UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

City of Duluth,

Plaintiff,

v. Case No. 0:09-cv-02668-SRN-LIB

Fond du Lac Band of Lake Superior Chippewa,

Defendant.

Defendant Fond du Lac Band of Lake Superior Chippewa's Memorandum in Support of Motion for Relief from Consent Order, Summary Judgment Order, and Order Compelling Arbitration under Rules 60(b)(5) and 60(b)(6)

The Fond du Lac Band of Lake Superior Chippewa is between a rock and a hard place. In 1994, this Court signed a Consent Order making a set of settlement agreements between these parties over the operation and revenues of the Fond-du-Luth Casino in downtown Duluth judicially enforceable. Both the agreements and the Consent Order were explicitly premised on the approval of the National Indian Gaming Commission ("NIGC") that the Agreements did not violate the Indian Gaming Regulatory Act ("IGRA")—approval that the then-newly created agency gave without any analysis after just days of review. As Indian gaming evolved, the NIGC built its expertise in interpreting and applying IGRA, and now, after revisiting the 1994 Agreements, the NIGC has withdrawn its approval of the Agreements. But it has also gone a step farther. The NIGC has issued a Notice of Violation of the Indian Gaming Regulatory Act to the

Band, and in a section of the NOV entitled "Measures Required to Correct the Violation," the NIGC Chairwoman directs:

> The Band must cease performance under the 1994 Agreements of those provisions identified in this NOV as violating IGRA. This applies to the entire 42-year term of the 1994 Agreements.[1]

But of course, the Consent Order, predicated on the NIGC's approval, still remains in effect and directs the Band's performance under the Agreements. Put simply, the Band literally *cannot* comply with both the Consent Order and the NOV. To relieve the inequity that this extraordinary change in circumstance has caused, the Court should relieve the Band from the Consent Order (and the later, related orders issued in this case) under Rules 60(b)(5) and (6).

Factual Background

The details of this dispute are set forth in numerous prior filings, so the Band includes only a brief review of the facts relevant to this motion:

1. In 1986, the Band and the City of Duluth entered into a series of agreements creating a joint venture to operate a gaming facility on tribal trust land located within the City. The "Fond-du-Luth Casino," opened the same year.

2. In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA").[2] The statute applied to all Indian-gaming operations, including pre-existing operations like Fond-du-Luth,[3] and required, *inter alia*, that Indian tribes must have the sole proprietary interest in, and sole control over, legal Indian gaming.[4]

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[1] July 12, 2011 NOV-11-02, *Fond du Lac Band of Lake Superior Chippewa,* attached at Exhibit A ("Notice of Violation"), at 18.

[2] 25 U.S.C. §§ 2701 *et seq.*

[3] Congress made clear that it intended to apply the statute retroactively to pre-existing arrangements. For example, the Act required tribes with existing operations to submit pre-existing tribal gaming ordinances and management contracts to the National Indian Gaming Commission, and, where necessary, to modify the ordinances and contracts to conform to the statute's requirements. 25 U.S.C. §§ 2712(b)(3), (c)(3). Further, in

3. Because it believed the parties' joint venture arrangement had been made illegal by IGRA, but could not convince the City to renegotiate a new agreement, in 1989 the Band filed a declaratory judgment action against the City in this Court.[5]

4. The parties filed cross-motions for summary judgment, but Judge Magnuson declined to reach the merits of the dispute or examine whether the agreements conformed to IGRA. Instead, at the City's urging,[6] Judge Magnuson noted that any judgment would "not terminate the controversy because the Chairman [of the National Indian Gaming Commission] retains the ability to review the agreements," and concluded that "the public interest is best served by allowing the Federal regulatory authority established by the IGRA [*i.e.*, the NIGC] to review the gaming operation and make its recommendation."[7] Judge Magnuson dismissed the action without prejudice to allow the NIGC to review the contracts.[8]

5. In accordance with the Court's ruling, the Band sought expedited review of the agreements before the NIGC, and the City submitted a detailed response. The then-Chairman of the NIGC issued a letter to the parties concluding that the agreements violated IGRA's requirement that the Band have the sole proprietary interest in the gaming operation.[9] The letter indicated that a formal enforcement action (which could result in fines and closure of the casino) would be forthcoming, but afforded the parties a brief window of time to negotiate a resolution that would avoid this consequence.

6. Faced with the threat of closure, the Band and City negotiated a new set of agreements (collectively called "the 1994 Agreements"). These were intended to shift ownership and control of the Casino operations to the Band, but retained a revenue-sharing arrangement and certain measures of control for the City.

7. The parties submitted the agreements to the NIGC for approval, and just three days later, on June 16, 1994, the NIGC's then-Chairman informed the parties of the agency's conclusion that the revised agreements "return[ed] full ownership and control of the Fond du Luth Casino to the Band and [were] consistent with the

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passing IGRA, the Senate Committee noted its explicit consideration of and express justification for the statute's retroactivity. Sen. Rep. No. 446, 100th Cong., 2d Sess. (1988), at 15.

[4] *See* 25 U.S.C. 2710(b)(2)(A).

[5] Complaint in Civ. No. 5:89-0163, Dkt. 10-10.

[6] *Fond du Lac Band of Lake Superior Chippewa Indians v. City of Duluth*, Civ. No. 5:89-0163, Mem. & Order (D. Minn. Dec. 26, 1990), Dkt. 10-11 at 1.

[7] *Id.* at 5, 6.

[8] *Id.*

[9] Sept. 24, 1993 Letter from NIGC Chair A. Hope to Chairman Peacock and Mayor Doty, Dkt. 11-1.

requirements of IGRA."[10] The Chairman also sent a letter, titled "Report and Recommendation of the National Indian Gaming Commission," to this Court expressing approval of the 1994 Agreements.[11]

8. To dispose of the earlier claims, the parties commenced a new action and memorialized the renegotiated agreements in a proposed "Stipulation And Consent Order."[12] That document recited a brief history of the arrangement and dispute, incorporated the 1994 Agreements as the terms of the proposed Consent Order, and specifically noted that "[t]he National Indian Gaming Commission has reviewed the 1994 Agreements and has concluded that these agreements are in conformance with the Gaming Act."[13]

9. The new case was initially assigned to Judge Rosenbaum, but was reassigned to Judge Magnuson on July 27, 1994.[14] Two days later, on July 29, Judge Magnuson signed the prepared "Order" portion of the Stipulation, without any modification or explanation.[15] The Court did not conduct an independent analysis of the terms of the Agreements or their propriety under IGRA.[16]

10. Under the 1994 Agreements (and so under the Consent Order), the parties reorganized the structure of the Fond-du-Luth arrangement to technically eliminate the joint venture between the parties. But the 1994 Agreements continued a series of ongoing obligations, including:

    a. Requiring the Band give the City a substantial portion[17] of the proceeds generated by the casino as "rent" over a total term of 42 years, even though the Band owns the property and appurtenant structure, and despite the fact that the City made and makes no capital or other contributions to its operation. For the period from 1994 to 2011, the Agreements (and so the

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[10] June 16, 1994 Letter from NIGC Chair A. Hope to Chairman Peacock and Mayor Doty, Dkt. 11-3.

[11] June 20, 1994 "Report & Recommendation of the National Indian Gaming Commission," Dkt. 11-4.

[12] July 29, 1994 Stipulation And Consent Order, *Fond du Lac Band of Lake Superior Chippewa Indians v. City of Duluth*, Civ. No. 5:94-82 (D. Minn.), Dkt. 11-7.

[13] *Id.* at 5, ¶8.

[14] July 27, 1994 Order of Direction to the Clerk of Court for Reassignment of Related Case, *Fond du Lac Band of Lake Superior Chippewa Indians v. City of Duluth*, Civ. No. 5:94-82 (D. Minn.).

[15] Stipulation And Consent Order, *Fond du Lac Band of Lake Superior Chippewa Indians v. City of Duluth*, Civ. No. 5:94-82 (D. Minn. July 29, 1994), Dkt. 11-7 at 6.

[16] *See id.*

[17] By the first half of 2009, the Band had paid the City more than $75 million in "rent." Affidavit of V. Radtke, Dkt. 49.

Consent Order) required the Band to pay the City 19% of gross revenue from slot machine operations.[18] The Agreements required the parties to renegotiate the percentage-of-gross-revenue payment for the 2011-2036 term.[19]

b. Requiring the Band to allow the City to access casino records.[20]

c. Affording the City continued regulatory control over the Casino, including the power of consent over changes to the Band's gaming ordinance and regulations,[21] and the right to review and object to licensing decisions.[22]

11. As the NIGC gained experience and began to publicize its sole-proprietary-interest reasoning, it became apparent that the 1994 Agreements remained problematic under IGRA, but the City again refused to voluntarily renegotiate the Agreements.

12. In light of this refusal, in 2009 the Band's leadership—which has a fiduciary obligation to its members—decided to stop payment under the 1994 Agreements because it believed that continued payment was illegal under IGRA and jeopardized the Band's operation of the Casino.

13. The City promptly initiated this third District Court action to enforce the 1994 Agreements;[23] the Band raised the defense of the illegality of the Agreements and asserted counterclaims against the City.[24]

14. The City quickly filed for summary judgment to establish its claim to 19%-of-gross-revenue payments for 2009, 2010, and 2011.[25] The Court ruled for the City on *res judicata* grounds, relying on the Consent Order.[26] In reaching this conclusion, the Court—like the 1994 Court—refused to address the question of whether the Agreements violate IGRA. Instead, the Court reasoned, "[i]t may be that the arrangement between the Band and the City violates the IGRA in the eyes of the NIGC. But until the NIGC initiates an enforcement action regarding the Fond du Luth Casino and proceeds with that action to a final decision on the

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[18] June 20, 1994 Sublease and Assignment of Gaming Rights Agreement, Dkt. 12-2 at 13, §4.2.
[19] *Id.* at 16, § 4.2.2.5.
[20] June 20, 1994 Tribal-City Accord, Dkt. 12-3 at 9, §16 (1994).
[21] *Id*. at 7, §6(c).
[22] *Id*. at 17, §26(j).
[23] Sept. 29, 2009 Complaint, Dkt. 1.
[24] Oct. 22, 2009 Answer, Dkt. 3.
[25] Dec. 10, 2009 Motion for Summary Judgment, Dkt. 7.
[26] Apr. 21, 2010 Memorandum Opinion & Order, Dkt. 73.

substantive issue of proprietary interest, this Court's view would constitute an advisory opinion."[27]

15. Because the 1994 Agreements were so out of synch with the NIGC's current sole-proprietary-interest analysis, the Band asked the NIGC to review the 1994 Agreements to determine whether they still complied with IGRA,[28] and asked the Court to continue the proceedings in this case to allow time for the NIGC review.[29] As the Band stated in its motion, "[e]ven though the Court ruled that the 1994 Agreements remain in force, *the NIGC can still determine that they are illegal*."[30]

16. The NIGC Chairwoman granted the Band's request to review the Agreements and requested briefing from both the Band and the City.[31] Both parties timely submitted their positions to the NIGC and fully participated in the NIGC's review of the 1994 Agreements.[32]

17. Meanwhile, the Court denied the Band's request for a continuance pending NIGC review,[33] and compelled the parties to submit to binding arbitration to determine the percent-of-gross-revenue payment for the second 25-year term of the 1994 Agreements.[34] Thus, the parties proceeded to prepare for arbitration under the 1994 Agreements while the NIGC continued its review of the legality of those very Agreements.

