

National Indian Gaming Commission

NOTICE OF VIOLATION

NOV-24-02

To: Honorable E. Michael Silvas, Governor
Ysleta del Sur Pueblo
119 S. Old Pueblo Road
El Paso, Texas 79907

1. *Notification of Violation*

The National Indian Gaming Commission Acting Chairwoman gives notice that the Ysleta del Sur Pueblo (Pueblo) violated the Indian Gaming Regulatory Act (IGRA), NIGC regulations, and its own IGRA Class II gaming ordinance by failing to submit fiscal year 2022 and 2023 audited financial statements (AFS) for its gaming operation. These submissions are four hundred ninety-three (493) days and one hundred twenty-seven (127) days overdue, respectively.

In 2015, the Pueblo submitted a Class II gaming ordinance to the NIGC Chair for approval pursuant to IGRA. The Chair's approval letter explained that the U.S. Department of Interior "Solicitor's Office concurred with our conclusion that IGRA applies" "and governs gaming on the Pueblo's reservation."¹ In 2022, the U.S. Supreme Court, in *Ysleta del Sur Pueblo v. Texas*, found IGRA applies to the Pueblo's gaming if such gaming is not prohibited by Texas law:

None of this is to say that the Tribe may offer any gaming activity on whatever terms it wishes. It is only to say that the Fifth Circuit and Texas have erred in their understanding of the Restoration Act. Under that law's terms, if a gaming activity is prohibited by Texas law it is also prohibited on tribal land as a matter of federal law. Other gaming activities are subject to tribal regulation and must conform with the terms and conditions set forth in federal law, including IGRA to the extent it is applicable.²

¹ Letter to Governor Hisa, Ysleta del Sur Pueblo, from NIGC Chairman Jonodev Chaudhuri re: Ysleta del Sur Pueblo Class II Tribal Gaming Ordinance and Resolution No. TC-021-14 at 3 (Oct. 5, 2015).

² *Ysleta del Sur Pueblo v. Texas*, 596 U.S. 685, 702–03 (2022) (citing, the Brief for United States as *Amicus Curiae Supporting Petitioners* at 31–33 (Dec. 2021)); The Pueblo's Supreme Court merits brief also asserted that IGRA applied to its gaming. *See Ysleta del Sur Pueblo v. Texas*, Brief of Petitioners at 35-36 (Dec. 2, 2021) ("No one disputes that, absent another federal statute precluding IGRA's application, IGRA by its terms applies to the Tribes' gaming activities. . . . The Tribes' gaming activities are [] governed by IGRA, under which they are subject to the Tribes' own regulatory jurisdiction and that of the NIGC for Class II games . . .").

This finding aligns with the U.S. Department of Justice’s position:

[The Restoration Act] as correctly construed to ban only those gaming activities on petitioner’s lands that are wholly prohibited under Texas law, is consistent with IGRA’s regulation of gaming in Indian country. That interpretation properly permits IGRA’s detailed national system for Indian gaming regulation, administered by the NIGC, to apply to gaming on petitioner’s lands.³

Since the Supreme Court’s decision in mid-2022, the NIGC sought the Pueblo’s voluntary compliance with the IGRA submission requirements via meetings, including government-to-government meetings; legal analysis; technical assistance; notifications; reminders; and letters of concern⁴. Nonetheless, the Pueblo contends that its gaming is governed solely by its Restoration Act⁵, not IGRA. But the Pueblo is incorrect: IGRA applies, and the Pueblo violated the statute, IGRA’s implementing regulations, and its own IGRA Class II gaming ordinance by failing to submit the 2022 and 2023 AFS.

2. *Authority*

Pursuant to IGRA and NIGC regulations, the NIGC Chair may issue a notice of violation (NOV) to any person for violating any provision of IGRA, NIGC regulations, or a NIGC Chair-approved gaming ordinance.⁶

3. *Applicable Federal laws, tribal ordinance, caselaw, and agency guidance*

- A. IGRA requires an annual audit of each gaming operation and requires tribes to submit a copy of the results of the annual audit(s) to the NIGC.⁷
- B. NIGC regulations define “gaming operation” as each economic entity that is licensed by a tribe, operates the games, receives the revenues, issues the prizes and pays the expenses.⁸
- C. NIGC regulations require that a gaming operation maintain permanent books of account or records, including inventory records of gaming supplies, sufficient to establish the amount of gross and net income, deductions and expenses, receipts and disbursements and other information required in any

³ Ysleta del Sur Pueblo v. Texas, Brief for United States as *Amicus Curiae Supporting Petitioners* at 31 (Dec. 2021).

