NATIONAL INDIAN GAMING COMMISSION

In the Matter of	)	
	)	**NOV/TCO CO-03-02**
	)	**Docket No. NIGC 2003-1**
Sac and Fox Tribe of the Mississippi in Iowa	)	
	)	**September 10, 2003**
	)	

DECISION AND ORDER

Appeal to the National Indian Gaming Commission ("NIGC" or "Commission") from a Temporary Closure Order ("TCO"), issued by the NIGC Chairman ("Chairman") and directed at the Meskwaki Casino Bingo Hotel ("Casino"), owned and operated by the Sac and Fox Tribe of the Mississippi in Iowa ("Tribe"), a federally recognized Indian Tribe with tribal headquarters in Tama, Iowa.

Appearances:
Cynthia Shaw, Esq., and John Hay, Esq., for the Chairman, NIGC
Christopher Karns, Esq., for the Elected Walker Council ("Walker Council")

Presiding Official:
Andrew Pearlstein, Office of Hearings and Appeals, U.S. Department of the Interior

ORDER

After careful and complete review of the agency record (consisting of 25 documents), pleadings filed by the Walker Council and the Chairman, the Chairman's Decision Upon Expedited Review, the Presiding Official's Recommended Decision, and the July 22, 2003 letter from Steven Olson ("Olson letter"), attorney for the Bear Faction to the Presiding Official ("PO"), with attached July 16, 2003, letter from the Bear Faction to Alex Walker, Jr. ("Bear letter"), the Commission finds that:

1. The Chairman bears the burden of proof in administrative appeals of enforcement actions. The proper standard of review is a preponderance of the evidence.

2. The Olson letter and the Bear letter constituted an improper ex parte communication.

3. The improper ex parte communication did not so taint the decision-making process so as to make the ultimate decision of the agency unfair.

4. The Commission rejects in its entirety the PO's Recommended Decision because the PO exceeded the scope of review when he addressed issues not raised on appeal. The appropriateness of the sanction imposed by the Chairman was the sole issue raised by the parties for review on appeal.

5. To determine whether closure of the Casino is the appropriate sanction, or whether a civil fine assessment is appropriate, we must first decide who is the recognized tribal leadership, legally authorized to govern the Tribe.

6. We defer to the Secretary of the Interior's determination as to the recognized tribal leadership. The Secretary recognizes the Walker Council. The Walker Council is not currently in control of the tribal government or the Tribe's gaming operation.

7. Because the federally recognized tribal leadership is not in control of either the tribal government or the Tribe's gaming operation, the gaming is, in effect, unregulated, and closure of the Casino is the only appropriate remedy.

8. We find that closure of the Casino is based on substantial, uncontested violations and is the only appropriate remedy, and, therefore, make permanent the Order of Temporary Closure.

9. Gaming may resume if, upon a petition by the Tribe to rescind the Closure Order, the Commission is convinced, following a visit by a designated NIGC employee(s), that the Tribe, acting through a duly elected, federally recognized Tribal Council, is in control of the Tribe and Casino, and that no violations of the IGRA, NIGC regulations or the Tribe's Gaming Ordinance exist.

PROCEDURAL AND FACTUAL BACKGROUND

The Sac & Fox Tribe of Mississippi in Iowa is a federally recognized Indian Tribe with headquarters in Tama, Iowa. The NIGC Chairman approved the Tribe's Gaming Ordinance on February 9, 1995. (AR#24). The Tribe then built and opened the Meskwaki Bingo Hotel and Casino.

The federally recognized governing body of the Tribe is a seven-member Tribal Council. Its elected Chairman is Alexander Walker, Jr., whose term began in November 1999 and runs through November 2003. In September 2002, members of the dissident faction, led by Homer Bear ("Bear Faction"), circulated and presented recall petitions seeking to remove Chairman Walker and the rest of his Council from their positions before expiration of their terms under the Tribe's Constitution. The Walker Council disputed the

validity of the petitions under the Tribal Constitution and refused to hold a recall election. (Walker Affidavit, pp. 5-6). No such election has been held to date.[1]

On March 26, 2003, the "hereditary chief" of the Tribe appointed Homer Bear, Jr. as the Chairman of the Tribal Council.[2] Mr. Bear and his appointees then assumed control of the Casino, as well as the Tribal government offices located in the Tribal Center. The Bear Faction appointed a new Casino General Manager and Tribal Gaming Commission Chairperson. (AR#7, p. 3, n.3).

On April 1, 2003, Aurene Martin, Acting Assistant Secretary for Indian Affairs, U.S. Department of the Interior, asserted in a letter to Iowa Congressman Leonard Boswell that "the Department continues to recognize the elected Tribal Council led by Alex Walker, Jr., as the leadership of the Tribe." (AR# 20). In a letter to Mr. Bear dated May 9, 2003, Terrance L. Virden, Deputy Commissioner of Indian Affairs with the Department's Bureau of Indian Affairs, cited the Martin letter to the same effect – that the BIA continues to recognize the Walker Council as the elected leadership of the Tribe. (AR#1). Previous correspondence from the BIA stated that the BIA did not have the authority to intervene in the internal tribal leadership dispute. (AR# # 13, 21).

