Nos. 11-3883 and 11-3884

UNITED STATES COURT OF APPEAL
FOR THE EIGHTH CIRCUIT

CITY OF DULUTH,

Appellee/Cross-Appellant.

vs.

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA,

Appellant/Cross-Appellee.

Appeal from the United States District Court
District of Minnesota – Civil Docket Case No. 09-cv-02668
The Honorable Judge Susan Richard Nelson

Response and Reply Brief of Fond du Lac Band of Lake Superior Chippewa

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Statement of the Issues Presented for Review by City's Cross-Appeal

The NIGC issued a final agency action directed at the Band that forbade the Band from complying with certain terms of the 1994 Agreements between the Band and the City—embodied in the Consent Order—because they violate federal law. Did the District Court abuse its discretion by relieving the Band from complying with those terms because applying them prospectively was no longer equitable under

Rule 60(b)(5)?

Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367 (1992)

Prudential Ins. Co. of Am. v. Nat'l Park Med. Center, Inc., 413 F.3d 897 (8th Cir. 2005)

United States v. Asarco Inc., 430 F.3d 972 (9th Cir. 2005)

Harrell v. Harder, 369 F. Supp. 810 (D. Conn. 1974)

Statement of the Facts Regarding City's Cross-Appeal

Two points bear mention with respect to the City's Statement of Facts. First, the City relies heavily on the testimony a former mayor provided during the aborted arbitration proceedings regarding the rent payments for the second term of the 1994 Sublease, going so far as to call his testimony "undisputed."[1] While technically true, his testimony was only undisputed because the arbitration was halted after the City rested its case and *before the Band had an opportunity to put on its rebuttal*

[1] *See* City's Brief at 16-17.

witnesses. Although the Mayor's testimony is largely—if not entirely—irrelevant to the questions before this Court on the parties' cross-appeals, it should be viewed for what it is: a politician's one-sided telling of how the parties' agreements came together.

Second, the City makes much of a series of e-mails and letters counsel for the Band sent to the NIGC regarding its review of the 1994 Agreements.[2] The City cites to an affidavit of its counsel for proof of these contacts,[3] but four of the "contacts" are not listed as exhibits to the affidavit. Furthermore, as the Band pointed out to the District Court, aside from the Band's requests for review of the Agreements and its briefing to the agency, the bulk of these contacts were simply to transmit documents or to update the NIGC on the status of the District Court proceedings. Only one document that the City was not copied on contained any substantive argument (which the NIGC did not endorse), and the City later received a copy of it and responded to it before the NOV was issued.[4] Thus, the City fully participated in the NIGC's review of the 1994 Agreements.[5]

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[2] *Id.* at 25-26.
[3] *Id.* at 25-26, n.43-46.
[4] *See* City's Appendix ("City's App.") at 190-191.
[5] *See also* p. 24, *infra.*

Summary of the Argument

The City's Cross-Appeal

In 1994, the Chairman of the National Indian Gaming Commission opined that the 1994 Agreements between the City and the Band complied with IGRA.[6] In 2011, after soliciting and receiving the parties' views and conducting a thorough review of the 1994 Agreements and their implementation, the Chairwoman of the NIGC concluded that various terms of the Agreements, as written and implemented, violated the requirement in IGRA that tribes possess the sole proprietary interest in their gaming activities and issued a Notice of Violation to the Band.[7] The NOV directed the Band to cease complying with those terms of the 1994 Agreements that violate IGRA, and threatened $25,000-per-day-per-violation fines and closure of the Casino if the Band did not comply.[8] Because the District Court found that the NIGC's interpretation of IGRA's sole-proprietary-interest mandate had changed since the agency signed off on the 1994 Agreements, it granted the Band limited relief from the 1994 Consent Order (and later orders enforcing it) under Rule 60(b)(5) so that the Band could comply with the NIGC's 2011 NOV.[9]

Because it disagrees with the NIGC's sole-proprietary-interest ruling in the NOV and the process leading up to it, the City would have this Court reverse the

[6] Band's Appendix ("A-___") at 133-135.
[7] Band's Addendum ("Add.") at 30-48.
[8] *Id.* at 48.
[9] *Id.* at 18-21.

District Court's order granting the Band relief from future compliance with the terms of the 1994 Agreements that, in the NIGC's final view, violate IGRA. But the change in circumstances presented by the issuance of the NOV (which subjected the Band to fines and possible closure of its Casino for continued compliance with the Consent Order) made applying the Consent Order prospectively "no longer equitable," and the District Court did not abuse its discretion in so holding. Further, the City's collateral attacks on the NIGC's decision are misplaced. The proper route for the City to challenge the NOV would be through an Administrative Procedure Act action in which the NIGC can defend its decision and its administrative record is available to the reviewing Court. Moreover, the City fully participated in the NOV process, and its views on the sole-proprietary-interest mandate were considered and properly rejected.

The City also argues that the District Court erred by allowing the Band to use Rule 60(b) to turn the process into an untimely appeal of the merits of the Consent Order. But the Band didn't assert that Judge Magnuson got something wrong in 1994 when he entered the Consent Order; the Band made its Rule 60(b) motion because, independent from the parties' agreements or any actions of the Band, the NIGC refined its sole-proprietary-interest analysis in such a way that giving one-third of casino profits for a long period of time in exchange for no services and allowing an outside party to control various aspects of gaming regulation and

licensing was no longer lawful. So the Rule 60(b) process was not an improper or belated "appeal" of the Consent Order.

The Band's Appeal

Although the District Court correctly applied Rule 60(b)(5) to grant the Band prospective relief from the Consent Order from the date of the NOV forward, the District Court did not properly analyze the Band's request for retroactive relief under Rule 60(b)(6) for the $10.3 million in Unpaid Rent[10] that the NIGC also directed the Band not to pay. Although Rule 60(b)(6) is not limited to prospective relief and provides authority for granting relief from "a final judgment, order, or proceeding" for "any other reason that justifies relief," the District Court foreclosed true inquiry into Rule 60(b)(6) relief by erroneously concluding that the Band could not get such relief if it did not meet the criteria for relief under Rule 60(b)(1) – (5).

In its response, the City contends that the Band's request for retroactive Rule 60(b)(6) relief was not "district" from its request for prospective Rule 60(b)(5) relief, and that this alleged failure to distinguish the requests precluded relief. But the City misapprehended the Band's requests, and in any event, alternative pleading under Rule 60(b) is common.

[10] As defined in the Band's Brief, the Unpaid Rent is rent the Band did not pay from September 2009 – March 2011, which totals just over $10.3 million. Band's Brief at 14-15.

The City also contends that because the NOV is not a "judgment," the Band is not subject to inconsistent obligations warranting Rule 60(b)(6) relief. But the City cannot deny that the NIGC found the rent payments to the City "are a factor that demonstrates [the City] has a proprietary interest in the gaming activity"[11] and that it directed the Band to "cease performance under the 1994 Agreements of those provisions identified in this NOV as violating IGRA."[12] Nor does the City dispute the substantial caselaw the Band cited that did not deal with inconsistent "judgments."

Finally, the City contends that because the Band took the initiative to seek review of the 1994 Agreements before the NIGC, the Band is not entitled to Rule 60(b)(6) relief. The cases on which the City relies for this contention, however, are easily distinguishable. And because the Band was simply seeking to determine the legality of the 1994 Agreements in light of separately developing agency definitions, the fact that the Band sought review is irrelevant. When Rule 60(b) is properly applied, the issuance of the NOV directing no further payments to the City is an exceptional circumstance justifying relief from the Consent Order and the summary-judgment order that would otherwise require the Band to pay the Unpaid Rent.

[11] Add. at 46.
[12] Add. at 47.

Argument

I. The District Court did not abuse its discretion by granting the Band relief from the Consent Order and later orders enforcing it because applying those orders prospectively was no longer equitable.

A. This Court reviews Rule 60(b)(5) rulings for abuse of discretion.

The City contends, with no citation, that the standard of review for its challenge to Judge Nelson's order granting the Band prospective relief from various prior orders is *de novo*.[13] But in fact, "[t]his Court reviews a district court's ruling on a Rule 60(b)(5) motion for abuse of discretion."[14] A court abuses its discretion when it considers the wrong factors, gives improper weight to the factors it considers, or if it commits a clear error of judgment.[15] A district court also abuses its discretion if it based its ruling on an erroneous view of the law.[16] But the City has failed to show that Judge Nelson so abused her discretion by granting the Band prospective relief under Rule 60(b)(5).

