

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

**THE NOOKSACK INDIAN TRIBE OF
WASHINGTON and the NOOKSACK
BUSINESS CORPORATION II,**

Plaintiffs

v.

**OUTSOURCE SERVICES
MANAGEMENT, LLC.,**

Defendant.

Case No. 12-411

FIRST AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF

For its complaint Plaintiffs, the Nooksack Indian Tribe of Washington (the “Tribe”) and the Nooksack Business Corporation II (“NBC II”), by and through their undersigned counsel, allege as follows:

I. NATURE OF THE CASE

1. This is a suit arising in part under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. (the “IGRA”) and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 regarding whether certain agreements related to the financing and operation of the Nooksack Indian Tribe of Washington’s Northwood Crossing Casino (the “Casino” or “Northwood”) are void under IGRA as an unapproved management agreement, and/or

1 whether those agreements grant an interest in the Casino to an entity other than the Nooksack
2 Indian Tribe of Washington (the “Tribe”), in violation of the sole proprietary interest rule.

3 2. This suit also arises, in part, under 28 U.S.C. §1331 because it presents federal
4 questions regarding the waiver of sovereign immunity by a federally recognized Indian tribe,
5 the power of the Tribe to tax the Casino’s revenue notwithstanding a contractual provision
6 purporting to limit the Tribe’s taxing authority, and the enforceability of a contractual
7 provision that purports to limit the power of the Tribe to enact legislation affecting the terms
8 and conditions of such contract, in derogation of the Reserved Powers Doctrine.

9 **II. THE PARTIES**

10 3. The Tribe is a federally recognized Indian tribe, organized under the Indian
11 Reorganization Act of June 18, 1934 and the Constitution and By-Laws of the Tribe, with a
12 reservation in northwestern Washington, near the Canadian border.

13 4. Nooksack Business Corporation II (“NBC II”) is a corporation chartered and
14 existing under the laws of the Tribe. NBC II is a legal entity wholly owned by the Tribe and
15 has the same rights, privileges and immunities with respect to federal, state, and local law as
16 the Tribe. For personal jurisdictional analysis purposes, NBC II is a resident of the state of
17 Washington.

18 5. Upon information and belief, Outsource Services Management, LLC
19 (“OSM”) is a Minnesota limited liability company with its principal place of business in
20 Minneapolis, Minnesota.

21 6. Upon information and belief, OSM is a loan servicer acting on behalf of the
22 Federal Deposit Insurance Corporation (“FDIC”) as the successor in interest to Marshall
23 Bank, N.A.’s interests in certain agreements between and among the Tribe, NBC II, and
24 Marshall Bank, N.A. As the servicer of the NBC II loans, OSM routinely and regularly
25 interacts with NBC II and the Tribe and transacts business in the state of Washington.
26

III. JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over Plaintiffs' Declaratory Judgment claims pursuant to 28 U.S.C. § 1331 because they present federal questions regarding: (1) the waiver of sovereign immunity by a federally recognized Indian tribe; (2) the interpretation of contractual provisions involving gaming establishments on the Reservation pursuant to 25 U.S.C. § 2711 and 25 C.F.R. § 502.15; (3) the power of the Tribe to tax the Casino's revenue; and (4) the enforceability of a contractual provision that purports to limit the power of the Tribe to enact legislation affecting the terms and conditions of such contract, in derogation of the Reserved Powers Doctrine.

8. Jurisdiction is further conferred by 28 U.S.C. §1362 because this is a matter brought by an Indian tribe with a governing body duly recognized by the Secretary of the Interior, where the matter in controversy arises under the laws of the United States.

9. The Court has personal jurisdiction over defendant OSM because it has transacted and continues to transact business in the state of Washington, and because it has agreed by contract to resolve disputes arising from the agreements between NBC II, the Tribe and OSM's predecessor in interest in the United States District Court for Western District of Washington.

IV. FACTS

10. The IGRA requires Indian tribes to receive approval from the National Indian Gaming Commission (the "NIGC") before engaging in "Class II" or "Class III" gaming. 25 U.S.C. §§2701(b), (d). Class II gaming includes bingo and card games except for "banking" card games like baccarat, chemin de fer, and blackjack. 25 U.S.C. §2703(7). Class III gaming includes banking card games and slot machines. 25 U.S.C. §2703(8).

11. Beginning in the early 1990s, the Tribe sought to engage in tribal gaming. Consistent with the IGRA, the Tribe created the Nooksack Gaming Commission and adopted

1 a comprehensive Gaming Ordinance (the “Ordinance”) that was approved by the NIGC in
2 1993.

3 12. Since shortly after the approval of the Ordinance, the Tribe has operated a
4 Class III gaming facility on reservation land in Deming, Washington called the Nooksack
5 River Casino (the “River”) that is licensed by the Nooksack Gaming Commission. The
6 River is operated by the Nooksack Business Corporation (“NBC”).

8 13. In 2006, the Nooksack Gaming Commission licensed a second, Class II
9 gaming facility to be operated by NBC II, and began construction on Northwood in 2006.

10 14. Northwood is located on a 20-acre parcel owned by the Tribe near Lynden,
11 Washington, approximately one-half mile south of the Canadian border.

12 15. On April 30, 2007, Marshall Bank, N.A. and NBC II entered into a 6-year
13 Construction/ Term Loan Agreement and related agreements (collectively, the “Construction
14 Loan Documents”), under which NBC II borrowed \$17,602,731 from Marshall to pay certain
15 costs associated with the development and construction of Northwood (the “Construction
16 Loan”).

17 16. At the same time, Marshall and NBC II also entered into a 6-year Equipment
18 Loan Agreement and related agreements (collectively, the “Equipment Loan Documents”),
19 under which NBC II borrowed \$8,635,417 from Marshall to purchase gaming equipment to
20 be used at Northwood (the “Equipment Loan”).

21 17. The Construction Loan and the Equipment Loan (the “Loans”) were to
22 finance costs associated with designing, developing, constructing and equipping Northwood
23 and related facilities.

24 18. At the time the Northwood loan was executed, NBC had an existing
25
26

1 \$15,315,856 loan from BankFirst for the River that was executed on December 21, 2006.

2 The terms of the River loan are substantially similar to the Northwood loan.

3 19. Upon information and belief, an affiliated entity of Marshall acquired
4 BankFirst in 2008 and thereafter BankFirst was placed into receivership by the Federal
5 Deposit Insurance Corporation ("FDIC") on July 17, 2009.

6 20. None of the Construction Loan Documents or the Equipment Loan
7 Documents (hereinafter, collectively, the "Loan Documents") was submitted to the NIGC for
8 review.
9

10 21. Under the terms of the Loan Documents, the laws of the state of Washington
11 governed the parties' agreement.

