

# NATIONAL INDIAN GAMING COMMISSION

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## NOTICE OF VIOLATION

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NOV-11-01

TO: J. Randy Gallo (Via Certified U.S. Mail)  
17107 Jupiter Farms Rd.  
Jupiter, FL 33478

Bettor Racing, Inc. (Via Facsimile & Certified U.S. Mail)  
3709 S. Grange Avenue  
Sioux Falls, SD 57105  
Fax: (605) 275-9421

Tony Reider, President (Via Facsimile & Certified U.S. Mail)  
Flandreau Santee Sioux Tribe  
(AGENT FOR SERVICE OF PROCESS)  
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Ryan Kills A Hundred, Chairman (Via Facsimile & Certified U.S. Mail)  
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### A. Notification of Violation

1. Notice of Violation – Bettor Racing, Inc. & J. Randy Gallo in his official and individual capacity

The NIGC Chairwoman gives notice that Bettor Racing, Inc. (Bettor Racing) and its President, J. Randy Gallo, in his official and individual capacity, (Mr. Gallo or collectively with Bettor Racing as Respondents), located in Flandreau, South Dakota, managed a tribal gaming operation without an approved management contract in violation of the Indian Gaming Regulatory Act (IGRA) and National Indian Gaming Commission (NIGC) regulations from September 24, 2004, through March 16, 2005. *See* 25 U.S.C. §§ 2710(d)(9); 2711; 25 C.F.R. § 573.6(a)(7).

Further, Respondents managed an off-track betting operation called Royal River Racing (the OTB) at the Flandreau Santee Sioux Tribe's (Tribe's) Royal River Casino (the

Casino) under two unapproved modifications to a management contract from February 15, 2007, through April 5, 2010, in violation of IGRA and NIGC regulations. *See* 25 C.F.R. § 573.6(a)(7).

Finally, Respondents had a proprietary interest in the OTB, and in fact profited more from the OTB than did the Tribe itself. Respondents received more than 70% of the net gaming revenue from the OTB over the entire five-year term of its agreement with the Tribe. Moreover, Respondents ran the OTB as their own separate business and, thereby, controlled the money flowing into and out of the OTB. These actions violate the sole proprietary interest provision of IGRA. *See* 25 U.S.C. § 2710(b)(2); 25 C.F.R. §§ 522.4(b)(1), 522.7. As a consequence, Respondents' actions conflict with IGRA's congressionally mandated purposes of ensuring that the Indian tribe is the primary beneficiary of the gaming operation, and shielding the tribe from organized crime and other corrupting influences. *See* 25 U.S.C. § 2702(2).

## 2. Notice of Violation – Flandreau Santee Sioux Tribe

The NIGC Chairwoman also gives notice that the Tribe, located in Flandreau, South Dakota, permitted the Respondents to manage the OTB without an approved management contract in violation of IGRA and NIGC regulations from September 24, 2004, through March 16, 2005. *See* 25 U.S.C. §§ 2710(d)(9); 25 C.F.R. § 573.6(a)(7).

Moreover, the Tribe and the Respondents operated the OTB under two unapproved modifications to the management contract in violation of IGRA and NIGC regulations, from February 15, 2007, through April 5, 2010. *See* 25 C.F.R. § 573.6(a)(7).

The Tribe also failed to submit the management letters prepared by the Casino's independent auditors, Hanson, Vilhauer & Raml, P.C., within 120 days of its 2005 and 2006 fiscal year ends, in violation of NIGC regulations. *See* 25 C.F.R. § 571.13(a).

Finally, the Tribe's payments of net gaming revenue to Respondents, over and above what was allowed under the approved management contract, violated IGRA's use of net gaming revenue mandates, as well as the Flandreau Gaming Ordinance. *See* 25 U.S.C. §§ 2710(b)(2) and (3); 25 C.F.R. § 522.6; Flandreau Gaming Ordinance § 17-6-1(3).

### B. Authority

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

C. Background Summary

The Tribe operates one gaming facility, the Royal River Casino (the Casino) which conducts both class II and class III gaming. In 2004, the Tribe converted a room inside the Casino from a bingo hall into an off-track betting operation called Royal River Racing (the OTB). Bettor Racing, Inc. d/b/a Royal River Racing (hereinafter Bettor Racing and together with Mr. Gallo as Respondents) was involved in the conversion and operated the OTB from its inception until April 2010.

In August 2009, the NIGC Contracts Division conducted a compliance investigation of the management contract between the Tribe and Respondents. The management contract was approved by NIGC Chairman Phil Hogen on March 17, 2005 (hereinafter the approved management contract).

The NIGC contract compliance investigation focused on the calculation of the net gaming revenues of the OTB managed by Respondents. NIGC contract investigators found that Respondents claimed the [

] as operating expenses of the OTB. Doing so resulted in decreased net gaming revenues, which were to be divided between the Tribe and Respondents in accordance with the approved management contract. Under the terms of the approved management contract, the aforementioned [

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] Thus, [ ] were improperly included as operating expenses and deducted from the net profits to be split between the parties in accordance with the approved management contract.

In addition to these improper operating expenses, NIGC contract investigators discovered Bettor Racing paid bettors, including [ ] incentives or rebates in percentages or amounts set by Mr. Gallo.<sup>1</sup>

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By letter dated August 27, 2009, the NIGC Director of Contracts and Director of Enforcement informed [ ] that Respondents were not in compliance with the approved management contract. Following the August 27 letter, additional correspondence between the NIGC and Respondents resulted in Bettor Racing reimbursing the Tribe \$ [ ] for calendar year 2006; \$ [ ] for calendar year 2007; and \$ [ ] for calendar year 2008. The reimbursements include the amounts paid [ ] as well as the over and short expense<sup>2</sup> of the OTB, and interest earned on patron accounts.

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<sup>1</sup> NIGC continues to investigate the payment of bonuses or incentives to bettors; [ ] and the consulting fees paid to agents. These activities are not included in this NOV.

