

7

IN THE SUPREME COURT  
CHEYENNE AND ARAPAHO TRIBES OF OKLAHOMA  
CONCHO, OKLAHOMA

CHEYENNE-ARAPAHO  
SUPREME COURTS OF OKLA.  
**FILED**  
IN THE SUPREME COURT

AUG 17 2007

IN RE: The EXECUTION OF CASINO )  
GAMING MANAGEMENT CONTRACTS )  
with Southwest Casino and Hotel Corp. )

DOCKET CIV PAGE 1871  
FILE Patty Bell IMAGE  
COURT CLERK  
DEPU

Governor Darrell Flyingman, )  
Plaintiff/Appellant, )

Southwest Casino & Hotel Corp. )  
Intervenor/Appellee )

Case No: CNA-SC-07-07

Cheyenne and Arapaho Tribal Legislature )  
Intervenor/Appellee )

Cheyenne and Arapaho Tribal Council )  
Intervenor/Appellee )

---

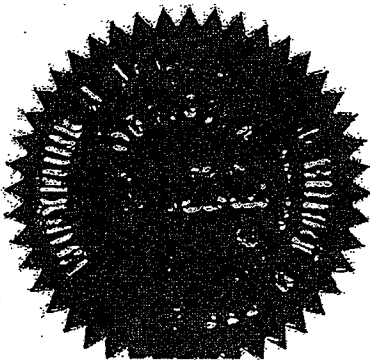
BEFORE: Chief Justice Ryland L. Rivas, Associate Justice Dennis W. Arrow,  
Special Justice Karen Eby, and Special Lindsay G. Robertson

---

JUDGMENT REVERSING DECISION OF THE TRIAL COURT  
OF THE CHEYENNE AND ARAPAHO TRIBES

NOW COMES the Court Clerk for the Supreme Court, Patty Bell, pursuant to  
Section 461 of the Appellate Procedure Code of the Cheyenne and Arapaho Tribes of Oklahoma,  
and hereby enters judgment in this action in accordance with the decision of the Cheyenne and  
Arapaho Supreme Court filed August 17, 2007.

DONE this 17th day of August, 2007.



Patty Bell  
Patty Bell  
Court Clerk  
Cheyenne and Arapaho Supreme Court

AUG 17 2007

In the Supreme Court  
of the Cheyenne-Arapaho Tribes

CONCHO, OKLAHOMA

DOCKET UV PAGE 871  
FILED [Signature] IMAGE  
COURT CLERK  
DEPS. :

IN RE the EXECUTION OF CASINO )  
GAMING MANAGEMENT CONTRACTS )  
with Southwest Casino and Hotel Corp. )  
)  
)  
)  
Governor Darrell Flyingman, )  
Plaintiff/Appellant. )  
)  
)  
Southwest Casino & Hotel Corp., )  
Intervenor/Appellee. )  
)  
)  
Cheyenne and Arapaho Tribal Legislature, )  
Intervenor/Appellee. )  
)  
)  
Cheyenne and Arapaho Tribal Council, )  
Intervenor/Appellee. )

Case No. CNA-SC-07-07

---

ON APPEAL FROM THE MAY 18, 2007 ORDERS OF THE  
TRIAL COURT IN CASE NO. CNA-CIV-07-27

---

OPINION AND ORDER

---

BEFORE: Chief Justice Ryland L. Rivas  
Associate Justice Dennis W. Arrow  
Special Justice Karen Eby  
Special Justice Lindsay G. Robertson

PER CURIAM.

This Court is of the opinion that the issues herein have been thoroughly briefed, that oral argument would not assist the Court in making its decision, and that undue delay would be caused were the Court to schedule oral argument on this matter.

I. BACKGROUND

The Tribes' Lucky Star casinos at Concho and Clinton are managed by Southwest Casino and Hotel Corp. ["Southwest"] pursuant to a gaming management agreement that was set to expire by its own terms on May 19, 2007. The efforts of members of three branches of government regarding the Tribes' relationship with Southwest beyond that date are at issue in this case.

The Tribes' Constitution provides that the Tribal Council, the Governor, and the Legislature are involved in the process of binding the Tribes to important governmental agreements such as treaties, compacts, and gaming management contracts. The most complete explanation of the process is found in Article VII, the article establishing the powers of the Executive Branch. Article VII, section 4(c) provides:

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

In October 2006, Governor Darrell Flyingman sent out requests for proposals [RFPs] for a three-year gaming management contract to manage the Concho and Clinton casinos to five gaming management companies. The RFPs required development of a training program for tribal members. Although its management-fee terms are sketchy, it appears to provide for 12.5% of some unspecified number in the first year, 9% in the second year, and 6% in the third year. A separate RFP concerning a proposed casino in Elk City, Oklahoma was also sent. Southwest was among the companies to which the Governor sent the RFPs.

