National Indian Gaming Commission

IN THE MATTER OF:	)	Presiding Official Docket Nos. NIGC 2000-9, 2002-6, 2002-7
THE SEMINOLE NATION OF OKLAHOMA,	)	Civil Fine Assessments CFA-00-06 CFA-00-10
Appellant/Respondent.	)	

COMMISSION DECISION

Appearances: Gary Pitchlynn, O. Joseph Williams, Norman, Oklahoma for the Seminole Nation of Oklahoma, Appellant.

William Grant, Sandy Ashton, Washington D.C., for the Chairman of the National Indian Gaming Commission.

Presiding Official, Marcel S. Greenia

This decision concerns appeals filed before the National Indian Gaming Commission (NIGC) pursuant to 25 C.F.R. § 577.3 by the Seminole Nation of Oklahoma (Nation). The Nation submitted timely Notices of Appeal to the NIGC contesting the Civil Fine Assessments issued by the Chairman of the NIGC. Chief Jerry Haney of the Seminole Nation[1] also filed a Notice of Appeal (NIGC 2002-7) to the NIGC but counsel for Mr. Haney withdrew her representation.

[1] At the time of this action there was a separate ongoing dispute as to who is the lawfully elected Chief of the Seminole Nation and whether the Chief has any authority to contest gaming matters.

While Chief Haney was notified of the time and date of hearing, he failed to appear at the hearing.

The complete record in this matter consists of the agency records provided by the Chairman of the NIGC, the supplemental statements, briefs and supporting documentation submitted by the parties, hearing testimony and arguments, and all the exhibits accepted into evidence at the hearing. This decision is based on a complete review of the entire record. The objections made by the parties were taken into consideration in rendering this opinion. The Commission of the NIGC relied on the Presiding Official's assessment of credibility of each witness in determining the weight to be accorded to their testimony.[2]

Statement of Facts

The Seminole Nation of Oklahoma (Nation) is a federally recognized tribe of Indians with its headquarters located in Seminole County, Oklahoma. The Seminole Nation Development Authority (SNDA) is a duly created agency of the Nation that had been granted authority and responsibility by the General Council of the Nation to manage and operate the Nation's gaming activities. The Nation operates four facilities. (TR 46). This includes the Seminole Nation Travel Plaza, Seminole Nation Bingo at Miccosukee, River Mist, and Seminole Nation Trading Post and Gaming Trailer in Wewoka. (TR 47).

On March 1, 2000, the Nation first offered gaming devices generically known as "Red Hot Re-Spin" manufactured by Infinity Group (Infinity) at its facilities. Shortly thereafter, on March 14, 2000, a representative from the NIGC observed alleged Class III[3] gaming machines being offered for play and issued three preliminary notices of violation (PNOV) concerning the

[2]References to the February 10, 2003, transcript shall be designated "TR". The Chairman's exhibits will be referred to as "Exh C".

[3] *See* 25 U.S.C. § 2703

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term "class II gaming" means–

Bingo and Included Games

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)--

operation of the games and requested that the Nation discontinue play of these games. The Nation continued to offer the games in question to the public for play, as was observed on May 11, 2000, by an NIGC representative.

On May 30, 2000, the Chairman of the NIGC issued a Notice of Violation and Order of Temporary Closure (NOV/CO 00-06) (May Order) to the Nation for play of the Red Hot Redspin game. The Chairman alleged that the game was a Class III gambling device requiring a tribal state compact and directed the Nation to cease and desist in the operation of the gaming machine. The Nation does not have a compact with the State of Oklahoma that allows the Nation to operate Class III gaming devices.[4] In response, the Nation timely filed a notice of appeal with the NIGC but continued to operate the Red Hot Re-spin device and other similar gaming devices.

On June 28, 2000, a representative from NIGC observed a total of thirty two (32) Red Hot Re-spin type gambling devices in operation in the Nation's gambling facilities. The other devices bore the names of Sovereign Sevens, Red Hot & Blue and Lucky Break, which are also manufactured by Infinity Group. On July 10, 2000, the NIGC representative witnessed not only the thirty-two (32) Red Hot Re-spin type machines but also twelve (12) other similar type devices labeled Buffalo Nickels. Buffalo Nickels is also an Infinity manufactured game. (Exh C-6)

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo and other games similar to bingo and

Card Games

(ii) card games that-

(I) are explicitly authorized by the laws of the State, or (II) are not explicitly prohibited by the laws of the State and are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include-

(i) any banking card games, including baccarat, chemin der fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind....

(8) The term "class III gaming" means all forms of gaming that are not class I or class II gaming.

[4] *See* 25 C.F.R. § 502.21. *Tribal-State compact* means an agreement between a tribe and a state about class III gaming under 25 U.S.C. § 2710(d).

Based upon the May Order the Chairman issued, on August 17, 2000, a proposed civil fine assessment (CFA 00-06) for play of the Red Hot Re-spin machines and other such gambling devices. The Chairman assessed an aggregate fine of $400,000 beginning on March 14, 2000, (date of the issuance of the three PNOVs), through August 17, 2000, with an additional fine of $2,000 per day for each day of play thereafter. (Exh C-1, Tab 22).

Approximately two weeks later, on August 30, 2000, a NIGC representative observed the continued play of the Red Hot Re-spin type machines and the Buffalo Nickels gambling devices. The NIGC representative also noted the installation of new Class III gambling machines.[5] Id.

On September 12, 2000, the Chairman issued another Notice of Violation and Order of Temporary Closure (NOV/CO 00-10) (September Order) alleging with specificity the use of Class III games without a tribal state compact in violation of 25 U.S.C. §2710(d) and 25 C.F.R. §573.6(a)(11). The September Order required the Nation to cease and desist from all gaming activity in all four of its facilities. The Nation timely appealed the September Order but did not cease and desist from play. Rather, the Nation continued to add games to the machines and continued playing variations of the games described in NOV 00-06 and NOV 00-10.

