National Indian Gaming Commission

IN THE MATTER OF	)	
	)	**NOV/CFA 01-01**
COLORADO RIVER INDIAN TRIBES	)	
	)	**July 17, 2003**
	)	
	)	

FINAL 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).

Appearances

Gwenellen P. Janov for the Respondent, Colorado River Indian Tribes
Maria Getoff for the Chairman, National Indian Gaming Commission

Presiding Official

Candida S. Steel, Office of Hearing and Appeals, U.S. Department of the Interior

1. Statement of the Case

On January 23, 2001, the NIGC Chairman issued a Notice of Violation (NOV) to the Tribe alleging 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. 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 and 6.[1] The NOV also stated that the NIGC must have access to all gaming facilities and records to fulfill its responsibilities under IGRA. The alleged denial of access occurred during an attempted audit of the Tribe's records and the internal controls in existence at the Tribe's Blue Water Casino near Parker, Arizona, scheduled to begin on January 9, 2001. Indian gaming operations are to have in place internal control standards that are at least as strict as those set forth in the Minimum Internal Control Standards (MICS) adopted by Commission. 25 C.F.R. Part 42.

In an effort to settle the matter, Respondent and NIGC staff 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, on May 11, 2001, a Proposed Civil Fine Assessment (CFA) in the amount of $20,000. Respondent appealed both the NOV and the CFA. The appeals were consolidated at the request of the parties.

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[1]In pertinent part, IGRA and NIGC regulations provide:

> The Commission—(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 any other matters necessary to carry out the duties of the Commission under this chapter[.]

25 U.S.C. § 2706(b)(4);

> (a) The Commission's authorized representative may enter the premises of an Indian gaming operation to inspect, examine, photocopy, and audit all papers, books, and records (including computer records) concerning:
> (1) Gross revenues of class II gaming conducted on Indian lands; and
> (2) Any other matters necessary to carry out the duties of the Commission under the Act and this chapter.

25 C.F.R. § 571.5; and

> (a) Once the Commission's authorized representative presents proper identification, a gaming operation shall provide the authorized representative with access to all papers, books, and records (including computer records) concerning class II gaming and any other matters for which the Commission requires such access to carry out its duties under the Act.

25 C.F.R. § 571.6.

A preliminary issue identified in Respondent's appeal was the Commission's authority to issue the regulation establishing the MICS for Class III gaming operations.[2] 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.[3] By agreement of the parties, the Commission was to be presented first with a legal question as to whether the Commission had authority to issue the regulation establishing the MICS. If the Commission determined that it possessed the requisite authority, the matter was to be remanded to the Presiding Official for an evidentiary hearing and recommended decision on factual issues including whether NIGC or Respondent terminated the MICS compliance audit.

In its Memorandum Decision and Order dated May 30, 2002, the Commission reaffirmed its authority to promulgate MICS relating to Class III gaming, thereby resolving the preliminary legal question. We incorporate the Memorandum Decision and Order of May 30, 2002, into this Final Decision as part of the final agency action.

The evidentiary hearing on factual issues was held on October 24, 2002. The Presiding Official submitted a Recommended Decision to the Commission on May 12,

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[2] "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 not include 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 forms 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).

[3] Respondent does not challenge the Commission's authority to issue MICS that pertain to class II gaming.

2003. Both parties submitted Objections to the Recommended Decision that were duly considered. 25 C.F.R. § 577.14.

In our review of the Recommended Decision and the record in the case, it appeared that while a fundamental disagreement continued to exist about the Commission's authority, the parties did not disagree on other important aspects of the case. The Commission directed its appellate counsel to discuss a resolution of some or all of the issues with Respondent's counsel. The Respondent agreed to allow the Commission additional time to render a decision so that the discussions might continue.[4] The Commission and Respondent ultimately reached agreement on several issues which are set forth in a Procedural Stipulation that is now part of the record in the case. This decision incorporates all relevant provisions of the Procedural Stipulation. We appreciate the Tribes' willingness to reach a satisfactory resolution of the issues.

