

# *National Indian Gaming Commission*

IN THE MATTER OF

The February 27, 2012 Disapproval of the  
Amendment to the Gaming Ordinance of  
the Sac and Fox Nation of Oklahoma

Final Decision and Order

June 18, 2012

The Sac and Fox Nation of Oklahoma (Tribe) appeals the National Indian Gaming Commission Chairwoman's (the Chairwoman) February 27, 2012 disapproval of an amendment to the Sac and Fox Nation Gaming Ordinance (the Amendment).

## FINAL DECISION AND ORDER

After careful and complete review of the appeal filed by the Sac and Fox Nation of Oklahoma; the response filed by the Chairwoman through counsel; and a response filed by the Tribe, the Commission finds and orders that:

1. The Chairwoman erred in disapproving the Amendment on the grounds it did not comply with 25 C.F.R. § 522.2.
2. The Chairwoman erred in disapproving the Amendment on the grounds it did not comply with 25 C.F.R. § 556.2.
3. The Chairwoman erred in disapproving the Amendment on the grounds it did not comply with 25 C.F.R. § 558.2.
4. It cannot waive the 90 day appeal decision deadline contained in 25 C.F.R. § 524.3(a) as it would deny the Tribe its right to enact laws governing its gaming activity and it would deny the Tribe the right to immediately exercise its rights under 25 U.S.C. § 2714.
5. It cannot determine whether the parcels identified in the amendment are eligible for gaming because that issue is beyond the scope of this appeal.
6. It cannot approve the Amendment because it does not have the authority to approve an ordinance unless it is consistent with federal law.
7. The Commission remands the Amendment to the Chairwoman to determine within 90 days whether or not the parcels identified therein are eligible for gaming under IGRA.

## STATUTORY, FACTUAL, AND PROCEDURAL BACKGROUND

The Tribe's Class II gaming ordinance was initially approved by Chairman Anthony Hope on April 1, 1994. The Tribe's gaming ordinance has been amended four times since then, including a 2008 amendment to include Class III games, which was approved by Chairman Philip Hogen on November 20, 2008.

Part 556 of NIGC regulations require a tribe to include Privacy Act and false statement notices on all application forms for key employee or primary management official positions. *See* 25 C.F.R. §§ 556.2 and 556.3. In 2009, the NIGC revised its regulations to update the notices. Although the new notices were required to be put on all application forms after a 180 day grace period, any ordinance that had been approved by the Chair prior to December 31, 2009, the effective date of the revision, did not need to be amended or resubmitted for approval. Rather, if a tribe submits a new ordinance, or amends its previously approved ordinance, after the effective date, it must reflect the new language. *Id.*

At the same time that the Privacy Act and false statement notice regulations were revised, NIGC regulations were also amended to require and authorize tribal officials to make eligibility determinations for *granting a gaming license* to key employees or primary management officials. *See* 25 C.F.R. § 558.2. Prior to the change, the regulations required a determination of a key employee's and primary management official's eligibility for *employment*, rather than a gaming license.

After the updated regulations had gone into effect, the Tribe amended its ordinance for a third time. The third amendment changed the process for removal of gaming commissioners and, as required, updated the Privacy Act and false statement notice provisions. Chairwoman Stevens approved the amendment on December 14, 2010.

On December 1, 2011, the Tribe submitted the amendment at issue here. Through resolution SF-11-194, the Tribe changed the ordinance's definition of Indian lands to include five specific parcels of land. The Tribe submitted the amended section of the ordinance only, rather than a restated copy of the entire ordinance with the only new change being the Indian lands definition.

On February 27, 2012, Chairwoman Stevens disapproved the Tribe's amended gaming ordinance on the grounds that the amended ordinance did not include the updated Privacy Act and false statement notices and did not comply with updated eligibility determinations for granting gaming licenses. Specifically, the disapproval letter stated:

...NIGC regulations require ordinance submissions to include updated Privacy Act and False Statement notices as well as updated eligibility determinations to grant gaming licenses. 25 C.F.R. §§ 522.2, 556.2, 556.3, 558.2. The Tribe's existing ordinance does not include the updated Privacy Act and False Statement notices or the updated eligibility determinations for granting gaming licenses, and the submitted ordinance amendments do not comply with these regulations. Any new submission must satisfy the requirements set forth in IGRA and NIGC regulations.

