UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

City of Duluth,

Plaintiff,

v.

Case No. 0:09-cv-02668-ADM-RLE
Honorable Ann D. Montgomery

Fond du Lac Band of Lake Superior Chippewa,

Defendant.

Defendant Fond du Lac Band of Lake Superior Chippewa's Response to Plaintiff City of Duluth's Summary-Judgment Motion

---

Introduction

The City calls this an easy case: the Band and the City made a deal in 1994 and now the Band has reneged on that deal, so the Court should award summary judgment to the City. And the City's rule-first-ask-questions-later litigation strategy seeking summary judgment just days after filing suit is unsurprising: under the formula the City seeks to enforce, the Band would continue to pay the City what has amounted over the last 16 years to just under a third of its profits from the Fond-du-Luth Casino in exchange for *virtually nothing*. But this is not a sour-grapes case—the deal the City seeks to enforce is unlawful. It is precisely the type of agreement the National Indian Gaming Commission has recently and repeatedly found to violate the Indian Gaming Regulatory Act. Because ordering the Band to comply with the terms of the deal would compel further violation of federal law, the City's summary-judgment motion must fail.

Band's Statement of Material Facts

The Band does not dispute that the parties entered a set of agreements governing the construction and management of the Fond-du-Luth Casino in 1986 (the "1986 Agreements"). The Band also does not dispute that, after the passage of the Indian Gaming Regulatory Act ("IGRA") in 1988, the parties had a series of disagreements regarding the legality of the 1986 Agreements. Both parties believed that they had resolved those disagreements through a series of new agreements in 1994 (the "1994 Agreements"). Furthermore, the Band does not dispute that this Court, under Judge Paul C. Magnuson, entered a consent order recognizing the parties' settlement as reflected in the 1994 Agreements. But there are a number of material facts that the City either omitted or misrepresented in its Motion, and there are a number of material facts in dispute. A comprehensive outline of the relevant facts follows.

The 1986 Agreements

1. Before 1988, the federal government did not regulate gaming on Indian lands, but various tribes, including the Band, operated gaming facilities before that time on tribal trust lands based upon their inherent tribal sovereignty to do so.[1]

2. In an effort to foster economic development through such a facility, in 1986, the Band and the City entered the 1986 Agreements, which purported to authorize

[1] *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). *See also* Tribal-State Compact for Control of Class III Blackjack on the Fond du Lac Band of Lake Superior Chippewa Reservation in Minnesota (Sept. 25, 1991) at § 1.07 (noting Band has engaged in gaming since 1981), Ex. A to Second Aff. of S. Van Norman.

the Band to have the U.S. government take land into trust on its behalf to authorize gaming activities under Band law at a location in downtown Duluth.[2]

3. One of the 1986 Agreements was the "Commission Agreement," which created a seven-person Duluth-Fond du Lac Economic Development Commission (the "Commission") as a joint venture between the City and Band to jointly manage the gaming operation, which was named the Fond-du-Luth Casino (the "Casino").[3]

4. Under the 1986 Commission Agreement, the Band purchased the land that would become the site of the Casino and the appurtenant building. The Band rehabilitated the building, paid for all costs to convert it for gaming purposes, granted a lease to the Commission to use the building for gaming purposes, and paid $200,000 for initial operating capital.[4]

5. Under the 1986 Commission Agreement, the City purportedly contributed its agreement to approve the transfer of land into trust status, performance under the 1986 Development Agreement,[5] and "police and fire protection for such building during the

---

[2] *See* 1986 Agmts. (Apr. 1, 1986), Ex. 7A-B to City's Memo. in Support of Mot. for S.J. (Dec. 10, 2009) ("City's Memo."), Dkt. 10-7.

[3] 1986 Comm'n Agmt. at §§ 4-5, Ex. 7A to City's Memo., Dkt. 10-7. The Commission was also a "political subdivision" of the Band. *Id.* at § 2.

[4] *Id.* at § 26 (a)-(b). *See also* September 1993 "Open Letter to the Citizens of Duluth" at 1 (Band costs to start up Casino came to more than $7 million), Ex. 12 to City's Memo., Dkt. 11-2.

[5] This included acquisition of land and construction of an adjacent parking ramp, for which the City was repaid by Commission funds. *See* 1986 Develop. Agmt. at § 1.2 (City obligations for parking ramp), Ex. B to Second Aff. of S. Van Norman; 1986 Parking Ramp Lease at § 5 (Commission to repay City for all parking ramp costs plus

term of the Business Lease."[6]

6. In fact, no municipal approval was required under the relevant federal regulations at the time to take the land into trust. Indeed, the land had already been taken into trust and designated as an Indian reservation *before* the 1986 Agreements were signed.[7]

7. The 1986 Commission Agreement split net proceeds of the Commission's activities between the Band (which received 25.5%), the City (24.5%), and the Commission (50%). The Commission was required to use the proceeds to conduct its activities, which could include any economic development for the City and Band.[8]

8. Also under the 1986 Commission Agreement, in addition to the payments the City received as profit from the Casino, the Commission separately paid the City "in-

---

interest), Ex. C to Second Aff. of S. Van Norman; 1994 Distr. of Assets at § 1 (distributing all Commission parking ramp escrow funds of $3,082,177 to City), Ex. 18D to City's Memo., Dkt. 12-5.

[6] 1986 Comm'n Agmt. at § 26(c), Ex. 7A to City's Memo., Dkt. 10-7. *See also id.* at §10 ("The Fond du Lac Band acknowledges that the creation of Indian Country, as defined herein, is dependent upon the approval of the creation of Indian Country, as defined herein, by the City of Duluth, and that, without the approval and consent of the City of Duluth, Indian Country, as defined herein, cannot be created and the activities to be conducted by the Commission could not be done.").

[7] *Compare id.* (dated *April 1*, 1986) *to* BIA Proclamation (dated *January 8*, 1986) (declaring Fond-du-Luth parcel part of reservation before City gave consent), Ex. D to Second Aff. of S. Van Norman.

[8] 1986 Comm'n Agmt. at § 14(c), Ex. 7A to City's Memo., Dkt. 10-7; *see also* § 3 (Commission purposes).

lieu-of" payments for the real- and personal-property taxes that would have been due on the building if it were not held in trust for the Band.[9]

9. The 1986 Agreements also included a lease agreement from the Band to the Commission for the Casino site (the "1986 Lease").[10]

10. The 1986 Lease had an initial term of 25 years,[11] and the Commission exercised an option to extend the 1986 Lease for an additional 25 years, or until 2036.[12]

IGRA and the 1989 Litigation

11. In 1988, Congress passed the Indian Gaming Regulatory Act ("IGRA"),[13] which requires that each tribe participating in gaming enact a gaming ordinance. Among other requirements, each tribal gaming ordinance must include a provision requiring that the tribe will have "the sole proprietary interest and responsibility for the conduct of any gaming activity."[14]

12. In accordance with IGRA, the Band passed a tribal gaming ordinance that was approved by the Chairman of the National Indian Gaming Commission ("NIGC")

---

[9] *Id*. at § 16, Ex. 7A to City's Memo., Dkt. 10-7.
[10] 1986 Lease, Ex. 7B to City's Memo., Dkt. 10-8.
[11] *Id.* at § 4.
[12] *See* 1986 Comm'n Agmt. at § 30 (providing for 25-year initial term and automatic 25-year renewal "unless Commission is dissolved"), Ex. 7A to City's Memo., Dkt. 10-7.
[13] 25 U.S.C. §§ 2701 *et seq*.
[14] 25 U.S.C. § 2710 (b)(2)(A).

and included the required restriction that the Band retain the sole-proprietary interest in its gaming operations.[15]

13. In 1989, the Band sued the City and Commission regarding the 1986 Agreements (the "1989 Litigation"), alleging that they violated IGRA.[16]

14. On November 2, 1990, under its interim IGRA authority and in response to a request by the Band, the Associate Solicitor - Indian Affairs William G. Lavell issued a letter opining that the Commission Agreement violated IGRA's requirement that tribes retain the sole-proprietary interest in their gaming operations because, among other reasons, the City's share of profits exceeded mere compensation for services.[17]

15. On December 26, 1990, Judge Magnuson issued a Memorandum and Order in the 1989 Litigation dismissing the Band's complaint without prejudice, and finding that it was in the public interest to permit the agreements to be reviewed by the Chairman of the newly formed NIGC under its review authority under IGRA before the Court ruled on them.[18]

---

[15] *See* Fond du Lac Band of Lake Superior Chippewa Gaming Ordinance No. 09-93, along with enacting resolution and NIGC Chairman approval letter, Ex. E to Second Aff. of S. Van Norman.
[16] *See Fond du Lac Band v. City of Duluth*, Civ. No. 5-89-163, Compl. (D. Minn. 1989) at ¶¶ 26-27, Ex. 9 to City's Mot. for S.J., Dkt. 10-10.
[17] *See* Nov. 2, 1990 Letter from W. Lavell (Assoc. Solicitor - Indian Affairs) to Asst. Sec'y. - Ind. Affairs at 2, Ex. F to Second Aff. of S. Van Norman.
[18] *See Fond du Lac Band v. City of Duluth*, Civ. No. 5-89-163, Memo. and Order, Ex. 10 to City's Memo., Dkt. 10-11.

