

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

City of Duluth,

Plaintiff,

vs.

Case No. 0:09-cv-02668-ADM-RLE

Honorable Ann D. Montgomery

Fond du Lac Band of Lake Superior
Chippewa,

Defendant.

Second Affidavit of Kevin K. Washburn

Kevin K. Washburn, being duly sworn, testify as follows:

1. I have been asked to opine as to whether the 1994 agreements between the City of Duluth and the Fond du Lac Band of Lake Superior Chippewa interfere with the Band's "sole proprietary interest" in its gaming operation in violation of federal legal and regulatory requirements. My qualifications are reflected in paragraphs 2 through 4 and my opinion begins at paragraph 5.

2. I am the Dean of the University of New Mexico School of Law. I have served in this capacity since July 1, 2009. Prior to the deanship, I was the Rosenstiel Distinguished Professor of Law at the University of Arizona (2008-09) and the Oneida Nation Visiting Professor of Law at Harvard Law School (2007-08). I began my academic career at the University of Minnesota Law School, where I served on the faculty from 2002-08. One of my principal areas of expertise is Indian gaming. I have taught courses in gaming law and Indian law. Prior to becoming an academic, I was the General Counsel of the National Indian Gaming Commission in Washington, D.C., where I served from January of 2000 to July of 2002 under Chairman Montie R. Deer. Before that, I served stints as a federal prosecutor and a civil trial attorney at the U.S. Department of Justice. After graduating from Yale Law School, I served as a law clerk to Judge Wm. C. Canby, Jr., of the Ninth Circuit, who authored the Nutshell on American Indian law. I first was exposed to legal issues involving Indian gaming during that clerkship. Since becoming an academic, I have testified often before Congress on matters involving Indian gaming. I serve as an executive editor of Cohen's Handbook of Indian Law and have principle responsibility for the chapter on Indian gaming, among others. I have also testified on several occasions in federal, state, and arbitral forums on such matters. A copy of my current curriculum vitae is attached to this affidavit as Exhibit A.

3. The Fond du Lac Band of Lake Superior Chippewa has retained me to explain the processes of the National Indian Gaming Commission ("Commission"), how the Commission's definition of "sole proprietary interest" has evolved since the Indian Gaming Regulatory Act ("IGRA") was enacted and the Commission was formed, how the Commission evaluates whether an entity other than an Indian tribe has taken a proprietary interest in a tribe's gaming activity, and – based on that information – how the Commission would evaluate the 1994 Agreements between the City of Duluth and the Band.

4. I have engaged in research on the sole-proprietary-interest standard for several years. When I was serving as general counsel to the NIGC, the provision began to attract a significant amount of attention because Indian gaming was beginning to be seen in some high-profile cases to benefit outsiders much more than Indian tribes. Since I left the Commission, I have also been consulted by various parties in matters in litigation in judicial or arbitral forums regarding the definition of "sole proprietary interest."

Opinion

5. Introduction: In the agreements in this case, the parties seem to have worked very hard to evade federal regulatory requirements. They did so, in part, by creating an unusual business structure in which the Band leased its own trust land to a third party which then sub-leased the land back to the Band. As a result, *the Band is paying millions of dollars of "rent" each year to lease land that it already owns. Moreover, the so-called "rent" that the Band is paying for the lease of its land is unrelated to the value of the land, and is likely to be many times higher than the market value of the land being "rented," suggesting that the agreements in this case create is a sham transaction designed to pay something other than "rent."* This agreement is highly unusual, and ought to have been highly suspicious. The NIGC today would be very likely to conclude that the agreement violates the Band's sole proprietary interest in its gaming operation by granting, in effect, an ownership interest to the City.

6. In 1994, in their effort to evade federal regulatory requirements, the parties successfully obtained the blessing of the key regulatory agency, which was then in its infancy, and the Court. There is no question that the parties sought to evade federal regulatory requirements. Indeed, the parties seem to have admitted that the original arrangement ran afoul of federal law. The unusual arrangement created by the 1994 Agreements was apparently intended to create technical compliance without substantially changing the substantive terms of prior agreements. The question is whether the parties can successfully evade federal law in this manner. If not, then the issue for the Court in this case is whether it should allow parties to collude to evade substantive federal legal requirements and undermine the intent of Congress and the rule of law.

7. It is not surprising that this question arises in a case involving Indian law; there is a long history of federal statutory protections for Indian tribes being eroded or ignored when it is expedient to do so. I suspect that the Commission and the court ignored troubling aspects of the arrangement in this case for two reasons. First, it involved two public entities seeking to work together around a controversial matter, which is ordinarily beneficial. And, second, the victim cooperated. The victim, of course, was the Band, which entered a contract that seems, in some respects, unconscionable and was induced to give away significant gaming revenues for no clear benefit. As a result, Congressional intent and the rule of law may well have been undermined.

8. Discussion: In IGRA, Congress authorized Indian gaming to be an *Indian tribal* resource. Congress sought to protect Indian gaming as a tribal resource by specifying that only Indian tribes can own and operate Indian gaming operations. The intent here was clear. President Ronald Reagan had made it a goal of his Indian policy to seek to wean tribes from the public fisc.¹ Congress enacted, and President Reagan signed, IGRA explicitly in order to “promote tribal economic development” and “tribal self-sufficiency.”² It authorized gaming only for public revenues for tribes and it forbade tribes from alienating the right to conduct gaming on the reservation. In effectuating this intent, Congress specifically provided that the tribe retain the “sole proprietary interest” in the gaming operation.³ As a result, it is clear that, although a tribe may contract with an outside party for specific services relative to a casino, including management of the gaming operation, it cannot sell the asset, the gaming operation itself. That asset, the casino, must be owned by the tribe. The single overarching purpose here was to insure that “the Indian tribe is the primary beneficiary of the gaming operation[.]”⁴ Allowing non-tribal actors to become primary beneficiaries of Indian gaming would undermine President Reagan’s goal of developing a significant resource for tribes with a view toward ultimate self-sufficiency.

9. IGRA is a single statute in a long line of federal laws, beginning with the Trade and Intercourse Acts, designed to protect Indians from outsiders seeking to profit from tribes. While few federal laws have absolutely forbidden outsiders from conducting business with tribes, numerous statutes have called for careful scrutiny of such business dealings. IGRA is within this category of federal laws requiring careful oversight of contracts between Indian tribes and outsiders. Prior to the enactment of IGRA, such contracts were regulated, if at all, primarily under a statute that required the Secretary of the Interior to review certain contracts related to the encumbrance or alienation of lands.

¹ 1 PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES: RONALD REAGAN, 1983, at 96, 97 (1984).

² 25 U.S.C. § 2702(1).

³ 25 U.S.C. § 2710(b)(2)(A).

⁴ 25 U.S.C. § 2702(2).

That statute, commonly known as Section 81, was originally enacted in 1871.⁵ Congress enacted the law out of concern about the ability of individual Indians and Indian tribes to protect themselves in financial transactions, and primarily transactions involving land. Section 81 gave federal authorities the ability to review and approve (or disapprove) such contracts to protect Indian tribes from fraud and sharp dealing by non-Indians who might seek to take advantage of Indians. As Congress noted when it enacted IGRA, Section 81 primarily dealt with contracts that were relative to, or encumbered, Indian lands, and was not designed generally to deal with substantial contracts that may have no direct nexus to property. Thus, to close a perceived gap in the law,⁶ when it enacted IGRA, Congress established the NIGC and shifted to the NIGC the authority to review certain contracts in the gaming realm, whether or not they might have been covered by Section 81.

10. The purposes for shifting this review to the NIGC reflected the distinct concerns of Congress in regulating this area. First, in the earliest debates leading up to the passage of IGRA, Congress was concerned about “over-reaching” by outside investors. Thus, in IGRA, Congress explicitly sought to insure that the Indian tribe, not the outsider, would be “the primary beneficiary” of Indian gaming. For example, at the heart of IGRA is a section that provides for the regulation of Indian tribal gaming contracts with outside management contractors.⁷ To achieve this end, the management contract provisions explicitly limit the magnitude of revenues that outside managers can earn from Indian gaming operations and the time in which such a contract can run.⁸ These provisions reflected the intention by Congress to protect Indian gaming and Indian tribes from outside profiteers and to insure that Indian gaming furthers tribal economic development and self-sufficiency.

11. Although IGRA created the NIGC in theory on October 17, 1988, the Commission did not issue its first regulations until 1993. At the time of the review of the 1994 Agreements, the Commission was in its infancy and had only a very small staff. Much of the focus in the early years at the NIGC was on management contractors and other private parties seeking to invest in Indian gaming and to obtain significant revenues. In the mid-1990s, however, the focus began to shift toward public entities that sought to take substantial revenues from Indian gaming operations. Unlike Minnesota, which did not seek a share of Indian gaming revenues in its tribal-state gaming compacts, many other state governments began to seek substantial shares of Indian gaming revenues.

⁵ 25 U.S.C. § 81. In its current form, Section 81 reads as follows: “No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.”

⁶ 25 U.S.C. §§ 2701(2) & 2711(h).

⁷ 25 U.S.C. § 2711.

⁸ See generally Kevin K. Washburn, *The Mechanics of the Indian Gaming Management Contract Approval Process*, 9 GAMING L. REV. 333 (2004).

These efforts produced significant litigation and ultimately resulted in legally imposed limits on revenue sharing for states in tribal-state gaming compacts. Ultimately, the legal principle that developed was that states cannot demand shares of tribal gaming revenues unless the state provides something in return, a *quid pro quo*. Otherwise, revenue sharing is unlawful. In most cases, the benefit offered by the state as the *quid pro quo* has been some level of “exclusivity” in gaming.⁹ In other words, the states promised to protect the tribal gaming monopoly or oligopoly to limit the competition that Indian tribes face, insuring a substantial economic benefit to tribes.

12. In the late 1990s, the NIGC began to scrutinize more carefully other private investors. Some of this scrutiny was prompted by Congress, following media reports about a South African developer who allegedly earned hundreds of millions of dollars from the Mohegan Sun casino in Connecticut. Through the Mohegan Sun controversy, it became apparent that circumstances in Indian gaming were beginning to depart from the Congressional ideal articulated in IGRA that Indian tribes should be the “primary beneficiary” of Indian gaming. The NIGC soon turned to the “sole proprietary interest” standard to address numerous troubling gaming deals between outsiders and Indian tribes.

13. IGRA provides that each “Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity” and each tribe must adopt an ordinance, enforceable by the NIGC, so providing before it conducts gaming.¹⁰ Since the year 2000, the NIGC has issued dozens of letters admonishing tribes and their contracting counterparts not to enter contracts, or to revise existing contracts, that violated the “sole proprietary interest” standard.¹¹ While the Commission has not issued a regulation defining the statutory term, “sole proprietary interest,”¹² it has taken numerous enforcement actions based on violations of IGRA’s requirement that an Indian tribe retain the “sole proprietary interest” in a tribal gaming activity.¹³ One of those enforcement actions recently produced a fine of \$5 million.¹⁴ On most occasions, the NIGC has had to

⁹ See generally NELL JESSUP NEWTON, ET AL., EDS., FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §12.05[2] (2005).

¹⁰ 25 U.S.C. § 2710(b)(2)(A).

¹¹ Some of the NIGC opinion letters describing the “sole proprietary interest” principle can be viewed at: <http://nigc.gov/ReadingRoom/SoleProprietaryInterestLetters/tabid/879/Default.aspx>.

¹² See 25 U.S.C. § 2710(b)(2)(A).

¹³ For an example of such an enforcement action, see NOV 99-33 against Seneca Junction (November 18, 1999), available at <http://nigc.gov/ReadingRoom/EnforcementActions/tabid/124/Default.aspx>.

¹⁴ See, e.g., *In re the Matter of Ivy Ong and Carlo World Wide*, NIGC NOV 07-02 and CFA 07-02 - Final Decision and Order, January 18, 2008, ¶¶ 1 and 3 (levying a final civil fine of \$5 million for violation of the sole proprietary interest principle) (attached as Exhibit B).

take no formal action because the mere threat has caused parties to revise their agreements, rendering enforcement unnecessary. The Department of the Interior has concurred in the Commission's understanding of the meaning of the "sole proprietary interest" standard.¹⁵

14. As a policy matter, I have expressed significant doubts about the efficacy of the NIGC's review of tribal economic arrangements in the context of the "sole proprietary interest" standard.¹⁶ However, the NIGC has viewed its enforcement of the "sole proprietary interest" standard as a substantial and successful enforcement effort and has informed members of the United States Senate that the Commission has saved tribes millions of dollars through this initiative, serving the purposes of IGRA to support tribal self-sufficiency.¹⁷

15. Under the NIGC's interpretation of the "sole proprietary interest" standard, the question is whether the tribe has alienated any part of the gaming operation, such that another party has effectively obtained part ownership. In general, as can be seen from reviewing dozens of letters the NIGC has written on the "sole proprietary interest" standard, the NIGC has tended to consider certain factors in determining whether an agreement violates the "sole proprietary interest" standard. As interpreted for the facts in this case in light of the 1994 Agreements, the factors to be considered here would include, but are not limited to, the following:

- The percentage of any payment by the Band to the City expressed as a percentage of the casino's net revenue;
- The length of the payment term;

¹⁵ Memorandum from the Associate Solicitor, Division of Indian Affairs, to the Director of the Office of Indian Gaming Management, regarding the review of a lease between Lake Sakakawea Associates (LSA) and the Three Affiliated Tribes of the Fort Berthold Reservation (October 10, 2002).

¹⁶ See, e.g., Kevin K. Washburn, et al., *Paternalism or Protection?: Federal Review of Tribal Economic Decisions in Indian Gaming*, 12 GAMING L. REV. & ECON. 435 (2008) (transcript of a discussion at Harvard Law School organized by Professor Washburn and others). See also Kevin K. Washburn, *Prepared Statement and Oral Testimony*, Oversight Hearing on the Regulation of Indian Gaming, United States Senate, Committee on Indian Affairs (John McCain, Chairman), 109th Cong., 1st Sess. (April 27, 2005).

¹⁷ Letter from Philip N. Hogen, Chairman, NIGC, to Senator John McCain, Chairman, Senate Committee on Indian Affairs, et al., p. 6 (February 1, 2005) (describing contracts in which an outside investor receives compensation that bears no relationship to the value of the services provided as "illegal and unconscionable" because it is akin to "a fractional ownership" interest that violates IGRA's requirement that tribes retain the "sole proprietary interest" in the gaming operation) (attached as Exhibit C).

- Whether (and how) the Band's payment is tied to casino profits;
- Whether the Band's payment is structured as "rent";
- Whether the 1994 Agreements grant any security interests to the City;
- What services or other consideration the Band has received from the City in return for the payment;
- The extent of the risk the City has taken on;
- The "market rate" for services comparable to those the City provides to the Band; and
- Whether the 1994 Agreements include any features of a management contract.

16. As I stated in my prior Affidavit, I cannot fully analyze these factors to my own satisfaction in the time I have been allowed and with the information currently available. More information would be needed to conduct this analysis most effectively. For example, one would need appraisal data of the market value of the land that the Band is ostensibly "leasing" from the Commission and market rates for equivalent rental land to determine whether the "lease" can fairly be characterized as such. It is likely that, in this case, the arrangement here is not what an ordinary person would characterize as a lease at all but is designed to obfuscate a very different type of financial arrangement. It would also be helpful to obtain information on the amount of revenues that the city has received from the lease arrangement to insure that the "rent" payments are fair for a "lease" transaction. I suspect that such data would be damning to the characterization of the arrangement here as a "lease"; it would be the kind of data that the NIGC might seek to discover in its analysis.

17. Despite the lack of full information available to me, the NIGC has applied the factors set forth above in dozens of letters in the past ten years and I have reviewed most of these letters in some form and am familiar with the Commission's analysis. As a result, I can provide some observations as to the significant concerns that the NIGC would likely have with the 1994 Agreements in this case.

18. The terms of this transaction are highly unusual. To "lease" land that the Band already owns, and on which the casino is located, the Band must pay "rent" to the City equal to 19 percent of the gross revenues that the Band earns from video games of

chance.¹⁸ The term of the agreement is roughly 18 years, with a term for renewal for another 25 years. Under standard NIGC analysis under the “sole proprietary interest” standard, the NIGC would likely find myriad problems with this arrangement, as set forth below.

19. First, Indian gaming can generally only occur on land owned by a tribe. The Band is the beneficial owner of the land, and the lease to the commission interferes, to some degree, with this ownership and undermines the federal legal requirement that Indian gaming can occur only on Indian lands.¹⁹ The need for the Band to lease out and then lease back its own land creates an artificial transaction that is highly suspect. To any neutral observer, the lease-leaseback arrangement looks like a sham transaction designed to allow a third party into a deal in which the third party is unnecessary.

