

IN THE DISTRICT COURT OF THE MUSCOGEE (CREEK) NATION
OKMULGEE DISTRICT

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| A.D. ELLIS, in his official capacity as |) | |
| Principal Chief of the Muscogee (Creek) |) | |
| Nation, |) | |
| Plaintiff, |) | |
| v. |) | Case No: CV 2009-33 |
| |) | |
| BRISTOW MUSCOGEE INDIAN |) | |
| COMMUNITY; CHECOTAH MUSCOGEE |) | |
| CREEK INDIAN COMMUNITY; DUCK |) | |
| CREEK INDIAN COMMUNITY; EUFAULA |) | |
| INDIAN COMMUNITY; HOLDENVILLE |) | |
| CREEK INDIAN COMMUNITY; and OKEMAH |) | |
| INDIAN COMMUNITY, chartered |) | |
| communities of the Muscogee (Creek) |) | |
| Nation, |) | |
| Defendants. |) | |

FINAL JUDGMENT AND ORDER

FINDINGS OF FACT

Some of the named Defendants, organized pursuant to Muscogee (Creek) Law, managed and operated Class II gaming facilities known to the National Indian Gaming Commission (NIGC) under various names for several years. The Plaintiff alleges these Defendant Communities and the Muscogee (Creek) Nation entered into a purported contracts, styled " Facility Use Agreements," at various times under which the Defendants allegedly extended their leasehold on real property held in trust by the United States for the benefit of the Muscogee (Creek) Nation. Notably in all cases, under the "Facility Use Agreements," both the Nation and contracting Communities were each entitled to one-half of the net earnings of the respective gaming operation situated in the various facilities. The Nation retained

ownership of the physical facilities and the parties to each “Facility Use Agreements,” shared financial responsibility for maintenance expenses.

The controlling federal law with which all Indian Class II and III gaming must comply is the Indian Gaming Regulatory Act (IGRA), October 17, 1988, Public Law 100-497. The purpose of this Act by the United States Congress is to provide a statutory basis to allow Indian Tribes to operate gaming to promote tribal economic development and self-sufficiency, resulting in stronger tribal governments and to meet congressional concerns regarding Indian gaming.

The Act provides for federal regulation of Indian gaming in order to prevent organized crime and other corrupting influences from infiltrating tribal gaming. The Act assures Indian gaming is conducted fairly and honestly and most importantly, the Act requires the Indian Tribe to be the primary beneficiary of the gaming operation.

The Muscogee (Creek) Nation has the ultimate legal responsibility for all affirmative acts and/or omissions at any property subsequently deemed not in compliance with federal law and regulations promulgated by the National Indian Gaming Commission (NIGC). 25 United States Code §§ 2701 to 2721.

Significantly, the Muscogee (Creek) Nation has never petitioned for, nor does it possess, a “Certificate of Self-Regulation” pursuant to 25 United States Code § 2710 (c) (4-5) entitling it to operate Class II gaming without specified federal monitoring and oversight.

On February 27, 2009, the Principal Chief, acting in his official capacity as Chief Executive of the Muscogee (Creek) Nation, filed this lawsuit seeking injunctive relief and an accounting in order to restore national management and/or financial control to the Muscogee (Creek) Nation of the six (6) named gaming facilities, owned by the Muscogee (Creek) Nation,

within the territory and boundaries of the Muscogee (Creek) Nation and on land held in trust by the United States for the perpetual benefit of the Muscogee (Creek) Nation. The aforementioned "Facility Use Agreements" expired at various times as stated on their face and before the Plaintiff's February 28, 2009 Re- Entry.

On February 28, 2009, citing statutory authority pursuant to Muscogee (Creek) Nation Code Annotated Title 11 §4-302, Plaintiff Principal Chief of the Muscogee (Creek) Nation A.D. Ellis, issued Executive Orders No. 09-04 through 09-09. Through those Executive orders, the Plaintiff Principal Chief took the following actions; 1) assumed general oversight authority over each of the nation's gaming facilities situated within the Defendant Communities; 2) authorized the Muscogee (Creek) Nation Controller to take control and management of all gaming finances and records; 3) appointed managers of certain gaming facilities, and; 4) removed all authority from the Defendants over any gaming enterprises, funds, financial resources, assets, records, contracts, bank accounts, bank records and any other documents of any kind relating to the operation of the gaming facilities situated within the Defendant Communities.

On March 4, 2009, the Plaintiff Principal Chief transmitted new and legally-sufficient proposed and executed Facility Use Agreements to the Defendant Communities that permitted them to use some of the Nation's real and personal property situated within the Communities for all their usual and customary purposes except gaming.

On March 6, 2009, the Plaintiff Principal Chief issued Executive Orders No. 09-11 through 09-14 which revised certain actions taken with regard to the Duck Creek, Holdenville, Okemah, and Eufaula Communities insofar as the Executive Orders clarified the authority and

oversight by the Muscogee (Creek) Nation Gaming Operations Authority Board (GOAB) of the subject gaming facilities.

This Court, after an extended hearing, granted the Plaintiff's prayer for a Preliminary Injunction as to all Defendant Chartered Communities ordering; 1) an accounting from each Defendant of all gaming revenues and expenses derived and expended from each gaming facility beginning with fiscal year 2002 through the date of said Order; 2) preliminary injunctive relief in which the Defendants were barred from interference with the Plaintiff and his lawful agents, employees and delegates in the execution and actions authorized by Executive Orders No. 09-04 through 09-09; 3) preliminary injunctive relief in which the Defendants were barred from using, spending, dispersing or secreting any funds, accounts, or proceeds of gaming revenues pending the above accounting and other orders of this Court; 4) all accrued gaming revenue held by the Defendants was to be held in escrow by the Controller and secured by U.S. Treasury bills for sums exceeding the amounts insured by the Federal Deposit Insurance Corporation (FDIC), and; 5) preliminary injunctive relief in which the Defendants were barred from altering, destroying or secreting financial and community records of any kind regarding the operation of gaming facilities.