In a letter dated November 13, 2006, Southwest's Chief Executive Officer informed the Governor that the company was "pleased to accept your proposal" about the Concho and Clinton casinos. The letter stated that "[w]e agree to all of its terms" and that "[t]his includes, if desired by the Tribes, the expansion of the facilities at both Concho and Clinton." The letter generally outlines expansion ideas, and it also proposes the construction of a health clinic and office building. The letter concludes by expressing the company's willingness to "consider as an alternative, if you and the Tribes prefer, a one-year extension of our current agreement, on its current terms, to provide continuing management of the Concho and Clinton facilities until any issues associated with the Tribes adoption of its new constitution have been resolved."

Southwest subsequently presented proposals to the Tribal Council at a November 18, 2006 meeting, corresponded with Governor Flyingman, and engaged in discussions with members of the

Legislature. These efforts did not result in an accord about a gaming management contract with the Governor. The Governor eventually took the position that the Tribes should manage its own gaming operations, and did not need to employ any gaming management company.

However, several members of the Legislature wanted the Tribes to have a contract with Southwest, and they were aware that the existing contract would expire on May 19, 2007. On February 24, 2007, a Special Meeting of the Tribal Council took place at which a Tribal Council resolution concerning Southwest was purportedly passed.<sup>1</sup> Due perhaps to perceived alleged procedural irregularities in the calling of that meeting, the Legislature later called a special meeting of the Tribal Council for March 31, 2007 for purposes including the consideration of a contract or contracts with Southwest.

Out of the March 31 special Council meeting emerged a Tribal Council Resolution "authorizing the Governor to enter into" agreements with Southwest, "which contract(s) or extension(s) shall be in accordance with the 5-year management proposal presented by Southwest immediately following the Special Tribal Council meeting on November 18, 2006," with certain specific revisions or additions stated in the Resolution. The Resolution then:

- "authorizes and directs" the Governor to sign the agreements "within 5 (five) days following passage of this resolution";
- "authorizes and directs" the Legislature to ratify the agreements within five days after the Governor signs them; and
- provides that "if the Governor fails to sign and enter into the contract(s) or extension(s) as directed in these resolutions, the Tribal Council . . . authorizes and directs the Legislature to ratify the gaming management [sic] no later than 10 (ten) days following the date of this resolution and the legislature [sic]."<sup>2</sup>

The March 31 Council Resolution does not refer to any attachments or refer to any proposed agreements by name, other than the reference to the "proposal presented . . . immediately following the November 18, 2006 Special Tribal Council meeting."

The next development reflected in the record is the delivery of then-Acting Tribal Council Coordinator David Bearshield's letter to Governor Flyingman dated April 5, 2007 (five days after the March 31 meeting). That letter states that it encloses nine agreements made in accordance with the March 31 Resolution "for your negotiation and/or signature." Although the nine agreements enclosed with the letter were not included in the record, the author of the letter did list their titles, and

<sup>1</sup> The record does not contain the resolution that was purportedly passed at the February 24, 2007 Council meeting, and no party appears to rely on the action taken at that meeting. Moreover, we recently held the attempted February 24 meeting invalid in *Lynn v. Bearshield*, No. CNA-SC-07-04, 10 Okla. Trib. \_\_\_ (Cheyenne & Arapaho S.Ct., Aug. 15, 2007).

<sup>2</sup> This portion of the Resolution appears to be have extra language in places and to be missing some language in others. No party has attempted to explain the wording of the provision.

described their contents as follows:

- "Amendment No. 11" to the existing Gaming Management Agreement with Southwest;
- a "Gaming Management Agreement" and an "Expansion Agreement" regarding the existing Concho and Clinton casinos;
- a "Gaming Management Agreement" and a "Development and Expansion Agreement" regarding the existing Watonga and Canton casinos;
- a "Gaming Management Agreement" and a "Development Agreement" regarding new casinos to be developed at Seiling, Colony, and Hammon; and
- a "Gaming Management Agreement" and a "Development Agreement" regarding a new casino to be developed at Elk City.

Mr. Bearshield's letter also states that "the enclosed agreements were prepared in accordance with the resolutions of the Tribal Council adopted on February 24, 2007, after which an attorney selected by the Tribal Council negotiated and approved the terms of each of the attached agreements," and that "on March 31, 2007, the Tribal Council again authorized and directed you to enter into the enclosed [nine agreements]."

The Governor brought suit challenging the constitutionality of the Tribal Council's resolution on April 3, 2007. Southwest obtained permission to intervene in the litigation on April 13.

The Governor did not sign the agreements that Mr. Bearshield provided him. Thus, a document dated April 14, 2007, and titled "Amendment No. 11 to Third Amended and Restated Gaming Management Agreement," was executed by Ida Hoffman, the Speaker of the Legislature,<sup>3</sup> and by a representative of Southwest. It appears that this is the same "Amendment No. 11" that Mr. Bearshield enclosed with his letter to the Governor. Amendment No. 11 provides that the current agreement between Southwest and the Tribes shall remain in force, with two modifications. The two modifications relate to the term of the agreement and the management fee. The term of the agreement is extended for a period commencing May 19, 2007 and ending on the earlier of (a) National Indian Gaming Commission [NIGC] approval of the "New Management Agreement," which Amendment No. 11 recites is "pending," or (b) May 19, 2009. The stated management fee is 10% of Total Net Revenues of \$28 million or below, and 15% of Total Net Revenues above \$28 million.