After September 12, 2000, and prior to the visit by the NIGC representative on December 18, 2000, the Nation changed the outside glass on the cabinet housing the "Lucky Cherries" gambling device to depict the new name, "Skill Cherries." The device continued to offer the same games as before, including, Pirate's Gold, Klondike, Funny Fruit, and Reel of Fortune games. Two new games were also added to the device. Id.

Sometime following September 12, 2000, the Nation added additional games on the Pot O Gold multi-game machines. Eight new games played as card and keno games were added. Twelve games were available for play on the Pot O Gold machine.[6] Id.

Also taking place during this time period was an expansion of the Nation's gaming facilities (TR 47-49). In the later part of August 2000, the Seminole Nation Travel Plaza's first expansion was completed. By spring of 2001 its second expansion had been realized which doubled the size of the Travel Plaza. This allowed approximately 250 machines to be placed

[5]Rainbow Reels, Fantasy Fives, offering five line games, Pot O Gold, Triple Sevens, Gold Row Bonus, Spinball Bonus, Re-spin Sevens and Lucky Cherries which offers four line games and Pirate's Gold, Klondike, Funny Fruit and Reel Fortune.

[6]Jacks or Better, Shamrock 7s, Deuces Wild, Spin Jack 21, Triple 7s, Gold Row Bonus, Spinball Bonus, Respin Sevens, Superpick, Super Double-up, Toucheasy, and Superball.

within the facility. (TR 49-50). At Wewoka, the Nation replaced the singlewide trailer with a doublewide trailer sometime in 2000 allowing space for approximately 50 games in October of 2000. (TR 49). In December of that same year, renovations were under way for the Seminole Nation Bingo which would allow 50 to 75 machines within the facility. (TR 49). During the later part of 2001 and early winter of 2002, a complete renovation of River Mist was conducted. (TR 49). This expansion also doubled the space of River Mist allowing for approximately 235 machines. (TR 49). Previous to the renovations, River Mist's machine capacity was approximately 75 to 100 machines. (TR 49).

On January 19, 2001, the Nation filed suit against the State of Oklahoma (State) for failing to negotiate in good faith with the Nation for a Class III compact. (Seminole Nation of Oklahoma v. State of Oklahoma, United States District Court for the Eastern District of Oklahoma, Case No. CIV-01-036-S). On August 21, 2002, the U.S. District Court issued an order dismissing the Nation's suit against the State on the grounds that the suit was barred by the Eleventh Amendment of the United States Constitution.

The Nation's appeal of the May and September Orders were consolidated for hearing and the hearing was held, before the Presiding Official, on February 4-6, 2002. Hearing on the proposed civil fine assessment (CFA 00-06; NIGC 2000-9) was deferred until decision on the merits in the instant cases. On April 8, 2002, the Presiding Official issued a Recommended Decision. Based upon the evidence presented at hearing, the Chairman's May Order was affirmed in that Chairman had met his burden of proof as to the Class III classification of the games listed in NOV 00-06. However, the Presiding Official found that Chairman failed to meet his burden regarding the violations alleged in the September Order classifying the games as Class III gaming and recommended the September Order be vacated and set aside. The Counsel for the Chairman objected to the recommended findings.

On May 7, 2002, the Commission issued its Notice of Decision and Order as to the Nation's appeal of the May and September Orders. (Exh C-3 Tab 1). The NIGC found that the games described in NOV 00-06 and NOV 00-10 did, in fact, constitute Class III gaming activity and because there was no tribal state gaming compact, the operation of these games constituted a violation of IGRA. The Commission ordered that the Nation cease and desist from all gaming activity in all four of its facilities and made permanent the Orders of Temporary Closure, including the Temporary Order to cease and desist from all gaming activity.

Following the Commission's May 7, 2002 Order, the Nation discontinued use of some games, changed the names of other games listed in violation, and continued to play games that

functioned in a similar manner to those games specified in NOV 00-10. (Exh C-5). The Pot O Gold multi-game machines that had displayed the name Pot O Gold were changed to display the name "Seminole Casino." Id. The cabinets displayed the same vendor and the screen identified the same manufacturer. While four games that had been available for play on July 18, 2001, were no longer offered,[7] eight other similar games continued to be offered for play with four additional card themed games also available to the public.[8]

From July 18, 2001, through August 13, 2002, the Nation offered for play games that were functionally similar to the games listed in the Commission's Order of May 7, 2002, including Skill Cherry games, other Infinity games[9] and various Wildfire games with the respin feature activated. (Exh C-6).

During the period through January 17, 2003, the Nation continued to offer the Skill Cherry games and other Infinity games[10] as well as Wildfire games, all of which had similar characteristics to the games listed in the Commission's Order of May 7, 2002. Id. Sometime between June 18, 2002 and January 17, 2003, the Nation again offered the Infinity games with the respin feature activated. Id. The Nation operated the gambling devices that played the Red Hot Respin game specifically named in NOV 00-06, from March 14, 2000, through the date of the last visit to the Nation's gaming facility by a representative of the Commission, January 17, 2003. Id.

The total machine count at all Seminole gaming facilities is as follows:

1. On July 10, 2000; 42 machines
2. On January 18, 2001; 298 machines
3. On October 21 2002; 535 machines
4. On January 17, 2003; 587 machines

On May 31, 2002, the Nation advised that it would stop play of the games specified in the Commission's Order of May 7, 2002; but that it would not cease and desist from all gaming activity in its four facilities as ordered.

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[7]Triple 7's, Gold Row Bonus, Spinball Bonus and Respin 777.

[8]Joker Poker, Shamrock 7's, High Roller Jacks and Super Gold 21.

[9]Sparkling 7's, Treasures, 7's A Winner, Fantasy Fortune.

[10]7's A Winner, Fantasy Fortune and Treasure. Red Hot Millions (RHM), RHM Fantasy Fortune, RHM Treasure, RHM 7's A Winner were also offered with a re-spin feature activated.

