THE HONORABLE THOMAS ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

THE NOOKSACK INDIAN TRIBE OF WASHINGTON and the NOOKSACK BUSINESS CORPORATION II, Plaintiffs, v. OUTSOURCE SERVICES MANAGEMENT, LLC, Defendant.	Case No. 12-CV-00411 TSZ SUPPLEMENTAL BRIEF OF PLAINTIFFS THE NOOKSACK INDIAN TRIBE AND NOOKSACK BUSINESS CORPORATION II **NOTED FOR HEARING: JUNE 1, 2012, 10:00 a.m.**

Pursuant to the Court's May 16, 2012 Minute Order directing the parties to provide additional briefing on four topics, plaintiffs the Nooksack Indian Tribe (the "Tribe") and Nooksack Business Corporation II ("NBC II") provide this joint Supplemental Brief.

A. Ongoing Proceedings in Whatcom County Superior Court Do Not Implicate Important Interests Vital to the Operation of State Government.

The key to determining whether comity concerns are implicated in an ongoing state proceeding – and thus whether the second *Younger* requirement is met – is to ask whether federal court adjudication would interfere with the state's ability to carry out its basic executive, judicial, or legislative functions. *Potrero Hills Landfill, Inc. v. County of Solano*, 657 F.3d 876, 883 (9th Cir. 2011).

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Neither the 9th Circuit nor the United States Supreme Court has held *Younger* to apply generally to ordinary civil litigation. *Potrero Hills*, 657 F.3d at 882. To the contrary, abstention remains an extraordinary and narrow exception to the general rule that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Id, quoting New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989).

"Unless interests 'vital to the operation of state government' are at stake, federal district courts must fulfill their 'unflagging obligation' to exercise the jurisdiction given them. *Potrero Hills*, 657 F.3d at 883, *quoting Miofsky v. Superior Court of the State of California*, 703 F.2d 332, 338 (9th Cir. 1983) (declining to extend *Younger* to encompass conventional civil litigation).

When the Court has found that interference with judicial proceedings alone justified abstention, that interference has been substantial. *Champion International Corp. v. Brown*, 731 F.2d 1406, 1408 (9th Cir. 1984), *citing Juidice v. Vail*, 430 U.S. 327, 51 L. Ed. 2d 376, 97 S. Ct. 1211 (1977) (appellant sought to have the state's statutory contempt processes enjoined as unconstitutional); *Trainor v. Hernandez*, 431 U.S. 434, 52 L. Ed. 2d 486, 97 S. Ct. 1911 (1977) (appellant sought to have the state statutory attachment scheme declared unconstitutional). The interest at stake must go to "the core of the administration of a state's judicial system," Juidice, 430 U.S. at 335, and its importance must be "measured by considering its significance broadly." *AmerisourceBergen v. Roden*, 495 F.3d 1143, 1150.

A challenge to the enforcement of a **single court judgment** is not a substantial enough interference with a state's judicial processes to justify abstention. *Potrero Hills*, 657 F.3d at

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886, *citing Champion International Corp.*, 731 F.2d at 1408; *AmerisourceBergen*, 495 F.3d at 1150 (holding that state's interest in enforcing one particular judgment did not qualify as sufficiently important to satisfy *Younger*'s second threshold element).

Here, of course, the only ongoing state court proceedings, Whatcom County Superior Court Cause No. 12-2-00491-5, are proceedings supplemental to the enforcement of a judgment entered on February 24, 2012, not following a trial, or even a motions practice, but, rather, upon filing of a confession of judgment signed by NBC II in March, 2010. The Tribe is neither a party to those proceedings, nor a judgment debtor. There has been no adjudication of the merits of the loan agreements. NBC II moved, unsuccessfully, to vacate the judgment based on the absence of state court jurisdiction over a lawsuit against an Indian tribe, arising on an Indian reservation; based on the revocation of NBC II's limited waiver of sovereign immunity; and because the loan agreements constituted void management agreements that had not been approved by the NIGC and therefore the limited waiver of sovereign immunity contained in the loan agreements was also void and unenforceable.[1]