12 22. The loans were secured by all of the gaming equipment in the casino and
13 proceeds from gaming in the casino, as well as any operations financed in whole or in part by
14 proceeds from the casino.
15

16 23. In the event of default, the security interest extended to the gross proceeds of
17 casino operations held in all accounts at the Depository Bank, including the Operating
18 Account:

19 **Section 2.1 Pledge, Lien and Grant of Security Interests** As security for
20 the payment and performance of all of the Secured Obligations outstanding
21 from time to time, equally and ratably on parity with each other, each of the
22 Borrower and the Tribe hereby grants to the Depository, for the benefit of the
23 Secured Payees of each and all of the Secured Obligations from time to time
24 outstanding, a pledge of, a lien on and a present security interest in, all of the
25 right, title and interest of the Borrower in the following (collectively, the
26 "Pledged Financial Assets"): (a) the Pledged Revenues, whether now or
hereafter owned, existing, arising or acquired, wherever held or located, and
whenever received; (b) all the Depository Agreement Accounts and related
Financial Assets; and (c) all proceeds of the foregoing; excluding, however,
so long as no Event of Default has occurred and is continuing hereunder, any
amounts properly transferred or applied from the Operating Account
(including to pay Debt Service on the Equipment Loan), the Secured

Obligations Account, the Repair and Replacement Account, the Tribal Distribution Account or the Additional Incentive Payments Account or the Excess Pledged Revenues Account. . . The Borrower, the Tribe and the Depository each acknowledge and agree that with respect to each Depository Agreement Account, subject to the express terms and conditions of this Depository Agreement, the Depository shall as agent for the Secured Payees have the right to redeem or transfer any Financial Asset in the Depository Agreement Account without further consent of the Borrower. [Depository Agreement, §2.1 at pages 11 – 12.]

24. Interest on the Construction Loan was payable monthly, with interest only and no principal to be paid for the first twelve monthly payments during the construction and equipping of the casino.

25. Commencing on the thirteenth month, both interest and principal were payable on the Construction Loan in 59 monthly installments, and the unpaid balance of principal and any unpaid interest was to be payable upon the sixtieth payment date, on which date approximately half of the Loan principal would remain due and payable.

26. Both “Minimum Interest” and deferrable interest called “Additional Incentive Amounts” are payable on the Construction Loan. For the first 12 interest-only payments, Minimum Interest accrued at a rate equal to the monthly adjusted Prime Rate reported by the Wall Street Journal, plus 2.5% per annum. Thereafter, Minimum Interest accrued at a rate equal to 10.5%.

27. On or after April 1, 2008 (the “Conversion Date”), to the extent there was surplus monthly cash flow each month, additional payments known as Additional Incentive Payments were payable as additional interest on the Construction Loan. The term “Additional Incentive Payment” means a payment of interest accruing on the principal loan balance at the annual non-compounding rate of 4.75% that is deferrable if there is insufficient surplus monthly cash flow. All Additional Incentive Payments deferred because of insufficient surplus monthly cash flow are due and owing at the maturity or earlier prepayment of the entire Construction Loan.

1 28. The Equipment Loan is senior in right of payment to the Construction Loan,
2 secured by a perfected first priority security interest in the purchased gaming equipment, and
3 both principal and interest on the Equipment Loan are payable as Operating Expenses prior
4 to any payment of principal or interest on the Construction Loan.

5 29. With the Additional Incentive Payments, the effective interest rate for the
6 \$17,602,734 Construction Loan is 15.25%.

7 30. Minimum interest was due and payable regardless of the amount of revenues
8 generated by Northwood, and any failure to pay such interest for any reason constituted a
9 Default.

10 31. The Loan Documents afforded Marshall a number of rights and remedies
11 upon default, including the right to “exercise or enforce any and all other rights or remedies
12 available by law or agreement against the Borrower, or against any other Person or property
13 (but not in contravention of any Loan Document). . .” Construction Loan, page 44, §7, ¶(a).
14 Remedies under Washington law include, but are not limited to, the appointment of a
15 Receiver under the Washington Receivership Act, Chapter 7.60 RCW.

16 32. Notwithstanding the rights and remedies of Marshall upon default, the NBC
17 II’s obligations to pay amounts due under the Loan Documents, and any other claims,
18 liabilities or obligations of the NBC II or the Tribe are enforceable solely against (i) the
19 Pledged Assets and (ii) assets of the Facilities Enterprise (including revenues, but excluding
20 property purchased with proceeds of the Equipment Loan, or proceeds thereof) that were the
21 subject of a Transfer in violation of the terms hereof (“Transferred Facilities Assets”).

22 33. Neither the general obligation nor the full faith and credit or taxing power of
23 the Tribe was pledged to the payment of any amounts due on the Note or under any other
24 Loan Document or any Tribal Document (as defined in the Tribal Agreement), except to
25 recover Transferred Facilities Assets (or the value thereof) or certain “Restocking Fees” as
26 provided in the Tribal Agreement.

34. Marshall assumed oversight of Casino revenues, which NBC II was required to deposit into a depository account controlled by the Depository Bank as an agent solely of Marshall:

Section 2.3 Control of Accounts. The parties intend that a perfected security interest in all Depository Agreement Accounts and Financial Assets be created in favor of all Secured Payees (with the priority of rights herein set forth), with the Depository acting the agent of all Secured Payees. To that end, the Borrower acknowledges and agrees that (a) to the extent a Depository Agreement Account is a “deposit account” within the meaning of the State UCC, the Depository is the “bank” within the meaning of the State UCC, and (b) to the extent a Depository Agreement Account is a “securities account” within the meaning of the State UCC, the Depository is the securities intermediary for the Depository Agreement Account and shall in such capacity act as the agent for all Secured Payees to hold all security entitlements related to all Financial Assets and such Depository Agreement Account, including the right to direct the transfer or redemption of any Financial Assets on behalf of the Secured Payees without the consent of the Borrower. Each of the Depository and the Borrower expressly acknowledges and agrees that the Depository is acting solely as an agent of the Secured Payees in connection with this Depository Agreement and that the Depository is not acting as an agent of the Borrower in any manner or at any time in connection with this Depository Agreement. [Depository Agreement, §2.3 at page 13].

35. Under the Depository Agreement, all proceeds of Northwood operations except Daily Cash-on-Hand requirements were required, on a daily basis, to be deposited in the Pledged Revenues Account at the Depository.

36. Once deposited there, the Depository, not NBC II, controlled the funds, and moved them among the various accounts and sub-accounts at the Depository that were created under the Depository Agreement in the following priority: (1) the Operating Account and Equipment Loan Sub-Account; (2) the Secured Obligations Account; (3) the Repair and Replacement Account; (4) the Tribal Distributions Account; (5) the Additional Incentive Payments Account; and (6) the Excess Pledged Revenues Account (collectively, the “Waterfall Accounts”).

1 37. NBC II was required to provide, in advance, a monthly Operating Budget, and
2 the Depository would transfer funds in that amount to the Operating Account.

3 38. Under the terms of the Depository Agreement, Operating Expenses included
4 the debt service on the Equipment Loan. Thus, transfers to the Operating Account included
5 sufficient funds to make the monthly debt service payments on the Equipment Loan.

6 39. The Depository would then transfer funds to the Secured Obligations Account
7 to pay the Monthly Debt Service Charges.

8 40. After transfers have been made to the Operating Account and the Secured
9 Obligations Account, the Depository would transfer funds to the Repair and Replacement
10 Account. The amount to be deposited was required to be 1% of all Pledged Revenues that
11 are revenues of Class II and Class III Gaming.