16. But in the meantime, the 1986 Agreements continued in force[19] while the Band repeatedly tried to bring the City to the negotiating table.[20]

NIGC Review

17. The Band petitioned the NIGC for expedited review, but it was not until September 24, 1993 that NIGC Chairman Anthony Hope issued a letter opining that the 1986 Commission Agreement violated the sole-proprietary-interest provisions of IGRA and that the City's position that the Band's gaming ordinance did not apply to the Casino was incorrect.[21]

18. Chairman Hope stated that the purpose of its letter was "to advise the parties that unless the Band and the City are able to settle [their] dispute, we will be initiating an enforcement action to bring the Fond du Luth gaming operation into compliance with IGRA."[22]

19. Chairman Hope also stated that the NIGC was "fully cognizant of the potential financial hardship which could result from an enforcement action," and therefore encouraged "the parties to begin an immediate effort to reach an agreement to resolve this matter."[23] Accordingly, he stated the NIGC would "defer the

---

[19] *Id.* at 4-6.
[20] *See* Band's "Open Letter to the Citizens of Duluth" (Sept. 1993) at 2, Ex. 12 to City's Memo., Dkt. 11-2.
[21] *See* Sept. 24, 1993 Letter from A. Hope to R. Peacock, et al., Ex. 11 to City's Memo., Dkt. 11-1.
[22] *Id.* at 2.
[23] *Id.*

commencement of any enforcement action for a period of 30 days to permit the parties an opportunity to negotiate. If during this period, there is evidence of significant progress toward a settlement, an additional deferral would be considered."[24]

20. It was only *after* this threat of enforcement action that the City met with the Band to re-negotiate the illegal 1986 Agreements, and the parties entered the 1994 Agreements as a settlement of their disputes.[25]

21. On June 16, 1994, after review of the draft 1994 Agreements, Chairman Hope opined that "this agreement returns full ownership and control of the Fond du Luth Casino to the Band and is consistent with the requirements of IGRA,"[26] and on June 20, he issued a "Report and Recommendation" to the Court recommending that the settlement be approved.[27]

The 1994 Agreements

22. The 1994 Agreements included a "Commission Amendment" that restructured the Commission into a two-person entity consisting of the mayor of the City and the Chair of the Band (or their respective designees).[28]

23. Under the 1994 Distribution of Assets Agreement, the Commission paid the City $3,082,177 that had been held in the form of "parking ramp escrow funds."[29] The

---

[24] *Id.* at 2-3.
[25] *See* 1994 Agmts., Exs. 18A-F to City's Memo., Dkt. 12-1-7.
[26] Jun. 16, 1994 Letter from A. Hope to R. Peacock, Ex. 13 to City's Memo., Dkt. 11-3.
[27] Jun. 20, 1994 Letter from A. Hope to Hon. P. Magnuson, Ex. 14 to City's Memo., Dkt. 11-4.
[28] 1994 Comm'n Amend. at §1(i)(a), Ex. 18C City's Memo., Dkt. 12-4.

parties divided up the assets of the Commission, with the City receiving one-third of the total distributable, cash assets of $16,134,306, making the City's share $5,378,102. The Band received all non-cash assets and two-thirds of the cash assets.[30]

24. The 1986 Lease from the Band to the Commission remained in place with certain amendments. Its term through 2036 remained unchanged.

25. But the parties also entered a 1994 Sublease of the Casino site from the Commission back to the Band.[31]

26. The Sublease required the Band to pay the Commission rent equal to 19% of the gross slot-machine revenues from the Casino until 2011, which rent was permanently assigned to the City.[32]

27. The term of the Sublease matches the term of the 1986 Lease.[33] It calls for the parties to renegotiate the rent in 2010 for the 25-year term beginning April 1, 2011.[34]

28. The City's obligations to the Commission and Band under the 1994 Agreements were quite limited.

29. Under the 1994 Tribal-City Accord**,** the Commission's liquor license was transferred to the Band and the City agreed not to "arbitrarily or capriciously withhold extension or renewal" of the liquor license.[35]

---

[29] *Id.* at § 1.
[30] 1994 Distr. Agmt. at § 2(A), Ex. 18D to City's Memo., Dkt. 12-5.
[31] 1994 Sublease, Ex. 18A City's Memo., Dkt. 12-2.
[32] *Id.* at § 4.2.2.1-2.
[33] *Id.* at § 3.1.
[34] *Id.* at § 4.2.2.5.

30. The only other ostensible consideration by the City for the 1994 Agreements was the purported offer of tribal-gaming exclusivity to the Band, [36] but under IGRA, all Indian gaming is federally, not locally, regulated.[37]

31. In contrast, the Band's obligations to the City remained considerable. In addition to the Band's substantial "rent payments" to the City, under the Accord, the Band purportedly cannot change its own gaming regulations as they pertain to the Casino without the City's approval.[38]

32. The Accord still allows for City inspections of and access to Casino records[39] and requires City review of gaming licenses.[40]

33. The only services the City has provided to the Casino since 1994 are the same services that the City provides for other Duluth businesses.[41]

---

[35] *See* Tribal-City Accord at § 14, Ex. 18B to City's Memo., Dkt. 12-3.
[36] And even that offer of exclusivity appears under a provision of the 1986 Commission Agreement made "dormant" by the 1994 Amendments—section 30 stated that City "shall not enter into an Agreement similar to this Agreement with any other Indian Government for the conduct of activities the same as or similar to those to be conducted by the Commission within a radius of 250 miles of the City Hall of the City of Duluth without the prior approval" of the Band and Commission. *But see* 1994 Comm'n Amends. § 3, Ex. 18C to City's Mot., Dkt. 12-4.
[37] *See generally*, 25 U.S.C. §§ 2701 *et seq.*
[38] Tribal-City Accord at § 6(c), Ex. 18B to City's Memo., Dkt. 12-3.
[39] *Id.* at §§ 15-16.
[40] *Id.* at § 26(j).
[41] Aff. of K. Diver at ¶ 17; *see also* Excerpt of City of Duluth 2009 Annual Approved Budget at Table of Contents, 18, 19, 22, and 38 (noting fire, police, and public works departments are funded from General Fund revenues, and that property-tax payments contribute to General Fund), Ex. G to Second Aff. of S. Van Norman.

The 1994 Litigation

34. On June 22, 1994, the Band filed suit against the City for declaratory and injunctive relief, at the same time filing a joint stipulation of the parties, asking the Court to approve the settlement as reflected in the 1994 Agreements and to dismiss the case.[42]

35. On July 29, 1994, the Court entered a consent order reflecting the settlement and dismissing the case, but there was no further adjudication of the issues between the parties.[43]

Rent Paid under the 1994 Sublease and the Value of the City's Services

36. Under the terms of the 1994 Sublease, from approximately June 1994 to August 2009, the Band has paid the City approximately $75,874,407.66.[44]

37. Expressed as a percentage of the net gaming revenues (as defined in IGRA) of the Casino, total rent payments to the City have ranged between 26.59% (in 1996) and 33.49% (in 2008).[45]

38. Neither the 1994 Agreements nor any other documents in the record include any fair-market value analysis of an appropriate rental rate for the Casino space

---

[42] *Fond du Lac Band of Lake Superior Chippewa Indians v. City of Duluth*, Compl., Civ. No. 5-94-82 (D. Minn. 1994), Ex. 16 to City's Memo., Dkt. 11-6.
[43] *Fond du Lac Band of Lake Superior Chippewa Indians v. City of Duluth*, Stip. and Consent Order, Civ. No. 5-94-82 (D. Minn. July 29, 1994), Ex. 17 to City's Memo., Dkt. 11-7.
[44] Aff. of V. Radtke at ¶ 3.
[45] Aff. of K. Larson at ¶ 7 and Ex. 1.

based upon market comparisons in downtown Duluth, and the Band has not yet had an opportunity to conduct discovery on this issue.