The absence of substantial interference with the state's judicial processes is highlighted by the lack of any jurisdiction by the state court to enforce a judgment against assets located on the Nooksack reservation, or against Tribal trust property. The state court's authority to enforce a state court judgment does not extend onto the Reservation. It is axiomatic that no legal judgment has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. *Wilson v. Marchington*, 127 F.3d 805, 807 (9th Cir. 1997). "Because states

[1] The state court's denial of NBC II's motion cannot be deemed a conclusive determination that the loan agreements are not management agreements; if NBC II had prevailed on its motion and the court had vacated the judgment on any of the three grounds asserted by NBC II, the issue of the validity of the loan agreements would still have to be litigated, but in a new lawsuit.

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and Indian tribes coexist as sovereign governments, they have no direct power to enforce their judgments in each others' jurisdiction." *Id*, at 807; *see, also, Joe v. Marcum*, 621 F.2d 358 (10th Cir. 1980) (enjoining enforcement of writ of garnishment against wages of debtor earned on the reservation); *Annis v. Dewey County Bank*, 335 F. Supp. 133 (Dist. S.D. 1971) (granting permanent injunction prohibiting state officials from enforcing state court judgment against secured personal property located on the reservation); *Anderson v. Engelke*, 954 P.2d 1106, 287 Mont. 283 (1998) (state court lacks jurisdiction to enforce tribal court judgment on reservation); *Inland Casino Corp. v. Superior Court*, 8 Cal. App. 4th 770, 10 Cal.Rptr.2d 479 (1992) (state court lacks jurisdiction to entertain action to foreclose mechanic's lien against equipment installed in bingo room on reservation).

Nor does the state court have jurisdiction to adjudicate the ownership, right to possession, or interest in any real or personal property owned by an Indian Tribe, nor the power to encumber it. 25 U.S.C. § 1322(b); 28 U.S.C. §1360(b); RCW §§ 37.12.050, 060.

> **Nothing in this chapter shall authorize the alienation, encumbrance, or taxation of any real or personal property**, including water rights and tidelands, **belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States**; . . . **or shall confer jurisdiction upon the state to adjudicate, in** probate proceedings or otherwise**, the ownership or right to possession of such property or any interest therein**; . . . RCW 37.12.060 [emphasis added].

The United States Supreme Court has broadly construed this restriction on state court jurisdiction. *In re Marriage of Landauer*, 95 Wn. App. 579, 584-585 (1999). In *Bryan v. Itasca County*, 426 U.S. 373, 391, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976), cited with approval in *Landauer*, the United States Supreme Court held that the grant of jurisdiction under PL 280 did not include the power to tax, and observed that "the express prohibition of any 'alienation,

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encumbrance, or taxation' of any trust property can be read as prohibiting state courts, acquiring jurisdiction over civil controversies . . . from applying state laws or enforcing judgments in ways that would effectively result in the 'alienation, encumbrance, or taxation' of trust property." In reliance on *Bryan*, the *Landauer* court held that where the court adjudicated ownership of the trust property, it exceeded the scope of its jurisdiction. *Landauer*, at 586.

In addition, the *Landauer* court also found the state court's adjudication of the respective property interests of the parties in the trust property impermissible because federal law prohibits the conveyance of trust property without the approval of the Secretary of the Interior. *Id*, at 587, *citing* 25 U.S.C. §348, 25 C.F.R. §152.22. Tribally-owned real and personal property is not treated the same under state or federal law as is property owned by other judgment debtors. OSM has no judgment lien on the Casino real property, improvements, or fixtures, because a judgment of the state court cannot apply state laws or enforce judgments in any way that would effectively result in the 'alienation, encumbrance, or taxation' of trust property. *Landauer*, 95 Wn. App. at 585, *quoting Bryan*, 426 U.S. at 373; *see, also, In re Dumontier*, 389 B.R. 890 (Bank. D. Mont. 2008) (state law judgment lien cannot encumber trust property).

There are no interests 'vital to the operation of state government' at stake in the ongoing Whatcom County supplemental proceedings. *Younger* abstention is not warranted, and the Court must fulfill its 'unflagging obligation' to exercise the jurisdiction given it.