12 41. Thereafter, the Depository would transfer the Monthly Tribal Distribution
13 Amount to the Tribal Distribution Account.

14 42. Next, the Depository would transfer to the Additional Incentive Payments
15 Account any amounts required to be deposited therein.

16 43. Finally, the Depository would transfer to the Excess Pledged Revenues
17 Account all remaining funds from the Pledged Revenues Account.

18 44. Under the terms of the Loan Agreement and the Depository Agreement, all
19 proceeds from the casino operations at Northwood were Pledged Revenues, as that term is
20 defined in the Depository Agreement, except those amounts that had to be retained by
21 Northwood as its Daily Cash-on-Hand Requirements:

22 **Pledged Revenues:** whether now existing or hereafter arising, wherever
23 located and however evidenced, whether in the form of money, deposit
24 accounts, investments, accounts, instruments or other assets, that constitute
25 income, revenues, rents or other receipts of the Facilities Enterprise,
26 including, without limitation, income, revenues, rents and receipts arising
from: (a) class II and class III gaming (as such terms are used in IGRA),
including, without limitation, receipts from bingo, slot machines, and card
games; (b) on-site facilities for dining, food service, beverage, restaurant and
other concessions derived therefrom; (c) hotel, motel or other lodging

facilities financed in whole or in part with Recourse Debt; (d) the lease or sublease of space or Equipment within, on or at the Facilities; (e) the disposition of all or any portion of any Facilities; and (f) any other activities carried on within the Facilities, including license fees or the net proceeds of business interruption insurance (or its equivalent) obtained by or on behalf of the Borrower with respect to the Facilities; . . . Notwithstanding the foregoing, the Borrower may retain and need not pledge an amount equal to the Daily Cash-on-Hand Requirements. [Depository Agreement, at § 1.1, pgs. 9 – 10].

Daily Cash-on-Hand Requirements: the amount of cash which is reasonably determined and certified by the Borrower to the Depository as necessary to be retained on site to properly operate the Facilities (which under Section 3.1(a) hereof is not required to be deposited with a Collection Bank or the Depository). [Depository Agreement, at § 1.1 at p. 2].

45. NBC II is required to certify its Daily Cash-on-Hand Requirements, to justify not depositing that portion of the daily receipts.

46. “Operating Expenses” were defined under the Depository Agreement as follows:

Operating Expenses: the current expenses of operation, maintenance and repair of the Facilities, excluding capital expenditures and excluding those items expressly excluded below, but including Permitted Tribal Gaming Commission Expense. Operating Expenses shall include, without limitation, prizes, wages, salaries and bonuses to personnel, the cost of materials and supplies used for current operation and maintenance, security costs, utility expenses, trash removal, cost of goods sold (other than with respect to tribal crafts sold in the gift shop), advertising, insurance premiums, rental payments for real or personal property (other than capital lease payments), payments of property taxes owing to the State or any political subdivision of the State, payments to the State pursuant to the Compact or any applicable Gaming Regulations, payments made pursuant to Gaming Device Agreements, payments required to be made to the National Indian Gaming Commission pursuant to IGRA, and current expenses that are not recurrent monthly but may be reasonably expected to be incurred in accordance with GAAP. For purposes of this definition, with respect to any month, Debt Service (including both principal and interest, and whether due as scheduled or as a result of acceleration) due on the Equipment Loan on or before the first day of the next following month shall constitute an Operating Expense. Notwithstanding the foregoing, Operating Expenses shall not include (i) any interest expense (including any amounts paid by the Borrower under a Swap Arrangement) or

other payment constituting Debt Service or Monthly Service Charges on any Debt (other than principal and interest payable with respect to the Equipment Loan), (ii) any allowance for depreciation, renewals or replacement of capital assets, (iii) any other non-cash charges, (iv) any amounts paid to a third party firm, corporation or other business entity for managing all or any portion of the Facilities, or (v) any payment or other distribution of money or property to the Borrower or tribal members of the Borrower, other than Permitted Tribal Gaming Commission Expenses. [Depository Agreement, at § 1.1, p. 7].

47. The definition of “Operating Expenses” under the Construction Loan Documents is inconsistent with IGRA and the NIGC Regulations, because it fails to include as “Operating Expenses” some of the expenses incurred in the business, which the 2009 amendment to 25 U.S.C. §502.16 clarified were intended to be included. 74 FR 142 at 926-940 (July 27, 2009).

48. Authorized Operating Expenses under the Depository Agreement and Loan Agreement include only current expenses, and may not include any aged accounts. As a consequence, if NBC II is late on a payment to a vendor and its account became past due, the Loan Agreement and Depository Agreement prohibited the payment of the past due invoice – in effect, allowing the lender to determine which vendors NBC II was able to pay, and which would not be paid.

49. The funds in the Operating Account remained Pledged Assets under the agreements, and in the event of a default, the Loan Agreement and Depository Agreement permit the lender to appropriate without any notice any and all Pledged Financial Assets in any account, including the Operating Account.

50. The Construction Loan Agreement prohibits the Tribe from entering into any Gaming Device Agreement which causes the total number of gaming devices or electronic games of chance subject to such agreements to exceed 25% of the total number of devices or games then in use in at the Casino.

1 51. In addition, the Tribe was required (with the proceeds of the Equipment Loan)
2 to purchase at least 300 video gaming terminals suitable for Class II Gaming that are
3 convertible for playing Class III Gaming.

4 52. The Tribe was further required under the Construction Loan Agreement to
5 pursue an amendment to its Compact that will allow not less than 300 devices for Class III
6 Gaming to be operated at the Casino.

7 53. Under the original Loan Documents, the Depository Agreement provided for
8 a guaranteed monthly distribution to the Tribe of \$50,000. Under a First Amendment to
9 Construction Loan dated June 1, 2008, the guaranteed monthly distribution to the Tribe was
10 reduced to \$25,000.

11 54. The Loan Documents each contain a limited waiver of sovereign immunity
12 under which NBC II and the Tribe purportedly agreed to grant to the Lender and all Persons
13 entitled to benefit from any Loan Document an irrevocable limited waiver of sovereign
14 immunity from suit or legal process with respect to any Claim arising under the Loan
15 Agreements.

16 55. The Construction/Term Loan Tribal Agreement (the "Tribal Agreement"),
17 one of the Loan Documents, purports to prohibit the Tribe from imposing a tax on the
18 revenue of the Casino. Tribal Agreement, ¶ (w), § 11.

19 56. The Tribal Agreement purports to prevent the Tribe from taking any action
20 which "(r)escinds, revokes, or materially amends. . . any other ordinance, resolution, or
21 regulation relating to the Loan or the Facilities, which rescission, revocation or amendment
22 would likely have a Material Adverse Effect" on the Loan. Tribal Agreement, ¶ (x)(iii).

23 57. The Tribal Agreement purports to prohibit the Tribe from enacting legislation
24 which impairs or interferes, or could impair or interfere, in any manner, with any right or
25 remedy of the Lender; purports to render any such legislation void without the prior written
26

1 consent of the Lender, thereby granting to the Lender a right of veto power over the Tribe.
2 Tribal Agreement, § 11.