Pursuant to this Court's Order of April 21, 2009, forensic audits were conducted on each of the Defendant Communities. Those audits were intended to trace total gaming revenue from its source through the accounts of each Defendant Community to eventual disbursement and to discover the recipients of the money during the Ordered audit period beginning in Fiscal Year 2002 through the end of Fiscal Year 2008.

The aforementioned audits were amended and supplemented during the course of the trial and traced gaming revenues previously controlled by the Defendant Communities from

their gaming origins to Community bank accounts, and in some cases, the final recipients. Each audit revealed the Defendant Communities had engaged in the following conduct;

a) all, except Holdenville and Bristow, had commingled their gaming revenue with other funds in their general operating accounts;

b) all spent net gaming revenues on programs and expenditures which benefitted certain Community individuals and/or other individuals, rather than the Muscogee (Creek) Nation citizens as a whole;

c) collectively, direct testimony during trial and the examination of net gaming revenue held by Communities revealed expenditures for the benefit of individuals that included, among other things, vacation stipends, individual travel and lodging expense, golden parachute type one-time cash payments for certain employees, payment for individual's groceries or grocery bills, gift cards for individuals and juveniles, cash donations, payment of individual personal bills, purchase of household appliances for individuals, purchase of vehicles and tractors for individuals, purchase of lawn equipment for individuals, payment for individual residence yard maintenance, individual Christmas gifts and payment of credit card bills. There were instances where gaming revenue was used to purchase real property without proper authority.

d) Proper tax reporting pursuant to the Federal Tax Code at 26 Code of Federal Regulations § 31.3402(r)-1 was rarely, if ever, performed nor were the proper Internal Revenue Service reporting form or forms issued to the recipients of said payments, be they cash or in-kind.

e) the majority of "community programs" administered by the Defendant Communities did not operate under any meaningful eligibility criteria, and some criteria used such as meeting attendance in order to participate in a community activity is unconstitutional. Courtwright v.

July, 3 Okla.Trib.132 (Muscogee (Creek) Nation Supreme Court 1993). Others failed to link need and circumstances with the provided benefit as required by controlling Federal law and importantly excluded other Muscogee (Creek) citizens from participating.

The Preliminary hearing began on March 17, 2009, thereafter, a bench trial of this matter was held that continued on various days from August 24, 2009 until November 25, 2009. For a total of forty-six trial and motion days.

CONCLUSIONS OF LAW AND FACT

VENUE

This Court is the court of general jurisdiction for the Muscogee (Creek) Nation empowered to decide civil actions brought by Muscogee (Creek) citizens arising in Indian Country under the laws of the Muscogee (Creek) Nation. Activities constituting the subject matter of the instant litigation took place within the territorial jurisdiction of the Muscogee (Creek) Nations' Courts and involve alleged violations of governing Muscogee (Creek) Nation and United States of America Federal Indian law.

SUBJECT MATTER JURISDICTION

This Court has subject matter jurisdiction of the instant action.

PERSONAL JURISDICTION

The District Court has personal jurisdiction over the Defendants and Principal Chief.

STANDARDS AND GROUNDS FOR PERMANENT INJUNCTIVE RELIEF

Injunctive relief is an equitable remedy. This Court finds instructive *Ebay Inc, v. Mercexchange, LLC*, 547 U.S. 388 (2006). In *Ebay*, a unanimous Supreme Court of the United States set forth the classic four-factor test which must be met before permanent injunctive relief

may be granted and stated that “a major departure [from said test] should not be lightly implied.” 547 U.S., at 391. The Court also stated, “the decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.”

The four-pronged test for granting of permanent injunctive relief is a well-established principle of equity in American jurisprudence, recently recounted anew in *Ebay*, the first prong, requires the Plaintiff to demonstrate that it has suffered irreparable injury. Secondly, that remedies at law, including money damages, are inadequate alone to compensate or make the Plaintiff whole. Thirdly, the Plaintiff must show that under a balancing of the hardships analysis, the remedy is warranted. Finally and fourthly, that the public interest would not be disserved by permanent injunction.

I. Irreparable Injury

Based upon a careful reading of controlling federal law and consideration of the evidence presented at trial, this Court holds that the Plaintiff prevails on the merits of this case. This is principally due to ample justification for the Plaintiff’s entry grounded in a triad of legal problems inherent in the terms of the now expired Facility Use Agreements.

A. Entry Justified by Illegal and Void Facility Use Agreements

The Muscogee (Creek) Nation conducts gaming at nine (9) locations. The six (6) locations subject to this lawsuit are known to this Court and the National Indian Gaming Commission (NIGC) under various names and are six (6) of that nine (9). Thus, despite purported independence from the Nation’s authority and oversights pursuant to Muscogee (Creek) Nation Annotated Title 21 §4-103 (C)(1)(1) and the “Facility Use Agreements,” the National Indian Gaming Commission, the Federal Indian Gaming Regulatory Act and this

Court view gaming operations conducted at each named Community to be acts of the Muscogee (Creek) Nation.

Misfeasance, malfeasance, or nonfeasance at a Community facility threatens the entire Nation's ability to conduct gaming at any of the nine locations for the continuing benefit of 69,538 Creek citizens (population as of February 3, 2010) and places the National Treasury at risk by levy of federal civil fines under the Federal Indian Gaming Regulatory Act of 1988 (IGRA).

A review of the "Notices of Violation" issued by the National Indian Gaming Commission to various Indian Tribes, on file with the National Indian Gaming Commission attests, the subject Facility Use Agreements, primarily due to the provision for net gaming revenue-splitting, required approval by the National Indian Gaming Commission before they could become effective. *See* National Indian Gaming Commission Notice of Violation NOV-09-37, Sept 1, 2009 issued to Yakama Nation, and; National Indian Gaming Commission Notice of Violation NOV-06-11, June 12, 2006 issued to Puyallup Tribe of Indians. The Court finds that no such Federal approval ever occurred as to any of the subject Facility Use Agreements.

Further, the Court notes a March 13, 2009 letter from the National Indian Gaming Commission to the Plaintiff Principal Chief and introduced by the Plaintiff in which John E. Peterson, National Indian Gaming Commission, Director of Enforcement, advised Principal Chief A.D. Ellis that the Enforcement Division of the National Indian Gaming Commission has been investigating the use of Muscogee (Creek) Nation gaming revenue by several communities. [Plaintiff's Exhibit No.7] He stated the programs benefit individual community members without a recognized need and without using criteria to limit beneficiaries. Mr.

