SUPREME COURT
OF THE
ROSEBUD SIOUX TRIBE

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ROSEBUD SIOUX
TRIBAL COURT

CA04-06

ROSEBUD SIOUX TRIBE, Plaintiff/Appellant, vs. BBC ENTERTAINMENT, INC., Defendant/Appellee.	MEMORANDUM OPINION AND ORDER

Per Curiam (Chief Justice Frank Pommersheim and Associate Justices Leroy Greaves and Pat Lee). (Associate Justice Greaves files a separate concurrence in the judgment, but does not agree with the discussion in Part III of this opinion).

I. Introduction

This case involves a dispute between the Rosebud Sioux Tribe, Plaintiff-Appellant, and BBC Entertainment, Inc., Defendant/Appellee, over a management contract entered into by the parties pursuant to the National Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* (IGRA). On February 11, 1993, BBC signed a contract to provide gaming management for the Tribe's casino to be operated on Tribal trust land within the exterior boundaries of the Rosebud Sioux Reservation. The management contract was approved on June 14, 1994 by the Chairman of the National Indian Gaming Commission (NIGC) as required by federal law, 25 U.S.C. § 2711 and its implementing regulations found at 25 C.F.R. part 533. The five year contract began when the Rosebud Sioux Tribe Casino was opened on August 16, 1994 and ended at midnight on August 15, 1999.

At the conclusion of the contract and after the final disbursement of funds, the Tribe concluded that BBC had breached the management contract in several material respects. The

Tribe thereupon filed a complaint against BBC in Rosebud Sioux Tribal Court based on eight different causes of action and sought a total of $843,754.09 in damages.[1]

Count 1, the sole subject of the appeal, alleged that BBC wrongfully took $415,857 from the Casino's bank accounts; more precisely that this sum came from the Operation Expense Reserve (OER) account that was required to be established by the Manager. Art. 6.4(c)(5) of the Management Contract expressly states "There shall be an 'Operation Expense Reserve'" and that it shall be funded *solely* by the Manager via a discretionary "initial funding" and "in addition, the Manager agrees to make contributions from gross receipts to such reserve from time to time as the Manager determines to be necessary to accumulate funds in such reserve in an amount reasonably required to provide financial stability to the Project." Art. 6.4(c)(5).

The Tribe alleged that BBC made no initial contribution and that the Tribe and BBC subsequently and mutually agreed orally that each side would contribute 7.5% of its net profits each month to the OER. This oral modification is not disputed by the Tribe. The Tribe alleged that at expiration of the contract, BBC took $415,856 from the OER account in accordance with BBC's view that it was entitled to 35% of the OER account balance as provided by the Management Contract's division of net profits with 65% going to the Tribe and 35% to BBC.

The Tribe's central contention on the single count involving the OER account is straightforward enough. It contends that oral modification as how to *fund* the OER and agreed to by *both* parties is void as a matter of federal law for failure to obtain the NIGC's approval of the

[1] The Management Contract expressly states that "any litigation relating to a dispute over the terms, rights, or obligations set forth in the agreement shall first be initiated in Rosebud Sioux Tribal Court." Management Agreement between Rosebud Sioux Tribe and BBC Entertainment, Inc. (1993), Art. 21.

modification as required by federal law.[2] The Tribe contends that because the modification is void BBC was *not* entitled to any of the money in the OER account.

Special Judge B.J. Jones ruled to the contrary on July 12, 2004. While he agreed that there was an oral and mutually agreed upon modification as how to fund the OER account, he made no express determination whether this violated NIGRA. Instead he found "that nothing in the agreement prohibited the parties from using their respective net earnings to fund an account such as the OER account." Slip Opinion at 9.

A timely notice of appeal was subsequently filed. Oral argument was held on April 24, 2006.

II. Issues

This appeal raises two issues, namely:

A. Whether the mutual oral modification of the Management Contract as how to fund the OER account is void as a matter of federal law for failure to comply with the Indian Gaming Regulatory Act and its implementing regulations; and

B. If the Management Contract modification is void, what is the appropriate remedy for the failure to comply with the contract modification provisions of IGRA.

Each issue will be decided in turn.