B. District Courts can grant relief from prospective consent orders under Rule 60(b)(5) when a significant change in circumstances warrants revision of the decree.

The Consent Order to which the parties agreed in 1994 incorporated the terms

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[13] City's Brief at 11.
[14] *Prudential Ins. Co. of Am. v. Nat'l Park Med. Center, Inc.*, 413 F.3d 897, 903 (8th Cir. 2005) (citing *Parton v. White*, 203 F.3d 552, 555-56 (8th Cir. 2000)).
[15] Band's Brief at 21 (citing *Thatcher v. Hanover Ins. Group, Inc.*, 659 F.3d 1212, 1213 (8th Cir. 2011)).
[16] Band's Brief at 22 (citing *Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002, 1005-06 (8th Cir. 2006)).

of the parties' 1994 Agreements, including the requirement that the Band pay 19% of the Casino's gross slot-machine revenues to the City until March 2011, and that the parties negotiate (and, failing that, arbitrate) a new percentage of gross slot-machine revenues to govern the second 25-year term of the 1994 Sublease. Those requirements, among others, were ongoing injunctions to the parties to adhere to the 1994 Agreements, akin to ongoing injunctions often embodied in consent decrees in other contexts.

In a landmark ruling regarding when consent decrees may be modified, *Rufo v. Inmates of the Suffolk County Jail*, the Supreme Court

> emphasized the need for flexibility in administering consent decrees, stating: "There is no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen."[17]

And although the District Court noted that some lower courts (but not this Court) have confined the *Rufo* test to "institutional reform cases,"[18] the Court ultimately relied on *Rufo's* emphasis on flexibility: "The standard for modification of a consent decree is a flexible one, but modification will not therefore 'be warranted in all circumstances.'"[19] In this case, there was a definite and unequivocally applicable change in circumstances: the agency approval on which the Consent Order was

[17] *Rufo*, 502 U.S. at 367, 380 (quoting *Railway Employees v. Wright*, 364 U.S. 642, 647 (1961)).

based was rescinded, and the Band was subject to substantial fines and closure of the Casino if it continued to comply with the Consent Order.

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

To obtain relief under Rule 60(b)(5), the Supreme Court held in *Rufo* that a movant must establish "that a significant change in circumstances warrants revision

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[18] Add. at 12. Many Circuits have expressly found that *Rufo's* flexible standard applies outside the institutional-reform setting. *See, e.g.*, *Bellevue Manor Assoc. v. U.S.*, 165 F.3d 1249, 1255 (9th Cir. 1999) ("[W]e join a significant number of other Courts of Appeals in finding that *Rufo* sets forth a general, flexible standard for all petitions brought under the equity provision of Rule 60(b)(5)) (citing cases); *United States v. W. Elec. Co.*, 46 F.3d 1198, 1203 (D.C. Cir. 1995) (applying *Rufo* standard to antitrust consent decree outside of the institutional-reform context); *Bldg. & Constr. Trades Council of Phila. & Vicinity, AFL-CIO v. NLRB*, 64 F.3d 880, 887 (3d Cir. 1995) (holding that *Rufo's* interpretation of Rule 60(b)(5) is a rule of general applicability and not limited to institutional-reform litigation); and *In Re Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993) (observing that *Rufo's* flexible standard is not limited to institutional-reform cases). *Cf. Patterson v. Newspaper and Mail Deliverer's Un.*, 13 F.3d 33, 38 (2d Cir. 1993) (holding that *Rufo's* permissive standard applies to "reform" of unions).

[19] Add. at 15 (quoting *Rufo*, 502 U.S. at 378). Judge Nelson also cited to *Alexis Lichine & CIE. v. Sacha A. Lichine Estate Selections, Ltd.*, 45 F.3d 582, 586 (1st Cir. 1995), in which the Court found that less flexibility is required when dealing with purely "commercial" disputes, because the public's interest is not at stake in the same way it is in institutional reform cases. Add. at 14. Because the change of circumstances here was not simply a change in the commercial fortunes of the parties, however, but was based on a federal agency determining that the activities were illegal and enjoining the Band from making additional payments under the contracts at issue, greater flexibility is called for than if the Band's Rule 60(b) motion were based on purely commercial interests. *Cf. Alexis Lichine*, 45 F.3d at 586-587 (observing that the plaintiff's case was based on "sales figures, the amount spent on promotion, the number of people hired, ratings and image").

of the decree."[20] And under *Rufo*, "[a] consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law."[21] That is precisely what happened here.

In 1993, the Chairman of the then-newly formed National Indian Gaming Commission notified the Band and the City that the 1986 Agreements establishing a joint venture between the City and the Band to own and operate the Fond-du-Luth Casino violated IGRA's sole-proprietary-interest requirement by giving the City of Duluth an actual ownership interest in and control over the Band's gaming activity.[22] With some assistance from NIGC staff, the parties restructured the agreements in an attempt to undo the joint-venture structure created by the 1986 Agreements and to give technical ownership and control of the Casino and its gaming activities to the Band, while still preserving a substantial revenue stream to the City. And in 1994, three days after their submission, the NIGC Chairman concluded that the Agreements did not violate IGRA. In particular—but with no

[20] *Rufo*, 502 U.S. at 383. *See also* Add. at 15 n.9.
[21] *Id.* at 388. *See also White v. National Football League*, 585 F.3d 1129, 1136 (8th Cir. 2009) (quoting *Rufo*); *United States v. Krilich*, 152 F. Supp. 2d 983, 993 (N.D. Ill. 2001) ("A consent decree . . . cannot oblige a party to perform illegal conduct."), *aff'd* 303 F.3d 784 (7th Cir. 2002).
[22] A-133.

analysis—he noted that the agreements "return[ed] ownership and control of the Fond Duluth [sic] Casino to the Band and [are] fully consistent with the IGRA."[23]

As the Band described in its opening brief, in the intervening 17 years, the NIGC refined its interpretation of IGRA, and in particular of IGRA's requirement that tribes retain the sole proprietary interest in their casinos.[24] In a series of opinions regarding particular transactions in which parties sought review of their contracts, the NIGC's Office of General Counsel found that various agreement structures—particularly those involving payment of a percentage of gaming revenues over a long period of time—violated the sole-proprietary-interest requiremen.[25] In many of those cases, the non-tribal contractor was receiving a lot

[23] A-352. The City contends that the NIGC Chairman spent a lot of time working with the parties on the 1994 Agreements. City's Brief at 19. While that may be true, it doesn't change the fact that he provided no analysis of the sole-proprietary-interest requirement in his "approval," A-352, and, as the District Court noted, was ultimately irrelevant to the current Chairwoman's analysis. Add. at 7 n.2 ("The claim that the NOV mischaracterizes the circumstances of the NIGC's 1994 approval of the Agreements, whether or not true, does not undermine the fact that the NIGC plainly changed its conclusion regarding the validity of those agreements.").

[24] IGRA requires that each tribe that wishes to conduct Class II or Class III gaming enact a gaming ordinance, which must be approved by the NIGC Chair, that requires the Indian tribe to "have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). The Fond du Lac Band adopted such an ordinance in 1993, and it was approved by then-NIGC Chairman Anthony Hope. *See* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/fonddulacbandofchippewa/ordappr092393.pdf (last visited May 14, 2012).

[25] A sample of these letters dating back to 2004 is available at http://www.nigc.gov/

less money than the Band was paying to the City and for a far shorter period of time than the duration of the 1994 Agreements, and was providing far more services to the tribe for the payments they received.[26]

More recently, the Chair of the NIGC began taking formal enforcement actions based on the sole-proprietary-interest requirement,[27] including the NOV issued to the Band. In February 2012, it issued a $2,000,000 fine to a contractor that it found had taken a proprietary interest in a tribal casino in South Dakota.[28]

This evolution of agency interpretation is not unique. As the First Circuit noted, "[e]xperience is often the best teacher, and agencies retain a substantial measure of freedom to refine, reformulate, and even reverse their precedents in the light of new insights and changed circumstances."[29] The NIGC's experience with a

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Reading_Room/Sole_Proprietary_Interest_Letters.aspx (last visited May 14, 2012). *See also* Add. at 42 ("Further, since 2003 the OGC issued over 50 legal opinions analyzing the [sole-proprietary-interest] mandate.").

