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IN THE SUPREME COURT
OF THE SAC AND FOX NATION OF OKLAHOMA
356159 EAST, 926 ROAD, STROUD, OKLAHOMA 74079

NEW GAMING SYSTEMS, INC.,

Appellant/Plaintiff,

vs.

SAC AND FOX NATION, AND

SAC AND FOX NATION BUSINESS

ENTERPRISE,

Appellee/Defendant.

Appeal No.: APL-08-01

(Case No.: CIV-05-01)

FILED

IN THE SUPREME COURT

DATE 6/16/11 @ 1:23 pm

DOCKET PAGE RECORDED

SAC & FOX NATION

COURT CLERK

BY clerk DEPUTY

ORDER

Now on this 23rd day of May, 2011, comes on for oral argument and decision is Appellant New Gaming Systems, Inc's, (hereinafter referred to as "Appellant" or "NGS") Notice of Appeal filed November 5, 2008, appealing the Order of the Sac and Fox District Court entered October 16, 2008 (Case No. CIV-05-01), wherein the district court sustained the Motion to Dismiss of Appellee Sac and Fox Nation, and Appellee Sac and Fox Nation Business Enterprise, (hereinafter referred to as the "Appellee" or "Nation"), and dismissed Appellant's First Amended Complaint filed September 20, 2006.¹ The Appellant has requested that the judgment of the district court be reversed and the case remanded to the district court with instructions to stay the action in the district court pending conclusion of Appellant's action against the National Indian Gaming Commission (hereinafter referred to as the "NIGC") in the U.S. District Court for the Western District of Oklahoma or to allow the case to proceed on its merits. At the request of the parties, this Court allowed and heard oral argument of the parties on May 23, 2011 at 10:30 a.m.

This Court after having reviewed the motions, briefs and record in this case, and having heard the arguments of the parties, hereby concludes for the reasons provided herein that the

¹ The Original Complaint was filed February 24, 2005.

1 relief requested in the Notice of Appeal is DENIED, and the Order of the district court dated
2 October 16, 2008, is AFFIRMED.

3 Background of the Parties

4 This case has a long history in this Court and in the district court including numerous
5 pleadings and requests for relief. This Court has issued orders in the underlying matter and has
6 heard oral argument.

7 The Appellant, New Gaming Systems, Inc. is a California corporation with its principal
8 place of business at 1617 18th Street, Sacramento, California.

9 The Sac and Fox Nation is a federally recognized Indian tribe whose address is Route 2,
10 Box 246, Stroud, Oklahoma 74079.

11 The Nation has a Constitution and Bylaws that establish the Nation's government. The
12 Nation's Governing Council is made up of all members of the Nation eighteen (18) years of age
13 and older. Art. II. The Constitution provides for a Business Committee, consisting of a Principal
14 Chief, Second Chief, Secretary, Treasurer and one (1) committee member elected by secret
15 ballot. Art. III. The Constitution grants supreme delegated powers to the Governing Council, Art.
16 II; and granted delegated powers to the Business Committee to act on behalf of the Nation in all
17 matters except those on which the Governing Council has supreme power to take final action.
18 Art. III.

19 The Sac and Fox Nation Business Enterprise is a subdivision and entity owned by the Sac
20 and Fox Nation created to own and operate a casino with a separate board of directors elected by
21 the Governing Council with its administrative offices in Oklahoma.

22 The Nation passed a Resolution GC/SF-04-07 on July 19, 2003, creating the Sac and Fox
23 Nation Gaming Commission for the purpose of overseeing all Class II and Class III gaming
24 activities conducted within the Sac and Fox Nation jurisdiction.

25 Federal Court Procedural History

26 On July 10, 2008, NGS filed an action in the United States District Court for the Western
27 District of Oklahoma, Case No. CIV-08-0698-HE, against the NIGC, its chairman and vice
28 chairman, and the Nation seeking judicial review of an agency decision under the Administrative
Procedures Act, 5 U.S.C. 701-706. This Court has been advised that, on March 17, 2009, the

1 federal court granted the Nation's motion to stay pending the exhaustion of tribal remedies,
2 including appellate review. NGS filed a Motion to Remove Stay on January 5, 2011. This Court
3 has been advised that the federal denied the NGS's motion to remove the stay on April 22, 2011.

4 Tribal District Court Procedural History²

5 Appellant filed a Complaint on February 24, 2005 (Case. No. CIV-05-01) in the district
6 court against the Appellee alleging breach of an equipment lease dated August 8, 2003 and
7 breach of two (2) promissory notes dated August 8, 2003, in the amount of \$521,768.00, (total
8 amount including additional funds \$548,896.00) and April 28, 2004, in the amount of
9 \$20,000.00. The complaint further sought damages relating to gaming activities. (CR 1-32)

10 Summons were issued (CR 33-38) with returns of service. (CR 39-44)

11 Appellee filed a Special Appearance, Verified Motion to Dismiss and Brief in Support
12 with declaration of Darrell Gray, Second Chief pleading sovereign immunity barred the action.
13 (CR 45-74)³

14 A notice of hearing was filed May 12, 2005 for hearing set June 22, 2005 at 9:30 a.m.
15 (CR 75) with docket (CR 76)

16 A declaration of Kay Rhoads, Principal Chief, was filed May 16, 2005. (CR 77)

17 The Appellant filed a Brief in Opposition to Motion to Dismiss with attached Resolution
18 SF/GC-03-06.⁴ (CR 78-94)

21 ² It is noted by this Court that due to the lengthy procedural history in the District Court and the Supreme
22 Court, and subsequently U.S. District Court for the Western District of Oklahoma, this matter originating
23 in a Complaint and Special Appearance/Motion to Dismiss and Amended Complaint, has been handled
24 and decided as a combination of Special Appearance/Motion to Dismiss/Motion for Summary Judgment,
25 wherein discovery procedures were allowed beyond normal Summary Judgment procedures because of
26 the complexity of the issue.

27 ³ Appellee pled the defense of sovereign immunity alleging the agreement and notes sued upon
28 constituted an unapproved management contract pursuant to NIGC and that the agreement containing the
limited waiver of sovereign immunity was void *ab initio*.

