

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

CHARLES COLOMBE,	*	CIV. 11-3002
	*	
Plaintiff,	*	
	*	TRIBAL DEFENDANTS’
v.	*	MEMORANDUM OF LAW IN
	*	SUPPORT OF THEIR MOTION
	*	FOR SUMMARY JUDGMENT
	*	AND IN OPPOSITION TO
ROSEBUD SIOUX TRIBE, et. al.,	*	PLAINTIFF’S MOTION FOR
	*	SUMMARY JUDGMENT
Defendants.	*	

INTRODUCTORY STATEMENT

In this case, the Rosebud Sioux Indian Tribe sued the former manager of the Tribe’s casino, seeking money damages for breach of contract. The contract was the management agreement (“the Contract”) between the Tribe and BBC Entertainment, Inc. (“BBC”), the company that managed the Tribe’s Rosebud Casino from August 15, 1994 to August 15, 1999. As a matter of federal law, such contracts are governed by the provisions of the Indian Gaming Regulatory Act, 25 U.S.C. §§2701-21 (“IGRA”). IGRA and the federal regulations implementing IGRA require all tribal casino management agreements and modifications to such agreements to be in writing and approved by the Chairman of the National Indian Gaming Commission (“NIGC”) in order to be legally valid; IGRA and federal regulations provide that any tribal casino management agreement or any modification to such an agreement that is not approved by the NIGC is void. In

this case, the Contract between the Tribe and BBC was approved by NIGC.

At the heart of this controversy is an unwritten agreement between BBC and the Tribal Council, which was neither submitted to the NIGC or approved by it, which effectively modified the NIGC-approved management agreement.

After the management contract term ended in August 1999, the Tribe discovered that through the actions of BBC president Charles Colombe, BBC had unilaterally paid itself approximately three hundred thousand dollars from casino funds in the final week of the contract term. The Tribe brought a breach of contract claim to recover that money from BBC.

The Management Agreement provided that any litigation arising out of a dispute concerning the Contract would be brought in Rosebud Sioux Tribal Court. As provided by the Contract, the Tribe brought an action for money damages in the Rosebud Sioux Tribal Court against BBC. The Tribe's complaint claimed that BBC had taken money that belonged to the Tribe in violation of the Contract.¹ BBC's defense at trial was that the money Colombe took from casino funds represented BBC's share of contributions to the casino's Operating Expense Reserve ("the OER"). BBC argued that it was entitled to recover its contributions to the OER pursuant to an unwritten, but mutually agreed upon oral modification of the Contract.

The legal validity of the oral contract modification was at the heart of BBC's defense, in pre-trial summary judgment litigation and in the trial. The Tribe

¹ The only claim in the Tribe's complaint that is in issue here is the claim set forth in Count I of the complaint, concerning the Operating Expense Reserve clause in the Contract.

argued that the terms of the NIGC-approved contract were controlling. Those terms provided that the Manager could only recover its initial contribution to the OER and it was undisputed that BBC had made no initial contribution to the OER. At the summary judgment stage and in trial, BBC argued that the terms of the written management agreement were not controlling and should not be enforced because the Tribe and BBC had agreed to modify the OER clause in the Contract. It was undisputed that the agreement had never been reduced to writing or approved by the NIGC. The Tribe cited the terms of the Contract, IGRA, federal regulations implementing IGRA, and 8th Circuit case law to support its argument that any agreement that changed or modified an NIGC-approved casino management contract that had not been approved by NIGC was void as a matter of law.

The Special Tribal Court judge, the Honorable B.J. Jones, ruled that there had been a legally valid oral modification of the casino management agreement and granted judgment to BBC.²

The Tribe appealed that ruling to the Rosebud Sioux Tribal Supreme Court, again pursuant to the terms of the Management Agreement. The Tribal Supreme Court held that the oral modification of the Contract was void as a matter of law because it had never been approved by the NIGC. The Tribe's Supreme Court reversed the trial court and remanded the case for an accounting of damages.

