IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

A.D. ELLIS, in his official capacity as, Principal Chief of the Muscogee (Creek) Nation,	
Plaintiff-Appellee,	
vs.	
CHECOTAH MUSCOGEE CREEK INDIAN COMMUNITY, DUCK CREEK INDIAN COMMUNITY, EUFAULA INDIAN COMMUNITY, HOLDENVILLE CREEK INDIAN COMMUNITY, and OKEMAH INDIAN COMMUNITY, Charter Communities,	**Appeal Case No. SC-10-01**
Defendants-Appellants.	**Appeal from the District Court of the Muscogee (Creek) Nation Okmulgee District Case No. CV-209-33**

OPINION AND ORDER

MVSKOKVLKE FVTCECKV CUKO HVLWAT VKERRICKV HVYAKAT OKETV YVNKE VHAKV HAKATEN ACAKKAYEN MOMEN ENTENFVTCETV, HVTVM MVSKOKE ETVLWVKE ETEHVLVTKE VHAKV EMPVTAKV

OPINION AND ORDER BY CHIEF JUSTICE JONODEV CHAUDHURI, JOINED BY VICE CHIEF HOUSTON SHIRLEY AND JUSTICE AMOS MCNAC. JUSTICE KATHLEEN SUPERNAW ISSUES A SEPARATE OPINION, DISSENTING IN PART AND CONCURRING IN PART. JUSTICE LEAH HARJO - WARE ISSUES A SEPARATE DISSENTING OPINION. JUSTICE MONTE DEER DID NOT PARTICIPATE.

NOW as of the 20th day of July, 2011, the above cited case comes before this Court for appellate review. At issue is whether the lower court's order of permanent injunctive relief should be upheld.

Since we have no precedent in the Muscogee (Creek) Nation for the standard of review of trial court awards of equitable relief, we find the rule applied by the United States Supreme Court in *eBay, Inc. v. MercExchange, LLC*, 547 U.S.388 (2006) persuasive. We believe this rule articulates the traditional principles in Muscogee tribal law. In *eBay*, the Court held "[t]he

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." *Id.*

"Abuse of discretion" is one of the most rigorous standards of judicial review in Muscogee law. Under that standard, lower court action may be reversed if the lower court's decision is unreasonable in light of the facts of the case, or is an unreasonable deviation from precedent. This court finds no unsound, unreasonable or illegal abuse of discretion. The Appellants have not made a showing that the lower court decision should be reversed.

Nor have the Appellants shown the trial court unreasonably deviated from Muscogee precedent.

We held in *Reynolds v. Skaggs* that "a per-capita payment *ipso facto* is . . .wrong." 4 Mvs. L. Rep 116, 120 (2006). In that matter, Justice Harjo-Ware, in her then capacity as Attorney General, argued no per capita payments should be made in any circumstances. *Id.* at 120. It was left up to the trial court to determine if payments made were legal or illegal. *Id.* at 121.

The lower court ruling in the instant case is consistent with our previous opinion in *Reynolds* and will not be disturbed, and a system that permits a community to receive a share of gaming revenues for disbursement as they see fit was properly permanently enjoined by the lower court.

In conclusion, this Court finds no fundamental or reversible error in the lower court's legal rulings in this case. No abuse of discretion has been demonstrated. Accordingly, we affirm the trial court decision issued March 19, 2010 in the District Court, Patrick E. Moore presiding.

We now separately address certain issues raised by Justices Supernaw and Harjo-Ware in their respective discussions. These issues involve: 1.) the appropriate standard of review; 2.) the relationship between Muscogee law and federal law; and 3.) certain considerations regarding the gaming authority of the Communities and 4.) Balancing of Equities.

I. Standard of Review

The Abuse of Discretion Standard of Review set forth in the main opinion is perfectly consistent with our precedent. Under our case law, when exercising *appellate* jurisdiction, this Court will review issues of law *de novo* and issues of fact for clear error. This general and well-established rule is identical to the standards applied by numerous tribal, federal, and state appellate courts. That said, appellate courts often have to refine this general approach in a variety of specific circumstances. For instance, appellate courts differ as to how they will review mixed questions of law and fact. Similarly, the *de novo*/clear error distinction is not entirely helpful when reviewing lower court permanent injunction orders. As stated in the main Opinion, the commonly-applied standard of review for such matters in other jurisdictions is that of a review for an abuse of discretion. That this Court adopts such a universally-applied standard to such matters into Muscogee case law is decidedly unremarkable.