Also on April 14, 2007, the Legislature passed "Administrative Resolution No. A01/2007-04-01 Ratifying Governor's Signature of Southwest Casino Gaming Management Contract." As a recital in that "administrative resolution" states, the Governor had not in fact signed any such contract.

<sup>3</sup> The lines and blanks in Amendment No. 11 where the title of the Tribes' representative was to be written were left blank.

Therefore, the Legislature resolved that "the gaming management agreement, in the form attached, shall be deemed to be signed by the Governor, consistent with the Tribal Council's authorization to negotiate and sign, and that the Legislature hereby ratifies such signature."<sup>4</sup>

The Legislature then sought permission to intervene in this litigation, notifying the Trial Court that it had ratified the actions of the Tribal Council and questioning the Governor's status in the wake of the certification of a recall petition against him. The Trial Court granted the Legislature's motion to intervene in the first of its three May 18, 2007 Orders.

Also on May 18, 2007 (the day before Southwest's contract was to expire by its terms), Judge Tripp conducted a hearing in the Trial Court at which he took the testimony of a member of the Legislature, Michael E. Martin, concerning government officials' discussions and negotiations with various gaming management companies since early 2004. Judge Tripp also heard the arguments of Governor Flyingman (pro se) and attorneys for Southwest and the Legislature. In a brief second May 18 Order, Judge Tripp denied Governor Flyingman's motion that he (Judge Tripp) recuse.

Following the hearing, by a third Order also dated May 18, 2007, Judge Tripp issued an Order stating the following findings of fact and conclusions of law:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that evidence pertaining to the case supports a ruling that (1) the March 31, 2007, Tribal Council Resolution authorizing a gaming management contract extension with Southwest Casino and Hotel Corp. is hereby deemed valid and constitutional pursuant to Article VII, Section 4(c); (2) the time limitations contained in the March 31, 2007, Resolution were reasonable given that time was of the essence; (3) Negotiations were sufficient pursuant to the Constitution between Southwest and the Tribe, the Governor, and his agents for the two-year extension because the Governor proposed specific terms and Southwest accepted and then improved those terms; (4) no further action is required of the Governor in this matter as his duties concerning the two-year extension are deemed ministerial; and further, a writ of mandamus is not necessary; (5) the action of the Legislature ratifying the extension with Southwest on April 14, 2007, was in accordance with the March 31, 2007, Resolution and the Constitution; (6) the two-year contract extension between Tribes and Southwest is deemed sufficient and appropriate given the obligation of a right of first refusal and a good faith negotiation requirement pursuant to Section 2.4 of Southwest's existing gaming management contract, and (7) the Court takes no argument or actions concerning the recall of the Governor.

---

<sup>4</sup> Although the Resolution states that the form of the agreement is attached, no agreement is attached to the Resolution in the record. It may be that the agreement is the five-year contract referred to in the Tribal Council Resolution, and it may be that it is one of the nine agreements enclosed with Mr. Bearshield's April 5, 2007 letter, but the record does not contain sufficient information to support such a finding.

## II. DISCUSSION

Treaties, compacts, and gaming management contracts are all important agreements that are vital in shaping the Tribes' relationship with the rest of the world. The Constitution expressly requires that the Tribal Council, the Governor, and the Legislature all participate in the process of entering into such agreements.

### A. Powers of the Branches of Government Regarding Contracts

The Constitution gives the Governor the "power to negotiate and sign a treaty, compact, or gaming management contract which has been previously and specifically authorized by the Tribal Council." Art. VII, section 4(c). If the Tribal Council has authorized and the Governor has negotiated and signed such a contract, the contract is then "subject to ratification" by the Legislature. *Id.*

With respect to contracts other than treaties, compacts, and gaming management contracts, the process is more streamlined. Article VII, section 4(d) gives the Governor the power to negotiate and sign such other types of contracts as have been previously authorized by either the Tribal Council or the Legislature. If the wishes of the Tribal Council and the Legislature conflict, the Constitution expressly provides that the Tribal Council's wishes take precedence over those of the Legislature. *Id.*

Both of those provisions are found in Article VII, the portion of the Constitution describing the Executive Branch. The Constitution's Article concerning the Legislative Branch is silent concerning contracts. The only other mention of contracts in the Constitution is in Article V, the Article governing the Tribal Council. Article V, section 2(c) provides that "[t]he Tribal Council shall have the power to authorize the Governor to enter into treaties, compacts, or any contract." Essentially, this states the power to authorize contracts that is restated in more detail in the Executive Branch Article. It is noteworthy that the section does not say that the Tribal Council has the power to *direct* the Governor to enter into contracts; it only provides that the Tribal Council may, in its discretion, *authorize* him to do so. It confers no power on the Tribal Council beyond that stated in Article VII, sections 4(c) and 4(d).

Thus, under the provisions of the Constitution relating specifically to treaties, compacts, and gaming management contracts, the Governor does not have the power to act alone to bind the Tribes to a gaming management contract. The Governor cannot negotiate or sign a gaming management contract until he has prior specific Tribal Council authorization. Further, even if the Governor signs a gaming management contract that he has negotiated after prior Tribal Council authorization, the Legislature has the power to ratify the contract — or not.

