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**	**Final decision and order** **August 17, 2007**

On appeal to the National Indian Gaming Commission (NIGC or Commission) from an approval by the NIGC Chairman of a gaming management contract between the Cheyenne and Arapaho Tribes of Oklahoma and Southwest Casino and Hotel Corporation, 25 U.S.C. § 2711.

FINAL DECISION AND ORDER

After careful and complete review of the agency record; a statement of reasons on appeal filed by Darrell Flyingman, Appellant and Governor of the Cheyenne and Arapaho Tribes of Oklahoma (Tribes); and a motion to intervene by Southwest Casino and Hotel Corporation (Southwest), the Commission finds and orders that:

1. Governor Flyingman timely filed this appeal, but did so mistakenly under 25 C.F.R. part 577 instead of 25 C.F.R. part 539.

2. In the interests of justice, the Commission chooses to decide this appeal on the merits, and thus strict compliance with the filing deadline under 25 C.F.R. § 539.2 for Governor Flyingman's statement of reasons and supporting documentation is waived.

3. In the interests of justice, and as the Commission chooses to decide this appeal on as complete a record as possible, Southwest's motion to intervene is granted.

4. Southwest's motion for summary affirmance on the ground that Governor Flyingman's appeal was not timely or properly filed is denied because the Commission has waived strict compliance with 25 C.F.R. § 539.2.

5. Southwest's motion for summary affirmance on the ground that the Commission's review is strictly limited to the record before the Chairman is denied because 25 C.F.R. § 539.2. does not thus limit the Commission's review.

6. 25 U.S.C. § 2711 requires the NIGC Chairman's approval for gaming management contracts between Indian tribes and their management contractors.

7. In April 2007, the Tribes, by their Speaker of the First Legislature, Ida Hoffman, submitted an amendment to the Third Amended and Restated Gaming Management Agreement between the Tribes and Southwest, the so-called "Amendment 11."

8. Amendment 11 was signed by Southwest's CEO and by Ms. Hoffman, in apparent contradiction to the requirements of the Tribes' constitution, Art. VII, sec. 4(c).

9. The Tribes' District Court, in *In re the Execution of Casino Gaming Management Contract with Southwest Casino and Hotel Corp.,* CNA-CIV-07-27, determined that the action taken by the Legislature in ratifying Amendment 11 "was in accordance with the March 31, 2007, Resolution and the Constitution."

10. In approving Amendment 11, the Chairman properly deferred to the District Court's interpretation of the Tribes' constitution, in accordance with Federal Indian policy.

11. On August 17, 2007, the Cheyenne and Arapaho Supreme Court overruled the District Court decision in *In re the Execution of Casino Gaming Management Contract with Southwest Casino and Hotel Corp.,* CNA-CIV-07-27. The Supreme Court held that Amendment 11 was not validly entered into by the Tribes because Amendment 11 was not signed by the Governor and that the actions of the Legislature with regard to the contracts with Southwest were invalid and ineffective under the Constitution to cause any such contracts to be valid.

12. Amendment 11 was not properly submitted to the Chairman under 25 C.F.R. § 535.1(c) because following the decision of the Cheyenne and Arapaho Supreme Court, Speaker Hoffman is not an authorized official of the Tribes and did not have authority to act on behalf of the Tribes.

13. The Chairman's May 18, 2007, approval of Amendment 11 is reversed.

STATUTORY, FACTUAL AND PROCEDURAL BACKGROUND

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et seq.*, deems 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). In order to address its concerns, Congress 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, Congress granted the NIGC Chairman the power and authority to approve gaming management contracts, 25 U.S.C. §§ 2705(4), 2710(d)(9), and set out various statutory criteria for approving and disapproving contracts. 25 U.S.C. § 2711(b), (e). Congress, for example, limited management fees to 30% of net gaming revenue – 40% in special cases when permitted by the Chairman on petition from a tribe. 25 U.S.C. § 2711(c). Management contracts that have not been approved by the Chairman are void. 25 C.F.R. §533.7. *First American Kickapoo Operations, LLC. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1168 (10th Cir. 2005).

