

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:)
Brenda Jo Musel,) Case No. 20-42761
) Chapter 7
)
Debtor.)
)

DEBTOR’S RESPONSE TO TRUSTEE’S MOTION FOR TURNOVER OF PROPERTY

TO: THE UNITED STATES BANKRUPTCY COURT, THE UNITED STATES TRUSTEE,
AND JULIA A. CHRISTIANS, CHAPTER 7 TRUSTEE.

Debtor, Brenda Jo Musel, by and through their attorney, responds to the trustee’s Motion for Turnover of Property.

1. Debtor filed for Chapter 7 Bankruptcy relief on December 8, 2020.
2. Debtor filed amended schedules on February 17, 2020 which described the debtors right to receive future per capita payments held in trust and quoted Gaming Revenue Allocation Plan at Section 12(D) (EXHIBIT A).
3. Section 12(D) applies only to a Deferred Per Capita Savings Plan which the debtor has not elected.
4. The amended schedules should have explained that nothing contained in the Gaming Revenue Allocation Plan gives any person a vested property right or interest in Band gaming revenues, pursuant to Section 16. Debtor intends on filing an amended Schedule B to more accurately describe the agreement.

WHEREFORE, Debtor respectfully requests that the Court deny the trustee’s motion to compel debtor to turnover any and all per capita payments received after December 8, 2020 and any future payments made to the debtor.

Dated: February 26, 2021

HOGLUND, CHWIALKOWSKI & MROZIK, PLLC

/e/ Alyssa F. George
Alyssa F. George, Atty ID #396799
Hoglund, Chwialkowski & Mrozik, PLLC
1781 County Road B West
Roseville, MN 55113
(651) 628-9377

VERIFICATION

I, Alyssa F. George, declare under penalty of perjury that I have read the foregoing documents and that they are true and correct to the best of my knowledge, information and belief.

Date: February 26, 2021

/s/ Alyssa F. George

EXHIBIT A

**POKAGON BAND OF POTAWATOMI INDIANS
GAMING REVENUE ALLOCATION PLAN**

Section 1. Purpose

The Federal Indian Gaming Regulatory Act of 1988 (“IGRA”)(25 U.S.C. §§ 2701 *et seq.*) allows tribal operation of gaming facilities for purposes of funding tribal governmental operations, providing for the general welfare of the tribe and its members, promoting tribal economic development, and donating to charitable organizations or local governmental agencies. The IGRA allows a per capita distribution plan as one means of providing for the general welfare of the tribe. The Pokagon Band of Potawatomi Indians (“Band”) operates gaming facilities in accordance with the IGRA. The Band’s Tribal Council (“Tribal Council”) finds that it is in the best long-term interest of the Band to fund core tribal operations with the net revenues from gaming operations, but also to provide for per capita allocations to Band members from excess net revenues. The purpose of this Code is to provide for the allocation of net gaming revenues among Band operations and a per capita distribution program. This Code is intended to comply with the IGRA and all other applicable federal law.

Section 2. Authority

This Code is enacted by the Tribal Council pursuant to the Pokagon Band of Potawatomi Indians By-Laws and the authority granted by 25 U.S.C. § 1300j-4(a)(2).

Section 3. Allocation of Net Gaming Revenue

A. Debt Retirement and Compact Payments

Net gaming revenues shall be dedicated, as a first priority, to repayment of debt, payment of capital and regulatory costs, maintenance of reasonable reserves and cash balances *provided* that such reasonable reserves and cash balances shall be limited to amounts required by federal law (including minimum internal control standards) and what is necessary for capital expenditures, and compliance with all contractual obligations of the Band or any governmental branch, division, subdivision, enterprise, agency, or other instrumentality of the Band relating to the gaming operation. The term “net gaming revenues” means all gross revenues of the gaming operation, less amounts paid out as or for prizes, and less total operating expenses. The term “gaming operation” means (a) all gaming operations regulated by IGRA, carried on directly or indirectly by or on behalf of the Band within the exterior boundaries of the State of Michigan and the State of Indiana, and (b) any other commercial operations supportive or ancillary thereto, but only to the extent revenue from such operations is pledged as collateral to secure any financing used to develop, construct or enhance the operations described in clause (a).