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<sup>2</sup> An "over and short expense" occurs when a teller errs and either overpays or underpays a winning ticket resulting in the betting pool being incorrectly distributed among the winning ticket holders. The amount paid by the OTB to correct the teller's error was not allowed to be an expense of the OTB for purposes of calculating the amount owed to the Tribe under the approved management contract because the tellers were under the complete control and direction of Respondents. These expenses are required to be paid by the

During the contract compliance investigation, NIGC learned that Respondents proposed to the Tribe that the parties amend or modify the approved management contract to reduce the Tribe's minimum guaranteed payment from  $\frac{1}{2}$ % of the gross handle for all telephone wagers<sup>3</sup> to  $\frac{1}{2}$ % of gross handle up to \$ [redacted] plus  $\frac{1}{2}$ % of all gross handle in excess of \$ [redacted] and to waive the  $\frac{1}{2}$ % split of the net gaming revenues. The Tribe agreed to reduce the minimum guaranteed payment as proposed by Respondents, but did not agree to waive the receipt of the  $\frac{1}{2}$ % of the net gaming revenues that the Tribe was owed pursuant to the approved management contract. The Tribe's attorney, Terry Pechota, advised Respondents and the Tribe that the NIGC would not approve any modification to the approved management contract that resulted in the Tribe receiving less than 60% of the net gaming revenue. b4

A modification reducing the minimum guaranteed payment to include  $\frac{1}{2}$ % of all gross handle in excess of \$ [redacted] was executed by the parties on February 15, 2007 (the first modification). The first modification was submitted to the NIGC for NIGC Chairman Hogen's approval on February 16, 2007. On April 13, 2007, the NIGC received a letter from the Tribe's attorney, Terry Pechota, requesting that the NIGC hold the approval of the first modification in abeyance until the Tribe's litigation with the State of South Dakota was resolved. The Tribe's litigation with the State of South Dakota has not yet been resolved and the first modification to the approved management contract has never been approved by the NIGC. b4

Based on the review of financial records during the investigation, it was discovered that Respondents had been paying the Tribe its minimum guaranteed payment pursuant to the terms of the first modification. Further, Respondents applied the terms of the first modification retroactively to January 1, 2006. Therefore, Respondents operated the OTB under the first modification to the management contract from at least February 15, 2007, until August 1, 2008, in violation of IGRA and NIGC regulations, and received bonuses based on the first modification during calendar years 2006, 2007, and 7 months of 2008.

The investigation also revealed that Respondents had approached the Tribe in 2008 requesting yet another modification (the second modification) to the management contract to reduce the minimum guaranteed payment from  $\frac{1}{2}$ % of all gross handle to  $\frac{1}{2}$ % of all gross handle up to and including \$ [redacted] plus  $\frac{1}{2}$ % of all gross handle in excess of \$ [redacted]. Although never formalized in writing by the parties, Rollyn Samp, the Tribe's attorney, executed a statement dated October 31, 2008, advising the external auditor for the Tribe's gaming operation that the Tribe's Executive Committee had approved an amendment to the compensation portion of the management contract to lower the minimum guaranteed payment to  $\frac{1}{2}$ % of the first \$ [redacted] in gross handle b4

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Respondents pursuant to the Flandreau Santee Sioux Tribe Gaming Commission Pari-mutuel Betting Gaming Regulations. See Flandreau Santee Sioux Tribe Gaming Commission Pari-mutuel Betting Gaming Regulations § 26.280.

<sup>3</sup> All subsequent references to gross handle refer to the gross handle for all telephone betting. The percentage ( $\frac{1}{2}$ %) paid to the Tribe for all walk-in betting as provided in the approved management contract has never been changed or modified by the parties. b4

plus [ ]% of all gross handle in excess of \$ [ ] to be effective August 1, 2008. See Letter from Rollyn Samp to Whom It May Concern, dated October 1, 2008. The second modification to the management contract was not submitted to the NIGC for approval and, thus, was never approved. Therefore, Respondents operated the OTB under the second modification to the management contract from August 1, 2008, to April 5, 2010, in violation of IGRA and NIGC regulations. b4

Even though the first and second modifications were not approved, Respondents still received the benefit of them in the form of "annual bonuses." The review of financial records revealed that Respondents received an annual bonus from the Tribe that was not provided for in the approved management contract in the amount of \$ [ ] for calendar year 2005; \$ [ ] for calendar year 2006; \$ [ ] for calendar year 2007; and \$ [ ] for calendar year 2008. The bonus payments for calendar years 2006, 2007, and 2008 match the exact dollar amount that Respondents would have received under the first and second modifications. In order to redistribute the net profits provided for the first and second unapproved modifications, the parties called the amounts a "bonus" and agreed to exchange or swap checks on an annual basis following the year end audit of the OTB. b4

Respondents ran the OTB as if they were the sole owners of the operation by hiring and paying all of the employees of the OTB; adopting separate employee policies for OTB employees; setting the hours and times that the OTB would be open; maintaining separate bank accounts for the operation; handling all of the accounting, including an annual audit; and, making all other decisions regarding the operation of the business such as the amount of the incentives or rebates paid to bettors and the consulting fees paid to agents who brought in bettors, both of which significantly affected the net profits of the operation.

When Respondents' approved management contract with the Tribe ended, Respondents moved the OTB to Sioux Falls, South Dakota, taking with it the OTB's phone numbers, televisions, tote terminals, and satellite receivers.

The primary role the Tribe had in the OTB was to accept the weekly minimum payment as calculated by Respondents. As noted above, the Casino also exchanged checks with Respondents once a year. The annual exchange of checks, termed "the check swap" by Respondents but called a "bonus" by the Tribe, resulted in Respondents receiving a higher percentage of the net profits than was allowed under the approved management contract. The annual check swap or "bonus" resulted in Respondents receiving a disproportionately high percentage of the net gaming revenues of the OTB over the entire term of the approved management contract. As a result of the additional amounts paid by the Tribe, Respondents received 72% of the OTB net gaming revenues for calendar year 2005; 79% of the OTB net gaming revenues for calendar year 2006; 78% of the OTB net gaming revenues for calendar year 2007; and 80% of the OTB net gaming revenues for calendar year 2008. IGRA and NIGC regulations cap the percentage of net gaming revenues that a manager can receive for managing a tribal gaming operation to be no more than 40%. See 25 U.S.C. § 2711(c)(2); 25 C.F.R. § 531.1(i).