In April 2006, the Cheyenne and Arapaho Tribes ("Tribes") adopted a new constitution that establishes four branches of government: the Tribal Council, the Legislature, the Executive, and the Judicial. (*See Administrative Record*, Tab 13, Const. of the Cheyenne and Arapaho Tribes, Art. II, § 2.)[1] As a general matter, the new

[1] "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.

constitution delegates specific powers to each branch. In particular, it addresses gaming management contracts by requiring authorization by the Tribal Council, negotiation and a signature by the Tribes' governor, and ratification by the tribal legislature:

> The Governor shall have the power to negotiate and sign a treaty, compact, or gaming management contract which has been previously and specifically authorized by the Tribal Council. No treaty, compact, or gaming management contract shall be valid which has not been previously authorized by the Tribal Council. Any treaty, compact, or gaming management contract signed by the Governor shall be subject to ratification by the Legislature.

(*See Administrative Record*, Tab 13, Constitution, Art. VII, Sec. 4(c).)

On February 24, 2007, the Tribal Council considered a resolution to authorize the Tribes' Governor, Darrell Flyingman, the Appellant here, to negotiate and sign an amended management agreement with Southwest. At the time, Southwest was the manager of the Tribes' gaming operations and had been for a number of years. The amendment would extend their existing contract, which was due to expire on May 19, 2007, and Southwest had proposed the amended terms to the Tribal Council in a meeting of November 18, 2006. (*See Administrative Record*, Tab 16, May 14, 2007, letter of David Bearshield, Tribal Council Coordinator; Tab 24, Exhibit A, March 31 Tribal Council resolution.) Final approval by the Tribal Council would be contingent on a subsequent vote to be held on March 31, 2007. (*See Administrative Record*, Tab 16.)

On that day, the Tribal Council held a special meeting. (*See Administrative Record*, Tab 25, Exhibit C, resolution for special meeting.) It there adopted a resolution authorizing and directing Governor Flyingman to sign and enter into an extension of the gaming management contract with Southwest. The resolution also would require the contract to reduce the fee paid to Southwest from 20% of net revenue for the first $28

million earned to 15% of the first $28 million and 10% of net revenue for amounts in excess of $28 million. (*See Administrative Record*, Tab 16.)

The contract extension was a matter of strong political dispute within the Tribes. The Governor had made known his opposition to Southwest and to any proposed amendment and extension. He made known as well his refusal to execute any amendment. (*See Administrative Record*, Tab 14, March 2, 2007, letter from Governor Flyingman to Southwest.) Accordingly, the Tribal Council's March 31 resolution also authorized and directed the Tribes' legislature to ratify the amendment "if the Governor fails to sign and enter into the contract(s) or extension(s) as directed in these resolutions…." (*See Administrative Record*, Tab 24, Exhibit A.)

On April 3, 2007, the Governor filed a challenge to the constitutionality of the March 31 resolution, and thus to the validity of the adoption of the amended management contract, in the Tribes' District Court. *In re the Execution of Casino Gaming Management Contract with Southwest Casino and Hotel Corp.,* CNA-CIV-07-27. (*See Administrative Record*, Tab 37, April 3, 2007, declaratory judgment pleadings.)

The Governor did not in fact sign the amended contract as directed by the March 31 resolution. Instead, on April 14, 2007, Ida Hoffman, the Speaker of the First Legislature, signed the amendment. This "Amendment No. 11" extended the Southwest management contract for two years until May 19, 2009, and set Southwest's fee still lower at 10% of net revenue up to $28 million and 15% of net revenue over $28 million. The First Legislature ratified Amendment 11 and deemed it signed by the Governor. (*See Administrative Record*, Tab 33, contract amendment.) Amendment 11 was submitted for

the Chairman's review and approval shortly thereafter, both by Speaker Hoffman and by Southwest. (*See Administrative Record*, Tab 33, and Tab 30, Southwest submission.)

Since Amendment 11 did not contain the Governor's signature as required by the Tribes' constitution, the NIGC inquired with the Tribes about the propriety of Speaker Hoffman's signature. (*See Administrative Record*, Tab 22, May 7, 2007, letter from Elaine Trimble-Saiz.) Speaker Hoffman replied that she had authority to sign contracts in compliance with NIGC regulations and tribal law. (*See Administrative Record*, Tab 19, May 9, 2007, letter.)