1 The Appellee filed a Reply Brief in Support of Motion to Dismiss June 6, 2005. (CR 95-
2 108)

3 A hearing in the district court was held on June 22, 2005, and a court order issued
4 permitting limited discovery on the issue of sovereign immunity. The matter was set forth further
5 hearing. (CR 109-110) A transcript of the hearing was filed. (CR Exhibits 1-345)

6 The Appellee filed a Motion to Settle Order and for Reconsideration of Limited
7 Discovery July 15, 2005 with exhibits and supporting authority. (CR 111-145)

8 A Notice of Hearing was filed July 29, 2005 setting a hearing for August 31, 2005, at
9 9:30 am. (CR 146), with docket. (CR 147-148)

10 The Appellant filed a Brief in Opposition of Appellee's Motion to Settle Order and for
11 Reconsideration of Limited Discovery. (CR 149-156)

12 The Appellee filed an Application for Protective Order August 10, 2005, with supporting
13 authority. (CR 157-180)

14 The Appellee filed a Reply Brief in Support of Appellee's Motion to Settle Order and for
15 Reconsideration of Limited Discovery August 12, 2005. (CR 181-188)

16 A Motion to Compel Discovery was filed by Appellant August 16, 2005, requesting the
17 Appellee's response to interrogatories and requests for production submitted July 5, 2005, and
18 due August 4, 2005. (CR 189-190)

19 A Motion to Continue Hearing was filed by Appellant August 16, 2005. (CR 191-193)

20
21 ⁴ A Resolution of the Sac and Fox Nation, SF/GC-03-06 dated July 19, 2003 and filed August 1, 2003,
22 set forth: "A governing council resolution authorizing the Sac and Fox Nation Gaming Committee with
23 the advise (*sic*) and consent of the Sac and Fox Nation Business Committee to negotiate an "Equipment
24 Lease Agreement" and "Promissory Note" with New Gaming Systems, Inc. and to grant a limited waiver
25 of sovereign immunity to New Gaming Systems, Inc. only as provided in this resolution." (CR 92-94)
26 The resolution further set forth: "Whereas, both the Sac and Fox Nation and New Gaming Systems, Inc.
27 desire agreements that will be enforceable by their terms within the Sac and Fox Nation's courts only and
28 New Gaming Systems, Inc. has consented to personal and subject matter jurisdiction of such courts over
it." (CR 93)

1 A Combined Response to Appellant's Motion to Continue Hearing and to Compel
2 Discovery was filed by Appellee on August 19, 2005. (CR 194-196)

3 An order of the district court entered August 22, 2005 dismissed the case on the basis of
4 sovereign immunity of the Appellee, (CR 197-199) with certificate of mailing. (CR 200)

5 After remand per order of this Court dated June 9, 2006, a Notice of Hearing was set for
6 August 11, 2006 at 9:30 a.m. and Docket was filed June 26, 2006. (CR 213-214)

7 The Appellee filed an Unopposed Application to Reschedule Status Review Hearing July
8 28, 2006. (CR 215-216)

9 The district court ordered a continuance to August 24, 2006 at 9:30 a.m. (CR 217) with
10 docket. (CR 218)

11 The Appellee filed a Motion to Bifurcate and Limit Discovery to Issue of Contract
12 Validity August 22, 2006. (CR 219-228)

13 A Second Set of Discovery Requests to Appellee was filed August 24, 2006. (CR 229-
14 238)

15 A court minute was filed August 24, 2006 by the district court, (CR 239) setting the
16 Motion to Bifurcate and Limit Discovery for hearing, and setting a date for Appellee's objections
17 to the second set of discovery requests, and further setting a status review conference, for
18 November 20, 2006, at 9:30 a.m. (CR 240-241)

19 A Notice of Hearing dated September 15, 2006, was filed August 24, 2006, with docket.
20 (CR 242-243)

21 The Appellant filed a Brief in Opposition to Appellee's Motion to Bifurcate and Limit
22 Discovery September 7, 2006. (CR 244-253)

23 The Appellee filed their Response to Appellant's Second Set of Discovery Requests
24 September 8, 2006. (CR 254-273)

25 The Appellee filed a Reply Brief in Support of Motion to Bifurcate and Limit Discovery
26 September 14, 2006. (CR 274-284)

27 The Appellant filed a Response to Appellee's Discovery Responses September 14, 2006.
28 (CR 285-291)

1 The district court, after hearing conducted September 15, 2006, entered an Order
2 Limiting Discovery⁵, and Setting Hearing for April 23, 2007 at 9:30 a.m. Said order was filed
3 September 29, 2006. (CR 329-332)

4 A court minute was filed and an order was issued limiting discovery and setting a hearing
5 for April 23, 2007, at 9:30 a.m. to address the jurisdictional issue. (CR 292-294)

6 Appellant filed a First Amended Complaint on September 20, 2006, reciting that payment
7 of the two promissory notes had been made by Appellee, leaving the equipment lease as the
8 primary dispute.⁶ (CR 295-328)

9 The Appellee filed First Requests for Admissions, Interrogatories, and Requests for
10 Production of Documents October 27, 2006. (CR 333-343)

11 The Appellee filed under seal certain unredacted "Papers Discoverable" on November 20,
12 2006 (CR 344-346), as well as unredacted and redacted documents (CR 347-349), and privilege
13 log (CR 350-356).

14 The Appellant filed a Brief in Support of Motion to Require Disqualification of Judge
15 Padilla November 29, 2006, with exhibits. (CR 357-391)

16 The Appellant filed a Motion to Require Disqualification of Judge Padilla December 11,
17 2006. (CR 392-393)

18 The Appellee filed an Objection and Brief in Opposition to Motion to Require
19 Disqualification of Judge Padilla December 11, 2006 with exhibit. (CR 394-414)

20 The Appellee filed an Unopposed Application for Continuance of Evidentiary Hearing
21 December 11, 2006. (CR 415-417)

23 ⁵ Discovery was limited from the date of the contract of August 2003 through August 31, 2004, and
24 opinions of NIGC up to September 15, 2006. Depositions of tribal officers prior to August 31, 2004
25 would be allowed. All documents were due November 20, 2006, and recordings due January 31, 2007.
26 (CR 331)

27 ⁶ The pleading sets forth that the Appellee tendered payment of the promissory notes without condition
28 on or about April 14, 2006. (CR 297) See Court Minute at (CR 292).

1 The district court entered an Order Granting Continuance of Evidentiary Hearing which
2 had been scheduled for April 23 and 24, 2007. The order was filed January 26, 2007. (CR 418)

3 The Appellee filed a Motion to Compel January 30, 2007, with exhibit. (CR 419-434)

4 The Appellee filed an Unopposed Application for Extension of Time to Produce Records
5 January 30, 2007. (CR 435-437)

6 On January 30, 2007, the district court entered an Order Granting Extension of Time for
7 Appellee to produce recordings until February 15, 2007. (CR 438)

8 The Appellant filed a Motion for Default Judgment February 12, 2007. (CR 441-443)

9 The Appellant filed an Objection to Appellee's Motion to Compel February 21, 2007.
10 (CR 444-448)

11 The Appellee filed a Response to Appellant's Motion for Default Judgment February 26,
12 2007. (CR 453-466)

13 The Appellee filed a Motion to Withdraw Motion to Compel without Prejudice March 1,
14 2007. (CR 467-469)

15 The district court entered an Order Granting Extension of Time for Appellee to produce
16 recordings on March 2, 2007. (CR 470)

17 The district court entered an Order Allowing Motion to Withdraw Motion to Compel
18 March 2, 2007. (CR 471)

19 The Appellee filed a Notice of Supplemental Legal Authority March 15, 2007 with
20 exhibit. (CR 472-570)

21 The Appellee filed a Motion for Protective Order March 15, 2007. (CR 571-578)

22 The Appellee filed a Notice of Supplemental Authority Supporting Objection to
23 Appellant's Motion to Require Disqualification of Judge Padilla March 22, 2007 with exhibit.
24 (CR 580-597)