20. Second, the NIGC is usually skeptical when a non-tribal entity takes a share of gaming revenues and seeks to characterize this payment as “rent.” Here, the Band is paying “rent” to the City that is entirely unrelated to the value of the leased land. The rent payment is calculated not on the value of the land leased but on the income from video games of chance, i.e., slot machines. To the NIGC, such an arrangement would look more like a joint venture in a gaming operation than a payment for a lease of land.²⁰

21. Third, there is no cap on the amount of rent that the Band must pay. This fact undermines the notion that the City (or the Commission) is a landlord and the Band merely is a renter with a lease. Under typical NIGC analysis, which looks beyond the form to the facts of the transaction, the Band and the City are sharing income in the business, more in accord with a joint venture. In sum, the parties simply do not have a relationship that looks like the traditional relationship between a landlord and tenant; under the standard NIGC analysis, it looks like these two parties are sharing revenues in a manner more akin to partners in a gaming operation.²¹ While such an arrangement might

¹⁸ Sublease and Assignment of Gaming Rights Agreement Between Duluth Fond du Lac Economic Development Corporation and Fond du Lac Band of Lake Superior Chippewa at § 4.1, pp. 10-11 (June 20, 1994).

¹⁹ See 25 U.S.C. §2703(4)(a)&(b) (definition of Indian lands).

²⁰ See, e.g., Letter from Penny J. Coleman, Acting General Counsel, NIGC, to Chairman Mitchell Cypress, Seminole Tribe of Florida (June 5, 2003) at 9 (“The most obvious indicator of CCG’s proprietary interest in the gaming operation at Coconut creek is found in the high percentage payments of net gaming revenue, which, when considered along with the lease provisions discussed above, suggest a profit-sharing arrangement between the Tribe and CCG under the auspices of ‘rent.’”) (attached as Exhibit D). Note: the NIGC letters cited herein and attached hereto have been obtained and collected from various public sources, such as the Commission’s website.

²¹ In an opinion arising related to a gaming operation in California with facts somewhat analogous to the present case, the NIGC explained its concerns with a 16% “rent”

not be unlawful outside of Indian gaming, the NIGC would likely conclude that this arrangement undermines the Band's "sole proprietary interest" in its gaming operation.

22. Fourth, the rate of "rent" might well be found to be far higher than the purchase value of the land being rented. In the course of the 18 years (or up to 43 years) term of the sublease, the Band may well pay rent that is many times more than the fair market value of the land itself. This would suggest that the Band is actually paying the City something other than "rent." Discovery would be necessary to determine the value of the land that the Band is ostensibly "leasing" under this arrangement. Moreover, the length of this agreement is very long in comparison to other agreements found troubling by the NIGC and the value of the payments appears extremely high.

23. Fifth, the rental rate may also undermine the Band's Congressionally-mandated role as the "primary beneficiary" of the Indian gaming activity. The City's "rent" payment of 19 percent of gross revenues from video games of chance is a substantial payment that may well exceed even the share that Congress has explicitly authorized for approved management contractors. Indeed, typical gaming venues at the present time, slot machine revenues represent the substantial majority of all gaming revenues. Because the City's "rent" is based on gross revenues, the City's rental payment comes off the top. The Band must make payroll and all of its other expenses out of the remaining 81% of revenues. As a result, when final figures are calculated, the City may, in some years, earn net revenues that rival those earned by the Band.²² If so, the sublease agreement may well undermine the IGRA requirement that the Indian tribe be the *primary* beneficiary of an Indian gaming operation.

24. In its "sole proprietary interest" analysis, the NIGC sometimes recognizes value if the non-tribal party, here the City, is taking on significant financial risk, such as making a multi-million dollar loan which would justify the large payments. To my knowledge, the City has undertaken no significant financial risks in this case that would justify outsized returns. Nor has the City apparently offered services commensurate with the revenue that the City has received. For these reasons, if the NIGC reviewed this transaction today, the NIGC would be likely to find that the sublease is inconsistent with the NIGC's understanding of the "sole proprietary interest" standard.

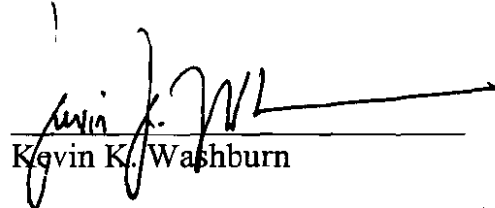
payment this way: "Although the 16% payment is called an "Incentive Rent" payment, this label mischaracterizes what is really a profit-sharing arrangement." Letter from NIGC Acting General Counsel Penny J. Coleman to Chairperson Merlene Sanchez, Guidiville Rancheria, p. 4 (July 21, 2004) (attached as Exhibit E).

²² In the California opinion letter cited above, the NIGC found that a payment equivalent to 16% of gross revenues would equal more than 50% of net revenues based on figures the NIGC collected from California gaming operations in 2001-02. See Letter from NIGC Acting General Counsel Penny J. Coleman to Chairperson Merlene Sanchez, Guidiville Rancheria, p. 4 (July 21, 2004) (Exhibit E).

25. The primary regulatory remedy for a violation of the “sole proprietary interest” principle is an action by a tribal gaming commission or the NIGC to close a facility or levy a fine against a tribal operator or perhaps an outside contractor. As expressed in IGRA, the right to engage in Indian gaming is a tribal public right, not a private right or a state or municipal right. The tribe must retain ownership of the gaming enterprise and is forbidden from alienating its right to conduct gaming to an outsider. In sum, if this principle has been violated, the NIGC could bring an enforcement action.


26. Ultimately, the question here is whether the 1994 Agreements violate the rule of law. I believe that the NIGC would answer that question in the affirmative. That said, the Court’s insight is apt that there has been a lot of opinion and very little “controlling” law addressing the substantive issue of what constitutes a violation of Congress’s “sole proprietary interest” standard. Order, p. 16. The Court would perform a valuable service to the public, the NIGC, the Indian gaming industry as a whole, non-tribal contractors, Indian tribes, and Indian people if it would reach the substantive issue of whether the 1994 Agreements violated IGRA’s “sole proprietary interest” principle. Millions of dollars of revenues invested throughout the United States ride on the question of what Congress meant by “sole proprietary interest.” This Court can provide more authoritative guidance on that question than any academic, or apparently the NIGC, can.

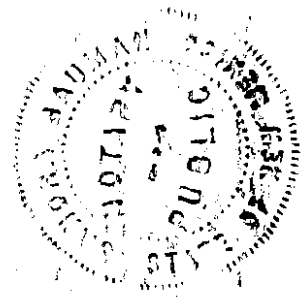
Further affiant sayeth not.


Kevin K. Washburn

Subscribed and sworn to before me this

13th day of January, 2010.


Notary Public



Exhibits to this Affidavit

A – Curriculum Vita of Kevin Washburn.

B – NIGC Final Decision and Order, *In re the Matter of Ivy Ong and Carlo World Wide*, NIGC NOV 07-02 and CFA 07-02, January 18, 2008.

C – Letter from Philip N. Hogen, Chairman, NIGC, to Senator John McCain, Chairman, Senate Committee on Indian Affairs, et al. (February 1, 2005).

D – Letter from Penny J. Coleman, Acting General Counsel, NIGC, to Chairman Mitchell Cypress, Seminole Tribe of Florida (June 5, 2003).

E – Letter from NIGC Acting General Counsel Penny J. Coleman to Chairperson Merlene Sanchez, Guidiville Rancheria (July 21, 2004).

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PRINCIPAL ACADEMIC APPOINTMENTS

University of New Mexico School of Law, Dean, July 2009 to the present.

University of Arizona James E. Rogers College of Law, Rosenstiel Distinguished Professor of Law, Fall 2008 to June 2009. Courses: Contracts, Criminal Law, Gaming Law. Committee work: Appointments Committee.

Harvard Law School, Oneida Indian Nation Visiting Professor, August 2007 to May of 2008. Courses: American Indian Law, Criminal Law, Gaming Law.

University of Minnesota Law School. Associate Professor. Fall 2002 through Summer 2008 (on leave at Harvard Law School during 2007-08 academic year). Earned tenure in May 2006; voted full professor in December 2007; offered University-wide Chair in March 2008. Courses taught: American Indian Law, Criminal Law, Administrative Law, Gaming Law, Property. Committee Work: Adjunct Professors, Admissions, Appointments, Community Life, Education Policy, Honor Code Council, International Programs, Various Search Committees. Faculty Advisor: American Indian Law Students Association, Law School Democrats. Fesler Research Fellowship, 2006-2007; Faculty Secretary, 2002-2003.

EDUCATION

Yale Law School, *J.D.*, 1993. Editor-in-Chief, *Yale Journal on Regulation*; Arnold & Porter Scholar.

Washington University (St. Louis) School of Law, 1990-1991. Gustavus A. Buder Scholar (full tuition scholarship); American Jurisprudence Awards: Torts, Civil Procedure.

University of Oklahoma, *B.A. (Economics) with Honors*, 1989.

PROFESSIONAL LEGAL EXPERIENCE

General Counsel, National Indian Gaming Commission, Washington, D.C., Jan. 2000 - July 2002. Provided legal advice to Presidentially-appointed Chairman and Associate Commissioners of the independent federal regulatory agency responsible for regulating Indian gaming, then a \$13 billion industry existing in 28 states. Supervised a staff of twelve lawyers and legal support personnel. Developed enforcement policy, strategy and regulatory initiatives. Advised the Commission on enforcement actions, administrative and judicial litigation, Congressional testimony and rulemaking. Interacted with the Solicitor General of the United States and other Department of Justice officials on appellate matters.

Assistant United States Attorney, Albuquerque, N.M., 1997-2000.

Handled all aspects of prosecutions in the Violent Crime Section, including supervising investigations by the FBI and other law enforcement agencies, handling indictments before federal grand juries, arraignments, preliminary hearings and detention hearings, and jury trials and appeals before the courts of the United States. Primarily handled violent crimes in Indian country. Argued before the United States Court of Appeals for the Tenth Circuit, the United States District Court for the District of New Mexico, and the New Mexico Supreme Court.

Trial Attorney, United States Department of Justice, Washington, D.C. 1994-97.

Appointed through the Attorney General's Honors Program to the Environment and Natural Resources Division – Indian Resources Section. Litigated affirmative cases on behalf of the United States in its role as trustee for Indian tribes. Defended programs of the Department of the Interior and the Environmental Protection Agency in actions by states and other non-Indian parties. Argued before the United States Court of Appeals for the Ninth Circuit, and state and federal courts in Arizona, Montana and Nevada.

Summer Law Clerk, Steptoe & Johnson (Phoenix, Arizona, and Washington, D.C.) Summer 1993; Kaye Scholer Fierman Hays & Handler (Washington, D.C.) Summer 1992; Meyer Hendricks Victor Osborn & Maledon (Phoenix, Arizona) Summer 1992; Montgomery & Andrews (Albuquerque and Santa Fe, New Mexico) Summer 1991; and McAfee & Taft (Oklahoma City, Oklahoma) Spring 1990.

JUDICIAL CLERKSHIP

Law Clerk, Hon William C. Canby, Jr., U.S. Court of Appeals for the Ninth Circuit, Phoenix, AZ, 1993-94 (former professor of Constitutional Law and Indian law and author of West's Nutshell on American Indian law).

CONGRESSIONAL TESTIMONY

Prepared Statement (and live testimony), Oversight Hearing on the Department of the Interior's New Guidance on Land-Into-Trust for Gaming for Indian Tribes, United States House of Representatives, Committee on Natural Resources (Nick. J. Rahall, Jr., Chairman), 110th Congress, 2d Session (February 27, 2008).

Prepared Statement (and live testimony), Oversight Hearing on Law Enforcement In Indian Country, United States Senate, Committee on Indian Affairs (Byron Dorgan, Chairman), 110th Congress, 1st Session (June 21, 2007).

Prepared Statement (and live testimony), Oversight Hearing on the Minimum Internal Control Standards in Indian Gaming, United States House of Representatives, Committee on Resources (Richard Pombo, Chairman), 109th Congress, 2d Session (May 11, 2006).

Prepared Statement (and live testimony), Oversight Hearing on the Regulation of Class III Indian Gaming following the Decision by the United States District Court for the District of Columbia in Colorado River Indian Tribe v. NIGC, United States Senate, Committee on Indian Affairs (John McCain, Chairman), 109th Congress, 1st Session (September 21, 2005).

Prepared Statement (and live testimony), Oversight Hearing on the Regulation of Indian Gaming, United States Senate, Committee on Indian Affairs (John McCain, Chairman), 109th Congress, 1st Session (April 27, 2005).

LEGAL SCHOLARSHIP

Conflict and Culture: Federal Implementation of IGRA by the National Indian Gaming Commission, the Bureau of Indian Affairs, and the Department of Justice, __ ARIZONA STATE LAW JOURNAL __ (forthcoming 2009).

Book Review, *Felix Cohen, Anti-Semitism, and American Indian Law*, 33 AMERICAN INDIAN LAW REVIEW 583 (2009) (peer reviewed) (review of DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM).

Remembering DeGiacomo, 38 N.M. L. REV. 235 (2008).

Paternalism or Protection?: Federal Review of Tribal Economic Decisions in Indian Gaming, 12 GAMING LAW REVIEW AND ECONOMICS 435 (2008).

Sex Offender Registration in Indian Country, 6 OHIO STATE JOURNAL OF CRIMINAL LAW 3 (peer reviewed) (forthcoming 2008) (with Virginia Davis).

The Legacy of Bryan v. Itasca County: How an Erroneous \$147 State Property Tax on a Mobile Home Provided the Legal Foundation for \$200 Billion in Indian Gaming Revenues, 92 MINNESOTA LAW REVIEW 919 (2008).

Restoring the Grand Jury, 76 FORDHAM LAW REVIEW 2333 (2008).

Tribal Self Determination at the Crossroads, 38 CONNECTICUT LAW REVIEW 777 (2006).

Federal Criminal Justice and Tribal Self-Determination, 84 NORTH CAROLINA LAW REVIEW 779 (2006).

American Indians, Crime and the Law, 104 MICHIGAN LAW REVIEW 709 (2006).

The Federal Criminal Justice System in Indian Country and the Legacy of Colonialism, 52 THE FEDERAL LAWYER 40 (March/April 2005).

Reconsidering the Commission's Treatment of Tribal Courts, 17 FEDERAL SENTENCING REPORTER 209 (February 2005) (this article is immediately followed by commentaries evaluating the proposal by three federal judges and a federal public defender).

Tribal Courts and Federal Sentencing, 36 ARIZONA STATE LAW JOURNAL 403 (2004).

A Different Kind of Symmetry, 34 NEW MEXICO LAW REVIEW 263 (2004).

The Mechanics of the Indian Gaming Management Contract Approval Process, 9 GAMING LAW REVIEW 333 (2004).

Lara, Lawrence, Supreme Court Litigation and Lessons from Social Movements, 40 TULSA LAW REVIEW 25 (2004) (Essay in Symposium on *United States v. Lara*, 124 S. Ct. 1628 (2004)).

A Legacy of Public Law 280: Comparing and Contrasting Minnesota's New Rule for the Recognition of the Tribal Court Judgments with the Recent Arizona Rule, 31 WILLIAM MITCHELL LAW REVIEW 479 (2004) (Essay in Annual Symposium on Developments in Minnesota Law) (with Chloe Thompson).

Federal Law, State Policy and Indian Gaming, 4 NEVADA LAW JOURNAL 285 (2004) (Essay in Symposium on Cross-Border Issues in Gaming).

Recurring Problems in Indian Gaming, 1 WYOMING LAW REVIEW 427 (2001); *cited in* In re: Gaming Related Cases, 331 F.3d 1094 (9th Cir. 2003) (majority opinion by Circuit Judge W. Fletcher); *excerpted in* ROBERT N. CLINTON, ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM: CASES AND MATERIALS 954-57 (4th Ed. 2003).

Recent Developments, 21 AMERICAN INDIAN LAW REVIEW 183 (1997).

BOOKS AND BOOK CHAPTERS

Author/Editor, ROBERT N. CLINTON, CAROLE GOLDBERG, REBECCA TSOSIE AND KEVIN K. WASHBURN, *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM: CASES AND MATERIALS* (Lexis/Nexis) (forthcoming 6th Ed. 2010).

Editor/Author, *INDIAN LAW STORIES* (with co-editors Philip Frickey and Carole Goldberg) (Contract with Foundation Press for publication forthcoming in 2010).

Sole Author, *THE LAW OF GAMING/GAMBLING: CASES AND MATERIALS* (Contract with Aspen Publishers) (forthcoming 2009).