On May 16, 2007, reasoning that Amendment 11 was not executed in accordance with the requirements of the Tribes' constitution, the NIGC Chairman disapproved it. (*See Administrative Record*, Tab 12, disapproval letter.) The Chairman's disapproval recognized that Governor Flyingman's declaratory judgment action was still pending. 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.)

On May 18, 2007, the Tribes' District Court issued an order in *In re the Execution of Casino Gaming Management Contract*, finding that the Tribal Council's March 31 resolution and the execution of Amendment 11 were valid under the Tribes' constitution. (*See Administrative Record*, Tab 5, order.) In particular, the court found that Governor Flyingman had negotiated the terms of Amendment 11, as the Tribes' constitution requires; that he did not have to sign the contract, a mere ministerial requirement; and that the action taken by the First Legislature in ratifying Amendment 11 "was in

accordance with the March 31, 2007, Resolution and the Constitution." *Id.* Governor Flyingman appealed this decision to the Tribes'. (*See Supplemental Record,* Tab 1, notice of appeal and attachment.)

Also on May 18, deferring to the decision of the District Court, the Chairman reversed his previous decision and approved Amendment 11. (*See Administrative Record* Tab 2, approval letter.) Recognizing the pending decision of the Supreme Court, he wrote: "[I]f the tribal court order is reversed on appeal, I would have to reconsider my approval and may void the contract." *Id.*

On June 14, 2007, the Governor filed the present appeal. (*See Supplemental Record,* Tab 1, notice of appeal.) On July 31, 2007, Southwest moved to intervene. (*See Supplemental Record*, Tab 8, motion to intervene.) On August 17, 2007, the Supreme Court overturned the District Court's decision. This decision followed.

DISCUSSION

I. PROCEDURAL MATTERS

A. THOUGH GOVERNOR FLYINGMAN DID NOT INITIALLY MEET ALL OF THE FILING REQUIREMENTS NECESSARY TO PERFECT HIS APPEAL, THE COMMISSION CHOOSES, IN THE INTERESTS OF JUSTICE, TO WAIVE STRICT COMPLIANCE AND DECIDE THIS APPEAL ON ITS MERITS RATHER THAN DISMISS IT ON PROCEDURAL GROUNDS.

As a preliminary matter, we note that Governor Flyingman filed this appeal under 25 C.F.R. part 577 rather than 25 C.F.R. part 539. (*See Supplemental Record*, Tab 1, notice of appeal.) Part 577 is inapplicable here. By its terms, part 577 applies to appeals from notices of violation brought by the NIGC Chairman; from proposed civil fine assessments for violations of IGRA, NIGC regulations, or approved tribal gaming

ordinances; from the Chairman's orders of temporary closure; and from "an order voiding or modifying a management contract subsequent to initial approval." 25 C.F.R. § 577.1(a)(1)-(4). This last refers to those situations where the Chairman acts under 25 U.S.C. § 2711(f) to void, or to require a modification of, an existing management contract that does not comply with the requirements of IGRA. By contrast, an appeal from the Chairman's approval or disapproval of an amendment to a management contract that arises in the ordinary course of business between a tribe and a gaming manager is brought under 25 C.F.R. part 539, which sets out this distinction:

> This part applies to appeals from the Chairman's decision to approve or disapprove a management contract under this subchapter, except that appeals from the Chairman's decision to require modification of or to void a management contract subsequent to his or her initial approval are addressed in part 577 of this chapter.

25 C.F.R. § 539.1.

The appellate procedures envisioned by parts 577 and parts 539 are different. Part 577 requires an initial notice pleading in the form of a notice of appeal, followed no more than ten days thereafter by a detailed supplemental statement "that states with particularity the relief desired and the grounds therefor and that includes, when available, supporting evidence in the form of affidavits." 25 C.F.R. 577.3(c). An appellant may also request a hearing and present testimony before a hearing official, who has the authority to regulate the course and schedule of the hearing and to rule on evidentiary and procedural motions. 25 C.F.R. § 577.7(a), (b). In short, part 577 contemplates an adversarial, evidentiary appellate proceeding suited to reviewing actions by the Chairman taken in many complicated and varied factual settings.

Part 539, by contrast, applies only to appeals from the Chairman's approval or disapproval of a management contract. It contemplates a summary determination by the Commission on a written record. This format is better suited to the review of the narrow question of whether the Chairman properly observed IGRA's requirements for approving or disapproving management contracts, 25 U.S.C. § 2711(b), (e). Accordingly, part 539, unlike part 577, provides for an accelerated schedule.