3 58. Upon information and belief, Marshall Bank, N.A., through affiliated entities,
4 negotiated at least 75 loans for tribal gaming operations between 2001 and 2008, including
5 the loan at issue in this matter, then syndicated the loans and sold participation interests to
6 other lenders, retaining the servicing rights and obligations under the terms of one or more
7 Participation Agreements with the other lenders.

8 59. Upon information and belief, Marshall Bank, N.A. was closed by the FDIC on
9 January 29, 2010 and OSM assumed the servicing rights and obligations of the participating
10 lenders for the Northwood Construction Loan and the Equipment Loan and the River loan
11 under the terms of the Participation Agreement(s).

12 60. Between November, 2008 and February, 2009, NBC II was unable to make
13 the monthly interest and principal payments due on the Construction and Equipment Loans
14 (the "Monthly Debt Service Charge Payments"). During that same time frame, NBC was
15 unable to make the monthly interest and principal payments due on the River loan, and went
16 into default.

17 61. Marshall sent NBC II a Notice of Default and declared all amounts due with
18 respect to the loans to be immediately due and payable.

19 62. NBC II and Marshall engaged in settlement discussions and on March 1,
20 2009, Marshall, NBC II, and the Tribe entered into a 6-month Equipment Forbearance
21 Agreement and a 6-month Construction Forbearance Agreement (the "First Forbearance
22 Agreements"), under which Marshall agreed not to exercise any rights or remedies available
23 under the Construction Loan and Equipment Loan Documents, so long as NBC II complied
24 with an amended payment schedule, and met certain other conditions set forth in the First
25 Forbearance Agreements.
26

1 63. Among the conditions NBC II was required to meet under the First
 2 Forbearance Agreements was the reduction of monthly deposits to the “Repair and
 3 Replacement Account” to \$0, and the elimination of any distribution to the Tribe from the
 4 Tribal Distributions Account.” Thus, the lender would receive 100% of the casino proceeds
 5 in excess of the monthly Operating Expenses, and the Tribe would receive nothing.

6 64. Under the First Forbearance Agreements, the term “Operating Expenses” was
 7 amended to include the cost of the lender’s legal fees and expenses.

8 65. Payments to the Tribal government from the Tribal Distribution Account were
 9 reduced to \$0, thus eliminating a minimum guaranteed monthly payment to the Tribe in a
 10 sum certain that has preference over the retirement of construction costs.

11 66. The amount to be paid to the “Repair and Replacement Account Deposit” also
 12 was reduced to \$0, which prohibited NBC II from performing any repairs or maintenance of
 13 the Northwood facilities.

14 67. On July 1, 2009, NBC II found itself once again unable to make the Monthly
 15 Debt Service Charge Payment of \$132,030.89 from the casino proceeds.

16 68. Marshall issued notice of breach of the First Forbearance Agreements and
 17 offered to extend the deadline for NBC II’s payment of this amount under the First
 18 Forbearance Agreements until July 3, 2009.

19 69. Marshall filed suit against NBC II and the Tribe in a Whatcom County,
 20 Washington Superior Court.

21 70. Marshall alleged breaches of the Construction and Equipment Loan
 22 Documents and First Forbearance Agreements, and sought a monetary award of
 23 \$19,535,356.32 (representing amounts due as of August 1, 2009 for the Construction Loan),
 24 plus \$8,211,112.84 (representing amounts due as of August 26, 2009 for the Equipment
 25 Loan), plus additional accrued interest, penalties, costs and fees.
 26

1 71. In settlement of the Whatcom County litigation, Marshall, NBC II, the Tribe,
2 and First National Bank & Trust Co. of Williston entered into a 3-year Forbearance, Waiver
3 and Amendment Agreement (Construction Loan) and a 3-year Forbearance, Waiver and
4 Amendment Agreement (Equipment Loan), both dated January 29, 2010 (the “Second
5 Forbearance Agreements”).

6 72. Under the Second Forbearance Agreements, NBC II was required to make
7 semi-monthly debt service payments between February 5 and June 15, 2010 totaling
8 \$132,030.90 per month.

9 73. Distributions to the Tribe from the Tribal Distributions Account were capped
10 at \$50,000 per month under the Second Forbearance Agreements.

11 74. The maturity date of the Construction Loan was extended by the Second
12 Forbearance Agreements to December 31, 2014, 7.5 years from the time the original loan
13 was executed.

14 75. The Waterfall Accounts created under the Depository Agreement were
15 amended, providing for payment of Operating Expenses, then full payment of the Debt
16 Service amounts (including the lenders’ legal fees and expenses), and then – only if there
17 were funds available after full payment of the Debt Service amounts and the lenders fees and
18 expenses – were funds to be distributed to the Tribe from the Tribal Distributions Account.

19 76. Thus, under the Second Forbearance Agreements, there was still no
20 guaranteed minimum payment to the Tribe out of its Casino operations.

21 77. During the continuing Forbearance Period, the deposits to the “Repair and
22 Replacement Account Deposit” remained at \$0, preventing NBC II from performing critical
23 repairs and maintenance of its casino facilities.

24 78. The Second Forbearance Agreements purported to amend §8.32 of the
25 Construction Loan Documents retroactively to add the following provisions pertaining to
26 management:

Notwithstanding any provision in this Agreement or any Loan Document, none of the Depository, Lender or any Secured Payee (collectively, the "Lending Parties") shall ever engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Borrower's gaming operations (collectively, "Management Activities"), including, but not limited to:

- (a) the training, supervision, direction, hiring, firing, retention, compensation (including benefits) of any employee (whether or not a management employee) or contractor;
- (b) any working or employment policies or practices;
- (c) the hours or days of operation;
- (d) any accounting systems or procedures;
- (e) any advertising, promotions or other marketing activities;
- (f) the purchase, lease, or substitution of any gaming device or related equipment or software, including player tracking equipment;
- (g) the vendor, type, theme, percentage of pay-out, display or placement of any gaming device or equipment; or
- (h) budgeting, allocating, or conditioning payments of Borrower's operating expenses;

provided, however, that upon the occurrence of a default, no Lending Party will be in violation of the foregoing restriction solely because the Lending Party:

- (i) enforces compliance with any term in any Loan Document that does not require the gaming operation to be subject to any third party decision-making as to any Management Activities; or
- (ii) requires that all or any portion of the revenues securing the Borrower's obligations be applied to satisfy valid terms of the Loan Documents; or
- (iii) otherwise forecloses on all or any portion of the Facilities securing the Borrower's obligations under the Loan Documents. [Second Construction Loan Forbearance Agreement, §6(e) and Second Equipment Loan Forbearance Agreement, §8].

79. The Second Forbearance Agreement required NBC II to execute and deliver a Confession of Judgment in an amount reflecting interest at the default rate and late fees on the Construction Loan and the Equipment Loan and the Additional Incentive Payments on the Construction Loan that were due and payable immediately prior to the commencement of the Forbearance Period.

1 80. NBC II executed and delivered a Confession of Judgment in the amount of
2 \$4,430,441.53, and OSM dismissed the Whatcom County, Washington Superior Court
3 lawsuit.

