NATIONAL INDIAN GAMING COMMISSION

IN THE MATTER OF SHINGLE SPRINGS BAND OF MIWOK INDIANS,	)	Docket No. NIGC 97-1 December 3, 1998

DECISION OF THE NATIONAL INDIAN GAMING COMMISSION

Appeal to the National Indian Gaming Commission ("Commission")[1] from a Notice of Violation NOV-5-06 ("NOV") issued by the Chair of the Commission in regard to alleged environmental, health, and safety violations committed by the Shingle Springs Band of Miwok Indians ("Tribe") in the maintenance and operation of its gaming facility, the Crystal Mountain Casino, located in El Dorado County, California.

APPEARANCES: Christine A. Lambert, Esq., Darla M. Silva, Esq., and Penny J. Coleman, Esq., Acting General Counsel, National Indian Gaming Commission, Washington, D.C., for the Chair; Ross Arbiter, Esq., Joel D. Siegel, Esq., Robert M. Philips, Esq., Los Angeles, California, for the Shingle Springs Band of Miwok Indians; Louis B. Green, Esq., Placerville, California, for El Dorado County; P.A. Le Doux, Placerville, California, for the Grassy Run Community Services District.

ORDER

After careful review of the administrative record, the filings by the Chair and the Tribe, and the Presiding Official's Recommended Decision,[2] the Commission finds that:

> The Chair did not meet her burden of proof in establishing that the fire safety and water concerns outlined in Paragraph 3a-h of the Notice of Violation resulted in a situation where the Tribe's gaming facility either threatened, or did not adequately protect the environment and the public health and safety as of November 2, 1996.

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[1]"Commission" refers to the body that is hearing this appeal and is currently comprised of Chairman Montie R. Deer and Vice-Chairman Philip N. Hogen.

[2]Pursuant to an agreement between the National Indian Gaming Commission and the Office of Hearings and Appeals ("OHA") of the Department of the Interior, the Tribe's appeal was referred to the Director of OHA for assignment to a presiding official for the issuance of a recommended decision. *See* 25 C.F.R. § 577.4.

FACTUAL BACKGROUND

The Shingle Springs Band of Miwok Indians is a federally recognized Indian Tribe with tribal headquarters located in El Dorado County, California. The National Indian Gaming Commission ("NIGC")[3] is a Federal agency vested with regulatory authority over Indian gaming pursuant to the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701, *et seq.* ("IGRA"), and implementing regulations set forth at 25 C.F.R. § 501, *et seq.*

In the summer of 1996, the Tribe expressed interest in opening a gaming facility on land held in trust for it by the Federal Government, in El Dorado County, California. The NIGC approved the Tribe's gaming ordinance on August 6, 1996. Several meetings were held among representatives of the NIGC, the Tribe, the Department of the Interior, and surrounding communities and local government groups concerning the proposed gaming facility.

The Tribe agreed to work with the NIGC and not to open the gaming facility until certain health and safety concerns which had been raised in the meetings were clearly identified and addressed. In order to identify the environmental, health and safety concerns, the NIGC contracted with a company called Parallax, Inc. ("Parallax") to prepare an environmental, health and safety assessment of the Tribe's proposed gaming facility ("Parallax Assessment").[4]

On October 4, 1996, the NIGC provided the Parallax Assessment to the Tribe. The Assessment, which was entitled "Preliminary Environmental, Health, and Safety Assessment, Native American Gaming Facility, Shingle Springs Rancheria in El Dorado County, California," opined that there were environmental, health, and safety problems related to the operation of the Tribe's proposed gaming facility. The Tribe engaged in discussions with the NIGC which were intended to identify the measures required to implement the Parallax Assessment's recommendations and to establish a process by which the NIGC could verify that the required corrective steps had been taken.

On October 26, 1996, the Tribe held a public hearing for the specific purpose of examining and addressing the environmental and health and safety issues relating to the construction and operation of the Tribal gaming facility, as set forth in the Parallax Assessment.[5] At this hearing, the

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[3]"NIGC" refers to the agency which includes the Commission and its staff.

[4]The Commission has held that for "all present and future administrative appeals of enforcement actions taken 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. Preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." In The Matter of JPW Consultants, Inc., Docket Nos. NIGC 97-4, 98-8 (footnote omitted).

[5]In a letter dated October 21, 1996, the Tribe informed the NIGC of its plans to conduct a public hearing "to examine and make determinations concerning public health and safety issues

Tribe received documents from the Office of El Dorado County Counsel and the Grassy Run Community Services District, which it placed into the record of the public hearing. The Tribe also placed several reports and other documents in the record.

By a letter dated October 30, 1996, the Tribe advised the NIGC of the hearing results and of its intent to begin operation of a gaming facility, to be known as the Crystal Mountain Casino. (Letter from Kohler to Fedman of 10/30/96, at 2). In this 14-page letter, the Tribe stated that it had addressed all of the concerns raised in the Parallax Assessment. (*Id.*). The Tribe's October 30, 1996, letter was sent by facsimile to Alan Fedman, NIGC Director of Enforcement, the morning of October 31, 1996.

The Tribe opened its gaming facility on November 2, 1996. In response, on November 2, 1996, the Chairman issued a Notice of Violation NOV-5-06 ("NOV") to the Tribe. (Notice Of Violation of 11/2/96). The basis of the violation was that the Tribe opened the Crystal Mountain Casino without correcting a significant number of problems identified in the October 4, 1996, Parallax Assessment. (Parallax Assessment of October 1996). The NOV outlines specific fire safety and water concerns in Paragraph 3(a)-(h). In response to the NOV, the Tribe voluntarily closed its Casino on November 11, 1996. Enforcement of the NOV and the Tribe's right to appeal from it were stayed while the Tribe attempted to resolve the issues raised in the NOV.

