



IN THE MATTER OF

The May 18, 2007, Approval of the Gaming Management Contract between the Cheyenne & Arapaho Tribes of Oklahoma and Southwest Casino and Hotel Corporation

Supplemental final decision and order

August 28, 2007

On motion to the National Indian Gaming Commission (NIGC or Commission) for reconsideration of its August 17, 2007, final decision and order reversing the approval by the NIGC Chairman of a gaming management contract between the Cheyenne and Arapaho Tribes of Oklahoma and Southwest Casino and Hotel Corporation.

SUPPLEMENTAL FINAL DECISION AND ORDER

After careful and complete review of the motion for reconsideration filed by Southwest Casino and Hotel Corporation (Southwest); the responses filed by Darrell Flyingman, Appellant and Governor of the Cheyenne and Arapaho Tribes of Oklahoma (Tribes); and a response filed by the NIGC Chairman through counsel,¹ the Commission finds and orders that:

¹ In matters where he takes executive action, such as approving or disapproving gaming management contracts, 25 U.S.C. § 2711, or bringing closure actions and levying fines to correct violations of the Indian Gaming Regulatory Act, 25 U.S.C. § 2713(a)-(b), the NIGC Chairman is represented by attorneys from the Commission's Office of General Counsel (OGC). 25 U.S.C. § 2707(a). On

1. The Commission declines to hear Southwest's motion for reconsideration because doing so is inconsistent with the underlying purposes of 25 C.F.R. part 539.
2. The parties have submitted evidence that Governor Flyingman submitted his notice of appeal by facsimile on June 15, 2007 – evidence that was not contained in the record before the Commission and presented here for the first time.
3. The Commission therefore treats the newly submitted evidence as a motion to supplement the record, which it grants in order to decide this appeal on as complete a record as possible.
4. Governor Flyingman timely filed his appeal, whether the Commission received his notice of appeal on June 15 or June 18, 2007.
5. 25 U.S.C. § 539.2 provides 30 days for filing an appeal of the Chairman's approval or disapproval of a gaming management contract.
6. Governor Flyingman's June 15, 2007, notice of appeal was timely filed 28 days after the Chairman's May 18, 2007, management contract approval.
7. June 18, 2007, is 31 days after the May 18, 2007, management contract approval on appeal.
8. In computing any period of time prescribed for filing and serving a document, the first day of the period so computed shall not be included. The last day shall be included unless it is a Saturday, Sunday or Federal legal holiday, in which case the period shall run until the end of the next business day.
9. The 30th day after May 18, 2007, was Sunday, June 17, 2007. The period for appeal therefore ran until the end of Monday, June 18, 2007. Governor Flyingman's June 18, 2007, notice of appeal was timely filed.
10. The Commission timely filed its August 17, 2007, final decision and order, whether Governor Flyingman filed his notice of appeal on June 15 or June 18, 2007.
11. 25 C.F.R. § 539.2 provides 30 days for the Commission decide an appeal, or 60 days if the appellant consents. Governor Flyingman consented to the 60-day period.
12. The August 17, 2007, final decision and order, was timely entered 60 days after the June 18, 2007, notice of appeal.

administrative appeals of those actions, the full Commission is represented by other OGC attorneys who, as a matter of practice, are recused from any involvement or participation in the Chairman's executive actions. Likewise, the Chairman's counsel is recused from any involvement or participation in appeals before the Commission.

13. August 17, 2007, is 63 days after the June 15, 2007, notice of appeal.
14. The Commission waives strict compliance with the 60-day requirement of 25 C.F.R. § 539.2 because all of the parties proceeded as if Governor Flyingman filed his appeal on June 18, 2007, because doing so will create no prejudice, and because doing so will make the record on appeal no less complete for the Commission or for a court upon any eventual judicial review.
15. The August 17, 2007, final decision and order, was timely entered after the June 15, 2007, notice of appeal.
16. The Commission makes changes to technical and typographical errors in the August 17, 2007, final decision and order as specified in Part III, below.
17. As supplemented and modified herein, the August 17, 2007, final decision and order remains in full force and effect.