III. Discussion

A. Management Contract Modification

The Management Contract expressly states that "There *shall* be an 'Operation Expense Reserve.'" Management Contract at 6.4(c)(5) (emphasis added). This account was to be funded by the Manager with *initial* funding provided at the 'discretion' of the Manager. *Id.* This section

[2] 25 C.F.R. § 535.1 provides "Modifications that have not been approved by the Chairman in accordance with the requirement of this Part are void."

also expressly permitted repayment of any initial contribution, "The Manager shall be entitled to repay itself for such *initial* contribution at such time as the Manager determines to be feasible without jeopardizing the financial stability of the operation of the project."[3] *Id.*

Sec. 6.4(c)(5) goes on to state the "Manager agrees to make monthly contributions from gross receipts to such reserve from time to time as the Manager determines to be necessary to accumulate funds in such reserve in an amount reasonably required to provide financial stability to the Project."[4] *Id.* No such (unilateral) contributions were made by the Manager, rather as noted above, there was an *oral* agreement by the parties to fund the OER through monthly contributions by *each* side in the amount of 7.5% of net profits. Slip Opinion at 6-7.

The crux of this issue is whether these facts constitute modification of Management Contract and thus required approval by the NIGC in accordance with 25 U.S.C. §§ 2701 *et seq.* and 25 C.F.R. Part. 533. Judge Jones found "that nothing in the agreement prohibited the parties from using their respective net earnings to fund such an OER account." Slip Opinion at 9. While such a reading is literally true, the resulting interpretation is neither reasonable nor possible within the language of the Management Contract itself and the plain meaning and history of the National Indian Gaming Regulatory Act. The Management Contract is quite specific; the OER is to be funded solely by the Manager. Sec. 6.4(c)(5) identifies contributions to be made by the Manager and *no one* else. Any change in this funding arrangement is indeed a modification of the Management Contract.

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[3] Both parties agree that no initial contribution was made by the Manager. Apparently, the Manager was willing to make a $300,000 initial contribution, but was (orally) dissuaded from doing so by the Tribe. Slip Opinion at 4.

[4] Sec. 6.4(c)(5) further provides that the "contributions from gross receipts to such reserve shall be part of the Annual Budget. Such reserve shall be used for project expenses such as, but not limited to, prize money, maintenance, contingent liabilities, taxes and assessments to the extent applicable, insurance, other future expenses, and working capital.

Such a plain meaning reading of the Management Contract language is reinforced by the history and structure of the National Indian Gaming Regulatory Act. A primary thrust of the Act – and duty of the National Indian Gaming Commission - is to protect tribes from improvident management contracts. The NIGC approved this Management Contract which called for *all* funding to the OER to be provided by the Manager. Any change from unilateral funding by the Manager to *bilateral* funding by the Manager and the Tribe could potentially disadvantage the Tribe and expose it to substantial financial risk. For example, what if the Tribe had orally agreed that it would *completely* fund the OER account? Under the rationale of the Special Judge, this would be okay because such a funding arrangement was not expressly prohibited by the Management Contract. Such an approach would eviscerate and gut the entire NIGC approval process that is designed to protect tribes.

This Court therefore finds that the oral agreement of the parties to fund the OER through mutual monthly contributions of 7.5% for their net profits was a modification of the Management Contract. Such a modification expressly requires approval of the NIGC. 25 U.S.C. § 2711. Failure to obtain the required NIGC approval for any management contract modification renders the modification "void." 25 C.F.R. 535.1. *Turn Key Gaming v. Oglala Sioux Tribe*, 164 F.3d 1092 (8th Cir. 1999).

B. Remedy for Illegal Management Contract Modification

The question of the appropriate remedy is not so readily apparent. The Tribe argues that because the Management Contract modification was "void" it automatically gets all the proceeds remaining in the OER account. Yet it is not that clean or simple. The structure of the NIGRA is to protect tribes in carrying out their management responsibilities for Class III gaming activities, but it is *not* designed to give tribes an unfair advantage or to condone potential unjust enrichment

of the Tribes. It is this latter concern that clearly troubled the Special Judge in this matter when he noted that allowing the Tribe to recover *all* the remaining proceeds to the OER account "would visit an inequity upon the Defendant herein." Slip Opinion at 9 and "would also result in unjust enrichment to the Tribe." Slip Opinion at 11. In this regard, it is worth noting that the federal court in the *Turn Key Gaming* case did *not* hold that an unjust enrichment claim was automatically foreclosed by an unapproved contract modification. In fact, the Eighth Circuit expressly remanded the unjust enrichment claim. 164 F.3d 1092, 1095.