After November 11, 1996, the Tribe worked with the Chair to attempt to resolve the allegations in the NOV.[6] The Tribe filed an appeal from the NOV on February 20, 1997. The Tribe filed a Supplemental Statement, dated February 28, 1997, in which it asserted that "the issues, which formed the basis of the [NOV], have now been fully addressed and remedied by the Tribe." (Supplemental Statement of 2/28/97, at 2). The Tribe further stated that it filed an appeal "[b]ecause the Tribe has satisfied the written concerns of the NIGC contained in the [NOV], [but] the NIGC will, nevertheless, not approve the facility without the review and order of the Presiding Official." (*Id.* at 4).

The Chair responded to the Tribe's February 28, 1997, filing by stating that several problems in the NOV had not been satisfactorily resolved, and that others had not been verified. The Chair required that its field investigator conduct a site visit to the Tribe's gaming facility in order to verify if the issues raised in the NOV had been properly addressed.

Following its field investigator's March 5, 1997, site visit, the Chair filed a statement dated

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involving the construction and operation of a Casino at the Rancheria." (Letter from Chairman Murray to Fedman of 10/21/96, at 1). The letter further stated that "[i]f [the NIGC] is interested in this topic and would like to present information pertinent to the subject please attend this meeting." (*Id.*). Significantly, no representatives from the NIGC or Parallax attended the public hearing.

[6]The Tribe did not contest the violations alleged in the NOV during the initial part of this appeal proceeding, but instead sought to address the alleged problems.

March 21, 1997, concerning the Tribe's response to the allegations in the NOV. (Statement of 3/21/97). The Chair stated that the Tribe had adequately addressed all of the problems identified in the NOV except the Tribe had not: (1) submitted "[s]teps needed to protect the facility if it is used as an evacuation site," as required by Paragraph 3(a) of the NOV; (2) provided "plan to facilitate the movement of emergency equipment onto the reservation," as required by Paragraph 3(a) of the NOV; and (3) shown coordination with local fire-fighting agencies, as required by Paragraph 3(d) of the NOV. (Statement of 3/21/97, at 1).

During a telephone conference call held among the parties and the Presiding Official on April 3, 1997, the Chair agreed that the Tribe had fulfilled all of the requirements set out in Paragraph 3(a) of the NOV, and that the only outstanding issues related to the Tribe's attempts to reach a mutual aid agreement with the local Diamond Springs Fire District, as required by Paragraph 3(d) of the NOV.

On April 10, 1997, the Chair submitted a Statement and Recommended Order in which she stated:

> The Tribe has now satisfied all of the concerns of the NIGC contained in the NOV and subsequent Statement. Therefore, it is respectfully requested that the Presiding Official issue a recommended order stating that the Tribe has fully addressed all of the issues raised by the NIGC in the November 2, 1996, Notice of Violation.

(Statement And Recommended Order of 4/10/97, at 2).

On April 11, 1997, the Presiding Official recommended that the Commission dismiss this proceeding stating:

> . . . Based on the statement of the parties, it appears that the issues raised in the NOV have been resolved between the parties. Consequently, it appears that there is no longer any issue in controversy between them regarding the Notice of Violation.

(Recommended Order of 4/11/97, at 1). By a Notice and Order received by the Presiding Official on May 8, 1997, the Commission declined to accept the Presiding Official's recommendation and remanded the matter. That Notice and Order which was signed by all three Commissioners, including the Chair, stated:

> The Commission remands the matter back to the Presiding Official for clarification and consideration of the following matters:
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> 1) The Presiding Official should enter Finding of Fact and Conclusions of Law on whether the fire safety and water concerns outlined in Paragraph 3a-h of the Notice of Violation existed as of November 2, 1996, and in making this determination consider the impact, if any, of the March 21, 1997 and April 10, 1997 statements of counsel, the February 28, and March 26 [,1997] statements of the Tribe and the Federal District Court's April 25, 1997 decision [in Shingle Springs Rancheria

v. Grassy Run Community Services [District], CIV-S-96-1414 DFL JFM].

> 2) In the alternative, if the parties intended to settle this matter, then a settlement agreement should be submitted with the appropriate consent findings as required by 25 C.F.R. § 577.9. Those findings and the agreement shall be certified by the presiding official, and that certification will constitute final agency action and will not be reviewed by the full Commission. However, the scope of the settlement should not go beyond the scope of the November 2, 1996 NOV.[7]

(Notice and Order, at 6).

The Commission also instructed the Presiding Official to rule on petitions to intervene which had been filed with it by El Dorado County, California, and the Grassy Run Community Services District. The Commission stated that "the regulations require that a decision on intervention is properly made by the presiding official and not the Commission." (Notice and Order, at 7).

On June 6, 1997, the Presiding Official denied motions to intervene filed by El Dorado County and the Grassy Run Community Services District, pursuant to 25 C.F.R. § 577.12(a)(4). (Order of 6/6/97). In that Order, the Presiding Official took under advisement the question of whether the District and County should be allowed to appear as amici curiae pursuant to 25 C.F.R. § 577.12(f). (*Id.*).

On November 3, 1998, the Presiding Official issued a Recommended Decision in this matter. The Recommended Decision held that "the Chair has failed to prove, by a preponderance of the evidence, that any of the allegations set forth in the NOV threatened, or did not adequately protect, the environment, or public health and safety on November 2, 1996." (Recommended Decision of 11/3/98, at 41). The Presiding Official further recommended that the Commission withdraw this NOV. (*Id.*). In regard to the intervention issue, the Presiding Official declined to grant amicus curiae status to either the County or the District.