Furthermore, Justice Harjo-Ware's position that *all* lower court decisions should be reviewed *de novo* is neither tenable nor consistent with this Court's case law. As stated above, when exercising *appellate* jurisdiction, we do not look at findings of fact *de novo*, as we have a well-established and logical rule that such findings be reviewed for an abuse of discretion. This rule, as we and a multitude of tribal, federal, and state courts have noted, recognizes the fact that trial courts are in a much better position than appellate courts to receive evidence and evaluate witness credibility. The dissent appears to suggest that we should always review facts *de novo*, an approach that is only appropriate when we exercise *original* jurisdiction. We do not believe Justice Harjo-Ware adequately takes into account the distinction between *original* and *appellate* jurisdiction.

II. FUAs as Management Contracts

Justice Supernaw's dissent provides a lengthy discussion of the 1994 *Reynolds v. Skaggs* case. She concludes that she would "overrule" an essential part of this MCN Supreme Court precedent.[1] She further suggests that all FUAs should be reviewed in light of federal regulations to determine whether they qualify as management contracts under federal law.

This issue, however, of whether Facility Use Agreements are management contracts was not central to the District Court's ruling. Indeed, the District Court's only reference to the Reynolds case – a brief nod to the precedent that disbursements that are patently illegal are void and properly enjoined under MCN Supreme Court case law – *makes no mention whatsoever* to management contracts. Instead, the District Court ruled that the FUA schemes are invalid because of more fundamental considerations. The District Court stated:

> Muscogee (Creek) Nation law cannot 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.

District Court Final Judgment and Order, p. 18. Thus, analysis of the specific language of any of the FUAs is unnecessary. The District Court's Order holds that the 50-50 split schemes they institute are illegal on their face without some legal authorization (such as a properly approved RAP) to the contrary. Therefore, a microanalysis of the specific FUAs in this case is beside the point.

[1] Justice Supernaw's dissent states: "To the extent that the Supreme Court found in Reynolds that the FUA was in essence a management contract, I would overrule that portion of the decision."

Thus, Justice Supernaw's discussion of the definition of a management contract is of little relevance to the District Court's ultimate holding and does not factor into whether the District Court's ruling constituted reversible error. Furthermore, notwithstanding the District Court's scant discussion of Reynolds, the case is part of our case law and is binding precedent. Justice Supernaw's interest in "overruling" part of its holding does not change, without a majority vote of the Justices issuing a given opinion, its precedential value.

III. Muscogee Law as Informed by Federal Law

The District Court performed a valuable public service in thoroughly receiving evidence, reviewing the record, and applying relevant law in issuing its Order. Although the District Court presented a complete analysis of federal law, its ruling was ultimately grounded in Muscogee law. We believe it was correct in doing so, and we disagree with Justice Supernaw's position that the FUAs should each be reviewed to determine whether they comport with federal regulations. Instead, if 50-50 splits are improper without a RAP under *Mvskoke law* as the District Court held, such a federal analysis is unnecessary.

Acknowledgment and adherence to federal law is an attribute of a prudent approach to the creation of tribal common law. Although acknowledgment of federal law is necessary – especially in areas of significant federal regulation such as gaming – decisions of the Muscogee Courts must always be grounded in Muscogee law.

Our analysis of federal law should be done with an eye toward recognizing the impact of federal law on internal tribal operations and using that knowledge to tailor our decisions to produce an MCN common law (MCN case law) that is fully protective of the best interests of the Nation.

The District Court properly acknowledged federal considerations in issuing its holding *based on MCN law*. As such, Justice Supernaw's dissent's suggestion that the FUAs should be reviewed based on a new federal checklist is erroneous. Instead, we do find that the DC properly weighed federal repercussions and properly assessed Appellee's concerns about federal sanctions in making a ruling based on *MCN* law. Justice Supernaw's statement that there is no Mvskoke precedent in this matter is also inaccurate. As stated above, Justice Supernaw states that she would overrule the portion of our Reynolds precedent with which she disagrees. Her disagreement, however, does not change its existence.

The interpretation of MCN law in light of federal considerations is entirely within the domain of MCN courts. This type of analysis – one that the District Court undertook – should not be subject to federal court review, and does not necessitate the protracted micro-analysis of current NIGC checklists that is recommended by Justice Supernaw.

IV. Balancing of Equities

Chartered communities have certain, limited, statutory rights to facilitate tribal services being made available for citizens in a local 'community'. These communities are not, however, political subdivisions of the Nation. They are not part of the political process. They have no similarities to Tribal Towns, which were the basis for Mvskoke government prior to the enactment of the current Constitution. Under the 1867 Constitution, and before, the *mekko* represented a Town in the House of Kings, a *tvstvnvkke* represented a Town in the House of Warriors. All citizens were members by matrilineal descent of a Tribal Town.