25 A Notice of Hearing was entered setting a hearing for April 9, 2007, at 9:30 a.m. The
26 notice was filed March 23, 2007, with Certificate of Mailing. (CR 598-599)

27 The Appellant filed an Objection to Motion for Protective Order April 4, 2007 with
28 exhibit. (CR 600-626)

1 The Appellee filed a Reply to Appellant's Objection to Motion for Protective Order April
2 6, 2007. (CR 628-632)

3 The district court entered an Order Denying Motion to Require Disqualification of Judge
4 filed April 9, 2007. (CR 633-634)

5 The district court entered a Court Minute of the hearing on April 9, 2007. (CR 636-638)

6 The Appellant filed a Motion to Require Compliance with Court Order and for Sanctions
7 April 12, 2007. (CR 640-648)

8 The district court entered an Order Denying Motion for Default Judgment and Order
9 Compelling Appellee to Answer filed April 13, 2007, and ordering the Appellee to file an answer
10 to the Complaint within ten days. (CR 649-651)

11 The Appellee filed a Response to Appellant's Motion to Require Compliance with Court
12 Order and for Sanctions April 13, 2007, with exhibits. (CR 653-681)

13 The Appellant filed a Withdrawal of Motion to Require Compliance with Court Order
14 and for Sanctions April 16, 2007. (CR 682-683)

15 The district court entered a Protective Order April 17, 2007, for confidential information
16 of Business Committee and Governing Council meeting recordings of the Nation. (CR 685-687)

17 The Appellee filed a Response to Appellant's Withdrawal of Motion to Require
18 Compliance with Court Order and for Sanctions April 18, 2007, with exhibit. (CR 689-695)

19 The Appellee filed an Application for Order to Suspend Filing of Counterclaims April
20 20, 2007. (CR 697-702)

21 The Appellee filed an Amended Application for Order to Suspend Filing of
22 Counterclaims April 20, 2007. (CR 703-708)

23 The Appellee filed an Answer April 23, 2007. (CR 710-716)

24 The Appellant filed an Objection to Application for Order to Suspend Filing of
25 Counterclaims May 3, 2007. (CR 719-728)

26 The Appellee filed a Reply to Appellant's Objection to Application for Order to Suspend
27 Filing of Counterclaims May 7, 2007. (CR 730-735)

28 The district court by way of Judge Dowty entered an Order Granting Application to
Suspend Filing of Counterclaims May 11, 2007. (CR 737-738)

1 A Notice of Hearing scheduled for July 18, 2007, at 9:30 a.m. was issued by the court
2 clerk on May 14, 2007. (CR 740-741)

3 The Appellee filed a Revised Notice of Supplemental Authority with exhibit May 30,
4 2007. (CR 745-792)

5 The district court entered a Court Minute for status/scheduling conference of July 18,
6 2007 setting the matter for hearing on December 4, 2007 at 9:30 a.m. (CR 794)

7 A scheduling order was entered by the district court on September 12, 2007. (CR 798-
8 800)

9 The Appellee filed an Initial List of Exhibits and Witnesses September 17, 2007. (CR
10 802-804)

11 A Notice of Hearing for October 10, 2007 at 9:30 a.m. and docket were filed September
12 26, 2007. (CR 806-807)

13 The Appellant filed a Preliminary Witness List (CR 808-810), and Exhibit List (CR 811-
14 819) on October 10, 2007.

15 A letter dated September 28, 2007, from Penny J. Coleman, Acting General Counsel for
16 NIGC was filed October 10, 2007. (CR 820-822) This letter requested that the Nation submit the
17 agreements in question and related documents to the NIGC for determination of whether the
18 same constituted a management contract. The letter also invited NGS to submit "any
19 information it wishes."

20 The district court entered a Court Minute at the status conference held on October 10,
21 2007, scheduling trial for December 4, 2007, at 9:30 a.m., and setting a deadline for motions in
22 limine by October 31, 2007, to be heard November 14, 2007. (CR 823)

23 The Appellee filed a Motion in Limine to Exclude Report and Testimony of Thomas C.
24 Nelson October 25, 2007, with exhibit. (CR 825-840)

25 The Appellee filed a Motion in Limine to Exclude Post-Contractual Evidence and Brief
26 in Support November 1, 2007, with exhibits. (CR 842-884)

27 The Appellant filed a Response and Objection to Appellee's Motion in Limine November
28 1, 2007. (CR 886-889)

1 The Appellee filed a Reply in Support of Motion in Limine to Exclude Report and
2 Testimony of Thomas C. Nelson November 9, 2007. (CR 895-901)

3 The Appellant filed a Final Exhibit List (CR 902-910), Final Witness List (CR 911-913),
4 and Deposition Designations (CR 914-917) November 9, 2007.

5 The Appellant filed a Motion to Stay Proceedings Pending Decision by National Indian
6 Gaming Commission November 9, 2007 with exhibits. (CR 918-925)

7 The Appellee filed a Reply in Support of Motion in Limine to Exclude Post-Contractual
8 Evidence November 13, 2007. (CR 927-934)

9 The Appellant filed a Response and Objection to Motion in Limine to Exclude Post-
10 Contractual Evidence November 14, 2007. (CR 936-945)

11 The district court entered a Court Minute and Order regarding hearing of November 14,
12 2007, wherein the district court ruled on the motions in limine.⁷

13 A Notice of Hearing for November 20, 2007 at 9:30 a.m. was entered November 14,
14 2007. (CR 952)

15 The Appellee filed an Objection to Appellant's Motion to Stay Proceedings Pending
16 Decision by National Indian Gaming Commission November 19, 2007 with exhibits. (CR 953-
17 982)

18 A hearing was held in the district court on November 20, 2007 with district court minute
19 entered November 21, 2007. (CR 983-985)

20 A Notice of Hearing was entered for December 4, 2007 at 1:30 p.m. filed November 21,
21 2007. (CR 986)

22 An order of the district court dated November 20, 2007 denied the Appellant's Motion to
23 Stay Proceedings Pending Decision by National Gaming Commission. (CR 988-989)

24
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26 ⁷ The district court clarified that the matter would be heard on summary judgment, granting the motion in
27 limine to exclude post-contractual evidence limiting documents and recordings to the date of August 31,
28 2004, and disallowing the testimony of Thomas C. Nelson, but allowing his report. (CR 946-951)

1 Appellant sought relief from this Court as further outlined in the “Tribal Supreme Court
2 Procedural History”; infra. The trial setting of December 4, 2007, was stayed pending action of
3 this Court.

