National Indian Gaming Commission

IN THE MATTER OF

J. RANDY GALLO,
BETTOR RACING, INC.

FINAL DECISION AND ORDER

September 12, 2012

NIGC NOV and CFA 11-01
OHA Docket No. DIR-2011-0066

Bettor Racing, Inc. (BRI), and its president J. Randy Gallo (Gallo), (together Respondents) appeal the National Indian Gaming Commission Chairwoman's notice of violation 11-10 (NOV) and civil fine assessment 11-01 (CFA). The NOV alleged Respondents: (1) managed a tribal gaming operation without an approved management contract from September 24, 2004, through March 16, 2005, in violation of the Indian Gaming Regulatory Act (IGRA) and National Indian Gaming Commission (NIGC or the Commission) regulations, 25 U.S.C. §§ 2710(d)(9), 2711, 25 C.F.R. § 533.1; (2) managed an off-track betting operation at a tribal casino under two unapproved modifications to a management contract from February 15, 2007, through April 5, 2010, in violation of IGRA and NIGC regulations, 25 U.S.C. §§ 2710(d)(9), 2711, 25 C.F.R. § 535.1(a); and (3) violated the sole proprietary interest provisions of IGRA, 25 U.S.C. § 2710(b)(2), 25 C.F.R. §§ 522.4(b)(1), 522.6(a). The Chairwoman assessed a fine in the amount of $5,000,000.

Appearances

Meredith A. Moore, Esq., for Respondents
Melissa Schlichting, Esq., and Heather Nakai, Esq., for the Chairwoman
John M. Peebles, Esq., and Patrick R. Bergin, Esq., for Intervenor, the Flandreau Santee Sioux Tribe

Presiding Official

T. Britt Price

FINAL DECISION AND ORDER

After careful and complete review of the agency record, the pleadings filed by the Respondents, the Chairwoman and the Tribe, and the Presiding Official's recommended decision, the Commission finds and orders that:

1. There are no genuine issues of material fact regarding the first violation for managing an Indian gaming operation without an approved management contract and it therefore grants summary judgment to the Chairwoman on this violation.

2. There are no genuine issues of material fact regarding the second violation for operating under two unapproved modifications to an approved management contract and it therefore grants summary judgment to the Chairwoman on this violation.

3. There are no genuine issues of material fact regarding the third violation for possessing a proprietary interest in Royal River Racing and it therefore grants summary judgment to the Chairwoman on this violation.

4. There are no genuine issues of material fact regarding the civil fine assessment and it therefore grants summary judgment to the Chairwoman on the civil fine assessment. Therefore, Respondents are ordered to pay the civil fine assessment of $5,000,000 as set forth in the Proposed Civil Fine Assessment.

STATUTORY BACKGROUND

IGRA and NIGC regulations provide a tribe may enter into a management contract for the operation of gaming if such contract has been approved by the Chair of the NIGC. 25 U.S.C. §§ 2710(d)(9), 2711(a)(1); 25 C.F.R. § 533.1. Management contracts not approved by the Chair are void. 25 C.F.R. § 533.7; *Wells Fargo Bank v. Lake of the Torches Economic Development Corp.*, 658 F.3d 684, 686 (7th Cir. 2011); *Catskill Development LLC v. Park Place Entertainment Corp.*, 547 F.3d 115, 120 (2d Cir. 2008); *First Am. Kickapoo Operations LLC v. Multimedia Games*, 412 F.3d 1166, 1168 (10th Cir. 2005). Subject to the Chair's approval, a tribe may amend a management contract. 25 C.F.R. § 535.1(a). To be valid, amendments shall be submitted to the Chair within 30 days of execution. 25 C.F.R. § 535.1(b).

To be approved, management contracts must meet certain criteria. For example, IGRA generally limits management contract terms to five years and caps management fees at 30 percent of net revenues, unless certain conditions are present. 25 U.S.C. §§ 2711(b)(5),(c). IGRA defines net revenues as "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees." 25 U.S.C. § 2703(9); 25 C.F.R. § 502.16. Management contracts must also provide "a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs." 25 U.S.C. § 2711(b)(3).

IGRA was enacted 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." 25 U.S.C. § 2702(1); *see also* § 2701(4). In enacting IGRA, Congress sought to ensure that Indian tribes are the primary beneficiaries of Indian gaming activities. 25 U.S.C. § 2702(2). Therefore, IGRA and NIGC regulations require that a tribe have the sole proprietary interest in its gaming operation. 25 U.S.C. §§ 2710(b)(2)(A), 2711(d)(2)(A); 25 C.F.R. §§ 522.4(b)(1), 522.6(a).