On the other hand, nothing in the Constitution imposes on the Tribal Council a *duty* to authorize the negotiation or signing of a gaming management contract desired by the Governor or the Legislature, or indeed any gaming management contract. Nor does the Constitution impose on the Legislature a *duty* to ratify a gaming management contract that the Tribal Council and the Governor both desire. And most significantly for purposes of this litigation, nothing in the Constitution imposes on the Governor a *duty* to negotiate or sign an agreement, even if the Tribal Council has previously authorized it and even if the Legislature wishes to ratify it. In short, under

1998 07 07 02:09P

p.30

Article VII, section 4(c), all three Branches of government must agree for the Tribes to be able to enter into a gaming management contract.

*B. General Provisions of Other Portions of the Constitution*

The Legislature and Southwest point to other general provisions of the Constitution in an attempt to sustain the proposition that the Legislature and/or the Tribal Council has powers superior to those held by the other governmental Branches with respect to gaming management contracts. Because of the clarity and specificity with which the Cheyenne and Arapaho Constitution addresses that question, however, we reject that proposition. Therefore, we hold that the following general constitutional provisions do not countermand the clear direction in Article VII, section 4(c) that the Governor is the tribal official with the power to negotiate and sign gaming management contracts, and the directive in Article VII, section 4(d) that the Governor is to negotiate and sign all other contracts on the Tribe's behalf after Legislative and/or Tribal Council authorization:

- the power of the Legislature and the Tribal Council to waive sovereign immunity "by law" contained in Article X, section 1;
- the power of the Tribal Council to "set policy for the Tribes" contained in Article V, section 2(a);
- the grant to the Legislature of "Legislative Power" and "the power to make laws and resolutions in accordance with the Constitution which are necessary and proper for the good of the Tribes" contained in Article VI, section 5(a); and
- the grant to the Legislature of the general "power to raise revenue" contained in Article VI, section 5(d).

We particularly reject Southwest's argument that the Constitution vests the Tribes' inherent sovereignty in the Legislature by virtue of Article III, section 2 of the Constitution. That provision, which is found in the Article titled "Territory and Jurisdiction," states:

Section 2. *Jurisdiction.* The Jurisdiction of the Tribes shall extend to all persons, activities, and property within the Territory based upon inherent Sovereignty, except as prohibited by federal law. Any person who enters the Territory shall, by entering, be deemed to have consented to the Jurisdiction of the Tribes. Every license or permit issued under the authority of the Tribes shall include a provision submitting all parties and their assigns to the Jurisdiction of the Tribes. Any employee of the Tribes shall, by accepting employment, be deemed to have submitted to the Jurisdiction of the Tribes. The Legislature shall have the power to assert the Sovereignty and Jurisdiction of the Tribes by law over all matters that affect the interests of the Tribes. Nothing in this Article shall be construed to limit the ability



### C. Invalidity of the March 31 Tribal Council Resolution and Subsequent Legislative Acts

Despite these clear and specific constitutional directions, when the then-Acting Tribal Council Coordinator delivered the nine agreements to the Governor via his April 5, 2007 letter, he emphasized that an unspecified Tribal Council attorney had already "negotiated and approved" the nine agreements delivered to the Governor for his "negotiation and/or signature."<sup>6</sup> Other parts of the record, including correspondence from Southwest, indicate that members of the Legislature negotiated with Southwest as well. By virtue of their own characterization of their actions, the Tribal Council (and to the extent applicable, members of the Legislature) would seem to have violated Article II, section 3 by exercising powers granted to the Governor. Certainly, the Constitution does not forbid a member of the Legislature, a member of the Tribal Council, or any other Tribal member from *discussing* contract matters with a prospective gaming management company. Any such discussions, however, do not *substitute for* the Governor's power to negotiate.<sup>7</sup>

The March 31, 2007 Tribal Council Resolution also violates the Constitution by attempting to direct and control the Governor's actions. To be valid, a Tribal Council Resolution may only *authorize* the Governor to negotiate and sign; it cannot require him to do so. Nowhere in the text of the Tribal Council Resolution is the word "negotiate," or any variant thereof, used. The resolution instead states that it "authorizes the Governor to enter into" the contracts, that the contracts *shall* include certain specific provisions, and that the Tribal Council "authorizes *and directs* the Governor to sign and enter into [the contracts] within 5 (five) days following passage of this Resolution" (emphasis added). Not only would five days seem to be an insufficient amount of time to negotiate