² Judge Jones's opinion did not address the provisions of IGRA, the federal regulations or the 8th Circuit case law that held that unapproved modifications of casino management agreements were void. Instead, he based his ruling on his view that if the court were to hold BBC to the terms of the Management Agreement that would "visit an inequity" upon BBC.

After a second trial on damages and remedies, Judge Jones entered an order directing BBC to pay the Tribe \$399,353.61, plus \$127,793.15 in damages. BBC did not appeal that order.

After Colombe brought this action, the Tribal Defendants moved to dismiss all his claims because BBC had failed to exhaust its tribal appellate remedies. This Court (in doc. #33) ruled that, although it had not appealed to the tribal Supreme Court, BBC had exhausted its tribal remedies as to one jurisdictional issue and allowed BBC to proceed on its claim that the tribal court had no jurisdiction to determine that the oral modification to the Contract was void under federal law.

Colombe now urges this Court to rule that the Rosebud Sioux Tribe Supreme Court had no jurisdictional authority to decide the very question that BBC had asked the trial court to decide and which the trial court did decide in the trial—whether the unapproved oral modification of the casino management agreement was legally valid.

Colombe contends that IGRA gives the NIGC exclusive jurisdiction to determine whether an unwritten modification of an NIGC-approved management agreement is legally valid, and that the Rosebud Sioux Tribe Supreme Court had no jurisdictional authority to determine whether the parties' unwritten, unapproved modification of the Contract was legally valid or void.

Both Colombe and the Tribal Defendants have filed motions for summary judgment.

Summary judgment under Rule 56 of the Federal Rules of Civil Procedure is

proper when there are no genuine issues of material fact to be decided and the moving party is entitled to judgment as a matter of law. “As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)

Both plaintiff and the Tribal defendants agree that there are no genuine issues of material fact to be decided and that this case should be decided on the law by summary judgment. The Tribal defendants contend that they are entitled to summary judgment and dismissal of the plaintiff’s claim as a matter of law.

FACTUAL AND PROCEDURAL BACKGROUND

The case that was litigated in the Rosebud Sioux Tribal Court system was a breach of contract action. In its complaint, the Tribe alleged that it was entitled to money damages from BBC because BBC took money that belonged to the Tribe, in violation of the clause in the Contract that set forth the rights and obligations of the parties with reference to an operation expense reserve fund from which operating expenses would be paid. Section 6.4(c)(5) of the Contract provides:

There shall be an “operation Expense Reserve”. The Manager agrees to contribute to such sum as the Manager in its discretion determines to be necessary to provide initial funding for such reserve. The parties agree that such initial contribution shall remain the property of the manager. The Manager shall be entitled to repay itself for such initial contribution at such time as the manager determines to be feasible without jeopardizing the financial stability of the operation of the project. In addition, the manager agrees to make monthly contributions from Gross Receipts to such reserve

from time to time as The Manager determines to be necessary to accumulate funds in such reserve in an amount reasonably required to provide financial stability to the Project. The contributions from Gross Receipts to such reserve shall be a part of the Annual Budget. Such reserve shall be used for project expenses such as, but not limited to, prize money, maintenance, contingent liabilities, taxes and assessments to the extent applicable, insurance, other future expenses and working capital.

Section 24.4 of the Contract provides that the written Contract constitutes the entire agreement between the parties. With specific regard to unapproved oral modifications of the Contract, it states:

This Agreement may not be changed orally, but only by an instrument in writing signed by the party against whom enforcement is sought. Any such amendment * * * must be approved in advance and agreed upon and approved in writing by the Tribe and submitted by the Tribe to the same Governmental Agency required for the initial approval of this Agreement or such other person or entity as may then exercise its powers, for its written approval.

Article 21 provided for access to courts in the event of a dispute arising from the Contract. Both BBC and the Tribe agreed that the Rosebud Sioux Tribal Court and the Tribe's appellate court would have authority to adjudicate any litigation arising from disputes over the terms, rights and obligations of the parties set forth in the Contract.

