IN THE MATTER OF Edward Street and Oakland Enterprises LLC, Respondents.	CFA-06-06 Final Decision and Order September 6, 2006

On appeal to the National Indian Gaming Commission ("NIGC" or "Commission") from a civil fine assessment issued to Respondents Edward Street ("Street") and Oakland Enterprises LLC ("Oakland") for management of a tribal casino without a contract approved by the NIGC Chairman contrary to 25 U.S.C. § 2711.

Appearances

Jeb Joseph, Esq., for Respondents
John Hay, Esq., for the Chairman

FINAL DECISION AND ORDER

After careful and complete review of the agency record and the filings of Respondents and the Chairman, the Commission finds and orders that:

1. The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2711, permits an outside party to manage a tribal casino only under a contract approved by the NIGC Chairman.

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2. The Tonkawa Bingo Casino was open and operating from November 1999 through its closure by order of the NIGC Chairman in February 2006, TCO 06-01.

3. During that entire period, Mr. Street, either through a sole proprietorship or through his limited liability company, Oakland, managed the Tonkawa Bingo Casino without a contract approved by the NIGC Chairman.

4. Mr. Street was not a tribal employee, and Oakland was not a Tonkawa tribal governmental entity. Therefore, a management contract was required.

5. The Chairman has the authority to bring an enforcement action against, and to levy fines against, a party that manages a Class III gaming operation without an approved contract. 25 U.S.C. §§ 2705(a), 2713(a)(1).

6. In determining the amount of the civil fine here, the Chairman appropriately weighed the factors in 25 C.F.R. §§ 575.3, 575.4, and his decision is amply supported by evidence in the record.

7. The civil fine assessment, CFA-06-06, in the amount of two million six hundred thousand dollars ($2,600,000.00) is upheld.

STATUTORY, PROCEDURAL, AND FACTUAL BACKGROUND

In the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*, Congress deemed the establishment of an independent Federal regulatory authority for gaming on Indian lands, together with the establishment of Federal standards for gaming on Indian lands, "necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3). One

such concern is that each tribe be the "primary beneficiary" of its gaming operation. 25 U.S.C. § 2702(2).

Congress therefore created the NIGC and gave it oversight regulatory authority for gaming on Indian lands. 25 U.S.C. §§ 2702(3), 2704(a). As part of that oversight authority, and to ensure that tribes remain the primary beneficiaries of their gaming operations, Congress did a number of things. It granted the NIGC Chairman the power and authority to approve gaming management contracts and made such contracts void as a matter of law unless and until the Chairman approves them, 25 U.S.C. §§ 2705(4), 2710(d)(9); it limited management fees to 30% of net gaming revenue – 40% in special cases permitted by the Chairman on petition from a tribe, 25 U.S.C. § 2711(c); and it required management contractors to undergo background checks and to be deemed suitable to engage in gaming, *i.e.* that a contractor not be

> a person whose prior activities, criminal record, if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming....

25 U.S.C. § 2711(e), (i).

Should a tribe, management contractor, or individual operating an Indian casino violate any of these provisions, the NIGC Chairman may assess a civil fine, not to exceed $25,000 per violation. 25 U.S.C. § 2713(a); 25 C.F.R. § 575.4. If the violation continues for more than one day, the Chairman may treat each daily illegal act or omission as a separate violation. 25 C.F.R. § 575.4 (a)(2).

Mr. Street is a member of the Tonkawa Tribe ("Tribe"). He and the Tribe began discussing his interest in managing the Tonkawa Bingo Casino at least as early as

September 1999. AR Tab 1[1]. By November, they had reached an agreement for him to do so, AR Tab 2, and the Tribe held Street out to the public as its casino manager. In a November 15, 1999, letter "to whom concerned," Donald Patterson, then the Tribe's president, wrote, "Mr. Eddie Street is currently managing bingo operations under the auspices of the Tonkawa Tribe." AR Tab 3.