[26] *See, e.g.*, A-421-430 (concluding that casino developer who was receiving 7% of gross casino revenues for five years or a maximum of $20.1 million had taken a proprietary interest in a tribe's casinos).

[27] *See, e.g.*, Final Decision and Order *In the Matter of Ivy Ong and Carlo World Wide Operations, LLC*, Dkt. 46-2, and NOV 11-01, *Bettor Racing, Inc. and J. Randy Gallo*, http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2freadingroom%2fenforcementactions%2fflandeausanteesiutribe%2fNOV11-01redacted.pdf&tabid=124&mid=774 (last visited May 14, 2012).

[28] *See* Notice of Proposed Civil Fine Assessment to J. Randy Gallo, http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2freadingroom%2fenforcementactions%2fflandeausanteesiutribe%2fCFA1101.pdf&tabid=124&mid=774 (last visited May 14, 2012).

[29] *Davila-Bardales v. I.N.S.*, 27 F.3d 1, 5 (1st Cir. 1994) (citing *Rust v. Sullivan*, 500 U.S. 173, 186-187 (1991) (reviewing INS position on admission of testimony

myriad of tribal-casino contracts over the 17 years that elapsed between the 1994 Agreements and the issuance of the NOV is what lead it to conclude that Chairman Hope's initial review of the 1994 Agreements was incorrect.

Judge Nelson noted that "despite the NIGC's initial position, more recently it has developed and applied its understanding of the 'sole proprietary interest' mandate with greater precision and consistency."[30] The issuance of the NOV, which directs that "[t]he Band must cease performance under the 1994 Agreements of those provisions identified in this NOV as violating IGRA,"[31] was a significant change in "factual conditions" that justified modifying the Consent Order under Rule 60(b)(5).[32]

As the City points out, Judge Nelson found that the NOV constituted a "change in law" justifying relief under Rule 60(b)(5).[33] The Band agrees that under existing caselaw, the issuance of the NOV does not constitute a change in law because there has been no change in a statute or binding caselaw. But because Judge Nelson also found that the issuance of the NOV could constitute a change in

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elicited from unrepresented underage persons)). *See also South Shore Hosp. v. Thompson*, 308 F.3d 91,102 (1st. Cir. 2002) (same).

[30] Add. at 8 n.3.

[31] *Id.* at 18.

[32] *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (internal citations omitted) (evaluating changes in facts—the costs of complying with the continuing court order—and the law—in the form of various new opinions from the U.S. Supreme Court).

[33] *See* City's Brief at 41.

circumstances[34]—which it certainly did—she did not abuse her discretion by granting relief under Rule 60(b)(5).[35]

Other courts have likewise found that agency action can constitute a "change in circumstances" under Rule 60(b)(5). In *United States v. Asarco Inc.*,[36] the Ninth Circuit considered whether post-consent-decree agency action justified Rule 60(b)(5) relief. A group of mining companies had entered into a consent decree with the EPA regarding their liability under CERCLA for cleanup costs in a particular area of Idaho known as "the Box." Two years later, EPA filed a CERCLA action to recover against the same companies for "injury to natural resources" for an area outside the Box, and the companies moved for relief from the consent decree, citing the difficulty they faced in paying cleanup costs in the Box now that they were also being required to pay damages for injuries outside it.[37] While the court ultimately denied the companies' 60(b)(5) motion because it found that they had anticipated liability outside the Box at the time they entered into the

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[34] Add. at 16 n.10.

[35] This Court can affirm the District Court's result, even if the District Court's reasoning was incorrect. *See, e.g., Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 1002 (8th Cir. 2011) (citing *Reasonover v. St. Louis Cnty., Mo.*, 447 F.3d 569, 578–79 (8th Cir. 2006)); *City of Grandview, Mo. v. Hudson*, 377 F.2d 694, 696 (8th Cir.1967) ("[T]his court may affirm for any reason supported in the record, even if that reason is different from the rationale of the district court . . . [and] . . . may affirm the district court even if it committed legal error in reaching the correct result.").

[36] 430 F.3d 972 (9th Cir. 2005).

[37] *Id.* at 977.

consent decree, its analysis presumed that EPA's later enforcement action constituted a "change in factual conditions" that would have warranted relief if the companies hadn't actually anticipated it at the time they agreed to the consent judgment.[38]

In another case involving a change in agency interpretation, the Connecticut District Court granted Rule 60(b)(5) relief so that the defendant could comply with the new rules. In *Harrell v. Harder*, a class of welfare recipients obtained a permanent injunction over Connecticut's welfare commissioner to implement the Supreme Court's *Goldberg v. Kelly* decision regarding pre-benefit-termination hearings.[39] Three years later, the federal Department of Health, Education and Welfare ("HEW") promulgated pre-termination hearing procedures that conflicted with the court's injunction, and the state welfare commissioner sought relief from the injunction under Rule 60(b).[40] The court found that the changes in the regulations were "akin to changes in the operative facts of the case," and were therefore "changes in conditions" that "may be sufficient to justify relief under Rule 60(b)(5)."[41] Ultimately, and by "[a]ccording HEW 'the deference due the agency charged with the administration of the [Social Security] Act,'"[42] the court agreed to

[38] *Id.* at 979-980.
[39] 369 F. Supp. 810 (D. Conn. 1974).
[40] *Id.* at 813.
[41] *Id.* at 814.
[42] *Id.* at 816 (quoting *Lewis v. Martin*, 397 U.S. 552, 559 (1970)).

modify its order to permit the welfare commissioner to comply with the federal regulations.[43]

As in *Asarco* and *Harrell*, here the agency's post-consent-decree change of its interpretation of federal law is a change of circumstance that is properly evaluated under Rule 60(b)(5), and because the change could not have been anticipated by either party, the District Court properly awarded Rule 60(b)(5) relief. Indeed, this case was even more compelling than *Asarco* or *Harrell* because the change in agency interpretation here did not just revise a set of generally applicable rules. The NOV is an order *specifically* directed at *these* particular parties and the very agreements that are the subject of the Consent Order. It expressly evaluates and then repudiates and rescinds the very agency action on which the 1994 Agreements and Consent Order were predicated.[44] Under Rule 60(b)(5), this unanticipated change in circumstances justified the limited relief the Band requested and received.[45]

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

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

[45] Parties requesting Rule 60(b)(5) relief based on changed factual circumstances are to "suitably" tailor their requests "to resolve the problems created by the changed factual or legal conditions." *Asarco*, 430 F.3d at 972 (citing *Rufo*, 502 U.S.

2. The parties did not anticipate (indeed *could not have* anticipated) how the NIGC would change its interpretation of "sole proprietary" interest.

To justify relief, the change in factual conditions must have been unanticipated by the parties when they entered into the consent judgment.[46] That is certainly the case here, where at the time the parties entered into the Consent Order, they had the "blessing" of the federal agency with jurisdiction to interpret the statute. Neither party could have foreseen how the NIGC's interpretation of the sole-proprietary-interest requirement would evolve over time.

In its first-ever rulemaking, in 1993, the NIGC declared that beyond giving a couple of examples involving direct ownership by third parties that would be prohibited, the agency could not predict how it would interpret the sole-proprietary-interest requirement: "It is not possible for the Commission to further define the term in any meaningful way. The Commission will, however, provide guidance in specific circumstances."[47] Even though the agency itself didn't know how its interpretation of the statutory commandment that tribes maintain the sole

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at 384). The Band's motion was specifically addressed to those portions of the 1994 Agreements—incorporated into the Consent Order—that Chairwoman Stevens found violate IGRA. *Compare* A-381-384 (Band's Motion for Relief under Rules 60(b)(5) and (6)) *with* Notice of Violation, Add. at 44-47. And the District Court's Order was tailored to address the problems created. Add. at 24-25.