2007 and 2009 updates, *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* 3d Edition (2005), primary authorship and editorial responsibility for updates to Chapter 9 (Criminal Jurisdiction), Chapter 12 (Indian Gaming) and Chapter 21 (Economic Development). Member of the Executive Board of Editors.

Author, *Tribal Voting Rights and Election Law*, Section 4.06, *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* 3d Edition (2005).

JUDICIAL RULES TESTIMONY

In Re Minnesota General Rules of Practice, Minnesota Supreme Court. Provided oral and written testimony to the Minnesota Supreme Court in October 2002 on the need for a rule recognizing tribal court judgments in state courts. The court adopted such a rule in December 2003.

MAJOR RESEARCH GRANTS

Co-Principal Investigator, 2006-2008 National Institute of Justice Grant of approximately \$1.46 million for "A Study of the Administration of Criminal Justice in Indian Country" with Carole Goldberg (UCLA School of Law) and Duane Champagne (UCLA Sociology Department), a qualitative empirical study involving interviews of more than 400 people, primarily tribal criminal justice officials, on twelve Indian reservations nationwide and a broader survey of fifty additional reservations.

OTHER PUBLICATIONS

Published Lecture, *American Indians, Crime and the Law: Five Years of Scholarship on Criminal Justice in Indian Country*, Inaugural William C. Canby, Jr., Distinguished Lecture, 40 *ARIZONA STATE LAW JOURNAL* 1003 (2008).

Contributing Writer, Center for Civic Education, *WE THE PEOPLE: THE CITIZEN AND THE CONSTITUTION* (2009) (a civics textbook written with federal funding for use in secondary education).

Constitutional Mythbusters: The U.S. Constitution and American Indian Tribes, (Tucson) *Arizona Daily Star*, A10, Sept. 14, 2008 (together with other authors).

Memorial Essay, *Remembering DeGiacomo*, 38 *NEW MEXICO LAW REVIEW* 235 (2008).

Interview of Professor Washburn, entitled "*Misplaced Justice*," *High Country News*, Jan. 21, 2008.

Conference Transcript, *The New Realism: The Next Generation of Scholarship in Federal Indian Law, Public Safety and Criminal Justice*, Materials Related to the National Congress of American Indians Conference at Berkeley, Cal., Nov. 17, 2006, printed at 32 AMERICAN INDIAN LAW REVIEW 1, 60-66 (2007).

Brief Essay on *Bryan v. Itasca County*, in KATE ROBERTS, MINNESOTA 150: THE PEOPLE, PLACES AND THINGS THAT SHAPE OUR STATE, Minnesota Historical Society (2007).

Op-Ed, *Iowa Credited for Step to Enforce Tribal Judgments*, Des Moines Register, May 29, 2007.

Interview of Professor Washburn, *The Big Gamble: Minnesota Governor Faces Political Repercussions Over Indian Gaming*, Grand Forks Herald, Nov. 28, 2004.

Op-Ed, *Don't Overestimate Gaming Industry Revenues*, (Minneapolis) Star Tribune, Oct. 1, 2004.

Interview of Professor Washburn, entitled *Tribal Sovereignty for Beginners*, Grand Forks Herald, Apr. 6, 2003.

Professor Washburn has also been quoted in various publications, including the New York Times, the Washington Post, the Wall Street Journal, Indian Country Today, the National Law Journal, the Chickasaw Times, and other national, regional and local newspapers. He has also appeared in stories reported by Minnesota Public Radio, WBUR-Boston, Twin Cities Public Television, and in numerous other radio and television news outlets.

OTHER ACADEMIC APPOINTMENTS

Arizona State University Sandra Day O'Connor College of Law, Inaugural William C. Canby, Jr., Distinguished Scholar in Residence. January 22-25, 2008.

University of Nebraska College of Law, Lincoln, Nebraska. Visiting Professor, Course on Race, Crime and the Law, in the Pre Law Undergraduate Summer Program funded by the Law School Admission Council (LSAC). June 21-July 2, 2004.

University of New Mexico School of Law, Albuquerque, New Mexico, Adjunct Professor of Law, Appellate Advocacy, and Moot Court Coach, 1998-1999; Guest Lecturer in numerous courses from Fall of 1997 through Fall of 1999 related to Indian law issues; Frequent Guest Lecturer, American Indian Law Center Pre-Law Summer Institute for Indian students entering law school. Guest Lecturer, University of New Mexico University College (undergraduate level), Introduction to Indian Law, Contemporary Approaches to Indian Law, 1998.

(SELECTED) INVITED LECTURES, ADDRESSES, COLLOQUIA AND OTHER ACADEMIC PRESENTATIONS

Presentation, *Culture and Conflict among Justice, Interior and the NIGC: Federal Implementation of the Indian Gaming Regulatory Act*, at Indian Country's Winning Hand: 20 Years of the Indian Gaming Regulatory Act, Arizona State University Sandra Day O'Connor College of Law, Fort McDowell Reservation, Scottsdale, Arizona, October 16-17, 2008.

Presentation, *Reconsidering Federal Oversight of Tribal Economic Decisions in Indian Gaming*, Northwestern University School of Law, Searle Center on Law Regulation and Economic Growth, Chicago, Illinois, September 15-16, 2008.

Luncheon Speaker, *The Indian Gaming Regulatory Act: Twenty Years Old*, at the Federal Bar Association's 33rd Annual Indian Law Conference, Albuquerque, New Mexico, April 10-11, 2008.

Presentation, *The Trust Responsibility in Context: Does the NIGC Have a Trust Responsibility?*, at a symposium entitled, Sustainability and Economic Development in Indian Country, at Lewis & Clark Law School, Portland, Oregon, April 4, 2008.

Commentator, Faculty Scholarship Roundtable on the Grand Jury, The George Washington University Law School, Washington, D.C., March 21, 2008.

Moderator (and Organizer), Panel Discussion entitled "*Paternalism or Protection: Federal Review of Tribal Economic Decisions in Indian Gaming*," Harvard law School, Cambridge, Massachusetts, March 20, 2008.

Panel Discussion, *The Supreme Court's Grant of Certiorari in Carcieri v. Kempthorne and its Broader Implications*, with the attorney for Governor Carcieri, Roger Williams University, Bristol, Rhode Island, February 29, 2008.

Faculty Workshop, *Reconsidering the Grand Jury*, Roger Williams University, Bristol, Rhode Island, February 29, 2008.

Faculty Workshop, *Reconsidering the Grand Jury*, Arizona State University Sandra Day O'Connor College of Law, Tempe, Arizona, January 25, 2008.

Public Lecture, *American Indians, Crime and the Law: Five Years of Scholarship on Criminal Justice In Indian Country*, Inaugural Honorable William C. Canby, Jr. Distinguished Scholar in Residence Lecture, Arizona State University Sandra Day O'Connor College of Law, Tempe, Arizona, January 24, 2008.

Faculty Workshop, *Reconsidering the Grand Jury*, University of Arizona James E. Rogers College of Law, Tucson, Arizona, January 18, 2008.

Presentation (and Co-Organizer), Tribal Leadership Development Conference, a workshop for newly elected tribal officials in the Upper Midwest on good government and leadership, University of Minnesota Law School, Minneapolis, Minnesota, December 14, 2007.

Faculty Workshop, *Reconsidering the Grand Jury*, Harvard Law School, Cambridge, Massachusetts, December 10, 2007.

Presentation and Discussion, *Indian Gaming: Its Origins, Evolution, and Place in Tribes' Struggle for Self-Determination*, with Robert Gips, counsel and advisor to the Mashantucket Pequot Tribe, and Joe Kalt, Ford Foundation Professor of International Political Economy at the Kennedy School of Government, Harvard Law School, Cambridge, Massachusetts, November 26, 2007.

Roundtable Discussion, *American Indians, Crime and the Law: Recent Scholarship on Criminal Justice in Indian Country*, Harvard Law School, Cambridge, Massachusetts, November 9, 2007.

Presentation and Discussion, *American Indians, Crime and the Law: Five Years of Scholarship on Tribal Courts, Federal Criminal Justice and Crime in Indian Country*, Harvard University Native American Program, Cambridge, Massachusetts, October 31, 2007.

Faculty Workshop, *Reconsidering the Grand Jury*, Vanderbilt Law School, Nashville, Tennessee, October 25, 2007.

Presentation and Discussion, *Problems with Federal Criminal Justice in Indian Country, and Solutions*, an address to 14 United States Attorneys and assorted Assistant U.S. Attorneys and other federal law enforcement officials as part of the annual meeting of the Native American Issues Subcommittee of the Attorney General's Advisory Committee, Durango, Colorado, October 23, 2007.

Faculty Workshop, *Reconsidering the Grand Jury*, University of Colorado Law School, Boulder, Colorado, October 19, 2007.

Faculty Workshop, *Reconsidering the Grand Jury*, University of Virginia Law School, Charlottesville, Virginia, September 28, 2007.

Panel Discussion, *Asymmetrical Litigation and Internet Gambling Laws*, as part of a panel of attorneys and professors discussing the World Trade Organization litigation between Antigua and the United States and other internet gaming issues, hosted by Professor Charles Nesson, Harvard Law School, Cambridge, Massachusetts, October 16, 2007.

Presentation and Panel Discussion, *Placing the Best Interests of the Student First*, as part of a panel of law school deans, entitled "The Transfer Student Dilemma – Another Perspective," at the Annual Meeting of the Law School Admission Council, Tucson, Arizona, June 1, 2007.

Presentation, *Indians Teaching Indian Law*, at "40 Years of the Pre-Law Summer Institute: A Retrospective Symposium," sponsored by the American Indian Law Center, University of New Mexico School of Law, Albuquerque, New Mexico, April 21, 2007.

Presentation, *Indian Law 101*, First Annual Legislative Forum, Indian Law Issues 101, Minnesota State Legislature, sponsored by the Minnesota Indian Affairs Council, February 20, 2007.

Dinner Speech, *The Stubborn Anishinabe Who Changed the World*, Welcome Dinner, National Native American Law Student Association, National Moot Court Competition, Minneapolis, Minnesota, February 16, 2007.

Lecture, *Criminal Justice as Prerequisite for Tribal Self-Determination*, a presentation at "Hope for All Generations: Weaving a Network of Safety, Justice and Healing," the 10th National Indian Nations Justice for Victims of Crime Conference, sponsored by the U.S. Department of Justice Office for Victims of Crime and the Tribal Law and Policy Institute, Palm Springs, California, December 7-9, 2006.

Lecture, *Agency Rulemaking and Indian Tribes*, a presentation as part of "Administrative Law: Indian Tribes and the Federal Agency Maze," a CLE course sponsored by the Sandra Day O'Connor College of Law, Arizona State University, Tempe Arizona, November 30 – December 1, 2006.

Presentation, and Conference Co-Organizer, *The New Realism: The Next Generation of Scholarship in Federal Indian Law*, a conference jointly sponsored by the National Congress of American Indians Policy Research Center and the University of California-Berkeley Boalt Hall School of Law, Berkeley, California, November 17-18, 2006.

Faculty Workshop, *Reconsidering the Grand Jury*, Marquette University Law School, Milwaukee, Wisconsin, October 12, 2006.

Presentation, *Indian Gaming Regulatory Act Proposed Reforms: McCain and Pombo Bills*, a component of a day-long Continuing Legal Education program entitled “Indian Gaming: Changing the Rules and Raising the Stakes,” sponsored by the Minnesota American Indian Bar Association, Mille Lacs, Minnesota, September 22, 2006.

Presentation, *Toward a New Realism in Federal Indian Law*, the inaugural Tribal Leader/Scholar Forum, sponsored by the National Congress of American Indians, at its 2006 Mid Year Conference (with Professors Bethany Berger, Phil Frickey and Sarah Krakoff), Sault Ste. Marie, Michigan, June 20, 2006.

Presentation, *Indian Gaming Law 101 and Recent Developments*, sole presenter at day-long continuing legal education program, sponsored by the University of Minnesota Law School, Minneapolis, Minnesota, June 7, 2006.

Moderator, Debate between Hennepin County Attorney Candidates Mike Freeman and Andy Luger, sponsored by the University of Minnesota Law School Democrats, a student organization, Minneapolis, Minnesota, April 4, 2006. See Mike Kazsuba, Making the Case to Be the Next Hennepin County Attorney, (Minneapolis) Star Tribune, April 5, 2006, page B3.

Lecture, *Reform of Criminal Justice for Indian Tribes*, Woodrow Wilson International Center for Scholars, Washington, D.C., March 14, 2006.

Lecture, *American Indians, Crime and the Law*, University of North Dakota Law School, sponsored by the Northern Plains Indian Law Center as part of the 2005-06 Speaker Series, Grand Forks, North Dakota, January 13, 2006.

Presentation, *Tribal Self-Determination at the Crossroads*, at Symposium entitled, “Indian Law at the Crossroads,” sponsored by the University of Connecticut and the Connecticut Law Review, Hartford, Connecticut, October 28, 2005.

Faculty Workshop, *Federal Criminal Law and Tribal Self-Determination*, University of Colorado School of Law, Boulder, Colorado, September 30, 2005.

Moderator, *Tribal Governance and Constitutional Challenges*, a tribal leader panel discussion regarding proposed constitutional changes within the Minnesota Chippewa Tribal Constitution at the Minnesota American Indian Bar Association’s Annual CLE Program, entitled “The Experts Speak,” Mystic Lake, Shakopee Mdewakanton Dakota Community, Prior Lake, Minnesota, September 23, 2005.

Faculty Workshop, *Federal Criminal Law and Tribal Self-Determination*, University of Arizona, James E. Rogers College of Law, Tucson, Arizona, September 15, 2005.

Lecture, *Federal Indian Country Criminal Justice, A Critique*, Federal Practice CLE, sponsored by the Federal Bar Association of Montana, Helena, Montana, September 9, 2005.

Informal Faculty Colloquium, *Federal Criminal Law and Tribal Self-Determination*, University of California – Berkeley, Boalt Hall School of Law, Berkeley, California, June 27, 2005.

Speaker, *Crime in Indian Country*, Oklahoma Sovereignty Symposium XVII, entitled “Building More Bridges – Pooling Our Resources,” sponsored by the Oklahoma Supreme Court, Oklahoma City, Oklahoma, June 1, 2005.

Moderator, "Tribal-State Gaming in Minnesota," a Panel Discussion on the Legal Implications of the Expansion of Indian Gaming, with Governor Pawlenty's Chief of Staff Dan McElroy, Shakopee Mdewakanton Dakota Community Tribal Attorney Willie Hardacker, Mille Lacs Band of Ojibwe Special Counsel Tadd M. Johnson, and James McGreevey, lawyer/lobbyist with Larkin Hoffman, representing three northern Minnesota tribes, April 19, 2005, University of Minnesota Law School.

Faculty Workshop, *American Indians, Crime and the Law*, University of New Mexico School of Law, Albuquerque, New Mexico, April 13, 2005.

Lecture, *The Secretary's Trust Responsibility and Indian Gaming Revenue Sharing in Tribal State Compacts*, a presentation at "The Gaming Law Minefield," the Ninth Annual National Institute on Gaming Law, American Bar Association Criminal Justice Section, Las Vegas, Nevada, February 17, 2005.

Lecture, *A Sober Assessment of Federal Indian Country Criminal Justice*, a presentation at the Indian Country Law Conference sponsored by the Miccosukee Tribe of Indians of Florida and the Center for Indigenous Law, Governance & Citizenship of the Syracuse University College of Law, Miami, Florida, February 12, 2005.

Lecture, *Tribal Courts and the Federal Sentencing Process*, a presentation at "Reviving Our Sacred Legacy; Lighting the Path to Our Future," the 9th National Indian Nations Justice for Victims of Crime Conference, sponsored by the U.S. Department of Justice Office for Victims of Crime and the Tribal Law and Policy Institute, Palm Springs, California, December 10, 2004.

Lecture, *The New Tribal Court Recognition Rule and the Broader Perspective*, a presentation on a panel on the "Comity Rule to Enforce Tribal Court Orders and Judgments," at the 2005 Minnesota Annual Conference of Judges, Bloomington, Minnesota, December 3, 2004.

Lecture, *Federal Indian Law, Civic Education, and Race Relations – How General Civic Ignorance Undermines the Status of Indian Tribes in Our Democracy and Breeds Mistrust*, Human Rights Day and Forum, State of Minnesota Department of Human Rights, St. Paul, Minnesota, December 3, 2004.

Lecture, *Lock 'Em Up: Taking Back Criminal Jurisdiction*, a presentation at the Sixth Annual Washington, D.C. Indian Law Conference, sponsored by the Federal Bar Association, the National Native American Bar Association, and the Native American Bar Association of Washington, D.C., September 24, 2004.

Lecture, *Tribal Courts and Implementation of the New Full Faith and Credit Rule*, a presentation at the Minnesota State Bar Association 2004 Convention, Duluth, Minnesota, June 10, 2004.