At the beginning of March 2000, the Tribe submitted its management contract with Mr. Street to the NIGC Chairman for his review and approval. AR Tab 40, ¶ 3. The submission, however, suffered from a number of deficiencies such that it could not be approved under 25 U.S.C. § 2711 or applicable NIGC regulations. For example, the parties failed to include a business plan, 25 C.F.R. § 533.3(e), failed to identify all individuals that had a financial interest in the contract, 25 C.F.R. § 533.3(d), and failed to include applications and costs for such individuals' background investigations, 25 C.F.R. §§ 533.3(d)(1), 537.1. AR Tab 8. An April 4, 2000, letter from NIGC's Contracts Division notified both the Tribe and Respondents of all deficiencies, as did a letter of July 27, 2001. AR Tabs 8, 15.

Though the contract was revised in October 2001, it was still deficient. AR Tab 40, ¶¶ 7-9. The parties never corrected these deficiencies – despite multiple notifications

[1] The Chairman developed substantial evidence to support issuance of the notice of violation, NOV 06-06 ("the NOV"), both to the Tonkawa Tribe and Respondents. All references to the agency record (AR) herein are to that record. As discussed more fully below, the Tribe appealed and settled the NOV, while Respondents did not timely appeal the NOV. Respondents therefore waived their right to appeal the NOV. The NOV became final as to the Tribe pursuant to an agreement between the Tribe and the NIGC Chairman. See Pre-Opening Agreement at 5. At issue here then is solely the propriety of Civil Fine Assessment 06-06.

from the Contracts Division over the next year – and the Chairman never approved the contract. AR Tabs 17, 20.

Mr. Street was aware of his obligation under IGRA to have a management contract approved by the Chairman. The April 4, 2000, letter from the Contracts Division stated:

> Please note that pursuant to 25 C.F.R. § 533.7, management contracts that have not been approved by the Chairman of the NIGC are void. No action should be taken under the contract until it is approved.

AR Tab 8. The parties were aware as well that they left this obligation unmet.

The September 30, 2002, minutes of the Tonkawa Business Committee note, "we have no approved gaming contract yet." AR Tab 19. Likewise, in a January 24, 2003, meeting among President Patterson, Street, and NIGC Field Investigator Marci Pate Ober, Mr. Street admitted that he and the Tribe still had to submit a management contract for approval. At that time, Ms. Pate reiterated to the Tribe and Mr. Street that managing without an approved contract was prohibited. AR Tab 42, ¶ 9.

Subsequently, on March 5, 2003, Respondents and the Tribe submitted a revised management contract for the Chairman's approval. AR Tab 23. Like the previous submissions, this one too was deficient, lacking, among other things, the identification of interested parties and their background investigation applications. The Contracts Division so notified the parties on April 15, 2003. AR Tab 24. In June 2003, the Contracts Division deemed the contract withdrawn given the parties' failure to respond to the April letter. AR Tab 25.

Respondents had further notice still of the obligation to have an approved management contract. The tribal CPA's August 1, 2003, management observation and recommendation report, which was addressed to Respondents, states:

> The management agreement between Oakland Enterprises LLC and the Tonkawa Tribe ... has still not been approved by the National Indian Gaming Commission (NIGC). An updated agreement currently being worked on has not yet been completed or formally approved by either party, nor has it been approved by NIGC.

AR Tab 27.

Thereafter, on May 12, 2004, the Tribe authorized and approved still another management contract. AR Tab 31. There is no evidence that this agreement was ever submitted to the NIGC, much less acted upon in any way by the Contracts Division or approved by the Chairman.

In short, at no time between November 1999, when the Tonkawa Bingo Casino opened, and February 2006, when the NIGC Chairman issued a closure order, was there an approved contract for anyone's, or any entity's, management of the operation.

Notwithstanding any of this, Respondents managed the Tonkawa Bingo Casino. Mr. Street's responsibilities were typical of casino management. He was responsible for day-to-day casino operations, for hiring and firing casino employees, for the placement of games on the casino floor, and so forth. AR Tabs 38; 42, ¶¶ 6, 11.