<sup>6</sup> While nothing in the Constitution forbids the Tribal Council Coordinator (acting or not) from delivering Tribal Council Resolutions to the Governor, clearly the Constitution does not give the Tribal Council Coordinator the power to negotiate and sign contracts or to direct the Governor to do so. The Constitution enumerates the following duties of the Coordinator: (1) receive requests for Special Meetings and, if the requests are valid, call Special Meetings, art. V, section 3(b); (2) provide at least 15 days' notice of all Tribal Council meetings, art. V, section 3(c); (3) receive copies of the Tribal Council's decisions and minutes, Art. V, section 4(b); (4) receive and publish proposed Resolutions before Tribal Council meetings, Art. V, section 4(c); (5) compile approved laws and Resolutions into a code to be published, art. V, section 4(c); and (6) receive petitions to have the Tribal Council repeal laws or Resolutions passed by the Legislature, Art. VI, section 7(a)(iv). In view of these provisions and of the fact that the Tribal Council can act only through meetings called pursuant to article V, it is logical to conclude that the Coordinator's job is to coordinate the annual and special meetings of the Tribal Council, not to negotiate gaming management contracts. One additional mention of the Coordinator is found in Article V, section 5(b), which states that "the Coordinator shall serve in accordance with terms and conditions established by the Tribal Council." We need not decide the meaning of this provision, although it would appear to relate to compensation, term of office, and similar aspects of the job. Obviously, however, any terms and conditions the Tribal Council might establish could not confer upon the Coordinator the ability to exercise powers expressly delegated to the other Branches of government, such as the delegation to the Governor of the power to negotiate and sign gaming management contracts.

<sup>7</sup> Also relevant to whether the requisite authorized negotiations took place is the provision of Article VII, section 4(c) that the Tribal Council's authorization of negotiations be "previous" to the negotiations. The October 2006 RFP, the November 2006 response, Southwest's November 2006 presentation to the Tribal Council, and most of the parties' subsequent correspondence did not happen before the March 31, 2007 Tribal Council Resolution. If all parties believed that desirable negotiations took place, culminating in an agreement that *all three* Branches of government approved, an argument that the Tribal Council ratified the prior negotiations could be made to support the validity of the negotiations, but those facts are not present in this case.

gaming management agreements involving millions of dollars, but it is flatly constitutionally impermissible for the Council to attempt to force the Governor to sign contracts within *any* amount of time. This is not to say that the Tribal Council cannot put a time limit on its *authorization* of the Governor's exercise of powers; it merely means that the Tribal Council cannot *require* the Governor to exercise his powers, within a specific time or otherwise.

The Trial Court accepted the argument of Southwest and the Legislature that by sending out the Requests for Proposals in October 2006, and by receiving back a letter stating that Southwest was "pleased to accept your proposal,"<sup>8</sup> the Governor did in fact "negotiate" the two-year extension agreement with Southwest in the way the Constitution contemplates. It then held that the Governor's power to "sign" the agreements that he has the power to negotiate is a mere ministerial duty. As a matter of law, those conclusions are incorrect. First, the record, although incomplete, reflects that the terms of the Governor's RFPs are not reflected in the two-year extension agreement that the Trial Court ultimately approved, and therefore the Governor did not negotiate the two-year agreement.<sup>9</sup>

<sup>8</sup> Although the Legislature's briefing refers to the Governor's RFP and Southwest's response in "offer and acceptance" terms, no party herein asserts that a contract was formed by those two documents.

<sup>9</sup> The record is far from clear about the exact extent of the agreements contemplated in the Tribal Council Resolution. The Resolution itself refers to "a gaming management contract or contract(s) or an extension or extension(s)," certainly suggesting that an "extension" was a possibility; perhaps an agreement such as the two-year extension reflected in Amendment No. 11 was contemplated. However, a two-year extension is mentioned nowhere. Elsewhere, the resolution refers repeatedly to five years. For instance, the subject line of the resolution is "Five (5) Year Extension with Southwest Hotel & Casino Corp." The Resolution later states in numbered paragraph 3 that one of the revised terms is that "Southwest will provide management services at Tribal gaming facilities for a period of five (5) years as follows: a. manage and expand Lucky Star Casinos Concho and Clinton. . . ." One might also consider that the direction that the "contract(s) or extension(s) shall be in accordance with the 5-year management proposal presented by Southwest immediately following the Special Tribal Council meeting on November 18, 2006" could constitute a reference to a document or set of documents relating to that November meeting, and that perhaps that documentation contains a two-year extension, but unfortunately, the Resolution does not attach or refer with more specificity to any such documents. Moreover, the Resolution refers to a management fee of 15% on the first \$28 million and 10% on revenues above \$28 million (reduced from whatever fee was presented on November 18). Nowhere does the Resolution describe a 10% fee on the first \$28 million and "an additional 15%" on revenues over \$28 million provided in the two-year extension ultimately submitted to the Governor for his negotiation and/or signature. Therefore, the factual basis of the Trial Court's ruling that a two-year extension is part of what the Tribal Council approved is unclear.