Presentation, *A Discussion of Minnesota's Rule for the Recognition of Tribal Court Judgments*, a panel discussion sponsored by the Minnesota American Indian Bar Association and the University of St. Thomas Law School, Minneapolis, Minnesota, April 28, 2004.

Lecture, *American Indians, Crime and the Law: De-Colonizing Indian Country Criminal Justice*, a presentation on a panel entitled, "Criminal Jurisdiction in Indian Country," Federal Bar Association's 29th Annual Indian Law Conference, Albuquerque, New Mexico, April 15-16, 2004.

Lecture, *Decolonizing Indian Country Criminal Justice*, a presentation to United States Attorney Tom Heffelfinger, other Administration officials, Senate staffers and representatives of the National Congress

of American Indians at a meeting called "Identifying Problems with Criminal Jurisdiction in Indian Country and Developing Viable Solutions," Washington, D.C., March 17-18, 2004.

Lecture, *A Different Kind of Symmetry*, a presentation at the New Mexico Law Review's Annual Symposium, entitled "Enforcing the Judgments of Tribal Courts," Albuquerque, New Mexico, March 6, 2004.

Lecture, *Federal Indian Law and Human Rights on Indian Reservations*, Human Rights Day and Education Forum, State of Minnesota Department of Human Rights, St. Paul, Minnesota, December 5, 2003.

Lecture, *United States Policy Toward Indian Nations: the Past, the Present and the Future*, University Lecture, Macalester College, St. Paul, Minnesota, November 13, 2003.

Lecture, *Indian Gaming and the Future of American Indian Policy*, Third Annual Northern Plains Indian Law Center Distinguished Lecture, University of North Dakota School of Law, April 1, 2003.

Lectures, "Amending Title 25 of the United States Code" and "The Future of Advocacy for Indigenous Nations," Indigenous Nations Law Symposium, University of Iowa College of Law, Iowa City, Iowa, March 14, 2003.

Lecture Commentator, Comments on Carole Goldberg's Individual Rights and Tribal Revitalization, Barry Goldwater Symposium on American Legal Institutions, Arizona State University College of Law, Tempe, Arizona, February 20, 2003.

Faculty Workshops, *Indian Gaming and Per Capita Distribution Issues*, a "job talk" paper, presented at the law schools at Albany, Florida, Gonzaga, Idaho, Kansas, Memphis, Minnesota, Nebraska, Southern Methodist University, and Wyoming, November 2002.

Lecture, *The Native American Experience with Reparations – the Indian Claims Commission*, Symposium entitled "Reparations for the Children of Slaves – An Idea Whose Time Has Come?," University of Memphis School of Law, Memphis, Tennessee, March 15, 2002.

Lecture, *Recent Developments in Indian Gaming and Per Capita Distribution Issues*, Indian Law Issues in the New Century, University of Washington School of Law and Gonzaga University School of Law, Spokane, Washington, February 1, 2002.

Presentation, *Update on Indian Gaming*, Meeting of Attorney General's Advisory Council's Subcommittee on Native American Issues, Albuquerque, New Mexico, April 4, 2001.

Lecture, *Current Issues in Indian Gaming*, Fifth Annual National Institute on Gaming Enforcement, American Bar Association Criminal Justice Section, Las Vegas, Nevada, February 15, 2001.

Lecture, *Federal, State and Tribal Relations in Indian Gaming*, panel entitled, "Jurisdiction in State-Tribal-Federal Courts," Sovereignty Symposium, Supreme Court of Oklahoma, Tulsa, Oklahoma, June 5, 2000.

Lecture, *Recent Developments in Indian Gaming*, Indian Gaming in the Twenty First Century, University of New Mexico School of Law, April 1, 2000.

Lecture, *Current Issues in Indian Gaming*, a guest lecture in course entitled, Contemporary Issues in Federal Indian Law, Adjunct Professor Riyaz Kanji, University of Michigan School of Law, Ann Arbor, Michigan, Spring 2000.

Lecture, *Litigating Federal Water Rights in the Gila River System*, a guest lecture in a course entitled, River Control and Management (joint law and graduate geology course), Professor Joseph Fellers, Arizona State University College of Law, Phoenix, Arizona, Fall 1997.

Lecture, *The County Supremacy Movement and Other Opposition to Tribal Resource Controls, Symposium on Tribal Stewardship of Environmental Resources*, University of Montana School of Law, Missoula, Montana, Public Land and Resources Law Review, March 1996.

Lecture, *Federal Indian Litigation in Montana*, Dispensing Justice in Indian Country, University of Montana School of Law, Missoula, Montana, July 1995.

OTHER TEACHING EXPERIENCE

National Judicial College, Instructor; Courses including Essential Skills for Tribal Court Judges; Essential Skills for Tribal Gaming Commissioners. Reno, Nevada, 2002 to present.

National College of District Attorneys, Instructor, Gaming Investigation Prosecution and Regulation, 2000, 2001.

Federal Bureau of Investigation, Instructor, FBI In-Service Training Seminar on Indian Gaming, May 14-18, 2001, Traverse City, Michigan.

Miscellaneous. Professor Washburn has made numerous presentations at gaming industry, Indian law, and federal law enforcement conferences including addressing the Attorney General's Advisory Committee of United States Attorneys (Native American Issues Subcommittee) and conducting in-service training for Law Enforcement Officers of the United States Forest Service.

BOARDS AND COMMITTEES

National Conference of Bar Examiners; Member, Criminal Law and Procedure Drafting Committee; term from 2006-2010 (responsible for drafting questions for the Multistate Bar Examination).

Cohen's Handbook of Federal Indian Law, Executive Committee of Board of Authors and Editors, 2005 to present; editor primarily responsible for updates to Chapter 9 (Criminal Jurisdiction), Chapter 12 (Indian Gaming) and Chapter 21 (Economic Development).

Law School Admission Council, Trustee, 2006 to 2009. Member or Liaison to Minority Affairs Committee, 2003 to 2007; Test Development and Research Committee, 2007 to present (appointed to Board of Trustees by then-LSAC Chairman Kent Syverud).

Center for Civic Education, Consultant on Curriculum, 2004 to 2006.

United States Department of Justice, Served as informal advisor to then-United States Attorney Tom Heffelfinger, Chair of the Native American Issues Subcommittee of the Attorney General's Advisory Committee, 2004 to 2005.

United States Sentencing Commission, Member - Ad Hoc Advisory Committee on Native American Sentencing Issues, Washington, D.C., 2002 to 2004; Co-Drafted Report Presented to the Sentencing Commission at a Public Hearing in Washington, D.C., on November 4, 2003.

Innocence Project of Minnesota, Member, Board of Directors, 2002 to 2003.

New Mexico Bar Association Indian Law Section, Member of Board of Directors, 1998 to 2002, and Chair, Indian Law Writing Competition, 1998 to 2003.

Minnesota American Indian Bar Association (MAIBA), Member, Scholarship Committee 2002-2004.

Yale Law School Fund,

Member, Board of Directors, 1998-2004

Class Agent, Class of 1993, 1992 to present

Yale Law School Class Reunion Committee 1998, 2003, 2008.

PROFESSIONAL AWARDS AND PERSONAL INFORMATION

Fesler-Lampert Research Fellowship, University of Minnesota Law School, 2006-2007.

Bronze Medal For Commendable Service, Environmental Protection Agency (for representing the agency in successful Clean Air Act litigation), June 7, 2000.

Award for Sustained Superior Performance, United States Attorney's Office, September 13, 1999 (cash award).

Special Commendations for Outstanding Service, United States Department of Justice, May 7, 1998 (for successfully litigating Montana v. EPA, 941 F. Supp. 945 (D. Mont. 1996) and 137 F.3d 1135 (9th Cir. 1998).

Special Commendation for Outstanding Service, United States Department of Justice, April 8, 1997.

Member, American Law Institute (since 2007).

Member, State Bars of Minnesota and New Mexico.

Member, Chickasaw Nation of Oklahoma, a Federally Recognized Indian Tribe.

Married to Elizabeth "Libby" Rodke Washburn.

Children: Cole (born 2002) and Ford (born 2004).



IN THE MATTER OF

Ivy Ong and Carlo World Wide
Operations LLC,

Respondents.

Notice of Violation: NOV-07-02
OHA Docket No. NIGC 2007-1 (Pfister)

Civil Fine Assessment: CFA-07-02
OHA Docket No. NIGC 2007-2 (Pfister)

Final Decision and Order
January 18, 2008

On appeal to the National Indian Gaming Commission ("Commission") from a notice of violation and proposed civil fine assessment issued by the Chairman of the Commission to Ivy Ong and Carlo World Wide Operations LLC ("Respondents") for managing without an approved contract in violation of 25 U.S.C § 2711 and 25 C.F.R. §§ 533.1 – 533.3 and for improperly holding a proprietary interest in Indian gaming activity in violation of 25 U.S.C. § 2710 (b)(2)(A); 25 C.F.R. § 522.4(b)(1); and the gaming ordinance of the Seminole Tribe of Oklahoma, Seminole Nation Public Gaming Act, Title 15, Section 11.

Appearances

Ivy Ong and Carlo World Wide LLC, *pro se*.
Maria Getoff, Esq., and Rebecca Chapman, Esq., for the Chairman, National Indian Gaming Commission.

Presiding Official

Thomas K. Pfister, Office of Hearings and Appeals, U.S. Department of the Interior.

FINAL DECISION AND ORDER

After careful and complete review of the agency record and the Presiding Official's recommended decision, the Commission finds and orders that:

1. The Chairman issued a notice of violation, NOV-07-02, to Respondents on May 16, 2007, for managing without an approved contract and improperly holding a proprietary interest in Indian gaming activity.
2. Respondents filed a pleading styled as a "request for dismissal" of NOV-07-02 on June 13, 2007, and a proper notice of appeal from NOV-07-02 on June 15, 2007.
3. The Chairman issued a proposed civil fine assessment of \$5,150,000, CFA-07-02, to Respondents on June 15, 2007.
4. Respondents filed a notice of appeal from CFA-07-02 on July 13, 2007.
5. Respondents did not file the supplemental statements required by 25 C.F.R. § 577.3(c) for either appeal. Respondents thus failed to prosecute the appeals and have waived the right to bring them.
6. Respondents failed to respond to a series of communications and orders from the Presiding Official designated for these appeals and thus clearly and unequivocally abandoned the appeals.
7. The appeals of NOV-07-02 and CFA-07-02 are hereby dismissed with prejudice.
8. Notice of violation NOV-07-02 is upheld.
9. Civil fine assessment CFA-07-02 is upheld and made final.

DISCUSSION

We adopt the thorough and well-reasoned recommended decision of the Presiding Official, attached, and add only the following few comments. First, the Presiding Official correctly finds that the failure to file the supplemental statement required by 25 C.F.R. § 577.3(c) is, by itself, a sufficient reason to dismiss. A notice of appeal filed under 25 C.F.R. § 577.3(b) simply puts the Chairman and the Commission on notice of an appeal from a particular notice or order. It is the supplemental statement

that, despite its name, provides the substance of the appeal. The statement must state “with particularity the relief desired and the grounds therefore” and must include supporting evidence, if available. 25 C.F.R. § 577.3(c). The failure to file a supplemental statement is akin to a failure to file an appellate brief before a United States Court of Appeals. Such a failure to prosecute an appeal is a waiver of the opportunity for appeal presented by 25 C.F.R. Part 577. *See, e.g., Ahlberg v. HHS*, 804 F.2d 1238, 1243 (Fed. Cir. 1986); *ViAids Laboratories v. USPS*, 464 F. Supp. 976, 981-982 (S.D.N.Y. 1979).

Second, Respondents’ dismissal of their attorney and their subsequent utter failure to respond to a long series of correspondence and orders from the Presiding Official, not to mention the Chairman’s motion to dismiss, is an equally sufficient ground for dismissal. The record clearly and unequivocally shows, and the Presiding Official correctly found, that Respondents abandoned these appeals.

Third and finally, the Presiding Official correctly concluded that the Commission, and not a presiding official, has the authority to dismiss an appeal as a final agency action. Such authority is not given to a presiding official by 25 C.F.R. Part 577. Further, The Administrative Procedure Act (“APA”) 5 U.S.C. §§ 701 *et seq.*, makes the recommended decision of a presiding official contingent, and it becomes the decision of the agency only in the absence of further agency action. Similarly, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (“IGRA”) makes only the appellate decisions of the Commission, not those of presiding officials, final agency actions. 25 U.S.C. §§ 2713(a)(2), 2714.

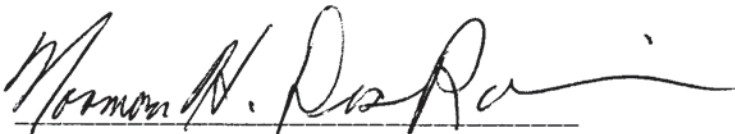
CONCLUSION

Respondents appeals of NOV-07-02 and CFA 07-02 are dismissed. NOV-07-02 is upheld. CFA-07-02 is upheld and made final.

It is so ordered by the NATIONAL INDIAN GAMING COMMISSION on this 18TH day of January, 2008.

A handwritten signature in black ink, appearing to read 'P. Hogen', written over a horizontal line.

PHILIP N. HOGEN
CHAIRMAN

A handwritten signature in black ink, appearing to read 'Norman H. DesRosiers', written over a horizontal line.

NORMAN H. DESROSIERS
VICE CHAIRMAN



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
WELSA Hearings Division
Bishop Henry Whipple Federal Building
1 Federal Drive, Suite 3600A
St. Paul, MN 55111-4040



DEC 19 2007

National Indian Gaming Commission
1441 L St. NW
Ninth Floor
Washington, DC 20005

Re: *In the Matter of Ivy Ong and Carlo World Wide Operations, LLC*
NIGC 2007-1, NOV-07-02; NIGC 2007-2, CFA-07-02

Dear Madame or Sir:

In regard to the above-referenced appeals, please find enclosed a Recommended Decision that NIGC Chairman's Motion to Dismiss Appeals be Granted. Please advise as to whom I should send the Administrative Record.

Sincerely,

Thomas K. Pfister
Administrative Judge

cc:

Ivy Ong, Individually
Ivy Ong, Manager, Carlo World Wide Operations, LLC
(via facsimile transmission: (760) 806-4839)

Maria Getoff, Esq.
Rebecca Chapman, Esq.
National Indian Gaming Commission
National Headquarters
1441 L Street, NW, Suite 9100
Washington, DC 20005

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS

DEC 19 2007

IN THE MATTER OF)	Docket No. NIGC 2007-1
)	Notice of Violation: NOV-07-02
IVY ONG AND CARLO)	
WORLD WIDE OPERATIONS, LLC)	Docket No. NIGC 2007-2
)	Civil Fine Assessment CFA-07-02
Respondents.)	
)	Indian Gaming Regulatory Act,
)	25 U.S.C. §§ 2701-2721

**RECOMMENDED DECISION THAT NIGC CHAIRMAN'S
MOTION TO DISMISS APPEALS BE GRANTED**

The National Indian Gaming Commission (NIGC) Chairman has filed a Motion to Dismiss Appeals. The NIGC Chairman moves to dismiss the above-referenced appeals due to Respondents' failure to perfect and pursue their appeals. Respondents have not filed any response or opposition to the motion. The motion is well-taken. The Presiding Official recommends that the NIGC Commission grant the motion and dismiss Respondents' appeals with prejudice.

BACKGROUND

The above-referenced matters arise from Respondents' appeal of the NIGC Chairman's Notice of Violation (NOV), NOV-07-02, and from their appeal of the NIGC Chairman's Proposed Civil Fine Assessment (CFA), CFA-07-02.¹

The NIGC Chairman issued NOV-07-02 on May 16, 2007. On June 14, 2007, Respondents' counsel filed an Entry of Appearance and a Request for Dismissal. Respondents filed their appeal of NOV-07-02 on June 15, 2007. Respondents did not file the supplemental statement required to be filed within ten days of their appeal of NOV-07-02 pursuant to 25 C.F.R. § 577.3(c).

¹ While these appeals have not been consolidated generally, the appeals are based on common facts and legal issues and, therefore, are consolidated here for the purpose of this recommended decision.

On June 15, 2007, the NIGC Chairman issued CFA-07-02. Respondents filed their appeal of CFA-07-02 on July 13, 2007. Respondents did not file the supplemental statement required to be filed within ten days of their appeal of CFA-07-02 pursuant to 25 C.F.R. § 577.3(c).²

An Order Granting Withdrawal, issued November 9, 2007, allowed Kevin Combs, Esq. to withdraw as Respondents' counsel.³ Respondents were ordered to file, within ten days of the Order, a statement containing the following information:

- (1) indicating whether the Respondents intend to pursue their appeals of these matters and, if so, whether the Respondents intend to proceed individually or through counsel; and,
- (2) providing a service address and facsimile telephone number for each Respondent.