DISCUSSION

The Commission has determined that the following issue is properly before it: whether the fire safety and water concerns outlined in Paragraph 3a-h of the Notice of Violation, resulted in a situation in which the Tribe's gaming facility either threatened, or did not adequately protect, the environment and the public health and safety, as of November 2, 1996.

The Chair has the authority to issue a Notice of Violation when a gaming "facility is constructed, maintained, or operated in a manner that threatens the environment or the public health and safety, in violation of a tribal ordinance or resolution." 25 C.F.R. § 573.6(a)(12). The Tribe's gaming ordinance contains a similar provision. (Ordinance Of The Shingle Springs Band For Gaming

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[7]In a filing dated May 14, 1997, the Chair responded to the settlement portion of the remand order and specifically stated that she did "not intend to settle this matter."

On Tribal Lands, Section 12-1). Thus, the Chair must show by a preponderance of the evidence that the issues raised in the NOV threatened the environment or the public health and safety, as of November 2, 1996.

In the NOV, the Chair alleges that the Tribe operated its gaming facility in a manner that threatened the environment or the public health and safety, in violation of 25 C.F.R. § 573.6(a)(12). (Notice Of Violation of 11/2/96, at 3). In support of its allegations, the Chair relies on the Parallax Assessment,[8] which represents the only comprehensive report on environmental, health, and safety issues at the Tribe's gaming facility.

In the absence of clearly articulated objective standards[9] applicable to a facility located on an Indian reservation, we accept the Presiding Official's recommendation that:

> a tribe or other entity operating a gaming facility is initially responsible for determining what environmental, health, and safety standards it will follow. If the Chair believes that the tribe's standards are appropriate, but have not been followed, he/she bears the burden of proving the tribe's lack of compliance. Conversely, if the Chair believes the tribe followed inappropriate standards, he/she bears the burden of proving both that the Chair's standard should be applied rather than the standard chosen by the tribe, and that the tribe did not meet the standard the Chair asserts should have been followed.

(Recommended Decision of 11/3/98, at 18).

As mentioned above, it is clear that the Parallax Assessment formed the basis for the NOV. As such, the credibility of the Parallax Assessment is fundamental to the Chair's case. We concur with the Presiding Official in ruling that the "record in this matter provides insufficient information on which to base a conclusion that the Parallax Assessment was more credible that other documents in the record." (Recommended Decision of 11/3/98, at 21). As such, we accept the recommendation of the Presiding Official and likewise conclude that "the Parallax Assessment is entitled to be given

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[8]The Parallax Assessment is a preliminary environmental, health, and safety assessment, which was performed to determine whether the operation of the gaming facility located on the Shingle Springs Rancheria would pose a threat to the environment, public health, and safety. (Parallax Assessment of October 1996, at 2).

[9]As pointed out by the Presiding Official in her November 3, 1998, Recommended Decision, "[t]he IGRA and its implementing regulations do not contain objective standards for the Chair's use in determining whether there are environmental, health, or safety problems at a gaming facility. Neither do they incorporate standards established by other agencies, such as the Environmental Protection Agency (EPA). Thus, both the Chair and the regulated public are left without guidance as to what standards the Chair will use to determine what constitutes an environmental, health, or safety problem sufficient to warrant an enforcement action." (Recommended Decision of 11/3/98, at 16).

no greater weight than any other document in the administrative record setting forth such opinions." (Recommended Decision of 11/3/98, at 21).

Allegations Contained In The Notice Of Violation

Paragraph 3 of the NOV sets forth seven areas in which the Chair alleges that the Tribe's gaming facility either threatened, or did not adequately protect, the environment and the public health and safety as of November 2, 1996. The allegations are set forth at Paragraph 3(a)-(h).[10] Paragraph 3(a) further identifies six areas related to the primary allegation which are in need of correction. Each area is treated separately below.

Evacuation Procedures

Paragraph 3(a) alleges that the Tribe failed to adopt a fire safety plan which would permit patrons to safely evacuate the Casino in the event of a fire emergency. (Notice Of Violation of 11/2/96, at 2). The operation of a Casino without adopting a casino evacuation plan certainly threatens public health and safety. As such, the first inquiry must address the question of whether the Tribe adopted a Fire Safety Plan, on or before November 2, 1996, which would permit patrons to safely evacuate the Casino in the event of a fire emergency.

On September 27, 1996, the Tribe sent a letter to Parallax, a copy of which was sent to the NIGC's Director of Enforcement, responding to concerns raised by Parallax regarding fire hazards and emergency reaction plans. (Letter from Kohler to Thompson of 9/27/96). As an attachment to its September 27, 1996, letter, the Tribe submitted an emergency evacuation plan "to assist in the rapid removal of patrons and staff from the Casino." (Attachment C). Additionally, attached as an exhibit to the record of the Tribe's October 26, 1996, public hearing, is an October 3, 1996, letter to the Tribe from Wildland Fire Services ("WFS"), the Tribe's Fire Safety Consultant, together with a "Rancheria Evacuation Plan." (Letter from Harrel to Kohler of 10/03/96, at 1) (referring to Exhibit G). Based on these two pre-November 2, 1996, submissions, it appears that the Tribe adopted a fire safety plan before the issuance of the NOV.