On April 30, 2003, the NIGC Chairman issued Notice of Violation ("NOV"), NOV-03-02 (AR#9). In the NOV, the Chairman concluded that the Tribe was in violation of the IGRA and NIGC regulations as a result of the takeover by the Bear Faction because (1) the federally recognized tribal government was deprived of the sole proprietary interest in and responsibility for the gaming operation; (2) an authorized tribal official was denied access to enter and inspect the Casino; and 3) the occupation of the Casino presented a threat to public safety. The Chairman stated that to correct the violations, Respondents shall, "no later than 5:00 p.m., May 2, 2003, allow the federally recognized tribal government access to and control of the Tribe's gaming facility." (AR#9).

On May 12, 2003, the Chairman issued a Temporary Closure Order (AR#25). The underlying bases for the TCO are three substantial violations alleged in the NOV. The TCO required the immediate closure of the Casino, pursuant to 25 C.F.R. § 573.6.

Although Homer Bear, Jr., and the Tribe, were named as Respondents in the NOV and TCO, and served with copies of each, the Bear Faction did not appeal the NOV, nor did it seek expedited review of the TCO or appeal the TCO. Instead, it continued to operate the Casino until May 23, 2003, when U.S. Marshals closed the casino. *In re: Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litigation*, Nos. 03-

[1] We understand that an election is scheduled for October 21, 2003, that the Bureau of Indian Affairs will supervise the election, and that the Walker and Bear Factions will be bound by the results of this election. The parties have not asked us to stay our proceedings pending the outcome of this election, and we do not elect to do so *sua sponte*.

[2] In a related case, *In re: Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litigation*, Nos. 03-2329/2355/2357/2390/2392/2393, 2003 U.S. App. LEXIS 17897 at* 3-4 (8th Cir. August 27, 2003), the Court noted that there is no provision under the Tribal Constitution authorizing the appointment of a Tribal Council by a hereditary Chief of the Tribe.

2329/2355/2357/2390/2392/2393, 2003 U.S. App. LEXIS 17897 at* 13 (8th Cir. August 27, 2003).

Alexander Walker, Jr., along with the Sac and Fox Tribe of Mississippi in Iowa ("Walker Council"), were named as Respondents in both the NOV and TCO. The Walker Council also did not appeal the NOV. It did, however, on June 12, 2003, appeal the TCO. Prior to that, on May 19, 2003, the Walker Council had requested informal expedited review of the TCO pursuant to 25 C.F.R. § 573.6(c). Chairman Walker and the Tribe requested that the TCO be rescinded in favor of other coercive measures for compliance against Respondent Homer Bear. Alternatively, Chairman Walker and the Tribe requested that the Order be modified to delay the effective date of the closure and to incorporate language clarifying the circumstances under which the Tribe would be permitted to conduct gaming.

On May 23, 2003, the Chairman issued a Decision Upon Expedited Review, denying the requests of Chairman Walker and the Tribe to rescind or modify the Order. Earlier that same morning, U.S. Marshals closed the Casino pursuant to a federal district court order. The Casino has remained closed since that date.

On June 12, 2003, Christopher Karns, Esq., of the law firm of Dorsey & Whitney, on behalf of the Respondent Alex Walker, Jr., and the Tribe, filed a Notice of Appeal of the Chairman's Order temporarily closing the Casino.[3] On June 17, 2003, the NIGC requested that this appeal be referred to a presiding official to conduct a hearing and issue a recommended decision, pursuant to the NIGC's administrative rules providing for such a referral as part of its appeals process.[4] Subsequently, in accordance with an agreement between the Department of the Interior's Office of Hearings and Appeals and the NIGC, this appeal was promptly referred to Administrative Law Judge Andrew Pearlstein as the designated PO.

On June 20, 2003, the Walker Council filed its Supplemental Statement in Support of Appeal from Order of Temporary Closure ("Supplemental Statement"). In its Supplemental Statement, the Walker Council states that it elect[s] to have the Commission determine the matter based solely on written submissions, provided that Respondent Homer Bear did not request an oral hearing and the presentation of witness testimony. (Mr. Bear not only did not request an oral hearing, but, as stated previously, failed to file an appeal altogether). The Walker Council further states that "the Tribe and its federally recognized Tribal Council acknowledge the circumstances in the NOV..." (Supplemental Statement at 2).

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[3] CO-03-02, Order of Temporary Closure, dated May 12, 2003.

[4] In pertinent part, the NIGC regulations, at 25 C.F.R. § 577.4, provide:

(a) The Commission shall designate a presiding official who shall commence a hearing within 30 days after the Commission receives a timely notice of appeal from the respondent.

In a conference call held on June 23, 2003, the Walker Council and the NIGC agreed that this matter could be resolved appropriately by means of written submissions, without an evidentiary hearing. On July 10, 2003, after confirming receipt of written submissions from the NIGC and the Walker Council, the PO closed the administrative record. The Bear Faction did not participate in the conference call.