On May 31, 2000 a NIGC representative requested financial information from the Nation in order to best determine the economic benefit derived by the Class III gambling to the Nation and to properly assess a civil fine. Having received no response to the request, a letter was sent by NIGC Field Investigator Marcelin R. Pate on July 7, 2000, again requesting not only the financial information but also the inventory records reflecting the removal or installation of any Red Hot Respin machines. (Exh C-1, Tab 17).

Pamela Yeager, Controller for the SNDA, responded that she would provide the information by July 21, 2000. On July 26, 2000, Ms. Yeager indicated that SNDA had 32 Red Hot Respin machines and 100 other machines; the revenue generated by the Red Hot R-spin machines from the start-up date until the date the machines were pulled from use were $198,000, less the Wizard's (the vendor) commission and less expenses. Ms. Yeager failed to identify the start up date or the date the machines were pulled from the floor. (Exh C-1, Tab 21).

With this limited information[11] available to the NIGC, the Chairman issued CFA-00-06 on August 17, 2000.

Following the May 7, 2002, decision of the Commission upholding NOV/CO 00-06 and NOV/CO 00-10, counsel for the NIGC Chairman wrote counsel for the Nation requesting information to assist in the assessment of a civil fine for NOV/CO 00-10 which had yet to be issued. The Nation indicated it would allow NIGC access to its financial information.

During the week of July 22, 2002, NIGC auditor, Rod West examined the available financial information. (TR 179). The Nation had previously provided NIGC the audited Financial Statements for the fiscal years ending September 30th 1999 (on July 27, 2001) and September 30th, 2000 (on December 5, 2001). (TR 180). The Nation had not submitted the audits for fiscal years ending September 30, 2001 and September 30, 2002.[12] The auditor requested financial statements for year 2001 and what the Nation had available for the previous nine months ending June 30th, 2002. (TR 192). Based upon the information provided, Mr. West prepared a spreadsheet summarizing the machine revenues, machine payouts and other types of gaming revenues at each of the locations. (TR 196).

[11]NIGC had filed a Motion to Compel Discovery which was denied by Presiding Official Bruce Johnson on August 16, 2001.

[12]This information as of the date of the Recommended Decision had not been provided to the NIGC.

The Nation filed timely appeals of CFA 00-06 and CFA 00-10.[13] Another appeal was filed by Chief Jerry Haney (NIGC 2002-7) but prior to the hearing on the fine assessments, counsel withdrew her representation of Chief Haney. Chief Haney was notified of the date of the hearing but did not submit any information, did not appear at the hearing and had no contact with the office of the Presiding Official.

DISCUSSION

This case is governed by IGRA, and its accompanying regulations. *See* 25 U.S.C. § 2713; 25 C.F.R. Part 575. When the NIGC finds a tribal operator is failing to comply with statutory and regulatory guidelines, the Chairman has the authority to issue a Notice of Violation (NOV) to the tribal operator. The NOV must contain citations to the violated federal requirement, a description of the surrounding circumstances, measures required to correct the situation, and a time limit for such correction, with a notice of the right to appeal to the full Commission. 25 C.F.R. § 573.3.

A temporary closure order or fine may be issued if the tribal gaming operation fails to correct the violations. Two separate NOVs with closure orders were issued in this case. NOV 00-06, issued May 30, 2000, involving the operation of electronic video gaming machines, generically referred to as "Red Hot Respin" machines.[14] A second NOV, was issued September 12, 2000. The machines in question involved not only continued and increased operation of the Red Hot ReSpin machines but also of newly installed electronic video gaming machines manufactured by separate business entities.[15]

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[13]On December 2, 2002, the Nation filed a motion to dismiss CFA 00-10 because a hearing had not commenced within thirty days (30) as required by 25 C.F.R. § 577.7(a). Counsel for the Chairman opposed the motion. The Presiding Official ordered a stay of proceedings on the two CFAs pending proceedings in federal district court on the NOVs. The Chairman filed an objection with the Commission on January 7, 2003. The Commission ordered a hearing on the two CFAs to be held forthwith.

[14]These machines, manufactured by Infinity Group Inc., include: Lucky Break, Red Hot and Blue, Sovereign Sevens, Red Hot Re-spin, and Buffalo Nickels.

[15]These machines, not manufactured by Infinity Group Inc., include: Rainbow Reels, Fantasy Fives, Pot of Gold (a multi-game device offering Triple Sevens, Gold Row Bonus, Spinball Bonus, and Respin Seven), and Lucky Cherries (another multi-game device offering Pirate's Gold, Klondike 5, Funny Fruit, and Reel of Fortune).

The Commission found, on May 7, 2002, that the Nation was operating Class III gaming machines without a Tribal-State compact.

Tribal-State Compact Required to Conduct Class III Gaming Operations

The Nation argues that it should not be required to enter into a Class III gaming compact before offering Class III games for play. This matter has been addressed in the underlying litigation of NOV 00-06 and NOV 00-10 and resolved against the Nation by the Commission in its May 7, 2002, Order.

Per Day Violation Penalty

The Nation alleges that Chairman's per day civil assessment fines impermissibly exceed the authority granted to NIGC by IGRA, under 25 U.S.C. § 2713(a) which provides:

> Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, ***not to exceed $25,000 per violation***, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this chapter....[emphasis added]

The Chairman posits[16] that Section 7 of IGRA which provides that the Commission shall "promulgate such regulations and guidelines as it deems appropriate to implement [Civil Fine Assessments]" is the statutory authority to treat each daily act as a separate violation. *See* 25 U.S.C. § 2706. Acting upon this authority, 25 C.F.R § 575 specifically addresses the assessment of civil fines under § 2713 of the Act.