The Parallax Assessment included the Tribe's September 27, 1996, letter as Appendix B, but did not discuss the attached evacuation plan, nor did the Assessment discuss the October 3, 1996, WFS letter, or the attached Rancheria Evacuation Plan.[11] Similarly, the November 2, 1996, NOV does not indicate that the Tribe had already submitted these two separate evacuation plans.

In a filing dated April 10, 1997, the Chair stated that "[a] comprehensive Fire Safety Plan was

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[10]There is no paragraph 3(g) in the NOV due to a clerical error.

[11]Based on the date of submission, it appears likely that the Assessment was completed before the Tribe Submitted the "Rancheria Evacuation Plan" on October 3, 1996. The October Assessment states that "[t]he Tribe plans to hire a Fire Safety Consultant to assist in the development of fire safety plans and programs." (Parallax Assessment of October 1996, at 42).

submitted by the Tribe on February 6, 1997" and "[a] Casino Evacuation Plan was also submitted by the Tribe on February 6, 1997." (Statement And Recommended Order of 4/10/97, at 1).

In its June 27, 1997, filing, the Tribe stated: "Other concerns stated in the Assessment, it developed, did require additional attention. These were addressed by the development of a Comprehensive Fire Safety Plan, . . . [and] a Casino Evacuation Plan . . ." (Appellant's Proposed Findings of Fact And Conclusions Of Law of 6/27/97, at 5-6).

Despite the Tribe's admission that its previous evacuation plans required additional attention and the fact that it ultimately developed a third fire safety plan and casino evacuation plan which were more detailed than the first two plans, the Chair has not proven the allegation contained in Paragraph 3(a). In fact, the Chair does not even allege that the two evacuation plans submitted before the issuance of the NOV were inadequate by any standard issued by any governmental agency. Thus, the Chair has not proven by a preponderance of the evidence that the Tribe did not adopt a fire safety plan, including a casino evacuation plan, as alleged in the NOV, on or before November 2, 1996, so as to threaten public health and safety.

Paragraph 3(a) of the NOV further alleges that because of the Tribe's failure to adopt an evacuation plan, six serious evacuation issues remained unresolved:

> 1) the need to mitigate smoke related hazards such as limited visibility and toxicity; 2) the need to control the movement of numerous vehicles attempting to exit on a single road; 3) the necessity of moving a large number of individuals (many of whom are elderly) by foot to a safe location; 4) the steps needed to protect the gaming facility in the event it is used as an evacuation site during a fire emergency; and 5) the need to have trained personnel to avoid panic conditions. Moreover, [6] the Tribe has failed to adopt a plan to facilitate the movement of emergency equipment onto the Reservation.

(Notice Of Violation of 11/2/96, at 2). In order for the Chair to carry her burden, she must prove by a preponderance of the evidence that these issues were not addressed as of November 2, 1996, thereby threatening public health and safety.

In regard to issues 3(a)(1),(2),(3) and (5), it appears that the Chair admitted that the Tribe addressed these particular concerns prior to the issuance of the NOV. In her March 21, 1996, filing, the Chair concedes that the following requirements have been met:

> The mitigation of smoke related hazards is described on p.7 of the Tribe's October 31, 1996 submission [sic, it appears that the chair is identifying the Tribe's October 30, 1996, letter by the date it was faxed to the NIGC]. The control of movement and exiting vehicles on the single road and movement by foot to safety are also addressed. The need for trained personnel in the event of an emergency situation has been

> demonstrated by the Tribe on p.9 of the October 31, 1996 report, which states that the Tribe has hired two class I and class II firefighters.

(Statement of 3/21/96, at 1). Based on the Chair's post-NOV filings, we find that the Chair has admitted that the allegations contained in Paragraph 3(a)(1),(2),(3) and (5), were unwarranted as of November 2, 1996. Therefore, we must conclude that the Chair has failed to carry her burden regarding these particular allegations.

Paragraph 3(a)(4) of the NOV requires the implementation of steps "to protect the gaming facility in the event it is used as an evacuation site during a fire emergency." (Notice Of Violation of 11/296, at 2). In order to prove this allegation, the Chair must first show that, as of November 2, 1996, the gaming facility was to be used as an evacuation site during a fire emergency.

It appears that the possibility of using the gaming facility as an evacuation site during a fire emergency was considered. In the Tribe's September 27, 1996, letter to Parallax, the Tribe's Fiscal Administrator stated:

> The Casino is a self [contained] facility with food, heating and sanitary facilities designed to care for up to 1500 persons per day. The facility air conditioning system is designed to filter smoke and provide for clean air. Keeping in mind the history of this area it is difficult to conceive of a situation which could develop in which it would not be safest to keep the Casino patrons at the Casino rather than evacuate them to congest local emergency systems.

(Letter from Kohler to Thompson of 9/27/96, at 3). The idea of keeping patrons in the gaming facility during a fire emergency was mentioned elsewhere in the record. The Parallax Assessment states that "[t]he Tribe also claims that procedures and plans are being developed to allow for evacuation of the Facility if needed or for customers to be protected within the Facility in the event of a fire emergency." (Parallax Assessment of October 1996, at 29) (citing Appendix B).

In a letter dated March 21, 1997, the Fire Chief for the Shingle Springs Rancheria Fire Department states that "it has been and continues to be my professional opinion to not use the Casino as an evacuation site in the event of a fire." (Letter from Davis to Lambert of 3/21/97, at 1). Further, the Fire Chief states that "the best step to mitigate the problem of a life safety hazard is to evacuate the people off the Rancheria prior to the event of an uncontrolled wild fire." (*Id.*). The Fire Chief did not state on what date he reached this conclusion or when the Tribe accepted his opinion.