4 The Appellee filed an Advice to the Court of National Indian Gaming Commission Final
5 Ruling April 3, 2008 with exhibit. (CR 991-1004)

6 A Final Decision and Order of the National Indian Gaming Commission dated May 22,
7 2008 affirming the Chairman’s March 26, 2008 disapproval of the Agreements, the gaming
8 machine equipment lease and promissory note was filed. (CR 1005-1026)

9 The Appellee filed an Application for Hearing on Pending Motion to Dismiss/Summary
10 Judgment or in the Alternative for Scheduling Conference July 9, 2008. (CR 1027-1030)

11 A Notice of Hearing for August 13, 2008 at 9:30 a.m. was entered July 28, 2008. (CR
12 1033)

13 The district court entered a Court Minute August 13, 2008 (CR 1034-1035) and a
14 Scheduling Order and Notice of Hearing August 13, 2008 setting a hearing October 6, 2008 at
15 9:30 a.m.. (CR 1036)

16 The Appellant filed a Motion for Extension of Time to File Brief in Opposition to Motion
17 of Summary Judgment September 8, 2008. (CR 1037-1039)

18 The district court entered an Order September 10, 2008 granting an extension of time
19 until September 19, 2008, for Appellant to file a brief in opposition to Appellee’s Motion for
20 Summary Judgment. (CR 1040)

21 The Appellant filed an Objection to Appellee’s Motion to Dismiss September 19, 2008
22 with appendix of exhibits. (CR 1041-1236)

23 The Appellee filed an Unopposed Application to Clarify or Extend Filing Deadline for
24 Reply to the Objection of Appellant to Appelle’s Motion to Dismiss September 29, 2008. (CR
25 1237-1239)

26 The district court entered an Order September 30, 2008 granting an extension of time
27 until October 1, 2008 for Appellee’s Reply Brief. (CR 1240-1241)

28 The Appellee filed a Reply to Appellant’s Objection to Appellant’s Motion to Dismiss
October 1, 2008 with exhibits. (CR 1242-1328)

1 The district court entered a Court Minute for October 6, 2008. (CR 1329-1332)

2 The district court entered an Order October 6, 2008 filed October 16, 2008 sustaining the
3 Appellee's Motion to Dismiss and dismissing the Appellant's Complaint⁸. (CR 1333-1345)

4 Tribal Supreme Court Procedural History

5 The Appellant filed an appeal September 9, 2005 to the district court's order dated
6 August 22, 2005, Case No. APL-05-02. A Certification of Record on Appeal was filed
7 September 12, 2005 certifying 26 instruments with a total of 200 pages. A Notice of
8 Transmission of Record on Appeal was filed September 23, 2005. A Notice of Completion of
9 Record on Appeal and Notice of Docketing of Appeal was filed September 23, 2005.

10 A transcript of the hearing held on June 22, 2005, with exhibits attached was filed. (CR
11 Exhibits 1-345)

12 The Appellant filed a Request for Oral Argument October 20, 2005.

13 The Appellee filed a Response Brief November 10, 2005.

14 The Appellant filed a Reply Brief November 28, 2005.

15 This Court heard Oral argument on March 24, 2006 at 1:00 p.m. in APL-05-02.

16 The Appellant filed a Supplemental Brief April 10, 2006.

17 The Appellee filed a Supplemental Brief April 10, 2006.

18 The Appellant filed a Motion to Strike Supplemental Brief of Appellee April 24, 2006.

19 ⁸ The district court concluded that the equipment lease and first promissory note meet the definition of a
20 management contract as defined by 25 C.F.R. § 502.15 requiring the approval of the NIGC Chairman
21 pursuant to 25 U.S.C. § 2711(a)(1). The agreements were not approved and therefore are void and of no
22 effect. 25 C.F.R. § 533.7. The limited waiver of sovereign immunity contained with the agreements were,
23 likewise, of no effect, and the separate limited waiver contained in the tribal resolution since it relates to
24 the void agreements, was also of no effect. Since the agreements are unenforceable and void, the
25 severability clause contained therein is of no effect and the covenant of good faith and fair dealing cannot
26 attach to a void agreement. The district court held that the defense of sovereign immunity was thus
27 available to the Defendant Sac and Fox Nation and Sac and Fox Business Enterprise and was
28 jurisdictional. (CR 1345)

1 The Appellee filed a Response to Appellant's Motion to Strike Supplemental Brief of
2 Appellees May 4, 2006.

3 This Court entered a Memorandum Opinion dated June 9, 2006, remanding the case to
4 the district court for further proceedings.

5 A letter dated July 23, 2007 from the Appellee requested that NIGC take final agency
6 action to determine whether the equipment lease constitutes a management contract.

7 A letter dated September 28, 2007 from NIGC indicated that it would consider the
8 request.

9 The Appellant filed a Petition for Writs of Prohibition and Mandamus and Request for
10 Emergency Relief on November 28, 2007. (Case No. APL-07-02)

11 On November 28, 2007, this Court entered an order denying the Appellant's Emergency
12 Writ of Prohibition requesting a stay of the district court hearing scheduled for December 4,
13 2007. A continuance of the Hearing set for December 4, 2007 was granted until December 14,
14 2007 at 9:30 a.m.

15 The Appellant filed an Application for Leave to File Reply Brief dated December 20,
16 2007.

17 On December 3, 2007, this Court entered an Order superseding the Order of November
18 28, 2007, staying the proceedings of the district court, requiring a response to be filed no later
19 than 3:00 p.m. on Friday, December 14, 2007, disallowing a rebuttal brief, and setting oral
20 argument for December 17, 2007, at 11:00 a.m.

21 The Appellee filed a Response and Objection to Appellant's Petition for Writs of
22 Prohibition and Mandamus and Request for Emergency Relief on December 14, 2007.

23 An Unopposed Motion for Earlier Setting or Continuance of Oral Argument was
24 submitted December 14, 2007.

25 This Court heard Oral argument on January 14, 2008 at 11:00 a.m. in APL-07-02.

26 This Court entered a Memorandum Opinion which was filed July 1, 2008 regarding the
27 Petition for Writs of Prohibition and Mandamus and Request for Emergency Relief. The Opinion
28 denied the Petition and remanded the case to the district court. (CR 1031-1032) This Court found

1 that the trial court's denial of the Motion to Stay was within its judicial discretion and the relief
2 sought from this Court was interlocutory in nature and suited for the district court.⁹

3 The Appellee filed on April 3, 2008, an Advice to the Court of the National Indian
4 Gaming Commission Final Ruling dated March 26, 2008 from Philip Hogan, Chairman.

5 The Appellant filed a Response to the Decision of Chairman of NIGC on April 4, 2008.

6 The Appellee filed an Objection to the Appellant's Response to the Decision of Chairman
7 of NIGS on April 8, 2008.¹⁰

8 The Appellee filed a Motion for Leave to Object to the Appellant's Response to the
9 Decision of Chairman of NIGC on April 8, 2008.

10 This Court entered a court minute/order denying the Appellee's Motion to Tax Attorney
11 Fees and Costs dated October 13, 2008.