Respondents' control over the OTB and its receipt of a high percentage of the net gaming revenues provided Respondents with a proprietary interest in the OTB in violation of IGRA, NIGC regulations, the Flandreau Gaming Ordinance and the Flandreau Pari-mutuel Betting Ordinance. *See* 25 U.S.C. §§ 2710(b)(2)(A), (d)(1)(A)(ii); 25 C.F.R. § 522.6(c); Flandreau Gaming Ordinance § 17-6-1(4) and Flandreau Pari-mutuel Betting Ordinance § 4.

The annual check swapping or "bonus" paid to Respondents also resulted in a substantial reduction of net gaming revenues of the Casino and thus a substantial reduction of the net gaming revenues distributed to the Tribe, as required by IGRA and the Flandreau Gaming Ordinance. Therefore, it was a misuse of the Tribe's net gaming revenue for the Casino to return net gaming revenues to Respondents as a "bonus" instead of distributing it to the Tribe as required by federal and tribal law.

Additionally, the Casino's independent auditor, Donald J. Raml of Hanson, Vilhauer and Raml P.C., issued two management letters that were not submitted within 120 days of the Casino's 2005 and 2006 fiscal year ends as required by NIGC regulations. *See* 25 C.F.R. § 571.13(a).

In sum, the actions taken by Respondents and the Tribe conflict with IGRA, NIGC regulations, and the Flandreau Gaming Ordinance. IGRA was enacted to ensure that tribes are the primary beneficiaries of their gaming operations and are shielded from corrupting influences. By acting under the first and second modifications to the management contract, Respondents were paid excessive net gaming revenues of the OTB – these substantial payments deprived the Tribe of being the primary beneficiary of the OTB. Further, for the reasons described above, Respondents had a proprietary interest in the OTB in violation of IGRA.

#### D. Applicable Federal and Tribal Laws

1. IGRA provides that an Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairwoman. 25 U.S.C. § 2710(d)(9).
2. A management contract is defined by NIGC regulations as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15.
3. 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 Chairwoman are void. 25 C.F.R. § 533.7.

4. 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 Chairwoman. 25 C.F.R. § 535.1(a).
5. 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 Chairwoman upon its execution. 25 C.F.R. § 535.1(b).
6. 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 Chairwoman are void. 25 C.F.R. § 535.1(f).
7. 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 Chairwoman has approved under part 533 of NIGC regulations. 25 C.F.R. § 573.6(a)(7).
8. NIGC regulations define "class III gaming" as including "any sports betting and pari-mutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai . . ." 25 C.F.R. § 502.4(c).
9. IGRA requires that, to lawfully operate Indian gaming, a tribe must have a tribal gaming ordinance approved by the NIGC Chairwoman. 25 U.S.C. §§ 2710(b)(1)(B), (d)(1)(A).
10. IGRA defines class III gaming as all forms of gaming that are not class I or class II. Pari-mutuel gaming is not defined as class I or class II under IGRA. 25 U.S.C. §§ 2703(6)-(8).
11. The Tribe's amended class III gaming ordinance (the Flandreau Gaming Ordinance) approved by NIGC Chairman Montie Deer on June 21, 1999, defines "Class III Gaming" as "all forms of gaming that are not class I or class II, as those terms are defined in the Indian Gaming Regulatory Act, including but not limited to . . ." Flandreau Gaming Ordinance § 17-1-3(4).
12. The Flandreau Gaming Ordinance requires that "all proceeds of the gaming activities authorized by this ordinance and received by the Tribe shall be used to promote the health, education and welfare of the Flandreau Santee Sioux Tribe." Flandreau Gaming Ordinance § 17-6-1(3).
13. IGRA requires that the tribal gaming ordinance must provide that the tribe have the sole proprietary interest in and responsibility for the conduct of any gaming activity. 25 U.S.C. §§ 2710(b)(2)(A), (d)(1)(A)(ii).

14. NIGC regulations require that a tribe's gaming ordinance provide that "the Tribe shall have the sole proprietary interest in and responsibility for the conduct of any gaming operation." 25 C.F.R. §§ 522.4(b)(1), 522.6(c).
15. The Tribe's ordinance on pari-mutuel betting (the Flandreau Pari-mutuel Betting Ordinance) approved by NIGC Chairman Phil Hogen on June 21, 2004, provides that "the Flandreau Santee Sioux Tribe shall have the sole proprietary interest in and responsibility for the conduct of pari-mutuel betting on Tribal lands." Flandreau Pari-mutuel Betting Ordinance § 4.
16. IGRA requires that class III gaming operations may only be lawfully conducted if the gaming is conducted pursuant to an ordinance that meets the requirements of 25 U.S.C. § 2710(b). 25 U.S.C. § 2710(d)(1)(A)(ii).
17. IGRA requires a tribal gaming ordinance to provide that the net gaming revenues from any tribal gaming operation are not be used for any purpose other than to: fund tribal government operations or programs; provide for the general welfare of the Indian tribe and its members; promote tribal economic development; donate to charitable organizations; or help fund operations of local government agencies. 25 U.S.C. §§ 2710(b)(2)(B), (d)(1)(A)(ii).
18. The Flandreau Gaming Ordinance requires that "the Flandreau Santee Sioux Tribe shall receive at least sixty percent (60%) of the net revenues of all gaming activities conducted pursuant to this ordinance." Flandreau Gaming Ordinance § 17-6-1(4).
19. IGRA and NIGC regulations prohibit the Chairwoman from approving any management contract that provides for a fee based upon a percentage of the net revenues of a tribal gaming activity in excess of 30% or if the Chairwoman is satisfied that the capital investment required and income projections require an additional fee up to 40%. 25 U.S.C. § 2711(c); 25 C.F.R. § 531.1(i). IGRA and NIGC regulations do not allow a management contractor to receive more than 40% of the net revenues of any tribal gaming activity under any circumstances. *Id.*
20. Failure to comply with any provision of IGRA, NIGC regulations, or an approved tribal gaming ordinance is grounds for issuance of a notice of violation (NOV). 25 U.S.C. § 2713; 25 C.F.R. § 573.3(a).
21. Failure to comply with NIGC regulations requiring the submission of management letters prepared by the Casino's independent auditor within 120 days of the end of the Casino's fiscal year is grounds for issuance of a notice of violation. 25 C.F.R. § 571.13(a).