We find that the Chair has shown that on November 2, 1996, the Tribe had not established procedures to protect the facility if it was used as an evacuation site, as alleged in the NOV. However, we further find that the Chair has failed to prove by a preponderance of the evidence that, on November 2, 1996, the Tribe actually intended to use the gaming facility as an evacuation site.[12]

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[12]In her April 10, 1997, filing the Chair stated that "[s]teps needed to protect the facility if it used as an evacuation site are no longer necessary because the Tribe, . . . shall not use the site

It appears likely that there was a difference of opinion among Tribal officials as to whether or not to use the gaming facility as an evacuation site. In the absence of any additional proof from the Chair that the Tribe did intend to use the gaming facility as an evacuation site on November 2, 1996, we conclude that the Chair has not carried her burden of proving that the Tribe's failure to develop steps for the use of the gaming facility as an evacuation site constituted a threat to public health and safety.

In addition to the enumerated issues identified above, Paragraph 3(a) further alleges that "the Tribe has failed to adopt a plan to facilitate the movement of emergency equipment onto the reservation." (Notice Of Violation of 11/2/96, at 2). Certainly, a failure by the Tribe to adopt such a plan would threaten the public health and safety. Thus, in order to carry her burden the Chair must prove by a preponderance of the evidence that the Tribe failed to adopt such a plan, thereby threatening public health and safety.

The adoption of a plan to facilitate the movement of emergency equipment onto the reservation was discussed in the WFS fire options paper, which noted that there could be problems if incoming emergency equipment and outgoing evacuees attempted to use the same roads. (Letter from Harrel to Kohler of 10/03/96, at 1) (citing Exhibit G).

In its September 27, 1996, letter to Parallax the Tribe set forth its response to this concern. The Tribe stated that "our Security Department would close access to the Casino from additional customers when word was received of a fire reported anywhere within a one mile radius of the Casino"; that "[a]ny consideration for evacuation would not begin until it was determined from local fire officials where fire equipment would be traveling to and from"; and that "[t]he Casino will not allow access over any roads being used by fire personnel to fight a fire in our area." (Letter from Kohler to Thompson of 9/27/96, at 3).

The Chair does not discuss this response in the NOV. However, in her April 10, 1997, filing the Chair stated that "[e]vidence of a plan to facilitate the movement of emergency equipment onto the reservation is contained at Exhibit D of the Shingle Springs Fire Safety Plan" submitted on February 6, 1997. (Statement And Recommended Order of 4/10/97, at 2).

The Chair must prove by a preponderance of the evidence that what the Tribe did, or failed to do, constituted a threat to public health and safety. The Chair stated that the Tribe addressed this particular issue by submitting a document on February 6, 1997. (*Id.*). However, the Chair's statement does not prove that the Tribe failed to adopt a plan to facilitate the movement of emergency equipment onto the reservation on or before November 2, 1996. In fact, the record reveals that prior to November 2, 1996, the Tribe had addressed the concern of moving emergency equipment onto the Reservation. As a result, we must conclude that the Chair has not proven by a preponderance of the evidence that the Tribe failed to adopt a plan to facilitate the movement of emergency equipment onto the reservation on or before November 2, 1996, so as to threaten public health and safety.

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for this previously stated purpose." (Statement And Recommended Order of 4/10/97). We have been unable to find any evidence in the record supporting the Chair's allegation that the Tribe intended to use the gaming facility as an evacuation site on November 2, 1996.

Fire Suppression

Paragraph 3(b) of the NOV alleges that the Tribe has failed "to perform essential capacity and pumping pressure tests to ensure the adequacy of the water supply to meet a fire emergency," and that "[s]erious questions exist as to whether the hydrants and wells on the Reservation are sufficient to support an effective fire suppression effort." (Notice Of Violation of 11/2/96, at 2).

The operation and maintenance of a Casino without performing essential capacity and pumping pressure tests to ensure the adequacy of the water supply to meet a fire emergency undoubtedly threatens public health and safety. In this instance, the crucial determination centers around whether the Tribe performed essential capacity and pumping pressure tests to ensure the adequacy of its water supply to meet a fire emergency.

During its October 26, 1996, public hearing the Tribe introduced an October 9, 1996, letter from Robert Dawson Drilling Co., which stated:

> Our company tested the flow rate of the fire hydrant located on Honpie Road, approximately 1/8 mile from the intersection of Reservation Road and Honpie Road. This hydrant is the nearest hydrant to the Crystal Mountain Casino.
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> The flow rate was determined on October 9, 1996 using a Sensus #1481971 flow meter. The flow rate is 374 gallons per minute, gpm, (50 cubic feet per minute).
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> On October 9th we also flow tested the storage tank at the 2" fire hose valve at the rear door of the casino. The line produced 90 gallons per minute. This line is supplied by two 10,000 gallon storage tanks. At a rate of 90 gallons per minute the stored supply of water would flow for 3 hours and 40 minutes. With the additional 20 gallons per minute flowing into the storage tanks from the well, there would be an increase flow time (at 90 gpm) of 50 minutes. The total flow time at 90 gpm would be 4 hours and 30 minutes.

(Letter from Rumsey to Shanahan of 10/9/96, at 1).

In its October 30, 1996, response to the Parallax Assessment, the Tribe documented that "[t]he fire hydrants and both fire stand pipes [had] been tested and the results are attached as (Exhibit "H") of the public hearing report." (Letter from Kohler to Fedman of 10/30/96, at 8). The October 30, 1996, response was received by the NIGC before the issuance of the November 2, 1996, NOV. In fact, in a letter dated November 1, 1996, the NIGC acknowledged receipt of the October 30, 1996, response from the Tribe, but did not discuss these two independent tests, both performed before the issuance of the NOV. (Letter from Fedman to Chairman Murray of 11/1/96, at 1).

