National Indian Gaming Commission

IN THE MATTER OF	)	
	)	**NOV/CFA 01-01**
COLORADO RIVER INDIAN TRIBES	)	
	)	**May 30, 2002**
	)	
	)	

MEMORANDUM DECISION AND ORDER

Appeal to the National Indian Gaming Commission (NIGC or Commission) from a Notice of Violation and Proposed Civil Final Assessment issued to the Colorado River Indian Tribes (Respondent or Tribe).

STATEMENT OF THE CASE

On January 23, 2001, the NIGC Chairman issued a Notice of Violation (NOV) to the Tribe. The NOV alleged that NIGC representatives had been denied access to the Tribe's Class III gaming records and to areas of the Tribe's gaming facility where Class III gaming was being conducted.

As the basis for the NOV, the Chairman cited the Indian Gaming Regulatory Act (IGRA) and NIGC regulations permitting Commission representatives to enter Indian Gaming premises and to have access to records concerning any matters necessary for the Commission to carry out its duties. 25 U.S.C. § 2706(b)(4); 25 C.F.R. §§ 571.5-6. The NOV also stated that the NIGC must have access to all gaming facilities and records to fulfill its responsibilities under IGRA.

In an effort to settle the matter, Respondent and NIGC held discussions and exchanged letters in which the parties set forth their respective positions regarding the NOV. When the matter was not resolved, the Chairman issued a Proposed Civil Fine Assessment (CFA). In turn, Respondent appealed both the NOV and the CFA and requested a hearing. The appeals were consolidated at the request of the parties.

A preliminary issue identified in Respondent's appeal was the Commission's authority to issue the regulation establishing the Minimum Internal Control Standards (MICS) (25 C.F.R. Part 542) for class III gaming operations.[1] Respondent maintained that the NOV should be vacated because the Commission lacked authority under IGRA to issue and enforce the MICS regulation as to class III gaming. Respondent argued that, given this lack of authority, the NIGC could not conduct an audit of Respondent's class III gaming activities and could not demand access to books and records that relate solely to class III gaming.[2]

Counsel for the parties notified the recently designated Presiding Official that they had agreed to bifurcate the proceedings. The agreement was to have the Presiding Official first issue a recommended decision on the legal question of whether NIGC had authority to issue the regulation establishing the MICS. If the Commission accepted a recommended decision that NIGC lacked statutory authority to promulgate the MICS, the proceeding would be over. If, on the other hand, the Commission determined that it

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[1] "Class II gaming" and "class III gaming" are terms defined in IGRA. "Class II" gaming includes bingo, games similar to bingo, and card games that are not prohibited by the laws of the state in which a tribe conducts gaming. The term does include not banking card games such as blackjack or "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." "Class III gaming" means all form of gaming that are not class I or class II. "Class I gaming" involves traditional and social games played by tribes and is not the subject of MICS. *See* 25 U.S.C. § 2703(6)-(8).

[2] Respondent does not challenge the authority of the Commission to issue MICS that pertain to class II gaming.

possessed the requisite authority, the matter would be remanded to the Presiding Official for a second, evidentiary, hearing and recommended decision on the fact issue of whether NIGC or Respondent terminated the MICS compliance audit. The parties also agreed that if, after the first hearing, the Commission determined that it had the requisite authority, that determination would not be a final agency action for the purposes of an Administrative Procedure Act (APA) review. Rather, final agency action would occur only after the Commission acted on the Presiding Official's second recommended decision on the facts. Letter from Michele F. Mitchell, NIGC Staff Attorney, and Gwenellen P. Janov, Respondent's counsel, to Presiding Official Candida S. Steel (October 29, 2001).[3]

The Chairman filed his Amended Brief on November 6, 2001. Respondent filed its Response on November 9, 2001. The Chairman filed his Reply Brief on December 17, 2001, and Respondent filed a Surreply on December 28, 2001. Several amici curiae also filed briefs.[4] The parties reached a stipulation concerning facts necessary for resolution of the legal issues. The Presiding Official held a hearing for oral argument on the legal issues January 16, 2002. The record as to the legal issues was closed on March 19, 2002. The Presiding Official submitted a recommended decision (Recommended Decision) to the Commission on May 2, 2002.

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[3] While not wishing to second-guess counsel for the parties at this juncture, the Commission notes that bifurcation of the hearing, with a separate submission of the question of NIGC's authority to issue class III MICS, has resulted in a delay in the final disposition of this matter. The Commission discourages the use of this bifurcated procedure except in the unusual case in which a legal issue, not previously decided, controls the result. In this case, factual questions are also important to the disposition.

