May 20, 2009

Governor Darrell Flyingman
Cheyenne & Arapaho Tribes of Oklahoma
Office of the Governor
100 Red Moon Circle
P.O. Box 38
Concho, OK 73022

James B. Druck
Chief Executive Officer
Southwest Casino Corporation
2001 Killebrew Drive, Suite 350
Minneapolis, MN 55425

Re: Undue influence allegations

Dear Governor Flyingman and Mr. Druck:

As you are no doubt aware, Governor Flyingman has asked me to reconsider the November 8, 2007 letter in which I concluded that Southwest Casino Corporation (Southwest) did not *unduly influence* the Cheyenne and Arapaho Tribes contrary to the Indian Gaming Regulatory Act (IGRA). I have done so, and I hereby withdraw that letter.

I do so because my previous interpretation of *undue influence*, on which I based my 2007 letter, was incorrect. That conclusion is supported by the enclosed memorandum from the Office of the General Counsel, which also sets out in detail the agency's new interpretation of "unduly interfere or influence ... any decision or process of tribal government relating to the gaming activity." 25 U.S.C. § 2711(e)(2).

Finally, I feel I must emphasize that the matter of Southwest's *undue influence* is moot as it was at the time of the November 2007 letter. Southwest's management contract with the Tribes expired by its terms on May 19, 2007. At present, Southwest has no gaming management contracts with any Indian tribe. The matter of its last management contract with the Cheyenne & Arapaho Tribes – the Third Amended and Restated Gaming Management Agreement ("the Last Agreement") – has been resolved since the end of August 2007 and that resolution did not involve the issue of *undue influence* pursuant to 25 U.S.C. § 2711(e)(2).

In 2007, a controversy arose as to whether the Tribes had adopted and ratified an extension to the Last Agreement consistent with the requirements of the Tribal

constitution to accomplish such an action. This controversy became the subject of a Tribal District Court decision and subsequent Tribal Supreme Court appeal. Both of these court decisions affected my actions and the actions of the NIGC concerning this management contract because the Commission deferred, as stated in the final decision and order in this matter, to the interpretation of tribal law by the tribal courts.

On May 19, 2007, the Southwest contract was due to expire by its terms. On May 18, 2007, the Cheyenne & Arapaho Tribes district court found that amendment no. 11 to the Southwest management contract, that would extend the term of the contract, had been lawfully adopted and ratified by Tribal government consistent with the requirements of the Tribal constitution. Based on this trial court decision, also on May 18, 2007, I approved the amendment to extend the contract. On June 14, 2007, Governor Flyingman filed an appeal to my May 18th decision that approved the contract extension. Southwest submitted a request to intervene in that appeal which was granted.

On August 17, 2007, *In the Matter of The May 18, 2007, Approval of the Gaming Management Contract between the Cheyenne & Arapaho Tribes of Oklahoma and Southwest Casino and Hotel Corporation* (August 17, 2007), the Cheyenne and Arapaho Supreme Court reversed the district court's decision. The Supreme Court found that the amendment to extend the contract had not been ratified as required by the Tribal constitution. On that same day, the full Commission issued a final decision and order on the appeal, reversing my earlier decision and finding, consistent with the decision of the Supreme Court, that the contract had not been validly extended and therefore, had expired by its terms on May, 19, 2007.

In short, the Last Agreement expired of its own accord, and the Commission disapproved the amendment to extend it because the extension had not been ratified as required by the Tribes constitution, i.e., on grounds other than *undue influence*. That said, were the question of Southwest's *undue influence* to come before me again, I believe I would come to a different conclusion than I did in November 2007.

Sincerely,

Philip N. Hogen
Chairman

Enclosure

May 18, 2009

Memorandum

To: Chairman Hogen

Through: Penny Coleman, Acting General Counsel

From: Toni Cowan, Staff Attorney
Michael Gross, Associate General Counsel

Subject: Review and reconsideration of the Chairman's previous conclusion concerning the Cheyenne and Arapaho Tribes and allegations of undue interference and influence by Southwest Casino Corp.

I. SUMMARY

On August 21, 2008, the Cheyenne and Arapaho Tribes' (Tribes) Governor, Darrell Flyingman, asked the Chairman of the National Indian Gaming Commission (NIGC or Commission) to reconsider his November 8, 2007 letter. (2007 letter). There, the Chairman found that Southwest Casino Corporation (Southwest), the long-standing gaming manager for the Tribes, did not "unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity" under 25 U.S.C. § 2711(c)(2).