Part 539 makes no provision for notice pleading. Rather, it requires the appellant to file a notice of appeal and, at the same time, a statement that sets out the reasons why the Chairman erred and that may attach supporting documents: "An appeal under this section shall specify the reasons why the person believes the Chairman's determination to be erroneous, and shall include supporting documentation, if any." 25 C.F.R. § 539.2. The Commission is then required to issue its decision within 30 days, or 60 if the appellant consents to the additional time. *Id.*

Here, because Governor Flyingman filed his appeal under 25 C.F.R. part 577 and not under part 539, he filed only a notice of appeal and omitted a statement of reasons and supporting documentation. Instead, he sought leave for additional time to file the supplemental statement required by part 577. (*See Supplemental Record*, Tab 1.) He reasoned that additional time would give the Tribes' Supreme Court an opportunity to decide his appeal in *In re the Execution of Casino Gaming Management Contract* and thus address an issue central to the determination of this appeal, namely whether Amendment 11 was properly executed under tribal law. *Id.*

As a technical matter, then, Governor Flyingman's appeal does not comply with the requirements of 25 C.F.R. § 539.2, and thus we could bar his appeal on this

procedural ground alone. *Id.* ("Failure to file an appeal within the time provided by this section shall result in a waiver of the opportunity for an appeal.") We decline, however, to do so.

First, under the circumstances presented here, the procedural non-compliance is a slim reed upon which to hang a dismissal. Notwithstanding the absence of a formal statement of reasons, the notice of appeal makes clear, if generally, the reason Governor Flyingman believes the Chairman's approval of Amendment 11 was in error. The approval, he argues, was contrary to IGRA and tribal law, *i.e.*, that Amendment 11 was not properly approved under the Tribes' constitution and therefore the Chairman approved an invalid contract. (*See Supplemental Record*, Tab 1.)

Next, there is no indication in the record before us that the Governor's reliance on part 577 rather than part 539 was done in anything other than good faith. Finally, the record reveals the importance of Amendment 11 to the Tribes. It indicates not only that the extension of Southwest's contract is a sharply contested political and legal issue, (*see, e.g., Administrative Record*, Tabs 14, 16, 24 Exhibit A, 37), but also that the failure of the management contract would obligate the Tribes, on short notice, to run their casinos themselves after years of employing an experienced manager. (*See, e.g., Administrative Record*, Tab 9, May 17, 2007, letter to Chairman Hogen requesting technical assistance for the transition to tribal operation.) Accordingly, we will decide this appeal on its merits.

As a general matter, an agency is free to waive procedural regulations such as internal filing deadlines to promote the orderly transaction of the agency's business, if doing so does not prejudice the public, prevent the agency from making a complete and

informed determination, or prevent judicial review of the same. *American Farm Lines v. Black Ball Freight Svc.*, 397 U.S. 532, 538 (1970).

Thus, in *American Farm Lines*, the former Interstate Commerce Commission (ICC) had the statutory ability to issue what it called "temporary operating authority" to a freight carrier, without a hearing or any other proceedings, in what were effectively emergency circumstances. The operating authority had to relate to a "service for which there is an immediate and urgent need" and where there is "no [existing] carrier service capable of meeting such need." *Id.* at 533-534. The ICC processed applications for temporary operating authority under the former 49 C.F.R. part 1131.

Among other things, those rules required that an applicant provide supporting statements of shippers that contain information "designed to establish an immediate and urgent need for service which cannot be met by existing carriers." *Former* 49 C.F.R. § 1131.2(c). In particular, a supporting statement had to contain some 11 items of information, including whether the shipper made efforts to obtain service from existing motor, rail, or water carriers; the dates and results of such efforts; the names and addresses of existing carriers who failed or refused to provide the service; and the reasons given for any such failure or refusal. *Former* 49 C.F.R. § 1131.2(c); *American Farm Lines*, 397 U.S. at 534.

American Farm Lines applied for temporary operating authority and received it over the objections of numerous other carriers. In the Supreme Court, these other carriers argued that the ICC's grant of authority was improper because it failed to follow its own regulations. Specifically, while American Farm Lines' application was supported by a statement of an official of the Department of Defense (DoD), his statement did not detail

the DoD's efforts to secure service from other carriers or the names and addresses of other carriers that refused service. *Id.* at 537.