#### E. Facts of Violation

1. The Tribe is a federally recognized Indian tribe with headquarters in Flandreau, South Dakota. The Tribe operates the Casino, which includes both class II and class III gaming. As part of the class III gaming, the Tribe operated a pari-mutuel betting operation known as Royal River Racing (the OTB) that was managed by Respondents. Respondents managed the OTB from September of 2004 to April of 2010.
2. Bettor Racing, Inc. (Bettor Racing) is a business corporation registered in the State of South Dakota. This corporation was registered on January 7, 1998. Bettor Racing lists its current principal executive office as 3705 S. Grange Avenue, Sioux Falls, South Dakota, 57105.
3. J. Randy Gallo (Mr. Gallo) is listed in the Articles of Incorporation of Bettor Racing as the sole shareholder and member of the Board of Directors. The Articles of Incorporation were filed with the Secretary of State for the State of South Dakota on January 7, 1999.
4. Mr. Gallo has been listed as the Director of Bettor Racing in its Annual Reports to the Secretary of State for the State of South Dakota since 1999, and negotiated the original management agreement with the Tribe on behalf of Bettor Racing.
5. Bettor Racing's fiscal year runs from January 1 through December 31 of every calendar year.

#### FIRST VIOLATION

#### Respondents and the Tribe violate IGRA and NIGC regulations – managing an Indian gaming operation without an approved management contract

6. On March 22, 2004, in Resolution No. 04-25, the Tribe authorized the Tribal President, Leonard Eller, to sign a management contract with Bettor Racing to manage the OTB at the Casino. President Eller was also authorized to submit the agreement to the NIGC for approval.
7. On March 26, 2004, NIGC received a copy of a management contract, between Bettor Racing and the Tribe for review and approval by NIGC Chairman Hogen. In addition, on that date, the Tribe also submitted the Flandreau Pari-mutuel Betting Ordinance for Chairman Hogen's review and approval.
8. On June 21, 2004, Chairman Hogen approved the Flandreau Pari-mutuel Betting Ordinance.

9. Throughout 2004 and early 2005, employees of the NIGC, agents of the Tribe, and Respondents had multiple communications regarding changes that needed to be made to the management contract before the NIGC Chairman could approve it.
10. Respondents began doing business as Royal River Racing at the Casino on September 24, 2004. Specifically, Respondents operated the OTB by accepting and placing bets on behalf of patrons at the Casino as well as accepting wagers placed over the telephone. Respondents' employees were present and working at the OTB from September 24, 2004, through March 16, 2005, as evidenced by the daily expenses incurred by them at the Casino, as well as telephone and other utility costs that Respondents were subsequently required to pay to the Casino.
11. Respondents' employees incurred expenses charged to Respondents on a daily basis. Further, the Casino authorized Respondents to incur expenses daily on the Casino's accounts with local merchants. The Casino billed Respondents on a monthly basis for these expenses and accepted the reimbursements paid by Respondents. Additionally, the Casino accepted and deposited payments from Respondents for a portion of the net revenues generated by the OTB.
12. In addition to the facts above, Respondents had extensive authority over and control of the OTB. Respondents determined the budget, were responsible for the hiring and firing of all employees, formally adopted an employee handbook applicable only to OTB employees and made virtually all the business decisions regarding the OTB.
13. Bettor Racing's fiscal year end is based on the calendar year end, or December 31, rather than on the fiscal year end used by the Tribe and Casino, which is September 30. The OTB was audited independently from the Casino by an audit firm hired solely at the discretion of Respondents.
14. The OTB's gross handle from September 2004 through December 2004 was \$ [ ] b4
15. Respondents made payments to the Tribe totaling \$ [ ] for the pari-mutuel betting conducted at the OTB from September 24, 2004, through December 31, 2004. b4
16. Respondents continued to make weekly payments to the Tribe for each week from January 2005 through March 2005.
17. Chairman Hogen approved a management contract between the Tribe and Respondents on March 17, 2005.

18. Therefore, Respondents managed the OTB from September 24, 2004, through March 16, 2005, without a management contract approved by the Chairman in violation of IGRA and NIGC regulations. 25 U.S.C. § 2710(d)(9), and 25 C.F.R. § 573.6(a)(7).
19. Furthermore, the Tribe permitted the Respondents to manage the OTB without an approved management contract from September 24, 2004, through March 16, 2005, in violation of IGRA and NIGC regulations. 25 U.S.C. § 2710(d)(9), and 25 C.F.R. § 573.6(a)(7).
20. Prior to the management contract being approved by Chairman Hogen, the Tribe entered into a consulting agreement dated September 20, 2004, with Mr. Gallo to act as a consultant for the OTB. The consulting agreement was limited to Mr. Gallo providing advice on running an OTB prior to approval of the management contract. However, Mr. Gallo was not operating as a consultant but was, in fact, managing the OTB starting on September 24, 2004.

#### SECOND VIOLATION

#### Respondents and the Tribe violate IGRA and NIGC regulations - operating under two unapproved modifications to the approved management contract

21. As noted above, on March 17, 2005, Chairman Hogen approved a management contract between the Tribe and Bettor Racing.
22. The approved management contract provides that Respondents' management fee is a percentage of the net revenue of the OTB based on a sliding scale. When the gross handle volume is less than \$ [ ] Respondents' management fee is [ ] % of the net revenue. When the gross handle volume is \$ [ ] or greater but less than \$ [ ] Respondents' management fee is [ ] % of the net revenue. When the gross handle volume is above \$ [ ] Respondents' management fee is [ ] % of the net revenue. b4
23. The approved management contract further provides that the Tribe's share of the net revenue from the OTB is also a sliding scale based on the gross handle volumes of the operation. When the gross handle volume is less than \$ [ ] the Tribe's share of the net revenue is [ ] % of net gaming revenue. When the gross handle volume is \$ [ ] or greater but less than \$ [ ] the Tribe's share is [ ] % of net revenue. When the gross handle volume is above \$ [ ] the Tribe's share of the profits is [ ] % of net revenue. b4
24. Under the approved contract, the Tribe's minimum guaranteed payment will never be less than [ ] % of gross public handle generated by walk-in b4

betting at the OTB plus the greater of \$ [ ] per week or [ ]% of the gross handle generated by telephone betting at the OTB.