> The Chairman shall review each notice of violation and order of temporary closure...to determine whether a civil fine will be assessed, the amount of the fine, and in the case of continuing violations, whether each daily illegal act or omission will be deemed a separate violation for purposes of the total civil fine assessed.

[16]The Chairman bears the burden of proof on this issue 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., NIGC 97-4, 98-8 (November 13, 1998).

25 C.F.R. § 575.3. "If noncompliance continues for more than one day, the Chairman may treat each daily act or omission as a separate violation." 25 C.F.R § 575.4(a)(2).

Our starting point is the language of the statute and its implementing regulations. Gwaltney v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987). In Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837 (1984), the United States Supreme Court outlined a four-step inquiry to determine what level of review a court should employ when reviewing the validity of an agency rule. First, the court should inquire whether congressional intent on the issue in question is clear or ambiguous. Id. at 842-43. If Congress plainly addressed the issue in the statute, the inquiry ends. Second, if the statute is ambiguous or silent as to the intent of Congress, the court should inquire whether the agency has interpreted the statute already. If the agency has interpreted the statute, further inquiry is necessitated. Id. at 843. Third, if the agency has interpreted the statute, the court must ascertain whether Congress expressly delegated the power to so interpret to the agency, or if the agency's power to interpret is implied. Id. at 843-44. Finally, if the court finds that Congress expressly delegated to the agency the power to interpret the statute, then the agency's interpretation should not be overturned by the court unless that interpretation is arbitrary and capricious. Id. If the court finds that the agency's power to interpret the statute is impliedly delegated, the court should not overturn the agency's interpretation unless it is unreasonable. Id.

Applying Chevron to the Commission's regulations, the first line of inquiry must be whether the intent of Congress is clear as to the definition of "per violation." Nowhere in IGRA itself or the legislative history of that act is "per violation" specifically defined. See 25 U.S.C. § 2713. S. Rep. No. 446, 100th Cong., Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 3071-3106. Legitimate argument can be made that a violation of IGRA occurs every time an illegal gaming device is played or every day that the facility allows its play. On the other hand, the Nation argues, there is only one violation every time an NOV is issued. Congressional intent is silent on this point.

This requires an analysis of whether the Commission has interpreted IGRA. As discussed above, the Commission interpreted IGRA by promulgating regulations that describe in greater detail the definition and application of civil fines and in the case of a continuing violation "for daily violations." *See* 25 C.F.R. § 575.3.

The next area of inquiry is whether Congress expressly or impliedly delegated the power to NIGC to interpret the statute in question. Chevron states that, "if Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." Chevron U.S.A. Inc., 467 U.S. at 843-44. A review of IGRA reveals such an explicit delegation to the NIGC to "fill the gap". The authority of the NIGC to clarify and define its authority comes from its expressly delegated power to regulate Class II and certain aspects of Class III gaming by Indian tribes and "to promulgate such regulations and guidelines as it deems appropriate to implement [IGRA]."

25 U.S.C. §§ 2706(b)(10) and see 2706, 2710, 2711-2713, and 2715-2716.

Moreover, Congress in 25 U.S.C. § 2713 prefaces the authority of its civil penalties provision with the statement, " [s]ubject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate fines, not to exceed $25,000 per violation...." [Emphasis added]. The regulations fill the statutory gap by further defining the case of the uninterrupted daily illegal act, otherwise viewed as a continuing violation, as separate distinct violations. See 25 C.F.R. § 575.3 and 575.4(a)(2). From a reading of the first clause of 25 U.S.C. § 2713, the language clearly conveys an expressed delegation of authority to the agency to promulgate regulations regarding civil fine assessments. This statutory clause is the mechanism by which the Commission derives its authority to define the term "violation" in context with NIGC's express authority to regulate gaming by Indian tribes.

Accordingly, the agency's interpretation, as expressly delegated by Congress, must be deferred to unless arbitrary or capricious. Chevron, *supra* at 833.

Even assuming *arguendo* that the authority delegated to NIGC regarding civil fine assessments is implied by Congress, the interpretation of a daily illegal act as a separate violation is still reasonable under a Chevron analysis. The determination of the reasonableness *vel non* of an agency's interpretation of its enabling statute requires consideration of competing legitimate interests. The discussion in Chevron is instructive.[17] Like the statute in Chevron, IGRA has competing policy considerations. One purpose of IGRA is to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). However, another stated purpose of IGRA is to "shield [Indian tribes] from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. § 2702(2).

It is clear from the history of the promulgation of these regulations that the NIGC carefully considered the competing policies of protecting Indian tribes from corrupting and negative influences while ensuring the Indian tribes are the primary beneficiaries of the gaming

[17]In the Chevron case the congressional intent was unclear as to what constituted a "stationary source" of pollution under the Clean Air Act. The Environmental Protection Agency defined the term so that all pollution-emitting sources at a single facility would constitute one stationary source. The Supreme Court upheld the EPA interpretation as reasonable. Id. at 845. When the Court examined the legislative history of the statute it uncovered dual and competing policies: to make inroads on air pollution while not excessively impeding reasonable economic growth of industries. Id. at 851-52. The Court held the definition to be reasonable because in promulgating it, the EPA had "considered the matter in a detailed and reasoned fashion" and tried to accommodate the conflicting policy considerations of the statute. Id. at 865.

they conduct. The NIGC arrived at its regulations after a 60 day comment period and five public hearings held across the country. *See* Notice of Public Hearing, 56 Fed. Reg. 56,282-01 (1991). It can be gleaned from the preamble that the specific issue of per day violation was addressed and that the regulations serve as a limitation on the Chairman's authority:

> One commentator stated that the Commission's treatment of 'each daily illegal act or omission (as) a separate violation' is an 'overly broad extension' of 25 U.S.C. 2713, which refers to a maximum $25,000 civil fine 'per violation' (see §§ 575.3, 55.4(a)(2)).
>
> The Commission disagrees. A 'violation' may occur once or it may occur hundreds of times a day (for example, every time an illegal machine game is played). Rather than broadening the Chairman's authority, the rule limits the Chairman's civil fine assessment authority to a maximum daily amount.