Mr. Street did not manage the Tonkawa Bingo Casino in his individual capacity for long. In June 2000, he formed a limited liability company, Oakland, of which he was the sole member and 100% owner. AR Tabs 9; 42, ¶ 17; 51, Schedule K1. Oakland did

business as "Tonkawa Bingo" or "Tonkawa Bingo Casino." AR Tabs 28; 57, schedule K1.

As it did with Mr. Street himself, the Tribe held Oakland out to the public as its casino manager. In an October 29, 2002, letter, then-Tribal-President Patterson wrote to Bank of America stating, among other things, "the Tonkawa Tribe of Oklahoma has a gaming management agreement with Oakland Enterprises LLC for the purpose of operating a gaming facility on our Tribal land." AR Tab 21.

Likewise, in 2000, the Tribe issued a business permit to Oakland, authorizing it to operate the Tonkawa Bingo Casino. The Tribe renewed the permit each year through 2005. AR Tab 11.

Mr. Street used his company as more than an ordinary shield against individual commercial liability. Instead, he arranged matters so that Oakland was, for all intents and purposes, the alter ego of the Tonkawa Business Casino. From the beginning, the arrangement with the Tribe placed overall operation and financial responsibility upon Oakland. Mr. Street, through Oakland, had the ability to hire, fire, and promote employees; to purchase and place games on the casino floor; and to otherwise manage the operation – all without the oversight or involvement of the Tribe. AR Tab 42, ¶¶ 11-12, 15-17.

Oakland was also responsible for all casino expenditures. It provided monthly profit and loss statements to the Tribe, which simply collected its share of casino profits and rent for the building in which the casino was housed. AR Tabs 2; 56; 58; 42, ¶¶ 12-13, 15-17.

More than this, though, Oakland was responsible for the day-to-day money handling for the casino. Tonkawa Bingo Casino had five bank accounts, all in the name of, and under the control of, Oakland. Mr. Street had sole signature authority. AR Tab 53; Tab 42, ¶¶ 11, 17.

Further, Oakland was responsible not just for employment decisions, it – and not the Tribe – actually employed the casino workers. It paid their salaries and benefits, paid necessary employment taxes, and issued W-2s. AR Tabs 54; 28; 39, ¶3; 42, ¶¶ 11, 16. As such, the casino's tax identification number was also in Oakland's name. AR Tab 42, ¶ 17.

Further still, Oakland was responsible for, and paid for, all casino promotions and casino vendor contracts. AR Tab 42, ¶ 17. It paid patrons and, when required for large jackpots, filed W-2Gs with the Internal Revenue Service on their behalf. Those forms identify "Oakland Enterprises," not the Tribe, as the payor. AR Tab 28.

In sum, all of the casino's income and expenses were income and expenses of Oakland. Its 2000 tax return reports some $21.2 million in casino revenue as against $20.1 million in expenses. One such expense was the Tribe's share of the proceeds. Oakland's 2001 return shows $80.2 million in income and $78.1 million in expenses. AR Tab 57, 1065 forms and "Federal Statements." From 2000 through 2004, Oakland earned $2.6 million, according to the annual reports for the Tonkawa Bingo Casino filed with the NIGC. AR Tab 60.

In view of all of these things, on February 2, 2006, the NIGC Chairman issued a notice of violation to the Tribe, Mr. Street, and Oakland, NOV 06-06 ("the NOV"). AR

Tab 43. The Chairman found that for more than six years, the Tribe allowed Mr. Street and Oakland to manage and operate the Tonkawa Bingo Casino without an approved management contract, contrary to 25 U.S.C. § 2711 and 25 C.F.R. § 533.1. Given the seriousness of the violation, the Chairman issued a temporary closure order, TCO 06-01, ("the TCO"), ordering the Tonkawa Bingo Casino closed. 25 C.F.R. § 573.6(a)(7). AR Tab 44.

Respondents did not timely appeal the NOV and therefore waived their right to do so. 25 C.F.R. § 577.3. The Tribe did file a timely notice of appeal, and on July 5, 2006, the Tribe and the Chairman settled the matter pursuant to a pre-opening agreement. In that agreement, the Tribe admits that it violated both IGRA and NIGC regulations when it allowed Respondents to manage the Tribe's casino from December 1999 to February 2006 without an approved management contract.