The Supreme Court, however, found that the ICC could waive this requirement. The application regulations were promulgated for the purpose of providing the ICC with information necessary to make an "informed and equitable decision" when acting on applications for temporary authority. *Id.* at 538. Notwithstanding the statement's omission, the ICC had sufficient information to act. The record supported the ICC's finding that American Farm Lines' service was required to meet DoD's immediate and urgent transportation needs, and it was sufficient to allow judicial review of the ICC's decision. *Id.* Moreover, the waiver did not prejudice the interested public. "The briefest perusal of the objecting carriers' replies, which cover some 156 pages in the printed record of these appeals, belies any such contention." *Id.*

Accordingly, the Supreme Court concluded that the ICC's waiver fell within the general rule that it is always within the discretion of an administrative agency to relax or modify procedural rules adopted for the orderly transaction of business before it when, in a given case, the ends of justice require it. *Id.* at 539. So too here.

Our ability to decide this case on its merits is helped, rather than hindered, by waiving strict compliance with the one procedural requirement of 25 C.F.R. § 539.2 that Governor Flyingman missed – submitting a statement of reasons and documentation showing why he believed the Chairman erred in approving Amendment 11. Giving Governor Flyingman a reasonable time for this submission makes the record before us, and before any Court should the litigation continue that far, that much more robust and complete. Likewise, we fail to see how complete consideration of the matter before us

would prejudice any other party with an interest in the outcome here. Allowing a reasonable time to submit a statement of reasons places the case in no different posture than if Governor Flyingman had filed his appeal under 25 C.F.R. part 539 in the first place.

Accordingly, shortly after we received the notice of appeal, we directed our appellate counsel to have Governor Flyingman correct the improper filing. We granted him 30 days from the date of his notice of appeal, until July 18, 2007, to file a statement of reasons and documentation. (*See Supplemental Record*, Tab 3, June 26, 2007, letter.) In light of the request for additional time in the Governor's notice of appeal, we sought his consent, pursuant to 25 C.F.R. § 539.2, for an additional 30 days to issue our decision. Governor Flyingman timely filed his statement of reasons and documentation and consented to our request for additional time. (*See Supplemental Record*, Tab 6, letter, and Tab 7, statement of reasons.)

B. THOUGH APPLICABLE REGULATIONS DO NOT PROVIDE FOR IT, THE COMMISSION CHOOSES, IN THE INTERESTS OF JUSTICE, TO GRANT SOUTHWEST'S MOTION TO INTERVENE IN THIS APPEAL.

On July 31, 2007, Southwest filed a motion to intervene in this appeal and respond to Governor Flyingman's statement of reasons and supporting documents. It argues that it may intervene as of right under Fed. R. Civ. P. 24(a) or, in the alternative, that it should be permitted to intervene under Fed. R. Civ. P. 24(b). Neither rule provides Southwest with grounds to intervene, however, as neither rule is applicable. The Federal Rules of Civil Procedure, by their terms, apply only to "govern the procedure in the United States district courts in all suits of a civil nature, whether cognizable as cases at law or in equity or in admiralty…." Fed. R. Civ. P. 1. They are also applicable to

proceedings that arise out of various statutes, but the Indian Gaming Regulatory Act is not one of them. Fed. R. Civ. P. 81.

Southwest's ability to intervene is governed by the Commission's regulations, and again the differences between parts 577 and 539 inform our action. The extended adversarial process envisioned by part 577 explicitly contemplates intervention by interested parties, and it thus provides both grounds for and a mechanism for intervention. 25 C.F.R. § 577.12.

The summary proceeding envisioned by part 539, by contrast, does not contemplate, and is silent about, intervention. It provides neither grounds for intervening nor a mechanism for doing so. We could, therefore, deny the motion to intervene on this procedural point alone. In the interests of justice, however, we decline to do so, and we grant the motion.

Again, we are free to waive procedural regulations to promote the orderly transaction of the agency's business, if doing so does not prejudice the public, prevent us from making a complete and informed determination, or prevent judicial review of our decision. *American Farm Lines*, 397 U.S. at 538. Indeed, such a waiver is not reviewable except upon a showing of substantial prejudice to the complaining party. *Id.* at 539.