[46] *Agostini*, 521 U.S. at 216 (concluding that the parties anticipated additional costs to petitioners when they entered the consent judgment, so that the fact that costs actually increased did not justify relief).

[47] 58 Fed. Reg. 5802, 5804 (Jan. 22, 1993).

proprietary interest in their gaming activities would play out, the City contends that the parties anticipated the course of events precisely, so that Rule 60(b)(5) relief should have been unavailable.[48]

In this regard, the City contends that the parties included terms in their Agreements that would cover the contingency presented by the issuance of the NOV. First, the City points to an inoperative section of the parties' 1986 Commission Agreement that purports to govern what would happen if a judicial or administrative decision prohibits the "City of Duluth from participating in the Commission in any manner."[49] But the NIGC's decision didn't prohibit the City from participating in the Commission. The structure of the Joint Commission on which the City's Mayor and the Band's Chairwoman sit remains unchanged, as do their powers.[50]

Second, the City claims that the parties anticipated the NIGC's change in interpretation of IGRA and issuance of an enforcement action by including a non-alteration and non-abrogation clause in the main 1994 Agreement, in which the parties agreed:

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[48] *See* City's Brief at 37-40.

[49] *Id.* at 38 (quoting A-103-105). The City acknowledges that this section of the 1986 Commission Agreement was made dormant by the 1994 Amendments to the Commission Agreement so long as the Sublease (which runs until 2036) is in effect. *Id.*

[50] *See* 1994 Amendments to the Commission Agreement, A-329-333; NOV, Add. 30-48 (which is silent with respect to the City's participation on the Commission).

> . . . not to seek directly, or through the use of paid lobbyists or other agents, any amendment to the Indian Gaming Regulatory Act of 1988, or any other federal law, that would alter or abrogate, or cause the alteration of abrogation of this agreement.[51]

But this term is also inapplicable here. The Band did not seek to amend IGRA or any other federal law. Rather, the *NIGC* changed its interpretation of the sole-proprietary-interest requirement through the process described above, a process in which the Band played no role whatever. The Band simply sought review of the agreements by the NIGC after that change occurred.

In any event, the City's analysis misses the mark. Even if the parties had contracted to prevent the Band from seeking review of the 1994 Agreements, the parties had (and have) no authority to contract for something that has become illegal: "[a] consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law."[52] Stated another way, "[a] consent decree . . . cannot oblige a party to perform illegal conduct."[53]

If the Band had sought relief simply because it believed—as one logically might—that paying just over $75 million to the City of Duluth in exchange for City services for which everyone else in the City paid a pittance was a bad deal, the

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[51] City's Brief at 38 (quoting 1994 Main Agreement § 13, A-141).
[52] *Rufo*, 502 U.S. at 388.
[53] *United States v. Krilich*, 152 F. Supp. 2d at 993 (concluding that consent decree requiring preservation of certain wetlands did not compel illegal conduct because EPA was not acting *ultra vires*) (internal citations omitted).

City's position might hold more sway. But the Band sought review of the agreements because their terms were so much more egregious than those that the NIGC had found to constitute taking a proprietary interest in a tribal gaming activity. And the NIGC issued the NOV because it conducted a thorough review of the agreements and how they had been implemented (something that the agency had not done in 1994) and concluded that they violate the Indian Gaming Regulatory Act.

3. The Band can't comply with both the Consent Order and the NOV.

As noted, the Consent Order requires the Band to comply with the 1994 Agreements, including, for example, by paying rent and requiring City approval to change the gaming regulations at the Casino.[54] But NIGC Chairwoman Stevens concluded in the NOV that both of those terms (along with several others) violate the sole-proprietary-interest requirement, and ordered the Band not to comply with them.[55]

The City doesn't dispute that the Band cannot comply with both the Consent Order and the NOV, but contends that the Band could not be "punished for

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[54] *See* Add. at 54 ("It is hereby ordered . . . [t]hat the Court retain jurisdiction over this matter, including specifically the 1994 Agreements, for the purpose of ensuring the obligations of the parties to comply with all provisions of the 1994 Agreements.").

[55] *See Id.* at 38, 47-48.

compliance with a valid court order."[56] For this proposition, the City relies on a Title VII remedial consent-decree case, *Martinez v. City of St. Louis*, in which this Court held that a party could not be subject to a damage award for actions taken to comply with a consent decree.[57] But while complying with a consent decree may insulate one from private claims for damages in the civil-rights context, *Martinez* sheds no light on whether compliance with a consent order could insulate an entity from enforcement of a final agency action where there is no doubt that the agency has jurisdiction to enforce a particular law—as the NIGC does with respect to IGRA.[58] More importantly, in *Martinez*, while the Court found that the City of St. Louis could not be subject to civil penalties for actions taken in compliance with a consent decree, it also found that the District Court had properly modified the decree prospectively based on a change in circumstances as permitted under *Rufo*.[59]

C. The City cannot collaterally attack the NOV through this litigation, and in any event, its attacks are without merit.

Throughout its Brief, the City attacks the NIGC's NOV, challenging the propriety of both the decision and the process leading up to it. Essentially, what the City sought before the District Court and now seeks here, is direct judicial review of the NOV, but without the agency record and without giving the NIGC an

[56] City's Brief at 36.
[57] 539 F.3d 857 (8th Cir. 2008).
[58] *See* 25 U.S.C. § 2713. *See also* Add. at 10 ("[T]he NIGC's 2011 NOV is a valid exercise of its regulatory authority.").
[59] 539 F.3d at 861.

opportunity to defend its actions. The District Court properly rejected this attempted end run around the agency.

1. Should the City desire judicial review of the NOV, it must seek that review directly under the proper statutory authority.

Because the NIGC can take enforcement actions only against tribes and casino management contractors (which the City was not),[60] the NOV was necessarily directed only at the Band, and the Band was the only party who could have directly appealed the NOV under IGRA.[61] But in cases like this one, where the statue at issue does not afford the City a separate path of review, Congress has directed that the Administrative Procedure Act ("APA") establishes the basis for judicial review of agency decisions by federal courts.[62] Under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[63] "Agency action" is defined to "include[] the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[64]

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[60] 25 U.S.C. § 2713(a)(1).
[61] 25 U.S.C. § 2713(a)(2); 25 C.F.R. Part 577.
[62] 5 U.S.C. §§ 701-706. *See generally* 33 C. Wright & C. Koch, *Federal Practice & Procedure* § 8291 (2006 ed.).
[63] 5 U.S.C. § 702.
[64] 5 U.S.C. § 551(13). *See also Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260-61 (9th Cir. 2000) (tribe lacked private right of action under IGRA but could proceed under APA).

But the City forwent its obvious avenue of relief under the APA in favor of a collateral attack on the agency action in response to the Band's Rule 60 motion. This is problematic for three reasons. First, Congress has decided how and by what manner parties may challenge agency actions. As a court of limited jurisdiction, it was far from clear that the District Court would have had subject-matter jurisdiction to hear the City's direct attack on the NOV without a statutory basis to do so.[65]

Second, it would hardly have been proper for the District Court to review the NIGC's action without allowing the NIGC to defend itself. The APA clearly contemplates that the federal agency whose decision is challenged will be named as a party in any action seeking judicial review.[66] A collateral attack like the City's in this case deprives the agency of the ability to defend its decision.

And third, any collateral attack on an agency action disadvantages the court by entreating it to review an administrative action without the record on which the action was based. The only way for a court to provide review in such a

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[65] *See Chemical Weapons Working Group, Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1492 (10th Cir. 1997) (affirming district court's dismissal of collateral challenge to permitting decision because "recognizing jurisdiction in this case would severely undermine the limited judicial review of agency permit decisions provided under the Resource Conservation and Recovery Act[.]"); *Greenpeace, Inc. v. Waste Tech. Indus.*, 9 F.3d 1174 (6th Cir. 1993) (dismissing citizen suit's collateral attack on EPA permit decision for lack of jurisdiction); *Grand Canyon Trust v. Pub. Serv. Co. of New Mexico*, 283 F. Supp. 2d 1249, 1253-54 (D.N.M. 2003) (dismissing permitting complaint that was not brought under the Clean Air Act because "[t]his Court may not allow Plaintiffs to circumvent the limited review process established by Congress[.]").