Very few *Mvskoke* citizens are members of a community, however membership is defined. Communities are not authorized to conduct business enterprises, benefitting local

members to the detriment of tribal citizens throughout the Nation. Balancing of equities has to be in favor of all, not just a few tribal citizens.

V. Practical Effect of the Justices' Divergent Positions in this Case

Finally, the force of this opinion is that the District Court's Order of Permanent Injunctive relief stands. A majority[2] ruling by this Court is necessary to overturn, remand, or modify the lower court's ruling. This Court's ruling is to affirm the District Court's Order.

Therefore, the District Court's Order in this matter remains in full force and effect.

IT IS SO ORDERED.

CHIEF JUSTICE JONODEV CHAUDHURI

VICE CHIEF JUSTICE HOUSTON SHIRLEY

JUSTICE AMOS MCNAC

[2] As we have previously discussed, it is conceivable that a plurality may, in some circumstances, carry the force of binding authority, however, such a scenario is not at issue in the present case.

JUSTICE SUPERNAW DISSENTING

Justice Supernaw filed a separate opinion, concurring in part the District Court's finding of impermissible uses of gaming revenue proceeds, and dissenting to the District Court's conclusions of law.

STATEMENT OF THE CASE

This appeal originates from a civil action filed in the District of the Muscogee (Creek) Nation, Okmulgee District, by Plaintiff/Appellee A.D. Ellis ("Principal Chief"), against Defendant/ Appellants who are five of the six chartered communities of the Nation, namely: Checotah Muscogee (Creek) Indian Community, Duck Creek Indian Community, Eufaula Indian Community, Holdenville Creek Indian Community, and Okemah Indian Community (collectively, the "Communities"). Bristow Muscogee Indian Community was a defendant in the case before the District Court, but did not join in the appeal.

From the record, it appears that the Principal Chief filed this action on February 27, 2009, in anticipation of the findings of an investigation of the Communities' use-of-revenue agreements by the National Indian Gaming Commission ("NIGC"). In a letter to the Principal Chief dated March 13, 2009, the NIGC stated its concern was the following:

> The general problem is that many of the programs benefit individual community members without an apparent link to a recognized need with the tribal community and without using criteria to limit the program's beneficiaries to those whose participation would help the community meet that need. Therefore, rather than qualifying as permissible 'government program' spending as that term is used in IGRA [Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq*], we are concerned that these practices may actually amount to the distribution of gaming revenues to individual tribal members without an approved revenue allocation plan.

Letter dated March 13, 2009, from John E. Peterson, Director of Enforcement, NIGC, to Principal Chief, enclosing NIGC Bulletin 01-05, "Use of Net Gaming Revenues Bulletin." [The Bulletin is correctly numbered 05-1].

The NIGC letter further cited examples within the Communities of Duck Creek, Checotah, Eufaula, and Okemah of impermissible uses of gaming revenues. Thereafter, the Principal Chief terminated the Communities' Facility Use Agreements (FUAs) and executed new ones that permitted the use of the Nation's real and personal property within the Community except for gaming purposes.

On March 19, 2010, the District Court Judge issued a decision finding that, based on a forensic audit of the Communities' accounts and testimony at trial, certain activities and lack of accounting were impermissible uses of gaming revenues; and that the initial FUAs in effect when alleged violations occurred were void because they were never submitted to NIGC for approval as management contracts. Order at 8-10, 12, 14. The Court further found that pursuant to the FUAs, the 50% gaming revenue proceeds to be distributed to the Communities constituted illegal per capita payments because there was no NIGC-approved Revenue Allocation Plan ("RAP"). *Id.* at 14 (citing *Reynolds v. Skaggs*, 4 MVS. L. Rep 115 (1994)). The Court held that the "50-50 Split" of gaming revenues diluted the Nation's "sole proprietary interest" in violation of federal gaming laws. *Id.* at 18. The Court permanently enjoined the Communities from operating the gaming activities at their respective facilities and ordered the release of estimated $2 million escrowed funds by the Communities to the Nation.

STANDARD OF REVIEW

The Supreme Court's standard of review of the District Court decision is clear error of findings of fact and *de novo on* conclusions of law. *Citizenship Board v. Todd*, 4 MVS. L. Rep 195, 196 (2000). *See also, Atkinson Trading Co. v. Shirley,* 210 F.3d 124, 1250-52 (10th Cir. 2000) (same standard as a federal court's review of tribal court decisions). I disagree with the

plurality setting a new standard and maintain that Muscogee case law should control in the review of the District Court's decision.