Here, we opt to allow Southwest to intervene and respond to Governor Flyingman's statement to again make the record that much more robust and to strengthen our own decision-making. As the resolution of the case before us is of great importance to the Tribes, we do not see how considering Southwest's response, while remaining within the 60 days allowed under 25 C.F.R. § 539.2 for making a decision, can work prejudice on anyone. Southwest's motion to intervene is therefore granted.

II. SUBSTANTIVE MATTERS

A. STANDARD OF REVIEW

Fundamentally, Governor Flyingman advances only one reason why the Chairman erred in approving Amendment 11 and extending for two years the management contract between the Tribes and Southwest. Amendment 11, he contends, was not properly authorized under the Tribes' constitution and is not a valid contract that the Chairman could have approved.[2] The propriety of the Chairman's approval, then, turns on a question of law, and our review is *de novo*.

Standards of review for administrative appeals within an agency are set by statute or regulation. *See, e.g.*, 5 U.S.C. § 557(b); *NLRB v. A.P.W. Products*, 316 F.2d 899, 904 (2nd Cir. 1963); *In Re S.H.*, 23 I. & N. Dec. 462 (Dep't. of Justice, Board of Immigration Appeals, Sept. 12, 2002); *Windsor Health Care Ctr. v. Ctrs. for Medicare and Medicaid Svcs.*, DAB No. 1902 (Dep't. of Health and Human Svcs., Dec. 22, 2003). Having no such standard mandated by IGRA, and having promulgated no such regulations, we choose to follow the common practice and review questions of law *de novo*. *See, e.g.*, *Birdtail v. Rocky Mtn. Reg. Dir., Bureau of Indian Affairs*, 45 IBIA 1, 5 (2007).

B. THE COMMISSION DEFERRS TO THE INTERPRETATION OF TRIBAL LAW BY THE CHEYENNE AND ARAPAHO SUPREME COURT.

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[2] Governor Flyingman does not challenge the propriety of the Chairman's approval because of anything that Amendment 11 contains. That issue is thus not before us. In any event, Amendment 11 provides only for a two-year extension of the existing gaming management contract and a reduction in Southwest's fee. As the Chairman found, its contents meet the requirements for approval of 25 U.S.C. § 2711.

Similarly, Governor Flyingman does refer, in passing, to investigations into Southwest's alleged undue influence on the Tribes' government. (*See Supplemental Record*, Tab 7 Exhibit B, p. 3; Exhibit D, pp. 8, 39). He does not, however, argue that the Chairman should have disapproved Amendment 11 under 25 U.S.C. § 2711(e)(2), which provides for mandatory disapproval upon a finding that the "management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity." As such, that question is also not before us, and any such investigations by the NIGC will proceed separate and apart from this appeal.

By this appeal, Governor Flyingman seeks to relitigate the question of whether Amendment 11 was properly authorized under the terms of the Tribes' constitution. He argues that the Chairman erred in approving Amendment 11 because it was not properly authorized or executed under tribal law, the decision of the Tribes' District Court to the contrary in *In re the Execution of Casino Gaming Management Contract with Southwest Casino and Hotel Corp.* notwithstanding. His statement of reasons incorporates and reiterates all of the arguments he has made both before the Tribes' District Court and before the Tribes' Supreme Court in that case: "As presented in our Statement of Reasons… we respectfully incorporate by reference the substantive arguments contained in each of the exhibits presented herein." (*See Supplemental Record*, Tab 7 and Tab 7 Exhibits B – E.) Although we conclude that the Chairman was correct in deferring to the May 18, 2007, decision of the District Court, the Cheyenne and Arapaho Supreme Court has since overturned the District Court's decision. The Commission defers to the Supreme Court's decision.

For the Commission to do otherwise would be to substitute its judgment about the proper meaning and interpretation of tribal law for that of the Supreme Court. As a matter of Federal Indian policy, that is inappropriate.

The Federal government's longstanding policy is to encourage tribal self government, and numerous statutes, including IGRA, embody this policy. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); 25 U.S.C. § 2702(1) ("The purpose of this chapter is to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal

governments"). Tribal courts play a vital role in tribal self government, and the Federal government has consistently encouraged their development. *Iowa Mutual*, 480 U.S. at 15.