The evidence in the record contradicts the allegations contained in Paragraph 3(b) of the NOV. The existence of the two independent tests reveal that the Tribe did perform essential capacity and pumping pressure tests of its wells and hydrants for fire fighting, before November 2, 1996. Furthermore, in her March 21, 1997, filing, the Chair admits, without elaboration, that the

requirements of Paragraph 3(b) have been met by the Tribe.[13] (Statement of 3/21/97, at 1).

We find that the Chair has not established that the Tribe failed to perform capacity and pumping pressure tests to ensure the adequacy of the water supply to meet a fire emergency on the reservation, on or before November 2, 1996. In fact, the record clearly shows that the tests were performed before November 2, 1996. Thus, we conclude that the Chair has failed to prove by a preponderance of the evidence that the capacity and pumping pressure of the fire hydrants and wells actually threatened public safety.

Integrity of the Casino Structure

Paragraph 3(c) of the NOV alleges that the Tribe "failed to establish that the structure of the gaming facility and the materials from which it is made are sufficiently fire retardant to avoid ignition for a period of time sufficient to permit safe evacuation from the Casino," and "has failed to perform essential tests to ensure that the materials from which the Casino is constructed are not duly flammable." (Notice Of Violation of 11/2/96, at 2-3).

The operation and maintenance of a Casino without performing essential tests to ensure that the materials from which the Casino is constructed are not duly flammable" certainly threatens public health and safety. Thus, to prove this allegation, the Chair must prove by a preponderance of the evidence that the Tribe operated its gaming facility without performing these essential tests to ensure the integrity of the casino's structure, thereby threatening the public health and safety.

The evidence in the record contradicts the allegations contained in Paragraph 3(c) of the NOV. During its October 26, 1996, public hearing the Tribe submitted materials from California State Fire Marshal certifying to the adequacy of the fire retardant value of the tent fabric. (Certification by California State Fire Marshal of 6/30/96, at 1). Additionally, in its October 30, 1996, response letter, the Tribe stated that "the fire safe characteristics of the Casino structure have been well documented." (Letter from Kohler to Fedman of 10/30/96, at 7). The Tribe further responded by asserting that:

> as recently as June 30, 1996, the California State Fire Marshall has recertified the Casino structure as fire resistant . . . Also representatives from Sprung Structure, the manufacturer of our Facility, testified at the hearing and reported that they have over fifty of these structures erected in California. In fact at Californian State University, Northridge several of these structures are being used for libraries and class rooms.

(Letter from Kohler to Fedman of 10/30/96, at 7).

We have found no discussion of, or reference to, the prior tests and certifications of the tent fabric in any of the Chair's filings. Therefore, we have no way to determine why the Chair believed

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[13]The Chair does not indicate whether she believed that the requirements had been met before the issuance of the NOV or after the issuance of the NOV.

that the testing and certification which the structure's fabric had already undergone were not sufficient. In her March 21, 1997, filing the Chair stated, without elaboration, that the Tribe had met all requirements of this subparagraph.[14] (Statement of 3/21/97, at 2).

In the absence of any evidence contradicting the prior tests and certifications submitted by the Tribe regarding the structure of the gaming facility, we find that the Chair has not proven by a preponderance of the evidence that the gaming facility and its fabric actually threatened, or did not adequately protect, public safety on November 2, 1996.

Paragraph 3(c) further alleges that the Tribe failed to show "that the casino has adequate air filtering, emergency warning systems, auxiliary power sources, and heat and smoke detectors." (Notice Of Violation of 11/2/96, at 3). Operating and maintaining a Casino without providing for adequate air filtering, emergency warning systems, auxiliary power sources, and heat and smoke detectors threatens public health and safety. The Chair must prove by a preponderance of the evidence that the Tribe operated its gaming facility without providing these essential safeguards, thereby threatening the public health and safety.

The Tribe discussed many of these safeguard issues in its September 27, 1996, letter to Parallax, in addition to various other fire-related issues which Parallax had raised. (Letter from Kohler to Thompson of 9/27/96). Furthermore, in its October 30, 1996, letter the Tribe stated:

> [A]ll air conditioning systems associated with the Casino are designed to shut down if they detect levels of smoke above a prescribed amount. This safety feature is designed to prevent smoke from being brought into the facility as well as preventing a draft condition to exist if an internal fire is detected. A shut down of the system will guarantee a longer period of smoke free air if external smoke is detected.[15]
>
> [I]f an external fire is detected air conditioning in the building is not desirable. Emergency lighting will be automatically activated at all exits and at various locations in the facility. It must be remembered that in a facility being used as a Casino, lighting is important not only for customer safety but for asset protection as well. A lighting system depending on an external source can be easily compromised so we have determined that a battery operated internal system is desirable. This system can be more easily repaired and inspected to insure reliability when needed.

(Letter from Kohler to Fedman of 10/30/96, at 7). The October 30, 1996 response letter further

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[14]The Chair does not indicate whether she believed that the requirements had been met before the issuance of the NOV or after the issuance of the NOV.