The Contract provided that the casino project would be conducted in conformance with the Indian Gaming Regulatory Act. [Recitals, H.] Section 4.1(b)(7) of the Contract obligates the Manager to comply with all provisions of IGRA and applicable Federal law. Section 4.2(c) also makes compliance with federal law a contractual obligation of the casino manager.

Section 6.6 expressly incorporated all laws of the United States, which would necessarily include IGRA and federal regulations implementing IGRA, into the Contract by reference. In relevant part, Section 6.6 provides:

Manager and Tribe mutually covenant and agree that they shall use their best efforts to comply with, and assure that the project is in compliance with the Compact and requirements imposed thereby, *all laws of the United States*, and any Tribal Ordinances, rules, or regulations and rules and regulations of the Tribal Gaming Commission applicable to the Operation of the Project as amended from time-to-time, *all of which are incorporated herein by reference*.

(Italics added.)

Although the Contract provided that any monies paid out to BBC as its manager's fee (35% of net profits) had to be paid simultaneously with the Tribe's 65% share of net profits, it was stipulated in the trial that in the last 4 days of the term of the Contract, BBC, through Colombe, without making any simultaneous split of monies, unilaterally paid itself \$272,222.15. At trial, BBC argued that BBC was entitled to that money pursuant to an unwritten agreement between Colombe and the Rosebud Sioux Tribal Council which modified the terms of the OER clause in the Management Agreement. BBC contended that, contrary to the provisions of the OER Clause in the Contract, BBC and the Tribe had agreed to make monthly contributions to the OER out of net profits (rather than gross receipts, as provided by the Contract) to pay the operating expenses of the casino, and that the parties had also agreed that BBC would be able to be paid back all of its contributions (rather than just the initial contribution, as provided by the Contract) at the end of the contract term. BBC argued that there had been a legally

valid, mutually agreed upon oral modification of the Management Agreement and therefore, the terms of the OER clause were no longer valid or controlling. See: Exhibit “A”–transcript of hearing on summary judgment motions.

On summary judgment and in trial, the Tribe argued that the Management Agreement expressly stated that no oral modification of the contract was valid, and as a matter of federal law, under the provisions of IGRA and federal regulations, any unapproved oral modification of the Contract was void. See: Exhibit “A”–transcript of hearing on summary judgment motions.

Trial was held on January 2, 2004, before Special Judge B.J. Jones. There was also argument on the summary judgment motions. On January 12, 2004, Judge Jones entered judgment for BBC on Count 1 with regard to the OER claim. In his order (page 3), Judge Jones found that the Tribe had “acquiesced to a modification of the contract pertaining to contributions to the OER fund” and that to hold BBC to the terms of the written, NIGC-approved Contract would “visit an inequity” on BBC.

As provided by Article 21 of the Contract, the Tribe appealed the decision of the special judge to the Tribe’s Supreme Court.

The issue raised in the Tribe’s appeal was:

Whether the trial court erred in permitting BBC to retain more than \$400,000 from a Rosebud Sioux Tribal Casino account, under a purported oral agreement to the NIGC-approved management agreement between BBC and the Tribe, where federal law both requires any such amendment to be in writing and deems void an attempted amendment that lacks NIGC approval.

The Rosebud Sioux Tribal Supreme Court reversed the trial court order

granting judgment to BBC and remanded the case back to the trial court for re-trial on the questions of remedy and damages. The Supreme Court held that the unwritten, unapproved agreement was an unlawful modification of the Agreement and was void as a matter of law:

[T]he oral agreement of the parties to fund the [Operating Expense Reserve] through mutual monthly contributions of 7.5% for their net profits was a modification of the Management Contract. Such a modification expressly requires approval of the NIGC. 25 U.S.C. §2711. Failure to obtain the required NIGC approval for any management contract modification renders the modification “void.”