This leads to an analysis of the similarities and differences between the terms of the Governor's original RFP and the terms of the two-year extension agreement. The contract contemplated in the RFP is a new agreement for management of the Concho and Clinton casinos with a three-year term. The RFP requires that the new agreement contain specific tribal employee training provisions. The RFP reflects a sliding scale management fee beginning at 12.5%, declining to 9% in the second year, and declining to 6% in the third. The agreement the Trial Court held was authorized is an extension of the original agreement to manage the Concho and Clinton casinos for a maximum of two years, or until a "New Management Agreement" is approved by the NIGC. The management fee is 10% fee on the first \$28 million of Total Net Revenues and "an additional 15%" on Total Net Revenues over \$28 million. The two-year extension agreement reflected in Amendment No. 11 apparently contains no employee training provisions. (It is possible that such a provision is found in the gaming management agreement that was set to expire May 19, 2007, but only one page of that agreement has been made a part of the record.) In short, it does not appear that the agreement sought in the RFP is the two-year extension agreement that the Trial Court held was valid. And without question, the Governor's interactions with Southwest were not the negotiations of the nine agreements Mr. Bearshield presented to

But, even assuming for argument's sake that the Governor engaged in negotiations with Southwest that ultimately resulted in the two-year agreement signed by Speaker Hoffman, the Governor certainly did not "sign" it, and because his signature (indicating his acceptance of the agreement) is a constitutional power rather than a ministerial duty, the absence of the Governor's signature would be independently fatal to the validity of the challenged gaming management contracts.

As we explain further in subsection II-D below, we have no doubt that the unconstitutional aspects of the March 31 Tribal Council Resolution are severable from its constitutional portions. To the extent that the resolution *authorizes* (rather than requires) the Governor to negotiate and sign a gaming management contract with Southwest, it is constitutional. However, its provisions mandating him to do so, as well as its provisions purporting to empower the Legislature to take action in the absence of the Governor's negotiation and signature, are unconstitutional. Even though the Governor may be *authorized* to negotiate a gaming management contract (or contracts) with Southwest, however, we re-emphasize that under Article VII section 4(c), the Governor has no power to *effectuate* such a contract without ratification by the Legislature.<sup>10</sup>

Finally, Amendment No. 11 (the two-year extension) is not validly signed on behalf of the Tribes. The Speaker of the Legislature signed it, but she is not the Governor. Only the Governor is constitutionally empowered to sign a gaming management contract. *See Art. VII, section 4(c).*

In summary, the Tribal Council's putative attorney admittedly "negotiated and approved" nine agreements (including the two-year extension) which the Tribal Council attempted to order the Governor to "enter into" within five days. Although the Speaker of the Legislature signed an agreement with Southwest and the Legislature passed a Resolution ratifying the agreements and stating that they were "deemed to be signed" by the Governor, the Governor did not negotiate or sign them. Therefore, the process followed by the Tribal Council and Legislature in this case resulted in no valid gaming agreement(s) with Southwest.

#### D. Severability

As noted above, Article VII, section 4(c) of the Cheyenne and Arapaho Constitution empowers the Tribal Council to *authorize* the Tribes' Governor to "negotiate and sign" a gaming management contract or contracts "subject to ratification by the Legislature," but does not empower the Tribal Council to circumvent or commandeer either the Governor's powers to "negotiate and sign" or the Legislature's power to ratify. As also noted above, we therefore hold unconstitutional

---

him for his "negotiation and/or signature."

<sup>10</sup> The assertion in Southwest's appellate brief that *legislative* ratification is *also* a ministerial act is incorrect. If the drafters of the Constitution had intended that the Tribal Council have "ultimate authority" in gaming management contract matters, the Constitution could have omitted any reference to legislative ratification; it could have provided that the Tribal Council would have power to override any decision of the Legislature not to ratify the contract or to override its inaction on ratification; or it could have contained a clause similar to that found in Article VII, section 4(d), which provides that "[i]n the event of a conflict between the acts of the Tribal Council and the Legislature regarding the authorization to contract, the act of the Tribal Council shall govern." Instead, Article VII, section 4(c) expressly gives specific, separate, discretionary powers to the Tribal Council (to authorize), the Governor (to negotiate and sign), and the Legislature (to ratify) gaming management contracts.

the March 31 Council Resolution to the extent it sought to do more than *authorize* the Governor to "negotiate and sign." But precisely because the Council *does* have the power to *authorize* the Governor to "negotiate and sign" a gaming agreement or agreements, (subject to legislative ratification), we must confront the question whether the March 31 Resolution is unconstitutional *in toto* or only to the extent that it attempted to dictate the outcome of negotiations and circumvent the Governor's power to sign (or to decide *not* to sign).<sup>11</sup> That is the question of "severability," which absent any severability clause we resolve by framing the dispositive question as one of presumptive Council intent: Would the March 31 Council, knowing that any contract(s) negotiated by the Governor would be subject to legislative ratification, and that the participation of the Council, Governor, and Legislature were *all* necessary to the consummation of a valid gaming management contract (or contracts), have voted to authorize the Governor to negotiate a proposed gaming contract (or contracts) with Southwest if it had known that it could not have dictated the outcome? Under the totality of circumstances herein, we conclude that the answer to that question is "yes." In so concluding, we rely on several undisputed and/or indisputable facts.

First, the 185-member majority of the 361 persons present and voting<sup>12</sup> at the March 31 Council meeting unmistakably expressed a preference for a gaming management contract with Southwest to the Governor's suggested tribal-management approach.