Peterson's March 13, 2009 letter states that rather than qualifying as a permissible "governmental program" the practices may actually amount to the distribution of gaming revenue to individual tribal members without an approved revenue allocation plan. He further writes the Indian Gaming Regulatory Act specifies an Indian tribe may distribute gaming revenue to individual tribal members (so-called per capita payments) only if such payments are made in accordance with a revenue allocation plan approved by the Secretary of the Interior. 25 United States Code § 2710(b)(3), (d)(1)(A)(ii). Mr. Peterson states the Muscogee (Creek) Nation does not have an approved revenue allocation plan and it is illegal to distribute gaming revenue to individual tribal members outside of tribal government programs, and government programs should be made equally available to all who meet the program standards. In the letter, he makes reference to National Indian Gaming Commission Bulletin 01-05. This Court will address National Indian Gaming Commission Bulletin 01-05 later in this Order.

The Court believes Mr. Peterson's letter was a gracious attempt by the National Indian Gaming Commission to afford the Muscogee (Creek) Nation the opportunity to put its gaming house in order and avoid more direct National Indian Gaming Commission enforcement involvement. Federal Regulations specific to the National Indian Gaming Commission allow the Chairman to reduce the amount of civil fine assessed based on the degree of good faith exhibited by the Tribal government in achieving rapid compliance. 25 Code of Federal Regulations Part 575-Civil Fines.

The subject of per capita payments will be addressed at length later.

The fact that Defendant Checotah Indian Community continued to operate and manage the Muscogee (Creek) Nation gaming operation geographically located in Checotah without benefit of a management contract approved by the National Indian Gaming Commission

Chairmen is mismanagement and jeopardizes the Muscogee (Creek) Nation's ability to legally operate gaming facilities. 25 Code of Federal Regulations §§ 502.1, §502.15.

The Plaintiff cites Executive Order 09-04 in which he states the "Facility Use Agreements" expired on February 29, 2009. The Courts finds for the Plaintiff on this point. As a matter of law, the provisions of Title 11, Chapter 4, Subchapter 3 of the Muscogee (Creek) Nation Code Annotated, entitled "Minimum Requirements of Lease Agreements," specifies minimum conditions to be contained in a lease agreement. The lease agreement shall contain: a beginning and ending date; legal description of affected tribal lands, including details as to structures and their condition on the site; activities allowed on the leased tribal lands and in the leased buildings; consideration; responsibility for insurance, utilities, maintenance and repairs; the Muscogee (Creek) Nation reserves the right to restrict the use of land and buildings; the lease will provide for re-negotiation during the term of the lease should intended use change; subleases must be approved; all tribal laws must be followed; and a requirement that all by-laws be submitted for approval to the Office of the Principal Chief before minimum conditions are statutorily satisfied; the Principal Chief retains the right of re-entry onto real property in the event a Lessee acts in a manner harmful to the Muscogee (Creek) Nation or its citizens, jeopardizes the Nation's real property and buildings being leased or acts in a manner injurious to public safety.

This Court finds, based on evidence and sworn testimony during trial, no "re-entry" was required since the facility use agreements had expired, and the right to enter and possess Muscogee (Creek) Nation real property legally lies solely with the Muscogee (Creek) Nation.

In the absence of a legally sufficient "Facility Use Agreement" in compliance with the United States Code and Muscogee (Creek) law between the Muscogee (Creek) Nation and the

Defendants, the Defendants could not legally continue management and /or control of the subject Muscogee (Creek) Nation real and personal property.

The Plaintiff's action was justified in order to safe-guard the Nation's real and personal property situated at each facility and to ensure the monies in accounts controlled by the Defendants, which originated as gaming revenue, remained in those accounts until such time as the Muscogee (Creek) Nation rightfully and legally appropriates the funds for one or all of the five (5) expressed legitimate purposes allowed for the expenditure of Indian gaming revenue specified in the Indian Gaming Regulatory Act at 25 United States Code § 2710(b)(2)(B), (d)(1)(A)(ii). Specifically;

- 1) tribal government operations and administration;
- 2) general welfare of the tribe and its members, provided that before payments from this allocation category shall issue there are published, non-discriminatory, eligibility criteria and demonstrated links to the recipients' recognized needs;
- 3) promotion of tribal economic development;
- 4) donations to charitable organizations;
- 5) contributions to help fund local (i.e. non-tribal) governmental agencies. (See Revenue Allocation Plans of Indian Tribes in Oklahoma approved by the United States Secretary of Interior; Absentee Shawnee Tribe; Sac and Fox Nation of Oklahoma, and; Tonkawa Tribe of Oklahoma).

This Court finds no constitutional impediment to the actions of the Muscogee (Creek) Nations' Principal Chief when the entire Muscogee (Creek) Nation is so obviously implicated

under the controlling federal law coupled with the expiration of the “Facility Use Agreements” and the control vacuum their expiration created.

In addition, this Court finds that the purported Facility Use Agreements were void since they were never submitted to, or approved by the National Indian Gaming Commission pursuant to 25 Code of Federal Regulations Part 522. That body of federal regulations requires that tribal ordinances or resolutions that concern Class II gaming operations enacted after February 22, 1993 must be approved by the Chairman of the National Indian Gaming Commission. 25 Code of Federal Regulations §§ 522.2 through 522.4.

After careful consideration of the facts and evidence introduced at trial, this Court finds the Plaintiff Principal Chief acted in accordance with his Constitutional responsibility and statutory authority by seizing gaming funds under the control and in accounts controlled by the Defendant Communities and placing management and financial control of the Muscogee (Creek) Nation’s gaming operations under the Muscogee (Creek) Nation Gaming Operations Authority Board (GOAB).