2. Recommended Decision

The Recommended Decision included findings of fact indicating that representatives of the Tribe told the NIGC audit team they would not have access to all requested Class III records and to all requested Class III areas of the gaming facility. Recommended Decision, p. 6-8 (#s 22, 23, 29, and 30). The Presiding Official concludes that evidence of record establishes "the audit work <u>was interrupted</u> by the Tribes on the second day of the audit[,]" that "the Chairman has shown by a preponderance of the evidence that the audit was halted by the Tribes for at least some period of time[,]" and that "notwithstanding the Tribes' admitted 'good faith' concern

[4]Commission regulations contemplate a final decision within 30 days of a presiding official's recommended decision. 25 C.F.R. § 577.15. Letters from Respondent's counsel indicating agreement to an extension of time for a Commission decision will be included in the record.

about the NIGC's authority [to conduct an audit of class III records], interference with the authorized audit is technically a violation." Recommended Decision, pp. 14-15. The interference with the audit was the result of the Tribe denying access to the Class III records and to all areas of the gaming facility. Recommended Decision, p.14.

3. The Notice of Violation

NOV 01-01 alleges a violation of 25 U.S.C. § 2706(b)(4) and 25 C.F.R. §§ 571.5 and 571.6 in that, on January 10, 2001, Respondent's Acting Attorney General, Lola Rainey, denied the audit team further access to Class III gaming records and Class III areas of the gaming operation. Evidence of records established that the audit was announced to Respondent well in advance of the scheduled date and that the audit team arrived on January 9, 2001, to find documents ready for their review as requested in the audit notification letter. On the morning of January 10, 2001, the Executive Director of the Tribal Gaming Authority, Armando Barley, notified the auditor leading the audit team that he was denying further access to Class III gaming records and to areas of the gaming facility for observation of Class III gaming activity. Hearing transcript, pp. 39-40, 104, and 155. Mr. Barley did so following consultation with Acting Attorney General Rainey. Hearing transcript, p. 113. We conclude that Executive Director Barley introduced the issue after his discussion with Acting Attorney General Rainey when he consciously informed the audit team that full access was being withheld.[5]

Ms. Rainey testified that she wanted to obtain a statement of the NIGC's authority to audit Class III gaming records and activities and that she intended to report on that authority to the then-sitting Tribal Council which would make a decision about

[5] The Recommended Decision indicates that which individual, Mr. Barley or Ms. Rainey, actually denied access can be considered a distinction without a difference.

granting access. Ms. Rainey did not indicate a timeframe for Tribal Council decision on when access might be given. She was discussing the authority issue with some of the audit team members when Region Director Ken Billingsley entered the conversation and asked whether the audit team was going to have access, "yes or no." Ms. Rainey testified that she could not give a "yes" or "no" answer because she did not have authority to do so and that only the Tribal Council could grant access. We interpret and find Ms. Rainey's statement to mean that "no, you cannot have access now, but we'll see if the Tribal Council wants to grant you that access after they consider your authority and how I analyze that authority." When she did not reply with a "yes," Region Director Billingsley announced that the team was leaving because access was being denied, and the audit was terminated.[6]

We find the Tribe to have committed a violation of NIGC regulations by halting a MICS compliance audit then in progress at Respondent's gaming facility based on its good faith concern that the NIGC lacks the statutory authority to conduct a Class III audit. We conclude that the audit team in good faith believed that Respondent's interruption of the audit on January 10, 2001, made completion of the audit impossible and, accordingly, departed the reservation.[7]

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[6] We do not agree with conclusions that "both parties were responsible for the impasse that resulted in premature termination of the audit" and "the audit team could have continued with the audit of the Tribes' Class II operations." Recommended Decision, p. 15. The audit could not be effectively and credibly conducted without access to Class III records and areas of operation. The Class II and Class III functions of the gaming facility are typically not separate and distinct.