The Governor based his request for reconsideration on the results of a new forensic audit ordered on all the Tribes' gaming operations by the tribal courts and performed by Grant Thornton (GT), a certified public accounting firm. The audit report was made public on August 18, 2008.

After much reflection on the issues involved, we believe that our original interpretation of *undue interference and influence*, which the Chairman embodied in his letter, was not a good one. While we did receive the GT report and the report was the impetus for our reconsideration, our analysis and conclusions are not based on that report. We had no input into the report's purpose or scope, nor did this agency verify the report's facts or conclusions. Therefore, the GT report was considered only as far as it corroborated facts already in the NIGC record.

Under our prior interpretation, undue interference or influence only occurs in a necessarily imbalanced, fiduciary relationship, e.g. parent and child or an elder testator and a caretaker or beneficiary, when the stronger party coerces an act or choice by impairing the free will of the weaker. Employing this interpretation in the 2007 letter, the Chairman determined that while there were reasons for concern, the decade-long relationship between Southwest and the Tribes was not imbalanced, and there was no coercion by Southwest.

This interpretation of *undue influence* is not well suited to Indian gaming. For one thing, as it is borrowed from wills and trust law, it assumes a fiduciary relationship. The relationship between a tribe and a gaming manager, however, appears to be an ordinary, commercial relationship and not the fiduciary relationship that a parent has to a child or trustee has to a beneficiary. Further, the wills and trusts standard assumes that the fiduciary relationship is between individuals and that undue influence occurs when there is coercion or domination of the weaker party by the stronger. Tribes and gaming managers are entities, however, not individuals. Each entity, Southwest as a business entity and the Tribes as a governmental entity, makes its decisions collectively with participation from many individuals. It is difficult to see how a manager, could act so as to coerce or force a result from a tribal governing body – particularly here, where the entire adult membership of the Tribes had to authorize the renewal of Southwest's contract.

Better interpretations of *undue interference* and *undue influence* come from the plain language of IGRA and the use of those terms elsewhere in federal law. *Undue interference* refers to actions that obstruct governmental entities and individuals and prevent them from performing their public functions. *Undue influence*, by contrast, refers to actions that can cause governmental entities or individuals to perform their public functions improperly or corruptly by allowing the actors to subvert their public obligations and responsibilities to their private interests. Applying this analysis, it becomes clear, based on the facts available in 2007, that Southwest attempted to or did unduly influence the Tribes for its own gain or advantage. By purchasing votes for the extension of its management contract and by improperly funding the tribal gaming commission that was supposed to regulate it, Southwest violated 25 U.S.C. § 2711 (e)(2).

HISTORY

II. HISTORY

The question of Southwest's undue interference or influence arises out of a complex historical, political, and litigious background.

A. The Tribes Begin Gaming

In the early 1990s, the Tribes explored their initial entrance into the gaming industry with Southwest, a Minnesota corporation. Southwest and the Tribes entered into a management agreement (the First Contract) that was not approved by the NIGC

Chairman and, therefore, void. They executed a second management agreement (Second Contract) on October 8, 1993. The Second Contract was approved by the Chairman on May 20, 1994, and on the same day, the Tribes opened the Lucky Star Bingo and Casino operation in temporary quarters in Concho, Oklahoma.

As soon as they started the gaming operation, the Tribes suffered a period of gaming losses, governmental disputes, and repeated amendments to the management contract. Less than two years into the term of the Second Contract, the Tribes and Southwest executed a third management agreement (Third Contract or 1995 contract). On December 6, 1995, the Chairman approved the Third Contract to supersede the Second Contract.

B. Governmental Disputes

In 1994 when the Tribes began gaming operations, the tribal government still functioned under a constitution dating from 1975. That constitution only provided for two branches of government: the Tribal Council and the Business Committee. The Tribal Council was nominally the governing body and was composed of all the enrolled members of the tribe over 18. The Business Committee was composed of eight elected members and, for all practical purposes, exercised all of the Tribes' governmental powers. *Flyingman v. Wilson*, CNA-SC-07-01, slip. op. at 2 (Chey. & Arap. S. Ct. March 23, 2007).

