National Indian Gaming Commission

IN THE MATTER OF	)	
MANAGEMENT CONTRACT BETWEEN	)	
FIRST NATION GAMING AND	)	
SAN PASQUAL BAND OF INDIANS	)	**December 14, 2001**
	)	
	)	

DECISION OF THE NATIONAL INDIAN GAMING COMMISSION

Appeal to the National Indian Gaming Commission (NIGC or Commission) by First National Gaming LLC (FNG) of NIGC Chairman Montie Deer's October 16, 2001, disapproval of the Revised and Restated Management Agreement between FNG and the San Pasqual Band of Mission Indians (Tribe).

APPEARANCES: Cynthia S. Omberg, Esq., National Indian Gaming Commission, Washington, D.C., for the Chairman; Kent E. Richey, Esq.; Vanya S. Hogen, Esq.; Minneapolis, Minnesota, and Thomas H. Hudson, Esq.; William T. Brack, Esq.; and Chris Changery, Washington, D.C., for FNG.

ORDER

After careful review of the administrative record, the Commission upholds the decision of the Chairman to disapprove the management contract between FNG and the Tribe.

FACTUAL BACKGROUND

On December 16, 1999, NIGC received a class II and class III management contract between the San Pasqual Band of Indians and First Nation Gaming. On May 22,

2000, Greg Strategier, Vice President and Chief Financial Officer of FNG, sent NIGC a copy of the Tribe's business plan.

On May 23, 2000, Elaine B. Trimble, NIGC Financial Analyst, sent a letter to Alan Lawson, Tribal Spokesman, and FNG delineating documents that the parties needed to submit before NIGC could review the contract. The required documents included: a justification for a term limit in excess of five years; an updated list of persons with a financial interest in the management contract; applications for each person with management responsibility for the contract who had not previously submitted an application to NIGC; an application for the Tunica Biloxi Tribe and Louisiana and RR Gaming of America; and a deposit to cover the cost of the background investigation.

On June 23, 2000, FNG submitted applications for persons and entities with a financial interest in, or management responsibility for, the contract. However, on June 30, 2000, Fred W. Stuckwisch, NIGC Director of Contracts, wrote Allen Lawson, Tribal Spokesperson, and Greg Strategier, FNG Vice President, notifying the parties that the submission was incomplete under the requirements of 25 C.F.R. §§ 533.3(d)(1) and 537.1. (Attachment 2.) Specifically, Stuckwisch stated that FNG, as manager, needed to determine whether the Tunica-Biloxi Tribe or related entity would be responsible for the contract and to submit necessary background investigation applications. Stuckwisch further stated that the contract could not be approved because it failed to comply with 25 C.F.R. parts 531 and 533 and that the parties would have to submit a revised and restated contract in order to gain approval. In an attachment to the letter, Stuckwisch listed 18 changes that needed to be made in order for the contract to be approved.

On July 25, 2000, Penny J. Coleman, NIGC Deputy General Counsel, sent Glen Feldman, counsel to the Tribe in Phoenix, Arizona, a letter acknowledging a July 12, 2000, meeting in which Feldman said he would provide documentation establishing that the Tribe's proposed gaming operation would be located on Indian land.

On November 6, 2000, Stuckwisch wrote to Rodney Savoy, FNG President. Stuckwisch said that, in light of the fact that FNG had informed NIGC of changes in persons and entities with a financial interest in, or management responsibility for, each contract, NIGC required a new, updated list pursuant to 25 C.F.R. § 433.3(d). On January 22, 2001, Shelley Cestia of FNG submitted to NIGC a list of owners of FNG and the dates on which background information was submitted for certain individuals.

On February 27, 2001, Stuckwisch wrote to Tribal Spokesperson Lawson, FNG Vice President Strategier, and Earl Barbry, Chairman of the Tunica-Biloxi Tribe of Louisiana, who is also President of FNG. Stuckwisch told the parties that the contract could not be approved because of failure to submit certain information, outlined in an attachment. That information included revised financial projections, an environmental assessment, financial documents, documentation concerning the land acquisition, and a copy of the start-up expense budget.

On August 29, 2001, Stuckwisch sent FNG President Rodney Savoy a letter regarding management contracts between FNG and five tribes, including San Pasqual Band of Indians. (Attachment 6.) Stuckwisch informed Savoy that NIGC could not proceed with background investigations of persons and entities with a financial interest in, or management responsibility for, the contracts because FNG had not responded to requests for: information regarding Earl J. Barbry, Jr.; Harold Pierite, Sr.; and Marshall

Pierite; a signed authorization from FNG to correct and sign all applications; and a current organizational chart showing all persons and entities with a financial interest in each contract. On September 26, 2001, FNG's Vice President Strategier sent a letter to NIGC's Stuckwisch stating that background information regarding the three individuals would be submitted before September 28, 2001, that FNG was granting authorization to correct all applications, and that FNG was sending the requested organizational chart.