B. Tribal Government Account

EXHIBIT A

1. After deducting the priority payments as provided in section 3.A above, the Band shall deposit thirty-eight per cent (38%) of remaining net gaming revenues in a Government Operations Account.
2. The Government Operations Account shall be used to support Band governmental operations including but not limited to support of the Tribal Council, and the various departments, agencies, boards, commissions, and committees established by law to provide governmental services to Band members and their families and to advance the sovereign interests of the Band. Funds from the Tribal Governmental Account may be used in connection with programs related to police and fire protection; physical and mental health services; education; legal and judicial system; elder assistance; cultural preservation; social services; transportation; housing; land use; the administration of Band government; and similar matters. Funds from the Account may also be used for expenditures that would promote better intergovernmental relations.
3. The first one millions dollars that is deposited into the Government Operations Account shall be devoted exclusively to a Band burial benefit fund, which shall be administered pursuant to a Burial Fund Code enacted by the Tribal Council.
4. Funds in the Governmental Operations Account may be invested pursuant to the direction of the Tribal Council, retaining sufficient liquidity to satisfy current needs, and all interest, dividends, or profits earned shall be retained in the Account. Balances in the Account shall be carried forward from year to year.

C. Economic Development Account

1. After deducting the priority payments as provided in section 3.A above, the Band shall deposit five per cent (5%) of remaining net gaming revenues in an Economic Development Account.
2. The Economic Development Account shall be used to support Band economic development activities, including but not limited to the purchase of land or businesses, development of businesses on or off the Band's reservation, and other economic activities that will foster Band financial independence and self-sufficiency.
3. Funds in the Economic Development Account may be invested pursuant to the direction of the Tribal Council, retaining sufficient liquidity to satisfy current needs, and all interest, dividends, or profits earned shall be retained in the Account. Balances in the Account shall be carried forward from year to year.

D. Per Capita Payment Account

1. After deducting the priority payments as provided in section 3.A above, the Band shall deposit fifty-seven per cent (57%) of remaining net gaming revenues in a Per Capita Payment Account.
2. The Per Capita Payment Account shall be used to advance the current and long-term personal health, safety and welfare of Band members by providing to members a periodic payment of money from net gaming revenues, pursuant to the standards and provisions of this Code. The Per Capita Account shall be used exclusively to make payments to eligible members.
3. Funds in the Per Capita Payment Account may be invested pursuant to the direction of the Tribal Council, retaining sufficient liquidity to satisfy current needs, and all interest, dividends, or profits earned shall be retained in the Account. Balances in the Account shall be carried forward from year to year. The Tribal Council shall not make investment decisions that will interfere with the distribution of per capita payments authorized and directed by this Code.

Section 4. Per Capita Payments: Schedule

The first per capita payment under this Code shall be made in the third month following the first deposit of funds into the Per Capita Payment Account, and payments shall be made monthly thereafter, on specific dates as determined by the Tribal Council.

Section 5. Per Capita Payments: Amount

Per capita payments shall be in equal amounts and shall be given to all enrolled Band members in accordance with the provisions of this Code. In accordance with Section 3(D) and Section 4 above, the amount of money available at the time in the Per Capita Account shall be divided by the number of eligible Band members at that time, and the result will be the amount of each member's payment. As a result, the amount of each eligible member's per capita payment may fluctuate from month to month depending on the amount of money available in the Per Capita Account.

Section 6. Per Capita Payments: Eligibility

A. General

All living persons who are enrolled members of the Band shall be eligible for per capita payments as provided by the provisions of this Code. These persons shall be termed "eligible members."