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25. The approved management contract provides that the net revenue is to be calculated on a monthly basis and that both the Tribe's share and Respondents' fee were to be paid simultaneously each month.
26. The approved management contract provides that Respondents pay the salary of the General Manager from the management fee through the duration of the management contract.
27. Under the approved management contract, Respondents were to transfer the minimum guaranteed payment to the Tribe by delivering a check for the amount to the Casino finance department on a weekly basis.
28. The Casino's comptroller, Laurel Tye, verified that the correct amount was being transferred by reviewing the gross handle amounts transmitted directly to her from United Tote, the tote company responsible for handling all wagers placed by Respondents.
29. After receiving the weekly payments from Respondents, the Casino would make a monthly payment to the Tribe for the net gaming revenue earned by the Casino which was then transferred to the Tribe and deposited in the Tribe's bank accounts pursuant to the RAP.
- a. Operating under an unapproved modification of a management contract reducing the minimum guaranteed payment from [ ]% of gross handle to [ ]% of gross handle.
30. In 2006, the Respondents and Tribe agreed to reduce the guaranteed minimum payment on gross handle that was set forth in the approved management contract. Accordingly, the payment was reduced from [ ]% of the gross handle to [ ]% of gross handle up to and including \$ [ ] and [ ]% of gross handle in excess of \$ [ ]
31. For fiscal year 2006, Respondents made payments equal to the reduced guaranteed minimum amount to the Tribe and the Tribe accepted them; thus, the parties acted under the first modification.
32. Both the Comptroller for the Casino, Laurel Tye, and Ray Henry, General Manager for Respondent, confirmed that the first modification was in effect when the Casino's annual independent audit was conducted by Hanson, Vilhauer, & Raml for the Casino's 2006 and 2007 fiscal years. The Tribe submitted audits for 2006 and 2007 to the NIGC.

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33. A draft modification representing the changes to the contract outlined in paragraph 30 above was submitted to the NIGC on January 19, 2007. The January 19, 2007, submission included a draft tribal resolution authorizing the modification to the approved management contract.
34. On February 16, 2007, the Tribe submitted a final and executed modification (the first modification) for the NIGC Chairman's review and approval. The first modification was dated February 15, 2007.
35. Also submitted to the NIGC on February 16, 2007, were two letters, dated January 25, 2007, one from Mr. Rollyn Samp, General Counsel for the Tribe, and one from Tribal President Joshua Weston, both requesting the Chairman Hogen's review and approval of the first modification. Along with the January 25 letters, the February 16, 2007, submission included the Tribal President's certification of authority, and the fully executed first modification dated February 15, 2007, that reduced the minimum guaranteed payment to the Tribe to [ ]% of the gross handle above [ ] [ ] b4
36. On April 13, 2007, Terry Pechota, attorney for the Tribe's Gaming Commission, requested on behalf of the Tribe that the NIGC hold in abeyance a final decision on the first modification until such time as the litigation regarding the Tribal-State Compact with the State of South Dakota was resolved.
37. NIGC Director of Contracts, Elaine Saiz, confirmed the receipt of the Tribe's request and agreed to hold the review of the first modification in abeyance until the litigation between the Tribe and the State of South Dakota was resolved.
38. Attorney for the Tribe's Gaming Commission, Terry Pechota, informed the General Counsel for the Tribe, Rollyn Samp, that the contract could not be approved or disapproved until the litigation was resolved.
39. The litigation between the Tribe and the State of South Dakota regarding the Tribal-State Compact is still pending, and the first modification to the approved management contract has never been approved by the NIGC Chairwoman.
40. Chairman Hogen never approved the first modification, dated February 15, 2007, to the approved management contract.
41. The Respondents and the Tribe acted under the first modification, resulting in the Tribe receiving less of the net gaming revenue than it should have received under the approved management contract.

42. Acting under the first modification, the Respondents and the Tribe, agreed to the following bonus payments which were not in compliance with the approved management contract:

Calendar Year	Net Income on which split based <sup>4</sup>	Amount due Tribe under approved contract <sup>5</sup>	Unapproved "Bonus" paid to Bettor Racing	Amount Received by Tribe (1 <sup>st</sup> Modification)
2006	\$ [ ]	\$ [ ]	\$ [ ]	\$ [ ]
2007	\$ [ ]	\$ [ ]	\$ [ ]	\$ [ ]

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43. Respondents conducted gaming operations at the Casino under the first modification, an unapproved modification to a management contract, in violation of IGRA and NIGC regulations, 25 U.S.C. § 2711 and 25 C.F.R. § 573.6(a)(7), from February 15, 2007, to July 31, 2008. And, the Tribe agreed to the first modification and acted under it in concert with the Respondents in violation of NIGC regulations, 25 U.S.C. § 2711(a)(1); 25 C.F.R. § 573.6(a)(7).

b. Second instance of operating under an unapproved modification of a management contract reducing the minimum guaranteed payment from [ ] % of gross handle to [ ] % of gross handle.

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44. On or about August 1, 2008, Respondents and the Tribe agreed to another modification (the second modification) to the approved management contract, making a second reduction in the minimum guaranteed payment on gross handle over \$ [ ] from [ ] % to [ ] %.

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45. This second modification was put into effect by the Respondents and the Tribe on August 1, 2008. Both the weekly minimum guaranteed payment and the end of year settlement calculation reflected this second modification.