[7] Respondent agrees to entry of the findings set out in this paragraph. See Procedural Stipulation, pp. 2 and 4.

4. The Civil Fine Assessment

Proposed CFA 01-01 contains a discussion of the five factors the Chairman must apply in issuing a civil fine assessment. 25 C.F.R. § 575.4. Seriousness of the violation, whether the conduct was willful or negligent, and the degree of good faith shown by Respondent in attempting to achieve rapid compliance after notification of the violation are significant factors in this case. Respondent does not have a history of prior violations and did not receive any economic benefit as a result of non-compliance.[8]

The Commission views denial of access to gaming records and to all areas of a tribal gaming facility to be a serious matter that goes to the heart of its ability to regulate Indian gaming.[9] Commission regulations include denial of access to a gaming facility to inspect records among those matters it considers to be a "substantial violation." See 25 C.F.R. § 573.6(a)(9).[10] As the proposed CFA recites, and as the Presiding Official concludes, "[s]uch access is necessary for the Commission to meet its responsibilities under IGRA. As a practical matter, Respondent's denial of access prevents the Commission from discharging the responsibilities entrusted to it by Congress...and poses

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[8] An aspect of an "economic benefit of non-compliance" is whether the violation is a continuing one permitting the Chairman to treat each day of non-compliance as a separate violation. 25 C.F.R. § 575.4(a)(2). The proposed civil fine assessment refers to a date by which the violation is considered to have been tolled, but does not state that the Chairman intends to treat each day of the twenty day period (January 10-30, 2001) as a separate violation. We do not agree with the Presiding Official's proposal that, because the CFA alludes to a period of violation of twenty days, the CFA intended a per day assessment of $1,000 per day for twenty days. We treat the violation as a single violation occurring on January 10, 2001.

[9] As recommended by the Presiding Official, we do not include the value of employee salary and other indirect expenses associated with the unsuccessful audit in our consideration of the "Seriousness of the Violation" factor. Taking this a step further, under the particular facts and circumstances of this case, we also do not base the civil fine assessment on the direct costs incurred in travel and lodging by the audit team.

[10] "...The Chairman may issue an order of temporary closure ...if one or more of the following substantial violations are present:

> (9) A gaming operation refuses to allow an authorized representative of the Commission...to enter or inspect a gaming operation, in violation of S. 571.5 or 571.6 of this chapter..."

a serious threat to the integrity of tribal gaming." Recommended Decision, p. 16. This conclusion, standing alone, can and does justify a substantial civil fine.

As a demonstration of its good faith to achieve compliance, Respondent has agreed in the recently executed Procedural Stipulation to allow a Commission audit team to begin a new MICS compliance audit of its gaming operation with full access to records relating to Class III gaming. Based on this recent development, the Commission believes that a significant reduction to the proposed civil fine assessment is appropriate. The Commission and Respondent have agreed in the Procedural Stipulation to a Civil Fine Assessment in the amount of $2,000. Respondent retains the right to seek judicial review of the Commission's decision and, specifically, the Commission's Memorandum Decision and Order of May 30, 2002, reaffirming the Commission's authority to establish MICS for Class III gaming and conduct a compliance audit.

ORDER

We find the Respondent Colorado River Indian Tribes to have been in violation of 25 U.S.C. § 2706(b)(4) and 25 C.F.R. §§ 571.5 and 571.6. We incorporate the Commission's Memorandum Decision and Order of May 30, 2002, into this Final Decision and Order. Based on all the facts and circumstances of this case, we assess a Civil Fine in the amount of $2,000.

FOR THE NATIONAL INDIAN GAMING COMMISSION:

Philip N. Hogen Chairman	Nelson Westrin Commissioner	Cloyce Choney Commissioner

7/17/03
Date