On July 16, 2003, the PO sent the NIGC, the Walker Council and the Bear Faction a notice concerning possible resolution of the matter through settlement or alternative dispute resolution. On July 22, 2003, the Bear Faction, by its attorney, Steven Olson, Esq., sent a letter to the PO in response to his inquiry to the NIGC and named respondents about the possibility of settling the dispute. Attached to the Olson letter was a copy of a July 16, 2003, letter from Homer Bear, Jr., to Alex Walker, Jr. Neither the NIGC nor the Walker Council were sent copies of the July 22 Olson letter and the accompanying July 16 letter from Bear to Walker until August 15, 2003, after the PO issued his Recommended Decision. It is apparent from the PO's August 15 letter that he was not aware, at that time, that the Olson and Bear letters were an ex parte communication. It appears that this did not come to his attention until after his Recommended Decision was issued.

On August 11, 2003, the PO issued his Recommended Decision, finding that none of the bases for closure had a sufficient factual basis and recommending that the TCO be dissolved and the Casino reopen. In a letter from the PO to the NIGC, the Walker Council and the Bear Faction, dated August 15, 2003, the PO revealed the existence of the July 22 letter and the attached July 16 letter for the first time, and acknowledged that the correspondence "was apparently not copied by Mr. Olson to the NIGC or to counsel for the Tribe or Walker faction." The PO also acknowledged reading the July 22 and July 16 letters. Both letters appear to have been read by the PO before he issued his Recommended Decision on August 11,[5] although he specifically noted that he did not consider the letters in issuing his Recommended Decision.

On August 22, 2003, the Walker Council and the Tribe objected in writing to the Recommended Decision by the PO, urging the Commission of the NIGC to reject the Recommended Decision in its entirety because of an ex parte communication it believed to be improper, and to remand the matter to a new PO for limited review of the issues raised by the parties to the appeal. The Walker Council also urges rejection of the Recommended Decision based on the PO's consideration of issues beyond the scope of the administrative appeal and seeks remand for consideration of the merits of the sole issue raised by the parties on appeal, i.e. the appropriateness of the sanction. The Walker Council asks that, if the Recommended Decision is adopted, that the Commission reject the PO's findings of fact and conclusions of law that support re-opening of the Casino under the Bear Faction's control. Finally, the Walker Council seeks clarification of the circumstances under which the Tribe will be permitted to re-open its gaming activity, in

[5] In the Recommended Decision, the PO mentions that "the parties, as well as the Bear Faction... all responded that mediation had been attempted unsuccessfully, most recently pursuant to an order of the federal Eighth Circuit Court of Appeals, and that such efforts were unlikely to be successful at this point."

the event the Commission rejects the Recommended Decision but does not remand the matter.

The NIGC also objected in writing to the PO's Recommended Decision, urging its rejection by the Commission. The NIGC argues that the PO "gravely exceeded his authority" by deciding "fact issues" that were not before him and "reaching into the Agency Record without notifying the actual parties to the litigation that allegations made by Mr. Bear would be the basis for his decision." (Chairman's Objections to Recommended Decision at 11-12).

DISCUSSION

I. Burden of Proof and Standard of Review

In administrative appeals of enforcement actions undertaken pursuant to 25 C.F.R. Part 573, the Chairman bears the burden of proof and the standard of review is a preponderance of the evidence. *In the Matter of JPW Consultants*, NIGC 97-4; NIGC 98-8; November 13, 1998 (citing *In the Matter of Shingle Springs Band of Mewok Indians*, NIGC 97-1, December 3, 1998).

Preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *Id.* at 4. Since the three violations alleged in the NOV as the basis for the TCO are conceded and not contested by the parties, we find each violation to be true for purposes of deciding the sole issue raised by the parties on appeal, i.e. the appropriateness of the Chairman's sanction for the violations.

II. The Olson letter and the Bear letter constitute an improper ex parte communication.

In their written objections to the Recommended Decision issued by the PO, both the NIGC and the Walker Council characterize the July 22 letter, and the accompanying July 16 letter, as an improper ex parte communication. We agree.

Neither the IGRA nor the NIGC's regulations address ex parte communications. We therefore look to the Administrative Procedures Act ("APA")[6], Standards of Conduct for

[6] We recognize that the APA's adjudication sections only apply to administrative hearings that are conducted under a statute that specifically provides for hearings to be on the record, 5 U.S.C. § 554(a), and that the NIGC, in the preamble to its appeals regulations, states that the IGRA does not. Vol. 58, No. 13, Fed. Reg. 5839. However, while perhaps not mandatory authority, the APA ex parte provision, and case law interpreting it, are persuasive authority because the adjudicatory regulations the NIGC does have are similar to the other APA adjudications sections, of which the ex parte provision is one subsection. For example, the APA requires that either the agency, one or more members of the agency, or one or more administrative law judges preside over the taking of evidence. 5 U.S.C. § 556(b)(1)-(3). The NIGC chose the term, "Presiding Official", and uses the ALJs at the Department of the Interior for this function. The

Administrative Law Judges ("ALJs") from the Department of the Interior ("Standards of Conduct"), and case law for guidance.