However, a quorum of five members was required to lawfully conduct business, which meant that four members could prevent the Business Committee from ever meeting. Further, the Chairman of the Business Committee could independently prevent the Business Committee from meeting just by failing to call a meeting. By April 2004, the 34th Business Committee failed to lawfully convene during the entirety of its two-year existence. *Id*, 7 Any effort to hold these constitutionally required meetings met with gridlock and stalemate. The actions of the members of the Business Committee amounted to what the Cheyenne & Arapaho Supreme Court called "passive aggression, neglect of duty, corruption, and diversion of funds while the Committee as an entity did nothing." *Id*,, 2.

On April 4, 2006, 75% of tribal council voters adopted a new constitution (2006 Constitution). *Id*. pp. 1, 6. To minimize the possibility for financial mismanagement, embezzlement and corruption, the 2006 Constitution established four branches of government with divided and interwoven constitutional checks: the Legislative Branch (eight members), the Executive Branch, the Judicial Branch and the Tribal Council. The Tribal Council is still made up of all members of the Tribes over 18 years of age. See Chey.-Arap.-Const. [2006] art. V, § 1.

C. The Involvement of the Tribal Courts

Ongoing disputes concerning improper control and misuse of the Tribes' gaming revenue; the extension of the Third Contract with Southwest, which expired in May 19, 2007; and various actions by Southwest, the tribal gaming commission, and the

Legislative Branch, led to numerous tribal court decisions and orders on these matters in 2007. Only the most relevant decisions, the ordering of a forensic audit, and the approval process required to extend a management contract will be discussed.

The genesis of the forensic audit that became the GT audit report, was "dozens of allegations, disputes and lawsuits during 2006 to 2007." GT audit report p.6. These issues concerned membership of the tribal gaming commission and its alleged conflicts of interest with the Business Committee, the tribal legislature and Southwest; improper control and alleged misuse of the Tribes' gaming revenue after distribution from the casino; the soon-to-expire Third Contract; and alleged bad acts by Southwest. *See* GT audit report at 6. As a result of these types of disputes, on January 19, 2007, the tribal district court ordered that a "complete forensic audit occur of the Gaming Commission and gaming revenue and Lucky Star and other Southwest casinos operating for the Cheyenne and Arapaho Tribes." *Gaming Board v. Flyingman*, CNA-CIV-07-04 slip op. at 1 (Chey. & Arap. Trial Ct. January 19, 2007). On October 10, 2007, the Cheyenne and Arapaho Supreme Court adopted the lower court order verbatim as to the forensic order to the extent it had not yet been complied with. *Flyingman v. Gaming Board*, CNA-SC-07-03 (Chey. & Arap. S. Ct. Oct. 10, 2007). This resulted in the GT audit report.

The last contract renewal between the Tribes and Southwest, which would have extended Southwest's management contract beyond 2007, was disputed as to its proper execution. That matter was heard by the tribal district court and ultimately by the Cheyenne & Arapaho Supreme Court. The legislative branch of the Tribes sought the renewal, and Governor Flyingman wanted to end the relationship with Southwest. The Tribal Council authorized the renewal, called "Amendment 11," and sent it to Governor Flyingman for his signature, as the Tribes' constitution required. Governor Flyingman, however, refused to sign the extension. Ida Hoffman, the Speaker of the Legislature, signed Amendment 11 instead and brought the matter before the district court. The court found the extension was "valid and constitutional," and on May 18, 2007, issued a two-page order to that effect. *In Re: The Execution of Gaming Management Contracts*, CNA-CIV-07-27 (Chey. & Arap. Trial Ct. May 18, 2007). Based on this decision, the NIGC Chairman approved the extension.

Thereafter, the Cheyenne & Arapaho Supreme Court reversed the District Court's decision. The Court found the Tribes' contractual relationship with Southwest, which had been repeatedly renewed since its initial adoption, had expired by its terms without an approved renewal by the Tribes. The Court held that Amendment 11 was not, in fact, lawfully executed. *In Re: The Execution of Gaming Management Contracts*, CNA-SC-07-07 at 14-15 (Chey. & Arap. S. Ct. Aug. 17, 2007) Following this decision, the full NIGC reversed the Chairman's approval of Amendment 11. As a result, Southwest no longer had a valid management agreement with the Tribes. *In Re: The May 18, 2007, Approval of the Gaming Management Contract between the Cheyenne & Arapaho Tribes of Oklahoma and Southwest Casino and Hotel Corporation* (August 17, 2007). On August 19, 2007, Governor Flyingman announced that the Tribes would take over the management of the Tribes' Lucky Star Casinos in Concho and Clinton, Oklahoma. The Tribes also operate the Feather Warrior Casino in Canton, Oklahoma.