On April 11, 2006, the Chairman issued the proposed civil fine assessment appealed here, CFA-06-06, which requires Respondents to pay a fine of two million six hundred thousand dollars ($2,600,000.00).

On May 11, 2006, Respondents timely filed a notice of appeal from the CFA 06-06. On May 15, 2006, the matter was referred for a hearing pursuant to 25 C.F.R. § 577.4(a).

On July 6, 2006, Respondents waived their right to an oral hearing and instead elected to have the NIGC decide the matter on written submissions.

On August 7, 2006, following an extension agreed to by the Commission, the Commission received a supplemental statement from Respondents pursuant to 25 C.F.R. § 577.3(c).

BURDEN OF PROOF AND STANDARD OF REVIEW

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

Preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *Id.* at 4. Since the violations alleged in the NOV as the basis for CFA 06-06 were not contested, we find the facts underlying the violations to be true for purposes of deciding the issues raised on appeal.

DISCUSSION

While the Chairman may exercise discretion in assessing a civil fine, 25 C.F.R. § 575.4(a)-(e) identifies five factors the Chairman must consider prior to assessing it: (1) the economic benefit of noncompliance; (2) the seriousness of the violation; (3) any history of violations; (4) the degree of fault, that is, any negligence or willfulness; and (5) any good faith attempt to correct the violation. We discuss each in turn.

Economic Benefit of Noncompliance

The Chairman issued a civil fine in the amount of $2.6 million, which represents the amount of money Respondent made managing the Tribe's casino for the years 2000 through 2004. AR Tab 60. The Chairman referred to audited financial statements on file with the NIGC for these years to ascertain Respondent's earnings. This figure does not reflect benefits paid to Mr. Street, such as travel expenses, the salary he paid himself, or distributions he took from Oakland. This figure also does not reflect Oakland's earnings for fiscal year 2005 as the NIGC had not, at the time the Chairman issued CFA 06-06, received the audited financial statement for FY 2005. AR Tab 60. Respondents have not disputed this figure. As such, we find that $2.6 million is a fair assessment of the economic benefit Respondents gained as a result of their non-compliance, that the Chairman appropriately weighed Respondents' economic benefit in assessing CFA 06-06, and that the Chairman's decision is amply supported by evidence in the record.

Seriousness of the Violation

Management of a tribal casino in the absence of an approved contract is per se a serious violation of IGRA. It is such a serious violation that NIGC regulations authorize the Chairman to close an Indian gaming operation if it is managed without an approved contract. 25 C.F.R.§ 573.6(7). In this case, the Chairman closed the Tribe's operation as a direct result of Respondents' continuously violating IGRA for more than six years.

Respondents do not dispute that they committed a serious violation. Instead, Respondents attempt to deflect responsibility away from themselves and onto both the Tribe and the NIGC. Respondents argue, essentially, that the Tribe insisted that Mr.

Street manage the casino, offered him no training or assistance, and left him entirely to his own devices. Supp. Stmt. at 1-2. Respondents further argue that the NIGC did nothing to assist him. Supp. Stmt. at 2-3. Mr. Street appears to believe that the NIGC should have been making regular, lengthy visits to the casino to advise him.

In fact, the record amply shows that the NIGC staff took extraordinary steps to advise Mr. Street that he (and Oakland) was managing without an approved contract and that this is a serious violation of IGRA:

- On December 1, 1999, NIGC investigator Marci Pate Ober conducted a site visit at the Tonkawa Bingo Casino, met with Mr. Street, and informed him that he and the Tribe had to submit a management contract for the Chairman's approval and that Mr. Street could not work under the contract until it was approved. AR Tab 42 ¶3.
- An April 4, 2000, letter from the Contracts Division to Mr. Street, which details the deficiencies in the first management contract submission, states:

  > Please note that pursuant to 25 C.F.R. § 533.7, management contracts that have not been approved by the Chairman of the NIGC are void. No action should be taken under the contract until it is approved. AR Tab 8.