18. On July 12, 2011, the second day of the arbitration, "[b]ased on a thorough review of the parties' submissions and the 1994 Agreements," the NIGC Chairwoman "conclude[d] that the 1994 Agreements, as written and as implemented, violate IGRA's mandate that the Band retain the sole proprietary interest in and responsibility for its gaming activity[,]"[35] and entered a Notice of Violation ("NOV") against the Band based on violations of IGRA and the agency's implementing regulations.[36] Whereas Chairman Hope's 1994 approval of the agreements "d[id] not contain any substantive analysis of the issues to support his

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[27] *Id.* at 17.
[28] May 17, 2010 Letter from Chairwoman Diver to NIGC Acting Chair Skibine, Dkt. 78-1.
[29] May 17, 2010 Motion for Continuance, Dkt. 75.
[30] *Id.* at 2 (emphasis in original).
[31] *See* October 20, 2010 Letter from Chairwoman Stevens to Chairwoman Diver and Mayor Ness, Dkt. 112.
[32] Notice of Violation, Ex. A at 6.
[33] Sep. 24, 2010 Mem. Op. & Order [Denying Motion to Continue], Dkt. 105.
[34] May 13, 2011 Order [Compelling Arbitration], Dkt. 179.
[35] *Id.* at 7.
[36] 25 U.S.C. §2713(a); 25 C.F.R. §573.3(a).

statement that the agreements were consistent with IGRA[,]"[37] the 19-page single-spaced NOV took pains to detail the NIGC's authority to enforce IGRA, the law regarding the sole-proprietary-interest standard, the history of the parties' relationship, and the offending terms of the Agreements.[38]

19. The NIGC Chairwoman concluded that the 1994 Agreements are illegal because a totality of circumstances under the Agreements afford the City an impermissible proprietary interest in the Fond-du-Luth Casino.[39] Specifically, the Chairwoman found the following aspects of the 1994 Agreements unlawful, both as written and as implemented: [40]

    a. The share of profits taken by the City from 1994 forward, including:

        i. the high amount of the City's ongoing share of gross revenues, which is not commensurate with the services the City provided to the Band;

        ii. the fact that the arrangement is characterized as "rent" even though the Band owns the Casino building on trust land;

        iii. the fact that "rent" payments are available to be spent on the general operations of the City without regard to any provision of services by the City for the Band;

        iv. the absence of any financial or other risk taken by the City;

        v. the fact that the 1994 Agreements do not convey any substantial benefits to the Band; and

        vi. the fact that the Casino receives the same level of municipal services that any other citizen or business located within the City would receive.

    b. The long term of the Agreements (the first term runs from September 30, 1993 until March 31, 2011, and the second from March 31, 2011 until 2036).

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[37] *Id.* at 2. *See also id.* at 5 n.4 (describing that "[a]s part of our review of this matter, NIGC staff members performed a search of Commission records and were unable to locate any analysis associated with [the 1994 Hope] letter.").

[38] *See generally, id.*

[39] *Id.* at 15-18.

[40] *Id*.

c. The requirement that any change in the Band's gaming ordinance or regulations will only be effective after the City has consented in writing, unless the change is required by federal law or tribal-state compact.

d. The requirement that the City be afforded a right to review and object to the Band's decisions regarding licensing of Casino employees.

e. The requirement that the City be afforded access to and a right to review and copy any and all records of the gaming operation.

20. In light of these violations, the Chairwoman directed the Band to "*cease performance under the 1994 Agreements of those provisions identified in this NOV as violating IGRA. This applies to the entire 42 year term of the 1994 Agreements*."[41]

Thus, the Notice of Violation has expressly repudiated the NIGC's approval of the 1994 Agreements—approval that was a basic predicate of both the 1994 Agreements and the Consent Order that memorialized them. Moreover, the Notice of Violation—the *only* decision of either the NIGC or this Court to conduct a detailed analysis of the 1994 Agreements—has found that the 1994 Agreements are illegal under IGRA. Now, under IGRA, if the Band continues to perform even one of the obligations the NOV identifies as unlawful—and even if it does so on the order of this Court—the Band will be subject to sanctions, including substantial fines and possible closure of the Casino. Rule 60(b) is addressed precisely to this sort of circumstance.

[41] *Id.* at 18 (emphasis added).

Argument

A. The Court should relieve the Band from the Consent Order under Rule 60(b).

In her summary-judgment opinion, Judge Montgomery acknowledged that "a consent decree may be reopened under certain circumstances,"[42] and instructed that the proper way to challenge the validity of the 1994 Agreements, which were the subject of the Consent Order, was through a motion under Rule 60(b).[43] The Supreme Court has

> emphasized the need for flexibility in administering consent decrees, stating: "There is no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen."[44]

In this case, we have a definite and unequivocally applicable change in circumstances: the agency approval on which the Consent Order was based has been rescinded, and the Band is subject to substantial fines and closure of its Casino if it complies with the Consent Order. Given the unique nature of this case, the NIGC's issuance of the Notice of Violation constitutes both a change in circumstances justifying relief from the Consent Order under Rule 60(b)(5) and an "extraordinary"[45] case justifying relief under Rule 60(b)(6).

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[42] Summary Judgment Order, Dtk. 73 at 9 (citing *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992)).
[43] *Id.*
[44] *Rufo*, 502 U.S. at 380 (quoting *Railway Employees v. Wright*, 364 U.S. 642, 647 (1961)).
[45] 11 Fed. Prac. & Proc. Civ. § 2864 (2d ed).

1. The NIGC's Notice of Violation constitutes a change in circumstances justifying relief from the Consent Order under Rule 60(b)(5).

To obtain relief under Rule 60(b)(5), the Supreme Court held in *Rufo v. Inmates of Suffolk County Jail* that a movant must establish "that a significant change in circumstances warrants revision of the decree."[46] And under *Rufo*, "[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."[47] That is precisely what has happened here.

In 1993, the Chairman of the newly formed National Indian Gaming Commission notified the Band and the City that the 1986 Agreements that established a joint venture between the City and the Band to own and operate the Fond-du-Luth Casino violated IGRA's sole-proprietary-interest requirement by giving the City of Duluth an actual ownership interest in and control over the Band's gaming activity.[48] With some assistance from NIGC staff, the parties restructured the agreements in an attempt to undo the joint-venture structure created by the 1986 agreements and to give technical ownership and control of the Casino and its gaming activities to the Band while still preserving a substantial revenue stream to the City. And in 1994, three days after their submissions, the NIGC Chairman concluded that the Agreements did not violate IGRA. In particular—but with no analysis—he noted that the agreements "return[ed] ownership

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[46] *Rufo*, 502 U.S. at 383.

[47] *Id.* at 388. *See also White v. National Football League*, 585 F.3d 1129, 1136 (8th Cir. 2009) (quoting *Rufo*); *United States v. Krilich*, 152 F. Supp. 2d 983, 993 (N.D. Ill. 2001) ("A consent decree . . . cannot oblige a party to perform illegal conduct.").

[48] September 24, 1993 Letter from Anthony Hope to Chairman Peacock and Mayor Doty, Dkt. 11-1.

and control of the Fond Duluth [sic] Casino to the Band and [are] fully consistent with the IGRA."[49]

In the intervening 17 years, the NIGC has refined its interpretation of IGRA, and in particular of IGRA's requirement that tribes retain the sole proprietary interest in their casinos.[50] Beginning approximately 10 years ago, the NIGC began to give greater attention to the sole-proprietary-interest rule because it "became more and more concerned about contracts that included egregious terms benefitting outside parties rather than tribes."[51]

In the early 2000s, the NIGC's Office of General Counsel began issuing a series of opinion letters regarding particular transactions and finding that various agreement structures—particularly those involving payment of a percentage of gaming revenues over a long period of time—violated the sole-proprietary-interest requirement. [52] Specifically, the Office of General counsel concluded that where a contractor takes little risk and receives compensation disproportionate to the services provided, the contractor

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[49] June 20, 1994 Report and Recommendation of the National Indian Gaming Commission, Dkt. 11-4, at 2.

[50] IGRA requires that each tribe that wishes to conduct Class II or Class III gaming enact a gaming ordinance, which must be approved by the NIGC Chair, that requires the Indian tribe to "have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). The Fond du Lac Band adopted such an ordinance in 1993, and it was approved by then-NIGC Chairman Anthony Hope. *See* Dkt. 45-5.

[51] Feb. 1, 2005 Letter from Chairman Hogen to Sens. McCain, Dorgan and Inouye, Dkt. 46-3 at 2 (noting that sole-proprietary-interest review had begun approximately six years earlier).