As a matter of practice, Federal courts hold that the exercise of Federal jurisdiction over matters relating to internal tribal affairs can impair the authority of tribal courts, and thus considerations of comity direct that tribal remedies should be exhausted before a question is addressed in Federal district court. *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 857 (1985). The same policy considerations apply here, and the Commission will thus defer to the determinations of the tribal courts about the meaning and proper interpretation of Cheyenne and Arapaho law.

Governor Flyingman contends that the decision of the District Court was not properly before the Chairman. Speaker Hoffman, he contends, acted beyond the scope of her constitutional authority and thus lacked standing to request of the Chairman, as she did on May 18, 2007, that he reconsider his May 16 disapproval of Amendment 11. Speaker Hoffman made her request on the basis of the District Court's decision. (*See Administrative Record*, Tab 3.)

We need not decide the question of Speaker Hoffman's standing. The Chairman was aware when he issued his May 16, 2007, disapproval that *In re the Execution of Casino Gaming Management Contract* was pending in the Tribes' District Court. He thus specifically stated he might reconsider his disapproval if the District Court were to conclude that Amendment 11 was properly authorized:

> 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.) The Chairman's May 18, 2007, reconsideration, then, arose *sua sponte* (whether or not it also arose out of Speaker Hoffman's request), something the Chairman was well within his power to do. *Trujillo v. General Elec. Co.,* 621 F.2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider.") *Albertson v. Federal Communications Comm'n*, 182 F.2d 397, 399 (D.C. Cir. 1950) ("The power to reconsider is inherent in the power to decide … in the absence of any specific limitation"). Beyond this, the District Court's decision is properly within the full Commission's consideration on this appeal, for we may take judicial notice of it. *See, generally*, 5 U.S.C. § 556(e). However, since the District Court decision was issued, the Tribe's Supreme Court has overruled that decision and the Supreme Court's holding is also properly before this Commission.

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.

C. SOUTHWEST'S MOTION FOR SUMMARY DISPOSITION IS DENIED.

Southwest's response to Governor Flyingman's statement of reasons is a motion for summary affirmance for which it offers two arguments in support. On the one hand, Southwest contends that the Commission should affirm the Chairman's approval of Amendment 11 because Governor Flyingman failed to properly and timely file this appeal. On the other hand, Southwest argues that the Commission must affirm because its review is limited to the record before the Chairman, and the decision of the Tribes' District Court is dispositive therein. We find neither argument persuasive.

i. THE COMMISSION HAS WAIVED STRICT COMPLIANCE WITH THE FILING REQUIREMENTS OF § 539.2 IN THIS APPEAL

For all of the reasons stated in section I.A. of this decision, Southwest's motion for summary affirmance on the ground that this appeal was not timely filed is denied.

ii. UNDER THE PLAIN TERMS OF 25 C.F.R. § 539.2, THE COMMISSION'S REVIEW IS NOT STRICTLY LIMITED TO THE RECORD BEFORE THE CHAIRMAN.

Southwest argues that the District Court's decision must be dispositive because that decision was part of the record before the Chairman and because our review is necessarily limited to that record under 25 U.S.C. part 539. With this, we disagree.

Part 539 contemplates a summary proceeding, but it does not, by its terms, strictly limit the Commission to the record that was before the Chairman when deciding to approve or disapprove a management contract. We reject that reading of part 539 for two equally sufficient reasons.

First, reading 25 C.F.R. § 539.2 in this way is inconsistent with its plain and unambiguous terms. Again, that section specifically requires that "an appeal under this section shall specify the reasons why the person believes the Chairman's determination to be erroneous, and shall include supporting documentation, if any." 25 C.F.R. § 539.2. A reading that permits an appellant only to submit documentation that the Chairman already considered makes the requirements of § 539.2 meaningless. The appellant ceases to be a party advocating for his or her position and is relegated instead to a superfluous administrative support staffer for the Commission, able to provide only such documentation as the Commission already has.

Second, reading § 539.2 to preclude any document that was not originally before the Chairman would prevent the Commission from considering material that was not, but

should have been, before the Chairman. It would prevent the Commission, in short, from fully and properly performing its appellate function.

In short, nothing in 25 C.F.R. part 539 confines our review as Southwest would have it. The motion for summary affirmance on the ground that Governor Flyingman's statement of reasons must fall outside of our consideration is denied.