39. The St. Louis County Assessor listed as the 2009 Market Value for Taxes Payable in 2010 on the Casino land and building as $3,618,600, although it is exempt from tax, and so it assigned the property an "exemption" code that classifies this as "INDIAN RESERVATION – IN LIEU TAX @ 5%."[46]

40. If the Band were paying 5% tax based upon the $3,618,600 value, its total tax liability for 2010 would be $180,930.[47]

The Contrarevenue Issue

41. Last year, McGladrey & Pullen—the firm designated as the outside accountant for the Casino under the 1994 Agreements[48]—advised the Band that the Band had been improperly including certain promotional expenditures in slot revenue instead of deducting it, and that the appropriate deductions reduced the amount of rent the Band should have paid the City.[49]

42. The total amount of slot promotional expenditures incorrectly reported as a marketing expense (instead of a reduction in revenue) since 1994 was $2,952.882.05,[50]

---

[46] *See* St. Louis County's 2009 Assessor's Market Values for Taxes Payable in 2010 for Fond-du-Luth Casino, Ex. H to Second Aff. of S. Van Norman.
[47] *Id.*
[48] 1994 Tribal-City Accord at § 7, Ex. 18B to City's Memo., Dkt. 12-3.
[49] *See* Apr. 13, 2009 Letter from D. Peterson to R. Maki (enclosing Apr. 8, 2009 Letter of McGladrey & Pullen to D. Peterson), Ex. 5 to Aff. of K. Diver.
[50] *Id.*

and so the Band deducted 19% of that amount, $561,047.59, from its rental payments to the City.

Standard of Review

To decide a motion for summary judgment, a court must examine "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," to determine whether any "genuine issue as to any material fact" is in dispute.[51] The Court must view all evidence and inferences in the light most favorable to the non-movant.[52] If, in this light, there are facts in the record that could preclude a decision for the movant, summary judgment may not be granted.[53]

Argument

I. Neither res judicata nor collateral estoppel applies in this case.

The City alleges that because the Band entered into a "Stipulation and Consent Order" in 1994 regarding the 1994 Agreements, res judicata mandates summary judgment in the City's favor. The City also alleges that the Band is precluded by the doctrine of judicial estoppel from asserting that any aspect of the 1994 Agreements is illegal because in 1994 the Band agreed that the Agreements were lawful. But res judicata does not apply to consent orders governing ongoing conduct, and judicial estoppel does not preclude a party from taking a different position where—as here—its

---

[51] Fed. R. Civ. P. 56(c).
[52] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).
[53] *Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995).

purpose is not to mislead the court or take unfair advantage of the other party. So as a matter of law, neither doctrine permits the Court to enter summary judgment in the City's favor.

A. Res judicata does not apply to a consent order governing continuing conduct.

A consent order or decree is not like a final judgment. A final judgment, such as an award of damages, has preclusive effect on the parties and is not subject to modification based on changes in the law because "an attempt to alter legislatively a legal judgment violates the separation of powers doctrine. A judgment providing for injunctive relief, however, remains subject to subsequent changes in the law."[54] And "[t]hese principles apply equally to consent decrees and litigated judgments."[55] This case is a "continuing case" because the Court did not award a final judgment to either party. Rather, it retained jurisdiction to enforce the 1994 Agreements while they are in effect.[56] And as the Eighth Circuit has held, "[i]n a continuing case, a consent decree is not the 'last word' of the courts in the case, even after the decree itself has become final for

---

[54] *Plyler v. Moore*, 100 F.3d 365, 371 (4th Cir. 1996) (reviewing whether passage of Prison Litigation Reform Act required changes in consent decree governing South Carolina prison conditions). *Compare KPERS v. Reimer & Koger Assoc., Inc.*, 194 F.3d 922 (8th Cir. 1999) (refusing to modify summary judgment granted to defendants based on lapse of statute of limitations after state supreme court issued ruling interpreting statute so as to make plaintiffs' claims timely).

[55] *Plyler*, 100 F.3d at 371.

[56] Consent Order at 6, Ex. 17 to City's Memo., Dkt. 11-7 (ordering "[t]hat the Court retain jurisdiction over this matter, including specifically the 1994 Agreements, for the purpose of ensuring the obligation of the parties to comply with all provisions of the 1994 Agreements").

purposes of appeal. Rather, a consent decree is an executory form of relief that remains subject to later developments."[57]

Because the Consent Order gave this Court continuing jurisdiction to enforce the 1994 Agreements, the Court *can* and *must* apply the law as it exists when asked to enforce it. In a case considering whether recent Supreme Court decisions required a change in a consent decree governing prison procedures in Michigan, the Sixth Circuit held that

> [o]ngoing injunctions should be dissolved when they no longer meet the requirements of equity. The law changes and clarifies itself over time. Neither the doctrines of *res judicata* or waiver nor a proper respect for previously entered judgments requires that old injunctions remain in effect when the old law on which they were based has changed.[58]

Accordingly, res judicata does not require the court to rubber-stamp the Consent Order.

Rather, the court must evaluate whether the Consent Order (and the 1994 Agreements incorporated in it) is still enforceable under current law because, as the Supreme Court held, "[a] consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law."[59] As is demonstrated below, the law regarding what is permissible in

---

[57] *Gavin v. Branstad*, 122 F.3d 1081, 1087 (8th Cir. 1997) (reviewing propriety of terminating consent decree regarding state prison conditions in light of new federal law).
[58] *Sweeton v. Brown*, 27 F.3d 1162, 1166-67 (6th Cir. 1994).
[59] *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 388 (1992) (setting forth "flexible" standard for determining when to modify continuing consent decrees in institutional-reform cases and rejecting "grievous wrong" standard announced in *United States v. Swift & Co.*, 286 U.S. 106 (1932)). *See also White v. Nat'l Football League*,

contracts between Indian tribes and outsiders has evolved over the past 15 years, and it is now clear that the 1994 Agreements impermissibly grant the City a proprietary interest in the Casino and constitute an illegal tax on Casino revenues.[60]

B. Judicial estoppel does not apply to this case.

The City also contends that because the Band took the position in 1994 that the 1994 Agreements did not convey a proprietary interest in the Casino to the City and now contends that they do, the Band's current arguments are precluded by the doctrine of judicial estoppel. The doctrine is intended to prohibit parties from "deliberately changing positions according to the exigencies of the moment."[61] But that is not what the Band has done. The Band has changed its position that the 1994 Agreements comport with IGRA's sole-proprietary-interest requirement because—as demonstrated below—the *NIGC* has changed its evaluation of this requirement. Recent NIGC opinions make clear

---

585 F.3d 1129, 1136 (8th Cir. 2009) (applying *Rufo* standard to consent decree to address antitrust matters in relationship between players and league owners); *Hendrix v. Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993) ("[T]he 'flexible standard' adopted in *Rufo* is no less suitable to other types of equitable case . . . [and] now a court can modify an injunction that it has entered whenever the principles of equity require it to do so."). The City's reliance on *Swift & Co.*, *see* City's Memo. at 23, Dkt. 9, is misplaced.

[60] *See* Section II, *infra*. *See also* Second Aff. of K. Washburn at ¶¶ 18-26. Mr. Washburn is the Dean of the University of New Mexico School of Law and former General Counsel to the NIGC. While the City has suggested (in its memorandum opposing the Band's motion to continue the City's summary-judgment motion) that how the NIGC works or whether the agreements violate the law is not an appropriate subject for expert testimony, the Eastern District of Wisconsin relied on Dean Washburn's testimony for just such a purpose in an opinion issued earlier this week. *See Wells Fargo v. Lake of the Torches Economic Dev. Corp.*, 2010 WL 62638 (E.D. Wis. Jan. 11, 2010), Ex. I to Second Van Norman Aff.

[61] *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal citations omitted).

that payments like those called for under the 1994 Agreements grant the City a proprietary interest in a tribal gaming activity—in direct contravention of IGRA. And "judicial estoppel is inappropriate when a party is merely changing its position in response to a change in the law."[62] Thus, judicial estoppel does not prevent the Band from making its case that the 1994 Agreements now violate the law.

II. Under current Indian-gaming law, the 1994 Agreements are unlawful, so summary judgment to enforce them is inappropriate.

The City may only prevail on its motion if it can demonstrate as a matter of law that the 1994 Agreements are still legal and enforceable. But drawing all inferences in favor of the Band, there is—at a minimum—a genuine issue of material fact regarding whether the 1994 Agreements grant an illegal proprietary interest in the Casino to the City or impose an illegal tax on the Casino revenues. If they do, they are illegal and cannot be enforced,[63] so summary judgment on the City's breach-of-contract claims would be inappropriate.

