

National Indian Gaming Commission

SETTLEMENT AGREEMENT SA-17-01

INTRODUCTION

This Settlement Agreement (Agreement) is entered into by and between the Cheyenne and Arapaho Tribes of Oklahoma (Tribes), a federally-recognized Indian tribe, and the Chairman of the National Indian Gaming Commission (NIGC Chairman), related to the Tribes' misuse of gaming revenue through actions of the Tribal Casino Chief Executive Officer in directing payments to Clinton Land Holdings, LLC, and violation of the sole proprietary interest requirement in an Indian gaming operation by transferring an unauthorized proprietary interest in the gaming operation to Clinton Land Holdings, LLC in violation of Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 et. seq., NIGC regulations, 25 C.F.R. § 501 et. seq. and the Cheyenne and Arapaho Tribal Gaming Ordinance.

CIRCUMSTANCES OF VIOLATION

1. The Tribes own and operate six gaming operations (Gaming Operations) in Oklahoma, including the Lucky Star Casino – Clinton (Casino).
2. On or about December 22, 2004, the Tribes, through Lucky Star Casino Club, Inc., leased property owned by Fred and Mary Jane Kiehn located at 22728 East 1035 Rd, Clinton, Custer County, Oklahoma (Land) for use as a parking lot at a rate of \$400.00 per month for use of 2 acres.
3. The Tribes leased the Land from the Kiehns beginning in 2004 and ending in 2012. Through the years, the Tribes' use of the Land continued, and many improvements had been made to the Land at the Tribes' expense. At the conclusion of the lease agreement in 2012, the Tribes were leasing approximately 2 acres of the Land from the Kiehns at a rate of \$500.00 per month.
4. In 2009, the Kiehns put the Land on the real estate market using an agent at the list price of \$625,000.
5. Shortly thereafter, the Kiehns agreed to allow the Tribes to purchase the property for \$425,000 in an unwritten agreement with Governor Daryl Flyingman. However, Governor Flyingman's term of office ended in January 2010 and this agreement was never consummated.
6. On or about January 02, 2010, the Tribes, by newly elected Governor Janice Prairie Chief-Boswell, through Executive Order 010210-1, hired Brian Foster of Norman,

Oklahoma, to act as the Chief Executive Officer (CEO) and Director of Gaming Operations for the Tribes. Mr. Foster was responsible for planning, organizing, and controlling the daily operations of all of the Tribes' Gaming Operations, including managing subordinate employees by, among other things, planning, assigning, and directing work, appraising performance, and rewarding and disciplining the employees for their work.¹

7. Under the Tribes' Constitution, Article VII, Section 4(d), the Tribal Governor is the only official with authority to contract on behalf of the Tribes, but must obtain prior approval from either the Tribal Council or Legislature to do so.
8. On or about February 19, 2011, the Tribes enacted Tribal Council Resolution 021911STC-002, which authorized the Tribal Governor to negotiate and execute contracts independent of the Tribal Council or Legislature up to \$500,000.
9. On or about March 11, 2011, Mr. Foster incorporated a limited liability company, Sooner Biofuels, LLC, (SBF) in the State of Oklahoma.
10. On or about August 22, 2011, Mr. Foster was provided an appraisal for the Land by a BancFirst employee via email. The appraisal includes an engagement letter that indicates that the purchaser of the Land is Brian Foster and that the seller is Fred Kiehn. The email also indicated that BancFirst would be willing to lend Mr. Foster 80% of the purchase price of the Land.
11. The appraisal determined that best and highest use of the property was its current use at the time of the appraisal, which included utilizing the home for office space, the shop for storage, and leasing the two acres to the Casino for a parking lot. The property was valued at a total of \$126,000 and the land alone was valued at \$85,500.
12. In early 2012, Ms. Kiehn contacted Mr. Foster, as CEO of the Tribes' Gaming Operations, to follow up on the sale of the Land to the Tribes. Mr. Foster confirmed that the Tribes would purchase the Land from Ms. Kiehn.²
13. On or about March 24, 2012, Mr. Foster emailed Thomas Fox and conveyed details of how he planned to acquire the Land, have "sbf" (presumably Sooner Biofuels) lease it to the Casino, the terms of compensation for the lease, and potential long