Respondents did not file the required statement.⁴

An Order Granting the Parties' Joint Motion to Extend Deadlines, issued August 23, 2007, set various pre-hearing deadlines. This Order set December 4, 2007, as the deadline for the following pre-hearing matters:

1. Date by which each party shall file a list containing the names of those persons it expects to call as witnesses at the hearing in this matter (including expert witnesses),

² Respondents' appeal of CFA-07-02 also contained a waiver of their right to a hearing within 30 days. On July 2, 2007, Respondents waived their right to a hearing within 30 days regarding their appeal of NOV-07-02. These waivers of the 30-day hearing requirement pursuant to 25 C.F.R. § 577.4(a), however, did not affect Respondents' obligation to file supplemental statements pursuant to 25 C.F.R. § 577.3(c).

³ The Order Granting Withdrawal directed Kevin Combs, Esq. to forward a copy of the Order to Respondents upon his receipt of the Order. A Certification filed by Kevin Combs Esq. on November 29, 2007, indicates that he successfully faxed the Order to Respondents on November 12, 2007.

⁴ In response to an Order to File Certification, issued November 28, 2007, Respondents' former counsel provided a facsimile number for Respondents, as a service address. Subsequent service upon Respondents by the Presiding Official has been to the facsimile telephone number provided by their former counsel. Even though the facsimile number provided by their former counsel appears to be forwarding to another telephone number, confirmation of successful receipt has been received. Service by facsimile is effective in these appeals. 25 C.F.R. § 577.6(b).

including the identification of the subject matter upon which such persons are expected to testify ("witness list");

2. Date by which each party shall file a list identifying the exhibits it expects to offer into evidence at the hearing in this matter ("exhibit list");
3. Date by which each party shall file reports of expert witnesses it expects to call as witnesses at the hearing in this matter (other than rebuttal witnesses):

Respondents did not comply with this deadline.

On December 6, 2007, the undersigned Presiding Official issued an Order to Show Cause. The Show Cause Order provided that Respondents' conduct, as referenced above, appears to constitute a waiver of their right to an oral hearing pursuant to 25 C.F.R. § 577.3(c). Therefore, Respondents were afforded five days to show cause as to why they have not waived their right to an oral hearing and to show cause as to why their appeals should not be forwarded to the NIGC Commission for a decision solely on the basis of written submissions.

The Show Cause Order also allowed Respondents five days to show cause as to why their Request for Dismissal should not be denied for failure to file a supporting brief.⁵ The Show Cause Order also suspended all remaining deadlines set forth in the Order Granting the Parties' Joint Motion to Extend Deadlines, issued August 23, 2007, until the issues in the Show Cause Order are resolved. Respondents did not file any response to, nor have they otherwise complied with, the Show Cause Order.⁶

Following the filing of the NIGC Chairman's Motion to Dismiss Appeals, the undersigned Presiding Official issued, on December 10, 2007, an Order Setting Briefing Schedule. This Order allowed Respondents five days to file a response to the NIGC Chairman's motion. The Respondents have not filed any response to the motion and, thus, have conceded the motion.

⁵ The Order Granting the Parties' Joint Motion to Extend Deadlines, issued August 23, 2007, set a deadline of November 12, 2007, within which Respondents could file an opening brief in support of their Request for Dismissal. Respondents have not filed an opening brief.

⁶ Given the recommendation that these appeals be dismissed, a ruling on the procedural and hearing related issues set forth in the December 6, 2007 Order to Show Cause is unnecessary and is reserved for a future ruling should the Presiding Official's dismissal recommendation be rejected and these appeals be remanded to the Presiding Official.

ANALYSIS

In his Motion to Dismiss Appeals, the NIGC Chairman asserts that Respondents' appeals should be dismissed with prejudice. The NIGC Chairman argues that Respondents have failed to perfect their appeals by not filing supplemental statements. The NIGC Chairman further asserts that Respondents have abandoned not only their right to a hearing, but their appeals generally, by their repeated failure to comply with orders. I agree.

Respondents' failure to comply with the Presiding Official's case management orders have interfered with the administration of these appeals. The NIGC Chairman has been prejudiced by Respondents' failure to file a statement regarding their intent to proceed with their appeals, which they were ordered to submit in the Order Granting Withdrawal. Respondents' failure to advise whether they intend to proceed with their appeals has wasted time and resources of the NIGC Chairman and the Presiding Official. The NIGC Chairman has been prejudiced by Respondents' failure to file their Witness List, Exhibit List, or Expert Report pursuant to the August 23, 2007, Order Granting the Parties' Joint Motion to Extend Deadlines. Respondents' failure in this regard has hampered the NIGC Chairman's ability to evaluate whether additional discovery is necessary.

The record substantially supports a finding that, in addition to waiving their right to an oral hearing, Respondents have, through their conduct, abandoned their appeals altogether. I also conclude that Respondents have failed to perfect their appeals of NOV-07-02 and CFA-07-02 by their failure to file the required supplemental statements. Therefore, the NIGC Chairman's motion should be granted and Respondents' appeals should be dismissed. This conclusion, however, raises a procedural issue regarding the proper mechanism for dismissal.

The regulations under which these appeals are adjudicated, 25 C.F.R. Part 577 -- APPEALS BEFORE THE COMMISSION ("Part 577"), are silent regarding the specific mechanism for dismissal of appeals in the present circumstances. Even so, certain provisions of Part 577 evidence a structure by which appeals, such as the instant ones, are to be adjudicated. For instance, a notice of appeal is to be filed with the NIGC Commission, rather than the Presiding Official. 25 C.F.R. § 577.3(a). The NIGC Commission then designates a Presiding Official to conduct a hearing. *Id.* § 577.4(a). Section 577.7(b), setting forth the authorities of a Presiding Official when conducting a hearing, confers on the Presiding Official the authority to dispose of procedural requests; to recommend decisions in accordance with § 577.14 of Part 577; and to take other actions authorized by the Commission consistent with Part 577; among other authorities, but does not provide any authority to grant dispositive motions. *Id.* § 577.7(b)(8), (b)(9), and (b)(10).

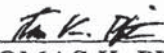
The only provision in Part 577 allowing an action of a Presiding Official to constitute final agency action is 25 C.F.R. § 577.9(d), pertaining to settlement agreements. This section provides that the Presiding Official's certification of consent findings in a settlement agreement shall constitute dismissal of the appeal and final agency action. Thus, the overall

structure of Part 577 leads me to conclude that the NIGC Commission, not the Presiding Official, has sole authority to grant a motion to dismiss and dismiss an appeal as final agency action. Part 577 confers on the Presiding Official only the authority to make recommendations to the NIGC Commission regarding the granting of a dispositive motion, such as the NIGC Chairman's Motion to Dismiss Appeals.⁷

RECOMMENDATION

Therefore, the Presiding Official recommends that the NIGC Commission grant the NIGC Chairman's Motion to Dismiss Appeals and dismiss Respondents' appeal of NOV-07-02 with prejudice and dismiss Respondents' appeal of CFA-07-02 with prejudice.

Done at Saint Paul, Minnesota



THOMAS K. PFISTER
Administrative Judge
Presiding Official

NOTICE

25 C.F.R. § 577.14(b) provides as follows:

(b) *Filing of objections.* Within ten (10) days after the date of service of the presiding official's recommended decision, the parties may file with the Commission objections to any aspect of the decision, and the reasons therefor.

⁷ As opposed to the denial of a motion to dismiss, which a Presiding Official could issue because the denial of such a motion does not constitute final agency action.

CERTIFICATE OF SERVICE

I hereby certify that on DEC 19 2007, a copy of the foregoing was sent, via facsimile transmission, to the following:

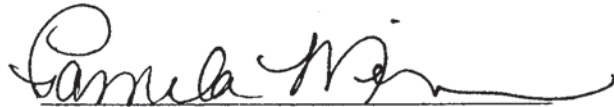
Ivy Ong, Individually
Ivy Ong, Manager, Carlo World Wide Operations, LLC
(760) 806-4839

and a copy was sent, via facsimile transmission and first class mail, to the following:

Maria Getoff, Esq.
Rebecca Chapman, Esq.
National Indian Gaming Commission
National Headquarters
1441 L Street, NW, Suite 9100
Washington, DC 20005

and a copy was sent, via first class mail, to the following

National Indian Gaming Commission
1441 L St. NW
Ninth Floor
Washington, DC 20005



Employee
U.S. Department of the Interior

CERTIFICATE OF SERVICE


I, FRANCES FRAGUA, certify that the foregoing Final Decision and Order and Recommended Decision to Respondent's appeal of NOV-07-02 and CFA 07-02, *In the Matter of Ivy Ong and Carlo World Wide Operations LLC*, was sent by facsimile transmission and U.S. Postal Service First Class mail this 18th day of January, 2008, to the following:

Ivy Ong, Individually
Ivy Ong, Manager, Carlo World Wide Operations, LLC
c/o Brian Ong
1442 Irvine Avenue
Newport Beach, California 92660
Fax #: (760) 806-4839

Thomas K. Pfister, Administrative Judge
Presiding Official
United States Department of the Interior
Office of Hearings and Appeals
WELSA Hearings Division
Bishop Henry Whipple Federal Building
1 Federal Drive, Suite 3600A
St. Paul, MN 55111-4040
Fax #: 612-725-1856

and a copy Hand-Delivered to:

Maria Getoff, Esquire
Rebecca Chapman, Esquire
National Indian Gaming Commission
Office of the General Counsel
1441 L Street, NW, Suite 9100
Washington, DC 20005



Frances Fragua
National Indian Gaming Commission
Office of the General Counsel
1441 L Street, NW, Suite 9100
Washington, D.C. 20005
(202) 632-7003



WASHBURN EX. C

February 1, 2005

The Honorable John McCain, Chairman
The Honorable Byron Dorgan, Vice-Chairman
The Honorable Daniel Inouye, Member
Committee on Indian Affairs
United States Senate
836 Hart Office Building
Washington, DC 20510

Re: Contract review and IGRA's sole proprietary interest requirement

Dear Senators:

This is in response to the December 15, 2004, letter of Senators Campbell and Inouye, then the Chairman and Vice-Chairman, respectively, of the Committee on Indian Affairs. The letter expresses concerns about the National Indian Gaming Commission's review of gaming-related contracts for violations of the sole proprietary interest requirement of the Indian Gaming Regulatory Act ("IGRA"). Senator McCain has previously expressed interest in this issue in the context of the Mohegan Sun Management contract. We appreciate the concerns of the Committee. Consequently, we thought it might be helpful if we provided our thoughts on the issue.

Reduced to its essentials, the December 15 letter is concerned that the Commission's contract review has discouraged otherwise-willing contractors from working with Indian tribes, and thus has deprived the tribes of opportunities to develop or expand casinos. The letter is further concerned that the Commission brought about that state of affairs by the *ad hoc* application of a new standard for violations of IGRA's sole proprietary interest requirement, without notice or guidance to the tribes or their contractors in a manner that is not subject to review, thus depriving all concerned of their statutory and constitutional protections under the Administrative Procedure Act.

We wish to assure you, Senators, that this is not the case. We believe that we have helped the tribes and that we have saved them tens of millions of dollars by providing guidance on this issue. In a nutshell:

- The Commission's review of gaming-related contracts is intended to assure that the Indian tribes are the primary beneficiaries of their gaming operations, as IGRA requires. Our review has identified for tribes casino development contracts that were not only illegal but also unconscionable. Proposed under the guise of mutually-beneficial ventures, some were so one-sided that the tribes would realize nearly nothing from the gaming operation.

- The Commission's review of contracts, which are voluntarily submitted by the parties, attempts to identify potential IGRA violations before they occur, and thus avoid both the necessity of enforcement actions against tribes and the myriad problems that can arise when parties suddenly discover that their operating agreement was executed in violation of applicable law. When our review identifies IGRA violations in contracts already in effect, tribes are often able to renegotiate them without our having to bring enforcement actions and interrupting casino operations.
- The Commission's review is not a new exercise, nor does it apply new standards, previously undisclosed. Since 1993, Indian tribes and their contractors have, at the Commission's encouragement, submitted some 440 contracts for review, specifically for a determination that they are not subject to, or that they comply with, IGRA's requirements for management contracts. The review for sole proprietary interest violations became part of this review about 6 years ago as the Commission became more and more concerned about contracts that included egregious terms benefiting contractors rather than tribes. Before that, the issue had lain dormant since January 1993, when the Commission, in adopting regulations on tribal ordinances, provided a formal statement on sole proprietary interest in the Federal Register and indicated that it would provide further guidance in individual cases.
- The Commission's review does not infringe on the rights of Indian tribes or their contractors. The Commission is charged with IGRA's enforcement, and I may bring enforcement actions for all IGRA violations, including the requirement that a tribe, in all of its contractual undertakings, maintain the sole proprietary interest in, and responsibility for, all gaming activity. This is so whether or not the parties have submitted their contracts for review. For every alleged IGRA violation, the parties are entitled to administrative review before the full Commission under the Administrative Procedures Act and to subsequent judicial review if they are still aggrieved.

A more detailed legal and factual discussion follows.

Legal background

To begin with, IGRA requires, as one of the necessary conditions for a tribe to open and operate a casino, a gaming ordinance approved by me, as the Commission Chairman. 25 U.S.C. §§ 2710(b)(B); 2710(d)(1)(A). For approval of a gaming ordinance, IGRA requires, among other things, that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). The Commission therefore adopted regulations providing that tribal gaming ordinances include a provision to that effect. 25 C.F.R. § 522.4(b)(1).

As such, should a tribe and a contractor execute an agreement that gives to the contractor some proprietary interest in the gaming operation, the agreement violates both the tribal gaming ordinance and IGRA, which empowers me to correct those, and all other, violations

through enforcement actions. Therefore, any agreement that violates IGRA's sole proprietary interest requirement places the tribe at risk of fines and closure of its casino.

That said, a complete discussion of the Commission's review of gaming-related contracts – agreements for the development and construction of casinos, loan agreements, gaming equipment leases, etc. – also requires a brief discussion of management contracts. As summarized above, the Commission's review of contracts for sole proprietary interest violations has long been part of a voluntary compliance program, namely the voluntary submission of management contracts by tribes and their contractors for a determination by the Commission that the contracts do not offend IGRA's stringent requirements. The Commission encourages this review in order to both advance IGRA's purposes and ensure compliance. Specifically, the Commission's review ensures that Indian tribes are the primary beneficiaries of their casinos and that enforcement actions for IGRA violations are avoided.

As you are aware, tribes and their contractors submit to me, as Chairman, all contracts for the management of Indian casinos, together with any collateral agreements, *i.e.* any agreement related to a management contract, or to the rights, duties, and obligations that a management contract creates. 25 U.S.C. § 2711(a); 25 C.F.R. § 553.2; 25 C.F.R. § 502.5.

IGRA has many strict requirements for the approval of management contracts, and a list of them is unnecessary here. Suffice it to say that a management contract that I have not approved is void, and management of a casino under a void agreement has a number of undesirable consequences. The tribe is subject to fines and the closure of its casino in an enforcement action; the contractor has to vacate the casino; the tribe has to run the casino by itself; and the contractor is subject to legal action to disgorge to the tribe the proceeds of the contract.

The history of the Commission's voluntary contract review

Given IGRA's restrictions on management contracts, and the consequences for managing without an approved contract, the Commission had, by 1993, received a number of requests for guidance on whether specific agreements were, under IGRA, management contracts that require approval and background investigations. Accordingly, on July 1, 1993, the Commission issued Bulletin 93-3, "Submission of Gaming-Related Contracts and Agreements for Review," which invited tribes and their contractors to submit what the December 15 letter calls "non-management contracts" – again, gaming equipment contracts, development agreements, loan agreements, etc. – to the Commission for review in order to determine if they were management contracts.

On October 14, 1994, the Commission issued Bulletin 94-5, "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)," which provided additional guidance on the issue. Noting that what distinguishes a management contract from other gaming contracts "depend[s] on the specific facts of each case," the Commission restated its willingness to provide voluntary review. Tribes and their contractors did not hesitate to accept the Commission's offer. Since July 1993, the Commission has received some 440 requests to review contracts.

The Commission's review for violations of IGRA's sole proprietary interest requirement is simply a part of the voluntary review of gaming-related agreements that it has conducted for more than 11 years. The Commission reviews such agreements both to see if they are management contracts and to see if they violate the sole proprietary interest requirement.