---

[62] *Longaberger Co. v. Kolt*, 586 F.3d 459 (6th Cir. 2009) (citing similar rulings from the Seventh, Fourth, Third, Ninth, Second, and Tenth Circuit Courts of Appeal). *See also Prudential Ins. Co. v. Nat'l Park Medical Center, Inc.*, 413 F.3d 897, 905 (8th Cir. 2005) (declining to apply judicial estoppel where a subsequent Supreme Court decision "undermine[d] the propriety of the ongoing injunctive relief.").

[63] *See* Section III, *infra.*

A. The 1994 Agreements grant an illegal proprietary interest in the Casino to the City.

1. The NIGC can and has imposed serious penalties for violations of IGRA's sole-proprietary-interest provision.

IGRA requires that Indian tribes have "the sole proprietary interest and responsibility for the conduct of any gaming activity" at their gaming operations.[64] This promotes the primary purposes of IGRA: to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self sufficiency, and strong tribal governments"[65] and "to ensure that the Indian tribe is the primary beneficiary of the gaming operation."[66] But the term "proprietary interest" is not defined in IGRA or federal regulations. Nevertheless, the NIGC (the federal agency with authority to regulate Indian gaming under IGRA)[67] has performed contract reviews under this provision. The NIGC's review typically takes the form of advisory-opinion letters issued in response to requests from tribes and their business partners.[68] Tribes and contractors often submit proposed contracts to the NIGC asking for a determination that

---

[64] 25 U.S.C. §§ 2710(b)(2)(A) and (d)(1)(A)(ii). In its Response to the Band's Motion to Continue, the City incorrectly asserted, without citation, that "funds paid to local government agencies are an exception to the sole proprietary interest analysis." City's Resp. to Band's Mot. to Cont. (Dec. 31, 2009) at 12, Dkt. 32. In fact, the sole exception to it is a grandfather clause for gaming operations owned by individual Indians pre-IGRA. *See* 25 U.S.C. § 2710(b)(4)(B).

[65] *Id.* at § 2702(1).

[66] *Id.* at § 2702(2).

[67] *See* 25 U.S.C. §§ 2704 (creating NIGC), 2705 (listing powers of Chairman), and 2706 (listing powers of Commission).

[68] *See* Second Aff. of K. Washburn at ¶ 17.

the contracts do not constitute management contracts (which expressly require NIGC approval and are void without it), and that the contracts do not impermissibly give any entity other than a tribe a proprietary interest in the tribe's gaming activity.[69] If the parties receive an advisory opinion indicating a probable violation, they typically have the opportunity to renegotiate rather than face an NIGC enforcement action.[70]

But the NIGC has also taken enforcement actions under its sole-proprietary-interest standards.[71] The Chairman of the NIGC has the authority to impose civil fines up to $25,000 per violation "for any violation of any provision of this Act, any regulation prescribed by the NIGC pursuant to this Act, or tribal regulations, ordinances, or resolutions approved under section[s] [2710 or 2712]."[72] In a 2007 action, the NIGC found an outside contractor had violated IGRA by operating under an unapproved management contract and, based upon its extraordinarily high fee, obtained an impermissible proprietary interest in a Seminole Nation gaming operation.[73] The NIGC

---

[69] *Id.* at ¶ 13.
[70] *Id.*
[71] *See, e.g.*, NIGC Final Dec. and Order on Notice of Violation 07-02 and Civil Fine Assessment 07-02 (Jan. 18, 2008) Against Ivy Ong and Carlo World Wide Operations, LLC, Ex. B to Second Aff. of K. Washburn.
[72] 25 U.S.C. § 2713.
[73] *See* NIGC Final Dec. and Order Against Ivy Ong, et al., Ex. B to Second Aff. of K. Washburn.

exercised its authority to fine the contractors for *each day* of the violation, with each violation as a *separate daily fine of $25,000*, and a total fine of *$5,150,000*.[74]

Here, in 1993, NIGC Chairman Anthony Hope informed the parties that it was "apparent" that the 1986 Commission Agreement created an impermissible joint venture, but deferred any enforcement action to allow the parties to negotiate.[75] Chairman Hope reviewed the renegotiated 1994 proposed Agreements and stated that the proprietary-interest violation inherent under the 1986 Agreements had been resolved.[76] But the NIGC was very new at that time, and under the standards it has developed since that time through its advisory opinions and enforcement actions, it is certain that the NIGC would not reach the same result now.[77] And while the NIGC has not yet taken any enforcement action here, it is empowered to do so at any time under IGRA, exposing both the Band and the City, to severe penalties (including closure of the Casino). Therefore, both parties have a strong incentive to ensure that the 1994 Agreements comply with *current* NIGC standards.

---

[74] *Id.*; *see also* NIGC Proposed Civil Fine Assess. Against Ong, et al., 07-02 (Jun. 15, 2007) at 7-8 (explaining basis for double fine), Ex. J to Second Aff. of S. Van Norman.
[75] *See* Sept. 24, 1993 Letter from A. Hope to R. Peacock, et al. at 1-2, attached as Ex. 11 to City's Memo., Dkt. 11-1.
[76] *Id.*
[77] *See* Second Aff. of K. Washburn at ¶¶ 11, 24, 26.

2. The NIGC has set clear bounds for the payment of fees for services in its sole-proprietary-interest opinions in an effort to ensure that tribes remain the primary beneficiaries of gaming revenues.

The NIGC's sole formal comment on the definition of sole-proprietary interest to date was in connection with the original round of IGRA rulemaking in 1993.[78] There, it cited specific examples of proprietary interests, including vendor-controlled placement of gambling devices, and a security interest that would give the nontribal party "the right to control gaming in the event of default by a tribe," or nontribal "stock ownership" in the facility.[79] But it went on to conclude that "[i]t is not possible for the Commission to further define the term in any meaningful way," and that instead, it would "provide guidance in specific circumstances."[80]

Since then, the principal guidance from the NIGC has been advisory opinions, in which the NIGC has outlined far more expansive criteria to evaluate violations.[81] While

---

[78] Purpose and Scope; Service; Approval of Class II and Class III Gaming Ordinances; Background Investigations and Gaming Licenses Under the Indian Gaming Regulatory Act, 58 Fed. Reg. 5802-03 (Jan. 22, 1993) (emphasis added).
[79] *Id.*
[80] *Id.*
[81] *See, e.g.*, Oct. 5, 2005 Letter from J. Shyloski to J. Gray, et al. ("Osage Letter"), Ex. K to Second Aff. of S. Van Norman; Dec. 21, 2004 Letter from P. Coleman to M. Sanchez ("Guidiville II Letter"), Ex. L to Second Aff. of S. Van Norman; July 21, 2004 Letter from P. Coleman to M. Sanchez ("Guidiville I Letter"), Ex. E to Second Aff. of K. Washburn.; Apr. 22, 2004 Letter from P. Coleman to E. Mason ("Timbisha Shoshone Letter"), Ex. M to Second Aff. of S. Van Norman; Jun. 5, 2003 Letter from P. Coleman to M. Cypress ("Seminole Letter"), Ex. D to Second Aff. of K. Washburn.
See also Feb. 1, 2005 Letter from NIGC Chairman P. Hogen to Hon. John McCain, et al. (citing as proprietary-interest red flags the practice of assigning "so-called 'rent'" for gaming equipment or casino buildings, where payment is far out of line with actual value

NIGC opinion letters are not binding on courts,[82] courts may examine the opinions and adopt analysis they find persuasive.[83] Because only one federal district court has looked at the proprietary-interest standard (and its decision was reversed on other grounds),[84] the NIGC's advisory opinions are the most instructive tool for determining what IGRA's sole-proprietary-interest standard means.

While IGRA contains no cap on fees that can be paid to developers or other non-tribal entities, it does cap fees to managers, limiting them to 30% of net revenues, and 40% for projects involving exceptional risk.[85] Chief amongst the factors the NIGC uses to determine when an outsider has taken a proprietary interest in a tribal gaming operation is IGRA's management-contract cap, which the NIGC uses as the outside boundary of acceptable compensation for *any* services to a tribal gaming facility.[86]

---

of services and the practice of giving contractors "preferential payments" before all obligations "other than operating expenses," which "create the possibility that the tribe is left with very little or is left in debt to the contractor," amongst other problems), attached as Ex. C to Second Aff. of K. Washburn. Mr. Hogen retired as Chairman of the NIGC in October 2009 and is now Of Counsel to the undersigned Jacobson Buffalo law firm.