STATUTORY, FACTUAL AND PROCEDURAL BACKGROUND

The statutory, factual, and procedural background of this matter leading up to the Commission's August 17, 2007, final decision and order is set out in detail in that decision, and there is no need to repeat it here. (*See Supplemental Record*, Tab 10, August 17, 2007, NIGC final decision and order.)²

On August 21, 2007, Southwest submitted a motion for reconsideration asking the Commission, on various and predominantly procedural grounds, to reverse the August 17, 2007, order and "issue a revised decision and order affirming the Chairman's May 18, 2007, determination approving Amendment No. 11 to the Third and Restated

² As in the August 17, 2007, final decision and order, "Administrative Record" refers to the record of documents considered by the NIGC Chairman and supporting his May 18, 2007, approval of the amended casino management contract between the Tribes and Southwest. "Supplemental Record" refers to those additional documents submitted to, and considered by, the full National Indian Gaming Commission in this appeal and in Southwest's subsequent motion for reconsideration.

Gaming Management Contract between the Tribes and Southwest....” (*See Supplemental Record*, Tab 11, motion for reconsideration, p. 14.)³

That same day, Governor Flyingman sought leave to file a response (*see Supplemental Record*, Tab 12, August 21, 2007, letter), which we granted as a simple matter of fairness, asking that we receive the response by August 24, 2007. (*See Supplemental Record*, Tab 13, August 22, 2007, letter.)

Governor Flyingman timely submitted his response on August 24. (*See Supplemental Record*, Tab 14). On that day, the NIGC Chairman, through his separate counsel, submitted a response (*see Supplemental Record*, Tab 15, response), and Southwest submitted a supplemental memorandum of points and authorities. (*See Supplemental Record*, Tab 16, supplemental memo.) Governor Flyingman submitted a reply to Southwest’s supplemental memorandum on Saturday, August 25. (*See Supplemental Record*, Tab 17, response.) This decision followed.

DISCUSSION

- I. THE COMMISSION DECLINES TO HEAR SOUTHWEST’S MOTION FOR RECONSIDERATION BECAUSE DOING SO IS INCONSISTENT WITH THE UNDERLYING PURPOSES OF 25 C.F.R. PART 539.

As it was in deciding Governor Flyingman’s appeal, our action on Southwest’s motion for reconsideration is governed by 25 C.F.R. part 539: “This part applies to appeals from the Chairman’s decision to approve or disapprove a management contract under this subchapter....” 25 C.F.R. § 539.1. Part 539, however, is silent about a party’s ability to seek reconsideration of a final decision by the Commission. We think it is

³ The submissions referenced in this section were all made by facsimile on the dates indicated. Original copies of most were subsequently received by First Class mail. (*See Supplemental Record*, Tabs 11-12, 14-17.)

inconsistent with the underlying purposes of part 539 to permit reconsideration of a final decision as of right.

As we stated in our August 17 final decision and order, part 539 contemplates a summary determination by the Commission on a written record. That format, we wrote, is better suited to reviewing “the narrow question of whether the Chairman properly observed IGRA’s requirements for approving or disapproving management contracts....” (*Supplemental Record*, Tab 10, final decision p. 9.) In addition, part 539 provides for an accelerated schedule. The appellant must file all appellate pleadings within 30 days of the Chairman’s decision, and the Commission’s decision must follow 30 days thereafter, or 60 days if the appellant consents. 25 C.F.R. § 539.2. Following the decision, review in Federal district court under the Administrative Procedures Act is immediately available. 25 U.S.C. § 2714.

As a general matter, then, absent some kind of exceptional circumstance that would counsel otherwise, such as a change in controlling law or clear error, we do not think it serves the purposes of this kind of summary proceeding to consider motions for reconsideration as a matter of course under part 539. The sheer flurry of correspondence and submissions generated by the present motion merely strengthens our conviction. (*See Supplemental Record*, Tabs 12-17.)