III. The Chairman's November 8, 2007 letter

It was against this background that the Chairman issued his 2007 letter responding to Governor Flyingman's allegations of undue influence by Southwest. The Chairman based the decision on facts discovered by NIGC through its own investigation and provided in correspondence to NIGC by the Tribes and Southwest. Ultimately, the Chairman found no undue influence by Southwest, though he called some of its actions into question.

For example, while reasonable travel expenses were authorized by the management agreement, the Chairman cautioned that it would have been best if Southwest had not paid the expenses of getting voting members to three council meetings in which the future of Southwest's business relationship with the Tribes was the subject of the discussion and the vote.

The Chairman found no undue influence because this requires "both an unequal relationship between the parties and coercion by the stronger party." 2007 letter at 2. In this circumstance, the Chairman found no evidence of an unequal relationship between Southwest and tribal members and no evidence that this transportation coerced any tribal member into voting for Southwest to continue as manager. 2007 letter at 4. The Chairman did, however, note:

> We do, however, caution Southwest that activity such as this creates the impression of influence that goes beyond that which is expected from a marketing perspective. Tribal Council meetings are the sole province of a Tribe, and it is the Tribe's responsibility to coordinate travel to and from critical council meetings. Because the topic of discussion and voting was the future of Southwest's business relationship with the Tribes, it would have been best if Southwest had not bused people in for the meeting.

Id.

Similarly, in 2006, Southwest paid for an elders' bus trip to visit another Southwest property and a festival. 2007 letter at 4. In addition to paying for transportation, meals, and hotel rooms, Southwest provided money coupons for use in the casino and $100 to each elder in cash. In the course of giving out $100 bills, the Southwest representatives told the elders how much it would appreciate their votes on a new Southwest management contract.

Again the Chairman found no undue influence because the elders were not disadvantaged with respect to Southwest, and Southwest's actions were not coercive. However, the Chairman found that although the payment to the elders on trips was an improper influence to be discouraged, this influence did not amount to undue influence within the meaning of IGRA.

> [T]he payment for the elders' trip, coupled with the cash give-aways and request for elders' votes was an improper exercise of influence and we discourage this type of activity.

2007 letter at 5.

Finally, one other action by Southwest came under criticism in the 2007 letter. In addition to reasonable travel expenses, Southwest had been paying for the operating expenses of the tribal gaming commission such as legal fees, labor, repairs, maintenance and licensing costs, which in 2006 totaled more than $129,202.64. The Chairman found that this funding by the Southwest presented, at best, the appearance of impropriety, and at worst, a serious conflict of interest which threatened the independence of the gaming commission but still did not rise to undue influence. 2007 letter at 6.

The GT audit report corroborates some of the conclusions in the extensive investigation conducted by the NIGC. NIGC Region V's findings set forth in its investigative report raise some of the same concerns found by GT. Specifically, the Region was concerned that Southwest:

1. Funded trips for elders, legislators, or Business Committee members. Such trips included not only all paid expenses but also distributions of cash to participants. Further, Southwest, despite being warned by the Governor not to do so, repeatedly provided operating funds to the gaming commission and other tribal agencies and to members who would be voting on Southwest's continuing management.

2. Violated the management agreement by making unauthorized deductions from the Tribes' monthly distributions. These deductions included allowing Business Committee members to withdraw gaming funds directly from the casino by cashing tribal checks, and holding those checks returned for insufficient funds. Southwest also paid expenses related to the Canton Development project from the casino's operating account. Southwest began withholding the Canton Development expenses from the monthly distribution to the Tribe starting with $222,020 in June 2004 despite the fact that there were no expenses incurred by Canton until October 2004. The casino also made reimbursement for travel without documentation, i.e. claimed but unsupported travel for some Tribal members.