58 Fed. Reg. 5838 (1993). The Commission also considered the economic benefit to a tribe that could result when engaged in noncompliant behavior when deliberating on the definition of "per violation":

> The Chairman will consider the extent to which the respondent obtained an economic benefit from a violation. In general, the Chairman will seek to impose a civil penalty that accounts for both documented or estimated benefit and the likelihood of escaping detection. If a violation continues for more than one day, the Chairman may treat each daily illegal act or omission as a separate violation, to the extend [sic] necessary to recover the total economic benefit on non-compliance.
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> The Chairman's consideration of the economic benefit of noncompliance is necessary to ensure that violators do not profit from their unlawful conduct and conversely, that law-abiding Indian gaming operations are not placed at a competitive disadvantage. The Administrative Conference to the United States has endorsed this approach to civil penalty assessment. [see 1 CFR 305.79-3, Recommendation A.I.].

57 F.R. 30584, 30587 (July 9, 1992). The preamble to the final rules reveals that the NIGC engaged in a "detailed and reasoned" consideration of legislative intent and the issues raised during the comment period. *See* Preamble to Final Rules 57 Fed. Reg. 12,382-01 (1992); 25 C.F.R. Part 502. NIGC's construction is consistent with other statutes and regulations proscribing continuing violations. See *e.g.* U.S. v. ITT Continental Banking Co., 420 U.S. 223, 231 (1975). The Nation's argument to limit fines to individual notices issued has been squarely rejected as contrary to enforcement policy in at least one non-precedential decision. (Goetz v. USDA, 2001 U.S. App., Lexis 7355 (10th Cir 2001)).

In this context, it has been frequently observed that "[t]he assessment of a penalty is particularly delegated to the administrative agency. Its choice of sanctions is not to be

overturned unless 'it is unwarranted in law' or without justification in fact." Panhandle Cooperative Association v. EPA, 771 F.2d 1149 (8th Cir 1985) cited with approval, Harmon Industries Inc. v. Browner, 19 F. Supp. 2d 988 (D.C. Mo. 1998). Likewise, the Commission's interpretations of various other sections of the IGRA have received deference under the Chevron test. *See* United States v. 162 Megamania Gambling Devices, 231 F. d 713, 718 (10th Cir. 2000) (Congress gave the Commission authority to promulgate such regulations and guides as it deems appropriate to implement the provisions of the Gaming Act; due deference is to be accorded); United States v. 103 Electronic Gambling Devices, 223 F.3d 1091, 1096-97 (9th Cir. 2000) ("NIGC's conception of what counts as bingo under IGRA, ...is entitled to substantial deference."); Shakopee Mdewakanton Sioux Cmty. v. Hope, 16 F.3d 261 (8th Cir. 1994)(holding that NIGC's decision to classify keno as Class III gaming is entitled to Chevron deference).

The Nation also argues that any ambiguity in the statute must be interpreted in favor of Indian tribes. It is true that statutes passed for the benefit of Indian tribes are to be liberally construed in favor of the tribes. Ramah Navajo Chapter v. Lujan, 112 F3d 1455 at 1462 (10th Cir. 1997). However, construing IGRA so as to protect Indian tribes from the influence of organized crime and other negative influences is a construction in favor of Indian tribes. Furthermore, it is in accord with Congress' expressed purpose for IGRA. 25 U.S.C. § 2702(2). *See also* South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 505-06, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986). The Nation's interpretation of allowing only one assessment in the midst of continuing and ongoing violations would have little effect in deterring prospective violators of IGRA and would allow violating tribes to reap potentially great economic benefit at the expense of other law abiding tribes. While it is true that the application of the canon of construction that statutes benefiting Native Americans should be construed liberally in their favor, such cannon does not permit a "disregard of the clearly expressed intent of Congress." *See* Tyonek Native Corp. v. Secretary of the Interior, 836 F.2d 1237, 1239 (9th Cir. 1998). *See also* Haynes v. U.S., 891 F.2d 238 (9th Cir. 1989) compare with Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439 (D.C. Cir 1988).

Thus the Chairman's actions through the use of the fine assessment process to recoup the economic windfall the Nation received by its noncompliance is consistent with the policy and purpose of the IGRA. 25 U.S.C. § 2702(2). Congress expressly delegated authority to the NIGC to interpret IGRA and its interpretation of the civil fine provision is neither "arbitrary" nor "capricious". To construe it otherwise would severely limit the enforcement provisions. A non-compliant party would not be deterred from the potentially tremendous economic benefit derived by continuous and ongoing disregard for compliance in light of a maximum assessment of one $25,000 fine. Even assuming an implied authority, the NIGC's promulgated regulations regarding civil fine assessments must be deemed valid unless they are found to be unreasonable. Chevron U.S.A. Inc., 467 at 843-44.

Delay in Issuance of CFA 00-10 within Thirty Days

Pursuant to 25 C.F.R. § 575.5(b), the NIGC Chairman "shall serve a copy of the proposed assessment on the respondent within thirty (30) days after the notice of violation was issued,

when practicable." The Nation contends that NIGC issuance of CFA 00-10 some seven hundred (700) days after the NOV is untimely and in violation of 25 C.F.R. § 575.5(b).

The Chairman argues that it is the Nation's failure to provide the financial information required by the rules delayed the assessment. Moreover, the Chairman contends that the financial information provided was incomplete. The Chairman notes that the regulation provides the assessment be issued 30 days following the NOV *when practicable.* See 25 C.F.R. § 575.5(b) (emphasis added). The Chairman thus contends that the language "when practicable" incorporates a measure of reasonableness into determining when a notice of proposed civil assessment is timely. The "reasonableness" of this delay must be considered in context of the chronology of events, the types of games played, and the revenues that were generated by the continued gaming activity. The Commission finds that the phrase "when practicable" requires merely reasonable attempts to issue a fine within an appropriate timeframe considering the circumstances of the administrative litigation as well as the workload and other priorities of the Commission.