[4] Amici Curiae were: the National Indian Gaming Association; Oneida Tribe of Indians of Wisconsin; and Lac Vieux Desert Band of Lake Superior Chippewa Indians, Tule River Tribe, Spokane Indian Tribe, Shoshone-Bannock Tribe, Santee Sioux Tribe of Nebraska, Shoalwater Bay, and Coquille Indian Tribe (one brief).

RECOMMENDED DECISION OF THE PRESIDING OFFICIAL

In her Recommended Decision, the Presiding Official concludes that the NIGC did not have authority under IGRA to impose the MICS on class III gaming and, therefore, that Respondent did not refuse entry to NIGC personnel who were carrying out their duties under IGRA. She recommends that the NOV and Proposed CFA be dismissed. Recommended Decision at 33. The Commission reverses the Recommended Decision for the reasons stated herein.

DISCUSSION

The NOV at issue in this appeal concerns an alleged refusal by tribal officials to allow NIGC representatives the access necessary to audit class III gaming records and to observe class III gaming activities and related cash handling procedures. We address Respondent's challenges to the Commission's authority to promulgate the MICS, to conduct audits, and to enforce the MICS.

1. Authority to Promulgate the MICS

Respondent argues that a threshold legal issue is whether NIGC had statutory authority to promulgate class III MICS. The Commission has already decided the question. In January 1999, the Commission determined that it had statutory authority to promulgate class III MICS when it published a regulation adopting standards for both class II and class III gaming as a final rule. Citing several provisions of IGRA, the

Commission stated in the rule's preamble, "The Commission believes that it does have the authority to promulgate this final rule.... [T]he Commission's promulgation of MICS is consistent with its responsibilities as the federal regulator of Indian gaming." 64 Fed. Reg. 509 (Jan. 5, 1999).

The Commission reaffirms its conviction that it had authority to promulgate the MICS as to class III gaming. We address the question herein only to reassert our 1999 determination.

An examination of the Commission's authority begins with IGRA, the general purposes of which are:

> (2) to provide a statutory basis for the regulation of gaming by an Indian Tribe adequate ...to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both operator and players; and
> (3) to declare that the establishment of independent Federal regulatory authority, Federal standards for gaming, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702.

IGRA does not contain specific direction to the Commission to adopt and publish minimum internal control standards. In the absence of this specific direction, the question becomes whether a reasonable interpretation of IGRA would allow the Commission to promulgate such standards. An examination of IGRA indicates that the Commission's interpretation is reasonable.

First, IGRA provides that the Commission has the authority to promulgate regulations and guidelines "as it deems appropriate to implement the provisions of this chapter." 25 U.S.C. 2706(b)(10). This authority is not limited to class II gaming but

extends also to class III gaming. The Commission believed, and continues to believe, that it was appropriate and necessary to promulgate regulations on MICS to implement the purposes of IGRA. The regulations help ensure that the Indian tribe is the primary beneficiary of the gaming operation and that both the operator and the player conduct gaming fairly and honestly.

The MICS, then, represent the Commission's interpretation of its oversight role and its charter to protect tribal gaming as a means of generating tribal revenue. The standards promote IGRA's purposes by protecting tribal assets in order to support tribal economic development and self-sufficiency. They also help ensure that a tribe is the primary beneficiary of the gaming operation and protect gaming as a means of tribal gaming revenue.[5] Internal controls are the primary procedures used to protect the integrity of casino funds and games and are a vitally important part of properly regulated gaming. Inherent in gaming operations are problems of customer and employee access to cash, unrecorded cash transactions at table games, questions of fairness of games, and the threat of collusion to circumvent controls. Internal control standards are therefore commonplace in the gaming industry.

In short, internal controls over a gaming operation's revenue stream are necessary to protect the revenue. Indian gaming does not serve its purpose of benefiting tribes if tribes cannot account for the tribe's gaming assets. Issuance of the MICS, and conducting audits consistent with the MICS, are reasonable and necessary components of the regulation and oversight of Indian gaming.

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[5] The standards set out in the Commission regulation are *minimum* standards. The Commission recognizes that Indian gaming is a diverse industry. The Commission's intent in promulgating the MICS was that tribes would develop their own internal control standards to addresses their particular needs and circumstances, not that tribes would simply adopt the MICS verbatim.

2. Authority to Conduct Audits

The Commission believes also that it has the necessary statutory authority to audit class III gaming operations. That authority derives from several sources. First, it derives from IGRA's specific provision that:

> (b) The Commission—
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> ...
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> (4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and <u>any other matters necessary to carry out the duties of the Commission under this chapter</u> (emphasis added).