In short, we regard motions for reconsideration under part 539 analogously to the way Federal courts consider them under Fed. R. Civ. P. 59(e). The decision to consider such a motion is committed to the Commission’s sound discretion and is reserved for exceptional circumstances. *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996); *Lightfoot v. District of Columbia*, 355 F. Supp.2d 414, 420 (D.D.C. 2005); *Judicial Watch, Inc. v. United States Dept. of Energy*, 319 F. Supp.2d 32, 34 (D.D.C. 2004). The motion is

not an opportunity to reargue facts or theories already considered and ruled upon, nor is it a vehicle to present arguments that could have been, but were not, advanced previously. *Lightfoot*, 355 F. Supp.2d at 421; *Clay v. District of Columbia*, 2005 U.S. Dist. LEXIS 11504 at *2 - *3 (D.D.C. 2005); *Judicial Watch*, 319 F. Supp.2d at 34. A motion for reconsideration must establish more than a party's continued belief that the decision in question was simply wrong. *State of New York v. United States*, 880 F. Supp. 37, 38 (D.D.C. 1995)(three-judge panel).

Here, Southwest's motion seeks only the proverbial second bite at the apple, offering no compelling reason to reconsider other than its conviction that we have erred. It urges, in particular, that we reconsider and reverse the August 17 decision on a variety of procedural grounds that all concern the timeliness of Governor Flyingman's appeal, which we have already considered and decided in our August 17 final opinion and order. (*See Supplemental Record*, Tab 11., pp. 2 – 12.)

Southwest urges as well, in its supplemental memorandum, that Governor Flyingman lacked standing to bring this appeal. (*See Supplemental Record*, Tab 16.) Without deciding the question, we doubt whether Governor Flyingman lacks standing. The Tribes' governor is an officer charged under the Tribes' constitution with a role to play in the adoption of any management contract. Be that as it may, this is certainly an argument that Southwest could have, but did not, raise when it intervened in this appeal.

Southwest urges, finally, that our final decision does not sufficiently defer to the August 17 decision of Tribes' Supreme Court. As the final decision explains at some length, as a matter of Federal Indian policy, it is inappropriate for the Commission to substitute its judgment for that of the Tribes' courts about the meaning and

interpretation of the Tribes' law. (*See Supplemental Record*, Tab 10, final decision, pp. 15-18.) That policy guided not only our decision but also the Chairman's prior decisions about the amended management contract between the Tribes and Southwest ("Amendment 11").

We waited until August 17 to enter our final decision and order for the express purpose of giving the Tribes' Supreme Court time to decide the validity of Amendment 11. When the Supreme Court decided on August 17 that Amendment 11 was not valid under tribal law, we made our decision accordingly.

Further, on May 16, 2007, the Chairman initially disapproved Amendment 11, reasoning that it was not adopted in accordance with the requirements of the Tribes' constitution. He recognized at the time, however, that that very question was pending in the Tribes' District Court. Accordingly, the Chairman wrote:

While I am prepared to reconsider this decision should the tribal court rule to the contrary, I am compelled, under my understanding of the NIGC regulations and tribal law, to disapprove the amendment to the contract.

(*See Administrative Record*, Tab 12, p. 5.) When the District Court found that Amendment 11 was properly adopted, (*see Administrative Record*, Tab 5, order), the Chairman reversed himself. (*See Administrative Record*, Tab 2, May 18, 2007, approval letter.)

The failure, then, to allow a tribal court to exercise its jurisdiction on a question of tribal law or to defer to a tribal court's decision once made may very well be an exceptional circumstance justifying reconsideration. We see no such failure here, however.

Southwest notes that though the Tribes' Supreme Court reversed the District Court and found that Amendment 11 was not properly adopted under the Tribes'

constitution, the Supreme Court stayed its decision until October 16, 2007. Southwest thus contends that the District Court's finding that Amendment 11 was valid was still in effect on August 17, 2007, the date of our decision, and that we should therefore properly have deferred to the District Court's order and affirmed the Chairman's approval of Amendment 11. (*See Supplemental Record*, Tab 11, motion pp. 12-13.) We disagree.

The Tribes' Supreme Court unequivocally held that Amendment 11 was invalid as of the entry of its order on August 17, 2007: "[I]n consequence, no valid gaming-management contract exists between Southwest and the Tribes *as of the date of the filing of this Opinion and Order.*" (*See Supplemental Record*, Tab 9, Supreme Court decision, p. 15.) (Emphasis added.) Contrary to Southwest's assertion, the Supreme Court did not stay that determination until October 16, 2007. Rather, it stayed any "enforcement of this Opinion and Order." *Id.* Thus, at the time we issued our final decision and order on August 17, Amendment 11 was not valid under tribal law. We properly deferred to the decision of the Supreme Court and reversed the Chairman's approval of Amendment 11.