Second, through its putative counsel<sup>13</sup> and others, the March 31 Council majority (possibly including then-Acting Council Coordinator David Bearshield) participated along with members of the Legislature in the negotiation of the terms of the proposed gaming contract(s) with Southwest. See, e.g., Letter to Gov. Darrell Flyingman from James B. Druck, CEO, Southwest Casino Corp., Apr 30, 2007, at 4, reproduced as Exh. A, Plaintiff's Reply to Southwest Casino's Response, No. CNA-CIV-07-27 (Chey. & Arap. Trial Ct., May 11, 2007).

Third, the fact that both Legislators and the Council's putative attorney participated in the negotiation of a set of draft agreements with Southwest (the core terms of which were ultimately "ratified" by the Legislature) evidences a commonality of purpose between the 185 Council members

---

<sup>11</sup> The Governor alleges that the conduct of the March 31 meeting, and particularly the voting on the Southwest contract, was questionable to the point that the chair of the meeting refused to sign the resolution. By contrast, Appellee Southwest, Tribal Legislature and Tribal Council defend the procedural validity of the May 13 Council meeting. See, e.g., Southwest's Response to Governor Flyingman's Emergency Motion at 13, No. CNA-CIV-07-27 (Chey. & Arap. Trial Ct., May 2, 2007); Cheyenne & Arapaho Tribal Legislature Combined Motion at 2, No. CNA-CIV-07-27 (Chey. & Arap. Trial Ct., May 17, 2007); Motion of Acting Tribal Council Coordinator to Intervene at 2, 4, No. CNA-CIV-07-27 (Chey. & Arap. Trial Ct., May 18, 2007). Beyond the Governor's allegations of improprieties in his pleadings, motions, briefs, and statements to the Trial Court at the May 18 hearing, however, the only evidence in the record for the procedural invalidity of that Resolution *in toto* consists of the fact that the resolution itself contains a signature line for the meeting's chairman but no chairman's signature. On the basis of the record before us, however, we conclude that the Governor has not met his burden of establishing that the March 31 Council meeting was procedurally (or otherwise) defective *in toto*.

<sup>12</sup> The record reflects that the challenged March 31 Council Resolution was adopted by a vote of 185 to 175.

<sup>13</sup> We need not and do not herein resolve any issue, presented to this Court in this or other pending cases, with respect to the authority *vel non* of any attorney to represent any Branch of tribal government. For purposes of this appeal, we assume *arguendo* the power of the Tribal Council's putative attorney to act in that capacity.

voting for the March 31 resolution and the members of the Legislature who ultimately voted to "ratify" it — a purpose to secure a gaming management contract with Southwest.

Fourth (and as we have now made clear) such a result would have been constitutionally impossible without negotiation by the Governor and the signature of the Governor. For those Council members who sought a gaming management contract with Southwest, authorization of the Governor to *negotiate* a contract with Southwest would have been an absolutely necessary first step.

Fifth, in light of the commonality of purpose between the March 31 Council majority and the working majority of Legislators, it is reasonable to assume that the former would have likely relied on the latter (which was possessed of the power to ratify or not ratify) to defend the former's preferences in the event that the Governor negotiated a management contract whose terms were unacceptable to the former.

Sixth, while a substantial number of the 176 Council members who voted "no" on March 31 likely did so because they supported the Governor's desire for *tribal* gaming management, a number of others were likely unsatisfied with the terms of the contract that the Council majority attempted to dictate and would have preferred to at least authorize the Governor to explore the possibilities of obtaining a more favorable agreement with Southwest.

In consequence, and basing our conclusion on presumptive intent absent any severability provision in the March 31 Resolution, we conclude that had it known that it could not constitutionally dictate the terms, and given the ratification "trump card" ultimately held by the Legislature, the March 31 Council majority would have had little if anything to lose by authorizing the Governor to at least *negotiate* a gaming management contract with Southwest. We therefore hold the March 31 Council Resolution unconstitutional only insofar as it attempted to circumvent the Governor's power to negotiate and to sign or not sign, but constitutional insofar as it authorized the Governor to negotiate a management contract with Southwest subject to subsequent ratification by the Legislature.

#### E. "Right of First Refusal"

The record contains only one page of the gaming management agreement that was set to expire on May 19, 2007. That page contains the following provision:

*2.4 Term of Agreement:* This agreement shall be for a term of seven (7) years from the date of the first day said Facility is opened for business. In the event a compact permitting Class III gaming is properly secured, it is the intention of the parties hereto to negotiate in good faith to cause the term of this Agreement to be extended and expanded to permit the development of Class III facilities. Tribe agrees that it will use its best efforts to seek appropriate approvals from NIGC for such extensions and expansion. In the event such approval is not obtained, Manager shall have no obligation to proceed with the expansion of the facilities.

The Legislature and Southwest have characterized this clause as a "right of first refusal." But there is insufficient information in the record for either this Court or the Trial Court to construe this clause as a "right of first refusal," and its "intention of the parties" language (*inter alia*) undermines the proposition that the clause was intended to create any binding contractual obligation on the Tribes.

following the expiration of that agreement.