⁴ Letter of Concern to Honorable Michael Silvas, Governor, Ysleta del Sur Pueblo, from Tom Cunningham, NIGC Chief Compliance Officer (CCO) re: Failure to Submit Fiscal Year 2022 Audited Financial Statements and an Agreed Upon Procedures Report (Sept. 28, 2023); Letter of Concern to Honorable E. Michael Silvas, Governor, Ysleta del Sur Pueblo, from Tom Cunningham, NIGC CCO re: Failure to Submit Fiscal Year 2023 Audited Financial Statements (July 12, 2024).

⁵ Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, § 107, 101 Stat. 668-669 (1987).

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

⁷ 25 U.S.C. § 2710(b)(2)(C).

⁸ 25 C.F.R. § 502.10.

financial statement, report, or other accounting prepared pursuant to IGRA and NIGC regulations. Tribes must make such records available for inspection by the NIGC for no less than 5 years.⁹

- D. NIGC regulations require that a tribe engage an independent certified public accountant to conduct annual independent audits of the financial statements of each gaming operation located on Indian lands for each fiscal year.¹⁰
- E. NIGC regulations further require a tribe submit a copy of the financial statements and audits, with any management letter and other documents and reports setting forth the results of the annual audit to the NIGC within 120 days after the end of each gaming operation's fiscal year.¹¹
- F. The Ysleta del Sur Amended Class II Tribal Gaming Ordinance, Number 00492, was approved by the NIGC Chair on October 5, 2015 (Ordinance).
- G. The Ordinance, Section 21, requires "Each Gaming Facility administered by the Regulatory Commission shall maintain accurate and up to date records for each gaming activity conducted. Records shall include: a. all financial transactions; b. all gaming machine testing, malfunctions, maintenance and repairs; c. personnel; d. complaints of patrons; e. facility in house investigations of any kind; f. incidents and accidents; g. actions by the Regulatory Commission against players or Gaming Facility visitors; and, h. actions by Regulatory Commission against or in reprimand of employees."
- H. The Ordinance, Section 22, entitled "Independent Audits" mandates in sub-section 1: "The Regulatory Commission shall require, and the Tribal Council shall cause, an audit to be conducted each year of all Class II Gaming Operations conducted on Tribal Lands. Such audit(s) shall be conducted by an Independent auditing firm, selected at the sole discretion of the Tribal Council, or by the Regulatory Commission on its behalf." Sub-section 3 directs: "The Regulatory Commission shall furnish a copy of each annual gaming audit report to the Commission." And the definitions of the Ordinance define "Commission" to "mean[] the National Indian Gaming Commission established and existing pursuant to the Gaming Regulatory Act."
- I. In 2022, in *Ysleta del Sur Pueblo v. Texas*, the U.S. Supreme Court found IGRA applies to the Pueblo's gaming if such gaming is not prohibited by Texas law: "Under [the Restoration Act's] terms, if a gaming activity is prohibited by Texas law it is also prohibited on tribal land as a matter of federal law. Other gaming activities are subject to tribal regulation and must conform with the terms and conditions set forth in federal law, including

⁹ 25 C.F.R. § 571.7(a)-(c).

¹⁰ 25 C.F.R. § 571.12(b); *see also* Ysleta del Sur Pueblo Class II Tribal Gaming Ordinance § 22(1).

¹¹ 25 C.F.R. § 571.13(a); *see also* Ysleta del Sur Pueblo Class II Tribal Gaming Ordinance § 22(3).