The disapproval did not address whether the new definition of Indian lands complied with IGRA or whether the five specific parcels are Indian lands eligible for gaming under IGRA. The disapproval stated, however, that if the Tribe cures the deficiencies, the NIGC's Office of General Counsel will coordinate with the Department of the Interior, Office of the Solicitor on whether the Indian lands definition is permissible and whether the lands are in fact Indian lands eligible for gaming under IGRA.

On March 28, 2012, the Tribe appealed the disapproval on the grounds that the Tribe's ordinance complies with the regulations and that the NIGC has no authority to regulate class II or class III gaming through the promulgation of regulations that impose additional requirements to those specified in IGRA for the approval of gaming ordinances.

On May 7, 2012, Counsel for the Chairwoman submitted a response to the Tribe's appeal. The response admitted that the Chairwoman erred in disapproving the Amendment based on 25 C.F.R. §§ 522.2, 556.2 and 556.3. However, Counsel for the Chairwoman maintained that the Amendment was rightfully disapproved because it did not comply with § 558.2. Additionally, the Chairwoman urged the Commission to waive the 90 day deadline for issuing a decision on the appeal so that it could determine the Indian lands issue.

On May 15, 2012, the Commission issued a scheduling order in this matter requesting a reply from the Tribe to the Chairwoman's Response to the Tribe's Appeal.

On May 24, 2012, the Tribe submitted its reply brief concurring in the Chairwoman's contention that Commission should decide the Indian lands issue, but objected to an open ended briefing schedule. The Tribe also argued that the Chairwoman's reliance on *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984) is misplaced. The Tribe further argued that even if *Chevron* is applicable, it can be resolved in the Tribe's favor at step one of its two-part test. Barring that, step two also makes clear that the Chairwoman's interpretation of IGRA is not entitled to deference.

## DISCUSSION

### **I. THE CHAIRWOMAN ADMITS ERROR IN BASING DISAPPROVAL OF THE AMENDMENT ON 25 C.F.R. §§ 522.2, 556.2, AND 556.3.**

The Chairwoman, through counsel, admitted error in disapproving the Amendment as to NIGC regulations, 25 C.F.R. §§ 522.2, 556.2, and 556.3. The ordinance updates required by those regulations were properly submitted by the Tribe in 2010 and approved by the Chairwoman on December 14, 2010.

### **II. THE CHAIRWOMAN ERRED IN DISAPPROVING THE AMENDMENT BASED ON 25 C.F.R. § 558.2.**

The Tribe argues that that the Commission's promulgation of § 558.2 was arbitrary and capricious and not authorized by IGRA. *See* Appeal, pp. 2-3. Specifically, the Tribe claims that IGRA does not authorize the Commission to add requirements for the approval of an amendment to tribal gaming ordinances. *Id.* at p. 3. We disagree with the Tribe and agree with the Chairwoman that § 558.2 is a reasonable interpretation of IGRA.



An agency's interpretation of a statute which it administers is entitled to deference unless Congress has directly spoken to the precise question at issue or, if the statute is "silent or ambiguous," the agency's interpretation is not based on a reasonable construction of the statute. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984).

According to the Tribe, the Chairwoman's reliance on *Chevron* is misplaced. We disagree. The Tribe claimed that the Commission has no authority to issue § 558.2 and that the interpretation is arbitrary and capricious. *See Appeal*, pp. 2-3. IGRA makes clear, though, that the NIGC administers IGRA and is required to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of [IGRA]." 25 U.S.C. § 2706(b)(10). The question remaining, then, is whether the regulation is entitled to deference, which is determined by the test laid out by *Chevron*.

We believe that § 558.2 is a reasonable interpretation of IGRA. We disagree with the Tribe that the question can be resolved at step one of the *Chevron* test. We agree with the Chairwoman that IGRA is ambiguous as to the question at issue. IGRA requires a tribal gaming ordinance to include a background investigation procedure that contains a standard whereby any person whose prior activities, criminal record, etc. poses a threat to the public interest or regulation of gaming shall not be eligible for employment. *See* 25 U.S.C. § 2710(b)(2)(f)(ii)(II). Although IGRA's use of the term *employment* seems clear when the specific sub-section is read in isolation, it becomes less so when put into the context of the surrounding provisions. Sections 2710(b)(2)(f)(ii)(I) and (III) are concerned only with licensing. Therefore, the Statute is ambiguous and § 558.2 is a reasonable interpretation of that ambiguity.