¹ Neither the Tribes nor the Gaming Operation was able to produce a final employment agreement for Mr. Foster. They were able to provide a draft employment agreement and all facts support that the parties acted according to its terms. Most notably, Mr. Foster was paid and accepted compensation pursuant to the terms of that agreement and declarations from two Lucky Star Casino Clinton General Managers described their relationship to Mr. Foster as complying with that agreement.

² The Constitution delegates authority solely to the Governor to contract on behalf of the Tribes. In order for Mr. Foster to have lawful authority to bind the Tribes to a contract, the Governor would have to delegate the Tribes' contracting authority to him through official action. The investigation revealed no official action granting authority to Mr. Foster to enter into contracts on behalf of the Tribes. Ms. Kiehn understood that Mr. Foster was acting on behalf of the Tribes through his employment as CEO of the Gaming Operations to purchase the Land and did so with authority.

term plans for the Land that would "keep the nige out of the picture i think even though it is a non gaming contract but payments would be made from the gaming facility."

14. On or about April 05, 2012, the Casino, through Barbara Paukei, forwarded Casino Site Plans that included the Land, to Mr. Fox, demonstrating that Mr. Fox had access to internal information related to the Casino's use of the Land prior to having a formal business relationship with the Tribes regarding the Land.
15. On or about April 12, 2012, Mr. Fox incorporated a limited liability company, Clinton Land Holdings, LLC, (CLH) in the state of Minnesota.
16. On or about April 24, 2012, Brian Foster presented Ms. Kiehn with a check for \$150,000 drawn from his personal account for the down payment on the property.
17. On or about May 10, 2012, Ms. Kiehn and Brian Foster executed a contract for the sale of her property to SBF. The contract indicates SBF will assign the contract to CLH.
18. On or about May 22, 2012, Ms. Kiehn sold the Land to CLH. Initially the settlement company believed it was being sold to SBF, though the final documents indicated that the land was sold to Tom Fox of CLH. Brian Foster was cc'd on the transmittal of the land purchase documents.
19. There is no record that Mr. Foster ever received reimbursement for the \$150,000 payment he made on the property from his personal account.
20. On or about May 22, 2012, Mr. Foster presented Mr. Sam Barnett, the Casino's general manager, with a negotiated lease agreement (Lease or Lease Agreement) with Clinton Land Holdings. Mr. Foster directed Mr. Barnett to sign the Lease Mr. Foster had negotiated. Mr. Barnett complied with the directions of his supervisor.
21. On May 22, 2012, Mr. Barnett signed the Lease on behalf of the Casino with CLH to lease the Land for \$25,000 per month plus 1% of the Gross Gaming Revenue of the Casino. The Casino was also liable for all improvements, damages, and day-to-day upkeep of the Land, including paying all Local/State/Federal taxes on the property. The Lease was an automatically renewable, month-to-month agreement with no termination date. Because the term of the contract was interpreted to be renewable monthly with no action by either party, the Lease had no maximum payment.
22. The Lease Agreement executed by the Casino with CLH at the direction of Mr. Foster, an employee of a tribal enterprise under the Executive Branch of the Tribes, exceeded \$500,000. Communications between the two demonstrate that both Mr. Foster and Mr. Fox anticipated that the Lease would exceed \$500,000 and the Lease Agreement did not receive Tribal Council or Legislative approval, and was not

signed or authorized in writing by the Tribes' Governor, as required by Tribal Council Resolution 021911STC-002 and the Tribes' Constitution.