12 The Appellant filed a Notice of Appeal November 5, 2008. The Appellant filed a brief on
13 January 9, 2009.

14 The Appellee filed a Response Brief on February 17, 2009

15 The Appellant filed a Reply Brief on March 9, 2009.

16 ⁹ On November 20, 2007, the district court held a hearing upon the Plaintiff's Motion to Stay
17 Proceedings Pending Decision by the National Gaming Commission arguing that the NIGC had
18 jurisdiction to rule upon the issue of whether or not the Equipment Leases between the parties constituted
19 a management contract and thereby waived the trial sovereign immunity. The district court denied the
20 Motion to Stay and held that the district court could determine whether sovereign immunity had been
21 waived and issues of federal law.

22 ¹⁰ The decision of Philip N. Hogen, Chairman, NIGC, dated March 26, 2008 found that the Equipment
23 Lease and Promissory Notes between the parties were disapproved advising the parties that management
24 contracts that have not been approved by the Chairman in accordance with NIGC regulations are void. 25
25 C.F.R. § 533.7. The decision enclosed a letter dated August 11, 2004 from Penny J. Coleman, Acting
26 General Counsel, NIGC, concluding that the agreements between the parties constituted a management
27 contract requiring approval of NIGC's chairman, and that an unapproved gaming management contract is
28 void and no action should be taken under it. (CR 70-73 Coleman letter)

1 The Appellee filed a Notice of Supplemental Authority on January 13 and 15, 2010,
2 attaching a decision of the United States District Court for the Western District of Wisconsin,
3 Well Fargo Bank, N.A. v. Lake of Torches Economic Development Corporation, Case No. 98-
4 CV-768. The Appellee made a request for oral argument.

5 The Appellee filed a Notice of Supplemental Authority June 1, 2010, attaching a decision
6 of the United States District Court for the Northern District of California, Elem Indian Colony of
7 Pomo Indians v. Pacific Development Partners X, LLC, Case No. C-09-1044-CRB, slip copy
8 2010 WL 2035331.

9 The Appellee filed a Notice of Supplemental Authority February 8, 2011 attaching the
10 Appellant's Motion to Remove Stay in Case No. 08-CV-00698-HE, pending in the United States
11 District Court for the Western District of Oklahoma.

12 The Appellee filed a Notice of Supplemental Authority April 27, 2011 attaching the
13 federal court's denial of the Appellant's Motion to Remove Stay in Case No. 08-CV-00698-HE,
14 pending in the United States District Court for the Western District of Oklahoma.

15 ANALYSIS

16 In its Notice of Appeal, the Appellant argues numerous errors in the district court's
17 judgment. The Appellant argues that the district court (1) erred in concluding the equipment
18 lease was a management contract; (2) erred in granting summary judgment; (3) erred in limiting
19 discovery after September 1, 2004; (4) erred in not addressing the covenant of good faith and fair
20 dealing; (5) erred in not giving effect to the severability clause in the equipment lease; (6) erred
21 in failing to find that the NIGC acted beyond statutory authority; (7) erred in failing to find that
22 NIGC regulations defining management contracts are void for vagueness and arbitrary; (8) erred
23 by finding the Appellees were entitled to special treatment due to sovereign immunity; (9) that
24 the judgment is not supported by substantial evidence; (10) that the judgment is arbitrary and
25 capricious; and (11) that the district court erred in relying upon NIGC final order.

26 Despite all the issues raised by Appellant, this Court finds that the dispositive issue is
27 whether the district court erred in its determination that NGC's equipment lease agreement and
28 promissory notes constitute a management agreement that is void under the IGRA and the NIGC

1 regulations for not being approved by the NIGC Chairman. On that dispositive issue, this Court
2 affirms the district court's determination.

3 The dispute arises out of an equipment lease and promissory notes between the parties, a
4 tribal nation, and a non-tribal entity, in conjunction with the construction and operation of a
5 casino. The NIGC determined that the lease and note constituted an unapproved management
6 contract under the Indian Gaming Regulatory Act and therefore void and unenforceable. The
7 question before the district court was whether it had proper jurisdiction over the action and
8 whether the limited waiver of sovereign immunity contained within the tribal resolution and the
9 agreements were enforceable to establish jurisdiction? The district court found that the Appellee
10 Nation had not waived its sovereign immunity and that the agreements were void and
11 unenforceable. Further, the district court found that the tribal resolution enacted for the purpose
12 of the agreement was therefore also null and void and of no effect, and dismissed the complaint.

13 The issue before us is whether the district court properly granted the motion for summary
14 judgment dismissing the underlying case based upon lack of jurisdiction over the Appellee
15 Nation.

16 This Court finds that the district court properly dismissed the action based upon lack of
17 jurisdiction, and further finds that there are no issues of material fact barring summary judgment,
18 and that the Nation is entitled to judgment as a matter of law.

19 Findings of Fact

20 The parties, a tribal nation and a non-tribal entity, entered into an equipment lease on
21 August 8, 2003 (CR 5-21, 299-315, 1085-1103) and two (2) promissory notes. An amendment to
22 the equipment lease was prepared but not signed by both parties. (CR 22-23, 316-317) On
23 August 8, 2003 a promissory note was signed for \$521,768.00, (CR 24-27, 318-321, 1104-1107),
24 and on April 28, 2004 a promissory note was signed for \$20,000.00. (CR 28-31, 322-325). A
25 copy of the check for the \$20,000.00 note was provided dated May 24, 2004. (CR 32, 326) The
26 parties agreed to the jurisdiction of the Sac and Fox Nation's courts. A limited waiver of
27 sovereign immunity was included in the equipment lease (paragraph 9.1 and 9.2) and in two (2)
28 promissory notes (paragraph 3.5) in accordance with a Resolution of the Governing Council,
SF/GC 03-06 dated July 19, 2003. (CR 92-94) During the course of the proceedings, the parties

1 settled the promissory notes and the promissory notes were no longer part of the complaint. (CR
2 327-328)

3 The equipment lease was submitted to NIGC by letter dated August 14, 2003.¹¹ (CR 963)
4 The casino off Interstate Highway 40 in Shawnee, Oklahoma was opened July 31, 2004. A letter
5 from Penny J. Coleman, Acting General Counsel, NIGC dated August 11, 2004 set forth that the
6 agreements constituted a management contract and required approval of the NIGC's Chairman
7 and requested submission of documentation set forth in 25 C.F.R. Sec. 533.3 within twenty (20)
8 days. (CR 70-73, 1111-1114) On August 23, 2004, the Nation asked NGS to remove its gaming
9 machines from the casino. (CR 1119)

10 On July 23, 2007, the Nation submitted documentation requesting the NIGC to decide
11 whether the agreements constituted a management contract. (CR 922-923, 964-965) NGS
12 responded on August 9, 2007. On September 28, 2007, Penny J. Coleman, Acting General
13 Counsel for NIGC, asked the parties to submit documentation within fifteen (15) days. (CR 820-
14 822, 975-976) On October 4, 2007, the Nation responded asking for a final determination. (CR
15 977-981) A letter dated October 12, 2007, granted NGS an extension of time to October 31,
16 2007. (CR 982)

17 On March 26, 2008, Philip Hogan, Chairman of NIGC disapproved the agreements
18 attaching the Coleman letter. (CR 994-1004, 1120-1126) On May 22, 2008, a NIGC Final
19 Decision and Order was issued affirming the disapproval of the equipment lease and promissory
20 notes. (CR 1005-1026, 1127-1145)

21 Conclusions of Law

22 The facts outlined above and presented by both parties are undisputed. The parties
23 entered into an equipment lease and promissory notes for the purpose of operating a casino. The
24 equipment lease and promissory notes were submitted to NIGC for approval which was never
25 given. The parties were notified in writing by NIGC that the agreements were management
26 agreements in relationship to the provisions granting the non-tribal entity management powers
27 over the gaming facility operations. The agreements required approval of the NIGC Chairman
28

¹¹ Pursuant to 25 C.F.R. § 533.4, the NIGC was required to act within 180 days of the submission.