B. List of Eligible Members

1. At 5:00 p.m. on November 30th of each calendar year, or at such other time as may be established by Tribal Council resolution, the Enrollment Coordinator shall determine eligibility for the per capita payments associated with the following year. The Enrollment Coordinator shall prepare a list containing the names,

addresses, and social security numbers of all eligible members as of that time. The Enrollment Coordinator shall certify that the list accurately and completely identifies all eligible members to the best of the Coordinator's knowledge, and shall forward the list under cover of a memorandum to the Tribal Council. The eligible members identified on such list, upon approval of the Tribal Council in accordance with tribal enrollment laws and the requirements of this Code, shall be the members who will receive the following year's per capita payments.

2. If the Tribal Council determines that there are no irregularities or inaccuracies in the list of eligible members submitted by the Enrollment Coordinator, the Council, by official action, shall direct the Band's chief financial officer to make the appropriate per capita payments to the listed members.
3. If the Tribal Council finds that there are irregularities or inaccuracies in the list of eligible members, it shall return the list to the Enrollment Coordinator for appropriate action and resubmission to the Council for approval.
4. It is the responsibility of each Band member to provide the Enrollment Coordinator with the member's correct name and current address. All correspondence and per capita payments from the Band will be mailed to the last address the member has supplied to the Enrollment Coordinator.

C. Death of a Member

A Band member shall cease to be eligible for per capita payments upon his/her death, and if the Enrollment Clerk determines that a member has died before per capita payments have been mailed, no payment for a deceased member shall be made, either in the name of the member or to his/her estate or heirs.

D. Disclaimers

An eligible member may disclaim any interest in a per capita payment that otherwise would be given to such member. A disclaimer is valid only if it is in writing, if it clearly disclaims all interest in the per capita payment, if it is signed by the member and notarized by an official authorized to administer oaths, and, if it is received by the Enrollment Coordinator or Tribal Council before the relevant per capita payment is made. A member who disclaims an interest in a per capita payment under this section shall not be sent a per capita payment, and the payment amount shall be returned to the Band Per Capita Payment Account.

E. Court Review

Any Band member adversely affected by a decision related to the distribution of a per capita payment, other than decisions subject to review under the provisions of Section 8, shall have the right to bring an action in the Tribal Court to seek review of such decision. A

final decision of the Tribal Court shall be binding. The Band hereby waives its immunity from suit for the limited purpose of allowing Tribal Court review under this section.

Section 7. Per Capita Payments: Method of Distribution

A. Mail or Direct Deposit.

Except as otherwise provided in this Code for minors and legally incompetent members, a per capita payment shall be made by check sent by U.S mail to the eligible member's current address or by direct deposit to the member's designated bank account. An eligible member may not pick up a per capita payment personally from the Band at its reservation offices or any other Band location.

B. Undeliverable Payments

If the Enrollment Coordinator has no correct current address for an eligible member, the Band shall retain that member's per capita payment or payments for a period of twelve (12) months from the date or dates of distribution. The Enrollment Coordinator shall publish a notice in each edition of the tribal newsletter during the twelve month period following the first retained payment advising such member that the Band is holding a payment or payments under such member's name, and that the member must contact the Enrollment Coordinator by a specified date or the relevant payment or payments will be forfeited. If the member fails to contact the Enrollment Coordinator and claim the per capita payment or payments by the expiration of the period, the funds shall be forfeited automatically and shall revert to the Band Per Capita Account without any further action or order, and all future per capita payments shall be forfeited automatically and revert to the Band Per Capita Account until a correct current address is received.

Section 8. Trusts for Minors

A. Payment into Trusts

The per capita payments to each eligible member under the age of eighteen, and per capita payments to members subject to Section 10 of this Code, shall be placed into an irrevocable minor's trust, which shall be created by the Tribal Council and administered by an independent Institutional Trustee. The trust shall be managed in accordance with a trust document that is consistent with the provisions of this Code. Income or interest earned by the trust principal shall be accumulated in the trust. To the extent practicable, the Trustee shall pay all applicable taxes related to trust contributions and earnings out of trust funds.