IGRA to the extent it is applicable.”¹²

- J. On March 24, 2023, the NIGC Office of General Counsel (OGC) confirmed NIGC’s jurisdiction over the Pueblo’s non-prohibited gaming in a letter to the Pueblo’s General Counsel. Specifically, NIGC OGC explained:

in *Ysleta*, the Supreme Court held that the provisions of the Restoration Act that apply to the Pueblo only ban those gaming activities that are banned in Texas and do not provide for Texas gaming laws to act as surrogate federal law on Indian lands. The Court explicitly stated, ‘[o]ther gaming activities [those not prohibited]... must conform with the terms and conditions set forth in federal law, including IGRA to the extent it is applicable.’ IGRA applies to all gaming activities conducted on Indian lands. Here, the Pueblo’s gaming activity occurs on Indian lands. Therefore, IGRA applies to the Pueblo’s gaming activity and, pursuant to the *Ysleta* decision, the gaming must conform to the terms and conditions set forth in IGRA.¹³

4. *Role of Independent Audit Report*

Submission of the annual independent audit report by a firm of certified public accountants is critical to the NIGC’s mission: protecting the integrity of Indian gaming. A firm’s ability to conduct an audit in accordance with generally accepted auditing standards and render an opinion on the financial statements prepared in conformity with generally accepted accounting principles provides a certain level of assurance as to the security of tribal gaming revenues. The audit report prepared and submitted on a timely basis is evidence of, among other things, the integrity of the gaming operation and, more specifically, the adequacy of the books and records, the functioning of the internal financial controls, and the disclosure of information bearing upon the financial statements.

5. *Circumstances of the Violation*

- A. The Pueblo is a federally recognized Indian tribe with tribal headquarters in Ysleta del Sur Pueblo, Texas.
- B. IGRA requires that tribes submit annual audits of each gaming operation.¹⁴ NIGC regulations require that a tribe engage an independent certified public accountant to provide annual independent audits of the financial statements of each gaming operation located on Indian lands for each fiscal year.¹⁵ The NIGC regulations further require a tribe submit a copy of the financial statements and audits, with any management letter and other documents setting forth the results of the annual audit to the

¹² *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 702–03 (2022) (citing, the Brief for United States as *Amicus Curiae Supporting Petitioners* at 31–33 (Dec. 2021)).

¹³ Letter to General Counsel Terrence Padilla, Speaking Rock Entertainment Center, from NIGC Acting General Counsel Rea Cisneros re: Response to February 8, 2023 Letter at 1 (Mar. 24, 2023).

¹⁴ 25 U.S.C. § 2710(b)(2)(C).

¹⁵ 25 C.F.R. § 571.12(b).

NIGC within 120 days after the end of each gaming operation's fiscal year.¹⁶

- C. The Tribe conducted gaming at its operation, Speaking Rock Entertainment Center (Casino), in Ysleta del Sur Pueblo, Texas, during 2022 and 2023.
- D. In a government-to-government meeting with NIGC Chairman Simermeyer on January 18, 2023, the Pueblo informed the Chairman and NIGC staff that the Casino's fiscal year is a calendar year and ends on December 31st.
- E. Consequently, the AFS for the Pueblo's gaming operation for fiscal years 2022 and 2023 were due to the NIGC on or before May 1, 2023, and May 1, 2024, respectively.
- F. The NIGC issued a Letter of Concern (LOC) regarding the fiscal year 2022 AFS on September 28, 2023, directing the Pueblo to submit the document within ten (10) days of the LOC. The Pueblo requested an extension, which was granted until October 16, 2023.
- G. In response to the LOC, the Pueblo advised "It remains our position that we are gaming under our Restoration Act, not IGRA, and the NIGC has no regulatory authority over that gaming."¹⁷
- H. Given the Pueblo's failure to submit a fiscal year 2023 AFS, on July 12, 2024, NIGC issued another LOC to the Pueblo. The LOC instructed the Pueblo to submit the document within ten (10) days of the LOC. The Pueblo responded, reiterating "It remains our position that we are gaming under our Restoration Act, not IGRA, and the NIGC has no regulatory authority over that gaming."¹⁸
- I. To date, the Pueblo has not submitted fiscal year 2022 and 2023 AFS for the Casino in violation of IGRA, NIGC regulations, and the Pueblo's gaming ordinance.

6. *Measures Required to Correct the Violations*

No remedial action can correct failing to submit fiscal year 2022 and 2023 audited financial statements.¹⁹ These documents were due within 120 days of the end of the Pueblo's fiscal year, December 31st. Therefore, the 2022 AFS were due by May 1,

¹⁶ 25 C.F.R. § 571.13(a).