B. Entry justified by illegal per capita payments

United States Department of the Interior has issued regulations regarding several aspects of the Indian Gaming Regulatory Act. An Indian Nation must have a Tribal “Revenue Allocation Plan” (RAP) approved by the Secretary of the Interior (Secretary) *before* it makes per capita payments to its citizens (*See* National Indian Gaming Commission Notice of Violation NOV-09-37, Sept 1, 2009 issued to Yakama Nation) in accordance with 25 United States Code §§2710(B)(3), 2710(D)(1)(A)(ii):

“(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2) (B):

(B) the plan is approved by the [United States] Secretary [of the Interior] as adequate, particularly with respect to uses described in clause (1) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the United States] Secretary [of the Interior] and the governing body of the Indian tribe; and

**(D) The per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.”
(emphasis added)**

This Court finds that no such Revenue Allocation Plan (RAP) applicable to the Muscogee (Creek) Nation approved by the United States Secretary of the Interior exists. Therefore, in the absence of an approved RAP, payments made by the Defendants, originating from the gaming proceeds to individuals or groups with no demonstrated link to a recognized need, violate Federal law at 25 Code of Federal Regulations §§ 290.1 through 290.26.

To be clear, the Muscogee (Creek) Nation in accordance with the Indian Gaming Regulatory Act, controls all gaming revenues and may in the Muscogee (Creek) Nation’s discretion furnish welfare payments, without deceit or fraud, based on documented, legitimate

needs to Muscogee (Creek) citizens. However, to permit Chartered Communities to dole out funds to persons, even those with identifiable needs or who are in particular circumstances that justify welfare assistance is to invite inadequate record-keeping, insufficient documentation, opportunities for beneficiaries to “double-dip” by obtaining assistance from both the national government and a Chartered Community, and politicization of the process. Moreover, no evidence was introduced to persuade the Court that the required federal tax liability notices required by 26 Code of Federal Regulations Part 31 were consistently issued to the recipients of net gaming revenue as required by the Federal Tax Code. Thus, such payments imperil the Nation’s continued ability to conduct gaming at these facilities while subjecting the Nation to federal civil penalties and fines .

This Court finds that the revenue sharing as spelled out in the “Facilities Use Agreements” in which Communities were contractually entitled to fifty per cent (50%) of net gaming revenue proceeds, which they in turn distribute to various individuals and entities without benefit of an approved Revenue Allocation Plan, constituted illegal per capita payments. These facts void the “Facilities Use Agreements” from the beginning. Such disbursements are patently illegal under the Federal Indian Gaming Regulatory Act and are therefore void and properly enjoined consistent with the Supreme Court of the Muscogee (Creek) Nation’s holding in *Reynolds v. Skaggs*, 4 MVSL Rep 115 (1994), if the Nation’s elected representatives choose to begin per capita payments originating from gaming revenues, they are free to do so provided a Revenue Allocation Plan, submitted by the Nation, is approved by the United States Secretary of the Interior. No such payments are legal until the Muscogee (Creek) Nation possesses a Revenue Allocation Plan approved by the United States Secretary of the Interior. This Court further finds that any per capita payments to individuals or entities

pursuant to an approved Revenue Allocation Plan must be the exclusive prerogative of the Muscogee (Creek) Nation and not a decision left to a small group of Muscogee (Creek) citizens comprising a Chartered Community.

For the benefit of those Muscogee (Creek) citizens who did not have liberty to attend the trial proceedings, or those who are unfamiliar with the Federal Indian Gaming Regulatory Act of 1988, the Federal Indian Gaming Regulatory Act of 1988 controls Indian gaming and imposes a federal statutory legal obligation on this Court, the Muscogee (Creek) National Council and the Principal Chief of the Muscogee (Creek) Nation to follow federal laws governing Indian gaming. The Indian Gaming Regulatory Act does not permit a Muscogee (Creek) Nation Chartered Community, or the Muscogee (Creek) National Council to authorize direct or indirect payments of net gaming revenues to individual citizens without a Revenue Allocation Plan, approved in advance by the United States Secretary of the Interior.

In accordance with The Federal Indian Gaming Regulatory Act of 1988 the Muscogee (Creek) Nation may not appropriate funds originating as gaming revenue or interest on gaming revenue to Chartered Communities, which are then paid in cash or in-kind to some or all individual Community members irrespective of their documented need, because such payments constitute illegal per capita payments despite passing through a legislative appropriations process. *See* National Indian Gaming Commission Notice of Violation NOV-09-37, Sept 1, 2009 issued to Yakama Nation, and; National Indian Gaming Commission Notice of Violation NOV-06-11, June 12, 2006 issued to Puyallup Tribe of Indians.

C. Dilution of the Nation's Sole Proprietary Interest in Gaming Activity

The Indian Gaming Regulatory Act of 1988 statutorily controls by federal law governance of gaming activities on Indian lands the Act states, among other things, the Tribe

must have the “sole proprietary interest in,” and responsibility for, conduct of any gaming activity. 25 United States Code § 2710 (b)(2)(A); 25 Code of Federal Regulations § 522.4.-522.7. Additionally, the Court takes judicial notice of a letter from then National Indian Gaming Commission Chairman Phil Hogan to Senators John McCain, Byron Dorgan and Daniel Inouye, in their capacities as members of the United States Senate Committee on Indian Affairs dated February 1, 2005, and publicly available on the National Indian Gaming Commission website, which states in part; “Because IGRA specifies that a tribe (not its members) must have sole proprietary interest [in the tribe’s gaming operations][...] ownership in a tribal gaming operation by individual tribal members would also be inconsistent with IGRA.” This Court finds that Facility Use Agreements, which operated to give ownership of one-half of the net gaming revenues from Muscogee (Creek) Nation gaming facilities situated within the Defendant Chartered Communities to those Chartered Communities, to be disbursed to individual community members by their boards, is the ownership of an interest in said gaming operation, and therefore inconsistent with the Indian Gaming Regulatory Act and illegal.

The Act requires that a Tribe’s gaming Ordinance must provide that “the Tribe shall have the *sole proprietary interest in and responsibility* for the conduct of any gaming operation.” 25 Code of Federal Regulations §522.5. 522.7 (emphasis added). Further, the Indian Gaming Regulatory Act states “[...] ensure that the Indian tribe is the primary beneficiary of the gaming operation.” 25 United States Code § 2702 (2). All revenues generated from any Muscogee (Creek) Nation gaming facility are the property of the entire Muscogee (Creek) Nation. A Chartered Community does not have any interest in such profits, or net gaming revenues.