B. Distributions

The trust document shall specify that distributions from the trust shall be made upon application of the beneficiary in no greater amounts than identified in the following schedule:

- 1) At age twenty-one, twenty-five percent of the then principal;
- 2) At age twenty-two, thirty-three percent of the then principal;
- 3) At age twenty-three, fifty percent of the then principal;
- 4) At age twenty-four, the balance of the trust.

C. Accounting

The trust document shall specify that the Trustee shall separately account for the interest of each beneficiary, and that the Trustee shall at all times make available account balance statements to the parent or legal guardian of the beneficiary, or to the beneficiary if he/she is eighteen years of age or older. The Trustee shall also send at least annually a trust account statement to the parent or legal guardian of the beneficiary, or to the beneficiary if he/she is eighteen years of age or older.

D. Death of Beneficiary

The trust document shall specify that if any trust assets remain at the time of a beneficiary's death, such assets shall be distributed in equal shares to any surviving children of the beneficiary; or if there are no surviving children such assets shall be distributed to the surviving spouse of the beneficiary; or if there are no surviving children and no surviving spouse such assets shall be distributed in equal shares to any surviving parents of the beneficiary who are members of the Pokagon Band; or if there are no surviving children and no surviving spouse and no surviving parents such assets shall be distributed in equal shares to the siblings of the beneficiary; or if there are no surviving persons as identified above such assets shall revert to the Pokagon Band.

E. Special Distributions

1. Health, Education, and Welfare: The trust document shall specify that the Institutional Trustee shall have the discretion to distribute from the minor's trust such sums from time to time as the Trustee deems reasonable and advisable to provide for the proper support, maintenance, health, and education of the beneficiary taking into consideration the needs, age, health, educational requirements, marital status, sources of financial support, and other circumstances of such beneficiary. The trust document shall specify that the Trustee's discretionary decision in this regard may be appealed by a parent or legal guardian to the Pokagon Band Family Welfare Commission, which shall affirm the decision if it was reasonable and which may reverse or revise the decision if it was arbitrary or capricious.

2. Handicapped or Terminally Ill: The trust document shall specify that the Institutional Trustee shall have the discretion to make early distributions of part or all of the minor's trust in cases where the beneficiary is permanently severely handicapped or terminally ill. The trust document shall specify that the Trustee's discretionary decision in this regard may be appealed by a parent or legal guardian to the Pokagon Band Family Welfare Commission, which shall affirm the decision if it was reasonable and which may reverse or revise the decision if it was arbitrary or capricious.

F. Fiduciary Decisions of Trustee

The trust document shall identify the choice of law and court under which allegations of allegations of breach of fiduciary duties by the Institutional Trustee shall be determined.

Section 10. Education Requirement

In order for an eligible member between the ages of eighteen and twenty-one to receive a per capita payment directly, such member must submit to the Enrollment Clerk or Tribal Council either (1) a copy of a high school diploma, or (2) a copy of a degree or certificate equivalent to a high school diploma, (3) documentary proof of satisfactory completion of high school degree-equivalent home schooling requirements for the member's state of residence, or (4) a certification from an accredited school or schools that the member has learning or other disabilities and has attended a full twelve years of school. The appropriate diploma, degree, or certification must be submitted before the list of eligible members is approved by the Tribal Council for any particular per capita payment. If such copy is not timely submitted, the per capita payment for such member shall be made to the member's minor's trust account.

Section 11. Legal Incompetents

The per capita payment to an eligible member who has been declared to be legally incompetent by a court of competent jurisdiction shall be made to the proper legal guardian or trustee as appointed and supervised by the court.

Section 12. Deferred Per Capita Savings Plan

A. Purpose

In order to provide for the future well-being of eligible members and to promote individual income tax-deferred savings, eligible members may elect to participate in a deferred per capita savings plan.

B. Eligible Participants in Plan

Any eligible member (except for individuals who have been determined to be legally incompetent) who is (1) at least eighteen years of age, (2) receiving a per capita payment directly pursuant to subsection 7.A of this Code and (3) not subject to a court order under

either Section 13 (relating to child support obligations) or Section 14 of this Code (relating to garnishment of per capita payments), may elect to defer all or part of the per capita payment that would otherwise be payable to him or her in the upcoming year.