[52] A sample of these letters dating back to 2004 is available at http://www.nigc.gov/Reading_Room/Sole_Proprietary_Interest_Letters.aspx (last visited Jul. 3, 2011). *See also*, NOV, Ex. A at 13 ("Further, since 2003 the OGC issued over 50 legal opinions analyzing the [sole-proprietary-interest] mandate.").

is not receiving a bargained-for fee for services, she is receiving an ownership interest in a tribe's gaming activity.[53] More recently, the Chair of the NIGC has taken enforcement actions based on the sole-proprietary-interest requirement.[54] And most recently of all, Chairwoman Stevens initiated an enforcement action against the Fond du Lac Band for violating the sole-proprietary-interest requirement in both the Band's Gaming Ordinance and IGRA by making "rent" payments to the City on a parcel the Band owns and giving the City too much control over Casino operations.[55]

This evolution of agency interpretation is not unique. As the First Circuit noted, "[e]xperience is often the best teacher, and agencies retain a substantial measure of freedom to refine, reformulate, and even reverse their precedents in the light of new insights and changed circumstances."[56] The NIGC's experience with a myriad of tribal-casino contracts over the past 17 years is what lead it to conclude that Chairman Hope's initial review of the 1994 Agreements was wrong. As Chairwoman Stevens noted in the

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[53] *See, e.g.*, June 5, 2003 Letter from P. Coleman to M. Cypress, Dkt. 46-4, and October 5, 2005 Letter from J. Shyloski to J. Gray, Dtk. 45-11.

[54] *See, e.g.*, Final Decision and Order *In the Matter of Ivy Ong and Carlo Word Wide Operations, LLC*, Dkt. 46-2, and NOV 11-01, *Bettor Racing, Inc. and J. Randy Gallo*, http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2freadingroom%2fenforcementactions%2fflandeausanteesiutribe%2fNOV11-01redacted.pdf&tabid=124&mid=774 (last visited Jul. 20, 2011).

[55] *See* Notice of Violation, Ex. A.

[56] *Davila-Bardales v. I.N.S.*, 27 F.3d 1, 5 (1st Cir. 1994) (citing *Rust v. Sullivan*, 500 U.S. 173, 186-187 (1991) (reviewing INS position on admission of testimony elicited from unrepresented underage persons)). *See also South Shore Hosp. v. Thompson*, 308 F.3d 91,102 (1st. Cir. 2002) (same).

NOV, "the NIGC's application of IGRA's sole proprietary interest requirement has developed over the Agency's existence."[57]

This issuance of the NOV, which directs that "[t]he Band must cease performance under the 1994 Agreements of those provisions identified in this NOV as violating IGRA,"[58] is a significant change in "factual conditions" that justifies modifying the Consent Order under Rule 60(b)(5).[59] To justify relief, the change in factual conditions must have been unanticipated by the parties when they entered into the consent judgment.[60] That is certainly the case here, where at the time the parties entered into the Consent Order, they had the "blessing" of the federal agency with jurisdiction to interpret the statute. Neither party could have foreseen how the NIGC's interpretation of the sole-proprietary-interest requirement would evolve over time.

The Ninth Circuit considered whether post-consent-decree agency action justified relief in *United States v. Asarco Inc.*[61] A group of mining companies had entered into a consent decree with the EPA regarding their liability under CERCLA for cleanup costs in a particular area of Idaho known as "the Box." Two years later, EPA filed a CERCLA action to recover against the same companies for "injury to natural resources" for an area outside the Box, and the companies moved for relief from the consent decree, citing the

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[57] Notice of Violation, Ex. A at 12.
[58] *Id.* at 18.
[59] *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (internal citations omitted) (evaluating changes in facts—the costs of complying with the continuing court order—and the law—in the form of various new opinions from the U.S. Supreme Court).
[60] *Id.* at 216 (concluding that the parties anticipated additional costs to petitioners when they entered the consent judgment, so that the fact that costs actually increased did not justify relief).
[61] 430 F.3d 972 (9th Cir. 2005).

difficulty they faced in paying cleanup costs in the Box now that they were also being required to pay damages for injuries outside it.[62] While the court ultimately denied the companies' 60(b)(5) motion because it found that they had anticipated liability outside the Box at the time they entered into the consent decree, its analysis presumed that EPA's later enforcement action constituted a "change in factual conditions" that would have warranted relief if the companies hadn't actually anticipated it at the time they agreed to the consent judgment.[63]

In another case involving a change in agency interpretation, the Connecticut District Court granted Rule 60(b)(5) relief so that the defendant could comply with the new rules. In *Harrell v. Harder*, a class of welfare recipients obtained a permanent injunction over Connecticut's welfare commissioner to implement the Supreme Court's *Goldberg v. Kelly* decision regarding pre-benefit-termination hearings.[64] Three years later, the federal Department of Health, Education and Welfare ("HEW") promulgated pre-termination hearing procedures that conflicted with the court's injunction, and the state welfare commissioner sought relief from the injunction under Rule 60(b).[65] The court found that the changes in the regulations were "akin to changes in the operative facts of the case," and were therefore "changes in conditions" that "may be sufficient to justify relief under Rule 60(b)(5)."[66] Ultimately, and by "[a]ccording HEW 'the deference due the agency charged with the administration of the [Social Security]

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[62] *Id.* at 977.
[63] *Id.* at 979-980.
[64] 369 F. Supp. 810 (D. Conn. 1974).
[65] *Id.* at 813.
[66] *Id.* at 814.

Act,'"[67] the court agreed to modify its order to permit the welfare commissioner to comply with the federal regulations.[68]

Like in *Asarco* and *Harrell*, here the agency's post-consent-decree change of its interpretation of federal law is a change of circumstance that is properly evaluated under Rule 60(b)(5), and because the change could not have been anticipated by either party, it merits Rule 60(b)(5) relief. But this case is even more compelling than *Asarco* or *Harrell* because the change in agency interpretation here does not just revise a set of generally applicable rules. The NOV is an order *specifically* directed at *these* particular parties and the very agreements that are the subject of the Consent Order. Indeed, it expressly evaluates and then repudiates and rescinds the very agency action on which the 1994

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[67] *Id.* at 816 (quoting *Lewis v. Martin*, 397 U.S. 552, 559 (1970)). When it enacted IGRA, Congress expressly established the "National Indian Gaming Commission . . . to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3). Unlike NIGC Opinion Letters, Notices of Violation are final agency actions. *Id.* at § 2714. Thus, the Court should afford the NOV's interpretation of IGRA substantial deference. *See, e.g., Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217 (D. Kan. 1998) (affording the NIGC Chairman's disapproval of a management contract, a final agency decision under 25 U.S.C. § 2714, *Chevron* deference). *See also Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 837-45 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.") (quotation and citation omitted); *Cent. S. Dakota Co-op. Grazing Dist. v. Sec'y of U.S. Dept. of Agric.*, 266 F.3d 889, 894-95 (8th Cir. 2001) ("When the resolution of the dispute involves primarily issues of fact and analysis of the relevant information requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies.") (quotation and alteration omitted).

[68] *Harrell*, 369 F. Supp. at 826.

Agreements and Consent Order were predicated.[69] Under Rule 60(b)(5), this unanticipated change in circumstances justifies the relief the Band requests.[70]

2. That maintenance of the Consent Order would require the Band to violate federal law is a "reason justifying relief from the operation of the judgment" under Rule 60(b)(6).

Relief under Rule 60(b)(6) is also appropriate here. Under Rule 60(b)(6), this Court may grant the Band relief from the Consent Order for "any . . . reason justifying relief from the operation of the judgment" other than the more specific circumstances set out in Rules 60(b)(1)-(5)."[71] Though the rule is used sparingly, its purpose is "to prevent the judgment from becoming a vehicle of injustice[,]" and it "is to be given a liberal construction" and "construed liberally to do substantial justice."[72] The rule recognizes that, upon occasion, unforeseen changes in circumstances make continued enforcement of a judgment unjust, and "[t]he 'other reason' clause . . . vests power in courts adequate to

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[69] *Accord In re. Racing Services*, 571 F.3d 729, 733 (8th Cir. 2009) (affirming relief from order under 60(b)(5) because "applying [the Subordination Order] prospectively is no longer equitable" where the order was "based on" prior state-court judgment and state-court judgment was reversed on appeal); *In re. Dowell*, 82 B.R. 998, 1010 n.6 (Bankr. W.D. Mo. 1988) ("If a judgment in a second case has meantime been entered which gives *res judicata* effect to the vacated judgment, it may be reversed on direct appeal or subjected to attack under Rule 60(b)(5).").

[70] Parties requesting Rule 60(b)(5) relief based on changed factual circumstances are to "suitably" tailor their requests "to resolve the problems created by the changed factual or legal conditions." *Asarco*, 430 F.3d at 972 (citing *Rufo*, 502 U.S. at 384). The Band's motion is specifically addressed to those portions of the 1994 Agreements—incorporated into the Consent Order—that Chairwoman Stevens found violate IGRA. *Compare* Band's Motion for Relief under Rules 60(b)(5) and (6) *with* Notice of Violation, Ex. A at 15-18.

[71] *Gonzalez v. Crosby*, 545 U.S. 524, 528-29 (2005).

[72] *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 515 (8th Cir. 1984). *See also Watkins v. Lundell*, 169 F.3d 540, 544 (8th Cir. 1999) ("Rule 60(b)(6) enables a court to "accomplish justice") (citing *Klapprott v. United States*, 335 U.S. 601 (1949)).

enable them to vacate judgments whenever such action is appropriate to accomplish justice."[73] Thus, when exceptional circumstances bar adequate redress through other mechanisms, relief under Rule 60(b)(6) is appropriate.[74] "The district court has wide discretion in deciding whether or not to grant a motion under Fed. R. Civ. P. 60(b), and its decision will only be reversed for clear abuse of discretion."[75]

To be sure, Rule 60(b)(6) motions are denied more often than they are granted. But "the fact that we have such a rule on the books means that district courts must have some discretion to grant relief from their judgments."[76] And courts across the country consistently apply the rule to relieve parties from judgments where, as here, those judgments place a party at risk of inconsistent obligations.[77] For example, "courts have granted post-judgment relief in 'same accident' cases to harmonize the legal outcome for victims of the same motor vehicle accident, and also to harmonize the results for parties of a common contractual transaction."[78] And though such cases do not arise frequently, "where the subsequent court decision is closely related to the case in question," or

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[73] *Atraqchi v. F.B.I.*, 959 F.2d 740 (8th Cir. 1992) (quoting *Klapprott*, 335 U.S. at 614-15).

[74] *See In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, 496 F.3d 863, 868 (8th Cir. 2007).

[75] *Atkinson v. Prudential Prop. Co., Inc.*, 43 F.3d 367, 371 (8th Cir. 1994).