23. Pursuant to the terms of the Lease with CLH, the Casino paid an increased price of \$24,500 more per month for use of the Land beginning May 22, 2012, with limited increased benefit to the Tribes for use of the Land.
24. Further, the Casino, acting at the direction of Mr. Brian Foster, transferred 1% of gross gaming revenue to Mr. Tom Fox for an indefinite period of time since the Lease Agreement renewed without any action by either party.
25. From June 05, 2012, through December 30, 2013, the Casino paid CLH a total of \$1,257,342.44.
26. The Casino paid three times more than the purchase price the Tribes had initially agreed to pay for the Land, ten times more than the Land's appraised value, and a minimum of \$56,400 dollars more per month than the Casino had paid to lease the Land in the prior 8 years for nearly the same usage with significantly less fiscal responsibility.

RECITALS

1. The Indian Gaming Regulatory Act authorizes the NIGC Chairman to issue civil fines for violations of the IGRA, National Indian Gaming Commission regulations, or tribal regulations, ordinances, or resolutions approved by the NIGC Chairman under 25 U.S.C. §§ 2710, 2712. 25 U.S.C. § 2713(a)(1).
2. Under the regulations of the NIGC, 25 C.F.R. § 573.3(a), 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.
3. The NIGC Chairman and the Tribes agree that the Chairman has obtained sufficient evidence to issue an NOV under the authority of 25 C.F.R. § 573.3(a) for misuse of gaming revenue and a violation of the sole proprietary interest in the Casino.
4. The Tribes have fully cooperated with the NIGC Chairman in the investigation of the matter.
5. Prior to any involvement of the NIGC, after Governor Hamilton entered office in January 2014, the Tribes canceled the Lease Agreement with CLH promptly upon identifying the problems with the Lease Agreement, ceased payment of gaming revenue under the terms of the Lease Agreement, and requested and received the resignation of Brian Foster and Sam Barnett from their gaming operations.

6. The NIGC Chairman and the Tribes desire to achieve an amicable resolution of the violations prior to the issuance of a NOV, thereby avoiding unnecessary expense or delay.
7. The Chairman and the Tribes have agreed to execute this Agreement and perform in accordance with the following covenants and conditions:

TERMS OF SETTLEMENT

8. This Agreement is entered into pursuant to 25 C.F.R. § 575.6(b) and shall be effective upon the date that it is signed by the last party to sign this Agreement (Effective Date).
9. The Tribes agree that IGRA was enacted to ensure that Tribes are the primary beneficiary of the gaming operation and that one way IGRA ensures that purpose is to require that gaming revenues be used either as operating expenses for the gaming operation or transferred to the tribal government as net gaming revenue. *See* 25 U.S.C. § 2701 et. seq.
10. The Tribes agree that any expenditure that is not an operating expense, one of the five uses of net gaming revenues, or per capita payments as authorized by IGRA is a violation of IGRA, NIGC regulations, and the Tribes' Gaming Ordinance. *See* 25 U.S.C. § 2703(9); 25 C.F.R. §502.16; Cheyenne and Arapaho Tribal Gaming Ordinance §§ 502 and 503.
11. The Tribes agree that transferring revenue from a gaming operation to a third-party as an operating expense reduces the net gaming revenue of the operation by an equivalent amount.
12. The Tribes agree that IGRA and NIGC regulations require net gaming revenues be paid to the Tribes, and defines net gaming revenues as gross revenues less amounts paid out as prizes and total operating expenses. *See* 25 U.S.C. § 2703(9); 25 C.F.R. §502.16.
13. The Tribes agree that operating expenses include those costs necessary to conduct the normal day-to-day operations of a gaming facility, such as for services, materials, supplies, or equipment, but does not include capital expenses, such as real estate acquisitions, as indicated by the legislative history of the IGRA (S. Rep. No. 100-446).
14. The Tribes agree that the transfer of revenue from the Casino to Tom Fox through CLH was not an operating expense as defined by IGRA and NIGC regulations. *See* 25 U.S.C. § 2703(9); 25 C.F.R. § 502.16.