[66] 33 C. Wright & C. Koch, § 8291; 5 U.S.C. § 703.

circumstance is to substitute its judgment for the agency's—a result clearly contrary to Congress's intent.[67]

The City participated fully in the NIGC process that culminated in the NOV,[68] and it did not object to the NIGC's authority. If the City believes that it is an aggrieved party adversely affected by the NIGC's action, then the APA is the only procedurally proper route for judicial review.

2. Even if the City's attacks on the NOV could be properly raised in this case, they still fail.

Because the NOV is an "agency action" under the APA,[69] it is entitled to deference. If the Court were reviewing the NOV in the context of an APA action—the only context in which it *could* be considered—the Court could only set the NOV aside or find it unlawful if it found the NOV to be:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . .
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]
> (D) without observance of procedure required by law.[70]

But the City didn't cite the APA or specifically argue that the NOV could be set aside for any of these reasons.

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[67] *See generally* 5 U.S.C. §§ 701 *et seq.*
[68] *See* Add. at 35 (discussing City's submissions); City's App. at 181 (same); and 85-108 (City's expert affidavit submitted to the NIGC). *See also* City's App. at 17 (City letter to NIGC).
[69] 5 U.S.C. § 551(13).
[70] 5 U.S.C. § 706(2)(A), (C)-(D) The other bases for setting aside agency actions do not apply here. 5 U.S.C. § 706(2)(B), (E)-(F).

Instead, the City suggests that any acknowledgement of deference to the agency is misplaced because the question is only "whether to modify a court order under Rule 60(b)."[71] In the City's view, the Court should effectively ignore the NOV even though the Band is bound by it because of the process leading up to the NOV. But it cites no law requiring any particular procedure that the NIGC may have violated.[72] The City also contends that the District Court should have overlooked the NOV because it would have retroactive effect and because the City disagrees with the NIGC's conclusion that some terms of the 1994 Agreements violate the sole-proprietary-interest standard. None of these attacks has any merit.

a. Agencies can act through adjudicatory proceedings, and can change their positions over time.

Agencies can act through rulemaking and through adjudicatory proceedings, whether formal or informal. According to the Supreme Court, "adjudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein, and [] such cases 'generally provide a guide to action that the agency may be expected to take in future cases."[73]

Adjudication serves a useful purpose because "[n]ot every principle essential to the effective administration of a statute can or should be cast immediately into

[71] City's Brief at 44.
[72] *Id.* at 48.
[73] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) (quoting *NLRB v. Wyman-Corgon Co.*, 294 US. 759, 765-766 (1969) (alteration in original)).

the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations."[74] For example, "problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule."[75] And that is precisely what happened in the case of the NIGC's definition of the sole-proprietary-interest requirement. The NIGC said in its first rulemaking that it could not fully define the term and would have to define it based on the circumstances presented.[76] The Indian-gaming industry evolved after the passage of IGRA, and, as described above[77] the NIGC's interpretation of the term "sole proprietary interest" necessarily evolved, too.

b. The NIGC did not violate any law or rule during the process leading up to the NOV.

The City suggests that the District Court erred by granting relief based on the NOV because agencies face "political pressures" that courts do not. For this proposition, the City relied on a footnote from a Third Circuit case analyzing the applicability of retroactivity principles to agency decisions, in which the Court suggested courts should keep a watchful eye on administrative agencies issuing

[74] *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 197, 202-203 (1947)).
[75] *Id.*
[76] 58 Fed. Reg. at 5804.
[77] *See* pp. *11-13*, *supra*. *See also* Band's Brief at 13-14.

retroactive decisions that cause "manifest injustice."[78] But the very next sentence in that case says "[b]ut agencies should retain their power to administer their organic statutes flexibly."[79]

Under the APA, an agency action can only be set aside if the agency failed to observe "procedure required by law."[80] Neither IGRA nor the NIGC regulations prescribe the procedure leading up to a Notice of Violation, and the City cites no procedure the NIGC failed to follow.[81]

Instead, the City advances a myriad of allegations that the process wasn't fair, stemming primarily from the fact that the Band requested review of the agreements.[82] As noted earlier, the Band requested this review because as it followed the NIGC's pronouncements about the sole-proprietary-interest rule, the

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[78] City's Brief at 48 (citing *Laborer's Int'l Un. of N. Am., AFL-CIO v. Foster Wheeler Corp.*, 26 F.3d 375, 386-87 n.8 (3d Cir. 1994)).
[79] *Laborer's Int'l*, 26 F.3d at 387 n.8.
[80] 5 U.S.C. § 706(2)(D).
[81] 25 C.F.R § 533.3 provides that the Chairman may issue a notice of violation, and includes of list of items a notice must contain. Once a notice of violation has been issued, the NIGC regulations set forth specific procedures to appeal it. *See* 25 C.F.R § 577.
[82] *See* City's Brief at 25-27, 48. The City even implies that by notifying the Band's counsel that the City had filed a FOIA request for Band documents, the NIGC was acting improperly. *Id.* at 27. But NIGC regulations *require* the agency to notify the submitter of documents that may contain "confidential commercial information" of any FOIA request for those documents so that the submitter can propose redactions of such information. 25 C.F.R. § 517.7(a) and (b). So the NIGC's notice to the Band's counsel was not only proper, it was mandatory.

Band concluded that the 1994 Agreements violated the rule.[83] Furthermore, it is very common for both tribes and their contractors to seek the NIGC's review of agreements for compliance with IGRA.[84]

In this case, once the Band requested review, NIGC Chairwoman Tracie Stevens notified both the Band and that City that she was accepting review of the agreements, and invited both parties to brief the issue; both did.[85] The City had a full opportunity to press its case before the NIGC, and it did so. The City filed a 40-page brief, an expert affidavit, and *five volumes* of exhibits with the NIGC in support of its position that the 1994 Agreements did not violate the sole-proprietary-interest rule.[86] And the NIGC Chairwoman thoroughly considered the City's position.[87] That the City failed to raise arguments that the Commission found compelling does not mean the process was flawed, and the District Court

[83] *See* pp. 11-13, *supra.*
[84] *See* Add. at 42 ("[S]ince 2003 the [NIGC's Office of General Counsel] has issued over 50 legal opinions analyzing the [sole-proprietary-interest] mandate. After receiving such legal opinions, the parties, when necessary, often amend such agreements to avoid an enforcement action."); Add. at 8 (noting that the NIGC had issued more than 50 opinions regarding the sole-proprietary-interest requirement);
[85] *See* Add. at 35 ("By letter dated October 20, 2010, the City and the Band were advised that the 1994 Agreements would be examined by NIGC. For that purpose, the letter requested the parties provide their views of the 1994 Agreements by November 19, 2010. Both parties timely submitted their views.").
[86] *See* City's App. at 181, 190.
[87] *See* Add. at 35-40.

properly rejected the City's claim to the contrary.[88]

3. The City's collateral attack on the NOV fails on the merits.

The City also contends here—as it did unsuccessfully before the District Court—that the 1994 Agreements do not violate the sole-proprietary-interest rule.[89] If the City were allowed to leap frog the APA and challenge the merits of the NOV here, this Court would still have to review the NOV under the deferential *Chevron* standard.[90] Under *Chevron*, where Congress has not spoken on the question at issue,

> the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[91]

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[88] Add. at 7 n.2. The City also attacks the NOV because Chairwoman Stevens noted that "no other federally recognized tribe has lands eligible for gaming within 250 miles of the Duluth City Hall," Add. at 46, and in fact, there are tribes within a 250-mile radius of Duluth who have lands eligible for gaming. City's Brief at 28. The City agreed not to "enter into an Agreement similar to this Agreement with any other Indian Government for the conduct of activities the same as or similar to those to be conducted by the [Development] Commission within a radius of 250 miles of the City Hall of the City of Duluth without the prior written consent of the [Band]." 1986 Commission Agreement, at §29 (b), A-98. But even Chairman Hope concluded that the joint-venture concept from the Agreement did not comply with IGRA because the Band did not have the sole proprietary interest in the Casino. *See* A-133-135. So regardless of its promise, the City *could not* enter into a similar agreement with any other tribe, and the NIGC's misstatement regarding other tribes within 250 miles is irrelevant.