The facts presented at the hearing were largely uncontested. The testimony and exhibits, detailing the continued and ongoing investigations prior to and following the issuance of the Commission's May 7, 2002, decision, notices of violation which served as the basis for the civil fine violation assessments, and the failure of the Nation to provide requested financial information to NIGC agents were unchallenged and admitted without objection. These operative facts support the position of the Chairman. Mr. West testified that he was able to look at financial information following a visit to the Nation's facilities on July 2002. The Nation provided him the audited Financial Statements for the fiscal years ending September 30th 1999 and September 30th, 2000. According to the testimony at the hearing, these audits failed to be filed in a timely manner. The auditor also requested any financial statements for fiscal year 2001 and any financial documents available for previous nine months ending June 30, 2002, for fiscal year 2002. (TR 192).

The information provided by the Nation was not sufficiently detailed, nor for that matter, properly documented, to allow him to extract the level of net gaming revenues for the respective properties. (TR 208, 209). The audits submitted by the Nation lacked sufficient detail to extract the level of gross gaming revenues for the facilities. (TR 182). According to Mr. West, it appeared to him that other expenses were deducted that are not normally deducted in arriving at gaming revenues in the two audited Financial Statements provided (1999 and 2000). (TR 183-184). He opined that the gaming revenues as stated in both fiscal year 1999 and 2000 were "net amounts" as opposed to gross revenues. (TR 186). The auditor requested further financial information with regard to fiscal year 2001 and first nine months of fiscal year 2002.

Using this limited information, Mr. West prepared a spreadsheet that summarized the machine revenues, machine payouts and other types of gaming revenues at the gaming locations. (TR 196). For fiscal year ending September 2001, he concluded that the gaming machine revenue would be $9,546,843.06. (TR 197). For the nine month period of fiscal year 2002 ending June 30, 2002, the amount of gaming machine revenue calculated by Mr. West is $10,543,391.74. (which excluded blackjack revenues). (TR 197). Mr. West admits that this is a

"best guess" based upon the information he was provided and reviewed. (TR 200). The Nation did not submit any financial information regarding the time period in question nor did the Nation present any evidence at the hearing to contradict the testimony of Mr. West. Based upon the foregoing, the recommended finding is the delay in the issuance of CFA 00-10 is reasonable under these circumstances and within the parameters of 25 C.F.R. § 575.5(b).

Furthermore, the Nation continued to play the games which were similar in operation to Red Hot Respin.[18] (TR 138-149). This also impeded the ability of the Chairman to assess fairly the situation and to issue an appropriate fine. There was testimony by Rick Deer, Tribal Council Member and Board of Trustee Member of the Seminole Nation, that the Class III games were removed following the Chairman's issuance of the NOVs. According to Mr. Deer, "[t]o the best of my knowledge we continued to use the cabinets, the monitors but we changed the programming inside, internally, inside the machine itself if there's something that's out of compliance according to the NIGC." (TR 231). The Chairman's expert, Mr. Farley, who conducted testing and submitted his report in the underlying violations, indicated in some detail, the manner in which the games were operated and the similarity of games to the game in controversy, are the same, except for the graphics and game themes. (TR 138-149). Other than the fact that the glass bearing the name of Red Hot Re-spin had been replaced with other glass bearing the names of different games played, no other appreciable difference existed in the mechanics of the games being played.[19] Id., (Exh C-5 and C-6). This play continued up through January 17, 2003, when NIGC representative Marcelin Pate visited the Nation's gambling facility. Not only did testimony and evidence at the hearing show continued usage of the games but also that the Nation had continued to add a substantial number of these Class III gaming devices to its facilities. The same violations support both CFA-00-06 and CFA 00-10.

Thus, these circumstances led to the delays surrounding the issuance of the civil fine assessments. CFA 00-06 was issued on August 17, 2000, following the issuance of NOV 00-06 and CO 00-06 on May 30, 2000. The Chairman assessed the Nation an aggregate amount of $400,000 for the continuing violation for each day for the period of March 14, 2000, through August 17, 2000. (Exh C-1 Tab 22). This civil fine assessment date begins with the issuance of three PNOVs by a field representative of NIGC. The Chairman assessed an additional fine of $2,000 for each day thereafter (following August 17, 2000) that the Nation continued the

[18]A similar game "Buffalo Nickels" could also be played on the machine. It has the same operating features as the other games but also contains a progressive feature which allows a jackpot prize to grow with each play of the game that does not award the jackpot prize.

[19]The games being offered under the newly replaced glass machines included: Sovereign Sevens, Lucky Break, and Red Hot and Blue.

operation of the games in question. (See Exh C1 Tab 22). The total amount assessed for CFA 00-06 is $2,146,000 up to January 17, 2003.

The second CFA, CFA 00-10, was issued on August 13, 2002, nearly two years after the issuance of the underlying violation, NOV 00-10. (Exh C-2 Tab 31). The Nation argues that this procedure violates the regulatory requirement that the CFA be issued within 30 days following the presentation of the NOV which was issued on September 12, 2000.[20] The September Order required the Nation to close all of its gaming activity. *See* United States of America v. Seminole Nation of Oklahoma, 2002 U.S. App. Lexis 27271 (10th Cir. 2002). Instead the Nation continued to play the games in question under different names[21] and again increased the number of these games in its facilities.(See Exh C-5 and C-6). This stymied the efforts of the Chairman to adduce an appropriate civil fine assessment.