[76] *In re Blue Diamond Coal Co.*, 3:93-CV-473, 1998 WL 1802907, at *3 (E.D. Tenn. Nov. 4, 1998).

[77] *E.g., WRS, Inc. v. Plaza Entm't, Inc.*, CIV. A. 00-2041, 2008 WL 2323991 (W.D. Pa. June 5, 2008) (granting Rule 60(b)(6) motion because "this case presents exceptional circumstances due to the very real possibility of inconsistent judgments.").

[78] *Blue Diamond*, 1998 WL 1802907, at *3 (E.D. Tenn. Nov. 4, 1998) (citing *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965); *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1976, en banc); and *First Am. Nat'l Bank of Nashville v. Bonded Elevator, Inc.*, 111 F.R.D. 74 (W.D. Ky 1986)).

"where two cases arising out of the same transaction result in conflicting judgments, [Rule60(b)(6)] relief has been found to be warranted."[79] Put simply, if, after the judgment, circumstances place a party at risk of inconsistent obligations, Rule 60(b)(6) is the vehicle to set right the cart and relieve the party of its inconsistent obligations.[80]

And that's precisely what's happened here. Lacking established regulatory direction, and working under a brand-new statute, in 1994, the parties did their best to follow IGRA's sole-proprietary-interest strictures. Indeed, after a cursory review in 1994, the NIGC stated that the Agreements complied with IGRA. But the law evolved, the NIGC took a second look, and as of last week,[81] the NIGC not only withdrew its approval of the agreements, but directed the Band to cease performance under the agreements. Today, without relief from the Consent Order, the Band is left in a double bind: either it can cease performance under portions of the 1994 Agreements, as the

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[79] *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 751 n.6 (5th Cir. 1995) (citations omitted). *See also Underwriters at Lloyd's of London v. OSCA, Inc.*, CIV.A.H-00-3442, 2003 WL 25740144 (S.D. Tex. Sept. 5, 2003) *aff'd in part, rev'd in part on other grounds sub nom. Underwriters at Lloyd's London v. OSCA, Inc.*, 03-20398, 2006 WL 941794 (5th Cir. Apr. 12, 2006) (affording Rule 60(b)(6) relief where "[i]f the Court were not able to correct its final judgment, the ultimate ruling on the amount of liability in this case would be wholly inconsistent with the Court's findings, which would constitute an extraordinarily absurd result.").

[80] *E.g.*, *Ameritech Corp. v. Int'l Broth. of Elec. Workers, Local 21*, 543 F.3d 414, 419 (7th Cir. 2008) (describing propriety of Rule 60(b)(6) relief where arbitration award is inconsistent with ensuing arbitration award); *Mayhew v. Int'l Mktg. Group*, 6 F. App'x. 277, 279 (6th Cir. 2001) (reversing denial of Rule 60(b)(6) motion as an abuse of discretion where a federal statute "directly conflict[ed] with the holding of the district court.").

[81] Rule 60(b)(6) motions must be made "within a reasonable time." Fed. R. Civ. P. 60(c)(1). The parties ceased arbitration the same day they received the NOV, and the Band alerted the Court to this development and received direction regarding the timing of this motion just days later. Certainly, the Band has not unreasonably delayed this motion.

NIGC has directed it (but in violation of the Consent Order), and risk the sanctions of this Court, or it can pay the City as the Consent Order requires (but in violation of the NOV), and risk fines of up to $25,000 *per violation per day* for *each* of the violations identified in the NOV and potential closure of the Casino.[82] The Band wants to follow the law. But it is impossible for it to comply with both the Consent Order and the NOV. This "unusual combination of events which have occurred make the situation extraordinary"[83] and justify relief under Rule 60(b)(6). The Court should modify the Consent Order so that the Band does not have to disobey the NOV.

B. The Court should relieve the Band under Rule 60(b) from the summary-judgment order and the order compelling arbitration.

This Court's summary-judgment order and order compelling arbitration each relied on the *res judicata* effect of the Consent Order and were both entered to enforce portions of the 1994 Agreements. The summary-judgment order was entered to enforce the Band's obligation to pay the City 19% of gross slot-machine revenues under the first term of the 1994 Sublease, and the order compelling arbitration was entered to enforce the parties' agreement to arbitrate a percentage-of-gross-slot-revenues rental rate for the second 25-year term of the 1994 Sublease. The NOV now prohibits the Band from performing any of the provisions in the 1994 Agreements that it identifies as violating IGRA "for the entire 42 term of the 1994 Agreements."[84] The rental payment—in both the first and

[82] 25 U.S.C. § 2713; 25 C.F.R. § 575.3.
[83] *Pierce*, 518 F.2d at 723.
[84] Notice of Violation, Ex. A at 18.

second term—is chief among the provisions it identifies as violative of IGRA,[85] so for the same reasons that the Court should relieve the Band from compliance with the Consent Order under Rules 60(b)(5) and (6), it should relieve the Band from compliance with the summary-judgment order and the order compelling arbitration. Because the NIGC has said in so many words that $75 million is more than payment enough for the City's very limited contributions to the Casino and has directed the Band to cease performance of the payment provisions in the 1994 Agreements, the Band should be relieved from paying anything further, whether under the summary-judgment order or as a result of any arbitration.

C. The law governing consent judgments requires this Court to modify the Consent Order to bring it into compliance with federal law.

Finally, it is important to take a step back and place the instant "extraordinary" situation into the broader context of federal law. A federal court's authority to enter and subsequently enforce a consent decree is governed by well-established rules.[86] "Consent decrees entered in federal court must be directed toward protecting federal interests."[87] Accordingly, a federal consent decree must "spring from, and serve to resolve, a dispute within the court's subject-matter jurisdiction; must come within the general scope of the

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[85] Notice of Violation, Ex. A at 7-9, 13-14, and 16-18.

[86] Although a consent decree embodies an agreement of the parties, "that agreement is 'reflected in, and [is] enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.'" *Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (quoting *Rufo, supra*, 502 U.S. at 378).

[87] *Id.* at 437.

case made by the pleadings; and must further the objectives of the law upon which the complaint was based."[88]

These controlling principles make two points clear. First, "'the district court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce,' not from the parties' consent to the decree."[89] As a result, although parties to a consent order may agree to undertake broad obligations, "[t]his is not to say that the parties may agree to take action that conflicts with or violates the statute upon which the complaint was based."[90]

This leads inexorably to the second point: where the consent decree requires the performance of obligations that now conflict with the statute upon which it is predicated, it must be modified. Obviously, in such circumstances the decree no longer "further[s] the objectives"[91] of the law that permitted its entry in the first place. And a court cannot be required to ignore significant changes where it is "satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."[92]

That is precisely the situation here. The Consent Order expressly rests on IGRA and the parties' compliance with that federal statute, but the circumstances that led to the decree's adoption no longer exist. Enforcing it (or the summary-judgment order and the order compelling arbitration, which both flow from the Consent Order) in any manner

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[88] *Id.* (citing *Firefighters v. Cleveland*, 478 U.S. 511, 525 (1986)).
[89] *Firefighters v. Stotts*, 467 U.S. 561, 576 n.9 (1984) (quoting *Railway Employees*, 364 U.S. at 651).
[90] *Cleveland*, 478 U.S. at 525.
[91] *Frew*, 540 U.S. at 437.
[92] *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932).

that requires the Band to perform obligations now deemed illegal under IGRA—whether making past or future "rent" payments, allowing City access to Casino records, or allowing City involvement in gaming regulatory functions—by definition conflicts with the statute rather than furthers its objectives. As such, the Consent Order no longer satisfies the general prerequisites for a consent decree, further demonstrating that relief from its provisions must be granted.

Moreover, a separate but related concern further militates in favor of relief here. The Consent Order created various revenue-sharing and regulatory-control obligations that bind the hands of the Band's elected and appointed government leaders for a 42-year period. As part of the obligation to ensure that enforcement of a consent decree will continue to effectuate federal law in a reasonable and necessary manner, the Supreme Court has made clear that a district court must be mindful of the decree's continuing impact on the self-government rights of affected governmental parties.[93] Although the Court's decisions typically involve States and local governments, there can be no dispute that the Band is also a separate sovereign, with its own legislative and executive rights and responsibilities. And while the inquiry usually involves whether the objective of the underlying federal law has been achieved, such that continuing the intrusion into another sovereign's affairs represented by the consent decree is unnecessary, its rationale has even greater force where, as here, the ongoing intrusion does not further *any* statutory objective but instead actually *conflicts* with the underlying law. Indeed, given that the

[93] *E.g.*, *Horne v. Flores*, 557 U.S. ___, 129 S. Ct. 2579, 2594 (2009); *Frew*, 540 U.S. at 441-42.

first expressed purpose of IGRA is to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments[,]"[94] continuing a Consent Order that restricts tribal authority—or enforcing that Consent Order through a summary- judgment order or order compelling arbitration—would be particularly inappropriate.[95]

Conclusion

Judge Montgomery foresaw that an NIGC enforcement action regarding the 1994 Agreements would be a game-changer, and put the Band on notice that Rule 60(b) was the appropriate vehicle under which to seek relief from the Consent Order if the NIGC acted. *The NIGC has acted.* The agency that Congress established to enforce the Indian Gaming Regulatory Act has (a) thoroughly reviewed the 1994 Agreements and how they have been implemented in the last 17 years, (b) found that they violate the Act in several respects, and (c) ordered the Band *to cease performance* of various parts of the 1994 Agreements or to face steep fines and possible closure of the Casino. This extraordinary change in circumstances requires that the Consent Order—and the summary- judgment order and order compelling arbitration that each flow from the Consent Order—be modified so that the Band can comply with the NIGC's order.

[94] 25 U.S.C. § 2702(1).
[95] 25 U.S.C. §§ 2701, 2702.

Dated: July 22, 2011

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

s/ Vanya S. Hogen

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

City of Duluth,

Plaintiff,

v. Case No. 0:09-cv-02668-SRN-LIB

Fond du Lac Band of Lake Superior Chippewa,

Defendant.

LR 7.1(d) Word Count Compliance Certificate Regarding Fond du Lac Band of Lake Superior Chippewa's Memorandum in Support of Motion for Relief from Consent Order, Summary Judgment Order, and Order Compelling Arbitration under Rules 60(b)(5) and 60(b)(6)

I, Jessica Intermill, certify that the Fond du Lac Band of Lake Superior Chippewa's Memorandum in Support of Motion for Relief from Consent Order, Summary Judgment Order, and Order Compelling Arbitration under Rules 60(b)(5) and 60(b)(6)complies with Local Rule 7.1(d).