FACTUAL BACKGROUND

The Flandreau Santee Sioux Tribe (Tribe) is a federally-recognized Indian tribe with headquarters in Flandreau, South Dakota. *See* "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," 75 Fed. Reg. 60810, 60811 (Oct. 1, 2010). The Tribe owns and operates the Royal River Casino (Casino) on its tribal lands in Flandreau, South Dakota. *AR 64, AR 68, AR 72.* The Casino offers Class II and Class III gaming pursuant to the Tribe's approved gaming ordinance. *AR 64; AR 68; AR 72.*

J. Randy Gallo is president of BRI, a pari-mutuel betting business incorporated in South Dakota. *AR 58 at 11:22-12:09.* In mid-2003, Gallo approached the Tribe about relocating BRI from Sioux Falls, South Dakota to the Royal River Casino. *Id. at 15:25 - 17:06.* Respondents desired the move, in part, to avoid a 4.5% tax that South Dakota imposed on the gross revenue, or handle, of the business. *Id. at 16:16-23.*

On August 27, 2003, the Tribe submitted a draft agreement between it and Respondents (the Parties) for review by the NIGC. *AR 58(C).* Gallo understood the Parties' agreement constituted a management agreement. *AR 58 at 26:24 - 27:3.* He also knew that NIGC approval was required for a management agreement to be valid. *AR 58 at 28:16-24.* On September 12, 2003, NIGC Acting General Counsel Penny Coleman issued an opinion that the agreement was a management contract that was subject to the Chair's review and approval, and advised that without the Chair's approval, the agreement was void. *AR 1.* On March 26, 2004, the NIGC received a management contract between Respondents and the Tribe for review and approval by the Chair. *AR 58 at 41:22 - 42:13; AR 58(H).* Also on March 26, 2004, the NIGC received from the Tribe a copy of the Ordinance on Pari-Mutuel Betting for review and approval. *AR 2.* On June 21, 2004, Chairman Hogen notified the Tribe that he had approved the Ordinance on Pari-Mutuel Betting. *AR 58(J).*

On September 20, 2004, the Parties entered into an agreement pending NIGC approval of the management contract. *AR 58 at 47:14 - 49:11; AR 58(K).* Gallo named the operation Royal River Racing. *AR 58 at 99:1.* On September 24, 2004, Respondents began operating Royal River Racing at the Casino. *AR 58 at 35:11-16.* During this time period, Respondents paid the Tribe its share of the revenue earned pursuant to the terms of the unapproved management contract. *AR 50(Q); AR 58 at 47:14 - 49:4.* Furthermore, Respondents admit they operated without an approved management contract from September 24, 2004, through March 17, 2005. *AR 58 at 35:11-16.*

Respondents admit that they owned Royal River Racing separate and distinct from the Casino. *AR 58 at 98:13 - 99:19; AR 59 at 331:10-14, 337:10-15.* The simulcast license for Royal River Racing was held only by BRI. *AR 58 at 11:9-19; 99:9-12.* Respondents had sole access to Royal River Racing's betting information provided by United Tote, a pari-mutuel betting service provider. *AR 58 at 67:22 - 69:14.* Royal River Racing was audited independently from the Casino by an audit firm hired by

Respondents. *AR 56(T); AR 58 at 115:9-171.* Respondents employed their own accountants. *AR 58 at 31:25 - 32:02.*

Respondents considered their employees to be separate and distinct from those employed at the Casino. *AR 59 at 300:06 - 301:14.* They completed performance reviews solely for Royal River Racing employees and provided them with discretionary bonuses. *AR 58 131:21 - 132:24.* Additionally, they reimbursed the Casino for providing Royal River Racing employees with the same food and drink discounts that Casino employees received. *AR 58 at 50:09-19.*

On March 17, 2005, NIGC Chairman Hogen approved the management contract between the Parties. *AR 58 at 74:01-22; AR 58(N); AR 74.* The approved management contract provided that Respondents' fee was to be a percentage of the net revenue of Royal River Racing, based on a sliding scale, and payable in monthly installments. *AR 74 at 44-45.* When the gross revenue was less than $30,000,000, Respondents received 40% and the Tribe received 60%. *Id.* When the gross revenue was between $30,000,000 and $60,000,000, Respondents received 35% and the Tribe received 65%. *Id.* When the gross revenue was more than $60,000,000, Respondents received 30% and the Tribe received 70%. *AR 58 at 76:21 - 77:7, 78:14-19, 80:18 - 81:08; AR 58(0) at 29-31; AR 74 at 44-45.*

This provision of the management contract states that "the Tribe's share of the profits shall never be less than 4% of gross public handle generated by non-telephone or walk-in betting at the Casino, plus the greater of $5,769.23 per week or *1% of all gross handle generated by telephone betting at the Casino.*" *AR 74 at 45 (emphasis added).* Thus, the Tribe was guaranteed $5,769.23 per week, the equivalent of 1% of $30,000,000 ($300,000) per year no matter how Royal River Racing performed. *Id; AR 58 at 19:1-8.* Additionally, since the provision states that Respondents were to pay the *greater* of 1% of all gross handle or this guaranteed minimum, when the gross handle of Royal River Racing exceeded $30,000,000 per year Respondents were required to continue paying a rate of 1% on all additional revenue over and above that $30,000,000. *AR 74 at 45.*