[82] *See, e.g., First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1174 (10th Cir. 2005).

[83] *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *see also Catskill Develop., LLC v. Park Place Entertainment Corp.*, 547 F.3d 115, 127 (2d Cir. 2008) (NIGC advisory opinions are entitled to *Skidmore* deference).

[84] *NGV Gaming, Ltd. v. Upstream Point Molate*, 355 F. Supp. 2d 1061, 1065 (N.D. Cal. 2005), *rev'd on other grounds, Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 782 (9th Cir. 2008).

[85] 25 U.S.C. §2711(c).

[86] *See, e.g.*, Osage Letter at 9, Ex. K to Second Aff. of S. Van Norman; Guidiville I Letter at 5, Ex. E to Second Aff. of K. Washburn; Timbisha Shoshone Letter at 5, Ex. M to

IGRA also limits management-contract terms to five years and—in limited circumstances—seven years.[87]

In its sole-proprietary-interest opinions, the NIGC also focuses on whether the payment structure reflects mere compensation for services or an improperly large share in the profits, which reflects ownership or a joint venture.[88] It typically relies on the Black's Law Dictionary definition of "proprietary interest" as "[t]he interest held by a property owner together with all appurtenant rights, such as a stockholder's right to vote the shares[,]" and of "owner" as "[o]ne who has the right to possess, use, and convey something; a person in whom one or more interests are vested."[89] The NIGC also examines

- whether the payment is structured as "rent" (in a "true lease," the value of "underlying equipment and structure" must correlate to a tribe's payments);[90]

Second Aff. of S. Van Norman; Seminole Letter at 11, Ex. D to Second Aff. of K. Washburn; *see also* Second Aff. of K. Washburn at ¶ 23.

[87] *Id.* at § 2711(b)(5).

[88] *See, e.g.*, Osage Letter at 6, Ex. K to Second Aff. of S. Van Norman; Seminole Letter at 6-7, Ex. D to Second Aff. of K. Washburn These and other NIGC Letters incorrectly cite 46 Am. Jur. 2d *Contracts* §57 (emphasis added, but found in NIGC letter); the actual source is 46 Am. Jur. Joint Ventures § 52.

[89] *See, e.g.*, Osage Letter at 5 (citing Black's Law Dictionary (7th ed. 1999)), Ex. K to Second Aff. of S. Van Norman; Seminole Letter at 5 (same), Ex. D to Second Aff. of K. Washburn.

[90] *See, e.g.*, Timbisha Shoshone Letter, at 4 (citing same language and finding violation based upon express profit interest above and beyond compensation for services and expenses, lack of provisions to transfer ownership to tribe at any time for a term long after developer would be paid back, high fee expressed as a percentage of net revenue, and lack of either ceiling or termination date to payments), Ex. M to Second Aff. of S. Van Norman; Seminole Letter at 4, 7 (same), Ex. D to Second Aff. of K. Washburn. *See*

- what services or other consideration the tribe receives for the payment (the NIGC has stated that it cannot "countenance contracts that are not paying for goods or services, but rather are clearly aimed at providing a substantial equity interest . . ."); [91]
- the extent of the risk to the contractor; [92]
- the "market rate" for comparable services; [93]
- whether the contractor has a high level of control over the operation, including any limitation of the tribe's regulatory authority; [94] and
- whether any present or contingent security interests are granted to a non-tribal party. [95]

---

also Dec. 12, 2005 Letter of P. Coleman to T. Nelson of the La Jolla Band of Mission Indians at 4-5 (low risk meant high development fee was unjustified), Ex. N to Second Aff. of S. Van Norman.

[91] *See, e.g.*, Osage Letter at 7 (finding development fee equal to 7% of gross revenues, up to a given cap, would equal "approximately one hundred percent (100%) of the actual cost of the developments" and concluding that this was "simply not reasonable" and constituted a proprietary-interest violation), Ex. K to Second Aff. of S. Van Norman.

[92] *See, e.g.*, Seminole Letter at 10 (in context of claims against both former tribal chairman and developer, risk was low where tribe had other successful casinos in operation and had other, better financing and development options), Ex. D to Second Aff. of K. Washburn.

[93] *See, e.g.*, Osage Letter at 9 (comparing alleged market rates for "developers" to developer fee at issue), Ex. K to Second Aff. of S. Van Norman; *see also* Feb. 26, 2009 Letter of P. Coleman to L. Marsten at 6 (developers typically charge 2-5% of construction costs), Ex. O to Second Aff. of S. Van Norman.

[94] *See, e.g.*, Timbisha Shoshone Letter at 5 (evidence of developer having received equity interest included limitation on tribe's right to revoke developer's gaming license, which "undermines the tribe's authority to regulate the gaming operation"; potential for receivership of gaming operation for tribal default was also impermissible.), Ex. M to Second Aff. of S. Van Norman.

[95] *See, e.g.*, March 29, 2007 Letter from P. Coleman to R. Grellner at 3-7 (stating possible proprietary-interest violation where security agreement permitted potential assumption of management of gaming operation to cure tribal failure to perform, gave security interest in tribe's "general intangibles," including tribe's stocks or franchises, and ability to

Under these criteria, the NIGC has rejected the following arrangements because they granted a proprietary interest in a tribe's gaming operation to a non-tribal entity:

- A 2004 development agreement between the Osage Nation and a casino developer that covered the construction and pre-opening development of two turn-key casinos. The contractor was to receive 7% of gross gaming and other revenues for a period for 5 years, with a cap of $20,144,000.[96] The NIGC rejected the agreement because:
  - The fee was out of line with the norm, totaling approximately 100% of the $22 million development cost for both facilities.[97] The NIGC found a normal development fee was no more than about 2-5% of the total development costs, or 4-5% in extraordinary circumstances.[98]
  - The fee as a percentage of net revenue approached IGRA's management-contract cap, totaling 26.4% of net casino revenue in the 2006 fiscal year.[99] The NIGC stated it was not reasonable "to expect a developer who is providing no on-going services to the Tribe to receive the same level of compensation typically paid to managers under management contracts."[100]
  - There was low risk to the developer because gaming was already established in the state, one of the properties was already in trust, and the developer did not finance the casino facilities; in fact, all of its out-of-pocket expenses were reimbursed by the tribe.[101]
- A 2004 development agreement and "lease" between the Guidiville Rancheria and developer F.E.G.V. Corporation for construction and development of a casino.[102] The NIGC rejected the agreement because, *inter alia*:

---

collect assets of tribe's other commercial ventures for noncompliance), Ex. P to Second Aff. of S. Van Norman. *See also* Second Aff. of K. Washburn at ¶ 15.

[96] Osage Letter, Ex. K to Second Aff. of S. Van Norman.

[97] *Id.* at 7.

[98] *Id.* at 9.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 7-9.

[102] Guidiville I Letter, Ex. E to Second Aff. of K. Washburn

- The lease of the underlying structure and equipment had no "bona fide correlation" to the tribe's payment of both "base rent" *and* 75% of net revenue amount for five years (which would far exceed the costs of development), *plus* an additional amount of 16% of gross revenues (or about 50% of net) for an additional 10 years.[103] The NIGC found that this was not rent but a "profit-sharing arrangement."[104]

- The risks were relatively low because Indian gaming had been "very profitable" over the previous five years,[105] and there was no Indian-gaming competition in that county.[106]

- The agreements "enable[d] the Developer to collect large amounts of money, over a potentially lengthy period of time, for doing nothing—performing no ongoing services for the Tribe, and once the original costs of building, equipping and financing are paid, giving the Tribe nothing in return."[107]

- A 2004 development agreement and "lease" between the Timbisha Shoshone in California Tribe and Rinaldo Corporation that was very similar to that between Guidiville Rancheria and F.E.G.V.[108] The Timbisha Shoshone agreements purported to give the developer base rent, plus 75% of net revenue for five years (which would, again, far exceed the costs of development), plus an additional 18% of gross revenues for an additional 10 years.[109] The NIGC rejected these agreements for the same reasons as it did in its Guidiville decision.[110]

- The NIGC rejected a 2000 set of agreements between the Seminole Tribe of Florida and Coconut Creek Gaming, L.L.P. because:

  - The Tribe "leased" the facility for $19,645,000 of "base rent" to cover initial construction and other costs (much more than the $8.5 million Coconut Creek actually spent out-of-pocket), and thereafter, 35% of net gaming revenues for 10 years.[111] Over those 10 years, the net-revenue payments would reach

---

[103] *Id.* at 4-5.
[104] *Id.* at 4.
[105] *Id.* at 5.
[106] *Id.* at 5-6.
[107] *Id.* at 5.
[108] Timbisha Shoshone Letter, Ex. M to Second Aff. of S. Van Norman
[109] *Id.* at 4.
[110] *Id.* at 6.
[111] Seminole Letter at 2-3, Ex. D to Second Aff. of K. Washburn

between $160-200 million,[112] with no payment ceiling.[113] The NIGC concluded the rent was "pretextual in nature" and "really memorialize[d] an intent to include an ownership interest for the contractor, rather than establish terms for the receipt of ongoing services or goods by the Tribe."[114]

- The risks were relatively low, as the tribe had a proven gaming track record by that time (it had two other "highly successful" gaming operations), the tribe's financial resources, and the site was located in a populous and heavily touristed area.[115]

B. The 1994 Agreements clearly violate the sole-proprietary-interest standards under the NIGC's factors.

Provisions of the 1994 Agreements, particularly the Sublease rental rate and term, fall well outside the boundaries of agreements that the NIGC has found to violate IGRA's sole-proprietary-interest rule. The 1994 Agreements' terms are illegal under IGRA and expose the Band (and the City) to potentially serious penalties.