[15]Significantly, the Assessment stated that "[t]he Facility's heating, air conditioning and ventilation system is designed to prevent exterior smoke from entering the facility." (Parallax Assessment of October 1996, at 42).

states:

> [W]e have purchased a hard wired smoke alarm system which has been installed in all areas not kept under constant camera surveillance. These areas are primarily office spaces and storage areas rarely visited by staff. These alarms are wired directly into out Surveillance Department which in turn is in direct communication with our Reservation Fire Department Personnel. The Surveillance Department is also in direct communication with our Central Dispatch who in turn can communicate directly with local fire agencies.
>
> As you may recall, in a previous report I had reported that we were in the process of obtaining a heat detector system to be installed in the Casino itself. Since that time we have discovered that such a system is not technologically practical in a structure with high ceilings (39) and which is constantly monitored by cameras, security staff and maintenance staff. Subsequently after careful consideration and when considering the fifteen thousand dollar ($15,000.00) price tag for a product that had limited if any value we reject this option.

(Letter from Kohler to Fedman of 10/30/96, at 9). The Chair did not discuss any of these statements. Instead, she merely stated in her March 21, 1997, filing, that the Tribe had met all requirements of this paragraph.[16] (Notice Of Violation of 11/2/96, at 2).

We conclude that, in the absence of any proof by the Chair that the Tribe's representations were inaccurate or insufficient, the Chair has failed to carry her burden of proving by a preponderance of the evidence that the final allegation contained in Paragraph 3(c) of the NOV posed a threat to public health and safety on or before November 2, 1996.

Coordinating Fire Fighting and Emergency Measures On The Reservation

Paragraph 3(d) of the NOV alleges that the Tribe "failed to establish agreements with the Shingle Springs Fire District and other county agencies to coordinate fire fighting and emergency measures on the Reservation." (Notice Of Violation of 11/2/96, at 3). In order to prove this allegation, the Chair must prove by a preponderance of the evidence that the Tribe failed to enter into such an agreement, and as a result maintained or operated its gaming facility in a manner that threatened public health and safety.

The Parallax Assessment identified the need to establish procedures to address emergency responses on the reservation. The Assessment set forth three options for addressing the concerns set forth in Paragraph 3(d) of the NOV: (1) contract for services; (2) enter into a mutual aid agreement; or (3) establish its own fire department. (Parallax Assessment of October 1996) (citing Appendix C at 7 & 8).

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[16]The Chair does not indicate whether she believed that the requirements had been met before the issuance of the NOV or after the issuance of the NOV.

Based on the evidence in the record, it appears that the Tribe decided to establish its own fire department. In fact, the Parallax Assessment states that the "Tribe states it plans to develop a Tribal Fire Department." (Parallax Assessment of October 1996) (citing Appendix I). Furthermore, the Assessment specifically states that the "Tribe plans to provide fire fighting training to Facility staff and develop a Tribal fire department." (Parallax Assessment of October 1996, at 42). It appears likely that the Tribe was planning to establish its own fire department to meet the emergency concerns set forth in Paragraph 3(d).

In the April 4, 1997, letter to the Chair, the Tribe admitted that it had not established the Shingle Springs Rancheria Fire Department prior to the issuance of the Parallax Report. (Letter from Kohler to Chairman of 4/4/97). More importantly, the Tribe stated that the NIGC had yet to confirm the establishment of the Rancheria Fire Department prior to November 2, 1996.[17] However, in its October 30, 1996, letter responding to the Assessment, the Tribe conveyed its plan to provide its own fully trained and equipped Fire Department to provide fire protection service for the Casino and the Rancheria. (Letter from Kohler to Fedman of 10/30/96, at 10).

As mentioned above, it is clear that the Parallax Assessment formed the basis for the NOV. However, we have been unable to find any language in the Parallax Assessment or its attachments, which require the Tribe to enter into a mutual aid agreement. As set forth above, the Assessment provided the Tribe with three options regarding emergency response concerns on the reservation. We fail to see the justification for mandating that the Tribe choose one option over all others.

We find that the Chair has failed to show why the Tribe's establishment of its own fire department, which was one of the options discussed in the Parallax Assessment and its attachments, was not sufficient to address her concerns regarding emergency responses on the reservation. The Chair has failed to show that the Tribe's failure to formalize a mutual aid agreement actually threatened, or did not adequately protect, public safety on November 2, 1996, in light of the Tribe's establishment of its own fire department.

Emergency Access Roads

Paragraph 3(e) of the NOV alleges that the Tribe had "not completed work on . . . emergency access roads other than Grassy Run Road. Although partially paved and graveled, the existing roads have gaps which would make it impossible to move emergency equipment onto and from the Reservation under certain weather conditions." (Notice Of Violation of 11/2/96, at 3).

If the Tribe maintained its existing roads in such a way so as to make it impossible to move emergency equipment onto and from the Reservation, it would certainly threaten public health and safety. In order to meet her burden, the Chair must show by a preponderance of the evidence that the existing Reservation roads were in such a condition so as to make it impossible to move

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[17]It is important to note that because the Chair has the burden of proof, the Tribe was not obligated to obtain NIGC confirmation of its plan to establish its own fire department before opening its gaming facility

emergency equipment onto and from the Reservation.

Provisions in the Parallax Assessment completely contradict the allegations contained in Paragraph 3(e). The Parallax Assessment stated that "[a]nother inspection was made of the local roads to determine if other alternative means of access and egress to the Rancheria for emergency purposes were present. Although these roads would not meet current El Dorado County road design standards and some were unimproved, the roads proved to be passable and are being used by local residents." (Parallax Assessment of October 1996, at 8). In addition, the Parallax Assessment stated:

> ♦ Access and egress to and from the Rancheria in a non-emergency situation is limited to one road.
>
> ♦ During a fire emergency, use of the main access road may be restricted by fire, traffic congestion, or the egress of fire equipment.
>
> ♦ There are other viable egress and access routes to and from the Rancheria on private roads that are normally closed to the public.
>
> ♦ Alternative means of evacuating the Rancheria and/or getting fire fighting equipment to the Rancheria do exist besides the road running through the Grassy Run subdivision.