<sup>1</sup> The net income on which the split of revenues is based was derived from the audited financial statements provided by Bettor Racing, Inc., plus the addition of undisputed amounts that should have been included in net income pursuant to the approved management contract such as Mr. Gallo's and Mr. Henry's salaries, interest income, and over/short amounts due to teller error.

<sup>5</sup> The amount due the Tribe under the approved management contract represents the split of monthly net income based on the applicable percentage each month. For example, in January the annual gross handle is less than \$ [ ] so the applicable percentage for the split of monthly net income is [ ] % to the Tribe and [ ] % to Bettor Racing. In December, when the annual gross handle totaled over \$ [ ] the applicable percentage for the split was [ ] % to the Tribe and [ ] % to Bettor Racing. For ease of calculation, the percentage split applied to the undisputed amounts added back into net income (see footnote 4 above) was [ ] % to the Tribe and [ ] % to Bettor Racing.

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46. Additionally, both parties asserted that the second modification was in effect during the annual independent audit for calendar year 2008 conducted by Hanson, Vilhauer, & Raml. Both the Tribe's comptroller, Laurel Tye, and Ray Henry, Bettor Racing's General Manager, documented the reduction in the minimum guaranteed payment that the Casino received during calendar year 2008. Further, the Tribe's General Counsel, Rollyn Samp, wrote a memorandum confirming that the Tribe's Executive Council had approved the amended compensation terms.

47. Respondents began making the weekly payments to the Tribe in accordance with the second modification and the Casino accepted the reduced minimum guaranteed payment equal to [ ]% of the gross handle from August 1, 2008, through April 5, 2010. b4

48. The second modification was never submitted to the NIGC or approved by the NIGC Chairwoman.

49. Acting under the second modification, the Respondents and the Tribe, agreed to the following payments which were not in compliance with the approved management contract:

Calendar Year	Net Income on which split based <sup>6</sup>	Amount due Tribe under approved management contract <sup>7</sup>	Unapproved Bonus paid to Bettor Racing	Amount Received by Tribe (2 <sup>nd</sup> Modification)
2008	\$ [ ]	\$ [ ]	\$ [ ]	\$ [ ]

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50. Respondents conducted the OTB under an unapproved second modification to a management contract in violation of IGRA and NIGC regulations, 25 U.S.C. § 2711 and 25 C.F.R. § 573.6(a)(7), from August 1, 2008, to April 5, 2010. And, the Tribe agreed to the unapproved second modification and acted under it in concert with the Respondents in violation of IGRA and NIGC regulations, 25 U.S.C. § 2711(a)(1) and 25 C.F.R. § 573.6(a)(7).

### THIRD VIOLATION

#### Respondents violate sole proprietary interest mandate of IGRA and NIGC regulations

51. Respondents exercised complete control over the OTB and ran the OTB as their own separate business and thereby controlled the money flowing into and out of the operation.

<sup>6</sup> See footnote 7.

<sup>7</sup> See footnote 8.

52. All of the OTB employees were hired and paid by Respondents. Furthermore, Respondents adopted their own employee policies to be applied only to OTB employees.
53. Respondents made all accounting and financial decisions related to the OTB. Respondents hired an auditor to perform an annual audit of the OTB separate and apart from the Casino. Respondents also maintained separate bank accounts from the Casino.
54. Respondents profited more from the OTB than the Tribe.
55. For calendar year 2005, the net gaming revenue of the OTB was \$[ ] b4
56. The Casino received a total payment of \$[ ] for calendar year 2005 from Respondents. b4
57. On August 31, 2006, the Tribe issued Resolution No. 06-100 that authorized a payment of \$[ ] to Respondents for calendar year 2005. b4
58. On September 6, 2006, the Tribe's President, Mark Allen, signed a check request for a bonus payment to Respondents for \$[ ] from the Casino. The check was issued directly out of the Casino's account. b4
59. This transfer by the Casino was accounted for as an expense of the gaming operation and none of the funds transferred on September 6, 2006, were ever distributed to the Tribe as net gaming revenue as required by IGRA and the Flandreau Gaming Ordinance.
60. The bonus was recorded in the Respondents' financial records as a "tribal bonus."
61. As a direct result of the tribal "bonus" for calendar year 2005, Respondents received 65% of the net gaming revenues of the OTB in calendar year 2005 in violation of IGRA, NIGC regulations, and the Flandreau Pari-mutuel Betting Ordinance. See 25 U.S.C. §§ 2710(b)(2)(A), (d)(1)(A)(ii); 25 C.F.R. § 522.6(c); Flandreau Pari-mutuel Betting Ordinance § 4.
62. For calendar year 2006, the total net revenue of the OTB was \$[ ] Under the terms of the original management contract, the amount owed to the Tribe should have been \$[ ] based on the scale included in the contract as follows: [ ] % of net gaming revenues for the first \$[ ] of handle and [ ] % of net gaming revenues for handle between \$[ ] and \$[ ] b4



63. The total amount paid to the Tribe by Respondents as compensation for the management contract for calendar year 2006 was \$ [ ] equal to 25% of the net revenue of the OTB. b4

64. On May 31, 2007, Respondents made an additional payment to the Tribe of \$ [ ] to make up the difference between weekly payments and the amount owed for calendar year 2006 pursuant to the approved management contract. b4

65. On May 31, 2007, the Casino issued a check request in the amount of \$ [ ] for payment to Respondents as a bonus for calendar year 2006. A check in the amount of \$ [ ] was issued on June 1, 2007, pursuant to the aforementioned check request, and signed by Laurel Tye, Comptroller of the Casino and counter-signed by Gordon Jones Jr., Treasurer for the Tribe. b4

66. This transfer by the Casino was accounted for as an expense of the Casino and none of the funds transferred to the Casino on May 31, 2007, were ever distributed to the Tribe as net gaming revenue as required by IGRA and the Flandreau Gaming Ordinance.

67. As a direct result of the bonus paid to Respondents, Respondents received 75% of the net gaming revenues generated by the OTB for calendar year 2006, in violation of IGRA, NIGC regulations, and the Flandreau Pari-mutuel Betting Ordinance. See 25 U.S.C. §§ 2710(b)(2)(A), (d)(1)(A)(ii); 25 C.F.R. § 522.6(c); Flandreau Pari-mutuel Betting Ordinance § 4.