1. The amount of fees paid to the City is completely disproportionate to the services the City provides to the Band, indicating ownership rather than fees-for-services.

In exchange for almost nothing, the City has received an extraordinarily high percentage of net revenues under the 1994 Sublease (although it is expressed there as a percentage of gross slot revenues). The more than 30% of net revenues the City now receives is, as a percentage, *more* than it received under the 1986 Commission Agreement, which gave it only 24.5% of net revenues (with additional, shared control

---

[112] *Id.* at 3.
[113] *Id.* at 10.
[114] *Id.* at 7.
[115] *Id.* at 10.

over the joint Commission's 50% share),[116] and which both the NIGC and Solicitor rejected.[117] Like the Seminole agreement rejected by the NIGC, there is no cap on the amount the Band must pay the City. The compensation has well exceeded any cost the City incurred in connection with the Casino. It is unquestionably disproportional to any reasonable payment for City services under the Sublease, and the Band received *no consideration* for the fee. Drawing all inferences in favor of the Band, as this Court must, this is strong evidence that the 1994 Sublease is unlawful under the NIGC's sole-proprietary-interest standards.

a. The fee is not commensurate with the City's services.

The *only* services the City provides for the fee are services other businesses in Downtown Duluth receive for paying property taxes.[118] But if the Band were paying taxes, presumably, the tax rate for the Casino site would be no more than the 5% of the assessed land-and-building value of $3,791,200 that the St. Louis County Assessor assigns to the property,[119] or $180,930 for 2010. In contrast, under the 1994 Sublease, the Band would owe the City more than *$6 million* in 2010, if recent years' trends

---

[116] *Compare* 1986 Comm'n Agmt. at § 16, Ex. 7A to City's Memo., Dkt. 10-7, *with* 1994 Sublease at §4.2.2.1, Ex. 18A to City's Memo., Dkt. 12-2.

[117] *See* Sept. 24, 1993 Letter from A. Hope to Chairman R. Peacock and Mayor G. Doty, Ex. 11 to City's Memo., Dkt. 11-1; *see also* Lavell Letter at 2, Ex. F to Second Aff. of S. Van Norman

[118] *See* City of Duluth 2009 Annual Approved Budget, Ex. G to Second Aff. of S. Van Norman.

[119] *See* St. Louis County's 2009 Assessor's 2010 Casino Taxes Payable, Ex. H to Second Aff. of S. Van Norman.

continued.[120] In other words, each year, through its purported "rent," the Band pays more than *33 times* what other Duluth business owners pay for similar City services.[121] The fee bears no relation to the City's services whatsoever.[122]

b. The fee is not "rent" and is not for any other valuable consideration.

The payment to the City is not "rent."[123] There is a 1986 Lease from the Band to the Commission and then a 1994 Sublease back to the Band. In essence, the Band pays the commission to use its own land, and the City is only a third-party beneficiary to the Commission's interest in this 19% of gross slot revenues from the Casino.[124]

Nor is the fee for any other service. Even in 1986, when the City purported to enter a "development" agreement with the Band, it only constructed an adjacent parking

---

[120] *See* Aff. of K. Larson at ¶ 4 and Ex. 1.

[121] And in fact, *by law* the City is obligated to provide these services *regardless* of whether the Band pays for them. *Shakopee Mdewakanton Sioux Community v. City of Prior Lake*, 771 F.2d 1153, 1155 (8th Cir. 1985) (upholding injunction prohibiting city from refusing to provide reservation residents with "police, fire, rescue, and other municipal services in the same manner as that in which services are provided other [city] residents.").

[122] Indeed, the fee is likely unconscionable. Minnesota follows the generally recognized doctrine of unconscionability. *See, e.g., Matter of Estate of Hoffbeck*, 415 N.W.2d 447 (Minn. Ct. App. 1987); *see also* Minn. Stat. § 336.2-302(1). Applying this doctrine, courts have refused to enforce agreements that involve excessively disproportionate exchanges of material promises. *See, e.g., Ahern v. Knecht*, 563 N.E.2d 787 (Ill. Ct. App. 1990) ("[g]ross excessiveness of price alone can make an agreement unconscionable"); *American Home Improvement, Inc. v. MacIver*, 201 A.2d 886 (N.H. 1994) (price/value ratio approximately 2.5 to 1 was unconscionable). Charging the Band *33 times* more than it charges similarly situated business for the same services is grossly excessive.

[123] *See* Second Aff. of K. Washburn at ¶¶ 5, 16, 18.

[124] *See* 1994 Sublease at § 4.2.2.1, Ex. 18A to City's Memo., Dkt. 12-2.

ramp. By the time the 1994 Agreements were negotiated, the City had fully reimbursed for the cost of this endeavor, and even today it retains ownership of the ramp.[125] In 1994, the City did not purport to offer any development services whatsoever.[126] Instead, it only offered empty promises. The City's purported offer of exclusivity was illusory because IGRA's passage eliminated any competition concerns. It restricted Indian gaming to "Indian lands," and no other tribe has "Indian lands" in Duluth.[127] The City promised in 1994 not to "arbitrarily or capriciously withhold extension or renewal" of the liquor license the Commission had transferred to the Band, but here, too, it could not do in any case.[128]

Taken together, under the 1994 Agreements, the Band pays the City to follow the law, and to use land it already has a right to use, for a purpose it already has a right to use it for. The NIGC rejects such arrangements. As in the Osage example, here the Tribe's payments to the City (more than $75 Million just since 1994) have far exceeded any start-up costs, which were approximately $7 million in 1986 (and were paid by the Band, not the City).[129] But unlike the developers in the Osage, Guidiville, Timbisha Shoshone, and

---

[125] *See generally*, 1986 Develop. Agmt. at § 1.2 (City obligations for parking ramp), Ex. B to Second Aff. of S. Van Norman
[126] *See generally*, 1994 Agmts., Exs. 18A-F to City's Memo., Dkt. 12-2-7.
[127] *See* 25 U.S.C. §§ 2703(4) (defining Indian lands) and 2719(a) (limiting Indian lands outside reservation boundaries to those acquired after passage of IGRA, with limited exceptions not applicable to other lands in Duluth).
[128] *See* Tribal-City Accord at § 14, Ex. 18B to City's Memo., Dkt. 12-3.
[129] *See* Band's "Open Letter" at 1, Ex. 12 to City's Memo., Dkt. 11-2; Aff. of V. Radtke at ¶ 3.

Seminole examples, the City has not provided *any* development services. The "rent" under the 1994 Sublease is not a fee for service. It is prima-facie evidence of a proprietary interest "aimed at providing a substantial equity interest"[130] to the City. Taking all inferences in favor of the Band, the NIGC's rejection of such arrangements—even where the contractor provided substantial services to a tribe—for insufficient consideration, makes clear that today the NIGC would find the 1994 Agreements grant the City an illegal proprietary interest in the Casino.

2. The Band pays the City more than it would be allowed to pay an outside company to *manage* the Casino.

IGRA caps payment for day-to-day, ongoing, post-opening casino management at 30% of net gaming revenues.[131] In contrast, the City provides *no* ongoing, post-opening services and receives more than 19% of gross slot revenues with only prize money deducted, not operating expenses.[132] This has amounted to between 26.59% (in 1996) and 33.49% (in 2008) of the Casino's net gaming revenues.[133] In other words, in exchange for providing absolutely no contractual services to the Band or Casino, the City received roughly as much per year (and in some years more) as IGRA permits an outside company to receive for *running* a tribal casino under an approved management contract.