B. *Brillhart v. Excess Insurance Co. of America* Does Not Warrant a Stay.

There is no presumption in favor of the state court litigation and this suit should not be stayed or dismissed under *Brillhart*. *Brillhart* holds that in an action filed under the Declaratory Judgment Act, a district court has the duty to determine whether the presentation of the

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plaintiff's claim in state court has foreclosed review in federal court. *Brillhart*, 316 U.S. at 495–96. *Brillhart* instructed courts to look at the circumstances surrounding the state and federal suit, and suggested that a stay or dismissal may be appropriate when the state court action was ***presenting the same issues, the dispute was not governed by federal law,* and/or *the actions are between the same parties***. *Id*.

Here, the federal lawsuit arises 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 Northwood Crossing Casino (the "Casino") are void and unenforceable. This suit also presents federal questions regarding the waiver of sovereign immunity by a federally recognized Indian tribe, the power of the Tribe to tax the Casino's revenue notwithstanding a contractual provision purporting to limit the Tribe's taxing authority, and 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.

The state action is a "tangentially related" suit that emerged from OSM's entry of confession judgment against NBC II only, and in which the Tribe is neither a party, nor amendable to suit. *See Brillhart*, 316 U.S. at 495–96 (federal court may consider whether claims of all parties can satisfactorily be adjudicated in state proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.). NBC II has appealed the entry of the confession of judgment, but the appellate remedy would be merely vacating the judgment, with no resolution as to the validity of the underlying documents. There has never been adjudication on the merits in state court on the validity of the agreements under

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the IGRA, the Nooksack Constitution and By-Laws, and federal common law.

NBC II and the Tribe have also appealed from the ongoing state court supplemental proceedings being waged against NBC II to execute on the state court judgment, on the ground that the state court lacks jurisdiction because neither NBC II nor the Tribe have waived their sovereign immunity for enforcement under the loan agreements:

> **. . . the Borrower hereby consents with respect to any Claim**: (A) to arbitration in accordance with the provisions of Section 8.27, and (B) **to be sued in** (i) **the United States District Court for Western District of Washington** (and all federal courts to which decisions of the United States District Court for the Western District of Washington may be appealed), (ii) **any court of general jurisdiction in the State** (including all courts of the State to which decisions of such courts may be appealed), **and** (iii) only if none of the foregoing courts shall have jurisdiction, or only **to permit** the compelling of arbitration in accordance with Section 8.27, or **the enforcement of any judgment, decree or award of any foregoing court** or any arbitration permitted by Section 8.27, **all tribal courts and dispute resolution processes of the Tribe**. . . **This Agreement is not to be construed as waiving sovereign immunity except as to the limited extent set forth herein.** *Construction Loan Agreement, §8.26* [emphasis added].

A Tribe's waiver of sovereign immunity is only valid in the particular proceeding in which the waiver is knowingly and expressly given. *See, e.g., McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989); *Pit River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (Tribe's participation in administrative proceeding does not waive tribal immunity in action filed by another party seeking review of agency decision). "As with waivers of immunity by any sovereign, the Court must look carefully for the express, unequivocal consent of a Tribe to be sued." *Ramey Construction Co., Inc. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982). Statements of waiver by Indian tribes are to be strictly construed and narrowly interpreted. *United States v. Sherwood*, 312 U.S. 584, 85 L. Ed. 1058, 61 S. Ct. 767 (1941).

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In determining whether to abstain, this Court "must balance concerns of judicial administration, comity, and fairness to the litigants." *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1367 (9th Cir.1991). The Supreme Court has urged federal courts to avoid needless determination of state law issues, to avoid duplicative litigation, and to discourage forum shopping. *Id.* Here, the only way to obtain a hearing on the merits of the dispute pleaded before this Court in the Tribe and NBC II's Amended Complaint, is to hear this dispute in federal court. This is not duplicative litigation, in that no hearing occurred—or will occur—in the state court on the merits of the IGRA determination and the significant issues of sovereignty raised by the Tribe. A supplemental proceeding is limited to issues surrounding the identity of property for execution of the judgment. *State v. Ralph Williams' N. W. Chrysler Plymouth*, 87 Wn.2d 327, 553 P.2d 442 (1976); *Field v. Greiner*, 11 Wash. 8, 39 P. 259 (1895) (primary purpose of supplemental proceedings is discovery and the most that can be rightfully adjudicated in such proceedings as to real estate is as to who is the owner thereof).