The APA prohibits any "interested person outside the agency" from making, or knowingly causing, "any ex parte communication relevant to the merits of the proceeding" to any decision-making official. 5 U.S.C. § 557(d)(1)(A). The APA further requires that a person involved in the decision-making process who receives any written ex parte communication must include such communications in the record of the proceeding, as well as all written responses to the communications. 5 U.S.C. § 557(d)(1)(C).

The Standards of Conduct, governing ALJs of the Department of the Interior ("DOI"), and directly applicable to the PO in this case by virtue of his employ by the DOI, generally prohibit an ALJ from receiving and considering ex parte communications, stating:

> (b) Ex parte communication – (1) Prohibition. Except to the extent required for the disposition of ex parte matters as authorized by law, there shall be no communication concerning the merits of a proceeding *between any party to the proceeding or any person interested in the proceeding or any representative of a party or interested person and any office personnel involved or who may reasonably be expected to become involved in the decision making process* on that proceeding, unless the communication, . . . if written, is furnished to all other parties. . . The terms "interested person" and "person interested in the agency proceeding" include any individual or other person with an interest in the agency proceeding that is greater than the interest that the public as a whole may have.
>
> This regulation does not prohibit communications concerning case status or advice concerning compliance with procedural requirements unless they are of inquiry that is in fact an area of controversy in the proceeding . . . Any written communication made in violation of this regulation shall be included in the record. In proceedings other than informal rulemakings, copies of the . . . communication shall be provided to all parties, who shall be given an opportunity to respond in writing. [Emphasis added.]

43 C.F. R. § 4.27(b).

APA requires that "when the agency makes the decision without having presided at the reception of the evidence, the presiding employee...shall first recommend a decision..." 5 U.S.C. § 557(b). The NIGC regulations also provide for a PO to issue a recommended decision. 25 C.F.R. §577.14.

In *Professional Air Traffic Controllers Organization (PATCO) v. Federal Labor Relations Authority (FLRA),* 685 F.2d 547 (D.C. Cir. 1982), the U.S. Court of Appeals for the D.C. Circuit expounded on the APA's general prohibition on ex parte communications, stating:

> The disclosure of ex parte communications serves two distinct interests. Disclosure is important in its own right to prevent the appearance of impropriety from secret communications in a proceeding that is required to be decided on the record. Disclosure is also important as an instrument of fair decision-making; only if a party knows the arguments presented to a decision-maker can the party respond effectively and ensure that its position is fairly considered. When these interests of openness and opportunity for response are threatened by an ex parte communication, the communication must be disclosed. It matters not whether the communication comes from someone other than a formal party or if the communication is clothed in the guise of a procedural inquiry.

Id. at 563.

Clearly, the PO here is involved in the decision-making process. In fact, he is integral to it. The use of a PO is provided for by NIGC regulations. NIGC regulations direct that, in appeals before the Commission, "[t]he Commission shall designate a presiding official..." 25 C.F.R. § 577.4(a).[7] NIGC regulations further provide that the PO shall render a Recommended Decision. 25 C.F.R. § 577.14. The Commission must then consider the Recommended Decision, but may "affirm or reverse, in whole or in part..." the Recommended Decision. 25 C.F.R. § 577.15. Because the Bear Faction's ex parte communication in this matter was directed to the PO, and not copied to or otherwise provided to the parties to the action until after the PO issued his Recommended Decision, it is improper.

III. The Improper Ex Parte Communication Did Not so Taint the Decision-making Process so as to Make the Ultimate Decision of the Agency Unfair.

Both parties urge the Commission to reject the Recommended Decision because of the ex parte communication. The parties argue that the communication has tainted the proceedings, and point to the fact that the PO referenced the ex parte communication in his Recommended Decision. Additionally, the Walker Council asks that the matter be remanded to a new PO to issue a new Recommended Decision. We find that the

[7] The regulation further provides that the PO shall commence a hearing. However, § 577.3 provides that the Respondent may waive in writing the hearing and elect to have the matter decided on written submissions alone. Respondents Walker and the Tribe have so elected in this case. Respondent Bear did not appeal the NOV or TCO and is, therefore, not a party to this matter on appeal.

improper ex parte communication did not so taint the proceedings as to make the ultimate decision of the agency so unfair as to require remand to a new PO.

Case law sets forth when an ex parte communication is so egregious as to undermine fundamental notions of due process and fairness. In *Freeman Engineering Associates v. Federal Communications Commission (FCC),* 103 F.3d 169, 184 (D.C. Cir. 1997), the Court cited to several factors that should inform this analysis, including:

> The gravity of the ex parte communication; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.

See also *PATCO v. FRLA*, 685 F.2d 547, 565 (D.C. Cir. 1982).

Before evaluating the effect of the ex parte communication in this instance, we must first address whether the person responsible for the communication – here the Bear Faction – qualifies as a party to this administrative action, and, if it does not, whether it qualifies as an interested party for purposes of our analysis. We conclude that the Bear Faction, while not a party to this action, is an interested party.