3. **Exhibited** various other regulatory failures during this period that demonstrated that management had not performed its responsibilities with due diligence. Neither had the Tribal Gaming Commission been effective. For example, in 2005, the gaming commission failed to require that all contracts over $25,000 be in writing, thus effectively screening them from external audit. At the same time, rather than making security information available immediately, as required by the management contract, Southwest only notified the gaming commission of theft by U.S. mail, thus hampering the gaming commission's ability to investigate.

V. A PROPOSAL FOR A DIFFERENT INTERPRETATION AND ANALYSIS

The legal analysis in the 2007 letter is, upon reflection, somewhat dissatisfying. Again, to find undue influence within the meaning of 25 U.S.C. § 2711(e)(2), the 2007 letter requires "both an unequal relationship between the parties and coercion by the stronger party." 2007 letter at 2. OGC imported this interpretation from the law of wills and trusts, but we should not have. It does not apply to the kind of relationship an Indian tribe has with its gaming manager.

The kind of unequal relationship envisioned under wills and trust law is a fiduciary relationship, one

> subsisting between two persons in regard to ... the general business or estate of one of them, of such a character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith. Out of such a relation, the law raises the rule that neither party may exert influence or pressure upon the other, take selfish advantage of this trust, or deal with the subject-matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of that other. [B]usiness shrewdness, hard bargaining, and astuteness to take advantage of the forgetfulness or negligence of another [is] totally prohibited as between persons standing in such a relation to each other. Examples of fiduciary relations are those existing between attorney and client, guardian and ward, principal and agent, executor and heir, trust and *cestui que trust*, landlord and tenant, etc.

Black's Law Dictionary 626 (6th ed. 1990).

While this describes the unequal relationship between a parent or guardian and a child or someone holding a financial power of attorney and an infirm grandparent, it is not at all clear that the relationship between a gaming manager and an Indian tribe is a fiduciary relationship in this sense. Rather, that relationship appears to be a straightforward, mutually beneficial, commercial relationship, one in which the fiduciary's obligations of *unselfish fairness and good faith* simply do not apply. The 2007 letter acknowledges this when it finds "the Tribes and Southwest to be equal business partners engaged in arms-length business dealings." 2007 letter at 2. In short, taking the meaning of *undue influence* from wills and trust law and applying it to that term as IGRA uses it was likely incorrect in its conception.

Be that as it may, as a practical matter, the interpretation of *undue influence* used in the 2007 letter does not fit the relationship between an Indian tribe and its gaming manager and cannot apply in the context of a tribal management contract. The wills and trust law governs relationships between individuals, but tribes adopt management

contracts through some collective governmental action – the vote of a tribal council or business committee, for example. It is therefore difficult to imagine a set of facts under which a manager coerces a result by impairing the free will of council or committee members, especially in a circumstance such as this one, where a majority of adult voting members of the Tribes had to vote to adopt a management contract.

What is more, wills and trust law assumes an unequal relationship between the parties, with the tribe being the weaker party. As a matter of appearance, an interpretation that again relegates Indian tribes to the position of ward, this time of their management contractors, may be viewed with justification as unnecessarily demeaning.

There is a better way to interpret 25 U.S.C. § 2711(e)(2). Based on their use elsewhere under federal law, the terms *undue interference* and *undue influence* have different, if related, meanings that the 2007 letter did not separate. The former refers to actions that prevent governmental entities and individuals from performing their public functions. The latter refers to actions that cause governmental entities or individuals to perform their public functions improperly by subverting or corrupting their public responsibilities in favor of personal ones. In the case of a vote, for example, *undue influence* refers to any action that would cause voters to cast ballots in their private interests, without regard to the merits of the election.

A. Undue Interference

It is well settled that the starting point for an examination of any statutory meaning is the text of the statute itself. *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, ... the sole function of the courts is to enforce it according to its terms"). *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). "To determine the 'plain meaning' of a term undefined by a statute, resort to a dictionary is permissible." *Id.* at 1034.