In fall 2005, Respondents first approached the Tribe seeking an amendment to the approved management contract (First Modification). *AR 58 at 84:18 - 85:12.* By 2006, the Parties agreed to reduce the Tribe's guaranteed minimum payment from 1% on *all* gross revenue to 1% only on the first $30,000,000 and then .5% for those amounts in excess of $30,000,000. *AR 29; AR 57vv; AR 58 at 109:06 – 110:1.* Therefore, this amendment preserved the $5,769.23 per week ($300,000 per year) minimum guarantee, but reduced the percentage the Tribe received on amounts made after the $30,000,000 threshold was met from 1% on all additional gross revenue to .5%. *Id.* This First Modification, however, was not submitted to the NIGC for review and approval until January 25, 2007. *AR 58(X).* The Parties later executed a First Modification on February 15, 2007, and from at least that day until to July 31, 2008, Respondents managed Royal River Racing pursuant to the unapproved First Modification. *AR 56(HH); AR 57(VV); and AR 58 at 108:17 - 109:05, 121:7 - 122:20, 133:2-18; AR 62*; *see also, AR 56(J).* Then on April 13, 2007, through its legal counsel, the Tribe requested that the NIGC hold in abeyance a final decision on the First Modification pending the resolution of litigation

regarding the Tribal-State Compact with the State of South Dakota. *AR 12; AR 54 at 18:19 - 19:04; AR 58(Y).*

During fiscal year 2006, Respondents made payments to the Tribe under this arrangement. *AR 58 at 108:17 – 110:04.* The Parties accomplished this using a check-swap scheme whereby Respondents annually remitted to Tribe a check for the full amount due under the approved management contract, and the Tribe wrote Respondents a check styled a "bonus," which represented the difference due under the unapproved modification and the approved management contract. *AR 20; AR 26; AR 58 at 87:12 - 88: 17, 108:20 - 109:05, 119:15 - 120:19; AR58(HH); AR 58(W).*

On August 1, 2008, the Parties again modified the approved management contract (Second Modification), reducing the Tribe's minimum guaranteed payment from .5% to .25% on all annual gross revenue over the $30,000,000 threshold. *AR 29; AR 56(J); see also AR 58 at 136:20 - 139:04, 152:16 - 153:07.* The Second Modification, likewise, preserved the guaranteed minimum of $5,769.23 per week, but again reduced the percentage the Tribe received on amounts Royal River Racing made after the first $30,000,000. The Second Modification was never submitted to the NIGC and so was never approved by the NIGC Chairman. *AR 54 at 52:033 - 53:14.* Beginning in August 1, 2008, and through at least December 30, 2009, the parties acted in accordance with the unapproved Second Modification. *AR 55(I); AR 58 at 158:11 - 158:20.* To carry out the Second Modification, the Parties continued to use the check swap scheme explained above. *AR 29; AR 58 at 87:12 - 88:17, 89:11-15, 92:08 - 92:19.*

The check-swap scheme was a mandatory prerequisite to maintaining Royal River Racing at the Casino, and the Tribe had no discretion in the matter. *AR 58 at 156:25 - 158:05; AR 59 at 226:24 - 227:15, 252:25 - 253:09.* In May 2007 and again in June 2008, the Parties swapped checks in the amounts of $752,133.78 and $1,058,853.56, respectively. *AR 19 at 23, 43; AR 20; AR 26; AR 56(HH); AR 56(Q).* In June 2009, the parties exchanged checks for a total of $1,435,734. *AR 19 at 69; AR 20; AR 55(L); AR 56(P); AR 56(R); AR 58 at 153:2 – 155:18.* Gallo documented each check swap and undertook an annual reconciliation, demonstrating the amounts owed to each party based on the percentages called for in each unapproved modification. *AR 19 at 23, 43, 69; AR 20; AR 29 at 2; AR 56(P); AR 56(Q); AR 56(R); AR (HH); AR 57(DDDDD).*

Under the terms of the approved management contract, the Tribe should have received a total of $4,544,755 for 2005, 2006, 2007, and 2008 combined. *AR 61.* The following table demonstrates the how the check swap worked to increase Respondent's share of the revenues as compared to the Tribe:

Year	Net Income On Which Split Is Based	Amount Received By Tribe	Amount Received By Bettor Racing	Percentage Of Revenues Received By Bettor Racing	Percentage Of Revenues Received By Tribe
2004	$1,786,756	$625,241	$1,161,515	65%	35%
2005	$2,262,866	$571,368	$1,691,497	75%	25%
2006	$3,057,549	$754,665	$2,302,885	75%	25%
2007	$3,882,770	$861,292	$3,021,479	78%	22%

AR 62.

PROCEDURAL BACKGROUND

In August 2009, the NIGC conducted a management contract compliance review. The Tribe assisted in the investigation by submitting extensive documentation and other information to the NIGC. On May 19, 2011, Chairwoman Stevens served Respondents and the Tribe with the NOV based on the evidence from the investigation. The NOV cited Bettor Racing for: 1) managing a tribal gaming operation without an approved management contract; 2) managing under two unapproved modifications to a management contract; and 3) holding a proprietary interest in Royal River Racing. The NOV ordered Respondents to reimburse the Tribe $4,544,755, the amount paid Respondents in excess of what it was owed under the management contract. On June 20, 2011, the Respondents appealed the NOV. Per NIGC regulations at 25 C.F.R. § 577.4, the matter was referred to Presiding Official (PO), T. Britt Price on July 8, 2011.

As to the Tribe, the NOV asserted four counts. First, that it permitted Respondents to manage Royal River Racing without an approved management contract. Second, that it allowed Respondents to operate under two unapproved modifications to the management contract. Third, that the Tribe failed to submit the management letters prepared by the Casino's independent auditors within 120 days of its 2005 and 2006 fiscal year ends. Finally, it charged that the Tribe's payments to Respondents violated IGRA's use of net gaming revenue mandates and the Tribe's gaming ordinance.