(*Id.* at 41).

We have been unable to identify any statement or recommendation in the Parallax Assessment to the effect that, under certain weather conditions, it would be impossible to move emergency equipment onto and from the Reservation. Section 6.3 of the Assessment, which sets out the recommendations on fire and safety issues, does not contain any recommendation to improve the roads or to complete work on emergency access roads other than Grassy Run Road. In fact, the Assessment states that alternative means of evacuating the Rancheria and/or getting fire fighting equipment to the Rancheria do exist. (*Id.* at 41). Furthermore, in her March 21, 1997, filing, the Chair stated only that the Tribe had met the requirements of this subparagraph, without specifying when or how. (Statement of 3/21/97, at 2).[18] As such, we find that the Chair has failed to prove by a preponderance of the evidence that the allegation contained in Paragraph 3(e) of the NOV either existed on November 2, 1996, or that it actually threatened the public safety at that time.

Measures To Restrict Off-Road Parking

Paragraph 3(f) of the NOV alleges that the Tribe "failed to adopt measures to restrict off-road parking and to eliminate the danger and confusion resulting from Casino patrons who cannot find on-site parking and attempt to exit by Grassy Run Road." (Notice Of Violation of 11/2/96, at 3).

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[18]The Chair does not indicate whether she believed that the requirements had been met before the issuance of the NOV or after the issuance of the NOV.

The failure of a Tribe to adopt measures to restrict off-road parking and to eliminate the danger and confusion resulting from Casino patrons who cannot find on-site parking and attempt to exit by Grassy Run Road, apparently threatens public health and safety. In order to prove this allegation, the Chair must prove that the failure to adopt such measures threatens public health and safety.

In its September 27, 1996, letter to Parallax, the Tribe indicated that it had not adopted a traffic management plan at that time, but had developed a traffic policy with corresponding procedures, and had reached an agreement with Sam's Town to park tourist buses and customer vehicles there and to use vans to shuttle customers to the gaming facility. (Letter from Kohler to Thompson of 9/27/96) (citing Attachment E).

The Tribe further addressed the off-road parking issue in its October 30, 1996, letter by providing the following:

> The Rancheria agrees with this recommendation and will commit to the following:
>
> (a) All shuttle drivers will be required to submit a daily report identifying potential hazardous conditions and these conditions will be reported to a proper authority.
>
> (b) An hourly count will be maintained for the parking area to determine if an increase in private vehicle traffic is developing. If this increase is noted we will attempt to implement programs to reduce the traffic.

(Letter from Kohler to Fedman of 10/30/96, at 3).

Once again, in her March 21, 1997, filing the Chair stated, without elaboration, that the Tribe had met the requirements of this subparagraph. (Statement of 3/21/97, at 2).[19] Aside from the March 21, 1997, filing, we have been unable to find any other discussion of this issue by the Chair.

In light of the Tribe's pre-NOV submissions, it appears that the Tribe did adopt measures to restrict off-road parking and to eliminate the danger and confusion resulting from Casino patrons who cannot find on-site parking and who attempt to exit by Grassy Run Road. Thus, we conclude that the Chair has failed to prove by a preponderance of the evidence that the allegations contained in Paragraph 3(f) of the NOV existed on November 2, 1996, or that, even if they did exist, actually threatened public health and safety at that time.

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[19]The Chair does not indicate whether she believed that the requirements had been met before the issuance of the NOV or after the issuance of the NOV.

Catch-All Provision

Paragraph 3(h) of the NOV alleges that:

> [t]he claims contained in the Tribe's [October 3, 1996] response are entirely undocumented. In addition, as a result of it decision to open the Casino before the discussions with the Commission had been completed, the Commission has never verified these claims. Until such documentation and verification occurs, there is no reliable evidence that action the Tribe claims to have taken are sufficient to correct the problem identified in the Assessment.

(Notice Of Violation of 11/2/96, at 3).

It appears that the allegation contained in Paragraph 3(h) is a kind of "catch-all" provision. Paragraph 3(h) essentially alleges that the Tribe violated its ordinance by operating and maintaining its gaming facility without verifying to the Chair that certain environmental, health and safety issues were addressed. (*Id.*). It is important to note, however, that the Tribe was not obligated to receive NIGC approval before opening its gaming facility. Nothing in the IGRA or in the NIGC's regulations require that a tribe obtain a finding by the NIGC that its gaming facility is safe before opening.

A notice of violation by the NIGC must be based on a finding that the Tribe's gaming facility was constructed, maintained, or operated in such a way that it threatened the environment and the public health and safety. The Chair cannot carry her burden of proof by merely alleging that the Tribe failed to verify certain health and safety measures to the Chair.[20] The Chair must prove that the environment and public health and safety were threatened, or at least were not adequately protected. In regard to Paragraph 3(h), we conclude that the Chair failed to prove that the allegations contained therein threatened the environment or public health and safety.

CONCLUSIONS

For the reasons stated above, we accept the Presiding Official's recommendation to withdraw Notice of Violation NOV-95-06.

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[20]We find it particularly troubling that the Chair issued the November 2, 1996, NOV without inspecting any of the health and safety issues identified in the Parallax Assessment. (Field Investigator's Summary Report of 11/2/96).

Montie R. Deer
Chairman

Philip N. Hogen
Vice-Chairman

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