FINDINGS OF FACT

In NIGC's Bulletin 05-1, the NIGC set forth some guidelines to assist tribal governments in determining the appropriate uses of net gaming revenues consistent with IGRA. It stated that net gaming revenues may be used for government purposes and for payments to individual tribal members. The use, however, is limited to five public purposes specified by IGRA. Those are:

1. To fund tribal government operations or programs;
2. To provide for the general welfare of the Indian tribe and its members;
3. To promote tribal economic development;
4. To donate to charitable organizations; and
5. To help fund operations of local government agencies.

NIGC Bulletin No. 05-1 at 1-2 (2005) (citing 25 U.S.C. § 2710(b)(2)(B); 25 U.S.C. §§ 2710(d)(1)(A)(ii) and 2710(d)(2); and 25 C.F.R. §§ 522.4, 522.6). The NIGC provides clear examples of permissible and impermissible uses of gaming revenues. Permissible uses allow distribution of proceeds to benefit individual members through established governmental service programs which should:

> 1) be created in response to a recognized need within the tribal community; 2) have eligibility criteria to determine which members qualify to participate in the program; and 3) not discriminate by including some members and excluding others without reasonable justification. Payments made and services offered should be made equally available to all those who meet program standards.

Id. at 3. If these procedures are not fully established, then the distribution will likely fall within the impermissible uses of gaming proceeds and possibly be construed as an illegal per capita payment. Payments in the form of cash, gifts or services to select individual tribal members for their personal use not in compliance with the government programs are not permissible. *Id.* at 4.

To the extent that the District Court found that some Communities had impermissible uses of gaming revenues that were identified in the NIGC's letter, I find no clear error. As such, I concur only in that limited portion of the decision. However, I dissent to the District Court's overbroad conclusions of law that the FUAs are management contracts and must be reviewed by NIGC, and that the "50-50 Split" is an unauthorized distribution of funds without an approved RAP and an illegal per capita payments.

CONCLUSIONS OF LAW

The District Court relied on *Reynolds v. Skaggs*, 4 MVS. L. Rep 115 (1994) (*"Reynolds"*), in concluding that a FUA is a gaming management contract. In *Reynolds*, this Court found that a distribution of $2,000.00 to persons attending a Checotah Creek Indian Community meeting was an illegal per capita payment in violation of IGRA. It further held that the Community Use Agreement was "in essence . . . a management contract with the Muscogee (Creek) Nation . . . ." *Reynolds* at 122. This Court further stated that,

> [t]he Indian Gaming Regulatory (IGRA) does <u>not</u> prohibit Indian tribes from making per capita payments, but does set forth terms and conditions that must be adhered to *before* per capita payments may be made to tribal members. It does not address how an independent management firm may spend the monies earned by its management contract with an Indian Tribe. [emphasis in original].

Id. at 122-23. Indeed, in 1994, the NIGC was not yet fully staffed and the Solicitor's Office, Department of the Interior, was still conducting many reviews. Nonetheless, NIGC issued Bulletin No. 94-5 regarding management contracts. Contents of a management contract included, but were not limited to, the following:

- Maintenance of adequate accounting procedures and preparation of verifiable financial reports on a monthly basis;
- Access to the gaming operation by appropriate tribal officials;
- Payment of a minimum guaranteed amount to the tribe;
- Development and construction costs incurred or financed by a party other than the tribe;

- Term of contract that establishes an ongoing relationship;
- Compensation based on percentage fee (performance); and
- Provision for assignment or subcontracting of responsibilities.

NIGC Bulletin No. 94-5 at 1 (1994). In contrast, the checklist for requirements of management contracts posted today on the NIGC's reading room under management contracts on its website at www.nigc.gov has a thorough listing of the requirements for a management contract to comply with 25 C.F.R. § 531. Without comparing the contents of each Community's FUA with section 531, it is impossible to determine whether or not the respective FUAs are management contracts. The *Reynolds* decision did not contain any such analysis and is conclusive.

More troublesome, however, is that after the *Reynolds* decision and for the next 15 years, neither the Nation's Gaming Commission nor any of the parties to this action requested the submission or submitted the FUA boilerplate agreement to the NIGC for a preliminary determination of whether or not it is a management contract or gaming-related agreement that must have approval. Since 1994, the NIGC stated that it recognized the need to provide early guidance as to which documents were to be submitted for their review. The NIGC states:

> [i]n order to provide timely and uniform advice to tribes and their contractors, the NIGC and the BIA have determined that certain gaming-related agreements, such as consulting agreements or leases or sales of gaming equipment, should be submitted to the NIGC for review. In addition, **if a tribe or contractor is uncertain whether a gaming-related agreement requires the approval of either the NIGC or the BIA, they should submit those agreements to the NIGC.** [emphasis added].

NIGC Bulletin No. 94-5 at 1. Had the Nation submitted a blanket FUA to the NIGC for an initial determination, the question would have been addressed by the entity that has the specialized expertise to examine the document.