This Court holds that Chartered Communities are not “local governments” pursuant to 25 United States Code §2710(2)(B) (See Revenue Allocation Plans of Indian Tribes in Oklahoma approved by the United States Secretary of Interior; Absentee Shawnee Tribe; Sac and Fox Nation of Oklahoma, and; Tonkawa Tribe of Oklahoma). Muscogee (Creek) Nation Chartered Communities have no governmental powers or authority other than those set forth in Title 11 of the Muscogee (Creek) Nation Code.

The Indian Gaming Regulatory Act of 1988 controls and voids any Muscogee (Creek) Nation statutory authority for the management and revenue sharing as practiced by Muscogee (Creek) Chartered Communities.

To be crystal clear on the point, “proprietary interest” as stated in 25 Code of Federal Regulations §§522.4, 422.7, is interpreted by the National Indian Gaming Commission consistently with the definition of “proprietary interest” in Dondlinger v. United States, 1970 U.S. Dist. LEXIS 12693 (D. Neb. 1970). In Dondlinger, the United States Court for Nebraska held “one has proprietary interest if he shares in, or derives profit from, a business as opposed to being a salaried employee merely performing clerical and ministerial duties.” Further, the NIGC has adopted the ordinary meaning of “proprietary interest” as “one who has an interest in, control of, or present use of certain property.” Evans v. United States, 349 F.2d 653. 658 (5th Cir. 1965). The Court is mindful that even if a colorable argument were advanced that the “sole proprietary interest” as contained in the Federal Indian Gaming Regulatory Act (IGRA) remains ambiguous, under the analysis announced in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the National Indian Gaming Commission (NIGC) enjoys broad judicial deference to its interpretation of ambiguities in federal law it is charged by Congress to enforce. Therefore, the National Indian Gaming Commission’s interpretation of

“sole proprietary interest” controls and any contrary profit-sharing scheme in force in this Nation, must yield to Federal authority or subject the Nation to substantial civil fines under the Federal Indian Gaming Regulatory Act.

Muscogee (Creek) Nation law, can not now or in the future, permit a “50-50 Split” of gaming revenue because such a participation in net gaming revenue is not permitted under the Federal Indian Gaming Regulatory Act since it dilutes and splits “sole proprietary interest” in net gaming revenues the Muscogee (Creek) Nation must statutorily and legally own. This Court has always held, tribal law yields to any controlling Federal law. That is the case when state law conflicts with Federal law, and the situation is no different in Indian Country when tribal law conflicts with Federal law.

As a matter of law, this Court finds that it is unlawful for fifty percent (50%) or any percent of the net gaming revenue proceeds from any Muscogee (Creek) Nation Casino to be set aside for any Muscogee (Creek) Nation Community where the gaming site is located for those Muscogee (Creek) Nation Community citizens to dispose of as they decide, while leaving the other fifty percent (50%) for the benefit of the Muscogee (Creek) Nations’ 69,538 Muscogee (Creek) citizens, such division of net gaming revenue violates the Federal Indian Gaming Regulatory Act’s expressed terms as to “sole proprietary interest” and is impermissible.

Neither the common law nor principles of equity can save the Facility Use Agreements even if their expiration did not occur before reentry. No contract may by its terms violate applicable Muscogee (Creek) or controlling Federal law as this one clearly does as detailed in the previous paragraphs. Moreover, the Court fails to find one of the most basic elements of contract formation in this case. The Court fails to find “consideration” in a lease contract where nothing of value was given in the bargain by the purported Lessee.

It is more accurate to state that the terms of the “Facility Use Agreements” allowed the communities to keep fifty percent (50%) of gaming revenues which otherwise, under the Federal Indian Gaming Regulatory Act, belonged to all 69,538 of the Muscogee (Creek) People, thus the Muscogee (Creek) Nation as Lessor received absolutely nothing of value remotely construed as consideration and to make a bad situation worse, the “Facility Use Agreements” subjected the Muscogee (Creek) Nation to civil fines and penalties each day they remained in effect.

If the Nation’s elected representatives choose to award gaming revenue to the Defendants, they certainly may do so under the Muscogee (Creek) Nation Constitution, but only pursuant to a Revenue Allocation Plan approved by the United States Secretary of the Interior coupled by an act of the National Council pursuant to an appropriations bill signed by the Principal Chief in which it is precisely stated; 1) the sum appropriated; 2) its intended purpose, if the appropriated funds are derived from gaming proceeds; 3) that its intended use is consistent with the acceptable uses explicitly stated at 25 United States Code § 2710(b)(2)(B), (d)(1)(A)(ii)(iii). Moreover, an additional safeguard exists in that the Muscogee (Creek) citizens, from whom the Muscogee (Creek) National Council ultimately derives its authority to legislate, shall be aware of said publicly enacted appropriations, thus illuminating expenditures of Muscogee (Creek) Nation funds in full view of the voting public. In contrast, any attempt to enrich the Defendants under the guise of a “Facility Use Agreement” which lets a small minority of the Muscogee (Creek) Nations’ population keep half of what, under the Federal Indian Gaming Regulatory Act, is the Muscogee (Creek) People’s money, fails under principles of equity and law.