68. For calendar year 2007, the total net gaming revenue of the OTB was \$ [ ] Under the terms of the management contract, the amount owed to the Tribe was \$ [ ] based on the scale included in the contract as follows: [ ] % of net gaming revenues for the first \$ of handle [ ] % of net gaming revenues for handle between \$ and \$ [ ] and [ ] % of net revenues for gross handle more than \$ [ ] b4

69. The total compensation distributed as net revenues to the Tribe for calendar year 2007 was \$ [ ] 25% of the net revenue of the OTB. b4

70. On June 18, 2008, Respondents paid the Casino \$ [ ] to make up the difference between weekly payments and the amount owed for calendar year 2007 under the management contract. This amount was a payment that would bring the Tribe's net revenue from the OTB to [ ] % of the net revenue when combined with the previous payments made as part of the minimum guaranteed payment. [ ] percent of the net revenues represents what the Tribe was entitled to receive under the approved management contract. b4

- 71. On June 19, 2008, a Casino check request was issued and labeled as "Bonus Bettor Racing 2007" in the amount of \$[ ]
- 72. On June 19, 2008, two checks were issued to Respondents in the amounts of \$[ ] and \$[ ] for a total of \$[ ]. The checks were signed by Laurel Tye and counter-signed by Garrie Kills A Hundred, a member for the Tribe's Executive Committee. b4
- 73. This transfer by the Casino was accounted for as an expense of the Casino and none of the funds transferred to the Casino on June 18, 2008, were ever distributed to the Tribe as net gaming revenue as required by IGRA and the Flandreau Gaming Ordinance.
- 74. As a direct result of the bonus paid to Respondents, Respondents received 75% of the net revenues generated by the OTB in calendar year 2007, in violation of IGRA, NIGC regulations, and the Flandreau Pari-mutuel Betting Ordinance. See 25 U.S.C. §§ 2710(b)(2)(A), (d)(1)(A)(ii); 25 C.F.R. § 522.6(c); Flandreau Pari-mutuel Betting Ordinance § 4.
- 75. For calendar year 2008, the total net revenue of the OTB was \$[ ]. Under the terms of the approved management contract, the amount owed to the Tribe should have been \$[ ] based on the scale included in the contract as follows: [ ] % of net gaming revenues for the first \$[ ] of handle, [ ] % of net gaming revenues for handle between \$[ ] and \$[ ], and [ ] % of net revenues for handle more than \$[ ]. b4
- 76. The total payment distributed to the Tribe as net gaming revenue for calendar year 2008 was \$[ ] 22% of the total net revenue of the OTB. b4
- 77. On June 10, 2009, Respondents issued a check to the Casino in the amount of \$[ ]. b4
- 78. On June 10, 2009, a check request was issued by the Casino for payment to the Respondents in the amount of \$[ ]. The payment was for a half "bonus" for 2008. The check request was signed by Tribal President, Joshua Weston. A check was issued by the Casino on June 12, 2009, for \$[ ] to Respondents and was signed by Laurel Tye and counter-signed by Joshua Weston, President of the Tribe's Executive Committee. b4
- 79. On June 30, 2009, Respondents issued a check to the Casino in the amount of \$[ ]. This amount was a payment that would bring the Tribe's net revenue from the OTB to [ ] % of the net revenue when b4

combined with the previous payments made as part of the minimum guaranteed payment pursuant to the approved management contract.

80. On June 24, 2009, a check request was issued by the Casino for Respondents in the amount of \$[ ] The payment was for a second half "bonus" to Respondents for 2008. The check request was signed by Laurel Tye and Jackie Barse. A check was issued by the Casino on June 26, 2009, for \$[ ] to Respondents and was signed by Laurel Tye and counter-signed by Gina Williams, a member of the Tribe's Executive Committee. b4
81. This transfer by the Casino was accounted for as an expense of the Casino and none of the funds transferred to the Casino on June 10, 2009, or June 30, 2009, were ever distributed to the Tribe as net gaming revenue as required by IGRA and the Flandreau Gaming Ordinance.
82. As a direct result of the "bonus" paid to Respondents, Respondents received 78% of the net gaming revenues generated by the OTB for calendar year 2008, in violation of IGRA, NIGC regulations, and the Flandreau Pari-mutuel Betting Ordinance. *See* 25 U.S.C. §§ 2710(b)(2)(A), (d)(1)(A)(ii); 25 C.F.R. § 522.6(c); Flandreau Pari-mutuel Betting Ordinance § 4.
83. The "bonus" payments received by Respondents are above the statutory limitations for management contractors set forth in IGRA – which along with the control exercised by Respondents over the OTB resulted in the Respondents' violation of IGRA and NIGC regulations. *See* 25 U.S.C. §§ 2710(b)(2)(A), (d)(1)(A)(ii); 25 C.F.R. § 522.6(c).
84. In addition to the above, rather than acting as a manager, Mr. Gallo stated that he was the owner of the OTB at the Casino and that the Tribe had no ownership interest. Mr. Gallo also stated that it was his understanding that he both owned and operated the OTB at the Casino.
85. In summary:

Calendar Year	Net Income on which split based <sup>8</sup>	Amount Received by Tribe	Bettor Racing Amount Received (including bonus)	Percentage of Net Revenues received by Bettor Racing	Percentage of Net Revenues received by Tribe
2005	\$[ ]	\$[ ]	\$[ ]	65%	35%
2006	\$[ ]	\$[ ]	\$[ ]	75%	25%

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<sup>8</sup> See footnote 7.

2007	\$ [ ]	\$ [ ]	\$ [ ]	75%	25%
2008	\$ [ ]	\$ [ ]	\$ [ ]	78%	22%

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86. Respondents' control over the OTB, along with an unreasonably high percentage of net revenues received by them during the term of the management contract, provided the Respondents with a proprietary interest in the OTB.
87. Respondents possessed a proprietary interest in the OTB in violation of the sole proprietary interest requirement of IGRA, NIGC regulations, and the Flandreau Pari-mutuel Betting Ordinance. *See* 25 U.S.C. §§ 2710(b)(2)(A), (d)(1)(A)(ii); 25 C.F.R. § 522.6(c); Flandreau Pari-mutuel Betting Ordinance § 4.