Undue means "exceeding or violating propriety or fitness: excessive." *Merriam-Webster's Collegiate Dictionary* 1290 (10th ed. 1998). Black's Law Dictionary defines *interference* as "to check, hamper, hinder." *Black's Law Dictionary* 814 (6th ed. 1990). The phrase *unduly interfere* appears in numerous federal statutes in this sense – excessive hindering or hampering – and thus prohibitions on undue interference appear as limitations on the application of a statute. For example:

- environmental laws cannot "unduly interfere with a Bankruptcy case...", 11 U.S.C. § 105;
- the collection of child support obligations may not "unduly interfere with the state's traditional authority,..." 18 U.S.C. § 228; and
- jurisdiction is not found if it "unduly interferes with interstate commerce..." 49 U.S.C. § 10501.

So too in IGRA, then, *undue interference* is used in this same limiting manner, to protect sovereign tribal governments from interference by a management contractor. The management contractor is made secondary to the tribal government and can only function if it does not excessively hamper or hinder tribal government processes relating to gaming.

As the term is specifically applied, *undue interference* refers to more than just inconvenience, which the terms *hamper* or *hinder* might imply. Rather, an action unduly interferes when it prevents government agencies or agents from actually performing their public responsibilities. For example, public officials acting in the course and scope of their positions have qualified immunity from suit because making them routinely subject to liability would prevent them from doing their jobs. *Elder v. Halloway*, 510 U.S. 510, 514 (1994). That is, "the central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.'" *Id. quoting Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). Similarly, certain inter-governmental tax immunity exists because to allow such taxation would unduly interfere with a government's ability to operate, *Pittman v. Homeowners Loan Corp.*, 308 U.S. 21 (1939); and there is no federal cause of action under the Indian Civil Rights Act, in part because a federal right of action would unduly interfere with tribal governmental functions. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978).

With this understanding of *undue interference*, nothing Southwest did unduly interfered with any decision or process of tribal government under 25 U.S.C. § 2711(e)(2). There is nothing in any investigative record or in the information provided to the NIGC to show that Southwest prevented the Tribes, or any agency or entity of the Tribes, from performing governmental functions. In fact, the contrary appears. Even in the record before the Chairman at the time of the 2007 letter, Southwest funded the operation of the Tribes' gaming commission, 2007 letter at 5-6, and it was instrumental in various get-out-the-vote efforts, transporting tribal members to three special council meetings, and paying for elders' trips to Cripple Creek, Colorado, and Taos, New Mexico. 2007 letter at 3-5.

Of course, the tribal gaming commission was regulating Southwest at the time Southwest was paying its bills, and the votes in question concerned Southwest's continuation as the Tribes' gaming manager. As such, the 2007 letter was concerned with the propriety of these, and other actions by Southwest. The Chairman found Southwest's actions to be improper but not to amount to *undue influence* under IGRA. Given a new understanding of *undue influence*, one that is more applicable to tribal gaming than the one derived from wills and trusts law, Southwest did "unduly ... influence for its gain or advantage [a] decision or process of tribal government relating to the gaming activity."

B. Undue Influence

Influence means simply to "sway" or "affect." *Merriam-Webster's Collegiate Dictionary* 599 (10th ed. 1998), and so to *unduly influence* means to sway or affect excessively or too much. Reduced to essentials, then, the question of undue influence comes down to how much influence is too much influence.

The 2007 letter identifies "too much influence" at the point where influence becomes coercion and suborns the free will of a weaker party. As *undue influence* is applied elsewhere in federal law, however, "too much influence" occurs when an action may cause governmental entities or individuals to perform their public functions improperly.

i. Undue influence in elections

The term appears frequently in challenges to the propriety of union elections, where workers vote whether to be represented by a union for purposes of collective bargaining. Such a vote is closely analogous to the circumstances here. In both cases membership (tribal or union) is voting on whether to enter a voluntary contractual relationship (casino manager or union) that is governed by a federal regulatory scheme (IGRA or labor law) and that brings with it certain costs and benefits. As such, it makes sense to give the term the same meaning in both situations.

In the context of a union vote, union representation must be the result of the "fair and free choice" of the employees. *NLRB v. Basic Wire Products, Inc.*, 516 F. 2d 261, 265 (6th Cir. 1975). If the union provides gifts to the employees before the vote, however, this has the potential to "influence votes without relation to the merits of the election." *Id.* If the gifts are of sufficient value, the election no longer represents the free and fair choice of the workers, and the election is void on the ground of undue influence. Thus:

> The inquiry ... concerns the potential of the gifts to influence voting decisions: Are the articles sufficiently valuable and desirable in the eyes of the person to whom they are offered to have the potential to influence that person's vote? Although workers may be willing to accept campaign buttons and bumper stickers to show support for a union, those articles have little potential to "purchase" or *otherwise unduly influence* a vote, especially as contrasted with attractive ball caps, T-shirts, and jackets.

