

# National Indian Gaming Commission

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## NOTICE OF VIOLATION

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NOV-19-03

To: Craig Harper, Chief  
Peoria Tribe of Indians  
118 S. Eight Tribes Trail  
P.O. Box 1527  
Miami, OK 74355  
Fax: (918) 540-2538

Tonya Mathews, Executive Director  
Peoria Tribal Gaming Commission  
1100 Buffalo Run Blvd  
Miami, OK 74354  
Fax: (918) 542-4850

### I. Notice of Violation

The Chairman of the National Indian Gaming Commission (NIGC) hereby gives notice that the Peoria Tribe of Indians of Oklahoma (Respondent or Tribe), headquartered in Miami, Oklahoma is in violation of the Indian Gaming Regulatory Act (IGRA), NIGC regulations, and its tribal gaming ordinance, because the Tribe operated under an unapproved amendment to its Management Agreement with Direct Enterprise Development (DED) and used net gaming revenue for purposes other than those permitted by IGRA, NIGC regulations, and the Tribe's gaming ordinance.

Normally, the Chairman issues a Letter of Concern under 25 C.F.R. § 573.2 prior to bringing an enforcement action. In this case, however, given that many of the violations identified here were raised with the Tribe during the most recent management contract review, the fact the Management Agreement with DED is no longer in effect, and the misuses of Net Gaming Revenue at issue were primarily the result of actions by DED principles, who are no longer present at the Casino, the Chairman believes that a Letter of Concern is not warranted in this matter.

## II. Authority

- A. The Chairman of the NIGC may issue an NOV to any person for violation of any provision of the Indian Gaming Regulatory Act, NIGC regulations, or any provision of a tribal gaming ordinance or resolution approved by the Chairman. 25 U.S.C. § 2713; 25 C.F.R. § 573.3.
- B. The Chairman shall have authority to levy and collect appropriate civil fines, not to exceed \$52,596 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 Act, any regulation prescribed by the Commission pursuant to this Act, or tribal regulations, ordinances, or resolutions approved under the Act. 25 U.S.C. § 2713(a)(1); 25 C.F.R. § 575.4.

## III. Applicable Federal and Tribal Laws

- A. Under IGRA and NIGC regulations, the NIGC Chairman (Chairman) may issue a Notice of Violation (NOV) to any person for violation 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; 25 C.F.R. § 573.3.
- B. IGRA provides that an Indian tribe may enter into a management contract for the operation of a class II or class III gaming activity if such contract has been submitted to, and approved by, the Chairman. 25 U.S.C. § 2710(d)(9); 25 U.S.C. § 2711(a)(1).
- C. Management contracts and changes in persons with a financial interest in or management responsibility for a management contract that have not been approved by the Chairman are void. 25 C.F.R. § 533.7.
- D. NIGC regulations provide that a tribe may enter into a modification of a management contract for the operation of a class II or class III gaming activity, subject to the approval of the Chairman. 25 C.F.R. § 535.1(a).
- E. NIGC regulations require that a tribe submit a modification of a management contract for the operation of a class II or class III gaming activity to the Chairman within 30 days of its execution. 25 C.F.R. § 535.1(b).
- F. NIGC regulations require that if the modification or amendment involves a change in person(s) having a direct or indirect financial interest in the management contract or having management responsibility for the management contract, a list of such person(s) and the information required under §537.1(b)(1) of NIGC regulations must be submitted to the Chairman for review.

- G. Any modifications to a management contract for the operation of a class II or class III gaming activity that have not been approved by the Chairman are void. 25 C.F.R. § 535.1(f).
- H. NIGC regulations provide that it is a substantial violation of IGRA for a management contractor to manage an Indian gaming operation without a contract that the Chairman has approved under part 533 of NIGC regulations. 25 C.F.R. § 573.6(a)(7).
- I. IGRA, NIGC regulations, and the Tribe's gaming ordinance specify that net gaming revenue from Class II and III operations may only be used for the following purposes: (1) to fund tribal government operations and programs; (2) to provide for the general welfare of the Indian tribe and its members; (3) to promote the tribal economic development; (4) to donate to charitable organizations; (5) to help fund operations of local government agencies. 25 U.S.C. §§ 2710(b)(2)(B) and 2710(d)(1)(A)(ii); 25 C.F.R. §§ 522.4(b)(2) and 522.6(b); Peoria Tribe of Indians of Oklahoma Gaming Ordinance, §16.1.