After a re-trial on damages, Judge Jones entered a judgment in favor of the Tribe against BBC in the amount of \$399,353.61, plus \$127,793.61 in interest.

BBC did not appeal that judgment to the Tribal Supreme Court. Instead, BBC filed this action before this court.

After basing its defense in the trial court on its argument that there was a legally valid oral modification of the OER clause in the Contract, BBC now argues that the Tribal Supreme Court lacked jurisdiction to rule on the very question that BBC had raised in its defense—whether there had been a legally valid oral modification of the management agreement. BBC now argues that only the National Indian Gaming Commission has legal authority to determine that question in this or in any given case.

QUESTION PRESENTED

The question to be decided by this Court is a pure question of law:

Does a federal administrative agency, the NIGC, have exclusive jurisdiction

to determine whether an unwritten, unapproved agreement to modify a casino management agreement is legally valid, or did the Rosebud Sioux Tribe Supreme Court exercise lawful jurisdictional authority to make that determination when it adjudicated the rights and obligations of the parties in the Tribe's breach of contract claim arising from an NIGC-approved management agreement?

LEGAL ARGUMENT

I

IN A BREACH OF CONTRACT ACTION ARISING FROM A CASINO MANAGEMENT AGREEMENT, A TRIBAL COURT HAS LAWFUL JURISDICTION TO DETERMINE THE LEGAL VALIDITY OF AN ORAL MODIFICATION TO THE CONTRACT

Although BBC raised the question of the legal validity of an unwritten oral modification of the Contract in its defense at trial, thereby implicitly acknowledging the tribal court's jurisdiction to rule on that question, Colombe now contends that the tribal Supreme Court lacked jurisdiction to determine that same question.

Colombe argues that the tribal Supreme Court lacked jurisdiction because the "Tribe has failed to comply with the mandatory statutory duty under IGRA"³, yet nowhere does Colombe point to any particular provision in IGRA where that mandatory statutory duty might be found. Without citing any particular provision of IGRA to support its assertion, Colombe asserts that IGRA gives the NIGC exclusive jurisdiction to determine whether an unwritten, unapproved modification

³ From the Conclusion in the Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment.

to an NIGC-approved casino management contract is legally valid.

Colombe argues that the Rosebud Sioux Tribal Court exceeded its jurisdictional authority in applying IGRA, federal regulations, and 8th Circuit case law to determine that an unwritten, unapproved modification of a casino management agreement was void under federal law. Colombe's chief argument—that only NIGC can make such a determination—necessarily means that no court has legal authority to determine whether an oral modification of a tribal casino management contract is valid, because that determination is exclusively within the province of a federal administrative agency. If Colombe's legal assertion were correct, it would mean that not only the Rosebud Sioux Tribe Supreme Court, but also the 8th Circuit Court of Appeals has exceeded its jurisdictional authority because, as will be discussed herein, the 8th Circuit has ruled in at least four cases that unapproved management agreements and unapproved modifications to such agreements were invalid as a matter of law.

In contending that only NIGC has jurisdictional authority to determine the legal validity of an unwritten, unapproved modification of a management agreement, Colombe ignores the express provisions of IGRA, federal regulations, and 8th Circuit case law that holds that courts, not the NIGC, have jurisdiction to determine the legal validity of unapproved management agreements and unapproved modifications to such agreements in contract disputes between Tribes and casino management companies.

25 U.S.C. §2711 of the Indian Gaming Regulatory Act provides generally

that for a management contract between an Indian Tribe and a casino management company to be legally valid, it must first be approved by the Chairman of the National Indian Gaming Commission. See also: 25 C.F.R. §533.7.

25 U.S.C. §2711(3) provides that “all collateral agreements to such contract that relate to the gaming activity” also must be approved by the Chairman to be legally valid.

25 C.F.R. §535.1(f) states:

Modifications [to management contracts] that have not been approved by the Chairman in accordance with the requirements of this part are void.