NLRB v. Shrader's, Inc. 928 F. 2d 194, 198 (6th Cir. 1991) (emphasis added).

As *Shrader's* suggests, gifts do not have to be very valuable to unduly influence an election. Courts and the National Labor Relations Board have invalidated union elections based on union's pre-election gifts of life insurance, *Wagner Elec. Corp.*, 167

N.L.R.B. 532 (1967), jackets worth $16 each, *Owens-Illinois*, 271 N.L.R.B. 1235 (1984), free medical screenings, *Mailing Services Inc.*, 293 N.L.R.B. 565 (1989), and filing a lawsuit on behalf of employees seeking back pay. *Nestle Ice Cream Co. v. NLRB*, 46 F. 3d 578, 585 (6th Cir. 1995). *Undue influence* in this context, then, means to influence or attempt to garner votes in your favor "without relation to the merits of the election." *Nestle Ice Cream v. NLRB*, 46 F. 3d 578, 583 (6th Cir. 1995).

In this last case, the Teamsters' president made two appearances before Nestle employees in Bakersfield, California, the day before a scheduled election. At the first, he announced that the Teamsters had filed a lawsuit against Nestle. At the second, he presented an $18,000 check to a Teamsters' member from another company. The check represented a back pay award secured with the Teamsters' help. A Teamsters attorney reported that the Teamsters had filed a similar suit against Nestle and estimated that each Nestle employee was due about $35,000. Both men repeatedly asked for the employees' votes. *Id.* at 579-580.

In reversing the NLRB and invalidating the subsequent election, the Sixth Circuit found *undue influence*. Providing free legal services with the promise of a payoff made it clear to the employees that they were going to receive something quite valuable. What is more, in providing the legal services and promising a payoff, the potential existed for the members to vote for the union, "simply out of a desire to continue receiving the benefit" rather than on the merits of representation. *Id.* at 584-585. Understanding *undue influence* in this way, Southwest unduly influenced the tribal elections on its continuation as the Tribes' gaming manager.

What happened between the Tribes and Southwest is a complex knot of circumstances that occurred over more than a decade. Auditors, investigators, and analysts from NIGC, other governmental agencies, and private companies have each focused on some part of these circumstances. Focused investigations are understandable given the length and scope of the activities involved and the different responsibilities of the investigations. As a result, there is no single source of complete investigative facts. Nonetheless, there is enough evidence for the Chairman to conclude that Southwest unduly influenced the Tribes governmental decisions and processes. In fact, there was enough evidence for the Chairman to find undue influence at the time of the 2007 letter, before the GT audit report.

Again, under the 2006 Constitution, the adult membership of the Tribes had to vote to authorize an amended management contract with Southwest. See Chey.-Arap.-Const. [2006] art. VII, § 4(c). The Region V investigation found that in October 2006, Southwest took tribal elders on a trip to Cripple Creek, Colorado, and Taos, New Mexico, to gamble and attend tribal ceremonies. The trip cost the elders nothing. Southwest paid for transportation, meals, and accommodations; gave each elder casino coupons, $100 in cash, and a coffee cup imprinted with "C & A Tribes on a visit to Cripple Creek;" and asked for their votes.

This is directly analogous to *Nestle* and the other union election cases. The substantial value of what Southwest provided, combined with its explicit request for votes, had the potential to cause the elders to vote for Southwest "simply out of a desire to continue receiving the benefit" rather than on the merits of Southwest's contract proposal. *Nestle*, 46 F. 3d at 584-585. Providing the trips for tribal elders was, therefore, *undue influence* on a tribal governmental process and decision under 25 U.S.C. § 2711(e)(2).