C. Annual Elections, Timing, and Termination

The Band's Tribal Council shall adopt a Deferred Per Capita Savings Plan (the "Plan") that is consistent with the provisions of this Code and governs the timing and procedures for elections, contributions, investments, distributions (including distributions by reason of death and advance distributions for unforeseeable emergencies), termination of elections and other procedural matters regarding the deferred per capita payments. A copy of the Plan document shall be provided to every eligible member upon request.

D. Grantor Trust to Hold Plan Assets

Plan assets shall be placed in one or more irrevocable grantor trusts (collectively, the "Trust"), created by the Tribal Council, owned by the Band, and administered by an independent Trustee. The Trust shall be managed in accordance with a trust agreement ("Trust Agreement") that is consistent with the Plan document and this Code. The Trust Agreement shall specify the Trustee's duties and the rights of the Trust beneficiaries. A copy of the Trust Agreement shall be provided to every eligible member upon request. The Trust assets generally shall not be subject to anticipation, alienation, assignment (either at law or in equity), pledge, encumbrance, attachment, garnishment, levy, execution or other legal or equitable process. The Trust assets shall be invested in accordance with the Band's Investment Policy.

E. Taxation of Distributions

When distributions are made from the Trust to the electing member or his or her beneficiaries, they will be treated like distributions of tribal gaming revenues and the Trustee shall report such payments to the IRS (or other tax authorities) and, to the extent required by applicable law, withhold income taxes.

F. Termination of Plan and Trust

The Band shall retain the power and authority to (1) suspend future participation in the Plan and future contributions to the Trust, (2) amend or terminate the Plan, but only if such amendment or termination does not have a material adverse effect on any eligible member's benefits or rights accrued as of the date of Band action, and (3) amend or terminate the Trust, but any termination shall take effect only after all benefits have been distributed to Plan participants and their beneficiaries pursuant to the terms of the Plan.

Section 13. Child Support Obligations

Upon presentation to the Band of an order from a state or tribal court of competent jurisdiction stating that an eligible member is delinquent with regard to a court ordered obligation of child

support, all or an appropriate portion of the per capita payment of any eligible member shall be directed so as to satisfy such obligation.

Section 14. Garnishment of Per Capita Payments

Upon enactment of an appropriate Code by the Tribal Council, a per capita payment may be subject to garnishment by the Tribal Court if necessary to satisfy an outstanding order of that court.

Section 15. General Welfare

Nothing in this Code shall preclude the Tribal Council from establishing and funding social benefit programs for the promotion of the general welfare of the Band and its members that are need-based or have other conditions for eligibility and that fall outside of this Code and its requirements for federal tax treatment of per capita payments.

Section 16. No Back Payments

Any person becoming an eligible member after a per capita payment is scheduled pursuant to this Code shall not be entitled to the scheduled payment or to any back payments of per capita benefits. The first per capita payment to a member who is newly placed on the list of eligible members in accordance with Section 6 of this Code shall be on the first date for payment scheduled during the calendar year to which the list applies.

Section 17. No Vested Rights

Nothing contained in this Code shall be construed to give any person a vested property right or interest in Band gaming revenues. All Band gaming revenues shall be held by the Band until disbursed pursuant to Band law and this Code. This Code may be amended only through referendum or initiative vote of the Band's membership, subject to applicable law.

Section 18. Federal Taxes

The Tribal Council shall insure that notification of the application of federal tax laws to Band per capita payments be made when such payments are made. The Tribal Council shall insure that federal income taxes are withheld from per capita payments as required by applicable federal law and regulation.

Section 19. Periodic Review

This Code shall be reviewed by a Revenue Allocation Code Review Committee at least every two to five years, and the Committee shall submit any recommendations for change to the Tribal Council. The Committee shall be comprised of three to seven adult Band members and shall be appointed by the Tribal Council.

Section 20. Reports to Band Members

The Tribal Council shall insure that a report is provided to Band members on an annual basis that gives the members an accurate summary or overview of Band casino revenue and revenue distributions.