1 which was never given, and therefore such agreements were null and void and unenforceable. All
2 provisions contained in the null and void agreements are unenforceable. Any tribal resolution
3 made for the sole purpose of entering into the agreements is moot and of no effect due to the null
4 and void agreements.

5 In reviewing this case *de novo*, this Court finds that there is no genuine issue as to any
6 material fact that would prevent the moving party from judgment as a matter of law even when
7 drawing reasonable inferences in the light most favorable to the nonmoving party. SF Civ. P.
8 Title 6, § 905. Fed. R. Civ. P. 56(c). *Sanders v. Southwestern Bell Telephone, L.P.* 544 F.3d
9 1101, 1104-1105 (10th Cir. 2008), quoting *Simms v. Oklahoma ex rel. Dep't of Mental Health &*
10 *Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999)

11 Discovery

12 Upon review of the record in this case, reasonable discovery was allowed by the district
13 court, and the district court properly used its discretion to rule upon relevancy to the underlying
14 pleadings and reasonable limitations in scope to address the issue(s) before the district court. We
15 do not find that the district court abused its discretion or was arbitrary in its rulings. SF Civ. P. §
16 401, et al. Fed. R. Civ. P. 26. Furthermore, we do not find that the parties were denied access to
17 relevant facts necessary to a fair presentation of their case.

18 Sovereign Immunity/Jurisdiction

19 “As a matter of federal law, an Indian tribe is subject to suit only where Congress has
20 authorized the suit or the tribe has waived immunity.” This immunity applies to the tribe’s
21 commercial as well as governmental activities. *Kiowa Tribe of Oklahoma v. Manufacturing*
22 *Technologies*, 523 U.S. 751, 754-55 (1998). Here, the parties, a tribal entity and a non-tribal
23 entity, agreed to enter into the equipment lease for the purpose of conducting business relating to
24 gaming operations. The Nation passed a resolution in which they agreed to a limited waiver of
25 sovereign immunity in order to conduct business. The parties further put provisions in the
26 equipment lease addressing the limited waiver of sovereign immunity at paragraphs 9.1, and 9.2.
27 (CR 295-296) The district court determined that the equipment lease was a void agreement and
28 therefore the limited waiver of sovereign immunity contained in the equipment lease authorized
by the resolution of the Nation was of no effect. Under federal law, absent the Chairman of

1 NIGC's approval of the management agreement, the agreements are void, 25 U.S.C. § 2711(a)(1)
2 and (3); 25 C.F.R. § 533.7. Since the agreements were not approved by NIGC, under federal law,
3 the agreements are void and of no effect. We find that the limited waiver of sovereign immunity
4 cannot attach to a void agreement, and the tribal resolution made for the purpose of entering into
5 such agreement is moot and unenforceable absent the agreements on which the resolution
6 applies.

7 Management Contract/Void Agreement

8 In 1988, Congress passed the Indian Gaming Regulation Act ("IGRA") establishing "a
9 statutory basis for the operation of gaming by Indian Tribes as a means of promoting economic
10 development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Regulations
11 have been promulgated to implement the provisions of IGRA. IGRA was also enacted to shield
12 tribes from organized crime and other corrupting influences, to ensure the tribe was the primary
13 beneficiary of the gaming operation, and ensure the gaming was conducted fairly and honestly.
14 25 U.S.C. § 2702(2). IGRA sets forth federal oversight of contracts between tribes and non-tribal
15 entities for the management of tribal gaming operations. 25 U.S.C. §§ 2702(3) and 2704(a).
16 Tribes may enter into contracts for the management of gaming operations, 25 C.F.R. § 502.15,
17 only with the approval of the National Indian Gaming Commission ("NIGC") chairman. See 25
18 U.S.C. § 2711(a)(1). See also 25 U.S.C. §§ 2705(4), 2710(d)(9), 2711(b), (e). Unapproved
19 management contracts are void. See 25 C.F.R. § 533.7; *First Am. Kickapoo Operations, L.L.C. v.*
20 *Multimedia Games, Inc.* 412 F.3rd 1166, 1176 (10th Cir. 2005) ("Lacking the formality of NIGC
21 approval, an agreement to manage does not become a contract: it is void."). See *Wells Fargo*
22 *Bank, N.A. v. Lakes of the Torches Economic Development Corporation*, Case No. 98-CV-768,
23 (W.D. Wisconsin, 2010) A gaming operation that violates any provision of IGRA or NIGC
24 regulations is subject to closure and fines up to \$25,000.00 per violation. 25 U.S.C. §§
25 2713(a)(1), (b)(1).

26 The IGRA regulations define '*management contract*' as "any contract, subcontract, or
27 collateral agreement between an Indian tribe and a contractor or between a contractor and a
28 subcontractor if such contract or agreement provides for the management of all or part of a
gaming operation. 25 C.F.R. § 502.15. A '*collateral agreement*' is defined as "any contract,

1 whether or not in writing, that is related either directly or indirectly, to a management contract,
2 or to any rights, duties or obligations created between a tribe (or any of its members, entities,
3 organization) and a management contractor or subcontractor (or any person or entity related to a
4 management contractor or subcontractor.” 25 C.F.R. § 502.5. The regulations also define
5 ‘primary management official’ as any person who has the authority to “set up working policy for
6 the gaming operation.” 25 C.F.R. § 502.19(b)(2). The regulations demonstrate that a “necessary
7 condition for a management contract is that it grant to a party other than the tribe some authority
8 with regard to a gaming operation.” *Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp.
9 2nd 659, 665 (W.D. La. 2005) (citing *First Am. Kickapoo*). See *Wells Fargo Bank, N.A. v. Lakes*
10 *of the Torches Economic Development Corporation*, Case No. 98-CV-768, (W.D. Wisconsin,
11 2010)

12 Here, the promissory note dated August 3, 2003 in the amount of \$521,768.00 was
13 determined to be a collateral agreement as it related directly to the gaming operation. At
14 paragraph 3, Warranties and Representation of the Maker, 3.5 sets forth that the Maker will
15 waive its sovereign immunity relating to the Note as provided in the tribal Resolution attached to
16 the agreement which is a material part and incorporated. Paragraph 10 of the Note sets forth
17 provisions relating to the suspension of gaming operations. We find that the language contained
18 in the promissory note references its application to the gaming operation.