The Muscogee (Creek) Nation Code authorizes the Principal Chief to enter into FUAs with the Communities for "use of tribal lands and buildings for the purposes of furthering governmental operations and community development." Muscogee (Creek) Nation Code Ann.

Title 11, § 4-101. In section 4-102 of Title 11, the FUA is designated as a "Lease Agreement" under Muscogee law. The leasing authority is found in Title 11, COMMUNITIES, Chapter 4, Chartered Community Use of Tribal Lands and Buildings. In comparison, the Muscogee laws governing gaming are set forth at Title 21.

In Title 21, the Communities may obtain gaming licenses. Muscogee (Creek) Nation Code Ann. Title 21, § 3-105. Section 3-105 provides that Community officers are primary management officials for purposing of obtaining a gaming license. Further, section 3-119 states that,

> [a]s a provision of licensing, no facility shall be operated pursuant to a management agreement or contract, and no facility shall operate gaming devices pursuant to a vendor agreement or contract, until said facility has acquired the review of the Gaming Commissioner for purposes of determining whether the said agreement or contract, or the gaming device which is the subject of the agreement or contract, complies with applicable law. All other leases, contracts or other agreements involving gaming activities shall be provided to the Gaming Commissioner for review.

Id. at § 3-119. Thus, the FUA would need to be provided to the Nation's Gaming Commissioner for review. The record is devoid of any such approval or a discussion as to whether this requirement was met before gaming was conducted. It appears as though the Nation has safeguard procedures in place, but the record does not reflect that these measures were followed.

Moreover, according to Muscogee law, management contracts must be approved by the National Council by resolution. *Id.* at § 4-101. Again, there is nothing in the record that shows the Nation has ever treated the FUAs as anything more than a lease and revenue sharing agreement.

In examining the terms of the Checotah Indian Community's FUA executed November 11, 2005, an Attachment B had been added to the basic use agreement terms, which was a summary of selected gaming code requirements. *See* Defendant/Appellant Checotah Indian

Community's Opening Brief, Exhibit D (May 25, 2010). In Paragraph 1, Contracts, Subparagraph B, the Checotah Indian Community is expressly prohibited from operating the gaming facility under any type of management contract or agreement. Subparagraph B provides that,

> [t]he Community gaming facility shall not be operated pursuant to a management agreement or contract, and shall not operate gaming devices pursuant to a vendor agreement or contract, until said facility has acquired the review of the Gaming Commission for purposes of determining whether the said agreement or contract, or the gaming device which is the subject of the agreement or contract, complies with applicable law.

Id. at 8 (citing MCNCA Title 21, § 3-119 [sic]). Thus, any FUA with Attachment B could not possibly be construed a management contract without the Nation's Gaming Commission's knowledge and sanction.

Based on the foregoing analysis, I disagree with the District Court's conclusion of law that the Communities' FUAs were gaming management contracts. It is an error of law without a sustainable legal basis. To the extent that the Supreme Court found in *Reynolds* that the FUA was in essence a management contract, I would overrule that portion of the decision. Each FUA must be examined individually; and, as previously stated herein, there was no reported such analysis in *Reynolds* comparing the FUA with NIGC management contract requirements.

Similarly, I disagree with the District Court's conclusion of law that the "50-50 Split" is an unauthorized distribution of funds without an approved RAP and an illegal per capita payment. The NIGC allows tribal distribution of gaming proceeds to all individual tribal members if tribe has an approved RAP that authorizes per capita payments. NIGC Bulletin No. 05-1 at 2 (citing 25 U.S.C. §§ 2710(b)(3) and 2710(d)(1)(A)(ii)). Tribes are not required to make per capita payments from net gaming revenues to individual tribal members, but if they choose to do so, they must comply with both IGRA and the administrative regulations of the BIA. *Id.*

(citing 25 U.S.C. § 2710(b)(3) and 25 C.F.R. Part 290.) There is no disagreement by the parties that the Nation does not have an approved RAP.

I agree with the Communities that receiving 50% of the net profit from gaming is pursuant to the Nation's Revenue Sharing Laws. *See* Muscogee (Creek) Nation Code Ann. Title 21, § 12-102. The Revenue Sharing Laws are valid laws of the Nation and have not been found unconstitutional or preempted by any federal law. See, e.g., *In the Matter of the Constitutionality of NCA 98-02,* 4 MVS. L. Rep 175 (1999) (this Court denied a challenge to law providing for revenue sharing of profits of truck plaza with Okmulgee Indian Community.)