In the *PATCO* case, the Court discussed the application of the APA rule on ex parte communications:

> The APA, 5 U.S.C. 557(d), applies only to ex parte communications to or from an interested person. The term interested person is intended to be a wide, inclusive term covering any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have. The interest need not be monetary, nor need a person be party to, or intervenor in, the agency proceeding to come under this section. The term includes, but is not limited to, parties, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated. The term does not include a member of the public at large who makes a causal or general expression of opinion about a pending proceeding.

Id.

Homer Bear, Jr., was a named Respondent in the NOV and TCO. Although he was served with the NOV and TCO, he elected not to participate in the administrative proceeding. He chose neither to appeal the NOV or the TCO. However, although the Bear Faction was not a formal party to the administrative proceeding, this does not prevent our conclusion that the Bear Faction is an interested party. As the dissident tribal faction responsible for ousting the tribal government recognized by the DOI, it was the Bear Faction's actions that were the focus of the allegations against the Tribe in the NOV and the bases for the TCO. Further, any possibility of a successful settlement depended on participation by the Bear Faction. Their actions could help resolve the dispute and lead to dissolution of the TCO, or their actions could perpetuate the conflict, resulting in permanent closure of the gaming facility. The Bear Faction is undoubtedly an interested party.

We next address whether the communication irrevocably tainted the decision-making process so as to make the ultimate judgment of the agency unfair. We look to the checklist of factors utilized by the *PATCO* Court.

(1) The gravity of the ex parte communication

The ex parte communication was made in response to a notice sent by the PO to the Chairman, the Walker Council and the Bear Faction exploring whether the matter could be resolved through settlement or alternative dispute resolution. On July 22, 2003, the Bear Faction, by its attorney, Steven Olson, Esq., sent a letter to the PO in response to his inquiry to the parties about the possibility of settling the dispute. Attached to the Olson letter was a copy of a July 16, 2003, letter from Homer Bear, Jr., to Alex Walker, Jr.

The Olson Letter was directed at settlement. He informed the PO that mediation was unlikely to resolve the issue. He argued that it was the Walker Council's intransigence that doomed the mediation. The attached Bear Letter was arguably more egregious. It is replete with disparaging accusations and remarks regarding Alex Walker Jr. and his administration. However, the PO stated in his August 15, 2003 letter, in which he advises the parties of the ex parte communication, that he considered the letter "only in the context of one of the parties' responses concerning settlement, which all agreed was unlikely." August 15, 2003 letter at 2. He further states that "[t]he July 22 Olson letter and attachment were not cited or relied on in any manner as the basis for any findings or conclusions in the Recommended Decision." *Id.*

We accept at face value the statements of the PO that he did not cite or rely on the ex parte communication. His assertions are entirely plausible. The letters were sent to the PO in response to an inquiry that he had initiated regarding possible settlement, not in response to one of the earlier, more substantive aspects of the proceedings, i.e. the NOV, TCO or written submissions by either party. The only mention of the ex parte letters by the PO in his Recommended Decision is at the beginning of the Decision, in a section entitled "Proceedings," in which the procedural posture of the matter is summarized. (Recommended Decision at 2). He concludes by discussing how he reached out to "the NIGC, Tribe and the Bear faction," regarding possible settlement, and how "all

responded that mediation had been attempted unsuccessfully . . . and that such further efforts were not likely to be successful at this point." (Id.). We accept the PO's assertion that he did not consider the ex parte letters.

(2) Whether the contacts may have influenced the agency's ultimate decision

The ultimate decision we reach here is to make permanent the TCO. As we find herein, the only issue on appeal was the appropriateness of closure as the sanction for the conceded violations. Neither the Olson Letter nor the Bear Letter touches on this specific issue. The Bear Letter does include the statement that, "the vast majority of the Tribe has repeatedly recognized that a Council headed by Homer Bear, Jr. is the true leadership of the Tribe." (Bear Letter at 3). This claim is supported with a detailed report of a recent tribal election in which "a record number of voters went to the polls and in which the Bear Faction's members received 97-98% of the vote, while members of the former Walker Council received just 2-3% of the vote." (Bear Letter at 1).

Our decision rests on our recognition of the Walker Council as the legitimate leaders of the Tribe, based on continuing federal recognition by the DOI of the Walker Council as the tribal leaders and our historic deference to the DOI on these matters. Therefore, any arguments to the contrary, set forth in the letters which comprise the ex parte communication, have not influenced our decision.

(3) Whether the party making the improper contacts benefited from the agency's ultimate decision

As stated above, the ultimate decision we reach here is to make permanent the TCO. The Casino will remain closed. The Tribe will not reap the benefits of Indian gaming unless and until the TCO is rescinded. We cannot fathom how this result could benefit the Bear Faction. Furthermore, our decision is based on acknowledgement of the Walker Council as the federally recognized government of the Tribe, which is contrary to the content of the Bear Faction's ex parte communication.

(4) Whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond

Although the contents of the Bear Letter were known to the Walker Council, it was clearly not known that the attorney for the Bear Faction, Steven Olson, had sent a copy of this letter to the PO, along with his own letter of July 22. Consequently, the only two parties, the Walker Council and the NIGC, were not given notice that both letters had been sent to the PO, and they were thereby deprived of their ability to respond to the letters, which were submitted to the PO several days after the record had been closed by the PO.