The sole proprietary interest review has its origins in January 1993, when the Commission adopted regulations concerning, among other things, the submission, review, and approval of tribal gaming ordinances. In response to a specific inquiry by a commenter, the Commission provided guidance on the meaning of the sole proprietary interest requirement. The Commission found:

1. An agreement whereby consideration is paid or payable to the gaming operation for the right to place gambling devices that are controlled by the vendor in such gaming operation is inconsistent with the requirement that a tribe have the sole proprietary interest.
2. Regarding collateral loans, a tribe may not grant a security interest in a gaming operation if such an interest would give a party other than the tribe the right to control gaming in the event of a default by the tribe.
3. Because IGRA specifies that a tribe (not its members) must have the sole proprietary interest, stock ownership in a tribal gaming operation by individual tribal members would also be inconsistent with IGRA.

58 F.R. 5804 (Jan. 22, 1993).

Having said this, the Commission felt further general guidance to be inappropriate, but concluded with a public offer to "provide guidance in specific circumstances" upon request. *Ibid.*

**Results of the Commission's contract review:
Tribes are the primary beneficiaries of their casinos**

Far from shutting down opportunities for tribes to build or expand casinos, the review of contracts, both for management contract and sole proprietary interest violations, has, without exaggeration, saved Indian tribes tens of millions of dollars. In so doing, review has helped ensure that tribes are the primary beneficiaries of their casinos, as IGRA intends. 25 U.S.C. § 2702(2).

The Commission has, for example, discovered agreements under which contractors have tried not only to take financial advantage of tribes but also to subvert IGRA's requirements for management contracts and for regulatory oversight. Contractors have presented tribes with so-called "consulting agreements" by which they offered to "assist" tribes in building and running a casino. Representative of such agreements is compensation of 35% of a tribe's net gaming revenue for a period of 5 to 7 years, well in excess of IGRA's 30% cap on compensation from net revenue in management agreements. 25 U.S.C. § 2711(c)(1). The contrac-

tors also insisted on preferential payments, *i.e.* payments from the tribe before all obligations other than operating expenses, and thus create the possibility that the tribe is left with very little or is left in debt to the contractor.

Contractors have attempted to safeguard their financial interests by arrogating to themselves significant management responsibilities, while at the same time claiming that the “consulting agreement” is not a management contract and not subject to my approval. Those management responsibilities have included such things as appointing the casino’s general manager, who has direct supervisory authority over all casino departments and employees; developing the casino’s internal controls; developing the casino’s budget; deciding which games to offer; and directing casino marketing and advertising.

As the Commission’s review and analysis developed, it prevented this kind of contract from ever taking effect, or allowed tribes to renegotiate such contracts if they had already been signed. As a result, the tribes have remained in control of, and have remained the primary beneficiaries of, their casinos. When notified that such agreements appeared to be management contracts that did not meet IGRA’s limitations on payment from net revenues, or other of its stringent requirements, tribes were able to negotiate more favorable financial arrangements and realized savings of millions. In addition, contractors were prevented from managing Indian casinos without first undergoing the necessary background checks and suitability determinations. 25 U.S.C. § 2711(e). The Commission’s review has thus advanced another of IGRA’s essential purposes. It has ensured that casinos, and those who manage them, are free from corrupting influences. 25 U.S.C. § 2702(2).

As contractors realized that they were no longer able to circumvent management contract review by calling a contract a “consulting agreement” or a “development agreement,” they began eliminating provisions that allowed them to control the day-to-day operations of casinos. In other words, they began to look for other ways to extract large sums of money from tribes without taking on responsibilities that would raise red flags in a review for management contracts.

This change in approach led the Commission to realize that some contractors were apparently receiving an ownership interest in tribal casinos because they were certainly not providing services worth the enormous sums of money they were receiving. By reviewing contracts for sole proprietary interest violations as well as management contract violations, the Commission has saved tribes many more millions of dollars.

In one agreement, for example, the tribe had a 10-year obligation to pay its contractor 35% of its net gaming revenues each month as so-called “rent” for gaming equipment and the casino building, all of which the tribe had already paid for in full within the first 6 months of the 10-year term.

In an even more egregious example, the tribe had a 5-year obligation to pay rent equal to all of the developer’s costs, plus interest, plus an additional “rent” of 75% of net revenue. Following that, the tribe had a 10-year obligation to pay 16% of gross revenue, an amount

roughly equal to 50% of net revenue, and all of these payments were to be made long after the developer ceased providing services of any kind.

These agreements, and others like them, violate IGRA's sole proprietary interest requirement because the developer's compensation is paid from the casino's profits, and it is paid in such a way and in such quantity as to bear little or no relationship to the value of the services provided or to the risk assumed. Rather, profits are distributed to the developer as to one with a fractional ownership interest -- a proprietary interest -- in an enterprise and its profits. The Commission's review has enabled tribes to avoid such illegal and unconscionable agreements and has thus assured that they are the primary beneficiaries of their casinos.

**Results of the Commission's contract review continued:
Enforcement actions are unnecessary**

The Commission's review of gaming-related contracts, again, whether for management contract or sole proprietary interest violations, is sound regulatory practice with a number of other straightforward, beneficial effects. By identifying IGRA violations before they occur, enforcement actions are not required, nor are the fines of up to \$25,000 per day or the closure of casinos. 25 U.S.C. § 2713(a)-(b). By identifying violations in contracts soon after execution, we are often able to negotiate resolutions without the need for enforcement actions. Whenever violations may be discovered, by proceeding in this way, the parties are able to avoid the uncertainty and loss of business occasioned by formal action taken against tribes for contracts executed in violation of applicable law.

Due process

Finally, the Commission's review does not infringe upon the rights of tribes or their contractors. My authority is explicit in IGRA. Without limitation, I am empowered to bring enforcement actions against all IGRA violations. 25 U.S.C. § 2713.

Again, however, one of the purposes of contract review is to eliminate IGRA violations and thus to avoid enforcement actions whenever possible. Doing so by means of an advisory opinion in response to a voluntary request for review violates no one's rights.

I want to stress again that our review is informal and voluntary. The parties are not obliged to seek review, nor are they obliged to heed our advisory opinion if they do. Indeed, in the rare instances when the Commission has reached out and asked to review contracts, the request is, of necessity, still voluntary. We have no jurisdiction over the contractors to compel their compliance, and we have brought no enforcement actions against the tribes pursuant to which we might compel them to submit contracts. The tribes and their contractors are free to decline our request, just as they are free not to seek an advisory opinion in the first place. As such, our review is an informal, prophylactic exercise that seeks negotiated solutions rather than formal enforcement. In other words, our review simply does not implicate the parties' statutory or constitutional rights.

The Commission is at great pains, however, to protect those rights when voluntary, cooperative action ceases and I bring a formal enforcement action. The parties are then entitled to complete review before the full Commission under the Administrative Procedures Act, and they are entitled to subsequent judicial review in District Court if they are still aggrieved. 25 U.S.C. §§ 2713(a)(2), (3); 2713(b)(2); 2713(c).

Given, then, the advisory nature of the Commission's contract reviews, and given the full panoply of administrative and judicial review available to aggrieved parties, the statutory and due process rights of the tribes and of their contractors are not infringed in any way.

In conclusion, I hope that our explanation provides you with a more complete understanding of our reasons for addressing the sole proprietary interest issue in the manner that we have. I would be most pleased to meet with you personally to discuss this matter further, or any other matter of concern to the Committee. I thank you for your time, interest, and concern.

Sincerely,

/s/ Philip N. Hogen

Philip N. Hogen
Chairman

WASHBURN EX. D



June 5, 2003

Mitchell Cypress
Chairman
Seminole Tribe of Florida
6300 Stirling Road
Hollywood, Florida 33024

Dear Chairman Cypress:

The purpose of this letter is to respond to your letter, dated October 31, 2002, to the National Indian Gaming Commission ("NIGC"), requesting our review of a number of substitute transaction documents, dated June 3, 2000, and entered into by the Seminole Tribe of Florida ("Tribe") and Coconut Creek Gaming, L.L.P. ("CCG"), along with its general partner, North American Sports Management, Inc. ("NORAM"), in connection with the financing, development, construction and operation of the Coconut Creek Casino ("Casino"), located in Coconut Creek, Florida. We conclude that these documents do not constitute a management agreement subject to our review and approval. However, we also conclude that the documents and the course of conduct of CCG reflect that the contractors obtained a proprietary interest in the Tribe's gaming activity, contrary to the Indian Gaming Regulatory Act ("IGRA"), its implementing regulations and the Tribe's gaming ordinance. Furthermore, it appears that the lease and a subsequent leasehold mortgage, which encumber fixtures on trust land, are subject to Bureau of Indian Affairs' approval.

The following documents were submitted for our review:

- 1) Substitute Transaction Summary Agreement;
- 2) Substitute Master Definitions List;
- 3) Substitute Phase I Structure and Equipment Lease ("Substitute Phase I Lease");
- 4) Substitute Cash Management Transaction Agreement;
- 5) Promissory Note from the Seminole Tribe of Florida to Coconut Chips, L.L.C.;
- 6) Substitute Phase II Ground Lease; and
- 7) Substitute Phase II Structure and Equipment Lease.

On June 3, 2000, the documents were signed by CCG/NORAM (hereinafter referred to as "CCG") and the Tribe. In a letter dated November 25, 2002, you submitted another document for our review, entitled First Addendum to Substitute Transaction Documents

("Morse Tract Agreement"), which was signed by CCG and the Tribe on March 30, 2001. Because it is our understanding that the Tribe chose to forego Phase II of the project, our review has primarily focused on Documents #1-5, listed above, along with the Morse Tract Agreement.

AUTHORITY

The authority of the NIGC to review and approve gaming related contracts is limited by the IGRA to management contracts and collateral agreements to management contracts. 25 U.S.C. § 2711. The authority of the Secretary of the Interior to approve such agreements under 25 U.S.C. § 81 was transferred to the NIGC pursuant to the IGRA. 25 U.S.C. § 2711(h). The NIGC's authority to inquire further into the contract as to whether it violates IGRA's requirement that the Tribe maintain the sole proprietary interest in a gaming facility arises out of the Chairman's and Commission's general oversight authority over Indian gaming, as well as its specific authority to impose civil fines and closure orders for violations of the IGRA, its implementing regulations and approved tribal ordinances.

BACKGROUND

The Coconut Creek Casino, located on trust land in Coconut Creek, Florida, opened for business on February 5, 2000. Negotiations between the Tribe and CCG, for the development and construction of the facility, had begun in early 1999. On September 10, 1999, the parties signed the original transaction documents. The documents are apparently intended to require the Tribe to pay for the construction and development of the gaming facility while CCG retained the ownership of the facility. The Tribe then "leased" the gaming facility from CCG. The documents required the Tribe to pay CCG 35% of its net gaming revenues from the Coconut Creek operation for a period of ten years, starting when the base rent obligations were met. The separate "base rent" provision was the means by which CCG was to be compensated for development, construction and start-up costs, plus interest; the Tribe's entire base rent obligation of \$19.645 was satisfied on September 1, 2000, six months after the Casino opened.¹ According to the Tribe, although CCG's actual out-of-pocket expenses, at any given time, never exceeded \$8.5 million, the Tribe paid \$19.645 million for CCG's expenditures (the facility's development, construction and start-up costs, plus interest), during the first six months of operation. A portion of the \$19.645 million -- \$4.5 million -- was listed as being for "prior acknowledged costs." On November 27, 2000, an \$8 million promissory note to Coconut Chips, L.L.P., "for value received," was discharged.²

¹ The Tribe provided this information.

² According to one of the Tribe's attorneys, the \$4.5 million payment was paid in partial satisfaction of the \$8 million note. The note was made in connection with the Tribe's "development of a tribal gaming facility on a parcel of real property located in Coconut Creek, Florida . . ." See Promissory Note, p. 1. The note is referred to in the Substitute Master Definitions List, attached to the Substitute Phase I Lease.

The Tribe and CCG signed a second set of transaction documents, which supercedes the first, on June 3, 2000. This second set of documents is similar to the first and contains the same 35/65 revenue-sharing provision. Notably, these substitute documents were not submitted to the NIGC for review until almost 2½ years after they were signed. A number of significant events occurred between the time they were signed and the time they were submitted. In May of 2001, the Tribe suspended its longstanding Chairman, James Billie, for "inappropriate acts and misconduct." On July 25, 2002, the Tribe stopped making the 35% rent-incentive payments to CCG. Up to that point, those payments had amounted to \$38 million, for "leasing" the Casino building and equipment back to the Tribe. Projected rent payments, over the ten-year minimum length of the agreements, have been estimated, by both the Tribe and CCG, at being between \$160-\$200 million. On October 11, 2002, CCG sued the Tribe for breach of contract. The case is pending in federal district court in southern Florida. Then, on March 17, 2003, the Seminole Tribal Council voted unanimously to permanently remove James Billie from office for gross neglect of duty and misconduct while serving as Chairman.

NIGC'S INVOLVEMENT

On September 20, 1999, the NIGC received a letter from Seminole Tribal Chairman James Billie, along with a packet of transaction documents, signed by the Tribe and CCG. The Tribe wrote seeking either NIGC approval of the contracts or acknowledgement that approval was not needed. The documents submitted were: (1) Phase I Structure and Equipment Lease Agreement; (2) Phase II Structure and Equipment Lease Agreement; (3) Cash Management Agreement; (4) Ground Lease; (5) Master Definitions List; and a (6) Transaction Summary Agreement.

Correspondence between the NIGC and Chairman Billie ensued over the next six months. The NIGC, several times, expressed concerns about provisions for incentive rent with 35% going to the developer, CCG, as "compensation for the substantial financial risk undertaken," and 65% going to the Tribe. In a letter dated January 24, 2000, the NIGC stated that it was concerned that the Tribe did not retain the sole proprietary interest in the gaming operation. The NIGC also wrote that it was not prepared to conclude whether or not the documents submitted by the Tribe constituted a management contract. The NIGC requested more documentation and information from the Tribe, including a copy of the partnership filing for Coconut Creek Gaming and a list of all partners. The NIGC advised that they would continue to evaluate the matter as an enforcement issue. The Tribe never responded to this letter.³

³ There is reason to believe that had a list of all partners been disclosed, the NIGC would have learned that an individual, who was previously found to be unsuitable for participation in Indian gaming, was involved in the CCG partnership. Gary Fears testified in a civil deposition on September 13, 2000, that both he and an individual named George Krug were partners in CCG. See Straub Capital Corporation v. Robb Tiller, Case No. CL 95-8635 AH, Civil Division, Palm Beach County, Florida. Significantly, in a letter dated May 22, 1997, Philip Hogen, then Associate Commissioner of the NIGC, disapproved a management contract between the Seminole Tribe of Florida and Gaming Management International II, Ltd. ("GMI") for reasons relating to the suitability of George Krug. Specifically, Krug had failed to disclose to the NIGC that, in 1992, he had been denied an application to become an investor in a riverboat casino by the Illinois Gaming Board. The denial was based on Krug's participation in a bid-rigging scheme for construction projects that

Now, more than 2½ years later, the Tribe has contacted the NIGC, seeking a determination of the validity of a second set of transaction documents ("substitute transaction documents"). These documents, which explicitly supercede the original ones submitted to the NIGC for review, were executed by the Tribe and CCG on June 3, 2000, and became the operative contracts with respect to gaming at Coconut Creek. They were first submitted to the NIGC for review on October 16, 2002. Among the substitute transaction documents was an entirely new one, a promissory note from the Tribe to Coconut Chips, L.L.C., in the amount of \$8 million. In late November of 2002, the Tribe submitted an additional document for our review, called the Morse Tract Agreement, which pertains to a parcel of land located in Coconut Creek, Florida. None of the Phase II documents, relating to a proposed expansion of the Casino, became operative, since after the transaction documents were signed, the Tribe chose to forego any expansion.

MANAGEMENT CONTRACTS

The NIGC has defined the term "management contract" to mean "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. The NIGC has defined "collateral agreement" to mean "any contract, whether or not in writing, that is related either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)." 25 C.F.R. § 502.5.

Management encompasses activities such as planning, organizing, directing, coordinating, and controlling. *See NIGC Bulletin No. 94-5.* In the view of the NIGC, the performance of any one of these activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether an agreement for the performance of such activities is a management contract requiring NIGC approval.

We conclude that there are some extensive controls on the Tribe, its use of the gaming operation and its revenues. We conclude, however, that these controls do not rise to the level of management of the operation. Consequently, after careful review of these documents and inquiries as to the contractors' conduct, we determined that the agreements do not establish a management relationship.

led to a grand jury investigation and trial, where Krug was granted immunity and then testified against his father, who was subsequently sentenced to prison. Although it is unclear whether Fears, in his deposition, was referring to George Krug, Sr., or George Krug, Jr., there are suitability issues concerning both father and son.