I further certify that I used the 2007 version of Microsoft Word to prepare this memorandum in 13 point font, and applied this word processing program to include all relevant text (including headings, footnotes, and quotations) in the following word count.

I further certify that the above-referenced memorandum contains 7,174 words.

Dated: July 22, 2011 FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

s/ Jessica Intermill

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NATIONAL INDIAN GAMING COMMISSION

NOTICE OF VIOLATION

NOV-11-02

TO: Karen Diver, Chairwoman (Via Certified U.S. Mail)
Fond du Lac Reservation Business Committee
Fond du Lac Band of Lake Superior Chippewa
1720 Big Lake Road
Cloquet, MN 55720

A. Notification of Violation

The National Indian Gaming Commission (the "NIGC") Chairwoman gives notice that the Fond du Lac Band of Lake Superior Chippewa (the "Band") entered into and operated under a series of agreements that grant the City of Duluth, Minnesota (the "City") an unlawful proprietary interest in the Band's gaming activity and prevent the Band from possessing the sole responsibility for the gaming activity.

The agreements as written, and as the parties operated under them, violate the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710(b)(2)(A); NIGC regulations, 25 C.F.R. §§ 522.4(b)(1) and 522.6(c); and the Band's gaming ordinance, *Fond du Lac Gaming Ordinance* § 401. Specifically, the relevant agreements, all dated June 20, 1994, include: Sublease and Assignment of Gaming Rights Agreement; Tribal-City Accord; and Amendments to the Commission Agreement (the "1994 Agreements").

This notice of violation (NOV) is not issued lightly.[1] In 1994, NIGC's first Chairman, Anthony Hope, wrote a letter to the parties stating that NIGC reviewed the agreements at issue here and found they were consistent with IGRA. Chairman Hope's review of the agreements, which appears to have been completed over the course of three days, was the NIGC's second involvement with IGRA's mandate that tribes retain the "sole proprietary interest" in their gaming activity.[2] Four days later, Chairman Hope sent a two page

[1] I am aware that the Band has sought relief from the consent decree involving this matter. *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 708 F.Supp.2d 890 (D.MN 2010). In that case, the Court concluded, "[i]t may be that the arrangement between the Band and the City violates the IGRA in the eyes of the NIGC. But until the NIGC initiates an enforcement action regarding the Fond du Luth Casino and proceeds with that action to a final decision on the substantive issue of proprietary interest, this Court's view would constitute an advisory opinion." *Id.* at 902-903.

[2] The first involvement appears to have occurred less than a year earlier and involved agreements between the Band and the City entered into in 1986. Chairman Hope found that under the 1986 Agreements "the

"Report and Recommendation" to the District Court, stating that the agreements were consistent with IGRA. Unfortunately, Chairman Hope's letter to the parties and his "Report and Recommendation" to the District Court do not contain any substantive analysis of the issues to support his statement that the agreements were consistent with IGRA.

Based on NIGC's application of the sole proprietary interest requirement, I find that the 1994 Agreements violate IGRA. Tribes, not third parties, are to possess the sole proprietary interest in and responsibility for the gaming activity and to be the primary beneficiaries of that activity. 25 U.S.C. §§ 2710(b)(2)(A); 2702(2). As discussed in more detail below, NIGC's application of the sole proprietary interest requirement essentially examines three criteria: 1) the term of the relationship; 2) the amount of revenue paid to the third party; and 3) the right of control provided to the third party over the gaming activity. Since the NIGC's inception, neither the NIGC Chair nor the Commission has approved any agreement, management or otherwise, under terms similar to the agreements at issue here.

In a 1993 letter to the Band and the City, Chairman Hope stated that agreements executed by the parties in 1986 involving this gaming operation violated IGRA's sole proprietary interest requirement. A close review of the 1994 Agreements demonstrates that they incorporate many of the primary terms of the 1986 agreements that Chairman Hope stated violated IGRA. The 1986 agreements provided for a 25 year term with a 25 year renewal period. The 1994 Agreements effectively pick up the remainder of the term established in the 1986 agreements. The 1994 Agreements have a 43 year term under which for the first 18 years the Band pays 19% of gross revenues from video games of chance to the City, with an undetermined percentage of gross revenues to be paid to the City over the twenty five year term from 2011 to 2036. The 1986 Agreements provided for the City to receive 24.4% of the net revenues from all gaming activities. Payments made by the Tribe to the City pursuant to the 1994 Agreements to rent the Tribe's own trust land appears to have actually exceeded the amounts the City would have received under the 1986 Agreements. From approximately June 1994 to August 2009, the Band paid the City approximately $75,000,000 to rent the Band's own trust land. In return, the City agreed not to enter into any other gaming ventures within 250 miles of Duluth. Under the 1994 Agreements, the City maintains the authority to veto any amendments to the Band's gaming ordinance applicable to the Fond du Luth casino and has the right to review and object to the Band's licensing decisions. As discussed in more detail below, the 1994 Agreements carry forward the substantive provisions of the 1986 Agreements Chairman Hope found to violate IGRA.

Band does not have the sole ownership or control of the Fond Du Luth Casino. . . . [T]he casino is operated as a joint venture in which the City has a significant ownership interest in the gaming operation and has substantial control over operations." *See* September 24, 1993 Letter from Chairman Anthony J. Hope to Chairman Robert Peacock and Mayor Gary Doty.

B. Authority

Under IGRA and NIGC regulations, the Chairwoman may issue a NOV to any person for violation of any provision of the IGRA, NIGC regulations, or an approved tribal gaming ordinance or resolution. 25 U.S.C. § 2713(a); 25 C.F.R. § 573.3(a).

C. Applicable Federal and Tribal Laws

1. IGRA requires that to lawfully operate Indian gaming, a tribe must have a tribal gaming ordinance approved by the Chairwoman. 25 U.S.C. §§ 2710(b)(1)(B), (d)(1)(A).

2. IGRA requires that the tribal gaming ordinance provide that the tribe "have the sole proprietary interest in and responsibility for the conduct of any gaming activity." 25 U.S.C. §§ 2710(b)(2)(A), (d)(1)(A)(ii).

3. NIGC regulations require that a tribe's gaming ordinance provide that "the tribe shall have the sole proprietary interest in and responsibility for the conduct of any gaming operation." 25 C.F.R. §§ 522.4(b)(1), 522.6(c).

4. The Band's ordinance approved by NIGC Chairman Anthony Hope on September 23, 1993, provides that the Band will have the "sole proprietary interest in and responsibility for the conduct of any gaming operation authorized by this Ordinance." *Fond du Lac Ordinance* § 401.

5. IGRA provides that class III gaming operations are only lawful if conducted pursuant to an ordinance that meets the requirements of 25 U.S.C. § 2710(b). 25 U.S.C. § 2710(d)(1)(A)(ii).

6. Failure to comply with any provision of IGRA, NIGC regulations, or an approved tribal gaming ordinance is grounds for issuance of an NOV. 25 U.S.C. § 2713; 25 C.F.R. § 573.3(a).

D. Circumstances of the Violation

Background

The 1986 Agreements

In 1986, the Band and the City entered into agreements whereby the parties would be co-owners of a gaming operation on a parcel of trust land held by the Band in the City.[3] However, just two years later IGRA was enacted, calling into question the legality of the agreements due to the fact that IGRA mandates that tribes have the sole proprietary interest in and responsibility for their gaming activity.

[3] The 1986 agreements that contain provisions carried forward in the 1994 Agreements are a Commission Agreement and a Business Lease both dated April 1, 1986 ("the 1986 Agreements").

In 1989, the Band filed suit in the United States District Court for the District of Minnesota alleging the agreements violated IGRA. On November 2, 1990, William Lavell, Department of the Interior Associate Solicitor for Indian Affairs, issued a letter opining that the 1986 Agreements violated IGRA's requirement that the Band have the sole proprietary interest in the gaming activity. This opinion relied on a number of factors, including the substantial amount of net profits, the City's access to records and that the casino was operated by the Fond Duluth Economic Development Commission (the "Development Commission") comprised of representatives of both the City and the Band. The Development Commission had the power to "license, regulate, and operate bingo and other gaming." Solicitor Lavell's opinion noted that the Development Commission held "substantial control over the gaming facility" and further explained that:

> Both the Band and the City have access to the books and records of the Commission, and the Commission is obligated to provide both parties financial records, profit and loss statements, and other requested financial statements. Sections 13(b) and (c). More importantly, the City received 24.5% of the net profits from the gaming while the Band receives 25.5%. Section 14(c). The City's share of the net revenues does not constitute compensation for services rendered as the management contractor for the Band's casino but rather constitutes the City's share of the profits as a co-owner of the gaming facility.

The City asserted "that only the chairman of the newly created National Indian Gaming Commission may review the agreements." The District Court dismissed the suit without prejudice on December 26, 1990 to allow the Chairman of the newly formed NIGC to review the agreements.

On September 24, 1993, NIGC Chairman Hope sent a letter to the Band and the City stating that the 1986 Agreements violated IGRA's mandate that the Band maintain the sole proprietary interest in the gaming operation. Chairman Hope's analysis in this letter was consistent with Solicitor Lavell's opinion. Specifically, Chairman Hope summarized:

> [I]t is apparent that under the Commission Agreement creating the Fond Duluth Economic Development Commission (Commission), the Band does not have the sole ownership or control of the Fond Du Luth Casino. In fact, under this Agreement the casino is operated as a joint venture in which the City has a significant ownership interest in the gaming operation and has substantial control over operations. . . . The City's assertion that, because the Commission is designated as a political subdivision of the Band, the tribe has the sole control of the Fond du Luth

> operation, is plainly contradicted by the fact that the Band is unable to unilaterally abolish, regulate or control the Commission. To the contrary, the terms of the Commission Agreement require joint decision making as well as shared profits and access to books and records.

Chairman Hope deferred enforcement action for 30 days to allow the parties to negotiate a resolution. NIGC convened discussions between the parties, and the Band and the City negotiated the 1994 Agreements.