For those reasons, there is no presumption that the state court is in a better position than this Court to proceed. *Gov't Emp. Ins. Co. v. Dizol*, 133 F.3d 1220 (9th Cir. 1998) held that there is a presumption that the federal court should decline to entertain a suit if the state suit involves the "same issues and parties pending at the time the federal declaratory action is filed. *Dizol*, 133 F.3d at 290. ("If there are parallel state proceedings involving the same issues and parties pending at the time the federal declaratory action is filed, there is a presumption that the entire suit should be heard in state court. . ." However, "[t]he pendency of a state court action does not, of itself, require a district court to refuse federal declaratory relief."). This suit does not have the same issues or parties as the ongoing supplemental proceedings in the state court,

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and does not rely upon state law. Indeed, it raises issues that are uniquely federal in nature: an Indian Tribe's inherent powers, *see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206, 55 L. Ed. 2d 209, 98 S. Ct. 1011 (1978) (Indian law is uniquely federal in nature, having been drawn from the Constitution, treaties, legislation, and an "intricate web of judicially made Indian law"); and issues arising under the highly regulatory framework of the IGRA and the NIGC regulations, which preempt state law. *See Gaming World Int'l v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 847-848 (8th Cir. 2003) (recognizing that the IGRA completely preempts state law with respect to Indian gaming). There is, therefore, no presumption that NBC II and the Tribe must rebut. *Brillhart* is not implicated, and a stay is not warranted.

C. Administrative Exhaustion Does Not Bar Resolution of Plaintiffs' Claims

The 2nd Circuit's decision in *St. Regis Mohawk Tribe v. St. Regis Management Co.*, 451 F.3d 44, 50-51 (2nd Cir. 2006), that IGRA requires exhaustion of NIGC administrative process prior to filing suit, has not been universally followed and exhaustion has been rejected either implicitly by allowing the suit to proceed, or explicitly. *See Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 677 F. Supp. 2d 1056 (W.D. Wis. 2010), *affirmed in part, reversed and remanded in part*, 658 F.3d 684 (7th Cir. 2011) (rejected exhaustion argument by Wells Fargo, concluded *St. Regis Mohawk Tribe* case did not apply); *See, also, Jena Band of Choctaw Indians v. Tri-Millennium Corp., Inc.*, 387 F. Supp.2d 671 (Dist. Louisiana 2005) (no exhaustion)[2]; *First American Kickapoo Operations LLC v. Multimedia Games, Inc.*, 412 F.3d 1166 (10th Cir. 2005) (no exhaustion); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Kean-Argovitz Resorts, Kean Argovitz Resorts-Michigan, LLC*, 2005 WL 1093922

[2] In order for a decision by the NIGC to be a final agency action subject to review, the decision must be made by the Chairman, not the General Counsel. *Jena*, 387 F. Supp. 2d 671.

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(W.D. Mic. 2005) (no exhaustion); *United States ex rel Bernard v. Casino Magic Corp.*, 293 F.3d 419 (8th Cir. 2002) (no exhaustion).

Recently, both the District Court for the Western District of Wisconsin and the 7th Circuit Court of Appeals squarely addressed both the exhaustion requirement and the *St. Regis Mohawk Tribe* decision, and concluded that neither barred judicial review. In rejecting Wells Fargo's argument, the court held that *St. Regis* was inapposite because it arose in a completely different procedural posture: "In the instant case, Wells Fargo seeks to enforce a management contract, but the Court cannot give effect to such a contract in the absence of prior approval from the NIGC Chairman. In other words, the court may determine whether a contract is a management contract when the issue becomes ripe for adjudication." *Wells Fargo*, 677 F. Supp. at 1061-1062.