---

[130] *See*, *e.g.*, Osage Letter at 7, Ex. K to Second Aff. of S. Van Norman.
[131] *See* 25 U.S.C. §§ 2711(c)(2) (also noting that, in special circumstances, the management fee may not exceed 40%); and 2703(9) (defined as "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees").
[132] 1994 Sublease at § 4.2.2.1-2., attached to City's Memo. as Ex. 18A, Dkt. 12-2.
[133] Aff. of K. Larson at ¶ 7 and Ex. 1.

Taking all inferences in favor of the Band, this excessive fee indicates that the 1994 Agreements violate IGRA's proprietary interest standard by granting the City an illegal ownership in the Band's Casino.

3. The term of the 1994 Agreements is many times longer than IGRA allows for management contracts.

The *50-year* length of the payment term here is ten times longer than IGRA's limit for management contracts (which is five or, under special circumstances, seven years).[134] It is also significantly longer than any other agreement the undersigned or its expert, the former General Counsel to the NIGC, have seen the NIGC evaluate (and invalidate).[135] As the Osage example (5-year term) and Guidiville, Timbisha Shoshone, and Seminole examples (10-year terms) illustrate, long-term payment structures are more indicative of a joint partnership or ownership interest than of payment for services. Taking all inferences in favor of the Band, the term, too, indicates that the 1994 Agreements grant the City an unlawful proprietary interest in the Band's gaming enterprise.

4. The City took on no risk in the 1994 Agreements with the Band.

In 1994, the City undertook no risk in connection with the gaming operation. The land had long been held in trust, gaming on the land was already approved, and IGRA provided additional assurance of the operation's legality.

---

[134] 25 U.S.C. § 2711(b)(5).
[135] *See* Second Aff. of K. Washburn at ¶ 22.

And neither was the Casino a financial risk. By 1994, the Casino had already proven profitable, and the Band had already compensated the City for the initial outlay to construct the adjacent parking ramp in 1986.[136] There was no City money at risk whatsoever under the 1994 Agreements. To the contrary, when the Commission was restructured, the City *received* unrestricted lump-sum payouts and various other considerations. Altogether, these facts demonstrate that the City's level of risk was far lower even than in the NIGC's evaluations of risk in the Guidiville, Timbisha Shoshone, and Seminole examples, which all involved at least some financial outlay by developers. Instead, as the NIGC said of the developer of the Osage casinos, the City took *no* financial risk in exchange for its payouts.[137] Taking all inferences in the Band's favor, this factor too demonstrates that the City seeks to enforce an illegal contract that grants it an unlawful proprietary interest in the Band's gaming operation. Because it cannot hold such an interest under IGRA or the Band's Gaming Ordinance, the City is not entitled to summary judgment.

5. The City exercises control over the Casino.

The City also holds impermissible control over the Casino under the sole-proprietary-interest analysis. Under the 1994 Tribal-City Accord, the Band purportedly cannot change its own gaming regulations as they pertain to the Casino without the City's

---

[136] *See generally*, 1986 Develop. Agmt. at § 1.2 (City obligations for parking ramp), Ex. B to Second Aff. of S. Van Norman

[137] *See* Osage Letter at 9, Ex. K to Second Aff. of S. Van Norman.

approval.[138] Such a provision, which reaches into a tribe's sovereign right to control its own gaming, exceeds the level of control a non-tribal party may exercise under the sole-proprietary-interest analysis.[139] Moreover, it usurps the Band's police power to govern itself.[140]

Additionally, the City still has access to Casino records under various 1994 provisions,[141] despite the fact that Interior specifically criticized this aspect of the 1986 Agreements and cited it as part of its justification for finding a sole-proprietary-interest violation in 1990.[142] Again drawing inferences in favor of the Band, as this Court must, this factor compels the conclusion that the 1994 Agreements grant the City an unlawful proprietary interest in the Band's Casino. As such, the Agreements are illegal, and bar the City's request for summary judgment.

C. The "rental" payments to the City under the 1994 Sublease also constitute an impermissible tax on the Band.

As a separate matter, states cannot tax Indian tribes for activities conducted on trust lands without express congressional authorization to do so,[143] and IGRA prohibits states *and their subdivisions* from imposing any tax upon a tribe's gaming operation as

---

[138] 1996 Tribal-City Accord at §6(c), Ex. 18B to City's Memo., Dkt 12-3.
[139] Seminole Letter at 8-9, Ex. D to Second Aff. of K. Washburn
[140] *Contra* 25 U.S.C. § 2710(b)(2)(A) ("the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity").
[141] *See, e.g.*, 1994 Tribal-City Accord at § 16, Ex. 18B to City's Memo., Dkt. 12-3.
[142] *See* Lavell Letter at 3, Ex. F to Second Aff. of S. Van Norman
[143] *E.g.*, *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (no state taxation of tribe on trust lands outside reservation).

part of a state-tribal gaming compact.[144] "[N]othing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity."[145]

Tribes *may* share gaming profits with state governments under state-tribal compacts approved by Interior. Examples of this arrangement occur in Arizona, California, Connecticut, Michigan, New Mexico, New York, Oklahoma, and Wisconsin.[146] But such revenue-sharing provisions are typically negotiated in exchange for gaming exclusivity, and are subject to scrutiny under IGRA.

The Ninth Circuit's decision in *Indian Gaming Related Cases (Coyote Valley II)*[147] provides the general framework for analyzing compacts. States must negotiate compacts in good faith, and it is incumbent upon courts to weigh a negotiated fee against the concessions a state offers to determine whether the fee is permissible or whether it is a prohibited tax.[148]

---

[144] The limited exception to this rule is that in the context of a tribal-state compact, IGRA authorizes an "assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity." 25 U.S.C. § 2710(d)(3)(C)(iii).
[145] *Id.*
[146] *See* Steven Andrew Light and Kathryn R.L. Rand, The Hand That's Been Dealt: The Indian Gaming Regulatory Act at 20, 57 Drake L. Rev. 413, 435 (Winter 2009).
[147] 331 F.3d 1094 (9th Cir. 2003).
[148] *Id.* at 1112. *Accord Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 2008 WL 6136699 (S.D. Cal. Apr. 29, 2008) (finding the state failed to renegotiate a compact in good faith where it insisted that the tribe pay additional revenues into the state's general fund but offered no "meaningful concessions"

Here, the City and Band have the equivalent of an unregulated "city-tribal compact"—one that far exceeds the fees in the existing compacts between the Band and the State of Minnesota. For example, the State blackjack compact requires the Band to pay *only $13,636.36 annually* to the State Department of Public Safety, Gambling Enforcement Division "[i]n order to assist the State's administration of its responsibilities under this compact . . . ." [149] In contrast, the percentage that the Band annually pays the City under the 1994 Agreements, over *$6 million* in 2008, is plainly "revenue-sharing," and in the context of tribal-state compact review, directly implicates the impermissible-tax clause. Though the City argues that the payment is for rent, not a tax, it far exceeds fair-market rental value, and the property is not even owned by the City. And unlike states, the City could not offer real exclusivity to the Band in 1994. In fact, drawing all inferences in favor of the Band, the City offered absolutely no consideration for this revenue stream. Considering the totality of the arrangements in this light compels the inference that the "rental" payments to the City under the 1994 Agreements—that were not tied to *any* permissible regulatory costs—constitute an impermissible tax on the Band under IGRA.

---

to the tribe, instead primarily offering "continued" tribal gaming exclusivity), Ex. Q to Second Aff. of S. Van Norman.

[149] *See* FDL Tribal-State Blackjack Compact at § 4.1, Ex. A to Second Aff. of S. Van Norman.