NIGC review of 1994 Agreements

By letter dated June 13, 1994, the parties submitted to NIGC the settlement agreement resulting from their negotiations. Three days later, on June 16, 1994, Chairman Hope wrote a letter to the parties stating: "We have reviewed the proposed settlement and have concluded 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." The letter contained only this conclusive statement with no supporting analysis.[4] Basically, the letter articulated Chairman Hope's conclusion to not initiate an enforcement action.

The parties then reached a settlement of the lawsuit. On June 20, 1994, Chairman Hope wrote a letter, entitled "Report and Recommendation of the National Indian Gaming Commission," to the Honorable Judge Magnuson even though NIGC was not a party to the litigation. Chairman Hope wrote "to report that the settlement agreement recently concluded between the Fond du Lac Band and the City of Duluth returns ownership and control of the Fond du Luth Casino to the Band and is fully consistent with IGRA. Accordingly, I recommend that this settlement agreement be approved." Chairman Hope's letter contained only this conclusive statement with no analysis to support it. The Court subsequently issued a Stipulation and Consent Order.

As discussed in more detail below, Chairman Hope's decision not to initiate an enforcement action is inconsistent with his 1993 letter given that the 1994 Agreements contain many "carried forward" provisions that are substantively identical to the 1986 Agreements. The focus of my concern is on these same provisions which provide an extraordinarily long term, an unjustified high level of compensation, and third party control over aspects of the gaming activity.

Current Review by NIGC and Positions of the Parties

On May 17, 2010, as the first term of the 1994 Agreements was coming to conclusion, the Fond du Lac Band of Superior Chippewa Indians wrote to NIGC requesting that the NIGC Chair mediate a dispute involving the Sublease and Assignment of Gaming Rights Agreement between the Band and the City of Duluth, Minnesota. The mediation request was made pursuant to the Sublease, which provides that if the parties do not reach

[4] As part of our review of this matter, NIGC staff members performed a search of Commission records and were unable to locate any analysis associated with this letter.

agreement concerning the renegotiation of the percentage of gross revenue to be paid for the period commencing April 1, 2011, the parties may request the NIGC Chairman mediate for purposes of attempting to bring the parties to agreement. *See* Sublease and Assignment of Gaming Rights Agreement, Sec. 4.2.2.5. The Sublease further provides that if the Chairman "refuses to mediate . . . the Band and the City shall submit the dispute to binding arbitration . . . ." *Id.* On August 13, 2010, I wrote to the Band and the City informing them that I declined to mediate this issue, because it would most likely be unproductive.

By letter dated August 16, 2010, the Band requested that the NIGC reexamine the 1994 Agreements to determine whether or not the changes to the 1986 agreements, as memorialized in the 1994 Agreements, conform to IGRA. Thus, the near conclusion of the first term under the 1994 Agreements and the Band's request for review triggered NIGC's present review. By letter dated October 20, 2010, the City and the Band were advised that the 1994 Agreements would be examined by NIGC. For that purpose, the letter requested the parties provide their views of the 1994 Agreements by November 19, 2010. Both parties timely submitted their views.

In its submission, the Band argues that the 1994 Agreements violate IGRA's mandate that the Band retain the sole proprietary interest in and responsibility for the gaming activity. Additionally, the Band views payments to the City as an improper tax on gaming. The Band bases this conclusion on its view that the rental payment is a sham designed to hide the true relationship between the parties. As support for this view, the Band states that not only is it paying rent on a parcel it owns but that the rental payment far exceeds rental rates in Duluth and the casino does not receive services from the City above the services received by any other commercial businesses. Additionally, the Band highlights the long term of the agreement, the fact that rent is paid before expenses are paid, and that the City offered no meaningful services in exchange for the rent. Finally, the Band points out that the City holds veto authority over any amendments to the gaming ordinance that apply to the casino.

The City's view is that the 1994 Agreements are analogous to a tribal-state compact. Tribal-state compacts are approved by the Department of the Interior pursuant to 25 U.S.C. § 2710(d)(8). The City retained Dr. Alan P. Meister to conduct a study of compact terms found in tribal-state compacts. Dr. Meister concluded that the 1994 Agreements' terms were consistent with tribal-state compacts in regard to compensation, term, access to financial records, and controls on gaming regulation. According to the City, the payment to the City was designed to reflect approximately one-third of the casino's net revenue. The City notes that the 1994 Agreements were entered into before the Band entered a compact with the State of Minnesota and therefore the exclusivity granted to the Band was valuable consideration for the rental payments. Additionally, the City points to the fact that it supported the Band's trust acquisition of the casino property in 1986, condemned property to build a parking ramp for the casino, paid the Band to manage a parking ramp under an agreement that expired on December 31, 2010, and agreed not to enter into any similar agreements with another Indian tribe. Finally, the City argues that

the revenue paid to it by the Band is not a tax because it was negotiated by the parties, rather than being imposed upon the Band by the City.

E. Summary of Violation

Based on a thorough review of the parties' submissions and the 1994 Agreements, I conclude that the 1994 Agreements, as written and as implemented, violate IGRA's mandate that the Band retain the sole proprietary interest in and responsibility for its gaming activity.

Share of the Profits and Term

As discussed, the 1986 Agreements created an economic development commission to manage the gaming operation. The commission was comprised of four members from the Band and three members appointed by the City. The Band received 25.5% of the net revenues and the City received 24.5%. The remaining 50% of the net revenues went to the Development Commission to be used for development on the Band's reservation and within downtown Duluth.

The 1994 Agreements changed the percentages of revenue distribution, with the City retaining 19% of *gross revenues* and the Tribe receiving the remainder. Based on this change, the City appears to have actually received more money than it would have under the 1986 Agreements. This apparent increase in revenue was most likely a result of the City's share being based on the gross revenues rather than net revenues.

While the structure of the economic development commission was changed in the 1994 Agreements by limiting its membership to the Mayor of the City and the Band's Chair, the 1994 Agreements require the Band to lease its trust land on which the casino is situated from the commission in exchange for a rent of 19% of the gross revenue from video games of chance. All of the rent payments are permanently assigned from the commission to the City. This structure appears deliberately designed to disguise payments of revenue of the casino to the City as rent payments. The Band is paying rent on a property it already owns and, according to the Summary Appraisal Report supplied by the Band, for a far higher rental rate than market rental rates.

The 1986 Agreements were for a term of 25 years with an automatic 25 year renewal unless the commission was dissolved. The initial term of the 1994 Agreements was for 17 years, which has expired. Nonetheless, under the 1994 Agreements, the City is entitled to an extension for an additional 25 years. The result is that the City will have a role in the Band's gaming, and certain control over it, for an extremely long period of time. In fact, exactly the same end date as envisioned in the 1986 Agreements.

In sum, while some of the financial terms and the business structure changed between the 1986 and 1994 Agreements, it is apparent that the long term of the agreements stayed the same while the City's share of the casino revenue appears to have increased. I am aware that the Band and the City are currently involved in arbitration to determine the rental

rate for the second term. Regardless of the outcome of this arbitration, it is my view that performance under the 1994 Agreements will prevent the Band from maintaining the sole proprietary interest in and responsibility for the gaming activity. While the percentage of income paid to the City is an important factor in my decision, as detailed below, it is not the only factor. A reduction in the fee will not remedy fees paid over the last 17 years, the additional twenty-five year term and the regulatory responsibility and control issues.

Regulatory Responsibility and Control over the Gaming Facility

The 1994 Agreements also grant the City the power to review and consent to any changes to the Band's gaming ordinance and regulations. *See* 1994 Tribal – City Accord ("Accord"). The Accord "governs the Band's conduct of gaming activities" at the Fond Du Luth casino. Specifically, the Accord provides that the Band may not modify its gaming ordinance or regulations, as they apply to the Fond Du Luth casino, unless the City of Duluth consents to the modification or the modification is required by Federal law or a tribal-state compact. *See* Accord § 6(c). Further, the Accord provides the City with the right to review and object to the Band's licensing decisions. *See* Accord § 26(j). One of the primary purposes of IGRA is to provide a statutory basis for tribes to regulate their own gaming activity. *See* 25 U.S.C. § 2702(2). The licensing of key employees and primary management officials is a core component of that regulatory responsibility. Thus, the City's power to directly control the regulation of the Band's gaming activity infringes on the Band's authority as confirmed by Congress. Accordingly, the Band does not retain the sole proprietary interest in, and responsibility for, the gaming activity.

Access to Records

Section 16 of the Tribal-City Accord requires the Band to provide the City's representative access to review and copy any and all records of the gaming operation. This level of access is unusual considering that IGRA does not grant the City *any* role in the regulation of Indian gaming.[5] This level of access is the type usually afforded to a business partner. Indeed, Chairman Hope found that this level of access provided for in the 1986 Agreements violated IGRA. *See* September 24, 1993, Letter from Chairman Anthony Hope to Chairman Robert Peacock and Mayor Gary Doty.

[5] It is also broader access than needed for the City to verify that it is receiving the correct percentage of revenue.

Comparison of 1986 & 1994 Agreements

As summarized in the chart below, the substantive terms of the 1986 and 1994 Agreements are almost identical.

	1986 Agreements	1994 Agreements
Term	25 years with automatic 25 year extension (1986 – 2036, 50 years)[6]	17 years with an automatic 25 year extension[7] (1994 - 2036, 42 years)[8]
Compensation to City	24.5% of net[9]	19% of gross[10] (approximately 26% to 33% of net)
Regulation of Gaming	Joint control between City and Tribe[11]	Ordinance and Regulations may only be amended with approval of the City.[12] The City has the right to review and object to licensing determinations.[13]
Access to Records	City retains right to access[14]	City retains right to access[15]

The City has conceded as much, highlighting the fact that many provisions from the 1986 Agreements were "carried forward in the 1994 Agreements." *See* City Brief at 11. Specifically, the City points to the exclusivity provision under which it is prevented from entering a similar agreement with another Indian tribe.

It is my conclusion that the 1994 Agreements carry forward more than just discrete provisions of the 1986 Agreements but rather carry forward the joint venture intent embodied in the 1986 Agreements. The parties share in the profits, with the City assuming no risk, providing no services commensurate with the payments received and the City retains control over the gaming operation.