The Chairman assessed a fine in CFA 00-10 in the amount of $6,030,000 for the period of September 12, 2000 until May 7, 2002, when the Commission's Order was issued. This total is 603 days at a rate of $10,000 a day. Following May 7, 2002, the Chairman assessed the Nation at a higher rate of $20,000 per day up until October 9, 2002 when the 30 days following filing of the Nation's appeal of CFA 00-10 expired (155 days). (See Exh C-2 Tab 31).[22] The total assessment for CFA 00-10 is $9,130,000. Clearly the actions of the Nation contributed significantly to the delay in the issuance of CFA 00-06 and CFA 00-10.

Application of CFA Factors to the Nation's Conduct

While the Chairman may exercise discretion in assessing a civil fine, 25 C.F.R. §575.4(a)-(e) identifies five factors the Chairman is to weigh prior to assessing any civil fine: (1) the economic benefit of noncompliance, (2) the seriousness of the violation, (3) any history of violations by the tribe (4) the degree of fault of the tribe, that is, any negligence or willfulness and (5) the good faith of the tribe to correct or attempt to correct the violation. Since these factors come within the ambit of the Congressional instructions in IGRA these regulations

[20]Nothing in this decision is intended to preclude the Chairman from seeking further fines for continued violations of the same NOV's after January 17, 2003.

[21] Pot-O-Gold was renamed Seminole Casino following issuance of the NOV. Lucky Cherries was renamed Skill Cherries following issuance of the NOV.

[22] The Chairman apparently concluded that the failure to provide the Nation with a hearing within 30 days of its appeal was sufficient reason to conclude the fine period at October 9, 2002, 30 days after the date of the Nation's September 9, 2002, appeal of CFA 00-10. The Commission concurs that this was a appropriate cut-off date for determining the fine. Likewise, however, nothing in this decision is intended to preclude the Chairman from issuing further fines as a result of the continued violation of NOV-00-10.

cannot be considered "arbitrary" or "capricious". Bluestone Energy Design v. Federal Energy Regulatory Commission, 74 F.3d 1288 (D.C. Cir 1996).

The first factor requires a review of the Nation's financial information during the time period in question. As noted earlier, the financial information ultimately provided by the Nation was, at best, sketchy. As a result the Chairman had to rely on the limited information provided and make reasonable estimates of revenue generated. The evidence at the hearing supports the conclusion that the Chairman's assessment was focused on the economic benefit the Nation derived from playing the games in question. From the record and evidence available, the Nation derived financial benefit from its continued play of Class III games. To the degree that the monies from the play of these Class III games were used for worthy causes does not change the illicit nature of the revenue. The end does not justify the means.

Furthermore, the record reflects that a NIGC field representative issued three warning notices (known sometimes as PNOVs) in March 2000. [23] When a NIGC representative issues a PNOV, it serves as a warning to a tribe to correct the problem in order to avoid a Chairman issued NOV and potentially subject the tribe to a civil fine assessment and possible closure. Noncompliance and, correspondingly, the accrual of economic benefits commences when the Nation violates the law. *See e.g.*, United States v. Dell'Aquilla, 150 F.3d 329 (3rd Cir. 1998)(finding that a violation of the Clean Air Act and the subsequent period for calculating a fine began when an EPA official first observed the violation). In the interest of deterrence, and in light of prior history of similar violations, a tribe should not be allowed to profit once it has become aware of and been warned of a violation. To allow this encourages tribes to defer compliance, unless or until formal NIGC enforcement action is initiated. Therefore, including the 77 days from the issuance of the PNOV is reasonable and intended to place the Nation on notice that it must assume responsibility for complying with the law. It cannot wait until a formal complaint (NOV) is issued by the Chairman.

[23] On this point, the Presiding Official found that the time attributed to the Preliminary NOV (77 days) which is part of the basis for CFA 00-06 should be excluded. The rationale behind this recommendation was based upon the language of the regulations. A review of 25 C.F.R. Part 571, Subpart B defines a Commission's Authorized Representative and identifies the Commission's Authorized Representative as having certain authority delegated to him or her. This includes the ability to enter gaming facilities, to conduct inspections and audits, and to access all papers, books and records. 25 C.F.R. 571.5 and 571.6. On the other hand, 25 C.F.R. Part 573 – Enforcement and 575-Civil Fines speaks to the actions and authority of the Chairman. Specifically 25 C.F.R. § 574.4 states "[t]he Chairman may access a civil fine ....for each notice of violation issued under § 573.3 of this chapter...". Under 25 C.F.R. 573.3(a) only: "[t]he Chairman may issue a notice of violation to any person for violation of any provision of the Act or this chapter....". The regulations reflect no delegation of authority to the Commission's Authorized Representative to issue a notice of violation. However, such PNOVs are not intended to meet the statutory or regulatory requirements of a NOV. They seek voluntary compliance by respecting the tribe's right and willingness to comply voluntarily with the law. Such notices are intended to support the tribes as the first line regulators.

The second factor to consider is the seriousness of the violation. The Nation was warned that they were in violation of IGRA, but, continued the activity, and increased the number of Class III machines in their facilities. This failure to take corrective action was a direct challenge to the authority of the NIGC to enforce compliance with IGRA. Additionally, based on the record, it cannot be disputed that the Nation intentionally challenged the compact provision of IGRA. The compact provision is a core concept of the statute, which serves as the fulcrum point balancing tribal sovereignty under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) and the State's rights under the 11th Amendment. This certainly is not a trifle issue or some minor infraction. The Nation, in effect, challenges the continued viability of IGRA following the Supreme Court's decision in Seminole Tribe of Florida v. State of Florida, 517 U.S. 44 (1996). This second factor is, therefore, met.

The third factor is the history of violations that are attributable to the Nation. A review of the agency record shows that the Nation has been previously cited for use and play of Class III gaming devices in January 1998. An accompanying CFA was issued and ultimately, the parties entered into an agreement for a reduced assessment. See Exh C-1, Tab 22. The Nation was also served a second NOV for failure to conduct background investigations in March 1999. An accompanying civil fine was issued but the Nation has yet to pay that fine. Id. Clearly the Nation has a history of prior violations that has resulted in the issuance of NOVs and CFAs. One of the prior NOVs is quite similar to the matters before the Commission. As the Nation has been charged since 1998 with two additional NOVs based on play of Class III gaming devices within its facilities without a state/tribal compact, the Chairman met his burden that the Nation has engaged in a continued pattern of noncompliance.