Here, like Wells Fargo, OSM is seeking to enforce the loan agreements against NBC II and the Tribe.[3] Indeed, it has taken a judgment against NBC II that it is in the process of enforcing via state court supplemental proceedings – but without a valid underlying agreement, there can be no enforceable judgment. OSM can only enforce the loan agreements by demonstrating that they do not constitute an unapproved management agreement. Like the courts in *Wells Fargo*, 677 F. Supp. at 1061-1062, *Casino Magic Corp.*, 293 F.3d at 424-26; and *First Am. Kickapoo* at 1172-75, this Court may determine whether the loan agreements are a management contract because the issue has become ripe for adjudication.

While the NIGC has exclusive authority to determine compliance with IGRA and the NIGC regulations, courts have exclusive authority to determine the legal validity of a document,

[3] Also like the *Wells Fargo* case, the Tribe submitted its loan agreements to the NIGC for review, but the NIGC failed to act. *See* Declaration of Martin, ¶¶ 2 – 6 and Exs. 1 – 4.

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which is beyond the scope of the administrative body. *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1418 (8th Cir. 1996). Here, because OSM is in the process of enforcing the loan agreements against NBC II and the Tribe, the issue of whether the loan agreements are management contracts has become ripe for adjudication by this Court.

In addition, equitable factors warrant the conclusion that the Court should not require exhaustion here. *Bromfield v. McBurney*, 2009 U.S. Dist. LEXIS 130839, 17-23 (W.D. Wash. 2009). The 9th Circuit has held that equitable estoppel can foreclose the defense of non-exhaustion. *Moyle v. Golden Eagle Ins. Corp.*, 239 Fed. Appx. 362, 364 (9th Cir. 2007). The Supreme Court thus "has declined to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise." *McCarthy v. Madigan*, 503 U.S. 140, 1146, 12 S. Ct. 1081, 117 L. Ed. 2d 291 (1992), overruled in part by statute as stated in *Booth v. Churner*, 532 U.S. 731, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001).

In determining whether exhaustion should be required, "federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *McCarthy*, 503 U.S. at 146. Accordingly, a litigant need not pursue administrative remedies if his or her "interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." *Id*. (citation omitted). This determination is "intensely practical," as "attention is directed to both the nature of the claim presented and the characteristics of the particular administrative procedure provided." *Id*.

There are additional bases for concluding that exhaustion is not required: the matter

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before this Court involves other than simply the determination of whether or not the loan agreements are void as unapproved management agreements. NBC II also alleges violations of the IGRA that are independent of management contract review by the NIGC. The structure of the loan and the lack of revenue generated by the casino result in the casino being operated for the sole purpose of paying the loan, rather than providing economic development opportunities for the Tribe; (2) with the effective interest rate and under the security arrangement referred to as a "Waterfall," the Tribe does not have the sole proprietary interest in the Tribe's gaming operation; and (3) because of the terms and conditions of the loan agreements, the power afforded to OSM (as successor to Marshall), and the inability of NBC II ever to service the loan from proceeds of the operation of the casino, the NIGC, acting as trustee, would not have approved the loan agreements.

Authority for the proposition that exhaustion is not required when the claims arise outside the administrative process is found in cases construing other statutory schemes, where the right to judicial review is clearly jurisdictional. For example, in cases arising under FIRREA, the 9th Circuit has said that a claimant falling outside the scheme is not required to exhaust prior to seeking judicial review. *Sharpe v. FDIC*, 126 F.3d 1147, 1155-1156 (9th Cir.1997). Bankruptcy court decisions have similarly concluded that certain types of claims fall outside of the FIRREA claims process and therefore do not require exhaustion. *In re All Season's Kitchen, Inc.*, 145 Bankr. 391, 400 (Bankr. D. Vt. 1992); *In re Purcell*, 141 Bankr. 480, 485 (Bankr. D. Vt. 1992) (debtor's action falls outside the FIRREA administrative claims procedure and thus no exhaustion is required.