Here, BBC contends that when the Rosebud Sioux Tribe Supreme Court applied those federal laws in making its determination that the oral modification of the Contract was void, it had no lawful authority to do so because the NIGC has “exclusive jurisdiction” to determine the legal validity of an unwritten, unapproved modification of a casino management agreement.

Notably absent from Colombe’s argument is any reference to any provision of IGRA that gives NIGC or its Chairman any authority to determine the *legal validity* of modifications to management agreements or any authority to determine whether a party has breached a management agreement or any authority provide a remedy if there was such a breach. 25 U.S.C. 2705 sets forth the authority of the Chairman of the NIGC: he has the power to issue orders to close a tribal casino; to levy and collect civil fines; to approve tribal gaming ordinances; and to approve management contracts. Nothing in Section 2705 or any other provision of IGRA gives its Chairman or the NIGC legal authority to determine the rights of the

parties in a management contract dispute or to award money damages for a breach of contract—which is simply to say that NIGC is an administrative agency, not a court. Thus, there is nothing in IGRA that supports Colombe’s claim that NIGC has any jurisdiction, let alone exclusive jurisdiction, to determine whether an oral modification of a contract was void under federal law for purposes of adjudicating the rights of the parties in a breach of contract lawsuit.

BBC’s legal argument is refuted by 8th Circuit case law. The case of Bruce H. Lien Co. v. Three Affiliated Tribes, 93 F.3d 1412 (8th Cir. 1996), conclusively answers the question as to whether NIGC has exclusive authority to determine the validity of a management contract or, as here, an oral modification of the contract. That case holds that not only does NIGC *not* have exclusive jurisdiction to determine the legal validity of a management agreement, but NIGC does not have any jurisdiction to determine the legal validity of a management contract. The Court of Appeals ruled that the NIGC is an administrative agency that only determines whether the proposed management contract meets NIGC requirements; only a court can determine the legal validity of a tribal casino management contract and the first court that must do so is the tribal court. That ruling would also necessarily apply to any determination of the validity of an oral modification of such contract.

In that case, the 8th Circuit Court of Appeals, in an opinion written by Senior District Judge Bogue, sitting by designation, held that NIGC did not have exclusive authority to determine the legal validity of a gaming contract. The Court

stated that the sole focus of the gaming management contract approval process by the chairman of National Indian Gaming Commission (NIGC) is compliance with IGRA and its implementing regulations and, thus, determination of the legal validity of the contract is not within the scope of that administrative body, whose review is essentially a paper review to test the sufficiency of documents submitted and whether the agreement meets IGRA's content specifications, citing Indian Gaming Regulatory Act, §§ 12(b)(1-6), 13, 25 U.S.C.A §§ 2711(b)(1-6), 2712; 25 C.F.R. §§ 531.1, 531.2, 533.

In Bruce H. Lien Co. v. Three Affiliated Tribes, the Tribes filed an action in their Tribal Court, seeking a declaration that the management contract signed by the former tribal Chairman was null and void under Tribal law due to lack of proper authority and failure to garner approval by the proper Tribal entity. The Lien company filed in federal district court for an injunction to stop the tribal court proceedings. The federal District Court ruled that the NIGC had exclusive jurisdiction for a first determination of the management contract's compliance and validity.

The Eighth Circuit reversed, recognizing that the problem with the district court's analysis was that the Tribes were challenging the legal validity of the contract itself, which was a determination that was beyond NIGC's authority to make.

Our interpretation of IGRA and the regulations promulgated thereunder lead to the conclusion that disposition regarding the legal validity of the management contract is beyond the authority of the NIGC. It further appears obvious that resolution of any or all collateral issues would be pointless

until a decision regarding the validity of the contract is achieved. That being the case, the issue becomes where the decision regarding the contract's validity is to be made. In the end we are convinced that the question must first be promptly addressed in the Tribal Court, subject to appropriate review by the District Court.