(5) Whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose

We do not believe that remand for new proceedings would serve a useful purpose. As discussed above, the PO has stated that the ex parte communication was not cited or relied on in any manner as the basis for any findings or conclusions in the Recommended Decision. Furthermore, the current record is sufficient for the Commission to decide the sole issue raised on appeal, based on the parties' written submissions, as they requested. Therefore, to remand the proceedings to a new PO would serve no purpose.

IV. The Commission Rejects in its Entirety the PO's Recommended Decision Because the PO Exceeded the Scope of Review When He Addressed Issues Not Raised on Appeal, and Did Not Address the Merits of the Issues Raised on Appeal.

Both parties to this appeal, the Chairman and the Walker Council, argued in their filed objections to the Recommended Decision that the PO exceeded the scope of review when he made findings of fact and conclusions of law based on the underlying violations and bases for closure, which the Walker Council had not appealed. We agree, and, therefore, reject the Recommended Decision in its entirety.

Both the Walker Council and the Bear Faction were identified as respondents in both the NOV and the TCO.[8] The Bear Faction appealed neither the NOV nor the TCO.[9] Therefore, the Bear Faction waived its right to contest the NOV and the TCO.

The Walker Council did not appeal the NOV, but did appeal the TCO. The Walker Council's pleadings clearly establish that the Walker Council, as the federally recognized leadership of the Tribe, admitted the violations and the underlying facts alleged in the NOV and Temporary Closure Order. In its Supplemental Statement, the Walker Council stated, "The Tribe and its federally recognized Tribal Council are not in control of the Tribe's governmental offices or gaming operations, or the revenues generated ...thereby resulting in a violation of the [IGRA]." (Supplemental Statement in Support of Appeal from Order of Temporary Closure at 1). The Walker Council further stated that "the Tribe and its federally recognized Tribal Council acknowledge the circumstances in the NOV..." (Id. at 2). We understand this to mean that the Tribe, by its federally

[8] The General Manager is also identified as a respondent in the TCO, presumably because the TCO orders closure of the Casino and the General Manager is in charge of the day-to-day operations of the Casino. Nevertheless, the General Manager did not appeal the TCO.

[9] We have considered whether the Bear Faction's May 2 letter evidences an intent to appeal the NOV, and find that it does not. While it does respond to the allegations in the NOV, it does not comply with the other requirements of the NIGC regulation governing appeals. 25 CFR § 577.3(a) provides that a respondent may request a hearing by submitting a notice of appeal, and Section 577.3(c) provides that a respondent may instead waive its right in writing to an oral hearing and instead elect to have the matter determined solely on the basis of written submissions. The Bear Faction has done neither. We also note that in its ex parte communication to the PO, the Bear Faction specifically states that it made a strategic decision not to appeal. See July 22, 2003, letter from Steven Olson, Esq., attorney for the Bear Faction, to the PO.

recognized tribal leadership, does not contest the facts upon which the NOV or TCO were based.

The NIGC regulations provide that a respondent may request a hearing to contest whether an order of temporary closure issued by the Chairman should be made permanent or be dissolved by submitting a notice of appeal. 25 C.F.R. § 577.3(a). After such notice is filed, the respondent must file with the Commission a supplemental statement that states "with particularity the relief desired and the grounds therefor. . . " 25 C.F.R. § 577.3(c). At the hearing, a respondent has the option of presenting oral testimony or witnesses. *Id.* However, in lieu of an oral hearing, the NIGC regulations provide that the respondent may elect to have the merits of the appeal determined "solely on the basis of written submission." *Id.*

The Walker Council waived its right to have a hearing, including presenting testimony and witnesses, and instead elected to have the merits of the appeal of the TCO decided solely on the basis of written submissions. Importantly, in its written submissions, the Walker Council did not dispute the violations alleged as the basis for the TCO or the facts that gave rise to those violations. Through its written submissions, the Walker Council narrowed the issues it could have appealed to only one -- the appropriateness of the sanction imposed by the Chairman, closure of the Casino.

Such a narrowing of the issues on appeal is permissible, even in situations where an administrative agency is required to hold a trial-type evidentiary hearing (unlike here, where an evidentiary hearing is optional). In *Persian Gulf Outward Freight Conference v. Federal Maritime Commission*, 375 F.2d 335 (D.C. Cir. 1967), the petitioner sought review of a final order of the Federal Maritime Commission directing the petitioner to cease and desist from carrying cargo at certain tariff rates found to be outside of an approved agreement. The D.C. Court of Appeals found that an agency could decide an appeal on a memorandum of law and need not provide an evidentiary hearing, where the petitioner (the Persian Gulf Conference) was afforded an opportunity to demonstrate what facts it felt were material to the issue before the agency (the Federal Maritime Commission). The Court discussed its reasoning, stating:

> It is fundamental to the law that the submission of evidence is not required to characterize "a full hearing" where such evidence is immaterial to the issue to be decided. The Supreme Court has defined a full hearing as one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law of the step asked to be taken. Where no genuine or material issue of fact is presented[,] the court or administrative body may pass upon the issues of law after according the parties the right of argument.