Absent, then, any exceptional circumstance justifying reconsideration of our August 17 order, we decline to consider Southwest's motion for reconsideration.

We make only one other observation about the interplay, or absence thereof, between our August 17 final decision and order and the Supreme Court's August 17 stay. As the Supreme Court is the final constitutional arbiter of the Tribes' law, it would be inappropriate for the Commission to question the propriety or wisdom of the Court's stay, and we do not attempt to do so. At the same time, it is, of course, the Commission that is statutorily charged with the implementation and interpretation of the Indian

Gaming Regulatory Act ("IGRA") and with administrative appellate review of the Chairman's executive decisions. *See, e.g.*, 25 U.S.C. §§ 2706(10), 2713(a)(2), 2714.

The narrow question before the Commission on Governor Flyingman's appeal was the propriety of the Chairman's approval of Amendment 11. As the Tribes' Supreme Court determined that Amendment 11 was not validly adopted, we reversed the Chairman's approval. When the Commission entered its final decision and order on August 17, 2007, then, there was, as a matter of Federal law, no management contract between the Tribes and Southwest. Management contracts that are not approved by the NIGC Chairman are void. 25 C.F.R. § 533.7.

That being the case, the full Commission is not the proper body to consider a stay of the effectiveness of the August 17 final decision and order. Management of an Indian casino without an approved management contract is a violation of IGRA, and the decision whether to take action against such a violation is committed exclusively to the Chairman acting in his sound discretion. It is the Chairman, not the full Commission, whom IGRA charges with taking enforcement action against IGRA violations. 25 U.S.C. § 2705(a)(1)-(2).

II. IN ORDER THAT IT MAY MAKE ITS DECISION ON AS COMPLETE A RECORD AS POSSIBLE, THE COMMISSION SUPPLEMENTS THE RECORD BEFORE IT TO INCLUDE EVIDENCE, PRESENTED BY THE PARTIES FOR THE FIRST TIME, THAT GOVERNOR FLYINGMAN FILED HIS APPEAL BY FACSIMILE ON JUNE 15, 2007.

In reviewing and deciding this appeal, we have labored to make a decision based on as complete a record as possible. That was a significant reason behind allowing Southwest's motion to intervene. In responding to Southwest's reconsideration motion, the Chairman's counsel informs us that the record on which we based our decision was

not, in fact, complete. (*See Supplemental Record*, Tab 15, p. 7.) This circumstance appears before us now for the first time.

In reviewing the appeal and in rendering the August 17 final decision and order, we proceeded on the understanding that Governor Flyingman's notice of appeal, though dated June 14, 2007, was received and filed on June 18, 2007, as the date stamp on the notice indicates. (*See Supplemental Record*, Tab 1.) We note that the parties proceeded on this understanding as well, as June 18 was the date we indicated to them that the appeal was filed, from which we calculated 30 additional days for Governor Flyingman to submit his statement of reasons on appeal, and from which we calculated 60 days for our final decision and order. (*See Supplemental Record*, Tab 3.)

The Chairman's response provides evidence that Governor Flyingman also faxed his notice of appeal and that that fax was twice logged in as received in the Commission's Washington, D.C., offices on June 15, 2007. (*See Supplemental Record*, Tab 15, Exhibits 3 and 4.) Governor Flyingman's response contains a declaration from his executive secretary confirming that she twice faxed the notice of appeal on June 15. (*See Supplemental Record*, Tab 14, declaration of Susan Hart.)

Recognizing the importance of this matter to the Tribes and Southwest, and in keeping with our determination to decide this matter on as complete a record as possible, we treat the submission of this additional evidence as a motion to supplement the record, which we grant. We consider whether marking Governor Flyingman's appeal as first filed on June 15, 2007, has any effect on our August 17 final decision and order and conclude that it does not. Under the circumstances here, whether Governor Flyingman's appeal was filed on June 15 or June 18, 2007, has no consequence for the timeliness of his appeal or of our decision.