PROPRIETARY INTEREST

Our main concern is whether CCG has acquired a "proprietary interest" in the gaming activities at the Coconut Creek Casino. After reviewing submissions by both the Tribe and CCG, we conclude that CCG has a substantial proprietary interest in the gaming operation. Although many factors contributed to this conclusion, we are particularly troubled by the financial terms and the length of the agreements, as required by the Substitute Phase I Lease. This arrangement obligates the Tribe to pay CCG 35% of its net gaming revenues each month, over a 10-year period of time (until 2010), long after the original construction, development, start-up costs and interest have been repaid by the Tribe. Although the 35% payment is called a "rent incentive" payment, this label mischaracterizes what is really a profit-sharing arrangement. The money is going to CCG for "renting" a building and equipment to the Tribe -- both of which the Tribe had already paid for by September of 2000, six months after the Casino opened -- on land that is trust land. In other words, the documents enable CCG to collect a large amount of money, over a lengthy period of time, for doing nothing -- performing no ongoing services for the Tribe, and, once the original costs of building, equipping and financing were paid, giving the Tribe nothing in return.

APPLICABLE LAW

Among IGRA's requirements for approval of tribal gaming ordinances is that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). Under this section, if any entity other than a tribe possesses a proprietary interest in the gaming activity, gaming may not take place. The NIGC, in its regulations, also requires that all tribal gaming ordinances include such a provision. 25 CFR § 522.4(b)(1). Accordingly, the Seminole Tribe's gaming ordinance, approved by the NIGC, specifically requires that "the Tribe shall have the sole proprietary interest in and responsibility for the conduct of any gaming operation." Ordinance of the Seminole Tribe of Florida for Gaming on Tribal Lands, No. C-02-94, § 6-1.

Our analysis begins by addressing what constitutes a "proprietary interest." The rules of statutory construction direct us to the plain language and the ordinary meaning of the words themselves. "Proprietary interest" is defined in Black's Law Dictionary, 7th Edition (1999), as "the interest held by a property owner together with all appurtenant rights" An owner is defined as "one who has the right to possess, use and convey something." *Id.* "Appurtenant" is defined as "belonging to; accessory or incident to . . ." *Id.* Reading the definitions together, a proprietary interest creates the right to possess, use and convey something.

Although there are no cases directly on point, courts have defined proprietary interest in a number of contexts. In a criminal tax case, an appellate court discussed what the phrase proprietary interest meant, after the trial court had been criticized for not defining it for jurors, saying:

It is assumed that the jury gave the phrase its common, ordinary meaning, such as 'one who has an interest in, control of, or present use of certain property.' Certainly, the phrase is not so technical, nor ambiguous, as to require a specific definition.

Evans v. United States, 349 F.2d 653 (5th Cir. 1965). In another tax case, Dondlinger v. United States, 1970 U.S. Dist. LEXIS 12693 (D. Neb. 1970), the issue was whether the plaintiff had a sufficient proprietary interest in a wagering establishment to be liable for taxes assessed against persons engaged in the business of accepting wagers. The court observed:

It is not necessary that a partnership exist. It is only necessary that a plaintiff have some proprietary interest. . . . One would have a proprietary interest if he were sharing in or deriving profit from the club as opposed to being a salaried employee merely performing clerical and ministerial duties. [emphasis added]

An additional aid to statutory interpretation includes the legislative history of the statute. The legislative history of the IGRA with respect to "proprietary interest" is scant, offering only a statement that "the tribe must be the sole owner of the gaming enterprise." S. Rep. 100-446, 1988 U.S.C.C.A.N. 3071-3106, 3078. "Enterprise" is defined as "a business venture or undertaking" in Black's Law Dictionary, 7th Edition (1999). Despite the brevity of this information, the drafters' concept of "proprietary interest" appears to be consistent with the ordinary definition of proprietary interest, while emphasizing the notion that entities other than tribes are not to share in the ownership of gaming enterprises.

Secondary sources also shed light on the definition of "proprietary interest." In a chapter on joint ventures in *American Jurisprudence*, 2nd Edition, the difference between having a proprietary interest and being compensated for services is discussed in the context of determining when a joint venture exists.

Where a contract provides for the payment of a share of the profits of an enterprise, in consideration of services rendered in connection with it, the question is whether it is merely as a measure of compensation for such services or whether the agreement extends beyond that and provides for a proprietary interest in the subject matter out of which the profits arise and for an ownership in the profits themselves. If the payment constitutes merely compensation, the parties bear to each other, generally speaking, the relationship of principal and agent, or in some instances that of employer and employee [footnote omitted]. On the other hand, a proprietary interest or

control may be evidence of a joint venture. [footnote omitted] [emphasis added]

46 Am. Jur. 2d *Contracts* § 57.

Finally, the preamble to the NIGC's regulations provides some examples of what contracts may be inconsistent with the sole proprietary interest requirement, but then concludes that "[i]t is not possible for the Commission to further define the term in any meaningful way. The Commission will, however, provide guidance in specific circumstances." 58 Fed. Reg. 5802, 5804 (Jan. 22, 1993).

ANALYSIS

The Tribe presents us with the question of when does, what appears to be, a "bad deal" -- which all tribes must be able to enter into -- constitute more than just a bad deal, but an actual interest in the gaming operation. In a true lease, the value of the underlying equipment and structure, and what the Tribe is paying for, must have some bona fide correlation. We look to whether these agreements are pretextual in nature, and whether they really memorialize an intent to include an ownership interest for the contractor, rather than establish terms for the receipt of ongoing services or goods by the Tribe. We conclude that, taken together, the documents and conduct reflect CCG's control and equity interest in the gaming operation sufficient to constitute a proprietary interest.

THE SUBSTITUTE PHASE I STRUCTURE AND EQUIPMENT LEASE

The Substitute Phase I Structure and Equipment Lease (hereafter "Substitute Phase I Lease") provides several indicators suggesting that the lease was intended to convey an ownership interest in the facility.

In the Summary Agreement of the transaction documents, the Substitute Phase I Lease is described as "the document through which the partnership will be repaid its investment in the Phase I Structure and Equipment, and will receive its profit interest." The definition distinguishes between CCG merely recouping its investment and CCG profiting from gaming at Coconut Creek. The documents contemplate both purposes being served by the documents -- CCG being reimbursed for out-of-pocket expenses, and other expenditures, and sharing in the profits. By sharing in the profits, as opposed to merely receiving compensation, CCG appears to have bargained for, and obtained, what amounts to an equity interest in the Tribe's gaming activity.

Sections 2.2 and 2.3 of the Substitute Phase I Lease provide that the Tribe will lease from CCG the Phase I Structure, which will be developed and constructed on the trust property. According to the Tribe, the Casino building was "actually constructed from the ground up, required the filling and relocation of a drainage lake and consists of a two-story structure with approximately 24,000 square feet of floor space."

Under Sections 5.1 and 5.2 of the Substitute Phase I Lease, the Casino's building and equipment belong to CCG, even after the original debt from development and construction costs was repaid.⁴ Article 5 states that the Tribe does not have, nor will acquire, any right, title or interest in the Phase I structure or equipment, except the right to possession and use, as provided for in the Lease. The Lease states the following:

The Lessor [CCG] shall at all times be the sole and exclusive owner of the Phase I Structure and Phase I Equipment. (§ 5.1)

The Lessor [CCG] shall have the right to place and maintain on . . . each and every piece of Phase I Equipment such inscription . . . to demonstrate Lessor's ownership. . . (§ 5.2)

The Lessee [the Tribe] shall not remove, obscure, deface or obliterate the inscription or permit any other person to do so. (§ 5.2)

The language of these provisions makes CCG the sole owner of both the gaming structure and the gaming equipment – without which, gaming could not occur. The effect of this grant of ownership to CCG is clearly intended to be long term (at least ten years). There is no provision for ownership of the Casino's structure and equipment to be transferred to the Tribe after satisfaction of the original development and construction debts. Although there is a provision for title vesting with Tribe, there is little likelihood of that ever happening, given the preconditions ("shall vest in Lessee upon later of (a) the Phase II commencement Date, or (b) Lessee has paid to Lessor all Base Rent due under this Phase I Lease or Residual Rent due Lessor under the Phase II Lease, if applicable"). See § 5.1. Instead, the Lease, in effect, restricts the Tribe to merely operating the facility for at least ten years, while clearly enabling CCG's continued ownership of the gaming facility and participation in the profits generated by the gaming activity at Coconut Creek. See §12.1(G).

Other Lease provisions indicate that CCG has extensive control over gaming at Coconut Creek. For example, Section 12 of the Substitute Phase I Lease prohibits the Tribe from freely engaging in transactions relating to the gaming facility and the trust land upon which it sits, without CCG's written approval.

Negative Covenants . . . Lessee [the Tribe] will not, except with the prior written consent of Lessor [CCG] . . .

Sale or Disposition of Trust Lands. Sell, dispose of, lease, assign, sublet, transfer, mortgage or encumber (whether voluntarily or by operation of law) all or any part of its right, title or interest in or to the Trust

⁴ This occurred on September 1, 2000; the Casino had opened for business on February 5, 2000.

Lands, the Phase I Facility, the Phase I Structure or the Phase I Equipment. (§ 12.8(B))

Alteration of the Phase I Facility. Materially alter the nature of the Phase I Facility, the business thereof, or the Phase I Structure. (§ 12.8(C)) (Emphasis added)

This latter provision, preventing any material changes to the gaming operation without CCG's consent, constitutes a control over the gaming operation.⁵

In summary, according to the Substitute Phase I Structure and Equipment Lease, the Tribe will not own the property and is only given the right to possess and use the building and equipment, without any right, title or interest in either, for the duration of the lease (ten years). See §§ 5.1, 7.1. Nor will the Tribe be allowed to remove the structure or equipment. See § 7.4. The Tribe cannot assign, encumber, lease, transfer or sell the Coconut Creek facility, structure or equipment or any part of the assets without CCG's prior written consent. See § 12.8(B)). The Lease provides that CCG is to be the sole and exclusive owner "at all times." See § 5.1. Finally, the Lease prohibits the Tribe from selling, disposing of, leasing, assigning, subletting, transferring, mortgaging or encumbering its right, title or interest in the trust land. See § 12.8(B).

These provisions, impacting directly on the ownership and use of the gaming operation and trust land, restrict the Tribe and empower CCG for at least ten years – not merely until the original development, construction and interest costs are paid. The negative covenants are to last "so long as there is Base Rent payable hereunder, or Lessee's other obligations hereunder, or under any of the other transaction documents remain outstanding." The primary "other" obligation assumed by the Tribe is the 35% rent incentive payment spanning ten years.

We are also persuaded that CCG was buying an equity interest in the gaming operation due to the lack of a rational relationship between the amounts invested by CCG, the services provided, and the expected return. The most obvious indicator of CCG's proprietary interest in the gaming operation at Coconut Creek is found in the high percentage payments of net gaming revenue, which, when considered along with the lease provisions discussed above, strongly suggest a profit-sharing arrangement between the Tribe and CCG, under the auspices of "rent." This payment, required by Section 4.3 of the Substitute Phase I Lease, requires the Tribe to pay CCG 35% of the net revenues from all receipts from facility operations, including all gaming activity. These payments are in addition to the repayment of the lender's costs, plus interest, to develop the facility.

The percentage payments raised concerns on our part from the outset. We were well aware that the Tribe had a significant income from other similar gaming properties located in Florida. We were also aware that the Tribe could have easily financed the construction and development of the property with its own resources. Consequently, the

⁵ While this language also suggests control much like management, we are not prepared, at this time to conclude that such control is sufficient to constitute a management agreement.

fairly negligible investment required, as opposed to the profits to be taken, raised serious concerns about the nature of the relationship between the Tribe and CCG.

CCG's explanation for the 10-year, rent percentage payments appears to be that it is compensation for the risks associated with its investment in this project. (See John Duffy's March 17, 2003, letter to Chairman Philip N. Hogen. "Such payments are primarily compensation to the nontribal entrepreneur for its expertise and for its assumption of the risk of development"). However, when asked to provide an explanation as to the risks associated with development, CCG simply declined to provide an explanation. CCG argues instead that its relationship with the Tribe is not a partnership under Florida law, and it, therefore, cannot have a proprietary interest in the operation. We are unconvinced, however, that Florida State law guides our analysis of Federal law. Furthermore, to the extent it did, the State usury laws would also guide us. Those laws reflect a state public policy protecting persons from contracts much like the ones at issue here.

On the other hand, the Tribe provided us with an extensive explanation as to its view of the risks associated with the gaming operation. The Tribe essentially asserts that it was misled by the contractor and Chairman James Billie; that the risks associated with the project were low; and that the Tribe could have easily arranged financing and developing commensurate with the risk, without entering into this one-sided agreement. While we realize that there are some risks with accepting the Tribe's version of events, in light of its desire to renege on the agreements, we were not provided an alternative version by the contractor, CCG. Furthermore, the Tribe's explanation resonates with a certain credibility because it is consistent with our own understanding of the risks associated with financing the operation, and satisfactorily addresses why this Tribe would enter into agreements that appear on their face to be intended for the benefit of the contractor rather than the Tribe.

Unlike some situations involving developers of Indian gaming operations, the high-percentage rent required by the Lease in this case cannot be justified by any commensurate assumption of risks on the part of the developer. Although we acknowledge that there is a degree of risk associated with any venture of this nature, there are a number of factors that diminished the risks attendant to this particular investment. First, when CCG entered into negotiations with the Tribe to be the developer of gaming at Coconut Creek, the Tribe had a proven track record in the gaming business, with at least two other highly successful gaming operations in Florida, one in Tampa and the other in Hollywood. Second, in September of 1999, the Tribe had substantial financial resources of its own. Third, the site selected for the Coconut Creek Casino was not remote, but located in a populous county near several urban areas. Fourth, the south Florida location is also a popular tourist destination, particularly during winter months.

There are other significant problems with the Agreement's rent-incentive provision, which demonstrate CCG's financial stake in the gaming operation. First, the monthly sum paid to CCG is not finite and there is no agreed-upon ceiling for the payments. It is based on a percentage of very healthy profits, predictably lucrative at the time the

documents were signed on June 3, 2000. Second, because of the open-ended nature of percentage rent payments, the fee of 35% is too high. It cannot be characterized as reasonable, given the lack of any actual consideration from CCG; the lack of any services being rendered by CCG; and the fact that the entire debt, plus interest, was foreseeably paid off within the first six months. Third, the term of the agreement is too long (ten years, beginning with the Casino's opening). The IGRA's section governing management contracts provides guidance as to what constitutes a reasonable length for a contract. Even when a facility is operating with an approved management contract, the contract term cannot exceed five years, unless the chairman of the NIGC determines that the capital investment and the income projections justify a 7-year term. *See* 25 U.S.C. 2711. Although management contracts providing for a fee for services, based upon a percentage of net revenues of a tribal gaming activity, are permissible, there are strict limits on the amount allowed. The NIGC's Chairman must determine that the percentage fee is "reasonable in light of the surrounding circumstances." Nor, under IGRA, can the fee exceed 30% of net gaming revenues, except in very limited situations. Here, the "rental" percentage fee far exceeds the 30% ceiling, and is not being paid for the receipt of management services of any kind.⁶ *See* 25 U.S.C. 2711(c)(1).

CCG AND NORAM'S CONDUCT

Since signing the transaction documents in January of 2000, CCG's actions (and that of its general partner NORAM) have also demonstrated an understanding that they had a controlling interest in the gaming operation at Coconut Creek.

LEASEHOLD MORTGAGE BY NORAM

Most significantly, on August 2, 2000, CCG executed a leasehold mortgage on the Tribe's trust land, without the Tribe's involvement. Both the building and the land were part of the transaction, in which CCG used a leasehold mortgage to secure a loan for the CCG partnership. The mortgage granted the lender, American Construction Lending Services, Inc., a security interest in the trust land, as well as all buildings and structures on the land; improvements that had been made to the land; and fixtures attached to the land. CCG represented in the mortgage document that it held the property in fee simple and could legally convey or encumber the property. The mortgage was filed and recorded in Broward County. The Tribe did not participate in this transaction. From a review of the leasehold mortgage, CCG appeared to be acting in its capacity as sole owner.

⁶ In addition to millions of dollars going to CCG for no apparent consideration other than "risk", the Tribe also paid \$8 million to Coconut Chips, L.L.P., also for no apparent consideration. Payment was in the form of a promissory note for \$8 million, dated June 3, 2000, "for value received." There is no evidence that the Tribe received any consideration for this Promissory Note. What constituted "value received" is not revealed in any of the substitute transaction documents or submissions from either the Tribe or CCG. According to the Tribe, the Note was repaid in full and discharged on November 27, 2000.