#### IV. Circumstances of the Violation

##### A. *Managing without an approved Contract*

As discussed in greater detail below, the Tribe and DED entered into two modifications to its approved management contract without obtaining the NIGC Chair's approval. More troubling than the violation itself, though, is that the parties modified the Agreement to implement changes for which the NIGC had previously expressly raised concerns, and that were removed from the Agreement to obtain the Chair's approval.

Acting under unapproved modifications to a management contract threatens the NIGC's ability to achieve its congressionally mandated goals of shielding the Tribe from organized crime and other corrupting influences; ensuring that the Tribe is the primary beneficiary of its gaming operation; and ensuring that gaming and management is conducted fairly and honestly by both the operator and players. *See* 25 U.S.C. § 2702(2). The unapproved modifications that are the subject of this NOV prevented the NIGC from fulfilling those statutory obligations, resulting in loss of net gaming revenues to the Tribe.

##### B. *Misuse of Net Gaming Revenue*

As also discussed in greater detail below, the Tribe's casino regularly made payments to DED's principles in a manner inconsistent with the terms of the Management Agreement. Numerous payments were issued directly to the principles, or to third parties on the principles' behalf. Although these advances were paid back from the management fee, there was no guarantee at the time the advances were made that the fee would be sufficient to cover the advances and the advances were made outside the scope of the approved management fee. As such, they were unlawful distributions of net gaming revenue.

Additionally, the Tribe and DED modified the terms of the Agreement to increase DED's fee. This was done after the NIGC had raised concerns with the calculation and the parties had changed it in order to obtain the Chair's approval of the Management Agreement. Moreover, the re-calculation resulted in the net revenue amount being increased solely for the purpose of calculating the management fee. The revised calculation was not used to determine the amount of actual net gaming revenue distributed to the Tribe. Put another way, the revised calculation benefitted DED to the amount of \$2,067,561 at the Peoria Tribe's expense.

One of the purposes of IGRA is to provide a statutory basis for the operation of gaming by tribes as a means to promote tribal economic development, self-sufficiency, and strong tribal governments. It is also to ensure that Indian tribes *as a whole* are the primary beneficiary of gaming revenue. To achieve that purpose, IGRA permits a Tribe to use its net gaming revenue for the five purposes listed above in paragraph III(I).

*Net revenues* means gross gaming revenues of an Indian gaming operation less— (a) amounts paid out as, or paid for, prizes; and (b) total gaming-related operating expenses, including all those expenses of the gaming operation commonly known as operating expenses and non-operating expenses consistent with professional accounting pronouncements, excluding management fees. Properly categorized as net revenues, the payments discussed herein are subject to IGRA and NIGC restrictions on their use.

## V. Violations

*Violation 1:* Operating under an unapproved Amendment to a Management Agreement – Stuart Campbell

- A. On June 3, 2005, the NIGC received a class II and class III management contract between the Tribe and DED, dated March 2, 2004. NIGC conducted a review of the management contract and discovered a contract between DED and Baxcase, a law firm owned by Stuart Campbell, which gave Mr. Campbell 5% of the management fee in exchange for legal services rendered to DED and the Tribe.
- B. In letters dated January 11, 2006; October 24, 2006 and February 16, 2007, the NIGC informed DED and the Tribe that if Baxcase and Mr. Campbell were to maintain a direct or indirect financial interest in the Management Agreement, the entity and individual would need to be submitted for a background investigation and suitability determination pursuant to 25 U.S.C. § 2711 and 25 C.F.R. § 533.3(d).

- C. In a letter to NIGC dated February 20, 2007, DED stated that the compensation provision for Baxcase had been changed into a monthly fee that was not based on a percentage of the management fees. Therefore, Mr. Campbell no longer held a financial interest in the management contract thus no background investigation would need to be conducted on him. An affidavit from Tony Holden attesting to the change in Mr. Campbell's compensation as well as a copy of the revised agreement between DED and Baxcase was submitted to NIGC.
- D. On October 1, 2007, the NIGC Chair sent a letter to the Tribe and DED approving the Third Amended and Restated Management Agreement.<sup>1</sup>
- E. Beginning in 2008, DED reverted Baxcase's fee to a percentage of DED's management contract fee, thus giving Baxcase and its principal, Stuart Campbell, a direct financial interest in the management contract.
- F. The change in entities and individuals with a financial interest in the Tribe's management contract with DED is a modification or amendment of the Management Agreement. 25 C.F.R. § 535.1(c)(4)
- G. DED and the Tribe did not submit an updated list of entities and individuals with a financial interest in the Management Contract as required by IGRA and NIGC regulations. 25 C.F.R. § 535.1(b)