To continue under the current scheme, despite its origin and basis under Muscogee (Creek) statutory law, is to put the entire Muscogee (Creek) Nation’s economic viability at risk

given the Chairman of the National Indian Gaming Commission's authority under the Indian Gaming Regulatory Act to levy and collect civil fines up to \$25,000 per violation, per day, "against the tribal operator of an Indian game or management contractor engaged in gaming for any violation of any provision of the Act :...}," 25 United States Code § 2713 (a)(1). In the case at bar, regardless of who is fined, the Muscogee (Creek) People lose. This precise point was driven home in the aforementioned letter from The National Indian Gaming Commission Director of Enforcement to the Plaintiff Principal Chief of March 13, 2009 [Plaintiff's Exhibit No. 7]; which states:

"[...] Our investigation shows that many of the Indian community programs that are funded with gaming revenue at the Muscogee (Creek) Nation have no demonstrated link to a *recognized* need within the community and have *no eligibility criteria* that tie the programs' beneficiaries to those identified needs."[emphasis added] The Court now holds, such activities that indeed occurred based on clear and convincing evidence adduced at trial, constitute illegal per capita payments, barred by the Indian Gaming Regulatory Act without an approved Revenue Allocation Plan on file with the Office of the U.S. Secretary of the Interior. The letter continues: **"For example, the Duck Creek Community travel program pays for community members to travel and attend events selected by the Community's activities committee. [...] The only eligibility criterion for this program is that the community members must be active participants in community meetings. This program fails to identify a recognized need within the community; fails to limit the types of events that can be sponsored in order to ensure that a recognized need within the community is met; and fails to include eligibility criteria to ensure that the program's beneficiaries are limited to those whose financial or other needs justify their participation in the program."**[Emphasis

added]. The letter concludes by stating; **“Other community programs have worthy titles but fail to use criteria that one would normally associate with such titles.”** The letter highlights improper use of net gaming revenue at and by Defendant Checotah in the administration of it’s hardship/medical assistance program which lacks meaningful criteria, Defendant Eufaula which administers a purported general assistance program that also lacks meaningful criteria, and Defendant Okemah’s emergency assistance program which lacks any criteria “whatsoever.” The letter concludes with the statement; **“These examples are meant to be illustrative. They are not the only programs that suffer from such deficiencies.”** These facts alone, are sufficient to subject the Nation to substantial fines, and such illegal activity, proven at trial, further bolsters the Plaintiff’s compelling need to have taken the steps necessary to restore the gaming facilities and all net revenues they generate to the control of the Muscogee (Creek) Nation’s central government.

The Muscogee (Creek) Nation clearly risks National Indian Gaming Commission levied civil fines of \$25,000 per day for each of the three ongoing illegalities. For purposes of further illustrating this point of law, this Court needs to look no further than the recent experience of a nearby sister Nation. A management contractor operating the Seminole Nation of Oklahoma’s gaming facilities was fined almost five million dollars by the National Indian Gaming Commission for serious Indian Gaming Regulatory Act violations in 2007. Among these violations was illegal profit-sharing perpetrated over a two-year period. (*See* National Indian Gaming Commission Civil Fine Assessment 07-02 (CFS-07-02)). Thus, the specter of fines amounting to thousands of dollars per day may levied against the Muscogee (Creek) Nation, at least since 2005 when the facially illegal agreements were executed, constantly looms as a very real possibility. This Court notes that “profit-sharing” and per capita payments at the Defendant

Communities continue to place the Nation at risk of substantial National Indian Gaming Commission civil fines. Indeed, the National Indian Gaming commission is even empowered to levy the “death penalty” to tribal gaming by ordering temporary closure of facilities for substantial violations of the Act. 25 United States Code 2713 § 14 (b)(1).

Considering: 1) no legal “Facility Use Agreements” existed; 2) the practice of illegal per capita payments, and; 3) the dilution of the Nation’s statutorily-required sole proprietary interest in the facilities and the revenues they generate, this Court is persuaded that the Plaintiff’s case prevails on the merits by the clear and convincing standard announced twelve years ago in Mazurek v. Armstrong, 520 U.S. 968, 972 (1997).

II. Remedies at law, including money damages, are inadequate alone

The Plaintiff has amply demonstrated harm to the Muscogee (Creek) Nation in fact due to the illegal revenue splitting scheme in operation pursuant to the expired and voidable facility use agreements. This harm cannot be lessened by money damages alone as the practice put the Muscogee (Creek) Nation in violation of controlling Federal law, made it liable to substantial Federal fines, and was rightly halted by the Principal Chief’s lawful actions of re-entry. The Muscogee (Creek) Nation’s funds and continued ability to conduct gaming were secured by the Plaintiff’s entry and placement of said funds in escrow accounts pending the outcome of trial.

Additionally, this Court finds that accounting practices employed by the Chartered Communities is woefully insufficient. The law of the Muscogee (Creek) Nation specifies all governmental-type funds will apply cost principles in accordance with the United States of America’s Office of Management and Budget (OMB) Circular A-87 in determining allowable costs. Central accounting and disbursement of said funds administered by the Nation’s Controller pursuant to the aforementioned Circular is crucial to ensure compliance.

Muscogee (Creek) Nation law requires all budgets shall be audited in accordance with the United States of America's Office of Management and Budget OMB Circular A-133 (Audits of States, Local Governments and Non-Profit Organizations), and Tribal Audit Law. This has not always been the case within the Defendant Chartered Communities, which this Court finds must be remedied by central management of *all* casino gaming revenues by the Muscogee (Creek) Nation's Controller, which are legally the property of the Muscogee (Creek) Nation for the abundant reasons cited above.

III. Balancing of Hardships.

The Defendants, in their capacities as individual Creek citizens suffered no legal harm incidental to the Plaintiff's entry. The Defendants, as Communities, suffered no legally cognizable irreparable harm since their previous management and control of the subject gaming facilities was patently illegal under the Federal Indian Gaming Regulatory Act, as discussed at length above.

Should the Defendants, or any of their members, wish to organize as provided by the Muscogee (Creek) Nation Code Annotated Title 3. Corporations and Business Entities; Title 21. Gaming and pursue the legal rights to act as a legitimate management contractor under the Federal Indian Gaming Regulatory Act, they are free to do so and after compliance with all Muscogee (Creek) Nation Laws apply to the Chairman of the National Indian Gaming Commission under 25 Code of Federal Regulations Part 533 for approval.

There is no Muscogee (Creek) Nation or Federal statutory bar to a Defendant's licensure by the Muscogee (Creek) Nation Office of Public Gaming and the National Indian Gaming Commission to conduct gaming operations at these facilities on behalf of the entire Nation under a National Indian Gaming Commission approved management contract.