- In August 2000, Investigator Pate Ober issued the Tribe and Mr. Street a Potential Notice of Violation (PNOV) for allowing the management of the Tonkawa Bingo Casino without an approved contract. Tab 42 ¶6.
- On January 24, 2003, Investigator Pate Ober met with Mr. Street and with tribal representatives and reiterated that Mr. Street and Oakland could not manage the casino without a contract approved by the NIGC Chairman. Tab 42 ¶9.

- An April 15, 2003, letter to Mr. Street, which details deficiencies in the last management contract submission, states:

> Please note that a gaming management contract that has not been approved by the NIGC Chairman is void and no action shall be taken under it. See 25 C.F.R. § 533.7. AR Tab 24.

- A June 5, 2003, letter to Mr. Street, the last in the series of letters from the Contracts Division to Mr. Street, AR Tabs 8, 15, 17, 20 and 24, states:

> Please note that a gaming management contract that has not been approved by the NIGC Chairman is void and no action shall be taken under it. See 25 C.F.R. § 533.7. AR Tab 25.

- On April 26, 2006, NIGC Region V Director Tim Harper wrote to Mr. Street:

> Please be advised that the National Indian Gaming Commission (NIGC) is conducting an investigation into the management of the Tonkawa Casino concerning possible management of the casino without an NIGC approved contract.... AR Tab 29.

Respondent Street's allegiance to his Tribe is admirable. It does not, however, excuse his conduct. One simply may not break the law and then argue that such behavior was at the behest of, or for the benefit of, another, regardless of the circumstances. Furthermore, if Mr. Street wanted to assist his Tribe, he should have made more of an effort to comply with repeated requests for further information by the Contacts Division in its attempt to facilitate the approval of a management contract.

We find that the Chairman appropriately weighed the seriousness of Respondents' violation of the law and that his decision is amply supported by evidence in the record. In fact, the seriousness of the violation here could have supported a much larger fine.

History of Violations

Respondents have no history of violations. While under other circumstances the absence of prior violations could factor against a large fine, we find that the Chairman properly weighed the comparative insignificance of this absence here in view of the length, seriousness, and willfulness of the violation.

Negligence or Willfulness

The Chairman found that this was a willful violation. Respondents were aware that there was never an approved management contract with the Tribe and that one was required. As detailed above, Respondents were repeatedly told by the Commission staff that an approved contract was required under IGRA. Mr. Street even admitted this to be the case. AR Tabs 8, 15, 17, 20, 24, 25, 29 and 42 ¶¶ 3, 6, 9. Despite everything, Respondents continued to manage the Tribe's casino without an approved management contract.

Mr. Street paints a picture of himself as a dutiful tribal member ignorant of the laws and regulations governing Indian gaming, one who accepted his Chairman's call to manage the casino and then set out to do so the best way he could. Given all of the foregoing, however, we find Mr. Street's picture of himself to be disingenuous. We have no doubt that the violation was willful. The Chairman properly considered this willfulness in assessing the fine, and his decision is amply supported by the evidence in the record. This factor too could have supported a much larger fine.

Good Faith

Finally, good faith only weighs against a large fine when a respondent moves quickly to achieve compliance after receiving a notice of violation. Here, Respondents were aware for years that they lacked an approved management contract, but at no time did Respondents make any serious, concerted efforts to have a management contract approved or to refrain from managing the Tribe's casino without one. The violation was only corrected when the Chairman took the drastic step of closing the casino. The Chairman properly weighed the absence of good faith, and his decision is amply supported by evidence in the record.

CONCLUSION

We find that assessment of a two million six hundred thousand dollar ($2,600,000.00) fine was appropriate in this instance, that the Chairman appropriately weighed the factors set out in 25 C.F.R. § 575.4(a)-(e), and that the undisputed evidence in the record amply supports his decision. Therefore, CFA-06-06 is upheld. It is so ordered by the National Indian Gaming Commission on this 6th day of September, 2006.

PHILIP N. HOGEN
CHAIRMAN

CLOYCE V. CHONEY
COMMISSIONER