*Violation 2:* Operating under an Unapproved Amendment to the Management Contract - Depreciation

- A. On June 3, 2005, the NIGC received a class II and class III management contract between the Tribe and DED, dated March 2, 2004. NIGC conducted a review of the management contract and identified an error in the calculation of depreciation whereby after the initial deduction of all depreciation, the non-facility depreciation was added back into the calculation as a depreciation adjustment, thus inflating the casino's net revenue and the management fee.
- B. In a letter dated February 16, 2007, the NIGC informed DED and the Tribe of the error and requested an explanation as to why the management fee was being calculated differently than the manner required by GAAP and the Management Contract.

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<sup>1</sup> See Third Amended and Restated Management Agreement between the Peoria Tribe of Indians of Oklahoma and Direct Enterprise Development, LLC (October 1, 2007).

- C. On May 21, 2007, the NIGC received a revised Business Plan from DED which reflected the correct calculation of deducting depreciation to determine Net Gaming Revenue used to calculate the management fee.
- D. In a memo to DED dated October 28, 2008, Stuart Campbell stated that the Management Contract allowed for separating depreciation into “facility” and “non-facility” categories for the purpose of calculating the management fee; specifically, once both categories of depreciation was deducted from the casino’s operating costs, the “non-facility” depreciation was to be added back into the calculation as a “depreciation adjustment” thus overstating the Net Gaming Revenue and increasing the management fee.
- E. From fiscal year 2008 through fiscal year 2018, DED and the Tribe reverted back to the erroneous depreciation calculation causing the appearance of higher net gaming revenues and an increased management fee.
- F. Neither IGRA nor NIGC regulations allow for any adjustment to the basis for determining operating expenses and net revenue.
- G. The change in the depreciation calculation is a modification or amendment of the Management Agreement. 25 C.F.R. § 535.1(c)(6).
- H. DED and the Tribe did not submit an amendment to allow for the revised depreciation calculation in the Management Contract as required by IGRA and NIGC regulations. 25 C.F.R. § 535.1(b).

*Violation 3:* Misuse of Gaming Revenue - Depreciation

- A. On June 3, 2005, the NIGC received a class II and class III management contract between the Tribe and DED, dated March 2, 2004. NIGC conducted a review of the management contract and identified an error in the calculation of depreciation whereby after the initial deduction of all depreciation, the non-facility depreciation was added back into the calculation as a depreciation adjustment, thus inflating the casino’s net revenue and the management fee.
- B. In a letter dated February 16, 2007, the NIGC informed DED and the Tribe of the error and requested an explanation as to why the management fee was being calculated before deducting interest and depreciation as both are legitimate operating expenses, as defined by Generally Accepted Accounting Principles and the Management Contract, and should be included in the computation of Net Revenues for the calculation of the management fee.

- C. On May 21, 2007, the NIGC received a revised Business Plan which reflected the correct calculation of deducting interest and depreciation in determining Net Gaming Revenue used to calculate the management fee.
- D. From fiscal year 2008 through fiscal year 2018, DED and the Tribe reverted back to the erroneous depreciation calculation causing the appearance of higher net gaming revenues and an increased management fee.
- E. In 2017, the NIGC discovered the use of the depreciation add-back calculation which resulted in the overstatement of net gaming revenue in the amount of \$7,347,483 and overpayments of management fees in the amount of \$2,067,561.
- F. In a letter dated September 28, 2017, the NIGC informed DED and the Tribe of the miscalculation and overpayment of management fees. To date, DED has not paid back the excess management fees.
- G. The use of the incorrect depreciation calculation was in direct contradiction to the NIGC's direction and IGRA's requirements that gaming revenues are used as operating expenses for the gaming operation or one of IGRA's five permitted uses. 25 U.S.C. § 2703(9); 25 C.F.R. § 522.4(b)(2).