15. The Tribes agree that transferring revenue from a gaming operation as an operating expense when it cannot properly be categorized as an operating expense of the gaming operation results in a misuse of net gaming revenue in violation of IGRA, NIGC regulations, and the Tribes' Gaming Ordinance. *See* 25 U.S.C. § 2703(9); 25 C.F.R. §502.16; Cheyenne and Arapaho Tribal Gaming Ordinance §§ 502 and 503.
16. The Tribes agree that transferring revenue from a gaming operation in a manner that violates IGRA, NIGC regulations, or the Tribes' Gaming Ordinance necessarily results in an illegal use of net gaming revenues because it prevents the net revenues from ever being transferred to the Tribes, and thus prevents the Tribes from expending the net revenues.
17. The Tribes agree that for approximately 7 years prior to May 22, 2012, they had leased the Land for its most beneficial purpose, a parking lot, for \$400-\$500 per month. The Tribes continued to use the Land after May 22, 2012, for substantially the same purpose.
18. The Tribes agree that the highest rental rate that could be rationally justified as "rent" for the Land after May 22, 2012, would have been \$3,000 per month.³
19. The Tribes agree that the rental rate of \$25,000 per month plus 1% of the gross win of the Casino so far exceeds the highest rationally justifiable rental rate that it demonstrates that the Lease Agreement was mere pretext for transferring gaming revenue to a third-party in violation of IGRA and the Tribes' Gaming Ordinance.
20. The Tribes agree that once the Lease Agreement was acted upon it resulted in the illegal transfer of net gaming revenues to CLH in violation of IGRA, NIGC regulations, and the Tribes' Gaming Ordinance.
21. The Tribes agree that it could have reasonably obtained a right to purchase the Land for \$425,000.
22. The Tribes agree that the \$425,000 purchase price included a premium of \$299,000 over the highest appraised value of the Land, which was \$126,000.
23. The Tribes agree that the option to purchase the Land for \$425,000 was available to it on May 22, 2012, and that its agent, Brian Foster, had resources available to make that purchase, including access to available funding and the process for receiving the proper authorization from the Tribes.
24. The Tribes agree that paying \$1,257,342 to CLH to use the Land for 18 months when it could have owned the land for \$425,000 is a financial transaction that so far exceeds the agreed upon purchase price of the Land that it is more than a bad deal, it is not rationally justifiable.

³ The parties agree that it is impossible to rationalize a rate higher than \$3,000 for the monthly rental of the Land.

25. The Tribes agree that the egregious difference between the Lease Agreement cost and the anticipated purchase price of the land is conclusive evidence that the Lease Agreement was mere pretext for transferring gaming revenue to a third-party in violation of IGRA and the Tribes' Gaming Ordinance.
26. The Tribes agree that the pretext served to transfer \$832,342 to CLH in violation of the sole propriety interest requirement of IGRA and the Tribes' Gaming Ordinance.
27. The Tribes agree that, but for the pretext, the Casino would have had an additional \$832,342.00 available for transfer to the Tribes as net gaming revenue, and thus the \$832,342.00 transferred to CLH was net gaming revenue.
28. The Tribes agree that the \$832,342.00 of net gaming revenue illegally transferred to CLH was a misuse of net gaming revenue in violation of IGRA, NIGC Regulations, and the Tribes' Gaming Ordinance.
29. The Tribes agree that failure to use net gaming revenues consistent with the requirements of IGRA, NIGC regulations, and the Cheyenne and Arapaho Tribal Gaming Ordinance is a violation of those laws. *See* 25 U.S.C. § 2703(9); 25 C.F.R. §502.16; Cheyenne and Arapaho Tribal Gaming Ordinance §§ 502 and 503.
30. The Tribes agree that its agents used net revenues in a manner inconsistent with IGRA, NIGC regulations, and the Cheyenne and Arapaho Tribal Gaming Ordinance when they paid net revenue to CLH over and above the fair market value for the lease of the property, where the rental rate could not be rationally justified as being for valuable consideration and was thus a misuse of gaming revenue.
31. The Tribes agree that it is a violation of IGRA, NIGC Regulations, and the Cheyenne and Arapaho Tribal Gaming Ordinance to give a third party a proprietary interest in the Tribes' Gaming Operations.
32. The Tribes and the NIGC agree that an individual or entity having an entitlement to a portion of gaming revenue for no return, service, or additional asset to the gaming operation is conclusive evidence of a proprietary interest.
33. The Tribes agree that the Tribes' agents, without lawful authorization, did grant Tom Fox, as principal agent of CLH, an interest in the net win of the Casino for no valid return, service, or additional asset to the gaming operation for a term that would continue perpetually.
34. The Tribes agree that by transferring the excessive rental compensation including an interest in the net win of the Casino for no valid return, service, or additional asset to the gaming operation, they violated the Sole Proprietary Interest