4 81. If a Forbearance Termination Event did not occur prior to December 31, 2011,
5 then certain defaults were to be waived, and certain additional payments, unpaid charges,
6 accrued interest, and interest prior to December 31, 2011 were to be forgiven, and all interest
7 accruing on the Construction Note in excess of 6.25% per annum from January 5, 2009 to
8 January 1, 2012 was also to be forgiven.

9 82. On January 29, 2010 Marshall Bank, NA was closed by the FDIC. As
10 Receiver, the FDIC stepped into the shoes of Marshall Bank as the Servicer of the
11 Construction and Equipment Loans and the Lender under certain Participation Agreements.

12 83. Effective May 5, 2010, the FDIC resigned as Servicer and Lender and
13 assigned, endorsed, and transferred all right and interest in certain Credit Agreements, and
14 the Construction and Equipment Loans, to OSM.

15 84. In March, 2010, while FDIC was Servicer of the Construction and Equipment
16 Loans, OSM purported to negotiate an amendment to the January 29, 2010 Second
17 Forbearance Agreement with the Tribe and NBC II, and the execution of a \$25,349,929
18 Confession of Judgment by NBC II dated March 29, 2010.

19 85. At the time of the March, 2010 Amendment to the Second Forbearance
20 Agreement and \$25,349,929 Confession of Judgment, OSM had no authority to execute such
21 agreement or demand such confession, because that authority was held by the FDIC as
22 Receiver of Marshall Bank.

23 86. The Amendment to the Second Forbearance Agreement was not signed by
24 OSM, and its ultra vires act was neither authorized nor ratified by the FDIC.

1 87. No Forbearance Termination Event occurred prior to December 31, 2011.
2 The Second Forbearance Agreements, as amended, expired of their own terms on January 1,
3 2012.

4 88. OSM has demanded payment of principle and interest on the Construction
5 Loan note and the Equipment Loan note in equal monthly installments in an amount
6 sufficient to fully amortize the loans by the maturity date of December 31, 2014.

7 89. OSM has asserted that it has not waived certain defaults as provided under the
8 Second Forbearance Agreements, and that certain additional payments, unpaid charges,
9 accrued interest, and interest prior to December 31, 2011 have not been forgiven, and all
10 interest accruing on the Construction Note in excess of 6.25% per annum from January 5,
11 2009 to January 1, 2012 has not been forgiven.

12 90. The balance of the Construction Loan is \$16,733,043. The balance of the
13 Equipment Loan is \$5,806,706. The amount of the monthly payment demanded by OSM is
14 \$689,804.

15 91. Northwood does not generate sufficient revenue to cover its operating
16 expenses and fully service the loans.

17 92. The Northwood revenue will be adequate to fully fund the Operating
18 Account/Equipment Loan Sub-Account, and in some months may fully fund the Secured
19 Obligations Account from which debt service is made.

20 93. The Northwood revenue will be inadequate in most, if not all months to fund
21 the Repair and Replacement Account after the Operating Account/Equipment Loan Sub-
22 Account and the Secured Obligations Account are funded.

23 94. The Northwood revenue will likely never be adequate to make distributions to
24 the Tribe in any amount after the Operating Account/Equipment Loan Sub-Account, the
25 Secured Obligations Account, and the Repair and Replacement Account are funded. As a
26 consequence, the Tribe will not receive any proceeds from its Northwood operations, and the

1 casino, and 100% of its revenue, will be managed for the sole purpose of servicing the debt
2 and paying the lender.

3 95. The terms of the Loan Documents violate the IGRA and the NIGC's
4 implementing regulations, because they give unapproved third parties the authority to set up
5 working policy for Northwood's gaming operation.

6 96. The Loan Documents thereby constitute a management agreement within the
7 meaning of 25 U.S.C. § 2711 that has not been approved by the NIGC and is therefore void
8 and unenforceable.

9 97. The Loan Documents further violate the IGRA and the NIGC's implementing
10 regulations because with the effective interest rate and under the Waterfall Accounts, the
11 Lender, not the Tribe, receives all of the proceeds of the Northwood operations, less a subset
12 of operating expenses as defined by IGRA and its implementing regulations, and thus the
13 Tribe does not have the sole proprietary interest in the Tribe's gaming operation.

14 98. The granting of a proprietary interest in the Tribe's gaming operations to the
15 lender renders the Loan Documents void under IGRA.

16 99. The limited waiver of sovereign immunity contained in the void Loan
17 Documents is void and unenforceable.

18 100. Compliance with the Loan Documents by NBC II will violate IGRA and the
19 NIGC regulations and the Tribe's own Gaming Ordinance, which if not corrected could
20 result in sanctions from the NIGC, up to and including closure of the Tribe's gaming
21 operation.

22 101. On February 6, 2012 the Tribe, by Resolution No. 12-014, rescinded its
23 limited waiver of sovereign immunity, and the limited waiver of sovereign immunity of NBC
24 II purported to have been granted under the Loan Documents.

25 102. On February 6, 2012 the Tribe, by Resolution No. 12-015, rescinded its grant
26 under the Loan Documents of the right to OSM or its agents to enter the Reservation.

1 103. On February 6, 2012 the Tribe adopted Title 100, the Nooksack Tribal Tax
2 Code. Chapter 100.04 of the Nooksack Tribal Tax Code created a Tribal Economic
3 Development Tax that imposes a tax on the Net Operating Income of all Businesses owned
4 or operated by the Tribe, located within the Reservation, and operated for purposes of
5 promoting the economic development of the Tribe.

6 104. II On February 24, 2012, without notice to the Tribe or NBC II, OSM filed
7 with the Whatcom County Superior Court, and the Court entered, a document titled
8 *Judgment Summary and Order Indorsing Confession of Judgment*. The Judgment attached
9 the March 29, 2010 Confession of Judgment under which NBC II, alone, purported to
10 consent to entry of judgment in the amount of \$25,349,929.

11 105. The Judgment incorrectly asserted that the Tribe had waived its sovereign
12 immunity and consented to entry of a judgment against it. OSM did not thereafter provide
13 the Tribe or NBC II with notice that it had entered the Judgment.

14 106. On March 26, 2012, without notice to NBC II or the Tribe, OSM caused the
15 Whatcom County Superior Court to issue Writs of Garnishment directed to a number of
16 banks holding accounts of NBC II, NBC, and the Tribe. Several of these banks seized funds
17 that were not owned by NBC II.

18 107. When NBC II and the Tribe became aware that its funds had been seized, they
19 moved immediately, and on an emergency basis, to vacate the Judgment and quash the Writs.
20 The Judgment was vacated as to the Tribe on March 29, 2012 by Agreed Order.

21 108. NBC II's motion to vacate the February 24, 2012 Judgment was heard by the
22 Whatcom County Superior Court on April 20, 2012, and the Court denied NBC II's motion.

23 109. On May 1, 2012, NBC II was dissolved pursuant to Title 57 of the Nooksack
24 Tribal Code, and is presently winding up its affairs, consistent with that Code and the
25 resolution authorizing NBC II's dissolution.
26

110. NBC II terminated all of the Northwood Casino employees and ceased its operations of the Casino.

111. A new Tribal corporation, The Woods, Inc. ("Woods") was chartered on April 16, 2012.

112. Woods has not waived its sovereign immunity.

113. On May 1, 2012, Woods acquired certain unencumbered assets of NBC II, agreed to hire all of the Northwood employees terminated by NBC II, was authorized by the Tribe to operate the Casino, and began operating the Casino.