19 The NIGC issued bulletins to provide guidance on issues that may arise under IGRA.
20 NIGC Bulletin 93-3 sets forth that “if a tribe or contractor is uncertain whether a gaming-related
21 agreement requires the approval of either the NIGC or the BIA, they should submit those
22 agreements to the NIGC.” NIGC Bulletin 94-5 gives guidance to tribes and entities as to what
23 constitutes a management contract, and sets forth the potential risk of acting pursuant to a
24 management contract that has not been approved by the NIGC Chairman. NIGC describes
25 management to include activities such as ‘planning, organizing, directing, coordinating, or
26 controlling’. (CR 1326-1328) A management contract must satisfy the standards of 25 C.F.R.
27 Part 531 and § 533.3.

28 Here, the district court found that the Final Order of NIGC, now on appeal, is not *res*
judicata on the issue of whether the agreements constitute a management agreement, nor is the

1 Final Order entitled to Chevron deference as requested by the Appellee. See Chevron U.S.A. Inc.
2 v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The district court found that
3 the agreements while not ambiguous contained terms whose meaning was unique to the Indian
4 gaming business environment. The district court allowed the report of Thomas C. Nelson as
5 expert testimony to assist in understanding of the terms in the agreement contained in the
6 Appellant's Objection to Appellee's Motion to Dismiss. (CR 1146-1154)

7 The district court found that the question of whether the equipment lease and promissory
8 notes constituted a management agreement within the meaning of IGRA was a question of law
9 and that there were no material issues of fact requiring resolution. (CR 1340) Citing Sac and Fox
10 Code, Title 6 § 905(c), and Deep Investments, Ltd. V. Jackson Hole Ski Corp., 938 F. 2d 1105,
11 1112 (10th Cir. 1991).

12 The district court found that the Coleman letter was incorporated by reference and
13 attachment to the NIGC Final Order, was not hearsay and would be considered by the court. (CR
14 1340) The district court found that 25 C.F.R. § 502.15 defining management contract was
15 consistent with the legislative intent evidenced by the cited legislative history and that NIGC
16 does have statutory authority through its chairman for the approval or disapproval of agreements
17 for the providing of gaming machines to an Indian gaming facility citing 25 U.S.C. § 2705(a),
18 and Senate Report No. 100-446, August 3, 1988, 1988 U.S. Code Congressional and
19 Administrative News p. 3071. (CR 1340-1341)

20 The district court found that the application of the plain-meaning understanding of the
21 term 'management' was consistent with NIGC Bulletin 94-5 in analyzing the agreements was
22 appropriate.

23 The district court found that the promissory notes were collateral agreements as they
24 related and were made for the gaming operation and contain provisions of the lease agreement.
25 (CR 1342) 25 C.F.R. § 502(5).

26 The district court found that the language in the equipment lease paragraph 1.1 requiring
27 that 80% of the gaming machines be by NGS design and the restriction on selection of the other
28 20% of machines on the floor without NGS approval evidenced the authority to exercise a
management function by NGS as contemplated in 25 C.F.R. § 502.15. The district court found

1 that the provision giving NGS the reservation of the right to join in the selection of a certified
2 public accountant to conduct an annual audit of the gaming operation in paragraph 16.4 gave
3 NGS management responsibility. The district court found that the provision in paragraph 6
4 whereby NGS was given veto authority over the choice of 'cash accounting system' constituted
5 an exercise of management authority. (CR 1343)

6 The district court deferred to the conclusion of NIGC where in paragraph 15, the
7 provision for rent payments were based upon a percentage of machine revenues mirrored terms
8 in management contracts and was consistent with fees paid casino managers. (CR 1344)

9 The district court analyzed the equipment lease under federal law including IGRA and
10 determined that the equipment lease gave NGS management authority over parts of the gaming
11 operation of the Nation, and that therefore it constituted a management agreement and required
12 approval of the NIGC chairman under 25 C.F.R. § 502.15 and 25 U.S.C. § 2711(a)(1). The
13 district court found that the equipment lease was void and of no effect citing 25 C.F.R. § 533.7
14 and the limited power waiver of sovereign immunity contained within the agreements was of no
15 effect due to the void agreement. The district court further held that the severability clause
16 contained in the void agreement had not effect, and likewise the covenant of good faith and fair
17 dealing did not attach to a void agreement.

18 In review of the equipment lease, in the recitals paragraph B. of the equipment lease (CR
19 290), the parties set forth that the equipment lease "is intended to comply with the Indian
20 Gaming Regulatory Act (25 U.S.C. § 2701 et seq.)," and that "the parties intend this lease to
21 constitute an Equipment Lease and not a Management Agreement used under IGRA and the U.S.
22 Department of the Interior, Bureau of Indian Affairs."

23 In the agreement paragraph 1.1 it sets forth, "[t]he exact mix of the machines that NGS
24 will make available will be agreed upon by the parties" referencing "the machines will be a mix
25 of approximately eighty percent (80%) of machines, which are NGS design and approximately
26 twenty percent (20%) of machines from other manufacturers which are agreed upon by the
27 parties." We find that this provision allows NGS to control the choice of machines on the floor
28 and thus manage part of the gaming operation. We agree with the district court that this provision
exhibits a management function for a critical aspect of the Nation's gaming operation. The NIGC

1 found that provision set forth an essential management function and ‘the Nation’s ability to make
2 decisions regarding theme, placement, displays, and promotions is limited when they cannot
3 freely choose any of the games on its floor.’ (CR 333) We find that this provision allows NGS to
4 plan, organize, direct, coordinate, control and manage the gaming operation.

5 Paragraph 1.2 of the agreement, sets forth that “NGS may lease such additional
6 equipment to Enterprise pursuant to this Lease *as agreed upon by the parties* from time to time.”
7 (emphasis added) We find that this provision also is an example of giving NGS management
8 control regarding the lease of additional equipment. We find that this provision allows NGS to
9 plan, organize, direct, coordinate, control and manage a part of the gaming operation.

10 The agreement sets forth that NGS and the Nation will select an independent certified
11 public accountant to perform an annual audit for the gaming operation at paragraph 16.4. (CR
12 299) IGRA requires each tribe to provide an annual audit of its gaming operation by an
13 independent certified public accountant. 25 U.S.C. § 2710(b)(2)(C). This is a management
14 function and allowing NGS to make a choice in auditor amounts to a delegation of responsibility
15 and management. We find that this provision allows NGS to plan, organize, direct, coordinate,
16 control and manage a part of the gaming operation.