The Tribe's sweeping claim for *all* the proceeds in the OER is thus not directly supported by statute or caselaw.[5] But what is the appropriate remedy then? The Court concludes at this point that it is not possible to identify or to fashion the necessary remedy without a detailed accounting and a set of findings on a number of issues. They include the following:

1. Whether a specific OER account was ever established. This bedrock concern is not answered by the Special Judge's opinion. For example, the opinion cites without qualification the Defendant Manager, Charles Colombe's, testimony that "there was never actually an accountant maintained as the OER accountant, but it was maintained on the books as a liability accountant and was used for various purposes including purchasing new machines, building a new gaming administration office, and other primary capital improvements." Slip Opinion at 8. Special Judge Jones himself characterized the relevant account as "an alternative OER account." Slip Opinion at 9. If an OER account was not established, what account was established?

[5] The Court does agree with the Special Judge as to the following: *If* at the end of the day after all debts have been *properly* paid there is still a balance in the OER account, that balance becomes an *asset* to be divided according to the terms of the Management Contract with 65% going to the Tribe and 35% to the Manager. This is the plain meaning of Sections 11(e) and (f) of the Management Contract.

2. Whether any expenditures from the account were used for 'capital improvements.' Mr. Colombe's testimony was in the affirmative. *Id.* at 9. The Special Judge's opinion also cited testimony of Mr. Paul Valandra, the Chief Gaming Officer Commissioner for the Tribe from 1997-1999 that he "was aware of the OER account and he understood the account to be used for capital improvements." Slip Opinion at 7. The Special Judge's opinion also noted that "it does appear that much of the money in that account were used to fund capitol (sic) improvement projects that Defendant did not have an interest in at the time of the termination." Slip Opinion at 12.

This is particularly problematical. The OER account as described in the Management Contract makes no mention of permissible expenditures for 'capital improvements' rather it envisions a separate "Capital Improvement Reserve" account for such expenditures. Section 6.4(c)(6). Such a Reserve was to be funded in an amount "agreed upon by the parties" with a "cap of $100,000." *Id.* It does not appear that such a "Capital Improvement Reserve" was ever set up, but there needs to be an express finding on that question along with a determination of how much money – including its source – was expended on such capital improvements and whether such capital improvements were within the scope of the "Capital Improvement Reserve."[6] This is particularly important in the context of potential benefits that accrued to the Tribe, but *not* to the Manager.

3. How much money was contributed in full by *each* side and what were the individual expenditures paid for from the OER account (or whatever account was established)?

While some of these specifics may be difficult to ascertain with any degree of certainty due to a certain murk or confusion over what was written in the Management Contract, what

[6] "Capital improvements to project building, including but not limited to, major repairs or replacement of the heating, air conditioning, roof, exterior walls or standard building components, drainage or the like." Sect. 6.5(c)(6).

some of the terms in the contract actually mean, what was actually done with the casino receipts, and what *oral* understanding existed between the parties, nevertheless the Court requires such an undertaking on remand. Without it, the requirements of law and justice will remain unfulfilled and a disservice will be rendered to all concerned.

IV. Conclusion

For all of the above-stated reasons, the judgment of the Special Judge is reversed and remanded. Specifically, this Court reverses the finding of the Special Judge that no illegal modification of the Management Contract occurred. The focus of the remand is to hold a hearing and an accounting sufficient to answer in full the three questions set out in Part III(B) of this opinion. The Special Judge may receive evidence and legal argument as he deems proper.

IT IS SO ORDERED.

For the Court:

Frank Pommersheim
Chief Justice

Dated July 20, 2006.

ATTEST:

Dorothy M. Nelson
Chief Clerk of Courts