[89] City's Brief at 50-53.

[90] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[91] *Id.* at 842-43.

In passing IGRA, Congress required the NIGC to ensure that "Indian tribe[s] will have the sole proprietary interest and responsibility for the conduct of any gaming activity[,]"[92] but did not define or otherwise directly address the precise question of what precisely constitutes a "proprietary interest." So "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[93] And "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[94] Instead, "[t]he power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[95]

The City contends—as it did before the NIGC—that payments made by the Band to the City are allowable under IGRA because 25 U.S.C. § 2710(b)(2)(A)(v) permits tribes to fund local government operations out of net gaming revenues.[96] Under the City's theory, payments to a municipality are exempt from the sole-proprietary-interest requirement, and a tribe could give *all* its revenues to a municipality. But NIGC Chairwoman Stevens rejected this theory, concluding that

> just because [a payment to a municipality] may be a proper use does not mean that the 1994 Agreements conform to IGRA's mandate that

[92] 25 U.S.C. §§ 2710(b)(2)(A), (d)(1)(A)(ii).
[93] *Chevron*, 467 U.S. at 843.
[94] *Id.* at 843-44.
[95] *Id.* at 843 (quotation and internal alteration omitted).
[96] City's Brief at 50-51; Add. at 35.

> the Band have the sole proprietary interest in its gaming activity. IGRA's sole proprietary interest mandate is violated by the high amount of revenue being conveyed to the City, the length of the term of the 1994 Agreements, and the City's right of control over the regulation of gaming under the 1994 Agreements.[97]

Chairwoman Stevens also rejected the City's claim—repeated in its brief[98]—that payments to the City are legally comparable to payments tribes make to states in tribal-state compacts. "[T]he City's comparison of the 1994 Agreements with tribal-state compacts is misplaced and unpersuasive. Under IGRA, tribal-state compacts are fundamentally different than the agreements at issue here."[99]

The City's attack on the NIGC's sole-proprietary-interest analysis, "fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress[.]"[100] Accordingly:

> the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."[101]

The NIGC's sole-proprietary-interest analysis "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by

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[97] Add. at 39-40.
[98] City's Brief at 30.
[99] Add. at 39.
[100] *Chevron*, 467 U.S. at 866.
[101] *Id.* (quoting *TVA v. Hill*, 437 U.S. 153 (1978)).

the statute, [and the courts] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[102] The NIGC's analysis is precisely the reasoned balance of interests to which *Chevron* requires deference.

D. Modifying the Consent Order was not an improper review of its merits.

The City's final attack on the District Court's order modifying the Consent Order (and the later orders enforcing it) is that it was an improper review of the merits of the Consent Order.[103] For this proposition, the City relies on two cases in which the Rule 60 movants attempted to use Rule 60 to get the trial court to reconsider issues they had already lost in the initial judgment. In *Sanders v. Clemco Indus.*, for example, this Court upheld the denial of a Rule 60(b) motion because "the motion raise[d] only issues of law that previously were rejected by the district court."[104] Here, the Band wasn't raising issues before the District Court that it had lost when the Consent Order was issued—it was, as Rule 60(b)(5) requires, presenting new circumstances that made "applying it prospectively . . . no longer equitable."

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[102] *Id.* at 845 (quotation omitted).
[103] City's Brief at 49.
[104] 862 F.3d 161, 170 (8th Cir. 1988). The other case the City cited for this argument, *Broadway v. Norris*, is similarly distinguishable because the Band did not simply reargue the merits of an issue they lost when the Consent Order was granted. 193 F.3d 987, 989-90 (8th Cir. 1999) (affirming district court's denial of Rule 60(b) motion because "defendants did nothing more than reargue, somewhat more fully, the merits of their claim of qualified immunity. This is not the purpose of Rule 60(b).").

II. This Court should reverse the District Court's refusal to grant the Band relief from the Unpaid Rent obligation under Rule 60(b)(6).

The Band should be relieved from the Unpaid Rent obligation under Rule 60(b)(6), which allows for "any other reason that justifies relief."[105] As the Band explained in its opening brief, Rule 60(b)(6) permits retroactive relief, and is tailored for precisely the exceptional circumstances presented here. The Band's appeal of the District Court's denial centers on that court's failure to analyze this claim under the Rule 60(b)(6) standard, much less to do so correctly.

The City presents little legal support for its response to *most* aspects of the Band's Rule 60(b)(6) arguments.[106] Instead, it relies almost exclusively on the District Court's own limited analysis of the issues, general naysaying, and the all-purpose, "equitable" arguments the City has relied on throughout this case.

A. This Court reviews the District Court's interpretations of Rule 60(b) *de novo*, and the application of those interpretations for an abuse of discretion.

In its opening brief, the Band argued that this Court should apply *de novo* review to the District Court's legal conclusion that Rule 60(b)(6) was unavailable in a situation that didn't fit Rule 60(b)(1)-(5).[107] The City does not dispute that this is the proper standard of review.

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[105] *Gonzalez v. Crosby*, 545 U.S. 524, 528-29 (2005).
[106] City's Brief at 55-71.
[107] Band's Brief at 22 (citing *Ind. Lumbermens Mut. Ins. Co. v. Timberland Pallet & Lumber Co.*, 195 F.3d 368, 374 (8th Cir. 1999); *Kuelbs v. Hill*, 615 F.3d 1037, 1041 (8th Cir. 2010)).

Nor does the City dispute that the abuse-of-discretion standard applies to the cursory Rule 60(b)(6) analysis the District Court *did* apply.[108] As the Band explained in its opening brief, the District Court refused to "consider the legal implications of compelling the Band's performance in violation of the NOV," a "relevant factor that should have been given significant weight[,]" and improperly gave "significant weight" to irrelevant and improper factors.[109]

B. Band's Rule 60(b)(6) claim is "separate and divisible" from the Band's other Rule 60(b)(5) claims.

Despite the City's argument to the contrary, the Band's Rule 60(b)(6) claim is "separate and distinct" from its Rule 60(b)(5) relief from "rent" payments for the second term of the 1994 Sublease (*i.e.* from 2011-2036).[110] In fact, the City fails to cite a single case to support its argument,[111] and does not dispute that separate and distinct prospective and retroactive relief can be rendered in the same Rule 60 case. So it appears that the City does not contest that where there *are* separate claims, the Court *can* award relief under different provisions of Rule 60.[112]

The City's sole argument is a fabricated admission by the Band to the purported effect that it has no Rule 60(b)(6) claim for retroactive relief here, just a

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[108] *Id.* at 21-22.
[109] *Id.*
[110] *Compare* City's Brief at 57-59 *with* Band's Brief at 24-25. The City also argues that the District Court properly denied relief from the Unpaid Rent obligation under Rule 60(b)(*5*), but the Band has not appealed that decision. *See* City's Brief at 59.
[111] City's Brief at 57-59.
[112] Band's Brief at 24-25.

failed Rule 60(b)(5) claim.[113] The City suggests that the Band's arguments to the District Court for relief under Rule 60(b)(5) as to all three rental periods collectively as "prospective correction of a past wrong" amounted to a concession that the Band's claim for Rule 60(b)(6) relief as to the Unpaid Rent was not really "separate and divisible" from its Rule 60(b)(5) claims, and that the District Court properly denied it.[114]

But this argument only exists if the Court adopts a contorted and unfair construction of the Band's argument. The Band's arguments were carefully structured and, as a plain reading reveals, were made *in the alternative* for relief from all aspects of the 1994 Consent Order under *both* provisions of Rule 60(b).[115] And as detailed in the Band's opening brief, this claim is separable from the counterclaims the District Court denied and is properly preserved for this Court's review.

C. Rules 60(b)(5) and (b)(6) have well-established distinctions that the District Court and the City fail to acknowledge.

Apart from misconstruing the Band's arguments below, the City simply implores adherence to the District Court's decision. The City cites no legal authority, instead relying verbatim on the now-oft-repeated paragraph from the

[113] City's Brief at 58-59.
[114] *Id.* at 57-58.
[115] *See* Band's Brief at 23-25 (explaining District Court's error in refusing to consider arguments in the alternative under each subsection of Rule 60(b)).