D. AMENDMENT 11, HAVING BEEN PROPERLY AUTHORIZED UNDER THE CHEYENNE AND ARAPAHO CONSTITUTION, WAS PROPERLY SUBMITTED TO THE CHAIRMAN FOR HIS REVIEW AND APPROVAL.

Finally, NIGC regulations put in place submission requirements for the Chairman's review and approval of amended management contracts. Some of these requirements are designed to ensure that the amended contract submitted was properly authorized by the tribal government. Thus, submission of the following is required:

(1) the amendment containing "original signatures of an authorized official of the tribe and the management contractor;"

(2) a letter "signed by the tribal chairman, setting out the authority of an authorized tribal official to act for the tribe concerning" the amendment; and,

(3) copies of documents evidencing the authority of an authorized tribal official to act for the tribe.

25 C.F.R. § 535.1 (c)(1)-(3). The submission of Amendment 11 failed to satisfy these requirements.

First, in April 2007, NIGC received a copy of the Amendment 11 with the original signatures of Ida Hoffman, Speaker of the First Legislature, and the CEO of Southwest. Speaker Hoffman is an elected official of the Tribes but, pursuant to the Supreme Court's holding in *In re the Execution of Casino Gaming Management*

Contract, was not authorized to sign Amendment 11. The Supreme Court found that the action taken by the Tribes' Legislature in ratifying Amendment 11 "was invalid and ineffective under the Constitution to cause any such contracts to be valid." (*See Administrative Record,* Tab 51).

Second, on May 9, 2007, NIGC received a letter from Speaker Hoffman setting out her authority to act for the Tribes concerning Amendment 11. (*See Administrative Record*, Tab 19.) Although the District Court determined that she had authority to act for the Tribes, the Supreme Court has since ruled that her actions with regard to the contracts with Southwest were invalid and ineffective under the Constitution. (*See Administrative Record*, Tab 51.) The relevant regulation here also requires, however, that the letter setting out the authority of the "authorized tribal official to act for the tribe" must be signed by the tribal chairman, which Speaker Hoffman is not.

We read 25 C.F.R. § 535.1(c)(2) broadly in order to accomplish its purpose, namely to assure the Chairman that the submission of, and the representations in, the statement of authority are themselves authorized by tribal law. As the Chairman has already noted, the title of the official making the statement is thus not particularly relevant, be it "president," "chief," "governor," or "town king." (*See Administrative Record*, Tab 12, p. 5.) Moreover, while officials providing the statement of authority are typically executive branch officials, that is not strictly necessary. A tribal government may not have an executive branch as such. However, the Tribes' Supreme Court determined that the First Legislature's actions in authorizing Amendment 11 were not constitutional. As such, the requirements of Section 525.1(c)(2) are not satisfied here.

Third and finally, the Tribes' Supreme Court has determined that Ms. Hoffman did not have the authority to act on behalf of the Tribes. (*See Administrative Record*, Tab 51).

CONCLUSION

Given all of the foregoing, the Chairman's May 18, 2007, approval of Amendment 11, the amended gaming management contract between the Cheyenne and Arapaho Tribes of Oklahoma and Southwest Casino and Hotel Corporation, is reversed.

It is so ordered by the National Indian Gaming Commission, this 17th 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 17th day of August, 2007, I served a copy of the foregoing **COMMISSION DECISION** by facsimile and by certified mail, return receipt requested, upon the following:

Darrell Flyingman, Governor
Cheyenne and Arapaho Tribes of Oklahoma
100 Red Moon Circle, P.O. Box 38
Concho, OK 73022

Ida E. Hoffman, Speaker of the Legislature
Cheyenne and Arapaho Tribes of Oklahoma
100 Red Moon Circle, P.O. Box 38
Concho, OK 73022

David Bearshield, Tribal Council Coordinator
Cheyenne and Arapaho Tribes of Oklahoma
100 Red Moon Circle, P.O. Box 38
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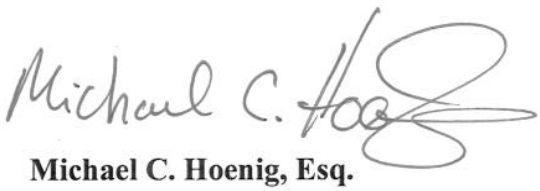

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