In addition the Tribe, alone, seeks a declaratory judgment that certain of the provisions

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of the loan agreements are unenforceable as violations of the Nooksack Constitution and Bylaws, and federal common law including the Reserved Powers Doctrine, because the loan documents (1) purport to limit the Tribe's taxing authority and prohibit the Tribe from imposing a tax on the revenue of the casino; (2) purport to prevent the Tribe from taking any action which rescinds, revokes, or materially amends any other ordinance, resolution, or regulation relating to the loan or the casino if it would have a material adverse effect on the loan; (3) 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 OSM; and (4) purport to render any such legislation void without the prior written consent of OSM.

The resolution of those issues, which impact the Tribe's sovereignty, are outside the IGRA regulatory framework, and are not subject to NIGC review, but are squarely within the exclusive authority of this Court to determine the legal validity of a document. *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996); *see, also, Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (U.S. 1974) (parties choose an arbitrator because of his knowledge and judgment concerning demands and norms of industrial relations; while resolution of statutory or constitutional issues is primary responsibility of courts).

D. The Application of the Reserved Powers Doctrine

The Court has asked whether there is Supreme Court or 9th Circuit authority addressing the application of the Reserved Powers Doctrine to an Indian Tribe to successfully void a contract limiting its taxing or spending powers. The Tribe has been unable to find any such authority that is directly on point, although the Supreme Court applied the Reserved Powers Doctrine to an Indian tribe in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), in holding

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that the Jicarilla Apache Tribe retained the right to impose a tax in the future because it had not been contracted away:

> To state that Indian sovereignty is different than that of Federal, State or local Governments. . . does not justify ignoring the principles announced by this Court for determining whether a sovereign has waived its taxing authority in cases involving city, state, and federal taxes imposed under similar circumstances. Each of these governments has different attributes of sovereignty, which also may derive from different sources. **These differences, however, do not alter the principles for determining whether any of these governments has waived a sovereign power through contract, and we perceive no principled reason for holding that the different attributes of Indian sovereignty require different treatment in this regard. Without regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.**

Merrion, 455 U.S. at 148 [emphasis added].

It is worth noting that while there is no authority directly on point, there is similarly no Supreme Court or 9th Circuit authority which would prohibit such an application of the Reserved Powers Doctrine, or Congressional action which speaks to this issue.

(1) <u>The Tribe's claim that the loan agreements are void under the Reserved Powers Doctrine is supported by Supreme Court and 9th Circuit precedent.</u>

The Reserved Powers Doctrine is a label the Supreme Court has applied to describe the uncontroversial proposition that a state may not enter into a contract that "surrenders an essential attribute of its sovereignty" and that, as a consequence, the Contracts Clause may not be used to compel a state to adhere to a contract that purports to achieve such a result. *Matsuda v. City and County of Honolulu*, 4512 F.3d 1148, 1153 (9th Cir. 2008) (quoting *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 23-24 (1977). The Contracts Clause, by its very terms, applies to the States alone: "No State shall…pass any…Law impairing the Obligation of Contracts." U.S. Const., Art. I, § 10.

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The Supreme Court has narrowly construed the clause because "literalism in the construction of the Contract Clause . . . would make it destructive of the public interest by depriving the State of its prerogative of self-protection." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240, 57 L. Ed. 2d 727, 98 S. Ct. 2716 (1978). Thus, "the Contract Clause does not deprive the States of their 'broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result.'" *Exxon Corp. v. Eagerton*, 462 U.S. 176, 190, 76 L. Ed. 2d 497, 103 S. Ct. 2296 (1983).

Courts have yet to address the issue of whether a Tribal government surrendering an essential attribute of sovereignty via contract is a violation of the Reserved Powers Doctrine (*Merrion* held that the surrender of an essential attribute of Tribal sovereignty – a Tribe's taxing authority – by *implication* because it was not expressly *reserved* in a lease would violate the Reserved Powers Doctrine). Regardless of the distinction between the source of sovereignty of Indian tribes and other governments, the Supreme Court has held that the differences do "not justify ignoring the principles announced by the Court for determining whether a sovereign has waived its taxing authority in cases involving a city, state, and federal taxes imposed under similar circumstances." *Merrion*, 455 U.S. at 148.