District Court's order in which the District Court improperly conflated the two relevant provisions of Rule 60(b): "[H]aving rejected such retroactive relief pursuant to Rule 60(b)(5), the Court declines to open any escape hatch that would permit such relief under Rule 60(b)(6)."[116] The Band's arguments in favor of reversal, therefore, stand unrebutted.

As the Band already established, the District Court's approach "forbids alternative pleading and forecloses Rule 60(b)(6) relief in situations not addressed by Rule 60(b)(1)-(5)."[117] It is a well-established principle—including by the United States Supreme Court—that Rule 60(b)(6) is a standalone, "catch-all" provision.[118] The City presents no support for the District Court's merger of the 60(b)(5) and (b)(6) requirements, and on *de novo* review, this Court should reverse the District Court's error of law.

D. The District Court abused its discretion by failing to consider *all* the relevant Rule 60(b)(6) factors and the equities with respect to granting relief from the Unpaid Rent.

In its opening brief, the Band argued that, to the extent the District Court made any Rule 60(b)(6) analysis, the court abused its discretion by failing to consider the proper dynamics at issue, namely that the Band can't comply with both

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[116] Band's Add. at 26-27 (Order at 26-27).
[117] Band's Brief at 26.
[118] *Id.* at 27-33 (citing *Klapprott v. United States*, 335 U.S. 601, 613-14 (1949) (stating that Rule 60(b)(6) "permits reopening when the movant shows any reason justifying relief from the operation of the judgment *other than* the more specific circumstances set out in Rules 60(b)(1)-(5).").

the Unpaid Rent obligation and the NOV, and that the Consent Order violates IGRA.[119] The Band argued further that placing undue weight on another factor, the supposed "equities" associated with requiring the City to repay the past rent and to forgo the Unpaid Rent, was improper. This is because in so doing the District Court thereby lumped together all the "past rent" claims—both the $75 million in rent the Band paid before this suit began *and* the $10.3 million in Unpaid Rent.[120] The court failed to even consider the request for relief on Unpaid Rent alone, which involves different considerations.[121] When these failures are taken together, the District Court abused its discretion in denying Rule 60(b)(6) relief as to the Unpaid Rent.[122]

The City both misstates the Band's position regarding the factors the District Court considered and errs in its own analysis of them. Contrary to the City's statement, the Band *agrees* that the "District Court's consideration of these various factors, or weighing the equities, is exactly what is required of the District Court."[123] The Court didn't properly weigh the equities, however, and therefore abused its discretion.[124] In fact, the exceptional circumstances presented by this

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[119] *Id.* at 35-44.
[120] *Id.* at 44-46.
[121] *Id.*
[122] *Id.* at 46-50.
[123] City's Brief at 60.
[124] Band's Brief at 44-46 (citing Order at 29). Although the City asserts at one point in its brief that the Band "completely failed to address" whether there were exceptional circumstances present, *see* City's Brief at 56, that is a *primary purpose*

case warrant reversal of Judge Nelson's order with respect to the Unpaid Rent.

1. The inconsistent obligations imposed by the Consent Order and the NOV regarding the Unpaid Rent demonstrate "exceptional circumstances."

The City makes three arguments in support of its position that the two inconsistent legal obligations here do not constitute "exceptional circumstances" justifying relief. The City argues that: (1) there are not really two "judgments" at issue; (2) the same two parties were parties to the Consent Order; and (3) the Band "deliberately and voluntarily chose to seek the NOV,"[125] so the Band is not entitled to relief. But these arguments do not withstand closer review.

a. A party need not be subject to inconsistent "judgments" to show "exceptional circumstances" under Rule 60(b)(6), only inconsistent "obligations."

For the first time on appeal, the City advocates the legally untethered argument that "exceptional circumstances" requires the existence of inconsistent "judgments." It offers no legal authority for the suggestion that being subject to a judgment and final agency action that are inconsistent would be any different from being subject to two inconsistent judgments. This is precisely the type of "extraordinarily absurd result" that Rule 60(b)(6) exists to avert.[126]

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of the Band's entire appeal. The particulars of the "exceptional circumstances" are discussed over 16 pages of the Band's brief. *See* Band's Brief at 34-50.

[125] City's Brief at 63-66.

[126] *Underwriters at Lloyd's of London v. OSCA, Inc.*, No. CIV.A.H-00-3442, 2003 WL 25740144 (S.D. Tex. Sept. 5, 2003) *aff'd in part, rev'd in part on other*

Moreover, the City's position is not the law, and ignores the substantial case law the Band cited both below[127] and in this appeal[128] that show the breadth of circumstances where relief is justified. The cases make clear that it is the risk of inconsistent "obligations," not just "judgments," where Rule 60(b)(6) relief may be appropriate.[129] And although many cases deal with two inconsistent court judgments,[130] others address inconsistent arbitration awards or other conflicting obligations.[131] In *Mayhew v. Int'l Mktg. Group*,[132] the Sixth Circuit reversed the lower court's denial of the Rule 60(b)(6) motion as an abuse of discretion where

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grounds sub nom. Underwriters at Lloyd's London v. OSCA, Inc., No. 03-20398, 2006 WL 941794 (5th Cir. Apr. 12, 2006).

[127] *See, e.g.*, City's App. at 205.

[128] Band's Brief at 36-37.

[129] *Id.*

[130] *See* Band's Brief at 36-37 (citing *WRS, Inc. v. Plaza Entm't, Inc.*, No. CIV. A. 00-2041, 2008 WL 2323991 (W.D. Pa. June 5, 2008) (granting Rule 60(b)(6) motion because "this case presents exceptional circumstances due to the very real possibility of inconsistent judgments."); *In Re Blue Diamond Coal Co., No. 3:93-CV-473*, 1998 WL 1802907, at *3 (E.D. Tenn. Nov. 4, 1998) (citations omitted) ("[C]ourts have granted post-judgment relief in 'same accident' cases to harmonize the legal outcome for victims of the same motor vehicle accident, and also to harmonize the results for parties of a common contractual transaction."); *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 751 n.6 (5th Cir. 1995 (citations omitted) ("where the subsequent court decision is closely related to the case in question," or "where two cases arising out of the same transaction result in conflicting judgments, [Rule 60(b)(6)] relief has been found to be warranted.")).

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

[132] 6 F. App'x. at 279.

there was a federal statute that "directly conflict[ed] with the holding of the district court."[133] This is the same scenario: the NIGC, the federal agency with interpretive authority, concluded that IGRA directly conflicts with the Consent Order. So there is no reason for this Court to distinguish these "inconsistent obligations" from those considered in other Rule 60(b)(6) cases and the Band is entitled to relief.

b. The status of the parties requesting relief is not a material factor in granting Rule 60(b)(6) relief.

Also without citation, the City contends that this is not like the cases the Band cited "where there are inconsistent judgments requiring harmonization of the results between accident victims or common contractual transactions arising out of the same matter."[134] It argues that no "harmonization is required" because there aren't a "multitude of parties in different cases" involved here, only the same two as were parties "subject to the Consent Order involved in the same litigation."[135]

Again, the City does not provide any reason *why* the particular identity of the parties here would mean relief is unwarranted, and the City again ignores precedent. The same parties were frequently both involved in the prior decision from which

[133] *Id.*
[134] City's Brief at 63 (citing Band's Brief at 36).
[135] *Id.* at 63-64.

one party now seeks relief due to a change in circumstances.[136] The City presents no reason that the Band is not entitled to the same relief.

c. Seeking review of the 1994 Agreements did not "create" the violation the NIGC identified in the NOV.

The City next argues that the exceptional circumstances the Band now faces are a result of its request for review of the 1994 Agreements by the NIGC. In essence, the City is making an "unclean hands" argument[137]—one the District Court rejected.[138] Ironically, the Band's hands are apparently unclean because it sought review of agreements it thought to be illegal and the reviewing agency reached that conclusion. The Band has been patent about its request for NIGC review of the Agreements, and, as noted *supra* at 26-29, nothing the Band did to engage the NIGC violated any rule or policy.[139]

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[136] *See, e.g.*, Band's Brief at 36-37 (citing *Ameritech Corp.*, 543 F.3d at 419) (same parties involved both in initial arbitration and later arbitration that was the subject of successful Rule 60(b)(6) motion); *WRS, Inc.*, 2008 WL 2323991 at 4-5 (same parties involved both in initial transaction, which gave rise to breach of contract and surety suit where default was entered and then later lifted in successful Rule 60(b)(6) motion)).