¹⁷ Letter to Thomas Cunningham, NIGC COO, from Governor Michael Silvas, Ysleta del Sur Pueblo re: Response to Letter of Concern Dated September 28, 2023, at 2 (Oct. 11, 2023).

¹⁸ Letter to Thomas Cunningham, NIGC COO, from Governor Michael Silvas, Ysleta del Sur Pueblo re: Response to Letter of Concern Dated July 12, 2024, at 2 (Aug. 2, 2024).

¹⁹ 25 C.F.R. §§ 542.3(f), 543.23(d), and 571.13(a).

2023 and the 2023 AFS were due by May 1, 2024. The 2022 submission is four hundred ninety-three (493) days overdue and the 2023 submission is one hundred twenty-seven (127) days overdue. **The Pueblo is directed to submit to NIGC the fiscal year 2022 and 2023 audited financial statements within ten (10) calendar days of the issuance of this notice of violation.**

7. Appeal

The Pueblo may appeal this Notice of Violation within 30 days of service by:
1) requesting a hearing before a Presiding Official under 25 C.F.R. part 584²⁰; or,
2) waiving their right to an oral hearing and instead electing to have the matter determined by the Commission solely based on written submissions pursuant to 25 C.F.R. part 585²¹. **Failure to file an appeal within the time provided shall result in a waiver of the right to appeal.**

Any appeal of this Notice of Violation should be submitted to the NIGC at the following address:

NIGC Office of General Counsel
1849 C Street NW Mail Stop # 1621
Washington, DC 20240.

A notice of appeal must reference this Notice of Violation.

If a party elects a hearing under part 584, they must file a brief with the Commission within ten (10) days after filing a notice of appeal²², stating with particularity the relief desired and the grounds in support, which may include supporting documentation and evidence in the form of affidavits²³. If a party prefers a closed hearing, they must include with the brief a request to do so and the reasons therefor²⁴. And if a party desires to present oral testimony at the hearing, they must include with their brief the specific names of proposed witnesses and the general nature of their expected testimony²⁵.

Pursuant to part 585, a party may waive their right to an oral hearing and instead elect to have the matter determined by the Commission solely on the bases of written submissions²⁶. To do so, the notice of appeal must reference this Notice of Violation and include a written waiver of the right to an oral hearing before a Presiding Official, electing to have the matter determined by the Commission solely based on written submissions²⁷. The appeal brief must be filed within 30 days of the service of

²⁰ 25 C.F.R. § 584.3(a).

²¹ 25 C.F.R. § 585.3.

²² 25 C.F.R. § 584.3(b).

²³ *Id.* (b)(2).

²⁴ *Id.* (b)(1).

²⁵ *Id.*

²⁶ 25 C.F.R. § 585.1(a).

²⁷ 25 C.F.R. § 585.3.

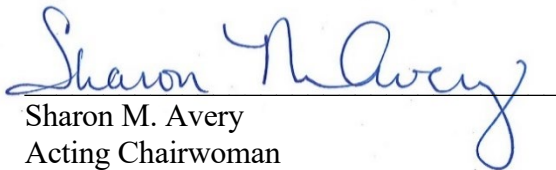
the record; succinctly state the relief sought and the supporting grounds therefor; and may include supporting documentation.²⁸

8. *Fine-Submission of Information*

The violations in this Notice of Violation may result in the assessment of a civil fine against the Pueblo in an amount not to exceed \$63,992 per violation per day.

Under 25 C.F.R. § 575.5(a), each party may submit written information about the violations to the Chair within fifteen (15) days after service of the Notice of Violation (or such longer period as the Chair may grant for good cause). The Chair shall consider any information submitted in determining the facts surrounding the violations and the amount of the proposed civil fine.

Dated this 5th day of September 2024.


Sharon M. Avery
Acting Chairwoman

²⁸ *Id.*

Certificate of Service

I certify that this **NOV-24-02** was sent by first class mail, certified U.S. mail, return receipt requested, and email on this 5th day of September 2024 to:

Honorable E. Michael Silvas, Governor
Ysleta del Sur Pueblo
119 S. Old Pueblo Road
El Paso, Texas 79907

And by first class mail only to:

Berney Gonzales
Raymond Etcity
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