III. Because the "rental" payments to the City are now unlawful, the Band cannot be required to continue to pay them.

The City expressly seeks summary-judgment on both liability *and* damages. These include: "damages suffered prior to the commencement of this action in the amount of $561,047.59"; for "additional damages it has suffered by the time of filing this Motion in an amount in excess of Two Million Dollars"; and for "specific performance of the parties' contract or, in the alternative, accelerated future damages in an amount in excess of Two Hundred Million Dollars"[150] for the second 25-year lease term, in which no rental rate has yet been set. Additionally, without citing *any* authority, in its proposed order, the City asks the Court to write into the Sublease a penalty clause requiring the Band to pay $1,000 per day for each day between the day the Band stopped paying the City and the day the City receives payment, should the Band ever cease payments again.[151]

But in its response to the Band's Motion to Continue, the City acknowledged that full summary judgment may *not* be available as to all issues in this case, despite its initial position, suggesting the Court could simply grant it "interlocutory judgment" on liability alone.[152] To the extent the Court considers any of the City's arguments in that brief,[153] it

---

[150] City's Compl. at 2, 11, Dkt. 9.
[151] City's Proposed Order at 3; *see also* City's Mot. for S.J. at 33, Dkt. 9.
[152] City's Resp. to Band's Motion to Continue (Dec. 31, 2009) at 11, Dkt. 32.
[153] *See* L.R. 7.1(b) (requiring memorandum of law in support of dispositive motion to be filed at served "at least 42 days prior to the hearing"); L.R. 7.1(g) (no memoranda of law will be allowed except as provided in rules). Forty-two days before the hearing date of

appears that the City now agrees that at least its future-damages calculation is neither precise nor even a proper subject for this Court if the 1994 Contracts are valid (in which case, if the parties dispute the amount of rent for that period, they must go to binding arbitration).[154] But because the 1994 Agreements are unlawful, as demonstrated above, as a matter of law the City cannot enforce the provision for rental payments and accordingly is not entitled to judgment as to liability *or* damages.

The general rule, long recognized in Minnesota, is that courts will not enforce a contract when the subject matter of the agreement or an act required for performance violates public policy as expressed in constitutional provisions, statutes, or decisional authority.[155] Even where a contract was originally lawful, if performance becomes illegal due to a change in the law, any subsequent performance is contrary to public policy and a party's non-performance will be excused.[156] In this case, taking all inferences in favor of the Band, the restructured rental arrangement violates current Indian-gaming law, making

---

February 4 was December 24, 2009, meaning thereafter the City was not entitled to submit additional briefing in support of its summary-judgment arguments, whether in the context of a supplemental brief or under the pretense of responding to the Band's Motion to Continue.

[154] City's Resp. to Band's Mot. to Cont. (Dec. 31, 2009) at 11, Dkt. 32.

[155] *E.g.*, *Seaman v. Minneapolis & R.R. Ry. Co.*, 149 N.W. 134 (Minn. 1914); *see generally* 8 *Williston on Contracts* §19:35 (4th ed. 1998).

[156] *Id.; see also Restatement (Second) of Contracts* § 264 (1981) (if performance of contractual duty is made impracticable by compliance with governmental regulation or order, regulation or order is "an event the non-occurrence of which was a basic assumption on which performance was made" and non-performance excused); *Restatement (First) of Contracts* § 458 (1932) (contractual duty discharged where performance subsequently prevented by law, including statute or administrative order).

performance under the 1994 Agreements is legally impossible. Accordingly, the City has no enforceable entitlement to the rental payments in issue, and the Court may not grant summary judgment in the City's favor.[157]

IV. The Band does not owe the City $561,047.09 in "contrarevenue" payments.

The City also contends that the Band improperly withheld "contrarevenue" payments from the City's rent payments in 2009, and asks that the Court order the Band to pay the amount it withheld to the City as part of summary judgment.[158] As it informed the City, the Band deducted the contrarevenue amount from the City's rent at the recommendation of its independent accountants, McGladrey & Pullen, based on their interpretation of accounting procedures for gaming enterprises.[159] Even if the City disagrees with the McGladrey analysis, the question of which accounting procedures

---

[157] Whether analyzed in terms of illegality, mutual mistake, or impossibility or impracticability, the end result is that the 1994 Agreements are not enforceable. *See generally Farnsworth on Contracts* §§ 5.9, 9.3, 9.9 (3d ed. 2004). Beyond the City's inability to recover rental payments, this motion for summary judgment must be denied because the Band must be afforded an opportunity to prove its claim for recovery of past payments that were unnecessary and unlawful.

[158] City's Memo. at 9-11, 17, Dkt. 9.

[159] *See* Jan. 28, 2009 Letter from K. Diver to D. Ness, with Attachments. 1 (American institute of Certified Public Accountants ("AICP") Exposure Draft: "Proposed Audit and Accounting Guide—Gaming" (Sept. 10, 2008)) and 2 (Schedule of Audited Discounts through December 9, 2008, totaling $561,047.56 reduction in rent), Ex. 3 to Aff. of K. Diver. *See also* Mar. 2, 2009 Letter from R. Maki to D. Peterson (requesting additional support from accountants McGladrey & Pullen), Ex. 4 to Aff. of K. Diver.; Apr. 13, 2009 Letter from D. Peterson to R. Maki (enclosing Apr. 8, 2009 letter of explanation from McGladrey & Pullen), Ex. 5 to Aff. of K. Diver.

should be applied to the "contrarevenue" payments presents a genuine issue of material fact.

"Contrarevenue" includes any costs that should be offset against revenue under generally accepted accounting principles.[160] Under a recent clarification in the American Institute of Certified Public Accountants' "Proposed Audit and Accounting Guide—Gaming," promotional expenditures like coupons and other casino perks must be accounted for as contrarevenue (i.e. as amounts that decrease gross revenues).[161] Since 1994, the Band has accounted for certain promotional expenditures, including slot coupons, as operating expenses, which affected *net income* (or in IGRA's parlance, "net gaming revenues"), but not *gross revenues*. Because the City's rental payment under the 1994 Agreements is based upon gross slot revenues, this resulted in overpayments to the City.[162]

Last year, McGladrey—the firm designated as the outside accountant under the 1994 Agreements[163]—advised the Band of this change and the corresponding historical reduction in gross slot revenues.[164] Upon the City's request, the Band forwarded McGladrey's own written confirmation of the overstatement calculation, which identified the total amount of slot coupons incorrectly reported as a marketing expense (instead of

---

[160] *See* Jan. 28, 2009 Letter from K. Diver to D. Ness, Ex. 3 to Aff. of K. Diver.
[161] *Id.* at Attach. 1.
[162] *Id.*
[163] 1994 Tribal-City Accord at § 7, Ex. 18B to City's Memo., Dkt. 12-3.
[164] *See* Apr. 13, 2009 Letter from D. Peterson to R. Maki (enclosing Apr. 8, 2009 Letter of McGladrey & Pullen to D. Peterson), Ex. 5 to Aff. of K. Diver.

as a reduction in revenue) since 1994 as $2,952.882.05.[165] Nineteen percent of that amount is the $561,047.59 the Band deducted from the payments to the City.

The City relies on its own auditor to argue that McGladrey's analysis is incorrect, but the City has said that this is an "admittedly complex issue" for which it had reached only "tentative conclusions."[166] This fact-intensive and technical issue will require expert testimony to resolve, and presents a genuine issue of material fact. Accordingly, this Court may not grant summary judgment on this issue.

Conclusion

If this case were as simple as the City contends it is—if the consent order issued in 1994 were a final judgment and the Band was seeking to evade it just to give itself an unfair advantage over the City—the Court could likely enforce that consent order and close this case. But this case is not that simple. First, the consent order was not a "final judgment," but instead is a continuing order subject to modification if continuing to enforce it would require a party to violate the law. And second, what both the Band and the City thought was permissible under the Indian Gaming Regulatory Act in 1994, when the National Indian Gaming Commission had just come into existence and begun to interpret the Act, is plainly not permissible now.

---

[165] *Id.*
[166] *See* May 12, 2009 Letter from R. Maki to D. Peterson, Ex. 22 to City's Memo., Dkt. 13-4.

Under NIGC standards, contracts giving tribal business partners far less money over far less time than the 1994 Agreements purport to require the Band to pay the City violate IGRA's sole-proprietary-interest rule. In light of those opinions (and the NIGC enforcement action taken against a similarly-situated contractor in 2007), the 1994 Agreements are illegal, and the City's motion to compel their enforcement by issuance of summary judgment must fail as a matter of law.

Dated: January 14, 2010

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

s/ Sara K. Van Norman
Henry M. Buffalo, Jr. (MN #236603)
Mark A. Anderson (MN #0002203)
Vanya S. Hogen (MN #23879X)
Sara K. Van Norman (MN #0339568)
Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C.
1360 Energy Park Drive, Suite 210
St. Paul, Minnesota 55108
Tele: (651) 644-4710
Fax: (651) 644-5904
E-mail: hmb@jacobsonbuffalo.com; vhogen@jacobsonbuffalo.com; svannorman@jacobsonbuffalo.com

Dennis Peterson (MN #0208036)
Tribal Attorney
Fond du Lac Band of Lake Superior Chippewa Legal Affairs Office
1720 Big Lake Road
Cloquet, Minnesota 55720
Tele: (218)878-2607
Fax: (218)878-2692
E-mail: dennispeterson@fdlrez.com