Bruce H. Lien Co. v. Three Affiliated Tribes, at 1417.

The Eighth Circuit expressly rejected the argument that the NIGC has exclusive jurisdiction to determine a management contract's legal validity. (At 1420-21.)

Thus, in the Lien Company case, the Eighth Circuit ruled that NIGC does not have exclusive jurisdiction, or any jurisdiction, to determine the legal validity of a management contract, and that the proper forum for such a determination is the tribal court. That ruling would necessarily also hold true for a determination of the legal validity of a modification to a management contract.

In Gaming World Intern., Ltd. v. White Earth Band of Chippewa Indians 317 F.3d 840 (8th Cir. 2003), the 8th Circuit ruled that a series of agreements between the Tribe and a casino management company constituted a management contract under IGRA and as such, it required NIGC approval to be valid. Since the agreement had not received NIGC approval, the 8th Circuit ruled that the agreement was void. Thus, if Colombe were correct in arguing that only NIGC has legal authority to determine the legal validity of a management contract or a modification to such contract, then the 8th Circuit had no jurisdiction when it ruled in Gaming World that an unapproved management agreement was void.

Again, in U.S. ex.rel. Bernard v. Casino Magic Corp., 293 F.3d 419 (8th Cir.

2002), the primary issue between the parties was whether management agreements not properly approved by the NIGC in accordance with Section 2711 of IGRA were unenforceable. The Court of Appeals held there was a management agreement under IGRA and because it had not been approved by NIGC, it was unenforceable.

If, as asserted by Colombe, only NIGC can make such a determination, due to its purported exclusive jurisdiction, then the Eighth Circuit had no jurisdiction in Gaming World to make that determination.

Colombe's exclusive jurisdiction argument is also refuted by Turn Key Gaming, Inc. v. Oglala Sioux Tribe, 164 F.3d 1092 (8th Cir., 1999). In that case, as in this case, the NIGC-approved management contract stated that it encompassed the entire agreement between the parties with respect to the subject matter thereof and that there were no other collateral agreements or understandings except those contained therein. As in this case, the contract in Turn Key Gaming provided that it could not be changed orally, but only by an instrument in writing signed by both parties and submitted by the Tribe for written approval to the NIGC. Recognizing that federal regulations mandate that any management contract that does not receive NIGC approval is void, and that under 25 C.F.R. 535.1(f), any attempted modification of an approved contract that does not comply with the regulations and does not receive approval is also void, the Eighth Circuit Court of Appeals ruled that the no-oral-modification clause and the federal regulation's requirements on modifying management contracts precluded consideration of any subsequent

agreements not approved by the Chairman of the NIGC. Accordingly, the Court ruled that those unapproved agreements to modify the management agreement could have no effect with respect to any of the subject matter encompassed by the Management Agreement. Turn Key Gaming, Inc. v. Oglala Sioux Tribe, 164 F.3d at 1094-95.

Colombe cites U.S. ex rel. The Saint Regis Mohawk Tribe v. President R.C.--St. Regis, 451 F.3d 44 (2d Cir., 2006), to support his argument that NIGC has exclusive authority to determine the legal validity of an oral modification of a management contract. But that was not the holding in the 2d Circuit case and the facts and issues in that case are significantly different from the facts and issues in the case now before this Court. That case dealt with a question of federal court jurisdiction: whether a district court may exercise original jurisdiction over a declaratory judgment action brought to void a contract for lack of approval alleged to be required under the Indian Gaming Regulatory Act. The issue was an exhaustion of administrative remedies question.

In that case, the St. Regis Mohawk Tribe commenced a *qui tam* action seeking a declaration that a construction contract which the Tribe argued was a collateral contract under IGRA was void for lack of contract approval by NIGC as required by IGRA. By predicating its declaratory judgment action on an alleged failure to comply with the regulatory regime set out in IGRA, the Tribe's case presented a threshold issue of exhaustion of administrative remedies available through the Commission.