The basic principle that a government cannot surrender an essential attribute of its sovereignty through a contract applies equally, if not more so, in the tribal context. *Id.*

(2) <u>Tribal taxing power is a reserved power that cannot be contracted away.</u>

The reserved powers of a state are those powers and authority "to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.'" *El Paso v. Simmons*, 379 U.S. 497, 508

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(1965) (quoting *Stephenson v. Binford*, 287 U.S. 251, 276 (1932). The Supreme Court maintained that "the reservation of essential attributes of sovereign power is also read into contracts" *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934). The Supreme Court has repeatedly affirmed that a sovereign cannot contract away reserved powers, specifically in the context of its police powers and power of eminent domain. *U.S. Trust Co.*, 431 U.S. 23-24.

The enactments protected by the reserved powers doctrine must serve broad societal purposes and not be directed at the abrogation of particular contracts. *See Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412-413 n.14, 74 L. Ed. 2d 569, 103 S. Ct. 697 (1983) (government excused from breach of Contracts Clause where legislation designed to remedy "a broad or general social or economic problem"); *U.S. Trust Co.*, 431 U.S. at 25, 26 n. 25 (doctrine applies where exercise of sovereign power is "reasonable and necessary to serve an important public purpose"); *City of El Paso v. Simmons*, 379 U.S. 497, 508, 13 L. Ed. 2d 446, 85 S. Ct. 577 (1965) (doctrine applies to "essential attributes of sovereign power" designed to protect the "general welfare"); *see also In re Seltzer*, 104 F.3d 234, 235 (9th Cir. 1996) (state law retroactively applying exemption of individual retirement accounts from bankruptcy estate served important public purpose).

In *Blaisdell* the Supreme Court considered the authority retained by the state over contracts "to safeguard the vital interests of its people," and reiterated the rule that all contracts are made subject to this paramount authority. Such authority is not limited to health, morals and safety, **it extends to economic needs as well**. *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38-39 (U.S. 1940).

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"Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153-154 (1980) (quoting Powers of Indian Tribes, 55 I.D. 14, 46 (1934). "The recent revitalization of tribal governments has resulted in tribes taking on more responsibility for governmental services. **The power to raise revenue to provide those services is crucial to the continuing progress of Indian tribes**." *Merrion*, 455 U.S. 130, 137-138 (quoting Cohen, Handbook on Federal Indian Law 715) (emphasis added). The Supreme Court has stated:

> Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government… [W]e can see no overriding federal interest that would necessarily be frustrated by tribal taxation.

Colville, 447 U.S. 153-154.

In the tribal context, the taxing power is even more essential to its existence than a state government. Tribes, unlike state and federal governments, have an extremely limited tax base: (1) tribes lack an adequate taxable land base, (2) tribes frequently lack taxing authority over nonmembers, and (3) tribes, when they possess such power, are at a competitive disadvantage and thus gain no benefit from a valid tax.

First, as recently as May 17, 2012, the U.S. Senate reported, "[a]n adequate land base is essential for the economic advancement and self-support of the Indian communities and the preservation of tribal culture…; the destruction of tribal economies…followed directly from the reduction of the tribal land base." Sen. Rpt. 112-166 at 4-5 (May 17, 2012). Here, the Tribe has no taxable land base, as its Reservation is approximately two acres and consists of a tribal building, casino, and a parking lot; thus, there is no taxpayer. Second, numerous Supreme Court

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opinions have drastically limited the Tribe's ability to tax nonmembers. *See generally Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654 (2001). To the extent that the Tribe could tax a nonmember, the Tribe lacks any significant land base to utilize as a point of activity in which to impose the tax.