However, we believe the Chairwoman wrongly applied § 558.2 and that the Tribe's gaming ordinance, as amended, is in compliance with the regulatory requirements of § 558.2.

In 2009, when changing 25 C.F.R. § 558.2's applicability to licensing rather than employment decisions, the Commission noted that the regulation "should be concerned with licensure and suitability determinations, not employment decisions." 74 FR 36926, 36928 (July 27, 2009). We agree with this point, but believe that this pertains to the NIGC, not tribes. The Commission agrees that its focus in ensuring suitability determinations are made should be, and in fact is, limited to licensing decisions. If, however, a tribe wishes to broaden its focus through its ordinance to *include* employment decisions, it should be able to do so.

This view is directly supported by the regulation itself. NIGC regulations require a tribe to "perform background investigations and issue licenses for key employees and primary management officials according to requirements that are *at least as stringent* as those in parts 556 and 558 of this chapter." 25 C.F.R. § 522.4(b)(5). When read in the context of this section, then, it is clear that part 558 is merely a minimum requirement that tribes must follow when making suitability determinations.

Here, in addition to requiring that all key employees and primary management officials<sup>1</sup> be licensed, the Tribe's gaming ordinance goes beyond IGRA's mandate and also requires *all* other employees (non-key employees) be licensed as well. *See* Sac & Fox Gaming Ordinance §§ 1-531 - 1-536. Since only key employees and primary management officials are subject to IGRA, the licensing standard for non-key employees can be, and in this case is, different – the Tribe's gaming ordinance contains two separate licensing processes and suitability standards: Subchapter A – Key Employee and Primary Management Official Licensing; and, Subchapter B – Non-Key Employee Licensing. *See* Sac & Fox Gaming Ordinance §§ 1-511 – 1-536.

Further, all gaming licenses, whether issued to a key employee, primary management official, or a non-key employee are valid only “so long as the employee remains employed.” *See* Sac & Fox Gaming Ordinance §§ 1-520 and 1-535. Although the Tribe's ordinance uses the term *employment* instead of *license*, the *employment* of a key employee and primary management official explicitly requires a *license* and vice versa. Thus, the gaming ordinance's use of the term *employment* is, in this case, *at least as stringent* as § 558.2.

Even if the term *license* were not synonymous with *employment* in this case, NIGC regulations prohibit the continued *employment* of a key employee or primary management official who does not have a *license* within 90 days of beginning work. *See* 25 C.F.R. § 558.3(b). Thus, a key employee's or primary management official's eligibility for *employment* is always dependent on the grant of a gaming license, whereas a key employee's or primary management official's gaming license need not be dependent on their employment. In such circumstances, a gaming ordinance's use of the term *employment* is more stringent than *license*.

Further, in drafting § 558.2 the Commission could have specified in the regulation that verbatim language was required. This is exactly what the Commission did when promulgating revisions to § 556.2 and § 556.3. However, in the case of § 558.2, the Commission chose to not require specific language. This choice is logical when considering that NIGC regulations require the Chair to approve an ordinance if, among other things, it provides that the tribe will “perform background investigations and issue licenses for key employees and primary management officials according to requirements that are at least as stringent as those in parts 556 and 558 of this chapter.” 25 C.F.R. §522.4(b)(5). If § 558.2 requires tribes to adopt its language verbatim then a tribe would not be allowed to make its requirements more stringent and would therefore make the language of § 522.4 meaningless.

### **III. THE COMMISSION CANNOT PROPERLY DETERMINE THE ELIGIBILITY OF THE PARCELS FOR GAMING IN THIS INSTANCE.**

As previously noted, the Chairwoman's disapproval of the Amendment did not address the issue of whether or not the parcels of land identified by the Tribe were eligible for gaming. Appeals under part 524 contemplate a summary determination by the

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<sup>1</sup> The Tribe's gaming ordinance defines Key Employee and Primary Management Official exactly as defined in NIGC regulations, 25 C.F.R. §§ 502.14 and 502.16, and references the corresponding NIGC regulation after each definition. *See* Sac & Fox Gaming Ordinance §§ 1-102(Q) and 1-102(Z).