On July 20, 2011, the NIGC settled NOV-11-01 with the Tribe. By the terms of the Agreement, the Tribe admitted to all of the allegations in the NOV and agreed to take several remedial measures, including providing training and submitting required documents to ensure that the violations do not reoccur. Should the Tribe breach the terms of the Agreement, it must pay a fine of $750,000.

The Tribe intervened in the appeal of the NOV. The Chairwoman moved for summary judgment, arguing under Rule 56 of the Federal Rules of Civil Procedure, that there was no genuine issue as to any material fact and, therefore, was entitled to judgment as a matter of law. The Tribe also moved for summary judgment in favor of the Chairwoman. Respondents opposed both the Chairwoman's and the Tribe's motions for summary judgment.

Respondents submitted a supplemental statement for the Chairwoman's consideration in determining whether and to what extent to assess a civil fine. After considering the arguments set forth in Respondents' submission, as well as the factors in NIGC regulation 25 C.F.R. § 575.4, the Chairwoman issued a CFA on February 10, 2012 that assessed a fine against Respondents in the amount of $5,000,000. On March 9, 2012, the Respondents timely filed a notice of appeal.

The proceedings on the motion for summary judgment on the NOV and motion for summary judgment on the CFA were combined on May 16, 2012. The Chairwoman, the Tribe and the Respondents then submitted briefs on the CFA.

The PO handed down her Recommended Decision granting the motions for summary judgment on the NOV and CFA on August 13, 2012. The PO agreed with the Chairwoman and the Tribe, finding that there is no genuine issue of material fact regarding both the NOV and the CFA, and as a result, the Chairwoman is entitled to judgment as a matter of law.

Respondents now object to the Recommended Decision. Respondents argue there are still issues of material fact and that summary judgment was therefore inappropriate. They dispute the Recommended Decision's analysis of: 1) their defense of lack of knowledge as to the first violation; 2) their defense of reliance on Tribe's counsel as to the first violation; 3) their defense of reliance on Tribe's counsel as to the second violation; 4) their statements regarding his ownership of Royal River Racing as evidence that the Tribe did not retain the sole proprietary interest in Royal River Racing; 5) regarding the remedial measure in the NOV, Respondents counter that the Tribe was compensated in accordance with the parties' agreements and that no law precludes the payment of a bonus; and 6) the amount of the CFA under the 8th amendment.

The Commission now reviews the Presiding Official's Recommended Decision granting summary judgment in favor of the Chairwoman. As the remedial measure has been supplanted by the CFA, the Commission will not consider this issue.

DISCUSSION

I. IGRA Does Not Have A Scienter Requirement.

Black's Law Dictionary defines scienter as "a degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of acts having been done knowingly." 1347 (7th Ed. 1999). Respondents' overarching

argument is that they had no knowledge their actions constituted violations of IGRA, and had no intent to deceive the Tribe or violate the law.

The PO considered this argument and found that Respondents cited no statutory or regulatory provision, no legislative history, no provision in the Tribe's gaming ordinance, and no agency or judicial case law interpreting IGRA to require intent to deceive or violate the law to establish the violations. Instead, the PO found the Chairwoman is neither expressly nor impliedly required to establish wrongful intent or intent to violate the law. In other words, the lack of knowledge cannot be raised as an affirmative defense to a *per se* violation.

The Commission agrees that IGRA does not have a scienter requirement and therefore will not consider the Respondents lack of knowledge as an affirmative defense in its assessment of the PO's recommendation for summary judgment on the three violations and the CFA.

II. Summary Judgment Was Appropriate As There Are No Issues of Material Fact Regarding the NOV or CFA.

Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ.P. 56(c).* All evidence must be viewed in the light most favorable to the nonmoving party and all reasonable inferences from that evidence drawn in the non-moving party's favor. *Wilburn* v. *Robinson,* 480 F.3d 1140, 1148 (D.C. Cir. 2007).

The party seeking summary judgment always bears the initial responsibility of establishing the absence of a genuine issue of material fact. *Celotex Coy. v. Catrett*, 477 U.S. 317, 323 (1986). To discharge this burden, the moving party must point out that there is an absence of evidence to support the non-moving party's case. After the movant has met this burden, the burden of production shifts and "the non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., LTD et al. v. Zenith Radio Corp. et al.,* 475 U.S. 574, 586 (1986) (citations omitted). The non-moving party "may not rest upon the mere allegations or denials of [the adverse party's] pleadings, but his response . . . must set forth specific facts showing that there is a genuine issue for trial." *First National Bank v. Cities Service Co.,* 391 U.S. 253, 288 (1968).

There Are No Issues Of Material Fact As To Respondents' Management Of Royal River Racing Without An Approved Management Contract.

The Chair must review and approve all contracts for the management of tribal gaming operations. 25 U.S.C. §§ 2711(a)(1), 2710(d)(9). Management contracts not

approved by the Chair are void and unenforceable. 25 U.S.C. § 2711(a)(1); 25 C.F.R. § 533.7; *see First Am. Kickapoo Operations, L.L.C.,* 412 F.3d at 1176; *see also Wells Fargo Bank Nat'l. Ass'n.*, 658 F.3d. at 699-700. Failure to obtain the Chair's approval of a management contract prior to operation under such contract is a per se violation of IGRA. *See* 25 U.S.C. § 2713.