114. By letter dated May 1, 2012, OSM advised NBC II of its intent to ask the Whatcom County Superior Court for the appointment of a receiver who would take the gross proceeds of Casino operations, determine appropriate operating expenses and transmit them to the Casino, and then deliver the remainder to OSM.

115. On May 2, 2012, NBC II notified OSM that it had been dissolved and was winding up its affairs.

116. On May 3, 2012, OSM obtained an ex parte order that purported to command the Chairman of the Tribe to appear and be examined in a supplemental proceeding before the Whatcom County Superior Court, upon penalty of confinement in jail for noncompliance; and further purported to enjoin the Tribe, the Chairman, NBC II, and NBC II's Chief Financial Officer from transferring, disposing of, or interfering with NBC II's property, including without limitation the Casino, pending further order of the Court.

V. CAUSES OF ACTION

First Cause of Action: Declaratory Judgment under the IGRA

117. NBC II and the Tribe adopt and incorporate the facts alleged at ¶¶ 1 – 116 as though reasserted here in full.

118. In 1988, Congress enacted the IGRA. Pub. L. No. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701 to 2721). Its stated goals were to create a comprehensive

1 regulatory framework “for the operation of gaming by Indian tribes as a means of promoting
 2 tribal economic development, self-sufficiency, and strong tribal governments,” to “shield
 3 [tribes] from organized crime and other corrupting influences, to ensure that the Indian tribe
 4 is the primary beneficiary of the gaming operation, and to assure that gaming is conducted
 5 fairly and honestly by both the operator and players.” 25 U.S.C. § 2702(1)-(2).

6 119. The IGRA provides the Chairman of the NIGC with the authority to review
 7 and approve management contracts entered into by an Indian tribe “for the operation and
 8 management,” 25 U.S.C. § 2711(a)(1), of a class II or class III gaming facility. See 25 U.S.C.
 9 §§ 2710(d)(9), 2711(a)(1).

10 120. As the Seventh Circuit Court of Appeals has recently explained in *Wells*
 11 *Fargo, N.A. v. Lake of the Torches Economic Development Corp.*, 658 F.3d 684 (7th Cir.
 12 2011), Congress enacted the IGRA to provide a comprehensive regulatory framework for
 13 gaming operations by Indian tribes that would promote tribal economic self-sufficiency and
 14 strong tribal governments while shielding them from organized crime and other corrupting
 15 influences.

16 121. Congress explicitly expressed a concern that Indian tribes be the primary
 17 beneficiaries of fair and honest gaming operations. See 25 U.S.C. § 2702(1)-(2).

18 122. Congress attempted to implement these legislative goals by conditioning,
 19 through 25 U.S.C. § 2711(b), the Chairman's approval of a management contract on the
 20 inclusion in the contract of several provisions designed to protect the interests of the Indian
 21 tribe. For example, the contract must provide “for a minimum guaranteed payment to the
 22 Indian tribe that has preference over the retirement of development and construction costs,”
 23 25 U.S.C. § 2711(b)(3), and it must specify “an agreed ceiling for the repayment of
 24 development and construction costs.” 25 U.S.C. § 2711(b)(4).

25 123. The contract cannot last more than five years unless the Chairman determines
 26 “that the capital investment required, and the income projections, for the particular gaming

1 activity require the additional time.” 25 U.S.C. § 2711(b)(5). Finally, the contract must set
 2 out “grounds and mechanisms” by which it may be terminated. 25 U.S.C. § 2711(b)(6).

3 124. Under NIGC regulations, unapproved management contracts are void. 25
 4 C.F.R. § 533.7.4

5 125. The Chairman's review of management contracts is subject to standards set
 6 out in the IGRA and in the NIGC regulations. Those standards include background checks of
 7 those involved with the management contractor, provisions setting out responsibility over the
 8 operations of the facility and substantive limits on the duration of the contract and the
 9 amount of compensation the management contractor may receive for its services. See 25
 10 U.S.C. § 2711; 25 C.F.R. §§ 531, 533, 537.

11 126. Sections 2710 and 2711 of the IGRA permit Indian tribes to “enter into a
 12 management contract for the operation of a Class III gaming activity” or to “enter into a
 13 management contract for the operation and management of a class II gaming activity,” only
 14 if the contract has been submitted to and approved by the Chairman of the Commission. 25
 15 U.S.C. §§ 2710(d)(9), 2711(a)(1).

16 127. The IGRA does not define “management contract.” The Commission has
 17 defined the term “management contract” by regulation as “any contract, subcontract, or
 18 collateral agreement between an Indian tribe and a contractor or between a contractor and a
 19 subcontractor if such contract or agreement provides for the management of all or part of a
 20 gaming operation.” 25 C.F.R. § 502.15.

21 128. The NIGC has interpreted the term “collateral agreements” to include land
 22 purchase agreements and development and construction agreements when those agreements
 23 “provide for the management of all or part of a gaming operation.” *Id.*

24 129. The IGRA and the NIGC regulations do not limit “collateral agreements” to a
 25 traditional contract to oversee the daily operations of the gaming facility, but extend to a
 26 financing scheme that permits the provider of funding intermittently to interject itself in the

1 management decisions of the facility to ensure the security of its investment. *Wells Fargo,*
 2 *N.A. v. Lake of the Torches Economic Development Corp.*, 658 F.3d 684 (7th Cir. 2011).

3 130. The lender, acting through OSM, has budgeted and allocated the payments of
 4 NBC II's operating expenses, by

- 5 a. defining operating expenses to include debt service on the Equipment Loan;
 6 while excluding so-called "non-operating expenses" such as other interest
 7 expenses, and allowances for depreciation, renewals, and replacements of
 8 capital assets, and prohibiting the transfer of funds to the Operating Account
 9 that are outside the lender's definition;
- 10 b. prohibiting the payment of aged and past-due (as opposed to current) accounts
 11 with vendors; and
- 12 c. prohibiting necessary maintenance and repairs of capital assets by directing
 13 the Depository not to transfer funds to the Repair and Replacement Account.

14 131. The Loan Agreement gives the lender, acting through OSM, the authority to
 15 decide how and when operating expenses at Northwood are paid, which is itself a
 16 management function.

17 132. The Construction Loan Documents and the Depository Agreement, when read
 18 together, prohibit NBC II from paying aged and past-due accounts because of the definitions
 19 of "Operating Budget" and "Operating Expenses".

20 133. In addition, because the Construction Loan Agreement contained
 21 requirements pertaining to the number and types of gaming equipment the Tribe could
 22 purchase and install, freedom to configure the gaming floor, the essence of managing a
 23 casino, is not in the control of the Tribe.

24 134. The Construction Loan Documents served as a management contract
 25 implicitly if not explicitly and the lender is the de facto manager of NBC II's casino
 26 operation. The lender, not NBC II, determined the number and type of gaming machines the

1 Tribe could purchase and install; has determined which vendors can be paid and which
2 cannot; and allowed the lender to prohibit maintenance and capital expenditures.