A. GOVERNOR FLYINGMAN TIMELY FILED HIS APPEAL, WHETHER THE COMMISSION RECEIVED HIS NOTICE OF APPEAL ON JUNE 15 OR JUNE 18, 2007.

The decision at issue in this appeal is the Chairman's May 18, 2007, approval of Amendment 11. Our regulations provide a period of 30 days in which to appeal that decision. 25 C.F.R. § 539.2. Thirty days from May 18, 2007, is June 17, 2007. Obviously, an appeal filed on June 15 – twenty-eight days later – is timely filed within the prescribed 30 days. As June 17, 2007, was a Sunday, an appeal filed on June 18 is likewise timely filed.

Though part 539 of our regulations is silent on the question of how weekends and holidays are treated for questions of filing and service of process, other sections are not and speak directly to the question:

In computing any period of time prescribed for filing and serving a document, the first day of the period so computed shall not be included. The last day shall be included unless it is a Saturday, Sunday, or federal legal holiday, in which case the period shall run until the end of the next business day.

25 C.F.R. § 577.6(e). We regard this as the applicable rule here. To do otherwise would create a purposeless inconsistency within our own regulations. It would also be inconsistent with what we understand to be the near-universal practice. Our regulation is modeled upon the analogous provision of the Federal Rules of Civil Procedure:

In computing any period of time prescribed or allowed by these rules..., the day... from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday... in which event the period runs until the end of the next day which is not one of the aforementioned days.

Fed. R. Civ. P. 6(a).

Accordingly, as the 30th day following May 18, 2007, was Sunday, June 17, 2007, the period for appeal from the Chairman's May 18 approval ran until the end of the next

business day, Monday, June 18, 2007, the date we regarded Governor Flyingman to have filed his appeal in our August 17, 2007, final decision and order.

- B. THE COMMISSION WAIVES STRICT COMPLIANCE WITH THE 60-DAY REQUIREMENT OF 25 C.F.R. § 539.2 BECAUSE ALL OF THE PARTIES PROCEEDED AS IF GOVERNOR FLYINGMAN FILED HIS APPEAL ON JUNE 18, 2007, BECAUSE DOING SO WILL CREATE NO PREJUDICE, AND BECAUSE DOING SO WILL MAKE THE RECORD ON APPEAL NO LESS COMPLETE FOR THE COMMISSION OR FOR A COURT UPON ANY EVENTUAL JUDICIAL REVIEW.

Part 539 provides the Commission with 30 days after receipt of a notice of appeal to issue a decision, or 60 days if the appellant consents to the additional time. 25 C.F.R. § 539.2. Governor Flyingman consented to the 60-day time period here. (*See Supplemental Record*, Tab 6.)

If, then, Governor Flyingman filed his notice of appeal on June 18, our August 17, 2007, final decision and order was timely entered 60 days later. If the appeal was filed on June 15, then our decision was entered 63 days later. We regard the 60-day deadline as another of the species of procedural regulations for the orderly conduct of business before the Commission that may be waived in appropriate circumstances, absent prejudice. We waive strict compliance with the deadline under the circumstances here, where all concerned treated this appeal as filed on June 18 and the June 15, 2007, faxed filing came to light only after we entered our final decision and order.

We note again that an administrative agency has the *ad hoc* power to relax its procedural rules in order to promote the orderly conduct of business before it and when the interests of justice so require. *American Farm Lines v. Black Ball Freight Soc.*, 397 U.S. 532, 539 (1970); *National Labor Relations Bd. v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir. 1953). This rule applies with “especial force” in cases before agencies that act in the public interest. *Monsanto Chemical*, 205 F.2d at 764. The Commission is such an

agency. We are charged by Congress with the Federal regulatory role under IGRA, “the statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments,” and Congress determined that the creation of the Commission was necessary for protecting Indian gaming as a means of generating tribal revenue. 25 U.S.C. § 2702(1)-(2).

There are, of course, limitations to an agency’s ability to waive a procedural rule. The waiver must not prejudice the public, prevent the agency from making a complete and informed determination, or prevent judicial review of the same. *American Farm Lines*, 397 U.S. at 538. We do not see how entering our decision, which we have based on as complete a record as possible, 63 days after the filing of the notice of appeal rather than 60 days prevents in any way our informed determination or judicial review.