### III. MATTERS WE DO NOT DECIDE

Because of the manner of our resolution of this case, it is unnecessary for us to address whether the Trial Court should have permitted intervention below, or whether it should have entered various *ex parte* orders, or whether its temporary restraining order was issued properly. And while we are dubious to say the least about whether the Legislature could validly act via an "administrative resolution" without following the Legislative Process, see art. VI, section 5(a) "[a]ll actions by the Legislature shall be embodied in a written law or resolution"; art. VI, section 7 ("the Legislature shall adopt and follow a public legislative process for enacting all laws and resolutions"), in view of our disposition of the case on Article VII, section 4(c) and broader separation-of-powers grounds, it is also unnecessary for us to explore that issue any further.

We also need not decide whether the supposed new gaming management contract is invalid because of its provision that the "Gaming Enterprise" (a term not defined in any portion of the agreement contained in the Record, but which Southwest has represented means Southwest) shall fund the operations of the Gaming Commission. The record does not contain the entire agreement in which this provision is contained, only one page. Nor does not appear that the entire agreement is contained in "Amendment No. 11," the two-year extension, which is the only agreement that the Trial Court held was authorized. In any event, in view of our holding that the nine agreements presented to the Governor are not valid even if they were authorized by the Tribal Council, we need not address whether such a provision is permissible.

The Legislature makes the interesting (if gratuitous) observation at unnumbered page 12 of its appellate brief that "[t]he appeal to the Tribal Supreme Court taken by the Appellant herein is also subject to appeal to federal district court along with any decision from the NIGC. Consequently, once the rights of Southwest vested upon approval a reversal of the trial courts [sic] decision is not final." We cannot and do not attempt to control any party's decision to seek relief from any federal administrative or judicial entity, nor can we control any such entity's determination about the effect of this decision. As to cases brought in Cheyenne and Arapaho courts, however, the Cheyenne and Arapaho Constitution provides that "[d]ecisions of the Supreme Court shall be final," Art. VII, section 6(c), and that "[t]he Courts shall render a final disposition in all cases properly filed," Art. VIII, section 6(f). The Constitution gives this Court "the power to interpret the Constitution and laws of the Tribes and to make conclusions of law," Art. VII, section 6(c), as well as "the power to declare the laws of the Tribes void if such laws are not in agreement with the Constitution," Art. VII, section 6(d). For tribal-law purposes, therefore, this Opinion and Order, exercising as it does our powers to interpret the Constitution and to declare laws unconstitutional, is a final decision.

We note the existence of allegations in a number of pending cases before us concerning the propriety of various alleged activities of Southwest in seeking to continue its relationship with the Tribes. We need not and do not decide either the legal merits or the factual basis for any such allegations, and we have insufficient information in the record on which to do so. According to its correspondence with the parties as evidenced by the record, the NIGC is investigating such matters.

Some parties have made assertions, unsupported by authority, that the Tribes' casinos will not be able to validly operate under federal law if Southwest is not allowed to continue to manage

them. That issue is not for this Court herein to decide. We do, however, note that on May 16, 2007, at a time when it appeared that the Southwest contract would expire by its terms on May 19 and a new contract would not be in place, Philip Hogen, Chairman of the NIGC, wrote the parties a letter referring to the making of "an orderly transition from a management contractor to a tribally-run operation." There is no suggestion that the NIGC would shut down the operating casinos were the agreement with Southwest to have expired on May 19. If in fact further steps need to be taken by those — whoever they may be — who will manage the casinos in the future, we would expect that the NIGC (as it has in the past) will give the Tribes every opportunity to meet the requirements of federal law before taking the drastic step of requiring their shutdown.

In fact, the only mention of closing casinos comes in Chairman Hogen's letter of May 15, 2007, in which he notes:

Recently, the NIGC has become concerned with the growing discord and discontent at the Cheyenne and Arapaho tribal community over this matter. The NIGC recognizes the economic importance Indian gaming serves; however, the NIGC cannot ignore the severity of the inter-governmental strife that is occurring as a result of this matter or our concern that such strife will result in potential harm to members of your community. In the past, similar situations at other tribes which posed a threat to public safety have resulted in the NIGC Chairman issuing closure orders of tribal gaming operations. Consequently, here, because it is in the best interest of the Tribes, we strongly encourage the tribal leadership to resolve this matter in a respectful and amicable manner and to take measures to prevent any actions that would jeopardize the safety of the Tribes' members.

It thus appears that the NIGC's primary concern is not the identity of the casino management personnel, but the inter-governmental strife surrounding this matter. We can only join the NIGC's call to our coordinate Cheyenne and Arapaho governmental Branches to work together on this matter in accordance with the requirements of tribal law to resolve the casino-management question.

#### IV. CONCLUSION

We REVERSE the May 18, 2007 Order of the Trial Court in Case No. GNA-CIV-07-27, and hold that Plaintiff/Appellant Flyingman was entitled to, and is hereby awarded, a declaratory judgment as follows:

1. That the March 31, 2007, Tribal Council Resolution is invalid and unconstitutional under Article VII, Section 4(c) of the Cheyenne and Arapaho Constitution insofar as it attempts to do more than *authorize* the Governor to "negotiate and sign" a gaming management contract or contracts, but that under the "severability" reasoning above, that Resolution is constitutional insofar as it authorizes the Governor to "negotiate and sign" a gaming management contract with Southwest subject to subsequent ratification by the Legislature;