GINSBURG LETTER

On August 2, 2001, 1½ years after the Coconut Creek Casino opened, the President of NORAM, Alan Ginsburg, wrote a 5-page letter to the Tribe, acknowledging the success of the Casino and proposing changes "to increase profits and expand the customer base." He described the letter as being "a short summary of our Proposal for Expansion" for the Tribe to consider and approve. Although Ginsburg was seeking the Tribe's approval, the tone and content of the letter suggest that both the letter writer and recipient were involved in a joint business venture, where both parties had a proprietary interest in the venture. For example, while discussing financing for the proposed expansion, Ginsburg noted that the Tribe "now makes approximately \$55,000,000 to \$65,000,000 per year from its share of Casino profits" and that "the plan is not to stop or reduce the present cash flow in any way." Ginsburg talked matter-of-factly about CCG/NORAM sharing the cost of expansion with the Tribe, stating: "In addition, NORAM will also pay its 35% share of the expansion from the new profit cash flow, thereby treating all of the expansion as an 'operating expense'." Ginsburg's letter assumes an existing partnership between CCG/NORAM and the Tribe, with CCG/NORAM not only profiting tremendously from their 35% share of revenues, but contributing a 35% proportionate share to the Casino expansion costs.

DOI APPROVAL

Furthermore, it appears that the Lease is subject to the Department of the Interior's approval. Leases that encumber Indian trust lands and allow trust lands to be used for business purposes must be approved under either 25 USC §§ 81 or 415(a). Section 81 requires approval of agreements and contracts that encumber Indian lands for 7 years or more. Section 415(a) requires approval for lands that are leased for business purposes. Consequently, to the extent that the Lease and related documents encumber trust lands and allow trust lands to be used for business purposes, they must be approved by the Secretary of the Interior. Therefore, we are referring this for a determination by the Department of the Interior's Office of Indian Gaming Management.

CONCLUSION

On October 16, 2003, the Tribe submitted a number of substitute transaction documents for our review. Although a different set of documents had previously been submitted and reviewed by the NIGC, we did not make a final determination as to their viability. The particular documents we currently reviewed had not been previously submitted or reviewed.

First, we conclude that the documents, while evidencing some control by the contractor, contain insufficient evidence of a day-to-day control over the gaming operation to constitute management of a gaming operation.

Second, although no one provision of the contracts constitute an explicit proprietary interest, the financial terms found in the documents, which grant a disproportionately

high percentage of 35% of net gaming revenues to CCG for ten years, bear no reasonable relationship to the risks associated with it. As such, it appears not to be just a "bad deal," but an equity interest in the operation.⁷ There is also an \$8 million promissory note, which was given to Coconut Chips, L.L.P., for consideration that is still unknown. There are various provisions in the agreements that give CCG ownership of the building and equipment and an inordinate amount of control over the building, equipment and the land. CCG's actions exacerbate our concerns that this is really a profit-sharing arrangement under the guise of something else.

The acquisition of a proprietary interest by a non-tribal entity violates the IGRA, its implementing regulations and the Seminole Tribe's gaming ordinance. Clearly, it is against the law for any entity other than the Tribe to have a proprietary interest in the gaming operation. See 25 U.S.C. 2710(2)(A) ("... the Indian Tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity"); Seminole Tribe's Ordinance for Gaming on Tribal Lands, No. C-02-94, § 6-1 ("The Tribe shall have the sole proprietary interest in and responsibility for the conduct of any gaming operation"); and 25 C.F.R. 522.4(1) ("The tribe shall have the sole proprietary interest in and responsibility for any gaming operation unless it elects to allow individually owned gaming...").

We conclude that the substitute documents, coupled with the conduct of CCG, indicate that CCG obtained a proprietary interest in the gaming operation at Coconut Creek Casino, in violation of the IGRA, its implementing regulations and the Seminole Tribe's gaming ordinance. We further conclude that the substitute documents are contrary to the public policy underlying the IGRA that prohibits entities other than tribes from having a proprietary interest in the gaming enterprise. The substitute transaction documents, when considered together, undermine the broad principles and policies of the IGRA, both on their face and in application.

Further, we note that the Department of the Interior ("DOI") has not approved the lease and leasehold mortgage. Since it appears that the trust land is encumbered by CCG's ownership of the facility, we are referring the matter to DOI for a determination as to whether the lease should have been reviewed and approved under 25 U.S.C. § 81 or 25 U.S.C. § 415(a).

Finally, we anticipate that this letter will be the subject of Freedom of Information Act ("FOIA") requests. Since we believe that some of the information contained herein falls within FOIA Exemption 4(c), which applies to confidential and proprietary information, the release of which would cause substantial competitive harm, we ask that you provide us with your views regarding release within ten days.

If you have any questions, please contact me or Katherine Zebell, Staff Attorney.

⁷According to the IGRA, management contracts cannot exceed five years, unless good cause is shown, and cannot exceed seven years under any circumstances, and management fees, based on a percentage of net gaming revenues, cannot generally exceed 30%.

Sincerely,

A handwritten signature in cursive script that reads "Penny Coleman".

Penny J. Coleman
Acting General Counsel

cc: Director, Office of Indian Gaming Management,
with incoming

John Duffy, Esq.

Paul Filzer, Esq.

Michael Kamen, Esq.

Donald Orlovsky, Esq.

WASHBURN EX. E



July 21, 2004

Merlene Sanchez
Guidiville Rancheria
P.O. Box 339
Talmadge, CA 95481

Received: 7/26/04
☒ Administrator
☒ Chair / Council
☐ Fiscal
☐ Health
☐ Education
☐ EPA

Michael D.

Dear Chairperson Sanchez:

The purpose of this letter is to respond to your request that the National Indian Gaming Commission (NIGC) review certain transaction documents executed by the Guidiville Indian Rancheria (Tribe) and F.E.G.V. Corporation (Developer). The documents included a Development Agreement and Personal Property Lease and a Cash Management Agreement (Agreements). The purpose of our review is to determine whether the Agreements, individually or collectively, constitute a management contract or collateral agreements to a management contract and are therefore subject to our review and approval under the Indian Gaming Regulatory Act (IGRA). We conclude that the Agreements do not constitute a management agreement subject to our review and approval. However, we also conclude that the Agreements evidence Developer's proprietary interest in the Tribe's gaming activity, contrary to IGRA, its implementing regulations and the Tribe's gaming ordinance.

Authority

The authority of the NIGC to review and approve gaming related contracts is limited by the IGRA to management contracts and collateral agreements to management contracts. 25 U.S.C. § 2711. The authority of the Secretary of the Interior to approve such agreements under 25 U.S.C. § 81 was transferred to the NIGC pursuant to the IGRA. 25 U.S.C. § 2711(h).

Management Contracts

The NIGC has defined the term "management contract" to mean "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. The NIGC has defined "collateral agreement" to mean "any contract, whether or not in writing, that is related either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)." 25 C.F.R. § 502.5. Management encompasses activities

such as planning, organizing, directing, coordinating, and controlling. *See NIGC Bulletin No. 94-5.* In the view of the NIGC, the performance of any one of these activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether an agreement for the performance of such activities is a management contract requiring NIGC approval.

After reviewing the Agreements, we conclude that the Agreements do not establish a management relationship.

Proprietary Interest

After reviewing the Agreements we conclude that the Developer has a substantial proprietary interest in the gaming operation. The Agreements provide that the Tribe will lease from the Developer the structure and the equipment necessary to operate a casino. The term of the lease is from July 3, 2002, until the 10th anniversary of the date the total base rent is paid.

The Agreements require that the Tribe pay an initial Base Rent which is an amount equal to the final total Pre-Development Costs, Construction Costs, and Start-Up expenses with a rate of interest equal to the Bank of America Prime Rate plus one percent amortized over sixty months. Additionally, during this five-year period, the Tribe shall pay an "Additional Base Rent" of seventy-five percent (75%) of the Net Revenue. Upon full payment of the total Base Rent the Agreements require the Tribe to pay "Incentive Rent" in an amount equal to sixteen percent (16%) of the Gross Revenues of the gaming operation for 10 years.

Applicable Law

Among IGRA's requirements for approval of tribal gaming ordinances is that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). Under this section, if any entity other than a tribe possesses a proprietary interest in the gaming activity, gaming may not take place. The NIGC, in its regulations, also requires that all tribal gaming ordinances include such a provision. 25 CFR § 522.4(b)(1). The NIGC is currently reviewing the Tribe's gaming ordinance. To receive NIGC approval, the Ordinance must contain a provision stating that the tribe must have the sole proprietary interest in any gaming operation.

"Proprietary interest" is defined in Black's Law Dictionary, 7th Edition (1999), as "the interest held by a property owner together with all appurtenant rights" An owner is defined as "one who has the right to possess, use and convey something." *Id.* "Appurtenant" is defined as "belonging to; accessory or incident to. . . ." *Id.* Reading these definitions together, proprietary interest creates the right to possess, use and convey something.

Although there are no cases directly on point, courts have defined proprietary interest in a number of contexts. In a criminal tax case, an appellate court discussed what the phrase

proprietary interest meant, after the trial court had been criticized for not defining it for jurors, saying:

It is assumed that the jury gave the phrase its common, ordinary meaning, such as 'one who has an interest in, control of, or present use of certain property.' Certainly, the phrase is not so technical, nor ambiguous, as to require a specific definition.

Evans v. United States, 349 F.2d 653 (5th Cir. 1965). In another tax case, Dondlinger v. United States, 1970 U.S. Dist. LEXIS 12693 (D. Neb. 1970), the issue was whether the plaintiff had a sufficient proprietary interest in a wagering establishment to be liable for taxes assessed against persons engaged in the business of accepting wagers. The court observed:

It is not necessary that a partnership exist. It is only necessary that a plaintiff have some proprietary interest. . . . One would have a proprietary interest if he were sharing in or deriving profit from the club as opposed to being a salaried employee merely performing clerical and ministerial duties. [emphasis added]

Id.

An additional aid to statutory interpretation includes the legislative history of the statute. The legislative history of the IGRA with respect to "proprietary interest" is scant, stating only that, "the tribe must be the sole owner of the gaming enterprise." S. Rep. 100-446, 1988 U.S.C.C.A.N. 3071-3106, 3078. "Enterprise" is defined as "a business venture or undertaking" in Black's Law Dictionary, 7th Edition (1999). Despite the brevity of this information, the drafters' concept of "proprietary interest" appears to be consistent with the ordinary definition of proprietary interest, while emphasizing the notion that entities other than tribes are not to share in the ownership of gaming enterprises.

Secondary sources also shed light on the definition of "proprietary interest." In a chapter on joint ventures in *American Jurisprudence*, 2nd Edition, the difference between having a proprietary interest and being compensated for services is discussed in the context of determining when a joint venture exists.

Where a contract provides for the payment of a share of the profits of an enterprise, in consideration of services rendered in connection with it, the question is whether it is merely as a measure of compensation for such services or whether the agreement extends beyond that and provides for a proprietary interest in the subject matter out of which the profits arise and for an ownership in the profits themselves. If the payment constitutes merely compensation, the parties bear to each other, generally

speaking, the relationship of principal and agent, or in some instances that of employer and employee [footnote omitted]. On the other hand, a proprietary interest or control may be evidence of a joint venture. [footnote omitted] [emphasis added]

46 Am. Jur. 2d *Contracts* § 57.

Consequently, if a joint venture is found to exist it would be further evidence that the Tribe did not hold the sole proprietary interest in the gaming operation.

Finally, the preamble to the NIGC's regulations provides some examples of what contracts may be inconsistent with the sole proprietary interest requirement, but then concludes that "[i]t is not possible for the Commission to further define the term in any meaningful way. The Commission will, however, provide guidance in specific circumstances." 58 Fed. Reg. 5802, 5804 (Jan. 22, 1993).

Analysis

In a true lease the value of the underlying structure and equipment, and what the Tribe is paying for, must have some bona fide correlation. In this case, the amount of compensation received by the Developer exceeds the amount of principal by such a great degree that the Developer has assumed the dominant equity interest. The Tribe is first, as in all lease agreements, obligated to repay all monies expended by the Developer plus interest of prime plus one percent over a five-year period (the Base Rent). Additionally, during this five-year period the Tribe is obligated to pay 75% of its net revenue (the Additional Base Rent). This alone is an extraordinarily excessive amount of compensation considering the Developer is providing no ongoing services after the structure is completed and equipped.

What is even more troubling is the fact that after the Tribe has paid back all of the money provided by the Developer, plus the 75% of net revenue for five years, it is required for an additional ten years to pay the Developer "Incentive Rent" in the amount of 16% of the operation's gross revenues. Although the 16% payment is called an "Incentive Rent" payment, this label mischaracterizes what is really a profit-sharing arrangement. The money is going to the Developer for "renting" a building and equipment which the Tribe will have already paid for in the Base Rent payments. Based upon financial results for California tribes without management contracts for 2001 and 2002, 16% of gross revenues would equal more than 50% of net revenues as defined by NIGC regulations. This large share of the net revenues (in the Additional Base Rent and the Incentive Rent) indicates an ownership interest in the profits.

What is further of grave concern to us is that under the Agreements the Tribe does not obtain title to the facility even after it has paid all cost plus 75% of the net revenues. Rather, the Tribe only gains title to the structure and equipment after it has paid 16% of the gross profits for ten years. The Developer is not merely sharing in the profits of the

game operation but rather receiving the lion's share of the profits as well as maintaining control over the use of the facility.

The Agreements enable the Developer to collect large amounts of money, over a potentially lengthy period of time, for doing nothing – performing no ongoing services for the Tribe, and, once the original costs of building, equipping and financing are paid, giving the Tribe nothing in return.¹ The level of compensation extends far beyond what is reasonable for the services provided. In this case, the Developer would be receiving a greater percentage of the net revenues than is allowed for a management contractor who would be providing ongoing services. 25 U.S.C. § 2711 (c).

Additionally, Section 9.1 of the Development Agreement and Personal Property Lease states that if the Tribe is in default of the Agreements then it is not entitled to the right to use or operate the facility. This provision is effective even after the Tribe has repaid all cost plus interest plus 75% of the net gaming revenues. This is further evidence that the developer maintains a level of control that is more consistent with one possessing a proprietary interest than simply providing a service or financing.

Section 5.2 of the Agreement provides that the Tribe may terminate the agreement two and a half years after they have paid the total Base Rent by paying the Developer an amount calculated as follows: multiply the average monthly Gross Revenues of the operation for the preceding 12 months by the number of months that remain in the Term. Then, multiply the product by 16%, and then multiply that product by 85%. The provision is labeled "Buyout" and it would seem, considering the amount of compensation already provided and by the amount of monies being paid at this point, that this is a buyout of an equity interest.

Further evidence of an equity interest by the Developer is Section 12.3 of the Development Agreement and Personal Property Lease that limits the tribal governments right to revoke the Developer's license. This provision undermines the Tribe's authority to regulate the gaming operation and evidences a level of control consistent with an ownership interest.

We are also unconvinced that under Section 15.1(E) a court would be able to appoint a receiver for a gaming operation; a court-appointed receiver would usurp a tribe's ability to own, regulate, and operate its gaming enterprise. While a provision such as this is typically found in commercial transaction agreements, a transaction involving government gaming is simply not comparable.

Finally, when examining whether or not the terms of an agreement so exceed the value of the service being provided as to grant a proprietary interest, we look closely at the circumstances and risk surrounding the transaction. Indian gaming in the State of California has shown to be very profitable in the last five years. Additionally, no other

¹ It is somewhat unclear what services the Developer is providing, besides financing, during the pre-development and development phases. For instance, Section 11.1 states that the Tribe is "responsible for selection of the Structure, the Equipment, and the Vendors."

tribe is currently operating a gaming facility in Solano County. We therefore, without further information, conclude that the risk involved in this project does not justify the high level of compensation or the long term of the agreement.

Determination

We conclude that the Agreements bestow a proprietary interest in the gaming operation on the developer, in violation of the IGRA, its implementing regulations and the Tribe's gaming ordinance. This conclusion is based upon the excessive compensation not related to services, the level of control over the use of the facility, and the limited ability of the Tribe to remove the developer if they are deemed unsuitable. The Agreements in this case memorialize an ownership interest for the developer rather than establishing terms for the receipt of ongoing services or goods by the Tribe. We further conclude that the Agreements are contrary to the public policy underlying the IGRA that prohibits entities other than tribes from having a proprietary interest in a gaming operation.

Finally, we anticipate that this letter will be the subject of Freedom of Information Act ("FOIA") requests. Since we believe that some of the information contained herein may fall within FOIA Exemption 4(c), which applies to confidential and proprietary information, the release of which could cause substantial competitive harm, we ask that you provide us with your views regarding release within 10 days.

We are forwarding a copy of this letter and the agreement on to the Office of Indian Gaming Management. If you have any questions, please contact John Hay, Staff Attorney.

Sincerely,



Penny J. Coleman
Acting General Counsel

cc: Director, OIGM (w/incoming)