The District Court cites no authority in tribal or federal law that finds the sharing of gaming revenue with the Communities is illegal. The NIGC did not determine that the FUAs are RAPs, nor has it indicated that sharing revenues with the Communities is on its face improper. *See* NIGC Letter at 2. What the NIGC determined, was that failure to permissibly distribute gaming revenues through government programs at the Community level "**may** actually amount to the distribution of gaming revenue to individual tribal members without an approved revenue allocation plan." [emphasis added]. *Id.* at 1. The NIGC provided the Nation the opportunity to address its own weaknesses in the administration and distribution of its gaming revenues, and it did not issue a notice of violation to the Nation.

The Communities did not attempt to distribute their 50% revenue share of the gaming proceeds to all members of their respective communities. *Cf. Reynolds* (distribution of $2,000.00 to all persons attending a Checotah Creek Indian Community meeting was an illegal per capita payment in violation of IGRA). Rather, here, the lack of sufficient application and documentation of isolated Community actions in administering and distributing some gaming proceeds were found to be impermissible uses of gaming revenues. As such, this mismanagement of funds does not rise to a *per se* per capita payment. Impermissible uses in

distributing gaming proceeds in several situations by certain persons can be readily distinguished from a plan or scheme to distribute proceeds to all Community members.

Further, sharing revenue does not dilute nor split the "sole propriety interest" of the Nation. This interest has safely been preserved in the Nation's laws. *See* Muscogee (Creek) Nation Code Ann. Title 21, § 12-101.

Based on the foregoing analysis and discussion, the District Court's conclusions of law are clearly erroneous in that the Nation's revenue sharing with the Communities is not an unauthorized distribution of funds that be included within an approved RAP resulting in an illegal per capita payment, and that the "50-50 Split" of gaming revenues did not dilute or diminish the Nation's "sole proprietary interest" in violation of federal gaming laws. As such I would reverse these findings.

Kathleen Supernaw
Associate Justice

JUSTICE HARJO-WARE DISSENTING

I. THE STANDARD OF REVIEW HAS ALREADY BEEN ESTABLISHED.

By way of their opinion in this case, three of my fellow justices advocate setting forth a new standard of reviewing lower court decisions in equity cases. I disagree with setting forth a new standard of review. However, I believe there is cause to vacate the permanent injunction entered by the District Court when reviewed under both the old and proposed standards of review.

Historically, the unwritten Muscogee Supreme Court standard of review of lower court decisions was *de novo*. When a case reached the Supreme Court, it took a new and fresh look at both the lower court's findings of fact and conclusions of law. The Muscogee Supreme Court modified its standard of review in *Citizenship Board v. Todd*, 4 Mvs. L. Rep. 195 (2000) where the Supreme Court held that we would only review a lower court's findings of fact for clear error. The Court retained its ability to perform a *de novo* review of the legal conclusions reached by a lower court. Review under the abuse of discretion standard gives lower courts a great deal of discretion which would rarely be reversed. In my view, a limitation on the Muscogee Supreme Court's standard of review is a limitation on our jurisdiction. Such action is unnecessary and inadvisable. I therefore dissent to such self-limitation.

II. THERE IS NO MUSCOGEE SUPREME COURT PRECEDENT ON THE ISSUE OF PER CAPITA PAYMENTS.

In applying a proposed abuse of discretion standard of review in the instant case, others propose two (2) bases upon which the lower court's decision could be reversed, i.e. (1) if the lower court's decision is unreasonable in light of the facts of the case or (2) if the decision is an unreasonable deviation from precedent. They first determined that the Muscogee Supreme

Court's decision in *Reynolds v. Skaggs*, 4 Mvs. L. Rep 116 (1994)[3] was a precedential per se rule and found that the lower court's decision in this case was consistent with it. The two cases are not identical which does not justify the application of a per se rule.

The facts in *Reynolds* indicate that the officers of the Checotah Creek Indian Community (CCIC) gave per capita payments of $2,000 to each community member who merely attended a particular meeting. Evidence showed that this was not the first per capita payment made. A CCIC member, Ms. Reynolds, did not attend the meeting. She brought suit before the District Court of the Muscogee Nation so she could get her per capita payments. During the course of the proceeding and before it entered its final order, the District Court asked the Supreme Court to determine whether per capita payments were constitutional under the Muscogee Constitution. The Muscogee Supreme Court accepted the certified question and pondered the requirements of the Indian Gaming Regulatory Act and the Oklahoma Open Meetings Act. However, there was no final Supreme Court decision since it was only asked to determine the constitutionality of the payments. The Supreme Court held:

> The Court was asked to rule on the Constitutional question of law, pertaining to per capita payments. The Court was not asked to rule on the legality of the per capita payments. The Court finds that per capita payments are not unconstitutional and remands the matter to the Muscogee Creek Nation District Court, for determination of the legality or illegality of the per capita payments made or not made to Checotah Creek Indian Community members.