*Violations 4 through 77: Misuse of Gaming Revenue – Management Advances*

- A. The Management Contract provides for the Manager to pay itself a percentage of the Net Gaming Revenue on or before the twenty-fifth (25<sup>th</sup>) day of the month. Third Amended and Restated Management Agreement, § 5.1.
- B. The Management Contract also provides that within twenty-five (25) days after the end of each calendar month of operations, the Manager shall calculate and report to the Tribe the Gross Revenues, Operating Expenses and Net Revenues for the previous month's operation of the gaming enterprise. Third Amended and Restated Management Agreement, § 5.1.
- C. The Management Contract further provides that the Manager shall disburse such Net Revenues, less any amount reasonably needed to maintain a Cash Contingency Reserve Fund, to the Tribe before disbursing the management fee. Third Amended and Restated Management Agreement, § 5.4.
- D. From fiscal year 2010 through fiscal year 2017, DED directed the distribution of revenue prior to the Tribe receiving its distribution of net gaming revenue.

- E. On 64 different occasions, these distributions were wired directly into the personal bank accounts of Tony Holden and David Qualls before the Tribe received its distribution, in violation of the terms of the management contract. Third Amended and Restated Management Agreement, § 5.4.
- F. On 10 different occasions, distributions were made directly to outside parties for items that include such purchases as a motorcycle for Tony Holden's motorcycle shop.
- G. The distributions were direct payments of revenue to Tony Holden, David Qualls, and various others at the direction of DED and were made in violation of the terms of the approved management contract thus unauthorized distributions of the net gaming revenue in violation of IGRA. 25 U.S.C. § 2703(9); 25 C.F.R. § 522.4(b)(2).

VI. Measures Required to Correct these Violations

Because the Tribe and DED have terminated their contractual relationship and DED is no longer managing the facility, the Tribe has already taken steps to cease operating under an unapproved modification to the management agreement. There is no way to correct the past violations. The Chair will, however, consider the Tribe's efforts taken to mitigate damages, including recouping overpayments of management fees, when determining an appropriate civil fine amount under 25 C.F.R. § 575.5, further discussed in Section VIII below.

VII. Appeal

Within 30 (thirty) days after service of this Notice of Violation, Respondent may appeal to the full Commission under 25 C.F.R. Parts 581, 584 or 585 by submitting a notice of appeal and, if desired, request in writing for a hearing to the National Indian Gaming Commission, 1849 C Street NW, Mail Stop #1621, Washington, DC 20240. Respondent 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, Respondent 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 Respondent wishes to present oral testimony or witnesses at a hearing before a presiding official, Respondent 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

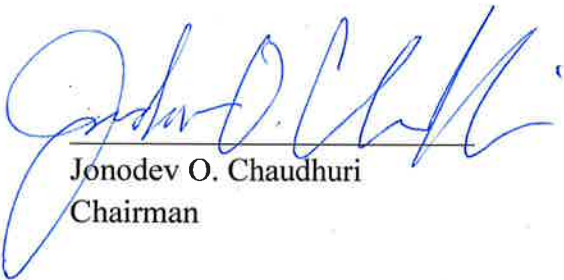


hearing is requested and why. Respondent may, in writing, waive its right to an oral hearing and instead elect to have the matter determined by the Commission solely on the basis of written submissions.

VIII. Fine and Submission of Information

Each of the violations cited above may result in the assessment of a civil fine against Respondent in an amount not to exceed \$52,596 per violation. Under 25 C.F.R. § 575.5(a), Respondent may submit written information about the violation and measures taken to prevent future violations to the Chairman within fifteen (15) days after service of this notice of violation (or such longer period as the Chairman of the Commission 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 10<sup>th</sup> day of May, 2019



Jonodev O. Chaudhuri  
Chairman

**CERTIFICATE OF SERVICE**

I certify that this **NOV-19-03** was sent by facsimile, email and certified U.S. mail, return receipt requested, on this 10<sup>th</sup> day of May, 2019 to:

Craig Harper, Chief  
Peoria Tribe of Indians  
118 S. Eight Tribes Trail  
P.O. Box 1527  
Miami, OK 74355  
Fax: (918) 540-2538  
Email: chiefharper@peoriatribe.com

Tonya Mathews, Executive Director  
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1100 Buffalo Run Blvd  
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Fax: (918) 542-4850  
Email: tmathews@peoriatribe.com



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Shakira Ferguson  
Legal Staff Executive Administrator