Commission on the narrow question of whether the Chairwoman properly observed IGRA's requirements for approving or disapproving an amendment to a tribal gaming ordinance. The Commission believes that it would be inappropriate to determine the Indian lands issue in the context of an appeal because the question was not considered by the Chairwoman in reaching her decision. The Chairwoman could have analyzed the Indian lands issue but did not. Further, if the Commission were to decide this issue on first impression, the Tribe would be deprived of its right to an administrative appeal.

The Chairwoman correctly notes that the Commission has previously reviewed Indian lands eligibility without an underlying decision by the Chair. *See In Re Wyandotte Nation Amended Gaming Ordinance* (September 10, 2004). That is not a common occurrence, though, as the Commission made clear by stating: "We do not typically agree to forego the Chairman's issuance of an ordinance disapproval letter and any resultant appellate process." *Id.* at p. 3. The Commission did so in *Wyandotte* based on specific factors that are not present here.

In *Wyandotte* the NIGC Office of General Counsel (OGC) had prepared and issued a legal advisory opinion on the status of the relevant parcel for gaming. In fact, the OGC had revised its opinion on at least one occasion before the full Commission made its decision. No such opinion has been issued in this case. Additionally, in *Wyandotte*, the eligibility of the land for gaming under IGRA was the subject of active litigation. That is not the case here. Unlike in *Wyandotte*, we cannot point to any facts in this matter that warrant assuming the Chairwoman's authority to make a preliminary Indian lands determination or depriving the Tribe to its right to an administrative appeal of that decision. We therefore remand the Indian lands question to the Chairwoman for a decision.

**IV. THE COMMISSION NEED NOT WAIVE THE 90 DAY REQUIREMENT FOR ISSUING A FINAL DECISION IN THIS INSTANCE.**

The Chairwoman has requested that the Commission waive the 90 day time period set forth in 25 C.F.R. § 524.3(a) so that it may solicit and consider further briefing on the Indian lands issue. But because we have decided that the Indian lands question must first be decided by the Chairwoman, a waiver of our decision deadline for purposes of briefing on that issue is unnecessary.

**V. THE COMMISSION CANNOT APPROVE AN ORDINANCE UNLESS IT IS CONSISTENT WITH FEDERAL LAW.**

Finally, we find that we cannot grant the Tribe its requested relief of approving the ordinance amendment. IGRA permits tribes to game only on Indian lands over which they exercise jurisdiction. *See* 25 U.S.C. § 2710(b)(1). Because the amendment to the Tribe's gaming ordinance is site specific, the status of those lands must first be determined by the Chair before it can be approved.<sup>2</sup> We cannot approve an ordinance amendment that

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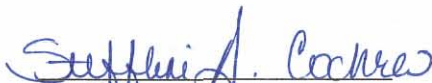
<sup>2</sup> *See Citizens Against Casino Gambling v. Kempthorne*, 471 F. Supp. 2d 295, 323-324 (W.D.N.Y. 2007) ("Whether proposed gaming will be conducted on Indian lands is a critical, threshold jurisdictional determination of the NIGC. Prior to approving an ordinance, the NIGC Chairman must confirm that the situs of proposed gaming is Indian lands.").

authorizes gaming on specific parcels of land without first determining the eligibility of the land for gaming under IGRA. Because that question is for the Chairwoman to decide, and no determination has been made, we cannot grant the Tribe the relief it requests.

CONCLUSION

Given all of the foregoing, the Commission orders that the Amendment be remanded to the Chairwoman to determine the eligibility of the identified parcels for gaming under IGRA. The Chairwoman is ordered to issue the determination with 90 days of this decision.

It is so ordered by the National Indian Gaming Commission, this 18th day of June, 2012.

  
Steffani Cochran  
Vice-Chairwoman

  
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Daniel Little  
Commissioner

## Certificate of Service

I hereby certify that on June 18, 2012, I served the foregoing final decision and order by hand delivery, electronic mail, and certified mail on:

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