First, the 1994 Agreements continue the profit sharing mechanism of the 1986 Agreements. The City's condemnation of the land, construction of a parking garage, and support of the trust acquisition all occurred well before the 1994 Agreements. Such actions by the City are not continuing and do not amount to quantifiable "services" bearing a rational relationship to the $75 million dollars provided by the Tribe over the past 17 years.

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[6] See 1986 Business Lease Agreement § 4.
[7] See 1994 Sublease and Assignment of Gaming Rights § 3.1.
[8] This agreement is retroactive to September 30, 1993. Id.
[9] See 1986 Commission Agreement § 14(c).
[10] See 1994 Sublease and Assignment of Gaming Rights § 4.2.2.2.
[11] See 1986 Commission Agreement § 11.
[12] See 1994 Tribal-City Accord §§ 6, 26.
[13] See 1994 Tribal-City Accord § 26(j).
[14] See 1986 Commission Agreement § 13.
[15] See 1994 Tribal-City Accord § 16.

Even in the context of a tribal-state compact, which is specifically provided for by IGRA, support of a trust acquisition is not of tangible economic benefit justifying a share of gaming revenue. On March 7, 2002, the Secretary of the Interior disapproved a compact between the Jena Band of Choctow Indians and the State of Louisiana under which the State was to receive 15.5% of the Jena Band's net revenues in exchange for the State's support for a trust acquisition. The Assistant Secretary of Indian Affairs noted that the location of the trust acquisition would "yield a substantial economic benefit to the Band" but disapproved the compact because:

> In our view, the intangible value of the State's support for the Band's application to take land in trust in Vinton, Louisiana, and have the parcel declared part of the Band's initial reservation for purposes of Section 20 of IGRA, is not the type of quantifiable economic benefit that would justify our approval of the revenue-sharing payments proposed under this Compact.

See March 7, 2002, Letter from Assistant Secretary – Indian Affairs Neal McCaleb to Tribal Chief B. Cheryl Smith.

Second, the City's comparison of the 1994 Agreements with tribal-state compacts is misplaced and unpersuasive. Under IGRA, tribal-state compacts are fundamentally different than the agreements at issue here. Cities are not parties to such compacts. By law, compacts between an Indian tribe and a state provide for regulation of class III gaming. Interior has approved some compacts that provide for a share of the net revenue if the State provides an on-going tangible benefit such as exclusivity from non-Indian gaming. Here, the City's reliance on the exclusivity granted under the 1994 Agreements is particularly dubious. The 250 mile area of exclusivity could not prevent another Indian tribe or a non-Indian entity from operating gaming because the City's jurisdiction does not extend beyond the City's limits. A city cannot step into a state's shoes for purposes of a compact, as it simply lacks the authority to do so. The City admitted as much, stating that "municipalities are, under IGRA, statutorily different than states." Thus, any similarity between the terms of the 1994 Agreements and any compact is irrelevant to the analysis here. IGRA's requirements relating to the terms of a compact are controlled by 25 U.S.C. § 2710(d)(3), whereas the 1994 Agreements are found to violate a wholly separate requirement of IGRA, 25 U.S.C. § 2710(b)(2)(A).

Despite the City's recognition that municipalities are different than states, it argues that payments made by the Band to the City are allowable under IGRA because § 2710 permits tribes to fund local government operations out of net gaming revenues. While funding local government operations is an allowable use of net gaming revenue, in this instance the payments to the City are from gross gaming revenue. More importantly, just because it may be a proper use does not mean that the 1994 Agreements conform to IGRA's mandate that the Band have the sole proprietary interest in its gaming activity. IGRA's sole proprietary interest mandate is violated by the high amount of revenue being

conveyed to the City, the length of the term of the 1994 Agreements, and the City's right of control over the regulation of the gaming under the 1994 Agreements.

As noted above, with the exception of this matter, since the NIGC's inception, neither the NIGC Chair nor the Commission has approved any agreement, management or otherwise, under terms similar to the 1994 Agreements. When Chairman Hope stated that the 1994 agreements were consistent with IGRA and did not initiate an enforcement action, it appears that the NIGC had only reviewed the 1986 agreements under the sole proprietary interest mandate. Indeed, Chairman Hope's brief letters do not provide any analysis supporting his statement. Further, Chairman Hope's recommendation to the U.S. District Court could not constitute a formal agency approval of the 1994 Agreements because IGRA limits the Chair authority to approval of tribal gaming ordinances and management contracts. *See* 25 U.S.C. §§ 2710(e) and 2711(b). Thus, the 1994 Agreements fall outside of any review under IGRA because they are not an ordinance or management contract.

Finally, I disagree with the City's position that enforcement at this time would ignore the policies underlying IGRA and create a new remedy. The NIGC is the agency Congress charged with enforcing the provisions of IGRA and approved tribal ordinances. 25 U.S.C. § 2713. Therefore, I may appropriately exercise my enforcement discretion regarding these violations.

NIGC agency action & NIGC OGC legal opinions – sole proprietary interest

"Proprietary interest" is not defined in the IGRA or NIGC regulations. However, "proprietary interest" must be construed in favor of protecting tribal interests and consistent with IGRA's purpose that tribes are to be the primary beneficiaries of the gaming activity. *See Rincon Band of Luiseno Indians v. Schwarzenegger*, 602 F.3d 1019, 1029 n. 9 (9th Cir. 2010). IGRA's legislative history supports the Agency's application of "proprietary interest," stating that "the tribe must be the sole owner of the gaming enterprise." S. Rep. 100-446, 1988 U.S.C.C.A.N. 3071-3106, 3078. "Enterprise" is defined as "a business venture or undertaking". Black's Law Dictionary, 7th Edition (1999). Despite the brevity of this legislative history, Congress' intent of "proprietary interest" appears to be consistent with the commonly understood meaning of proprietary interest, while emphasizing the notion that entities other than tribes are not to share in the ownership of gaming enterprises.

Black's Law Dictionary defines "proprietary interest" as "the interest held by a property owner together with all appurtenant rights . . ." Black's Law Dictionary, 7th Edition (1999). "*Owner*" is defined as "one who has the right to possess, use and convey something." *Id.* A*ppurtenant* is defined as "belonging to; accessory or incident to . . . ." *Id.*

Case law defines "proprietary interest" as "one who has an interest in, control of, or present use of certain property." *Evans v. United States*, 349 F.2d 653 (5th Cir. 1965). As one court explained:

> It is not necessary that a partnership exist. It is only necessary that a plaintiff have some proprietary interest. . . One would have a proprietary interest if he were sharing in or deriving profit from the club as opposed to being a salaried employee merely performing clerical and ministerial duties.

Dondlinger v. United States, 1970 U.S. Dist. LEXIS 12693 (D. Neb. 1970)(emphasis added).

Secondary sources also shed light on the IGRA's use of "proprietary interest." American Jurisprudence explains the difference between having a proprietary interest and being compensated for services in the context of determining when a joint venture exists:

> Where a contract provides for the payment of a share of the profits of an enterprise, in consideration of services rendered in connection with it, the question is whether it is merely as a measure of compensation for such services or whether the agreement extends beyond that and provides for a proprietary interest in the subject matter out of which the profits arise and for an ownership in the profits themselves. If the payment constitutes merely compensation, the parties bear to each other, generally speaking, the relationship of principal and agent, or in some instances that of employer and employee [footnote omitted]. On the other hand, a proprietary interest or control may be evidence of a joint venture. [footnote omitted] [emphasis added]

46 Am. Jur. 2d *Contracts* § 57. (footnote omitted and emphasis added). A joint venture is "an association of persons with the intent . . . to engage in and carry out a single business venture for joint profit for which such persons combine their property, money, efforts, skill, and knowledge without creating a partnership or a corporation." 46 Am. Jur. 2d Joint *Ventures* § 1.

When the Commission promulgated regulations requiring tribal gaming ordinances include the mandate that tribes retain the sole proprietary interest and responsibility for the conduct of any gaming activity, the Commission decided not to define proprietary interest. Rather, it decided to "provide guidance in specific circumstances." *See* 58 Fed. Reg 5804 (Jan. 22, 1993). Thus, the NIGC's application of IGRA's sole proprietary interest requirement has developed over the Agency's existence. *See* Letter from NIGC Chairman Hogen to Senate Committee on Indian Affairs Chairman McCain, Vice-Chairman Dorgan and Senator Inouye Regarding Contract Review and IGRA's Sole Proprietary Interest Requirement (Feb. 1, 2005) (2005 SCIA Letter).

The 1994 Agreements are contrary to the Agency's articulation of the sole proprietary interest requirement. In 2007, the NIGC Chairman took enforcement action against an illegal manager of an Indian gaming facility for violating the sole proprietary interest mandate. *See* Notice of Violation #07-02 (May 16, 2007). The 2007 notice of violation was based on an outside entity's control over many aspects of the daily operation of a tribal gaming facility and the high level of compensation. In that action, the individual was found to be managing the blackjack operation without an approved management contract. The individual received 40% of the blackjack revenues and 20% of the net win from gaming machine revenue.

Additionally, earlier this year I took action against a Tribe and a manager of an Indian gaming facility for violating IGRA's requirement that a tribe "have the sole proprietary interest in and responsibility for the conduct of any gaming activity." *See* Notice of Violation # NOV-11-01. In that matter, a non-tribal entity was operating an off-track betting operation for a five-year term and receiving more than 70% of the net revenue.

Further, since 2003 the OGC issued over 50 legal opinions analyzing the mandate. After receiving such legal opinions, the parties, when necessary, often amend such agreements to avoid an enforcement action. OGC legal opinions concerning the sole proprietary interest mandate have focused primarily on three criteria in its analysis of the requirement. The opinions examine: 1) the term of the relationship; 2) the amount of revenue paid to the third party; and 3) right of control over the gaming activity provided to the third party. These criteria are consistent with the commonly understood definition of "proprietary interest."

Accordingly, final agency actions by NIGC and OGC legal opinions have found an improper proprietary interest in agreements under which a party, other than a tribe, receives a high level of compensation, for a long period of time, and possesses some aspect of control. The compensation in these instances was typically based on a significant percentage of net gaming revenue[16] and often had terms beyond 5 years. *See* April 22, 2004 Letter from OGC to Eric Mason.