On October 16, 2001, NIGC Chairman Montie Deer sent a letter notifying Tribal Spokesperson Lawson and FNG President Earl Barbry, Sr., that the contract had been disapproved. Deer stated:

> We sent the parties several letters identifying the regulatory issues and other concerns the parties had not sufficiently addressed including: August 29, 2001; February 27, 2001; November 6, 2000; July 25, 2000; June 30, 2000; and May 23, 2000.
>
> Although there have been telephone calls, letters and meetings, the parties have not addressed the concerns raised in our letters....Thus, we have been unable to sufficiently evaluate the Contract.
>
> On August 29, 2001, the NIGC requested that the parties taken an action regarding the Contract within 30 days or the NIGC staff may recommend that the Contract be disapproved. To date, the parties have not submitted financing documents, other collateral agreements, a sufficient business plan, and a revised Contract as required by 25 C.F.R. Part 533. Therefore, the Contract has been disapproved.

On November 15, 2001, NIGC received an appeal by FNG of the Chairman's disapproval letter.

DISCUSSION

At issue before the Commission is whether the Chairman properly disapproved the proposed management contract between FNG and the Tribe. FNG has appealed the disapproval pursuant to the procedure set forth at 25 C.F.R. § 539.2.

In its appeal letter, Appellant FNG requests a meeting with the Commission prior to issuance of the decision. The appeal process for disapproval of a management contract is governed by 25 C.F.R. § 539.2. The regulation provides no right to a meeting or hearing prior to the Commission's decision. The request for a meeting is therefore denied.

FNG requests as relief that the Commission rescind the Chairman's disapproval and suspend consideration of the management contract while the parties finalize the contract submission. For the reasons set forth below, the Commission denies FNG the requested relief and affirms the Chairman's disapproval of the management contract.

NIGC's regulations govern the approval process for management contracts. Under 25 C.F.R. § 533.6(a), the Chairman may approve a management contract if the contract meets the requirements of 25 C.F.R. part 531 and § 533.3. In his disapproval letter, the Chairman noted that 25 C.F.R. § 533.3 requires submission of the management contract—including collateral agreements—and a three-year business plan. However, the Chairman noted, "the parties failed to submit all collateral agreements and a business plan sufficient to satisfy these requirements...." Attachment 6, p. 2. Because the parties' failed to submit the required documents, the Chairman, under the regulations, was unable to approve the contract.

The regulations also set forth grounds on which the Chairman must disapprove a management contract for class II gaming. Under 25 C.F.R. § 533.6(b), the Chairman "shall disapprove" a management contract in several instances. This case falls into one of those instances. Specifically, 25 C.F.R. § 533.6(b)(1)(iv) requires that the Chairman disapprove a contract when any person with a direct or indirect financial interest in, or

having management responsibility for, a management contract has refused to respond to questions asked by the Chairman in accordance with his responsibilities. As stated in the disapproval letter, the NIGC had, in six letters and several telephone calls and meetings, requested the requisite documentation to enable the Chairman to approve the contract. The parties did not submit the requested documentation and do not argue in their appeal that they did. Disapproval of the contract was therefore appropriate in this case.

In short, the Chairman has the right and duty to disapprove contracts that meet the regulatory grounds for disapproval. As in this case, a party's failure to submit all required documents, after repeated attempts by the Commission to obtain the documentation, may be deemed refusal to respond to questions asked by the Chairman, thus requiring disapproval under 25 C.F.R. § 533.6(b)(1)(iv).

Disapproval in this case is appropriate not only on regulatory grounds, but on policy grounds as well. Federal agencies must be free to oversee the application of their regulations. *American Cylinder Manufacturers Committee v. Department of Transportation,* 578 F.2d 24 (2nd Cir. 1978). Efficient agency administration requires that the Commission be free to disapprove contracts when the parties—having been given significant time and guidance by the agency—are unable or unwilling to perfect their submission; otherwise, the agency continues fruitlessly to expend its own limited resources. The Chairman properly disapproved the management contract at issue here.

CONCLUSION

For the above-stated reasons, the Commission affirms the Chairman's disapproval letter of October 16, 2001.

NOTATION NO. 01-01

National Indian Gaming Commission

ACTION:

ORDERING FORTHWITH THE ISSUANCE OF THE DECISION OF THE COMMISSION IN THE MATTER OF MANAGEMENT CONTRACT BETWEEN FIRST NATION GAMING AND SAN PASQUAL BAND OF INDIANS AFFIRMING CHAIRMAN'S DISAPPROVAL.

VOTES OF THE COMMISSION:

Montie R. Deer, Chairman	12/14/01 Date	In Favor / Opposed
Elizabeth L. Homer, Vice-Chair	12/14/01 Date	In Favor / Opposed
Teresa E. Poust, Commissioner	12/14/01 Date	in Favor / Opposed