The Chairwoman alleges that Respondents violated IGRA and NIGC regulations by managing Royal River Racing without an approved management contract from September 24, 2004 to March 17, 2005. *NOV-11-01 at 1.* Gallo admits Respondents operated Royal River Racing, without an approved management contract during that time frame. *AR 58 at 43:18-25, 35:11-14.* He also admits he knew the contract required approval. *AR 58 at 28:16-24; 76:4-11.* Further, other undisputed facts reveal Respondents managed Royal River Racing. *AR 50(M); AR 56(FF); AR 58 at 53:10-15, 54:25 - 55:7, 56:11-16, 57:2-14, 57:21 - 58:22, 59:2 - 60-12, 61:3 - 61-13, 166:18 - 167:15, 169:5-19, 170:15 - 171:23; AR 59 at 298:11 - 299:9.* Respondents do not offer any evidence to controvert the assertions or show there is any dispute to the material facts supporting the violation.

Respondents raise as an affirmative defense their detrimental reliance on the Tribe's Gaming Commission attorney Terry Pechota. Gallo asserts that Pechota told him that operating without an approved contract was acceptable to NIGC Chairman Hogen. This argument was raised before the PO as well. The PO found Respondents cannot cite to any provision in IGRA or NIGC regulations permitting the operation of Royal River Racing without an approved management contract. Further, oral representations cannot relieve a party of its obligation to comply with statutes and regulations. The Commission is also not aware of any source of law that would relieve the Respondents of responsibility even if what they allege were true.

Therefore, as the Respondents admitted actions constitute management under IGRA, the Presiding Official found there is no genuine issue as to any material fact. As a result, the Commission agrees with the Presiding Official that that the Chairwoman's Motion for Summary Judgment on this issue should be granted.

There Are No Issues Of Material Fact As To Managing Royal River Racing Pursuant To Two Unapproved Modifications To The Management Contract.

IGRA prohibits third parties from managing a tribal gaming operation without a management contract that has been approved by the Chair. *25 U.S.C. § 2710(d)(9), 2711(a)(1).* NIGC regulations require any amendments to an approved management contract be reviewed and approved by the Chair. *25 C.F.R. § 535.*

Respondents admit that the Parties first modified the approved management contract on February 15, 2007. *AR 57(VV).* From at least February 15, 2007, to July 31, 2008, Respondents managed Royal River Racing pursuant to the unapproved First Modification to the Management Contract, which decreased the Tribe's share of the net gaming revenue that had been agreed to under the approved management contract. *AR*

56(HH); AR 57(VV); AR 58 at 108:17 - 109:05, 121:7 - 122:20, 133:2-18; AR 62; see also AR 56(J). Beginning in August 1, 2008, and through at least December 30, 2009, the parties acted in accordance with the unapproved Second Modification. *AR 55(I); AR 58 at 158:11 - 158:20.*

Respondents again raise the affirmative defense of reliance on Terry Pechota's statement that operating without an approved contract was acceptable to NIGC so long as the Tribe receives its portion of the revenue. However, the PO found Respondents' testified they knew and understood an approved management contract was a prerequisite to conducting Indian gaming and confirms they operated Royal River Racing during the relevant period without approved modifications. The PO further found Respondents' assertions raise neither genuine nor material issues of fact and there is no reasonable basis for an expectation that anything but the NIGC's formal written approval could authorize the operation of Royal River Racing. Where unapproved management contracts and modifications are void *ab initio*, a rational trier of fact could not find Respondents' reasonably inferred they had the requisite written approval of the modifications.

That the Respondents operated Royal River Racing under two separate, unapproved modifications, to the management contract from February 15, 2007, to December 31, 2009, is uncontested. Therefore, there is no genuine issue as to any material fact that Respondents operated Royal River Racing under unapproved modifications to a management contract. As a result, the Commission agrees with the Presiding Official there is no genuine issue of material fact to submit for hearing and the Motions for Summary Judgment on this issue should be granted.

There Are No Issues Of Material Fact As Respondents Held A Sole Proprietary Interest in Royal River Racing.

IGRA requires a tribe must have the sole proprietary interest in, and responsibility for, the tribal gaming operation to ensure it receives the primary benefit of its gaming revenue. 25 U.S.C. §§ 2702, 2710(b)(2)(A). Moreover, Congress set explicit limitations on the amount of net gaming revenues that management contractors may receive for managing Tribes' gaming operations – 30% of net gaming revenues; 40% in certain circumstances. *Id.* at § 2711(c). IGRA does not allow a management contractor to receive more than 40% of net revenues of a tribal gaming activity. *Id.* To ensure compliance, Congress directed the Chair to disapprove management contracts and management contract modifications that violate such provisions. *Id.* at §2711(a).

When examining whether a tribe has the sole proprietary interest in the gaming operation, three factors are examined: "1) the term of the relationship; 2) the amount of revenue paid to the third party; and 3) the right of control provided to the third party over the gaming activity." *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F.Supp. 2d 712, 723 (D. Minn. 2011) (quoting *In Re Fond du Lac Band of Lake Superior Chippewa*, NIGC, NOV-11-02, p. 2). In this matter, the latter two factors are implicated when looking at the relationship between Respondents, the Tribe, and Royal River Racing.