Id. at 341.

The Respondent Walker Council, on behalf of the Tribe, narrowed the issues in its written submissions to whether closure was the appropriate sanction. The PO chose to ignore this narrowing of the issues by the only Respondent appealing, the Tribe and the Walker Council, and instead made recommended findings of fact and conclusions of law with respect to the underlying violations, consideration of which had been waived by the Bear Faction when it did not appeal, and which were agreed to by the Walker Council as part of its appeal. We must, therefore, reject the PO's decision in its entirety and now consider and decide the sole issue raised by the parties on appeal, i.e. whether the Chairman's temporary closure of the Casino was appropriate. In deciding this issue, we rely on the closed record and the written submissions of the parties, as they agreed.

V. To Determine Whether Closure of the Casino or a Civil Fine is the Appropriate Sanction, We Must First Determine Which Group Can Lawfully Act on Behalf of the Tribe and Correct the Violation.

Before we can assess the appropriateness of the Chairman's sanction -- closure of the Casino -- we must first determine who is ultimately responsible for gaming, and, therefore, ultimately responsible for correcting the gaming violations. A sanction would be inappropriate if levied against one who has no power to correct the violations forming the basis for the sanction.

In this case, the violations were directed to the Tribe. The Chairman noticed both Alex Walker, Chairman of the elected Council of the Tribe, and Homer Bear, nominal Chairman of the dissident group that had assumed control of the leadership of the Tribe and the operation of the Casino. Despite the fact that both of these individuals were noticed, the Tribe is the entity with authority to game under the IGRA. See 25 U.S.C. §§ 2710(b)(1)(B), (d)(1)(A)(i), (d)(2)(A)-(C). Thus, the Tribe is ultimately responsible for correcting the violations.

The Tribe acts through its governing body. Pursuant to the Tribe's Constitution, a Tribal Council is the governing body of the Tribe. (Article III, Section 1). The Tribal Council is to have authority to represent the Tribe in all matters pertaining to the business of the Tribe. (Article III, Sec. 2). The Tribal Council shall consist of seven members elected at large from members of the Tribe. (Article IV, Section 1).

The Tribe has both the ability and the power to correct the uncontested gaming violations. This can be accomplished by adherence to both the Tribe's Constitution and its Gaming Ordinance.

VI. We Defer to the Secretary of the Interior's Determination as to the Recognized Tribal Leadership. The Secretary Recognizes the Walker Council. The Walker Council is not in Control of the Tribal Government or the Tribe's Gaming Operation.

For a tribe to lawfully conduct gaming on its lands, the tribe must be "recognized as eligible by the Secretary [of the Interior] for the special programs and services provided by the United States to Indians because of their status as Indians" and must be "recognized as possessing powers of self-government." 25 U.S.C. § 2703(5). The Commission defers to the Secretary of the Interior's determination of whom the Secretary recognizes as the legitimate tribal leadership of a tribe. As we have stated in a prior Commission Decision:

> [T]he plain meaning of the [IGRA] establishes that only tribes recognized by the Secretary, acting through their designated representatives, may engage in Indian gaming. It follows that the Secretary, as the expert on such matters, would be the authority to determine who acts on behalf of the recognized tribe.

Decision Letter, Tuscarora Tribal Business Council, July 19, 1994, at 5-6 (AR# 23).

This Commission Decision sets forth a thorough legal analysis of why the Chairman should defer to the Secretary, why IGRA implies that the Chairman should rely on the Secretary for guidance on what group constitutes the governing body of a tribe, and why the Chairman's deference to the Secretary prevents the chaos caused when different federal agencies recognize different governing bodies of the same tribe. We find it unnecessary to reiterate that analysis here.[10]

We agree with the Walker Council that, for the NIGC to ensure that the "governing body of the Indian tribe" is responsible for the gaming activity, the NIGC necessarily must know what entity to recognize as the governing body of the Tribe. Such recognition, as well as federal recognition of a tribe itself, is evidenced by a government-to-government relationship between the United States (through its executive branch officials) and the Tribe (through its governing body)." (Tribal Respondents' Objections to Recommended Decision, at 14).

We find that the Walker Council is the group that can lawfully act on behalf of the Tribe and correct the bases for closure, and in so finding, we deferred to the Secretary of the Interior's determination that the Walker Council is the recognized tribal leadership. The recognized leadership is not currently in control of the Casino or its regulation.

VII. Because the Recognized Tribal Leadership is not in Control, the Gaming is in Effect Unregulated.

The Walker Council argues that closure of the Casino has "only halted an unauthorized group of dissidents from conducting gaming activity at the Meskwaki Settlement and has not stopped the other IGRA violations noted..." (Tribal Respondents' Objections to

[10] We share the Walker Council's concern, articulated in its Tribal Respondents' Objections to Recommended Decision, at 16, that the PO reached a contrary conclusion without even referencing this binding agency precedent.