[137] City's Brief at 64-65.

[138] *See* Add. at 7 n.2 ("Although the Band communicated with the NIGC leading up to the NOV, the Court cannot conclude that the Band lacks the clean hands for equitable relief.").

[139] In fact, the District Court's summary-judgment order specifically envisioned the enforcement-action process that the Band's review initiated. *See* A-377 (" . . . until the NIGC initiates an enforcement action regarding the Fond du Luth Casino and proceeds with that action to a final decision on the substantive issue of proprietary interest, this Court's view would constitute an advisory opinion.").

The City's argument promotes the very inequity of tribal/non-tribal commercial transactions that IGRA was intended to thwart.[140] The fact that the City doesn't "like" the NIGC's procedures, conclusions, or the agency itself,[141] does not constitute legal argument.

The cases cited by the City to support its unclean-hands argument are, considered in the best light, inapposite. For example, *Ackermann v. United States*[142] deals with a Rule 60(b)(6) motion for relief from a judgment from which the movant did not timely appeal.[143] The case had nothing to do with two inconsistent judgments. In an apparent attempt to force-fit the case to the present facts, the City wrote that, in *Ackermann*, "[t]he United States Supreme Court held that '[b]y no stretch of the imagination can . . . voluntary, deliberate, free, untrammeled choice' be considered exceptional circumstances."[144] In fact, the full quote reads: "By no stretch of imagination can the voluntary, deliberate, free, untrammeled choice *of*

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[140] *See, e.g.*, 25 U.S.C. § 2701(2) (stating that a purpose of IGRA is "to ensure that the Indian tribe is the primary beneficiary of the gaming operation"); 25 U.S.C. § 2711 (detailing requirements for casino management agreements with tribes).
[141] *See, e.g.*, City's Brief at 48 (stating "[t]he evidence is replete with documentation establishing that the Band voluntarily and deliberately engaged in communication with the NIGC culminating in the creation of the NOV"), and 49 ("It is error to turn the rights of the parties, established by contract and court judgment, over to the NIGC, an agency which is subject to 'dynamic political pressures.'").
[142] 340 U.S. 193, 200 (1950).
[143] *Id.*
[144] City's Brief at 64 (citing *Ackermann*, 340 U.S. at 200).

petitioner not to appeal compare with the Klapprott situation."[145] The type of "choice" *Ackermann* addresses, in other words, is that of a petitioner not to timely appeal—not the "choice" to openly submit one's agreements to the proper federal agency to determine whether they remain lawful, as the City implies.

Likewise, the facts in *In re Zimmerman*, on which the City also relies, are easily distinguishable.[146] There, the appellant filed a suit against her stepfather in December 1986 in federal court in Indiana claiming that he had physically and sexually abused her.[147] In January 1987, the Indiana court granted the stepdaughter a default judgment against her stepfather.[148]

Just a few days later, though, the stepfather filed for bankruptcy in Minnesota and received a discharge without his stepdaughter or anyone else having filed objections.[149] The stepdaughter thereafter filed for Rule 60(b)(6) relief in Minnesota bankruptcy court,[150] which concluded that there was significant evidence that the bankruptcy petition was filed in bad faith to force litigation in Minnesota.[151] But on review, this Court held that no relief was justified under Rule 60(b)(6)

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[145] *Ackermann*, 340 U.S. at 200. As the Band argued in its opening brief, in fact, *Klapprott* actually *supports* the Rule 60(b)(6) relief the Band seeks. Band's Brief at 29-30.
[146] 869 F.2d 1126, 1127 (8th Cir. 1989).
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*

because the stepdaughter offered no reason why she had not filed objections within the time allotted in the bankruptcy proceeding.[152]

In short, this Court concluded in *Zimmerman* that even though the *nonmovant* engaged in bad-faith manipulation of one court against another, no relief was available to the Rule 60(b)(6) *movant* because she had, without excuse, not availed herself of the bankruptcy court's procedures.[153] Here, the Band neither failed to avail itself of an available procedure nor engaged in bad faith or manipulation. The Band merely sought to enforce IGRA. And it followed proper procedure both in petitioning the NIGC to review the 1994 Agreements and, upon receipt of the NOV, immediately and properly bringing a Rule 60(b)(5) and (b)(6) motion.[154] Therefore, while the City misstates the holdings of its own authority in an effort to counter the

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[152] *Id.* at 1128.

[153] The City states that the Eight Circuit in *Zimmerman* "held that exceptional circumstances cannot be created through manipulation of one court against another and through the failure to avail oneself of available procedures." City's Brief at 64 (citing 869 F. 2d 1126, 1128 (8th Cir. 1989)). What this Court *actually* said is:

> We find unpersuasive Doe's argument that, even though she presented no explanation for her failure to seek redress through the usual means, the "integrity of the federal courts" requires that her motion be granted. As the District Court pointed out, "The integrity of the court[s] is protected not only by not allowing parties to manipulate one court against another, *but also by requiring parties to avail themselves of available procedures*."

869 F.2d at 1128 (emphasis added) (internal citation omitted).

[154] *See* A-370-71 (District Court suggested that the proper way for the Band to seek relief from the Consent Order was through Rule 60(b)).

Band's arguments, even properly read, the cases provide no support for the City's position and actually militate in the Band's favor.

2. The City does not contest that Band cannot lawfully pay the Unpaid Rent and comply with the NIGC's NOV.

Ultimately, the City does not contest the Band's conundrum. If Rule 60(b)(6) relief is not granted, the Band will be judicially compelled to violate the NOV.[155] As it has throughout the case, the City instead again complains about the Band's August 2009 decision to stop payments before getting the federal court's permission to do so.[156]

The Band's decision to suspend performance under the 1994 Agreements was not a show of disrespect for the District Court's jurisdiction (which the Band has not contested). Rather, it was a good-faith effort to avoid any further violation of federal law. The City has provided no serious challenge to the Band's arguments in favor of Rule 60(b)(6) relief from the Unpaid Rent obligation, and the District Court's ruling in that regard should be reversed.

[155] City's Brief at 63-66.
[156] *Id.* at 66-68.

Conclusion

The City would have this Court reverse the District Court's modification of the Consent Order and ignore the NOV because it claims it never would have settled this matter the way it did if it had thought the Agreements could later be deemed illegal. Of course, the same could be said for the Band. It would not have agreed to pay the City 19% of its gross slot machine revenues for 17 years if it had thought that doing so gave the City an illegal ownership interest in its Casino. But apart from demonstrating that neither party anticipated that the NIGC would declare the 1994 Agreements unlawful, the parties' convictions in this regard are largely irrelevant. The relevant inquiry under Rule 60(b)(5), as the District Court correctly held, is whether this change in the NIGC's interpretation made adherence to the 1994 Consent Order inequitable. Because the Band could not comply with both the Consent Order and the NOV, the District Court properly exercised its discretion to relieve the Band from future compliance.

The District Court did not properly evaluate the Band's request for relief from paying the Unpaid Rent under Rule 60(b)(6), however, because it conflated Rules 60(b)(1)-(5) with Rule 60(b)(6). Properly analyzed, Rule 60(b)(6) relief is warranted because the of the conflicting obligations presented by the Consent Order (and summary-judgment order) to pay the Unpaid Rent and the NIGC's order not to

pay it. Being subjected to large fines and closure of its Casino is an "exceptional circumstance" that warrants relieving the Band from paying the Unpaid Rent.

Dated: May 16, 2012

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Certificate of Compliance

The undersigned counsel hereby certifies that this brief contains 12,328 words, exclusive of the items set forth in Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure, based on the word count that is part of Microsoft Office Word 2010.

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Certificate of Service

I hereby certify that on May 16, 2012, I electronically filed the Appellant/Cross-Appellee Fond du Lac Band of Lake Superior Chippewa's Response and Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the ECF system. Participants in the case who are registered with ECF will be served by the CM/ECF system.

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