Respondents were the primary beneficiaries of the tribal gaming operation. The Tribe received only a minority percentage of the total profits. Using the check swap scheme discussed above, the Parties were able to style payments under their arrangement as a bonus to increase the flow of money to Respondents beyond the 40% permitted by IGRA. *AR 20; AR 26; AR 58 at 87:12 - 88:17, 108:20 - 109:05, 119:15 - 120:19; AR58(HH); AR 58(W).* Further, Respondents made the check-swap scheme a mandatory prerequisite to maintaining Royal River Racing at the Tribe's Casino, eliminating the Tribe's discretion to determine the payment amount. *AR 58 at 156:25 - 158:06; AR 59 at 227:14-15, 253:08-09.* The following table demonstrates the amount of revenues the Respondents received from the gaming operation as compared to the Tribe:

Year	**Net Income On Which Split Is Based**	**Amount Received By Tribe**	**Amount Received By Bettor Racing**	**Percentage Of Revenues Received By Bettor Racing**	**Percentage Of Revenues Received By Tribe**
2004	$1,786,756	$625,241	$1,161,515	65%	35%
2005	$2,262,866	$571,368	$1,691,497	75%	25%
2006	$3,057,549	$754,665	$2,302,885	75%	25%
2007	$3,882,770	$861,292	$3,021,479	78%	22%

AR 62.

From 2004 through 2007, the Respondents received the bulk of the revenues, often taking three times the profits as the Tribe, far beyond what is permissible under IGRA. Therefore, as the Respondents received the majority of revenue, the Tribe was not the primary economic beneficiary of the Indian gaming operations as required by IGRA.

Also a critical factor, Respondents controlled Royal River Racing, running it as a business separate from the Casino. Respondents admit they owned Royal River Racing separate from the Casino. *AR 58 at 98:13 - 99:19; AR 59 at 331:10-14, 337:10-15.* The simulcast license for Royal River Racing was held only by BRI. *AR 58 at 11:9-19; 99:9-12.* Respondents had sole access to Royal River Racing's betting information provided by United Tote, a pari-mutuel betting service provider. *AR 58 at 67:22 - 69:14.* Royal River Racing was audited independently from the Casino by a firm the Respondents hired. *AR 56(T); AR 58 at 115:9 - 117:1.* Respondents employed their own accountants. *AR 58 at 31:25 - 32:02.* Respondents considered their employees to be separate and distinct from those employed at the Casino. *AR 59 at 300:06 - 301:14.* They completed performance reviews solely for their employees and provided them with discretionary bonuses. *AR 58 at 131:21 - 132:24.* Additionally, they reimbursed the Casino for providing Royal River Racing employees with the food and drink discounts that were exclusively provided to Casino employees. *AR 58 at 50:09-19.* As Respondents admit and the facts demonstrate,

Royal River Racing operated as a separate business from the Casino and thus, Respondents were exerting an improper level of control over Royal River Racing.

Respondents argue their statements of ownership should not be equated to a violation of sole proprietary interest. They further argue IGRA permits management agreements. While the Respondents are correct to note management agreements are permissible under IGRA, it does not permit management agreements giving the manager a proprietary interest in what is supposed to be a tribe's gaming operation. Therefore, Respondents' statements of ownership do bear on the analysis of sole proprietary interest as it speaks to the level of control. Here, the Respondents admittedly exercised near total control of Royal River Racing, such as an owner would, and such control is impermissible under IGRA.

The PO further noted Respondents did not directly respond to the NOV's factual allegations, or its tables, noting the amount of money Respondents received in addition to their management fee. Instead, Respondents stated only the Tribe knew Bettor Racing was owned by Randy Gallo, and the Tribe had access to Royal River Racing facilities, book, safe, and general operations. The PO found these assertions do not raise any genuine or material issue of fact. Characterizing Mr. Gallo as a "consultant" does not change the admission he owned, controlled, managed, and operated Royal River Racing. Moreover, the Tribe's access does not establish a genuine or material issue of fact regarding ownership and control.

As Respondents earned the majority of the revenues and exerted an inappropriate level of control over Royal River Racing, there is no genuine issue as to any material fact Respondents held a proprietary interest in Royal River Racing in violation of IGRA. As a result, the Commission agrees with the Presiding Official that the Motions for Summary Judgment on this issue should be granted.

There Are No Issues Of Material Fact As to the Civil Fine Assessment.

The Chair has the authority to levy and collect appropriate civil fines up to $25,000 per violation against a management contractor engaged in gaming in violation of IGRA. 25 U.S.C. § 2713. NIGC regulations lay out the standard for assessing fines. 25 C.F.R. § 575.4:

> (a) Economic benefit of noncompliance. The Chair shall consider the extent to which the respondent obtained an economic benefit from the noncompliance that gave rise to a notice of violation, as well as the likelihood of escaping detection.
>
> (1) The Chair may consider the documented benefits derived from the noncompliance, or may rely on reasonable assumptions regarding such benefits.

(2) If noncompliance continues for more than one day, the Chairwoman may treat each daily illegal act or omission as a separate violation.

(b) Seriousness of the violation. The Chair may adjust the amount of a civil fine to reflect the seriousness of the violation. In doing so, the Chair shall consider the extent to which the violation threatens the integrity of Indian gaming.