25 U.S.C. § 2706.

The "duties of the Commission" are addressed throughout IGRA. The Commission's authority to have access to and audit class III operations is consistent with its duties created by the general purposes of IGRA and in the variety of Commission duties specifically established both as to class II and to class III gaming activities. As to class III gaming, IGRA specifically gives NIGC authority to:

- Approve or disapprove class III gaming ordinances (25 U.S.C. 2710(d)(1)(A));
- Approve or disapprove management contracts for the operation of class III gaming (25 U.S.C. 2710(d)(9)); and
- Collect fees on class III gaming revenue (25 U.S.C. 2717(a)(1)).

Regardless of the class of gaming, IGRA gives NIGC authority to:

- Issue civil fines (25 U.S.C. 2713(a)(1));
- Issue notices of violations (25 U.S.C. 2713(a)(3); and
- Issue temporary and permanent closure orders (25 U.S.C. 2713(b)(1)).

These provisions indicate Congress's intention that the Commission have both broad and specific duties as to class III gaming.

The language and structure of the statute thus do not support the Presiding Official's statement that "the NIGC has no direct authority, review or regulatory, over the conduct of class III gaming." Recommended Decision at 16. Clearly, NIGC does have direct authority over aspects of class III gaming: IGRA grants to the NIGC broad enforcement powers to ensure continuing compliance with the tribal gaming ordinances approved by the Chairman or the Commission,[6] as well as regulations the Commission may adopt under the authority given to it by IGRA. The Commission also has broad subpoena and deposition authority, and broad investigative authority. *See* 25 U.S.C. §§ 2713, 2715, and 2716.

Apart from issuing the MICS, the Commission's oversight role includes the responsibility of auditing tribal gaming operations, including class III gaming, and evaluating gaming records according to its internal control standards in order to determine whether tribal assets are being protected.[7] Conducting audits that evaluate whether a tribal gaming operation—class III as well as class II—functions under an effective internal control system is a proper exercise of Commission oversight responsibilities to protect the tribal gaming operation from fraud and loss of gaming revenue. Access to the gaming premises and to the operations' records is thus, as alleged in the Chairman's NOV and in IGRA, "necessary to carry out the duties of the Commission under this chapter [IGRA]." NIGC's attempt to access and audit

[6] The Commission disagrees with the presiding official's characterization of the duties of the Chairman and the Commission to approve tribal gaming ordinances as "ministerial." Recommended Decision at 16. These approval decisions involve the discretion to determine whether a particular ordinance meets the requirements specified in IGRA. 25 U.S.C. § 2710(b) and (d).

[7] The presiding official incorrectly states the proffered position of the Chairman regarding the Commission's ability to regulate within the ambit of class III gaming. The Commission does not assert that its role is to "regulate the day-to-day minutia of tribal Class III gaming operations." Recommended Decision at 12. To the contrary, the Commission's position is that IGRA assigns the Commission a broad oversight and regulatory role over the conduct of Indian gaming generally.

Respondent's class III gaming operation was therefore consistent with IGRA's purposes and with the range of authority that IGRA grants NIGC over class III gaming.

3. Authority to Enforce the MICS

Respondent argues that NIGC does not have authority to "enforce" the MICS as to class III gaming. This case, however, is not a MICS enforcement case; the NOV did not allege a violation of the MICS adopted by the Commission or by the Tribe's regulation. Accordingly, this decision does not address the ability of the Commission to "enforce" MICS per se. Instead, this case concerns access by NIGC representatives to conduct an audit.

Audits are a useful tool for the NIGC and for tribal gaming regulators. In fact, NIGC representatives have performed several audits for tribes that involve both class II and class III gaming operations. The results of these audits are shared with tribal leaders and tribal gaming regulators. Except in rare situations, audits are scheduled in advance with the cooperation of the tribal gaming facility. In the event deficiencies are found, NIGC representatives notify the tribe and allow a reasonable period of time for resolution. Unless the deficiencies create an immediate and severe threat to the integrity of the gaming operation, NIGC will work with the tribe and tribal gaming regulators to remedy the deficiencies. The NIGC would contemplate enforcement action only if a tribe failed to address noted deficiencies within a reasonable period of time. This process has led to improvements in the internal control systems for the tribal gaming operations that were audited. None has resulted in a notice of violation.

ORDER

For the reasons indicated, the recommended decision of the Presiding Official is reversed on the specified legal questions set forth above. The Commission concludes, as it has previously concluded, that it has the requisite authority to establish MICS for both class II and class III tribal gaming operations. The Commission also concludes it has the requisite authority to conduct a MICS audit of class III gaming activities in furtherance of its oversight responsibilities.

The case is remanded to the Presiding Official for a hearing on the facts and other pertinent legal issues.

May 30, 2002
Date

Montie R. Deer
Chairman

Teresa Poust
Commissioner

Commissioner Elizabeth Homer did not participate in the Commission's decision.