3 135. Taken collectively and individually, these terms give unapproved third parties
4 the authority to set up working policy for Northwood's gaming operation.

5 136. The Loan Documents, as amended by the Second Forbearance Agreements,
6 constitute a financing scheme that permits the provider of funding intermittently to interject
7 itself in the management decisions of the facility to ensure the security of its investment and
8 are, therefore, collateral agreements that require the approval of the Chairman of the NIGC.

9 137. The Tribe and NBC II are entitled to a declaration by this Court that the
10 failure to obtain the NIGC Chairman's review and approval of the Construction Loan
11 Documents renders them void ab initio.

12 138. A management agreement and collateral documents that are void for failure to
13 obtain approval are not subject to reformation by excision of offending provisions. For that
14 reason, the limited waivers of sovereign immunity contained in the void agreements are also
15 void and unenforceable.

16 139. The Tribe and NBC II are entitled to a declaration by this Court that the
17 limited waivers of sovereign immunity contained in the void agreements are also void and
18 unenforceable.

19 140. The 15.25% effective loan rate, the Waterfall Accounts that require that the
20 debt be serviced in full before any payments are made for repair or maintenance from the
21 Repair and Maintenance Account, or to the Tribe from the Tribal Distributions Account, and
22 the impossibility of the Northwood revenues being adequate to service the debt, deprive the
23 Tribe of any benefit from the Northwood gaming operations.

24 141. The Loan Documents thereby violate IGRA's purpose in ensuring "that the
25 Indian tribe is the primary beneficiary of the gaming operation. . ." 25 U.S.C. § 2702(2) (the
26 "Sole Proprietary Interest Provision").

1 142. A trustee, exercising the skill and diligence that a trustee is commonly held to,
2 would not have approved the parties' contract because it is clear that, from the time the loans
3 were made, Northwood would never be able to support the monthly debt service to pay off
4 the loans, particularly in light of the existing River loan, with its own unsupportable loan
5 obligation with BankFirst, an affiliate of Marshall.

6 143. Under 25 U.S.C. §2711(e)(4) and 25 C.F.R. §533.6(b)(4), the NIGC as the
7 Tribe's trustee would have disapproved the Construction Loan Documents on that basis if it
8 had been submitted by the parties prior to its execution.

9 144. The Tribe and NBC II are entitled to a declaration by this Court that the Loan
10 Documents are void for violations of the Sole Proprietary Interest Provision of the IGRA and
11 the NIGC regulations.

12 145. A court's decision to appoint a receiver would bring the Casino within the
13 custody and control of the court, and take it away from the Tribe, in violation of the IGRA.

14 146. The appointment of a receiver to control the gross proceeds of Casino
15 operations, and control the Casino's operating expenses, constitutes management of the
16 Casino within the meaning of the IGRA.

17 147. The Tribe and NBC II are entitled to a declaration by this Court that any
18 efforts by OSM to seek or obtain the appointment of a receiver violate the IGRA.

19 **Second Cause of Action: Declaratory Judgment of Invalidity of Contract Terms**

20 148. The Tribe adopts and incorporates the facts alleged at ¶¶ 1 – 147 as though
21 reasserted here in full.

22 149. The power to levy taxes and similar exactions is an inherent and essential part
23 of the authority of any government. This power is therefore an aspect of the retained
24 sovereignty of Indian tribes except where it has been limited or withdrawn by federal
25 authority.
26

1 150. Article VI, Sections 1(G) and (I) of the Tribe's Constitution and Bylaws
 2 establish the authority of the Nooksack Tribal Council to levy taxes upon members of the
 3 tribe and to levy taxes or license fees upon nonmembers doing business within the
 4 Reservation, and to regulate the use and disposition of tribal property. The Tribe's taxing
 5 power has not been limited or withdrawn by federal authority.

6 151. The Tribe has a duty and obligation to all its members and to the Tribe itself,
 7 to protect and preserve the political integrity, economic security and health and welfare of
 8 the Tribe. In order to provide direct and indirect civic and economic benefits to the members
 9 of the Tribe, to residents of the Reservation and to the general public, and to promote
 10 economic development on the Reservation and to preserve tribal existence, the Tribe must
 11 generate revenue for the operation, maintenance and improvement of essential tribal
 12 governmental services and programs.

13 152. The imposition of taxes is a necessary and appropriate method of generating
 14 revenues for the Tribe and paying for a portion of the costs of governmental services and
 15 programs incident to the preservation of tribal existence and the continued economic
 16 development of the Reservation.

17 153. Pursuant to Article VI, Sections 1(G), (H), (I), and (J) of the Tribe's
 18 Constitution and Bylaws, the Nooksack Tribal Council enacted Title 100 to fairly and
 19 adequately obtain tax revenue for the benefit of the Tribe's members.

20 154. The Loan Documents, and in particular the Tribal Agreement, purport to limit
 21 the Tribe's taxing authority and prohibit the Tribe from imposing a tax on the revenue of the
 22 Casino. Tribal Agreement, ¶ (w), § 11.

23 155. The Loan Documents, and in particular the Tribal Agreement, purport to
 24 prevent the Tribe from taking any action which "(r)escinds, revokes, or materially amends. . .
 25 any other ordinance, resolution, or regulation relating to the Loan or the Facilities, which
 26

1 rescission, revocation or amendment would likely have a Material Adverse Effect” on the
 2 Loan. Tribal Agreement, ¶ (x)(iii).

3 156. The Loan Documents, and in particular the Tribal Agreement, purport to
 4 prohibit the Tribe from enacting legislation which impairs or interferes, or could impair or
 5 interfere, in any manner, with any right or remedy of the Lender; and purport to render any
 6 such legislation void without the prior written consent of the Lender. Tribal Agreement, §
 7 11.

8 157. The Reserved Powers Doctrine prohibits a sovereign from entering into a
 9 contract that surrenders an essential attribute of its sovereignty, and a contract that purports
 10 to achieve such a result will not be enforced. *U.S. Trust Co v. New Jersey*, 431 U.S. 1, 23-
 11 24, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977); *Matsuda v. City and County of Honolulu*, 512
 12 F.3d 1148, 1153 (9th Cir. 2008).

13 158. This § 11 of the Tribal Agreement purports to grant to the Lender an
 14 impermissible veto power over the Tribe’s sovereign authority to legislate. Such an
 15 impermissible delegation of Tribal legislative authority to another is unenforceable under the
 16 Tribal Constitution and Bylaws, and federal common law including the Reserved Powers
 17 Doctrine.

18 159. Immunity from suit is a fundamental aspect of the Tribe’s sovereignty. Under
 19 long-established United States Supreme Court authority, a waiver of sovereign immunity
 20 may be withdrawn whenever a sovereign may suppose that justice to the public requires it,
 21 and courts cannot inquire whether such withdrawal operates unjustly upon parties who are
 22 affected thereby. *Beers v. Arkansas*, 61 U.S. 527, 529-30, 15 L.Ed. 991 (1857).