(c) History of violations. The Chair may adjust a civil fine by an amount that reflects the respondent's history of violations over the preceding five (5) years.

(1) A violation cited by the Chair shall not be considered unless the associated notice of violation is the subject of a final order of the Commission and has not been vacated; and

(2) Each violation shall be considered whether or not it led to a civil fine.

(d) Negligence or willfulness. The Chair may adjust the amount of a civil fine based on the degree of fault of the respondent in causing or failing to correct the violation, either through act or omission.

(e) Good faith. The Chair may reduce the amount of a civil fine based on the degree of good faith of the respondent in attempting to achieve rapid compliance after notification of the violation.

The Chairwoman considered the factors in 25 C.F.R. § 575 as well as Respondents' arguments and found: Respondents received a substantial economic benefit of at least $4,544,7551;[2] the violations of managing without an approved contract and holding a proprietary interest in the gaming facility were serious and substantial; the violations were willful and; Respondents did not act in good faith to correct the violations after issuance of the NOV. Moreover, she found these violations threatened the NIGC's ability to achieve its congressionally-mandated goals set forth in IGRA: to shield the Tribe from corrupting influences, to ensure the Tribe is the primary beneficiary of the gaming operation and gaming is conducted fairly and honestly by both the operator and players.

The Chairwoman balanced the above factors against the fact Respondents had no history of violations over the preceding five years. The Chairwoman thus assessed the following fines: $1,000,000 for managing without an approved contract; $2,000,000 for

---

[2] At the time of NOV, the Chairwoman had not yet obtained records to allow for the calculation of the Respondents' economic benefit for fiscal years 2009 through April 5, 2010.

managing under two unapproved modifications to a management contract; and $2,000,000 for violating IGRA's sole proprietary interest requirement.

In its Opposition to Motion for Summary Judgment on the CFA, the Respondents attacked the Chair's analysis of the above factors in 25 C.F.R. § 575.4. The PO considered the Respondents' arguments in its Recommended Decision. We now review this analysis.

Economic benefit of noncompliance. Respondents argued any analysis determining they received a significant and greater-than-deserved economic benefit was a gross oversimplification of the facts as Respondents did not engage in any intentional or deceptive conduct in its dealings with the Tribe; the Tribe took it upon itself to submit the management contract and subsequent modifications to the NIGC and represented to Respondents it did so; the Tribe realized exactly the amount for which it contracted, and; no law exists precluding the Tribe's payment of a discretionary bonus to Bettor Racing.

The PO after viewing Respondents' factual arguments in the light most favorable to Respondents found: they are not relevant to the question of whether the Chairwoman erroneously considered or determined the extent of the economic benefit derived from their noncompliance with the IGRA; Respondents do not deny having received an economic benefit from their noncompliance; Respondents do not question the Chairwoman's calculation of that economic benefit or her use of Respondents' calculation of the net income from Royal River Racing; nothing in the record otherwise furnishes a basis for challenging the Chairwoman's calculation of the economic benefit of noncompliance to Respondent; and the regulations contain no bar against the assessment of a civil fine before an appeal of an NOV is concluded, while expressly permitting the Chairwoman to assess fines after an NOV has been issued.

As the Respondents do not deny or challenge the amounts of economic benefits the Chairwoman determined they received for noncompliance, the Commission agrees with the Presiding Official's analysis of this factor.

Seriousness of the violation. Respondents dispute the presumptions they committed any of the violations in the NOV and therefore also dispute the validity of the CFA. As the PO pointed out, this argument is not a factual contention the violations are not serious. The NIGC regulations expressly state managing a gaming operation without an approved contract constitutes a substantial violation. Further, the Chairwoman's mandate to consider "the extent to which the violation threatens the integrity of Indian gaming" adequately supports her determination that a violation of the sole proprietary interest is a serious violation given the declared policies of the IGRA, *i.e.,* to ensure tribes are the primary beneficiaries of their gaming operations. Finally, the undisputed facts clearly establish a nexus between the NOV violations and the CFA and the Chairwoman is under no burden to "conclusively" establish any aspect or element of the NOV or CFA. As the Respondents do not dispute the seriousness of their violations, the Commission agrees with the Presiding Official's analysis of this factor.

History of violations. The Chairwoman and Tribe acknowledge Respondents have no previous violations and Chairwoman took this fact into consideration in determining the fine. The PO took this into account in her analysis as well. The Commission agrees with the Presiding Official's analysis of this factor.

Negligence or willfulness. The Respondents assert the record demonstrates they did not negligently or willfully circumvent the management contract amendment approval process. However, the PO held even assuming Respondents believed their actions were lawful, there is no genuine issue of material fact. The facts of record negate the possibility a reasonable trier of fact could find Respondents' violations were not negligent *(i.e.,* a result of a lack of ordinary care) or willful *(i.e.*, purposeful and intentional, or reckless). Further, the Chairwoman reduced the amount of the fine in recognition of the Tribe's part in this matter. A trier of fact could not reasonably find Respondents had no role, or only an insignificant role, in causing or correcting the violations at issue. As the record demonstrates the Respondents negligently and willfully caused or failed to correct the violations at issue, the Commission agrees with the Presiding Official's analysis of this factor.