This ties into the fourth factor, that is, the negligence or willfulness of the violations. The facts of the case clearly describe a knowing course of action on the part of the Nation. The Nation has chosen to proceed with Class III gaming despite the issuance of the PNOVs (issued March 2000) that warned that such acts were in contravention of IGRA and the 25 C.F.R. 501 *et. seq.* Failing to heed the warning, the Nation continued its play of Class III games. This was followed by the issuance of NOV/CO 00-06 (May 2000 Order), NOV/00-10 (September 2000 Order) and the Commission's Final Decision issued May 7, 2002, affirming the violations. Over the course of two years, the Nation has continued to play these games. The Nation's persistent course of action militates against any conclusion other than willful disregard of the Chairman's orders and the Commission's decision.[24]

[24] While the significant delay in issuing the CFA caused the Commission some concern, the Nation's course of conduct throughout the history of these violations lend substantial support to the Chairman's conclusion that the timing for issuance of the fine was only practicable two years after issuance of the second NOV. It is this two year delay however that we counter balance against the Nation's willful conduct. Otherwise, the Commission

When reviewing the fifth and final factor of good faith to correct the problem, the record is devoid of any substantial effort on the part of the Nation to resolve the matter. The record is replete with evidence of the Nation making minor changes to the exterior of the machines, slightly altering the name of the games or modifying the graphics while the mechanics of the games remained substantially the same. The Nation continued its ongoing effort to expand its facilities and increase the number of machines utilizing the Class III games in all of its gaming establishments. This, in combination with an ongoing and continued delay in providing financial information as requested by the Chairman, are indicative of a lack of good faith on the part of the Nation.

Clearly the Nation chose this course of action in light of others available and the Nation reaped an economic benefit that other tribes, by complying with the laws have not. By choosing to proceed in this manner, the Nation took upon itself the risk of being held accountable for its actions. The Chairman met his burden and properly weighed the factors in determining the fine assessment.

Notice to the Nation that Continued Play of Class III Gaming Devices Could Result in NOVs/COS and CFAs

The Nation alleges that, had it known that with the issuance of NOV/CO 00-10 and continued play of Class III gaming devices would result in a significant civil fine, it would have ceased play of those games. This argument is tenuous at best.

Clearly the Nation had prior contact with NIGC on this type of matter when it was issued a NOV/CO in January of 1998 and a subsequent CFA was issued in February of the same year. (Exh C-1, Tab 3) Furthermore, in the instant case, the Nation was provided with three PNOVs in March of 2000, followed by a NOV/CO 00-06 in May of 2000, issued by the Chairman when the Nation continued to play games believed to be in violation of IGRA. Again, the Nation did not comply and instead introduced new Class III games that were played in violation of IGRA, leading to the issuance of NOV/CO 00-10 in September of 2000.

To cry foul now seems rather incongruous in light of the evidence and testimony in this the case. The Nation's own actions led to the delay of issuance of CFA 00-10. Not responding to requests by the NIGC or its authorized representative to supply financial information and delays in submitting fiscal year end audits for 1999, 2000, and 2001 within 120 days of the fiscal year end were part to blame. (TR 177, 181). Moreover the information that was ultimately submitted and reviewed was sketchy and unclear (TR 182-185) making it extremely difficult to determine the net revenue for each of the gaming facilities during the period in controversy.

The Nation continued to play its Class III games albeit under different names and/or graphics, continued with its expansion operations and failed to cease and desist all gaming activities as set forth in the 00-06 and 00-10 Closure Orders. Even following the issuance of the

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would seriously consider a substantial increase in the fine in light of the Nation's continued refusal to close its operation.

Commission's decision in May 2002, the Nation failed to comply and cease and desist from all gaming activity. The Nation had sufficient knowledge and notice that its actions would in fact likely reap these type of results. The Nation failed to provide any testimony or submit any evidence to the contrary other than speculative argument. The continued actions of the Nation during the time in question--May 2000 through October 2002--rebut any arguments made by the Nation that had it known such a fine may be levied it may have discontinued play of the games. It is my finding that the Nation had sufficient notice despite the delay in issuance of CFA 00-10.

ORDER

In conclusion, the Civil Fine Assessments, CFA 00-06 and CFA 00-10 at issue in this appeal were appropriately issued pursuant to IGRA and its implementing regulations.

Both CFA 00-06 and CFA 00-10 are affirmed. The appeal of NIGC 2002-7, initiated by Chief Jerry Haney, is dismissed for failure of prosecution.

The Tribe is hereby ordered to pay a fine of $11,276,000.00, payable to the United States Treasury.

Philip N. Hogen
Chairman

Cloyce V. Choney
Commissioner

Nelson W. Westrin
Vice-Chairman

6/3/03
Date

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Philip N. Hogen
Chairman

Cloyce V. Choney
Commissioner

Nelson W. Westrin
Vice-Chairman

6/3/03
Date

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2003, I served a copy of the foregoing **COMMISSION DECISION** by certified mail, return receipt requested, upon the following:

Kenneth Chambers, Principal Chief
Seminole Nation of Oklahoma
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I hereby certify that on the 4th day of June, 2003, I served a copy of the foregoing **COMMISSION DECISION** by hand delivery upon the following:

William F. Grant, Esq.
Sandy Ashton, Esq.
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I also served via United States First Class Mail a true and correct copy of the foregoing instruments to the following address:

Marcel S. Greenia, Presiding Official
Robert More, Director
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Arlington, VA 22203

Dated: 6/4/03

Jerrie Moore
Jerrie Moore
Legal Staff Assistant