Third, to the extent that the Supreme Court held that Indian tribes do possess the authority to tax nonmembers, the Court also held that state taxes on the same activity are valid; thus creating the issue of double taxation, crippling any market advantage the Tribe may have. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 188-189 (1989). In the limited area where double-taxation is permissible, the Tribe maintains two tribal-state tax agreements, chiefly a cigarette/tobacco agreement and a fuel agreement, which only minimally generate tax revenues for the Tribe and have spending limitations. Excluding these tribal-state tax agreements, the Tribe is left to fund essential governmental services from: (1) revenues, if any, from its economic ventures, primarily the gaming establishments, (2) federal and state monies from grants and contracts, and (3) tax revenues from its own economic entities, primarily one of its two gaming establishments. *See* Exhibit 1 to Rickie W. Armstrong Declaration, *Nooksack Indian Tribe Strategic Plan* 10 (2012).[4]

The reserved powers of a sovereign are those powers and authority "to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.'" *El Paso*, 379 U.S. at 508. The *U.S. Trust Co*. decision outlined cases striking down state tax laws where the state had contractually bound itself from the future exercise of such power. 431 U.S. at 23-24. In nearly every such example,

[4] Available at http://nooksackindiantribe.org/wp-content/uploads/2011/11/NOOKSACK-INDIAN-TRIBE-STRATEGIC-PLAN1.pdf.

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the state tax specifically targeted the other contracting party, and was a method to intentionally deprive the other of the benefits of the contract; thus, the tax was a clear and intentional impairment of the contract. *Louisiana v. Pilsbury*, 105 U.S. 278 (1882). Here, in contrast, the tax is imposed uniformly on all tribally-owned economic ventures, not on the lender, and therefore does not impair the loan agreements per se, but limits the money available for loan payments and other liabilities.

Implicit in each of the cases identified in *U.S. Trust Co.* is the fact that the state has a wide range of taxing options at its disposal and yet chose to direct the tax at the option that would infringe upon the contractual rights of a particular party. This is the key distinction in the Tribal context, where the Tribe's reserved powers include its taxing and spending authority. Unlike a state government, without a taxing power the Tribe is left without the necessary power and authority to raise revenue and provide essential services to its people. *See Blaisdell*, 290 U.S. 398, 435.

Here, the Tribal Agreement contains a specific provision purporting to require the tribe to give up an essential attribute of its sovereignty, the right to tax one of its very limited sources of tax revenues, the gaming entity. Tribal Agreement, ¶ (w), § 11, Exh. 2 to Armstrong Decl. As previously stated, one of the three primary sources of revenue, the gaming establishments have netted little revenue for the Tribe since opening. Decl. of F. Scott Cannaday (Dkt. 25-1), ¶ 2.

The Tribe is left with federal and state grant and/or contract monies, which are inadequate to provide basic governmental services. See Exh. 1, Armstrong Decl. The Tribe has no other option than to raise tax revenues from its gaming establishments in order to provide necessary governmental services. The Tribe's strategic plan outlines the Tribe's goals for the

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next ten years. *Id*. at 4. The Strategic Plan evidences a lack of past and/or current governmental services and the root cause, a lack of governmental funding. *Id*. The members of the Tribe suffer from inadequate housing, an inadequate land base to meet housing needs, inadequate educational services and facilities, and known but yet to quantified public safety needs. *Id*. The facts contained in the Strategic Plan evidence the Tribe lacks the financial resources to safeguard the vital interests of its people and the mechanism to correct that is the proper exercise of its taxing power, a tribal reserved power, one that cannot be contracted away.

The Supreme Court held that the reservation of the authority necessary to protect the public is deemed to be part a contract with a sovereign. *Blaisdell*, 290 U.S. at 435; *see, also, Merrion*, 455 U.S. at 148. In the current case, given the Tribe's lack of possible sources of tax revenues, the Tribe is without the power and authority to safeguard the vital interests of its people without the taxing power over its own entities; thus, the clauses within the current agreement are a violation of the Tribe's reserved powers.

CONCLUSION

The additional issues raised by the Court provide no basis for staying or dismissing the Tribe's and NBC II's claims. The Court should allow the Tribe's and NBC II's claims to proceed, and grant them the preliminary injunctive relief they seek.

Dated this 29th day of May, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of May, 2012, I caused to be served the foregoing SUPPLEMENTAL BRIEF OF THE NOOKSACK INDIAN TRIBE AND NOOKSACK BUSINESS CORPORATION II by means of the ECF system, which will provide notice to all counsel of record of the parties.

/s/ Connie Sue Martin
Connie Sue Martin