17 In section 6 of the agreement under the title “Cash Accounting System”, NGS has a
18 power over the Nation’s choice of slot accounting system and to “audit the accounting figures
19 periodically.” It further states that “Enterprise shall not use a different cash accounting system
20 without NGS’s prior consent.” (CR 294) In addition, “[e]mployees will be trained by NGS on
21 the cashier/vault system”, and “NGS will help establish daily, weekly, monthly, and annual
22 revenue reports that will serve as a check and balance for Enterprise’s accounting system.” NGS
23 is granted management authority over gaming operations. We find that this provision allows
24 NGS to plan, organize, direct, coordinate, control and manage a part of the gaming operation.

25 Under section 15 entitled “Rent”, Enterprise agrees to pay rent during the first twelve
26 (12) months at thirty percent (30%) of the net win or drop from each and every machine, and
27 during the next twenty four (24) months, at twenty five percent (25%), and thereafter at twenty
28 five percent (25%). (CR 298) Under 15.3, net win or drop “shall be determined by calculating
the total receipts received by or in connection with such unit of Equipment less any prizes paid

1 by or in connection with said unit.” The provision refers to gross revenues and not net revenues
2 as defined under IGRA. 25 U.S.C. § 502.16. According to NIGC, ‘NGS stands to received 25-
3 30% gross revenues from 80% of the machines at the gaming operation, a figure that closely
4 resembles the kinds of fees paid to casino managers.’ (CR 335) We agree that these provisions
5 are consistent with management contracts as well.

6 We find and conclude that the equipment lease provides for management authority of
7 NGS over part and/or all of the Nation’s gaming operation. Since the management agreement
8 was never approved by the NIGC Chairman, it is null and void, giving none of the provisions
9 therein enforceability. The equipment lease has no legal effect.

10 Severability Clause/Void Agreement

11 The district court held that the severability clause contained in the void equipment lease
12 had no effect. The severability clause cannot be enforced as it has no effect in the void
13 equipment lease. This is not a situation involving only part of the equipment lease being invalid
14 or unenforceable wherein a severability clause could be applied to save the enforceable
15 provisions. Under federal law, absent the Chairman of NIGC’s approval of the management
16 agreement, the Agreements are void, 25 U.S.C. §§ 2711(a)(1) and (3); 25 C.F.R. § 533.7, and the
17 severability clause contained in the equipment lease is in itself void and without effect. The
18 severability clause cannot be separated out of the void agreement, because the null and void
19 agreement has not legal effect as if it did not exist. Because of this, there can be no legal
20 modification of the equipment lease. *A.K. Management Co. v. San Manuel Band of Mission*
21 *Indians*, 789 F. 2d 785, 786, 789 (9th Cir. Cal. 1986), a pre-IGRA management contract that had
22 not been approved by BIA was ‘null and void.’

23 Covenant of Good Faith and Fair Dealing/Void Agreement

24 The district court held that the implied duty of good faith and fair dealing did not attach
25 to the void equipment lease. Because a void contract is of no legal effect, the parties have no
26 duty to perform with regard to the void equipment lease. Furthermore, under the void contract,
27 the parties have no duty to seek revision of the void equipment lease. Likewise, under federal
28 law, absent the Chairman of NIGC’s approval of the management agreement, the Agreements
are void, 25 U.S.C. §§ 2711(a)(1) and (3); 25 C.F.R. § 533.7. The parties admit in their pleadings

1 and oral argument that the equipment lease was negotiated at great length with the advice of
2 counsel from both parties, both parties intended to have a binding and enforceable agreement,
3 and the parties would not have entered into a void contract. The evidence establishes that the
4 parties did enter into a void contract of which both should have known at the time of signature.
5 The fact that Appellant, which is in the gaming business, proceeded without NIGC approval
6 establishes, in our view, that it knowingly intended to assume the risk of entering into a void
7 agreement. Moreover, the intent of the parties is not at issue here, the plain language of the
8 equipment lease establishes a management contract with management duties of planning,
9 organizing, directing, coordinating, and control of a non-tribal entity over a gaming operation,
10 requiring NIGC approval. "Courts will not enforce or aid in the enforcement of a contract made
11 in violation of law, *nor grant relief* at the instance of a plaintiff who, in order to prevail, is
12 compelled to rely on an illegal contract." (emphasis added) *An-Cor v. Reheman*, 835 P.2d 93,
13 95, 1992 OK 109, § 11.

14 The Appellant cites *Rita, Inc. v. Flandreau Santee Sioux Tribe*, 798 F. Supp. 586, 589
15 (D.S.D. 1992) in support of its argument that the Appellee is bound by the covenant of good faith
16 and fair dealing, however it will be distinguished from the case at hand, in that the BIA indicated
17 the agreement met the requirement for approval except for background investigations and a
18 change to a quit claim deed. Here, we have no approval or partial approval by the regulatory
19 entity. We find that the covenant of good faith and fair dealing does not apply or attach to a void
20 and unenforceable agreement.

21 Void for vagueness/Federal Regulation

22 While it is the federal court's jurisdiction to ultimately determine whether regulations are
23 void for vagueness, in our analysis of the case we do not find the definition of management and
24 management contracts in IGRA as vague. The ordinary meaning of the regulations could be
25 understood by a reasonable average person and a person of common intelligence relating to any
26 contract that provides for the "planning, organizing, directing, coordinating, or controlling" of
27 any part of the tribal gaming operation by anyone other than a tribe as a management contract
28 requiring NIGC approval under IGRA. 25 U.S.C. § 2711(f). See 25 C.F.R §§ 502.15 and 502.5.
See also NIGC Bulletin No. 94-5. The equipment lease is not just for the sale or lease of vending

1 machines as alleged by the Appellant. The equipment lease contains provisions wherein NGS, a
2 non-tribal entity, has control over management decisions involving a part of the gaming
3 operation as outlined above. If the equipment lease was just a vendor agreement for the sale or
4 lease of vending machines, we would not be at this juncture. Here, the 'lease' of gaming
5 equipment is intertwined and interwoven with the management control by NGS over part or all
6 of the gaming operation making it a management contract.

7 For the reasons cited herein, we find that no issues of material facts exist and that as a
8 matter of law the agreement is void and unenforceable. Neither severance, nor good faith applies
9 to a void contract, and the district court is affirmed.

10 Conclusion

11 IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the equipment
12 lease agreement on which this matter is based, is an unapproved management contract under
13 federal law and is void, of no legal effect, and unenforceable.

14 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is no valid
15 waiver of sovereign immunity to establish jurisdiction over the Appellee, Sac and Fox Nation
16 and Appellee, Sac and Fox Nation Enterprise Board.

17 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Notice of Appeal
18 of the Appellant's prayer for relief is DENIED, and the Order of the district court dated October
19 16, 2008 dismissing the case is hereby AFFIRMED.

20 Dated and signed this 16th day of June, 2011.

21 
22 Justice Barbara A. Dakin

23 Concurring:

24 Chief Justice Joe Taylor
25 Justice Larry K. Lenora
26 Justice Timothy Posey

27 Concurring with exception:

28 Vice Chief Justice O. Joseph Williams: I concur in the Order, except I would further find that
the Promissory Note, dated August 8, 2003, constitutes a Collateral Agreement as defined under
25 C.F.R. § 502.5.