#### FOURTH VIOLATION

Improper use of net gaming revenues – Tribe violates IGRA and NIGC regulations by paying Bettor Racing a bonus directly from the net gaming revenues that were owed to the Tribe

88. IGRA mandates that the Tribe use its net gaming revenue for one of five purposes. *See* 25 U.S.C. § 2710(b)(2) and (3); 25 C.F.R. §§ 522.4(b)(2) and 522.6(b). The Flandreau Gaming Ordinance requires that all net gaming revenue, as defined by IGRA, be distributed to the Tribe, and mandates that the Tribe use the net gaming revenue for the purposes specified. Flandreau Gaming Ordinance § 17-1-3(15).
89. According to the approved management contract, the Tribe is entitled to receive [ ]% of all net gaming revenue generated by the OTB managed by Respondents. All of the monies received from Respondents pursuant to the approved management contract are net gaming revenue as defined by IGRA and the Flandreau Gaming Ordinance. *See* 25 U.S.C. § 2703(9); Flandreau Gaming Ordinance § 17-1-3(15).
90. The Casino paid Respondents "bonuses" and categorized them as an operating expense of the Casino. In so doing, the calculation of net gaming revenues due to the Tribe was incorrect and the amount paid to Respondents as "bonuses" was in fact net gaming revenue due to the Tribe.
91. Therefore, the Tribe, in paying Respondents "bonuses" in 2006, 2007, 2008, and 2009, violated IGRA, NIGC regulations, and the Flandreau Gaming Ordinance by not using net gaming revenue as specified in IGRA and the Flandreau Gaming Ordinance. *See* 25 U.S.C. § 2710(b)(3); Flandreau Gaming Ordinance § 17-1-3(15).

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FIFTH VIOLATION

Failure to submit management letters – Tribe violates NIGC regulations by not submitting management letters within 120 days of its fiscal year end

92. NIGC regulations require the Tribe to submit any management letters, together with the Casino's financial statements and audit, prepared by the an independent auditor within 120 days of the end of the Casino's fiscal year. *See* 25 C.F.R. § 571.13(a).
93. In conjunction with the Casino's annual audit for its fiscal year end September 27, 2005, the Tribe's independent auditor, Donald J. Raml of Hanson, Vilhauer & Raml, issued a management letter dated October 21, 2005. The October 21, 2005 management letter was not submitted to the NIGC within 120 days of the Casino's fiscal year end as required by NIGC regulations.
94. Together with the Casino's annual audit for fiscal year end September 26, 2006, Mr. Raml also issued a second management letter dated December 4, 2006. The December 4, 2006 management letter was not submitted to the NIGC within 120 days of the Casino's fiscal year end as required by NIGC regulations.
95. The October 21, 2005 and December 4, 2006 management letters have never been submitted to the NIGC.
96. Therefore, the Tribe violated NIGC regulation, 25 C.F.R. § 571.13(a), by not submitting the management letters dated October 21, 2005, and December 4, 2006, within 120 days of the Casino's 2005 and 2006 fiscal year ends.

F. Measures Required to Correct the Violations

Respondents are no longer operating the OTB at the Casino. Regardless, Respondents can and must reimburse the Tribe for all of the additional amounts of compensation received from the Casino because these payments provided the Respondents with more compensation than was due them under the approved management contract. This amount represents the difference between what the Tribe should have received under the approved management contract and what the Tribe actually received pursuant to the unapproved modifications. This reimbursement must occur within 30 days of this notice.

The NIGC Audit Division calculated the additional amounts owed to the Tribe to be \$ [ ] Respondents already paid an uncontested \$ [ ] to the Tribe. Therefore,

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Respondents must pay the Tribe the balance of \$ [ ] within 30 days of this notice. This amount reflects what is owed to the Tribe for 2005, 2006, 2007, and 2008.

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The NIGC is still investigating the payments made to the Tribe in 2009 and 2010, as well as the incentives or rebates paid to bettors; [ ] and consulting fees paid to agents over the entire term of the approved management contract. The NIGC Chairwoman may issue an additional notice of violation regarding matters that are still under investigation.

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Further, the Tribe cannot cure its violations of allowing Bettor Racing and Mr. Gallo to operate the OTB without an approved management contract or operate under two unapproved modifications to the management contract.

The Tribe's failure to submit management review letters within 120 days of its fiscal year end cannot be cured because the time for filing such documents has passed.

As for the violation of use of net gaming revenues, when the Tribe is reimbursed by Respondents, the amounts received from Respondents must be used in a manner consistent with IGRA and the Flandreau Gaming Ordinance and other applicable Tribal laws.

#### G. Appeal

Within 30 days after service of this Notice of Violation, the Tribe and Respondents may appeal to the full 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 Tribe and Respondents may appeal this Notice of Violation separately. The Tribe and Respondents have a right to assistance of counsel in such an appeal. A notice of appeal must reference this Notice of Violation.

Within ten days after filing a notice of appeal, the Tribe and Respondents 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 Tribe and Respondents wish to present oral testimony or witnesses at the hearing, the Tribe and Respondents 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 Tribe and Respondents may waive their right to an oral hearing and instead elect to have the matter determined by the Commission solely on the basis of written submissions.

#### H. Fine-Submission of Information

The violations cited above may result in the assessment of civil fines against the Tribe and Respondents in an amount not to exceed \$25,000 per violation per day. Under 25 C.F.R. § 575.5(a), the Tribe and Respondents may submit written information about the

violations to the Chairwoman within 15 days after service of this notice of violation (or such longer period as the Chairwoman may grant for good cause). The Chairwoman shall consider any information submitted in determining the facts surrounding the violation and the amount of the proposed civil fines, if any.

Dated this 19<sup>th</sup> of May, 2011



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Tracie L. Stevens, Chairwoman