Reynolds v. Skaggs, 4 Mvs. L. Rep 116, 123 (1994) (emphasis in original).

The case was remanded and left to the District Court to determine the legality of the per capita payments based upon the particular facts of *Reynolds* case. Although no reported District Court decision could be located, we now presumably have two (2) District Court decisions on the issue

[3] On December 20, 2010, I disclosed to the parties that I was once the Attorney General of the Muscogee (Creek) Nation and as such represented the Nation in the *Reynolds* case and gave them an opportunity to object to my participation in this case. No objections were submitted.

of per capita payments. There is no Muscogee Supreme Court decision, thus no Supreme Court precedent to follow or from which to deviate. In the absence of such precedent, it is incumbent upon us to undertake *de novo* review in instant case and make such a ruling for the first time.

III. THERE WAS NO IRREPARABLE HARM.

The facts of this case indicate the Chartered Communities disbursed funds for their local social services programs. The National Indian Gaming Commission (NIGC) notified our Principal Chief of the results of a federal investigation of Community spending as follows:

> According to our investigation many of the programs being run by several of the Nation's Indian communities with gaming revenue **may not** comply with the Indian Gaming Regulatory Act (IGRA) use-of-revenue limitations. The general problem is that many of the programs benefit individual community members without an apparent link to a recognized need within the tribal community and without using criteria to limit the program's beneficiaries to those whose participation would help the community meet that need. Therefore, rather than qualifying as permissible "government program" spending as that term is used in IGRA, we are concerned that these practices may actually amount to the distribution of gaming revenue to individual tribal members without an approved revenue allocation plan.

National Indian Gaming Commission letter, March13, 2009 (emphasis added).

It is clear that the NIGC found and was concerned with Community spending through social services programs which may not have complied with federal law. This did pose a risk of harm, however, it did not cause irreparable injury. The NIGC did not determine such payments to be impermissible per capita payments and did not bring any enforcement action against the Nation. Instead, the NIGC gave our Nation the opportunity to cure the defects in the Community social service programs.

A. Payments Made for Social Services Programs are Not Per Capita Payments.

The permanent injunction was based on an erroneous legal conclusion regarding the meaning of per capita payments. Community per capita payments from gaming revenues without approval

are illegal under both federal and Muscogee law. 25 U.S.C. § 2710, MCN Code Title 11, 6-304. However, disbursements from gaming revenues are permitted to be used for social service programs if they meet federal guidelines. Federal regulation and NIGC Bulletin No. 05-1 expressly exempt disbursements of gaming funds for social services programs in the very definition of per capita payments as follows:

> *Per capita payment* means the distribution of money or other thing of value to all members of the tribe, or to identified groups of members, which is paid directly from the net revenues of any tribal gaming activity. ***This definition does not apply to payments which have been set aside by the tribe for special purposes or programs, such as payments for social welfare, medical assistance, education, housing or other similar, specifically identified needs.***

25 C.F.R. §290.2 (*emphasis added).*

The District Court's overbroad ruling that Communities' expenditures constituted impermissible per capita payments is contrary to the above cited federal law. Communities should have been given an opportunity to cure whatever deficiencies they had with their social services programs.

The Muscogee District Court found the Communities received insufficient guidance in operating their social services programs. The District Court stated:

> The Court is mindful of the fact the defendant Communities expenditures 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, <u>but decidedly incomplete guidance</u>, 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. * * *

Ellis v. Bristow Muscogee Indian Community, et al., CV 2009-33, Final Judgment and Order, p. 24 (March 19, 2010) (emphasis in original).

Despite these findings, the District Court determined all Community expenditures to be impermissible per capita payments and ordered a permanent injunction nationalizing Community gaming enterprises and divesting them of their funds, all being relief not prayed for by the Principal Chief in his petition. It did not accord our own Chartered Communities the same opportunity to cure that was granted to our Nation by the federal government. The remedy should have been for the District Court to retain jurisdiction and supervise bringing Chartered Community social service programs into compliance with federal law.

IV. THE BALANCE OF EQUITIES WEIGHS IN FAVOR OF THE CHARTERED COMMUNITIES.

Equity is nothing more than fundamental fairness or that which is fair and just. Fundamental fairness is a cornerstone of Muscogee Common Law. The basic premise of the District Court's holding is essentially that it is not fair that a handful of people get to spend so much money depriving all the rest of us. Others found no abuse of discretion, agreeing with the proposition that "a system that permits a community to receive a share of gaming revenues for disbursement as they see fit was properly permanently enjoined by the lower court." Opinion and Order, p. 2.