Requirement of the Indian Gaming Regulatory Act and the Tribes' Gaming Ordinance.⁴

35. The Tribes admit the facts set forth in the "Circumstance of Violations" section of this agreement; agree that the NIGC possesses jurisdiction over this matter; and agree to comply with the terms of this Settlement Agreement.
36. In exchange for the terms, condition, and understandings, set forth in this Agreement, the Tribes waive their right to any administrative review of this Agreement (25 C.F.R. §§ 584, 585), submit information prior to the issue of a civil fine assessment (25 C.F.R. § 575.5), seek the reduction or waiver of a civil fine (25 C.F.R. § 575.6(a)), and the right to seek judicial review (25 U.S.C. § 2714).
37. In exchange for the terms, conditions, and understanding set forth herein, the Tribes hereby waive the rights specified in paragraph 36 of this Agreement and any other right to seek judicial review or otherwise challenge or context the Chairman's actions under this Agreement, including the right to have the Chairman provide his written analysis of the factors to be considered in assessing a civil fine set forth under 25 C.F.R. § 575.4.
38. The Chairman agrees upon execution of this Agreement that the NIGC shall not institute further proceeding or actions or assess any additional sanctions for the violations detailed in this Agreement against the Tribes, the Cheyenne and Arapaho Tribal Gaming Commission, or any other entity of the Tribes, or any of the officers and/or directors of such tribal entities, not including individual former employees actively engaged in the actions identified herein, unless the Tribes fail to comply with this Agreement. If the Tribes, the Cheyenne and Arapaho Tribal Gaming Commission, or any other entity of the Tribes, or any of the officers and/or directors of such tribal entities, not including individual former employees actively engaged in the actions identified herein fail to comply with this Agreement as outlined below, the Tribes agree that it will pay a fine of \$100,000 as outlined below.
39. The Tribes agree to adopt a procurement policy and procedure for their Gaming Operations within the next 12 months. The policy will include, by title, what positions are authorized to negotiate and execute purchase and lease agreements, any monetary limits including those set by tribal law, resolutions and constitution, and the approval process. If the NIGC has any concerns regarding the Tribes' procurement policy and procedure for its gaming operations, it will provide the Tribes its concerns in writing, and the Tribes agree to work in good faith with the NIGC to remedy its concerns.

⁴ This analysis is consistent with the NIGC's long held interpretation that a third-party has acquired a propriety interest in a tribe's gaming operation when it acquires an interest in gaming revenue for little or no service or asset provided. Though other factors are often considered, when revenue is transferred for an on-going period of time without any benefit to a tribe, no other factor is necessary to establish a proprietary interest. See NOV 11-02, Letter from P. Coleman to M. Cypress dated June 05, 2003, Letter from P. Coleman to J. Madalena dated October 27, 2006.

