NOTICE OF VIOLATION

Ref. No.: NOV-99-10
August 11, 1999

To: Herbert Whittish
Chairman
Shoalwater Bay Indian Tribe
Tokeland, Washington 98590

The Chairman of the National Indian Gaming Commission ("NIGC") hereby gives notice that the Shoalwater Bay Indian Tribe (hereafter referred to as "Tribe" or "Respondent"), located in Tokeland, Washington is in violation of the Indian Gaming Regulatory Act ("IGRA") and NIGC regulations.[1]

1. Background

The Respondent is a federally recognized Indian Tribe with tribal headquarters located in Tokeland, Washington. The Respondent operates the Shoalwater Bay Bingo and Casino facility ("Casino") located at Highway 105 and Old Tokeland Road, Tokeland, Washington, 98590. The Casino is located on the Shoalwater Bay Indian Reservation, on lands held in trust by the United States for the benefit of the Shoalwater Bay Indian Tribe. The lands are considered "Indian lands" as that term is defined in IGRA. *See* 25 U.S.C. § 2703(4). The Respondent operates class III gaming at its Casino. The Respondent does not have a Tribal-State compact with the State of Washington allowing for the operation of class III gaming.

2. The circumstances of the violation are as follows:

IGRA creates three classes of gaming which differ in the degree of tribal, state, and federal oversight. Class I gaming consists of "social games [played] solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class II gaming includes bingo, related activities, and certain non-banking card games. 25 U.S.C. § 2703(7)(A). IGRA specifically excludes any

[1]NIGC regulations are set forth in Chapter III, Title 25, Parts 500-599 of the Code of Federal Regulations. All sections of NIGC regulations cited in this Notice Of Violation refer to the pertinent parts of Title 25. NIGC regulations implement provisions of the IGRA.

banking card games from classification as a class II game. 25 U.S.C. § 2703(7)(B). Class III gaming is defined as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). Pursuant to NIGC regulations, class III gaming specifically includes (but is not limited to) any slot machines as defined in 15 U.S.C. § 1171(a)(1) and electronic or electromechanical facsimiles[2] of any game of chance. *See* 25 C.F.R. § 502.4. Class III gaming activities are permissible on Indian lands only if such activities are "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . ." 25 U.S.C. § 2710(d)(1)(C).

Operation of Class III Gambling Devices

From approximately March 12, 1998, through the date of the issuance of this Notice of Violation, the Respondent has operated the Shoalwater Bay Bingo and Casino facility on Indian lands located in Tokeland, Washington. During this period, the Respondent offered the following class III gambling devices: (1) Native Treasures; (2) Catch a Dream; (3) Sheriff's Round Up; (4) Pirate's Loot; and (5) American Game Technology Cash Key Video gaming devices.

The machines identified above are gambling devices as defined under 15 U.S.C. § 1171(a), and therefore, fall within the definition of class III gaming. *See* 25 C.F.R. § 502.4. Class III gaming activities are lawful on Indian lands only if such activities are "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . ." 25 U.S.C. § 2710(d)(1)(C). A compact is in effect only when "notice of approval by the Secretary [of the Interior] of such compact has been published by the Secretary in the Federal Register." 25 U.S.C. § 2710(d)(3)(B). The Respondent has not entered into a compact with the State of Washington and there has been no official approval of any compact and no publication in the Federal Register. Therefore, the Respondent is operating such class III gambling devices in the absence of a Tribal-State compact in violation of 25 U.S.C. § 2710(d). Additionally, the operation of class III gaming activities in the absence of a compact constitutes a "substantial" violation under NIGC regulations. *See* 25 C.F.R. § 573.6(11).

Operation of Class III Card and Table Games

During the relevant time period, the Respondent also offered other forms of class III gaming, including the following banked[3] games: (1) pai gow poker; (2) blackjack; and (3) roulette. NIGC regulations define all banking games as class III gaming. *See* 25 C.F.R. 502.4(a). The types of pai

---

[2]An electronic or electromechanical facsimile means any gambling device as defined in 15 U.S.C. § 1171(a)(2) or (3). *See* 25 C.F.R. § 502.8.

[3]Banking games, as commonly understood and as defined in NIGC regulations, are games in which the banker (usually the house) takes on, that is, competes against, all players, collecting from losers and paying winners. *See* 25 C.F.R. § 502.11. Conversely, non-banking card games are games where players play against each other. Poker is the typical example of a non-banking card game.

gow poker and blackjack identified in the instant action are banking "card" games, therefore, both pai gow poker and blackjack qualify as class III gaming. Moreover, NIGC regulations specifically define both pai gow poker and blackjack (if played as banking games) as class III gaming. *See* 25 C.F.R. § 502.4(a)(1). NIGC regulations also specifically define roulette as class III gaming. *See* 25 C.F.R. § 502.4(a)(2). Once again, the Respondent is operating class III games (pai gow poker, blackjack and roulette) in the absence of a Tribal-State compact in violation of 25 U.S.C. § 2710(d). Additionally, the operation of class III gaming activities in the absence of a compact constitutes a "substantial" violation. *See* 25 C.F.R. § 573.6(11).

3. The measures required to correct the violation:

The Respondent is to immediately cease and desist from the operation of all class III games within its Casino facility.

4. Fine-Submission of Information

The violations cited in this NOV may result in the assessment of civil fines against the Respondent in an amount not to exceed $25,000 per violation per day. The Respondent may submit written information about the violations to the NIGC Chairman within 15 days after service of this NOV (or such longer period as the NIGC Chairman may grant for good cause). *See* 25 C.F.R. § 575.5(a). The NIGC Chairman shall consider any information submitted in determining the facts surrounding the violations and the amount of the civil fine, if any. Such information should be submitted to the National Indian Gaming Commission, 1441 L Street NW, Suite 9100, Washington, D.C. 20005.

5. Notice of rights of appeal:

The Respondent may appeal the allegations contained in this NOV to the NIGC within 30 days after service of this NOV. *See* 25 C.F.R. Part 577. The Respondent may appeal the allegations by submitting a NOTICE OF APPEAL to the National Indian Gaming Commission, 1441 L Street NW, 9th Floor, Washington, D.C. 20005. The Respondent has a right to be represented by counsel in such an appeal. A NOTICE OF APPEAL must reference this NOV. Within ten (10) days after filing a NOTICE OF APPEAL, the Respondent shall file with the NIGC a supplemental statement that states with particularity the relief desired and the grounds therefore and includes, when available, supporting evidence in the form of affidavits.

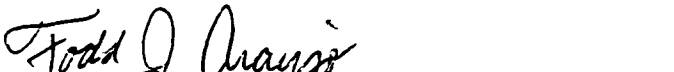
If the Respondent wishes to present oral testimony or witnesses at a hearing, the Respondent must include a request to do so with the supplemental statement. The request to present oral testimony must specify the names of the proposed witnesses and the general nature of their expected testimony, and whether a closed hearing is requested and why. The Respondent may waive the right

to an oral hearing and instead elect to have the matter determined by the NIGC solely on the basis of the written submissions.

DATED this 11th Day of August, 1999.

MONTIE R. DEER, Chairman
National Indian Gaming Commission

DATED this 11th Day of August, 1999.



TODD J. ARAUJO, Staff Attorney
National Indian Gaming Commission