Chartered Communities were created as political subdivisions of our Nation and exercise powers and privileges provided by Muscogee law. NCA 83-11 § 101(C) & (D); MCN Code Title 11, § 1-103. They were authorized to apply for grant funds in order to enter into business ventures and/or expand their social service programs. MCN Code Title 11, §3-101. They were authorized to conduct revenue generating activities for the purpose of social and economic

development. NCA 95-87 § 101(B). They were authorized to lease tribal property for the purpose of furthering governmental operations and community development where they operated the Nation's gaming enterprises through approved gaming licenses. MCN Code Title 11, § 4-101; MCN Code Title 21. Community involvement was recognized as very important for economic, health, and educational development in the Nation. NCA 92- 208 § 101 (C). They were promised training and technical assistance from the Nation. NCA 90-13 § 102. The Nation created, authorized and expected Chartered Communities to provide social services and perform economic development at the local level, shared gaming revenue with them for the performance of such purposes, promised them training and technical assistance and hired personnel to regulate gaming. Yet, the Nation failed to provide the Chartered Communities with such services and oversight of their progress and activities. Given these facts, it is fundamentally unfair for the lower court to have ignored the very federal and tribal law which permit their activities and then punish them for being ill-informed and not performing their functions pursuant to guidelines they were never given. The balance of equities falls in favor of the Chartered Communities. The permanent injunction should be vacated and the case be remanded to supervise curing the defects in Community social service programs.

V. WHETHER NATIONALIZING THE NATION'S GAMING ENTERPRISES IS IN THE PUBLIC INTEREST IS A LEGISLATIVE DETERMINATION OUTSIDE THE JURISDICTION OF THE LOWER COURT.

The preliminary injunction placing Community gaming funds in escrow prevented them from dispensing any funds which the NIGC might consider questionable. This curtailed the potential risk of harm thereby allowing an opportunity to get the Chartered Communities social services programs into compliance with federal law. Getting the Chartered Communities' social services programs into compliance with federal law would have alleviated the need for a

permanent injunction altogether. Instead, the permanent injunction granted was for relief the Principal Chief did not request in his petition, i.e. nationalizing the Communities' gaming enterprises and divesting them of their accrued funds.

Through the preliminary and permanent injunctive orders, Community gaming enterprises had been placed under the management and control of the Gaming Operations Authority Board (GOAB). However, the GOAB is not vested with the requisite legal authority to manage and control Community gaming, to wit:

> **Limitations on the Board's authority.**
>
> Without first obtaining approval by Tribal Resolution by the National Council, the Gaming Operations Authority Board shall have no power to:
>
> * * *
>
> Have or attempt to exercise jurisdiction or control over any gaming activities conducted by Chartered Creek Communities

MCN Code Title 21, § 4-103(C)(1)(k)(1) (emphasis in original).

The lower court's preliminary injunctive order vesting authority over community gaming to the GOAB could only legally have been in the nature of a temporary receivership. Likewise, the permanent injunctive order can only be a continuation of that receivership. Whether legislation should be adopted expanding the authority of the GOAB to assume national control over Community gaming is strictly a legislative determination. The judiciary is without jurisdiction to legislate this policy issue.

CONCLUSION

I concur with Justice Supernaw's analyses and conclusions that Facility Use Agreements do not constitute management contracts under the current state of the law and that there is no dilution of the Nation's sole proprietary interests by sharing revenues with the Chartered

Communities. These additional erroneous legal interpretations further erode the bases for issuance of a permanent injunction.

Upon *de novo* review, the permanent injunction was based upon a number of erroneous legal conclusions and cannot stand. Under a review for abuse of discretion, the lower court's decision was unreasonable in light of the facts discovered regarding the failed obligations of the Nation to provide adequate guidance and oversight of the Communities' social services programs and the absence of Muscogee Supreme Court precedent on point from which deviation can be determined. For the above and foregoing reasons, the decision of the District Court should be reversed, the permanent injunction vacated and the case remanded to effectuate a cure of the Communities' social services programs.

Leah Harjo-Ware
Associate Justice

IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

A.D. ELLIS, in his official capacity as Principal Chief of the Muscogee (Creek) Nation,	)	
Plaintiff-Appellee,	)	
vs.	)	Appeal Case No. **SC-2010-01**
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	)	Appeal from the District Court of the Muscogee (Creek) Nation, Okmulgee District, Case No. CV-2009-33
Defendants-Appellants.	)	

CERTIFICATE OF DELIVERY

I, Connie Dearman, Supreme Deputy Court Clerk for the Muscogee (Creek) Nation, do hereby certify that on this 20th day of July, 2011, that I faxed and mailed a true and correct copy of the foregoing Supreme Court's **Opinion And Order** with proper postage prepaid to the following:

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