40. The Tribes agree to refrain from entering into any contracts for activities related to the gaming operations with Sooner Biofuels, LLC, Clinton Land Holdings, LLC, Brian Foster, Tom Fox, Sam Barnett, or any company in which these individuals hold a financial interest without first submitting said contracts to the NIGC Oklahoma City Regional Office or any successor office of the NIGC, if applicable.
41. The Tribes agree that they will not employ or retain Brian Foster, Tom Fox, or Sam Barnett in any capacity to provide any service for the Tribes related to any gaming operation for a period of 10 years.
42. The Tribes will ensure that the Tribal Governor, the General Managers of all Tribal Gaming Operations, any Tribal employee providing supervision to the General Managers, the Tribes' Gaming Commission, the CFO's of each gaming operation, and any other employee(s) as determined by the Tribes' will attend a site-specific training related to the violations listed herein offered by the NIGC at a facility designated by the Tribes at a mutually agreeable time within the next 12 months.
43. The Tribes agree as part of their annual financial statement audits and Agreed Upon Procedures, to specifically engage an independent Certified Public Accountant to examine all of the Tribes Gaming Operations' adherence to a Tribal Gaming Regulatory Authority approved procurement policy and procedures. The purpose of the examination will be to determine whether: 1) the procurement policy is adequate and compliant with tribal law and regulations, 2) each casino has implemented the policy, and 3) the Gaming Operations complied with the policy within the year being tested.
44. The Tribes agree, for a period of three years, to submit for review of compliance with IGRA and NIGC regulations, all draft/unexecuted contracts, whether verbal, electronic or in writing, including gaming machine vendor agreements, to the NIGC's Office of General Counsel if said agreement entitles a third party to any percentage of Gross Gaming Revenue, Net Win, or Net Gaming Revenue. If the NIGC has any concerns regarding one of the Tribes' draft agreements, it will provide the Tribes its concerns in writing, and the Tribes agree to work in good faith with the NIGC to remedy its concerns prior to executing the agreement.
45. The Tribes agree to take all reasonable and necessary action to collect the Net Gaming Revenues paid to CLH in excess of the fair market value of the property.
46. For a period of three years beginning with the execution of this Agreement, the Tribes agree that it will provide the NIGC with an annual training funds assessment letter (Assessment Letter) identifying and detailing the amount of training funds dedicated to training the Tribes' Gaming Commission, internal audit staff, and the employees of its gaming operations, including the accounting department, which explains whether such funds are sufficient. Funds expended relating to training provided by the NIGC in accordance with this Agreement shall not be included in

the Assessment Letter. The Tribes agree to provide this Assessment Letter to the NIGC within three months of the effective date of this Agreement, and on the same day thereafter annually for two additional years. If the NIGC has any concerns regarding the Tribes' Assessment Letter or its schedule of training, it will provide the Tribes its concerns in writing, and the Tribes agree to work in good faith with the NIGC to remedy its concerns.

ADDITIONAL COVENANTS

47. This Agreement constitutes the entire agreement between the NIGC Chairman and the Tribes relating to the enforcement matter set forth at the beginning of this Agreement. Any modification or waiver of any term of this Agreement must be in writing and signed by both parties.
48. The NIGC Chairman and the Tribes expressly agree and acknowledge that time is of the essence in this Agreement. The recitals herein shall be binding upon the parties, their agents, heirs, personal representatives, successors and assigns.
49. The parties agree that after the Effective Date, this Agreement shall be a public document and may be published or disclosed by either party.
50. This Agreement may be executed on one or more counterparts and each shall constitute an original. A signature produced by facsimile shall be deemed to be an original signature and shall be effective and binding for purpose of the Agreement.
51. The terms of this Agreement will continue in full force and affect until 10 years from the date the Agreement becomes final.

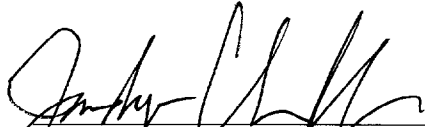
Cheyenne and Arapaho Tribes

National Indian Gaming Commission



Eddie Hamilton, Governor

Date: 4/7/17



Jonodev Chaudhuri, Chairman

Date: 4/11/17