST Bingo conducted Class II gaming during fiscal year 2017, the Tribe was required to submit an annual audit.¹⁴

12. Regarding Chairman Frazier's assertions that CRST Bingo is a small and charitable operation, grosses minimal revenues, and only serves as entertainment for tribal members, the NIGC Chair is sympathetic to the Tribe's circumstances; however, these

¹³ 25 U.S.C. § 2703(7)(A)(i); 25 C.F.R. § 502.3(a).

¹⁴ 25 U.S.C. § 2710(b)(2)(C); 25 C.F.R. §§ 571.12, 571.13.

facts are not relevant to any factor the NIGC Chair considers when issuing a proposed civil fine assessment.¹⁵ Additionally, whether an operation is small and/or charitable, it is still required to submit financial statements each year to the NIGC.¹⁶

13. Regarding Chairman Frazier's statements about the Dakota Access Pipeline protests and damage to equipment and records at CRST Bingo caused by increased traffic and mice, the NIGC Chair is again sympathetic to the Tribe's circumstances and has taken these facts into consideration as he determines an appropriate proposed fine. While the Chairman acknowledges that the Tribe's willingness to support the protests led to certain issues that made the audit more difficult to complete, and has factored that in to setting a reduced fine, it does not entirely excuse the failure to submit the required financial information.
14. Regarding Chairman Frazier's statement that CRST Bingo is currently closed and will remain closed until the fiscal year 2017 audit is submitted, this demonstrates general good faith efforts by the Tribe. However, these steps are not the type of good faith the NIGC Chair is required to consider for a proposed civil fine assessment, which looks at the Tribe's attempts to achieve rapid compliance after the notification of violation.¹⁷
15. Pursuant to IGRA and NIGC regulations, the NIGC Chair has authority to levy and collect appropriate civil fines, not to exceed \$51,302 per violation, against a tribe, a management contractor, or an individual operating Indian gaming for any violation of any provision of IGRA and NIGC regulations.¹⁸ If noncompliance continues for more than one day, the NIGC Chair may treat each daily illegal act or omission as a separate violation.¹⁹
16. On the date NOV 18-03 was issued, the Tribe was 269 days late in submitting the fiscal year 2017 audit for CRST Bingo, resulting in 269 separate violations.
17. The maximum fine amount for failure to submit the fiscal year 2017 audit for CRST Bingo is \$13,800,238.
18. The NIGC Chair, having carefully reviewed the written submissions from the Tribe and the factors stated above, assesses a fine in the amount of \$76,953.00 on the Tribe for the failure to submit the fiscal year 2017 audit for CRST Bingo.

¹⁵ See 25 C.F.R. § 575.4.

¹⁶ See 25 C.F.R. §§ 571.12, 571.13. If a gaming operation has gross gaming revenues of less than \$2,000,000 during the prior fiscal year, the operation may submit reviewed financial statements if the operation had three prior years of compliant financial submissions or received a waiver from the Commission. 25 C.F.R. § 571.12(c)(1-2). The Tribe did not request a waiver from the Commission to submit reviewed financial statements for fiscal year 2017 for CRST Bingo.

¹⁷ 25 C.F.R. § 575.4(e).

¹⁸ 25 U.S.C. § 2713(a)(1); 25 C.F.R. § 575.4; Annual Adjustment of Civil Monetary Penalty to Reflect Inflation, 83 Fed. Reg. 2,059 (Jan. 16, 2018).

¹⁹ 25 C.F.R. § 575.4(a)(2).

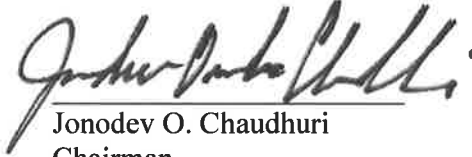
19. Interest shall be assessed at rates established from time to time by the Secretary of the Treasury on amounts remaining unpaid after their due date.²⁰
20. After balancing the factors found at 25 C.F.R. § 575.4, as well as considering the Tribe's circumstances, the NIGC Chair believes a \$76,953.00 fine is appropriate. The Tribe has presented evidence of extenuating circumstances pursuant to 25 C.F.R. § 575.5 and has represented to the NIGC Chair that it has hired a CPA firm to complete the fiscal year 2017 audit by the end of December 2018. However, the financial statements and audits are due at the same time every year, and IGRA allows the Tribe 120 days after the gaming operations fiscal year end for the preparation of the audit. NIGC staff made telephone calls and sent emails and letters regarding the overdue audit. Repeatedly, tribal officials told NIGC staff that the audit was underway or would be submitted shortly. Because the Tribe did not submit the fiscal year 2017 audit, the NIGC was not able to analyze CRST Bingo's regulatory compliance or technical assistance needs in a timely manner. The NIGC Chair finds a fine of \$76,953.00 is appropriate to balance the Tribe's excessive delinquency in meeting a critical requirement of IGRA.
21. 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, D.C. 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 the proposed witnesses, 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.

²⁰ 31 U.S.C. § 3717.

Dated this 21st day of November, 2018.



Jonodev O. Chaudhuri
Chairman

Certificate of Service

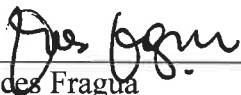
I, Frances Fragua, certify that this **Notice of Proposed Civil Fine Assessment (CFA 18-03)** was sent by certified U.S. mail, return receipt requested, on this 21st day of November, 2018 to:

Ev Ann White Feather, Tribal Secretary
Cheyenne River Sioux Tribe
P.O. Box 590
Eagle Butte, SD 57625

Courtesy Copy to:

Harold Frazier, Chairman
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