Likewise, we do not see any prejudice resulting from a waiver here. As we have said, we have permitted all interested parties to participate in the appeal, even when our regulations do not provide for such participation. These are not circumstances such as those that occurred in *Alamo Express, Inc. v. United States*, 613 F.2d 96 (5th Cir. 1980). There, the Fifth Circuit invalidated an Interstate Commerce Commission (ICC) grant of temporary authority to a carrier to transport auto parts, which it made without notification to existing carriers as its procedural regulations required. *Id.* at 97.

The Fifth Circuit rejected the ICC’s argument that this procedural requirement was waivable. The court found that the waiver prejudiced the existing carriers not just financially but also by excluding them from the ICC’s decision-making process. Further, because of the carriers’ exclusion, the ICC’s decision-making process itself suffered: “the likelihood of an informed finding of need is substantially diminished.” *Id.*

Further, we find no prejudice resulting from a waiver here, notwithstanding that 25 C.F.R. § 539.2 provides that the Chairman's decision is automatically affirmed if the Commission does not act. Given that a management contract not approved by the Chairman is void, 25 C.F.R. § 533.7, the purpose of the deadline in § 539.2 is to ensure swift action by the Commission. This ensures that an appeal does not languish without action by the Commission and that interested parties do not suffer for the absence of a decision, a state of affairs that in the worst cases can continue for years before Federal agencies. Viewed on that time scale or even on any commercially reasonable time scale, 63 days is no less swift than 60, and an aggrieved party may seek immediate review in Federal court using either measure. 25 U.S.C. § 2714.

Given the foregoing, our August 17, 2007 final decision and order was timely made, whether Governor Flyingman filed his appeal on June 15 or June 18, 2007.

III. TECHNICAL CORRECTIONS

In reviewing our August 17 final decision and order in preparation for issuing this supplemental one, we noticed a few technical and typographical errors that we hereby correct.

A. CORRECTION #1

Add the inadvertently omitted words "Supreme Court" immediately following "Tribes" on page 7, line 2.⁴

B. CORRECTION #2

Correct the typographical error in "defers" in heading B, page 15.⁵

⁴ The amended sentence reads: "Governor Flyingman appealed this decision to the Tribes' Supreme Court."

⁵ The amended heading reads: "The Commission defers to the interpretation of tribal law by the Cheyenne and Arapaho Supreme Court."

C. CORRECTION #3

Delete the comma immediately following “conclude” on page 18, line 15.⁶

D. CORRECTION #4

Add the inadvertently omitted word “not” immediately following “having” and “was” in lines 1 and 2, respectively, of heading D, page 20.⁷

E. CORRECTION #5

Correct the inadvertently mistaken cross-reference “(See *Administrative Record*, Tab 51)” to “(See *Supplemental Record*, Tab 9)” on page 21, lines 4 and 9-10.

CONCLUSION

Given all of the foregoing, the Commission chooses not to consider Southwest Casino and Hotel Corporation’s motion for reconsideration. As supplemented and modified herein, the August 17, 2007, final decision and order remains in full force and effect.

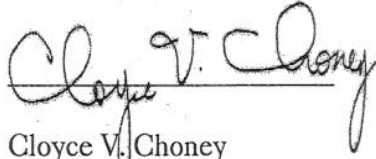
⁶ The amended sentence reads: “Given all of this, we defer to the decision of the Tribes’ Supreme Court and conclude that Amendment 11 was not properly authorized under the Tribes’ constitution.”

⁷ The amended heading reads: “Amendment 11, having not been properly authorized under the Cheyenne and Arapaho constitution, was not properly submitted to the Chairman for his review and approval.”


It is so ordered by the National Indian Gaming Commission, this 28th day of August,
2007.



Philip N. Hogen
Chairman



Cloyce V. Choney
Commissioner



Norman H. DesRosiers
Commissioner

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August, 2007, I served a copy of the foregoing **SUPPLEMENTAL DECISION AND ORDER** by facsimile and by certified mail, return receipt requested, upon the following:

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