Similar to this matter, OGC has analyzed other agreements that provide for rental payments based on a percentage of gaming revenue. *Id.* In 2003, the OGC issued an opinion finding that a contractor had obtained a proprietary interest in a tribe's gaming activity. *See* June 5, 2003 OGC Letter to Mitchell Cypress. In that situation, the tribe was required to pay 35% of its net gaming revenue as rent for a period of ten years. The OGC opined:

> Although the 35% payment is called a "rent incentive" payment, this label mischaracterizes what is really a profit-sharing arrangement. The money is going to CCG for "renting" a building and equipment to the Tribe – both of which the Tribe had already paid for by September of 2000,

[16] The IGRA defines net revenues as "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees." See 25 U.S.C. 2703(9).

> six months after the Casino opened – on land that is trust land. In other words, the documents enable CCG to collect a large amount of money, over a lengthy period of time, for doing nothing – performing no ongoing services for the Tribe, and, once the original costs of building, equipping and financing were paid, giving the Tribe nothing in return.

Id at 5. This case was highlighted by former Chair Hogen to the Senate Committee on Indian Affairs as an example of a violation of IGRA's sole proprietary interest mandate. 2005 SCIA Letter at 5. Chair Hogen further cited "an even more egregious example" under which a tribe made substantial payments for a five year term followed by "a 10-year obligation to pay 16% of gross revenue[.]" *Id.*

However, in some instances the OGC opined that the high level of compensation and the long term were warranted because of the risk assumed by the third party or because of the nature of the services. *See* October 18, 2005 OGC Letter to Arnold Samuel. Specifically, in one instance, the OGC stated:

> When we are presented with contracts, such as this one, where the developer is receiving a high level of compensation for a long period of time, we are compelled to examine whether or not the agreement gives the Developer a proprietary interest in the gaming operation. In our analysis we look to factors such as the risk to the developer, the ability of the Tribe to acquire other financing, and what services, if any, the Tribe is receiving in return for agreeing to the terms of the contract.

Id at 2.

In its sole proprietary interest analysis, OGC also examines control over the regulatory functions of the tribe, such as licensing. *See* Mason Letter at 5. The right of control over tribal regulatory decisions is an indicator that the tribe is not maintaining sole responsibility for the conduct of the gaming.

The same indicia of a proprietary interest found in those instances - the long term, high compensation with little or no risk, and control - are embodied in the 1994 Agreements. Indeed, the 1994 Agreements' terms in these key respects are more egregious than the examples former Chair Hogen highlighted to the Senate Committee on Indian Affairs and many of the agreements reviewed by OGC concluding that they violated IGRA's requirement that a tribe have the sole proprietary interest in and responsibility for the conduct of any gaming activity.

Based on the factors described herein, specifically, the high level of compensation coupled with a long term as well as control over the gaming regulation, I conclude that

the 1994 Agreements violate IGRA's mandate that the Band retain the sole proprietary interest in and responsibility for the gaming activity.

In summary, the facts below demonstrate the Tribe's violation of IGRA's requirement that the Tribe retain the sole proprietary interest in and responsibility for the gaming activity.

F. Facts of Violation

1. The Band is a federally recognized Indian tribe.

2. The Band operates the Fond du Luth Casino ("the Casino") located in Duluth, Minnesota on land placed into trust prior to October 17, 1988.

3. The Casino opened on April 1, 1986 and has continued in operation since that time.

4. In 1989, the Band and the State of Minnesota entered into a compact that was approved by the Secretary of the Interior.

5. On June 20, 1994, as part of a settlement agreement, the Band and the City entered into the 1994 Agreements.

6. The 1994 Agreements included, but were not limited to, the following: Sublease and Assignment of Gaming Rights Agreement; Tribal-City Accord; and Amendments to the Commission Agreement.

7. The Band and the City filed with the United States District Court for the District of Minnesota a Stipulation and Consent Order seeking the Court's approval of the 1994 Agreements and issuance of the Consent Order.

8. On July 28, 1994, the Court signed the Stipulation and Consent Order.

9. From June 1994 through August 2009, the Band and the City operated pursuant to the 1994 Agreements.

10. Section 1(i)(a) of the Commission Amendment created a Development Commission comprised of the Mayor of the City and the Chairperson of the Band.

11. Section 4 of the Sublease requires the Band to pay the Development Commission rent for a building that the Band owns located on a parcel that is held in trust by the United States for its benefit.

12. Section 3.8 of the Sublease provides that rental payments under the Sublease have been permanently assigned from the Development Commission to the City and are paid directly to the City.

13. The initial term of the Sublease is from September 30, 1993 until March 31, 2011.

14. Section 3.1of the Sublease provides that it is to run for an additional 25 year term after March 31, 2011 and the Sublease will expire in 2036.

15. The long term of this agreement is a factor that demonstrates the City's proprietary interest in the Band's gaming activity and that the Band does not have the sole proprietary interest in and responsibility for the gaming activity.

16. Section 4.2 of the Sublease requires the Band to pay rent in an amount equal to 19 percent of gross revenues from video games of chance for the initial term of 17 years.

17. The rental rate for the extended term of 25 years will be determined according to the terms of section 4.2.2.5 of the Sublease.

18. Rent payments made under the Sublease are placed in an account that can be spent on the general operations for the City without regard to any provision of services from the City to the Tribe.

19. The following table shows the division of gaming revenues for the Casino from 1994 through 2008.

Year	Gaming Net Income	Rent paid to City	Rent as percentage of Net Revenue
1994	9,336,421.93	2,737,225.28	29.32%
1995	12,183,933.00	3,275,862.73	26.89%
1996	13,117,265.55	3,487,524.67	26.59%
1997	14,347,797.57	3,898,595.29	27.17%
1998	15,412,276.33	4,221,993.82	27.39%
1999	17,015,919.21	4,636,790.23	27.25%
2000	17,071,089.31	4,838,070.35	28.34%
2001	16,873,265.32	5,115,645.02	30.32%
2002	18,693,568.61	5,521,705.82	29.54%
2003	18,345,039.78	5,440,224.68	29.66%
2004	19,490,796.19	5,653,522.89	28.01%
2005	19,322,907.37	5,608,777.39	29.03%
2006	18,819,221.77	5,844,786.65	31.05%
2007	20,245,652.18	6,415,459.89	31.69%

2008	18,329,290.43	6,137,694.33	33.49%

20. Between June 1994 and August 6, 2009, the Band paid the City approximately $75,874,407.66 to rent its own building on trust property held for its benefit by the United States.

21. The City assumed no financial or other risk in the development of the casino and the 1994 Agreements do not convey any substantial benefits to the Tribe. The high level of compensation and lack of financial or other risk by the City is a factor that demonstrates the Band does not have the sole proprietary interest in and responsibility for the gaming activity.

22. On August 6, 2009, the Band ceased making payments to the City pursuant to Band Resolution #1316/09.

23. The payments the City receives are a factor that demonstrates it has a proprietary interest in the gaming activity and that the Band does not have the sole proprietary interest in and responsibility for the gaming activity.

24. According to information received from the Band and the City, the Casino receives the same level of municipal services that any other citizen or business within the City would receive.

25. Under section 3 of the 1994 Commission Amendments, the City has agreed not to enter any agreement with another tribal government within 250 miles of the Duluth City Hall that is similar to the one entered into with the Band without prior approval of the Band.

26. No other federally recognized Tribe has lands eligible for gaming within 250 miles of the Duluth City Hall and no other gaming comparable to the Band's is permissible in Duluth.

27. Section 6(c) of the Tribal-City Accord requires that any change in the Band's gaming ordinance or regulations will only be effective after the City has consented in writing unless the change is required by federal law or by Tribal-State compact.

28. Section 16 of the Tribal-City Accord grants the City the right to review and voice objections to the Band's licensing of casino employees.

29. City control over the gaming activity is a factor that demonstrates that the Band does not have the sole proprietary interest in and responsibility for the gaming activity.

30. Section 16 of the Tribal-City Accord requires the Band to provide a representative of the City access to review and copy any and all records of the gaming operations.

31. Unfettered access to records of the casino is a factor that demonstrates the Band does not have the sole proprietary interest in and responsibility for the gaming activity.

Based on the totality of the above circumstances set forth above, the City possesses a proprietary interest in the gaming operation and responsibility for the operation in violation of IGRA, NIGC regulations, and the Fond du Lac Gaming Ordinance. *See* 25 U.S.C. 2710(b)(2)(A), (d)(1)(A)(ii); 25 C.F.R.§ 522.6(c); *Fond du Lac Gaming Ordinance* § 401.

G. Measures Required to Correct the Violation

The Band must cease performance under the 1994 Agreements of those provisions identified in this NOV as violating IGRA. This applies to the entire 42 year term of the 1994 Agreements.

H. Appeal

Within 30 days after service of this NOV, the Band may appeal to the full Commission under 25 C.F.R. Part 577 by submitting a notice of appeal, and, if desired, request for hearing to the National Indian Gaming Commission, 1441 L Street NW, Ninth Floor, Washington, DC 20005. The Band has a right to assistance of counsel in such an appeal. A notice of appeal must reference this Notice of Violation.

Within ten days after filing a notice of appeal, the Band must file with the Commission a supplemental statement that states with particularity the relief desired and the grounds therefore and that includes, when available, supporting evidence in the form of affidavits. If the Band wishes to present oral testimony or witnesses at the hearing, the Band must include a request to do so with the supplemental statement. The request to present oral testimony or witnesses must specify the names of proposed witnesses and the general nature of their expected testimony, whether a closed hearing is requested and why. The Band may waive its right to an oral hearing and instead elect to have the matter determined by the Commission solely on the basis of written submissions.

I. Fine-Order of Temporary Closure-Submission of Information

The violation cited above may result in the assessment of a civil fine against the Band in an amount not to exceed $25,000 per violation per day. The violation cited above may also result in the issuance of an order of temporary closure if the violation is not corrected. Under 25 C.F.R. § 575.5(a), the Band may submit written information about the violation to the Chairwoman within 15 days after service of this notice of violation (or such longer period as the Chairwoman may grant for good cause). The Chairwoman shall consider any information submitted in determining the facts surrounding the violation and the amount of the civil fine, if any.

Dated this 12 of July, 2011

Tracie L. Stevens, Chairwoman

cc: Henry Buffalo, Esq., Fond du Lac Band
Robert C. Maki Esq., City of Duluth
Shawn B. Reed, Esq., City of Duluth
Fond du Lac Tribal Gaming Commission