Good faith. Respondents argue they acted in good faith through the entirety of its dealings with the Tribe. The PO found the NOV does not charge a general lack of good faith in Respondents' dealings with the Tribe or rely on any such allegation to support the violations. Instead, it only alleges a lack of good faith in failing to comply with the NOV's corrective measure. There is no dispute that Respondents did not reimburse the Tribe the sum was due under the management contact. Further, the Respondents cite no statute, regulation, or case law that bars or restricts the weighing of this fact with others in considering whether to impose a civil fine and in what amount. As Respondents did not comply with the remedial measure in the NOV, the Commission agrees with the Presiding Official's analysis of this factor.

Excessive fine. Respondents' next claim the fine levied against them is unfairly larger than that levied against the Tribe. However, the PO notes Respondents profited from Royal River Racing to a much greater extent than the Tribe. The PO also notes the maximum fine the Chairwoman could have issued under IGRA is $65,755,000. The $5,000,000 assessed is well within the statutory and regulatory maximum allowed. We continue this analysis by assessing each violation independently.

The first violation is for managing Royal River Racing without an approved management contract from September 24, 2004, through March 16, 2005, which constitutes a period of 174 days. As the Chairwoman may assess up to $25,000 a day per violation, the maximum assessable fine for this violation is $4,350,000. The Chairwoman's decision to balance the factors in 25 C.F.R. § 575 to determine a fine of $1,000,000, or $5,747 per day, thus falls well within her civil fine assessment powers under IGRA. Therefore, the Commission agrees with the Presiding Official's Recommended Decision regarding the appropriateness of this fine.

The second violation is for managing Royal River Racing under two unapproved management contract modifications from February 15, 2007 to April 4, 2010, which constitutes 1,145 days. As the Chairwoman may assess up to $25,000 a day per violation, the maximum assessable fine for this violation is $28,625,000. The Chairwoman's decision to balance the factors in 25 C.F.R. § 575 to determine a fine of $2,000,000, or $1,747 per day, thus falls well within her civil fine assessment powers under IGRA. Therefore, the Commission agrees with the Presiding Official's Recommended Decision regarding the appropriateness of this fine.

The third violation is for holding a proprietary interest in Royal River Racing from August 31, 2006 to April 4, 2010, which constitutes 1,313 days. As the Chairwoman may assess up to $25,000 a day per violation, the maximum assessable fine for this violation is $32,825,000. The Chairwoman's decision to balance the factors in 25 C.F.R. § 575 to determine a fine of $2,000,000, or $1,523 a day, thus falls well within her civil fine assessment powers under IGRA. Therefore, the Commission agrees with the Presiding Official's Recommended Decision regarding the appropriateness of this fine.

Eighth Amendment. Finally, the Respondents challenge the CFA on the basis on the Eighth Amendment to the United States Constitution. Although the Chairwoman and Tribe submitted arguments in opposition, the PO noted the responses did not address the question of whether IGRA or any other statute confers authority on the NIGC or a Presiding Official to entertain a Constitutional claim. The PO found there is no such authority and the Eighth Amendment claim must be pursued in a judicial forum. The Commission agrees with the PO it lacks jurisdiction to consider constitutional claims and therefore will not address Respondents' argument.

After reviewing the Presiding Official's discussion on the CFA, we agree with the Presiding Official's analysis and conclusion that a trier of fact could not rationally find the proposed civil fine was unrelated to the established facts and therefore, summary judgment on the CFA should be granted.

CONCLUSION

For the reasons stated above, the Commission affirms the Presiding Official's conclusion that there are no genuine issues of material fact as to either the NOV or the CFA, and grants judgment in favor of the Chairwoman.

It is so ordered by the National Indian Gaming Commission, this 12th day of September, 2012.

Tracie Stevens
Chairwoman

Steffani Cochran
Vice-Chairwoman

Daniel Little
Commissioner

Certificate of Service

I hereby certify that on September 12, 2012, I served the foregoing Final Decision and Order by certified mail on:

Meredith A. Moore
Counsel for Respondents
Cutler & Donahoe, LLP
P.O. Box 1400
Sioux Falls, SD 57101-1400

John M. Peebles
Patrick R. Bergin
Counsel for Intervenor
Fredericks Peebles & Morgan, LLP
2020 L Street, Suite 250
Sacramento, CA 95811

T. Britt Price, Esq.
U.S. Department of the Interior
Office of Hearing and Appeals
Office of the Director
801 N. Quincy Street, Suite 300
Arlington, VA

I hereby certify that on September 12, 2012 I served the foregoing Final Decision and Order by hand delivery on:

Melissa Schlichting, Esq.
Heather Nakai, Esp.
Counsel to NIGC Chairwoman
National Indian Gaming Commission
1441 L St. NW
Suite 9100
Washington, DC 20005

I hereby certify that on September 12, 2012, I served the foregoing Final Decision and Order by e-mail delivery on:

Meredith A. Moore
Counsel for Respondents
meredithm@cutlerlawfirm.com

John M. Peebles
Counsel for Intervenor

jpeebles@ndnlaw.com

Patrick R. Bergin
Counsel for Intervenor
pbergin@ndnlaw.com

T. Britt Price
Presiding Official
T_Britt_Price@oha.doi.gov

Alison M. Grigonis
NIGC Staff Attorney