Indeed, in union elections, cash payments to voters accompanied by a request for their votes is undue influence per se. *Revco D.S., Inc. (DC) v. NLRB*, 830 F.2d 70, 72 (6th Cir. 1987) (union offer of $100 for a pro union vote held improper); *52nd Street Hotel Associates*, 321 N.L.R.B. 624, 634 (1996) ("Under established precedent, it is, of course, clearly objectionable for a union to explicitly buy votes by giving employees cash payments. Such a conferral of benefits...constitutes nothing less than an attempt to corrupt the election process."); *General Cable Corp.*, 170 N.L.R.B. 1682 (1968) ($5 gift certificate to employees by the union before the election was an objectionable inducement to vote); *Teletype Corp.*, 122 N.L.R.B. 1594 (1959) (payment of money by rival unions to those attending pre-election meetings constituted objectionable conduct). The same rule should apply here.

ii. Undue influence in other circumstances

Under IGRA's plain language, the prohibition on undue influence is not limited to elections. It applies to "any decision or process of tribal government relating to the gaming activity." 25 U.S.C. § 2711(e)(2). There is no question that, for a tribe that operates gaming, an election to choose a gaming manager is a "process of tribal government relating to gaming activity." Its application to elections suggests how the term is to be applied generally.

Purchasing votes corrupts an election by setting the voters' naked self interest against the merits of the question at issue. In other words, the voters' private interests conflict with the public obligation to vote fairly on the merits of the question before them. Generally, then, undue influence exists any time a manager's actions can compromise a tribal governmental function related to gaming by setting the actors' private interests into conflict with their public obligations and responsibilities. The mere potential for compromise is sufficient under IGRA, which does not require that the tribal governmental function or process actually be compromised. The Chairman must disapprove a management contract if the "management contractor has, *or has attempted to*, unduly interfere or influence ... any decision or process ... relating to the gaming activity." 25 U.S.C. § 2711(e)(2) (emphasis added).

Viewed this way, other instances of undue influence by Southwest appear. The 2007 letter finds that Southwest paid nearly all of the tribal gaming commission's operating expenses in 2005. This created a situation where the commission, then with only one commissioner, was placed in the position of regulating the entity that paid the

commission's expenses and, perhaps, the commissioner's salary. This continued through 2006. despite a directive from Governor Flyingman not to do so.

There were various regulatory failures during this period. In 2005, the gaming commission failed to require that all contracts over $25,000 be in writing, thus effectively screening them from external audit. At the same time, rather than making security information available immediately, as required by the management contract, Southwest only notified the gaming commission of theft by U.S. mail, thus hampering the commission's ability to investigate. While the record does not directly tie these various failures to the gaming commissioner's conflicted position, the existence of the conflict and the fact of the failures are sufficient to find that Southwest unduly influenced gaming regulation.

C. Additional Support for This New Analysis

Aside from being better suited to the circumstances of tribal gaming, there is another reason to change our reading of *undue influence*. It is consistent with our reading in § 2711(e) of another mandatory requirement for disapproval of a management contract. As a straightforward matter of statutory interpretation, a statute is passed as a whole, not in parts or sections, and it has one general purpose and intent. Consequently, each part or section should be construed in connection with every other. *Gustafson v. Alloyd Co., Inc.* 513 U.S. 561, 568 (1995); 2A Singer, *Sutherland, Statutes and Statutory Construction* § 46.05 (West 2000).

In addition to disapproval for undue interference and influence, "the Chairman shall not approve any contract if the Chairman determines that—

> (1) any person listed pursuant to subsection (a)(1)(A) of this section—
>
> > (A) is an elected member of the governing body of the Indian Tribe which is the party to the management contract;

25 U.S.C. § 2711 (e)(1)(A). In turn, 25 U.S.C. § 2711 (a)(1)(A) refers to

> each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock.

Fundamentally, this is a prohibition against self-dealing. If a member of the tribal governing body has a direct financial interest in a management contractor, the Chairman must disapprove the management contract. This eliminates the possibility that a governmental decision to enter into a management contract might be made out of personal gain, separate and apart from the merits of the contract itself. The statute does

not require proof of self-dealing but functions to disapprove a contract on the non-rebuttable presumption of a disqualifying conflict.

Read as proposed here, IGRA's prohibition against *undue influence* in § 2711(e)(2) embodies the same disqualifying standard of a conflict of interest between private gain and public obligation that an individual tribal government official with an interest in a management contract faces under § 2711 (e)(1)(A). We should, therefore, interpret the two similar provisions similarly.

If you require anything further, please do not hesitate to ask.