The Court is mindful of the fact the Defendant Communities expenditure of gaming revenues for various purposes was ill-informed as proven by facts adduced at trial which make clear the Defendants appear to have acted in good faith and sought guidance from the Nation's central gaming authority on acceptable purposes for which gaming revenues could be spent. Specifically, the Court finds that on June 6, 2005, Mr. Nelson Johnson, in his capacity as Muscogee (Creek) Nation Gaming Commissioner, provided some, but decidedly incomplete guidance, which may have led some or all of the Defendant Communities to believe they were operating within the law as to their expenditures of net gaming revenues. Specifically, Mr. Johnson furnished Defendants Bristow, Checotah, Duck Creek, Eufaula and Okemah a copy of NIGC Bulletin No. 01-05, "Use of Net Gaming Revenue" omitting pages 2, 5 and 7 of the seven (7) page bulletin. The omitted pages contained information concerning distributions of gaming proceeds *if* the tribe has a Revenue Allocation Plan, also defined as a per capita with the definition of money includes the distribution of other things of value. Also omitted were the steps required to be completed before a tribe may legally make a per capita. Impermissible Uses of Gaming Revenue discussed in Bulletin No.01-05 also was not sent. Some impermissible uses listed are cash used for personal use, purchase of personal cars, boats, houses and clothing, residential landscaping and payment of outstanding bills of tribal members.

The NIGC makes available to any person, the aforementioned bulletin, and a wealth of other information and guidance on its website at "<http://www.nigc.gov>."

As to some of Defendant's assertions they independently sought guidance from The National Indian Gaming Commission regarding compliance with the governing Indian Gaming Regulatory Act, this Court observes such enquiries went unanswered because the National Indian Gaming Commission does not respond to queries except from the recognized tribal governmental

authority. Namely, the government of the Muscogee (Creek) Nation headquartered in Okmulgee. (See July 24, 1987 letter from Ross O. Swimmer to Chief Leo R. Haney, Tuscarora Nation and July 12, 1994 Letter from Ada E. Deer, Assistant Secretary - Indian Affairs, United States Department of the Interior to Mr. Michael Cox, General Counsel, National Indian Gaming Commission available @ www.nigc.gov)

This Court takes notice of the fact tribes may make enquiries of the Internal Revenue Service, Chief Counsel regarding tax liability of individual gaming revenue beneficiaries, and the Internal Revenue Service Office of Indian Tribal Governments is available to assist tribes in navigating the submission process for such rulings. *See* National Indian Gaming Commission Bulletin No. 05-1, January 18, 2005.

IV. The Public Interest

Grant of the Plaintiff's prayed for injunctive relief is in the public interest. The Muscogee (Creek) People have great interest in seeing upheld the laws of the Muscogee (Creek) Nation and the United States. Given the civil penalties for mismanagement under the controlling federal law would be borne by all Muscogee (Creek) citizens, not merely the Defendants, the Muscogee (Creek) People are best served by National management control of the subject gaming facilities and all gaming revenues from same. Moreover, given the vast sums controlled by the Defendant communities under the illegal and invalid "50/50" Split," the Muscogee (Creek) People have been denied what is rightfully theirs under Federal law.

Moreover, traditionally, the Mvskokvlke shared equally in all aspects of life. All people were treated equally and tribal land was communally held for the benefit of all. The partitioning of a particular area of tribal land for the benefit of a few citizens, while denying the majority the full bounty of that land as the "50/50 Split," so clearly does, contradicts the ancient customs and

traditions of the Muscogee (Creek) People who, from time immemorial, recognized only communal stewardship of tribal land and resources.

Finally, the Constitutional Rights of Indians contained in the Indian Civil Rights Act 25 United States Code §§ 1301-1303 guarantees equal treatment by their tribal governments for all tribal members. The Defendant Communities' control of vast sums of net gaming revenues to use and disburse to their community members as they saw fit is contrary to the equal treatment guaranteed by the Indian Civil Rights Act, (25 United States Code § 1301 - 1303) and resulted in thousands of Muscogee (Creek) people who live outside the territorial boundaries of the Muscogee (Creek) Nation, or in communities within the Muscogee (Creek) Nation that lack a casino, receiving absolutely nothing of value from the net gaming revenue distributed to or retained by the Defendant Communities under the former revenue-splitting scheme, and those net gaming revenue funds were rightfully theirs to share.

To ignore the illegalities under and within the now expired "Facility Use Agreements," and to deny the Plaintiff's prayer is to invite public cynicism for the Rule of Law and to continue to allow tiny minorities of Creek citizens to benefit from tribal gaming, while denying the rest of the population a substantial share of those proceeds. Thus, the public interest of the Muscogee (Creek) People is best served by granting the Plaintiff's Petition.

CONCLUSION

The Plaintiff prevails in his prayer for permanent injunctive relief by clear and convincing evidence based on the testimony and evidence introduced during trial. The Muscogee (Creek) Nation's interests, which, as Principal Chief, the Plaintiff is sworn to protect, would continue to suffer irreparable injury if his actions to assume management control of the subject gaming

facilities were not upheld by this Court. The balance of the equities favors the Plaintiff and public policy considerations favor granting the Plaintiff's Petition.

Therefore, this Court grants the following permanent injunctive relief to the Plaintiff; 1) an accounting from each Defendant of all gaming revenues and expenses derived and expended from each gaming facility beginning with fiscal year 2002 through the present date, which, the Court notes has already occurred per its Order of April 21, 2009; 2) permanent injunctive relief in which the Defendants are barred from interference with the Plaintiff and his lawful agents, employees and delegates in the execution and actions authorized by Executive Orders No. 09-04 through 09-09; 3) permanent injunctive relief in which the Defendants are barred from using spending, dispersing or secreting any funds, accounts, or proceeds of gaming revenues; 4) all accrued gaming revenue previously held by the Defendants now held in escrow by the Controller shall be deposited into the General Fund of the Muscogee (Creek) Nation and the fund identified as Gaming Revenue Funds, only to be used as provided by the Indian Gaming Regulatory Act of 1988. 5) all Defendant Community smoke shop revenues commingled with gaming revenue now held in the escrow account by the Controller shall be separated and transferred back to the respective Communities, and; 6) permanent injunctive relief in which the Defendants are forever barred from altering, destroying or secreting financial and community records of any kind regarding the operation of gaming facilities.