23 160. The Tribe has revoked whatever limited waivers of its and NBC II’s sovereign
 24 immunity were granted under the Loan Documents by duly-enacted Resolution. The
 25 revocation of such waivers renders the Tribe and NBC II immune from suit by OSM.
 26

1 161. The power to exclude from the Reservation is an inherent sovereign right of
 2 the Tribe. The Tribe has revoked the grant under the Loan Documents of the right to OSM
 3 to enter the Reservation by duly-enacted legislation. The revocation of right to enter bars
 4 OSM and its agents from entering onto Trust lands, including entering the Casino premises,
 5 without permission of the Tribe.

6 162. The Tribe is entitled to a declaration by this Court that the provisions of the
 7 Loan Documents, and in particular the Tribal Agreement, that purport to prevent the Tribe
 8 from taking any action which “(r)escinds, revokes, or materially amends. . . any other
 9 ordinance, resolution, or regulation relating to the Loan or the Facilities, which rescission,
 10 revocation or amendment would likely have a Material Adverse Effect” on the Loan are
 11 invalid, void and unenforceable under the Tribe’s Constitution and Bylaws and federal
 12 common law including the Reserved Powers Doctrine.

13 163. The Tribe is entitled to a further declaration by this Court that the provisions
 14 of the Loan Documents, and in particular the Tribal Agreement, that purport to prohibit the
 15 Tribe from enacting legislation which impairs or interferes, or could impair or interfere, in
 16 any manner, with any right or remedy of the Lender; and purport to render any such
 17 legislation void without the prior written consent of the Lender, are invalid, void and
 18 unenforceable under the Tribe’s Constitution and Bylaws and federal common law including
 19 the Reserved Powers Doctrine.
 20

21 164. The Tribe is entitled to a further declaration by this Court that the provisions
 22 of the Loan Documents purporting to grant an irrevocable waiver or sovereign immunity by
 23 the Tribe and NBC II to the Lender are void and unenforceable, and the Tribe’s revocation of
 24 such waiver is valid and enforceable.
 25
 26

Third Cause of Action: Injunctive Relief

165. NBC II and the Tribe adopt and incorporate the facts alleged at ¶¶ 1 – 164 as though reasserted here in full.

166. OSM's efforts to enforce the February 24, 2012 Judgment against NBC II's Casino real property, improvements, and fixtures, and any assets located on Trust property or the Nooksack Indian Reservation, violate 25 U.S.C. § 1322(b) 28 U.S.C. §1360(b), and RCW §§ 37.12.050, 060.

167. Pursuant to the All Writs Act, federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

168. Having concluded that the Loan Documents are void and unenforceable, NBC II and the Tribe are entitled to an order enjoining OSM and its successors and assigns on behalf of all holders of beneficial interests in the void obligations from attempting to enforce the Loan Documents against NBC II and/or the Tribe, including but not limited to attempting to record and execute upon any Confession of Judgment required under the Loan Documents to be executed and delivered by NBC II.

169. NBC II and the Tribe are further entitled to an order enjoining OSM and its successors and assigns on behalf of all holders of beneficial interests in the void obligations from entering the Nooksack Reservation or the Northwood Casino, and enjoining any efforts to execute upon the collateral under the Construction Loan or the Equipment Loan.

170. OSM's efforts to execute on NBC II's real and personal property through Supplemental Proceedings in Whatcom County Superior Court violate 25 U.S.C. § 1322(b), 28 U.S.C. §1360(b), and RCW §§ 37.12.050, 060 and are void because they involve Tribal property over which the Whatcom County Superior Court lacks jurisdiction.

171. NBC II and the Tribe are entitled to an order permanently enjoining OSM and its successors and assigns on behalf of all holders of beneficial interests from seeking any

1 remedy available through Supplemental Proceedings in Whatcom County Superior Court to
2 execute upon NBC II's real and personal property.

3 172. Having concluded that certain of the provisions of the Loan Documents, and
4 in particular the Tribal Agreement, are invalid, void and unenforceable under the Tribal
5 Constitution and federal common law including the Reserved Powers Doctrine, the Tribe is
6 entitled to an order enjoining OSM and its successors and assigns on behalf of all holders of
7 beneficial interests in the void obligations from enforcing those provisions against the Tribe
8 and NBC II.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, the Tribe and NBC II respectfully request that this Court enter
11 judgment in their favor and against OSM as follows:

- 12 (1) Declaring that the Loan Documents, when read together, are void and
13 unenforceable because they constitute a management agreement within the
14 meaning of 25 U.S.C. § 2711 that has not been approved by the NIGC;
- 15 (2) Declaring that the limited waivers of sovereign immunity contained in the
16 Loan Documents are void and unenforceable;
- 17 (3) Declaring that the Loan Documents, when read together, are void and
18 unenforceable pursuant to 25 U.S.C. § 2702(2) because they grant a
19 proprietary interest in the Tribe's gaming operations to someone other than
20 the Tribe;
- 21 (4) Declaring that a trustee, exercising the skill and diligence that a trustee is
22 commonly held to, would not have approved the Loan Documents pursuant to
23 25 U.S.C. §2711(e)(4) and 25 C.F.R. §533.6(b)(4) if they had been submitted
24 to the NIGC for review, because from the time the loans were made,
25
26

Northwood would never have been able to support the monthly debt service to pay off the loans and the loans were doomed to default;

- (5) Declaring the provisions of the Loan Documents which purport to permit OSM to seek the appointment of a receiver who would control the gross proceeds of Casino operations and the Casino's operating expenses constitute management of the Casino under the IGRA;
- (6) Declaring any effort by OSM to seek the appointment of a receiver void as violative of the IGRA;
- (7) Declaring the provisions of the Loan Documents, and in particular the Tribal Agreement, that purport to limit the Tribe's taxing authority and prohibit the Tribe from imposing a tax on the revenue of the Casino invalid, void and unenforceable;
- (8) Declaring the provisions of the Loan Documents, and in particular the Tribal Agreement, that purport to prevent the Tribe from taking any action which "(r)escinds, revokes, or materially amends. . . any other ordinance, resolution, or regulation relating to the Loan or the Facilities, which rescission, revocation or amendment would likely have a Material Adverse Effect" on the Loan invalid, void and unenforceable.
- (9) Declaring the provisions of the Loan Documents, and in particular the Tribal Agreement, that purport to prohibit the Tribe from enacting legislation which impairs or interferes, or could impair or interfere, in any manner, with any right or remedy of the Lender; purports to render any such legislation void without the prior written consent of the Lender, thereby granting to the Lender a right of veto power over the Tribe invalid, void and unenforceable;

- 1 (10) Issuing a permanent injunction against the enforcement of the Loan
2 Documents, or any document related to or arising out of the Loan Documents,
3 including any Confession of Judgment, against NBC II or the Tribe;
4 (11) Issuing a permanent injunction against use of any remedy available to OSM to
5 execute or enforce its February 24, 2012 Judgment through Supplemental
6 Proceedings in Whatcom County Superior Court against NBC II's real and
7 personal property; and
8 (12) Granting such other relief as the Court deems appropriate.
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1 Dated this 9th day of May, 2012.

2
3 SCHWABE, WILLIAMSON & WYATT, P.C.

4
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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2012 I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record.

/s/ Connie Sue Martin

Connie Sue Martin