Section 21. No Waiver of Sovereign Immunity

Nothing in this Code shall be construed to provide a waiver of the sovereign immunity of the Band or any of its governmental officers and/or agents, except to the extent such waiver is explicitly provided herein.

Section 22. Effective Date

This Code shall become effective upon approval by the United States Department of the Interior pursuant to applicable federal law.

LEGISLATIVE HISTORY

THE "REVENUE ALLOCATION PLAN" ("RAP") WAS ENACTED BY THE TRIBAL COUNCIL ON OCTOBER 12, 2005 THROUGH ADOPTION OF RESOLUTION NO. 05-10-12-02; PARAGRAPH 3.A OF THE RAP WAS AMENDED ON MARCH 15, 2006 THROUGH ADOPTION OF RESOLUTION NO. 06-03-15-01; AND THE U.S. SECRETARY OF THE INTERIOR APPROVED THE RAP ON AUGUST 9, 2006 PURSUANT TO 25 U.S.C. 2710(b)(3)(B); PARAGRAPHS 3.B.1, 3.C.1, AND 3.D.1 OF THE RAP WERE AMENDED BY THE TRIBAL COUNCIL ON JANUARY 21, 2012 THROUGH ADOPTION OF RESOLUTION NO. 12-01-21-02, AND APPROVED BY THE CITIZENS IN A REFERENDUM VOTE CONDUCTED ON MARCH 24, 2012, AND APPROVED BY THE U.S. SECRETARY OF THE INTERIOR ON JUNE 8, 2012 PURSUANT TO 25 U.S.C. 2710(b)(3)(B); PARAGRAPH 3.A OF THE RAP WAS AMENDED BY THE TRIBAL COUNCIL ON NOVEMBER 11, 2017 THROUGH ADOPTION OF RESOLUTION NO. 17-11-11-03, AND APPROVED BY THE CITIZENS IN A REFERENDUM VOTE CONDUCTED ON JANUARY 13, 2018, AND APPROVED BY THE U.S. SECRETARY OF THE INTERIOR ON MARCH 27, 2018, PURSUANT TO 25 U.S.C. 2710(b)(3)(B); A NEW PARAGRAPH 12 WAS ADDED TO THE RAP TO IMPLEMENT A DEFERRED PER CAPITA SAVINGS PLAN AND ALL SUBSEQUENT PARAGRAPHS OF THE RAP WERE RENUMBERED ACCORDINGLY ON APRIL 23, 2018 BY THE TRIBAL COUNCIL THROUGH ADOPTION OF RESOLUTION NO. 18-04-23-02, AND APPROVED BY THE CITIZENS IN A REFERENDUM VOTE CONDUCTED ON JULY 14, 2018, AND APPROVED BY THE U.S. SECRETARY OF THE INTERIOR ON OCTOBER 5, 2018, PURSUANT TO 25 U.S.C. 2710(b)(3)(B).

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Bkry Case No: 20-42761

Brenda Musel

Chapter 7

Debtor(s).

**UNSWORN CERTIFICATE
OF SERVICE**

I, Alyssa George, employed by Hoglund & Mrozik, P.L.L.C., attorneys licensed to practice law in this Court, with office address of 1781 West County Road B, Roseville, Minnesota 55113, declare that on February 26, 2021, I served Debtor's Response to Trustee's Motion for Turnover of Property to each of the entities named below by first class mail postage prepaid and to any entities who are Filing Users, by automatic e-mail notification pursuant to the Electronic Case Filing System:

Electronic Mail Notice List

Julia A. Christians jchristians@laplibra.com,
lfrey@laplibra.com; MNOA@ecfcbis.com; sgelhar@laplibra.com

Robert J. Hoglund bankruptcy@hoglundlaw.com, hoglundlaw@ecf.courtdrive.com

United States Trustee ustpreion12.mn.ecf@usdoj.gov

I declare, under penalty of perjury, that the foregoing is true and correct.

Dated: February 26, 2021

Signed: Alyssa George

Attorney at Law