The Court explicitly recognizes that although the Bristow Muscogee Indian Community, a named Defendant in the instant lawsuit, entered no appearance nor filed any responsive pleading, it is nevertheless bound by this Judgment.

Additionally and for purposes of clarification as to the ordered distribution of the disputed net gaming revenues generated at the various Defendant Communities, the Court orders that the

Controller shall transfer within a reasonable time the smoke shop net revenues contained within the various co-mingled Community accounts based on the percentage of smoke shop revenues contained therein as determined by the court ordered audits, which the Court finds are rightfully owned by the Defendant Communities. In the case of Community accounts which did not contain co-mingled funds and exclusively contain smoke shop revenues, the Controller is directed to immediately transfer those funds, if not previously transferred, back to the Defendant Communities which are their lawful owners.

Accordingly, the Defendants' prayed for relief is denied.

GRANTED: PLAINTIFF'S PRAYER FOR PERMANENT INJUNCTION as to Defendants:

- 1} BRISTOW MUSCOGEE INDIAN COMMUNITY;
- 2} CHECOTAH MUSCOGEE CREEK INDIAN COMMUNITY;
- 3} DUCK CREEK INDIAN COMMUNITY;
- 4} EUFAULA INDIAN COMMUNITY;
- 5} HOLDENVILLE CREEK INDIAN COMMUNITY; &
- 6} OKEMAH INDIAN COMMUNITY, chartered Communities of the Muscogee Creek) Nation;

1) including the accounting from each Defendant of all gaming revenues and expenses derived and expended from each gaming facility beginning with fiscal year 2002 through the present date which this Court finds has already occurred;

2) includes permanent injunctive relief in which the Defendants are barred from interference with the Plaintiff and his lawful agents, employees and delegates in the execution and actions authorized by Executive Orders No. 09-04 through 09-09;

3) includes permanent injunctive relief in which the Defendants are barred from using, spending, dispersing or secreting any funds, accounts, or proceeds of gaming revenues pending contrary orders of this Court;

4) requires all accrued gaming revenue formerly held by the Defendants, now held in escrow by the Controller, shall revert to the Nation;

5) requires transfer as soon as the Controller deems reasonable and practical of all Defendant Community smoke shop revenues now held in the Nation's escrow account as soon as practically possible by the Comptroller. The amounts derived from Community smoke shop revenue now held in escrow pending this Order to be returned by the Controller to the respective Communities are calculated based on the percentages of smoke shop revenues contained in their respective co-mingled accounts as proven at trial and as set forth below;

BRISTOW MUSCOGEE INDIAN COMMUNITY: Was placed under Emergency Proclamation by the Principal Chief on February 4, 2008 and Amended on April 8, 2008 resulting in no smoke shop revenue being deposited into escrow with the Controller.

CHECOTAH MUSCOGEE INDIAN COMMUNITY: 11.6 percent of \$4,998,239.04 = **\$579,795.72** for release from escrow to the Community;

DUCK CREEK INDIAN COMMUNITY: 10 percent of \$5,561,043.40 = **\$556,104.34** for release from escrow to the Community;

EUFAULA INDIAN COMMUNITY: 12 percent of \$4,597,943.62 = **\$551,753.23** for release from escrow to the Community;

HOLDENVILLE CREEK INDIAN COMMUNITY: None. No commingling occurred, and smoke shop revenue was previously transferred to the Community by Order of this Court.

OKEMAH INDIAN COMMUNITY: 18.8 percent of \$2,167,760.23 = **\$407,538.91** for release from escrow to the Community,

and;

6) includes permanent injunctive relief in which the Defendants are barred from altering, destroying or secreting financial and community records of any kind regarding the operation of gaming facilities.

Additionally;


7) All revenues generated by any gaming facility owned by this Nation shall henceforth be managed utilizing the United States Office of Management and Budget (OMB) Circular A-87 and audited pursuant to OMB Circular A-133 and Muscogee (Creek) law;

8) Further proceedings are herein ordered as to the Plaintiffs' prayer for reimbursement of its attorney fees and costs related to this lawsuit, and;

9) The Plaintiff Principal Chief is herein awarded the right to assess against the Defendant Chartered Communities, jointly or severally, any civil penalty or fine(s) imposed on the Muscogee (Creek) Nation by subsequent National Indian Gaming Commission action, arising from acts or omissions the Commission's enforcement office finds were perpetrated within and/or by the Defendant Chartered Communities, during the period of calendar year 2005 through February 28, 2009.

IT IS SO ORDERED.

DATED this 19th day of March, 2010.

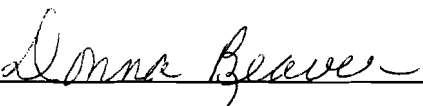


Patrick E. Moore

District Judge

CERTIFICATE OF MAILING/EMAIL AND FACSIMILE

I, Donna Beaver, Deputy Court Clerk for the Muscogee (Creek) Nation District Court, do hereby certify that on this 19th day of March, 2010, I sent by email, facsimile and US Mail, a true and correct copy of the foregoing **FINAL JUDGMENT AND ORDER - CV 2009-33** to: Rod W. Wiemer, Esq., 114 North Grand, Suite 200, Okmulgee, OK 74447 (rwattys@sbcglobal.net); Timothy S. Posey, Esq., 320 South Boston Ave., Suite 400, Tulsa, OK 74103 (tposey@HallEstill.com); O. Joseph Williams, Esq., 124 East Main Street, Norman, OK 73070 (jwilliams@pitchlynnlaw.com); Gregory G. Meier, Esq., 1524 S. Denver Ave., Tulsa, OK 74119 (GMeier@meierlaw.com); and Chad Locke, Esq., 314 West Broadway, Muskogee, OK 74402 (chadalocke@gmail.com). On this same date I, faxed the same to: Rod W. Wiemer, Esq., 918-756-3860; Timothy S. Posey, Esq., 918-594-0505; O. Joseph Williams, Esq., 405-447-4219; Gregory G. Meier, Esq., 918-584-1295; and Chad Locke, Esq., 918-687-5969.



Donna Beaver, Deputy Court Clerk