Recommended Decision at 18-19). The Walker Council argues that the more appropriate sanction is a fine against Homer Bear. We disagree.

Merely fining the unrecognized faction, while allowing gaming to continue, does not address the critical issue: that Indian gaming under the IGRA must be operated by the Tribe and by the tribal leadership recognized by the Secretary. We cannot allow an unrecognized, dissident faction to operate an Indian casino.

We recognize, as the Chairman did, that the Walker Council does not control the Bear Faction's actions. However, as the Chairman has stated, "When the federally recognized leadership is not in control of the gaming operation, the activity being conducted is not Indian gaming under the IGRA. I cannot allow such gaming to continue." (Decision Upon Expedited Review, at 3). We agree. Neither can we.

Our decision is supported by the 8th Circuit Court of Appeals, in a case directly related to this one. When the Casino did not close pursuant to the TCO, the Chairman of the NIGC sought federal court enforcement of the TCO in the United States District Court for the Northern District of Iowa. The Court granted a preliminary injunction enforcing the TCO, and on May 23, 2003, U.S. Marshals closed the Casino. *In re: Sac & Fox Tribe* at *13. On appeal, the 8th Circuit affirmed the district court's grant of the preliminary injunction. The 8th Circuit noted, in its analysis of whether the public interest favored enforcement of the TCO, that

> [p]rior to enforcement of the closure order in this case, gaming operations had become, effectively, unregulated. The BIA did not recognize the [Bear Faction], yet the [Bear Faction] had appropriated control of the gaming operations and diverted tribal assets into new bank accounts. As such, it was no longer possible for the NIGC to ensure that the tribe was the primary beneficiary of the gaming operation....

Id. at *32.

VIII. We Find that Closure of the Casino is Based on Substantial, Uncontested Violations and is the Only Appropriate Remedy, and, Therefore, Make Permanent the Order of Temporary Closure.

The "IGRA grants the Chairman broad authority to fashion remedies to cure perceived gaming violations, including the authority to order temporary closures." *Id.* at 21, citing 25 U.S.C. § 2713(b)(1). The Chairman may issue an order of temporary closure if one or more substantial violations exist. 25 C.F.R. § 573.6(a). NIGC regulations set forth 12 substantial violations that may, individually, form the basis for closure. Each of the three violations set forth in the TCO and conceded by the Walker Council may, individually, form the basis for closure, as each is a "substantial violation" as defined by NIGC regulations. The Commission has the power to, "by an affirmative vote of not less than 2

members and after a full hearing,[11] make permanent a temporary order of the Chairman closing a gaming activity..." 25 U.S.C. § 2706(a)(5).

The Tribe, through its elected council -- the Walker Council -- argues that closure will not cure the violations, and instead seeks a civil fine against the dissident faction in an attempt to coerce compliance. It argues that the violations are the result of the actions of the Bear Faction and that correcting the violations can only be accomplished by the actions of the Bear Faction. We disagree. The alternate remedy of a civil fine, proposed by the Walker Council, does not persuade us. We find that closure is the only appropriate remedy, and we make permanent the TCO.

The Tribe is ultimately responsible for its gaming operation. In this case, a break down in the governmental structure of the Tribe led to a government takeover by a dissident faction. That faction then assumed control of the Casino.

The Tribal Council, chaired by Respondent Walker, is the government of the Tribe that is federally recognized by the Secretary of the Interior. The Tribe and its federally recognized Tribal Council are not in control of the Tribe's governmental offices or gaming operation. The exclusion of the federally recognized leadership from control over operations of the gaming facility led to three substantial violations of the IGRA, NIGC regulations, and the Tribe's Gaming Ordinance. The Tribe, through its Council, the Walker Council, admits that those substantial violations occurred.

We agree with the Chairman that, "allowing a gaming operation to remain open while an unrecognized faction has control would encourage unlawful takeovers of Indian gaming establishments creating a situation that is inimical to stable tribal governments and their gaming operations." (Chairman's Reply to Respondents' Supplemental Statement at 4-5).

Under the circumstances presented here, closure is not only the best remedy; it is the only practical remedy when an unrecognized faction has illegally taken over the tribal government and its gaming operation. We recognize that closure of the Casino has negatively impacted the Tribe, Casino employees and the surrounding community. We do not reach our decision to close the Casino in haste or without serious consideration. We do believe, however, that closure is the only appropriate remedy in a situation where control of the Casino has been wrested from the Tribe and its legitimate tribal government. We trust that, in the end, our decision will serve to strengthen not only the government of this Tribe, but will strengthen all tribal governments.

Gaming may resume upon a petition by the Tribe to rescind the Closure Order, if the Commission is convinced, following a visit by a designated NIGC employee(s), that the Tribe, acting through a duly elected, federally recognized Tribal Council, is in control of the Tribe and Casino, and that no violations of the IGRA, NIGC regulations or the Tribe's Gaming Ordinance exist.

[11] As addressed above, Respondent Walker Council waived the hearing.

It is so ordered by the NATIONAL INDIAN GAMING COMMISSION.

Philip N. Hogen
Chairman

Nelson Westrin
Commissioner

Cloyce Choney
Commissioner