The Second Circuit did not rule that only NIGC has exclusive authority to consider the issues raised by the Tribe; it ruled that the Tribe had to exhaust administrative remedies before bringing a direct action to the district court.

This case involving the Rosebud Casino and BBC is quite different. Here, there was an NIGC-approved management agreement that explicitly provided that any contract dispute would be decided first in the tribal court, and then, it could be appealed to the Tribal Supreme Court, and then, if and when all tribal appellate remedies had been exhausted, a disappointed litigant could seek *de novo* review in the federal district court.

Further more, in the St. Regis Mohawk Tribe case, the Tribe made the allegation of an IGRA violation the basis of its declaratory judgment action. Here, BBC raised the legal validity of an oral modification to the contract as its defense in the Tribe's breach of contract action.

Therefore, the Second Circuit case is not applicable here. The applicable cases are Turn Key Gaming, Inc. v. Oglala Sioux Tribe and Bruce H. Lien Co. v. Three Affiliated Tribes, which taken together stand for the proposition that NIGC is not the proper body to determine the legal validity of an oral modification of a casino management agreement; rather, the tribal court is the body that has jurisdiction to make that determination.

The tribal court's authority to rely on federal law, IGRA and federal regulations, to determine the rights of the parties in a casino management contract dispute is particularly clear in this case, since the terms of the Contract itself

incorporated IGRA into the Contract by reference and made compliance with IGRA a contractual duty of the casino manager. Therefore, compliance with IGRA was not only a question involving federal law; it was also a contractual question which the tribal court clearly had jurisdiction to decide.

Colombe also argues that IGRA does not create a private cause of action. As a general proposition of law, the Tribe agrees that IGRA does not create a private cause of action. However, that general proposition of law has nothing to do with this case. It was the management agreement itself that gave rise to the Tribe's cause of action. The Tribe did not claim that BBC owed it money because it had violated IGRA. It claimed that BBC owed the Tribe money because it took the Tribe's money in violation of the Contract. IGRA did not give the tribal court its jurisdiction. It already had jurisdiction to resolve contract disputes arising on the reservation and the Contract in this case expressly recognized the Tribal Court's authority to resolve disputes involving the Contract.

The case cited by Colombe, Montgomery v. Flandreau Santee Sioux Tribe, 905 F.Supp. 740 (D.S.D. 1995) does not apply here. In that case, the court held that IGRA does not create a private action for individual tribal members to bring suit for a claimed IGRA violation. Obviously, that is not the case here, where the Tribe is bringing suit for breach of a management contract in which it was a party.

Contrary to the plaintiff's characterization of the Tribe's lawsuit, the Tribe did not bring a suit for damages for "a claimed IGRA violation"; it brought a suit for damages for a claimed Contract violation. Under the Contract and the tribal

court's jurisdiction to adjudicate contract disputes in which the Tribe is a party, the tribal court system, at the trial level and the Supreme Court level, clearly had jurisdictional authority to determine whether an oral modification of a contract between the Tribe and a casino management company was legally valid or void under federal law.

CONCLUSION

This Court should grant summary judgment on the one dispositive question of law before the Court. This Court should rule that the NIGC did not have exclusive jurisdiction to determine the legal validity of an unwritten, unapproved modification of the Contract in this case, and that the tribal Supreme Court acted within its authority in ruling that under federal law, the oral modification of the Contract was void.

The Court should deny the plaintiff's motion for summary judgment and should grant summary judgment in favor of the Tribal Defendants.

DATED this 4th day of September, 2012.

Respectfully submitted,

BY: /s/ Dana L. Hanna
Dana L. Hanna
HANNA LAW OFFICE, P.C.
P.O. Box 3080
Rapid City, SD 57709
dhanna@midconetwork.com
(605) 791-1832
(605) 791-1834 (fax)

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Tribal Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment was electronically served upon the other parties in this case via the electronic mail addresses listed below:

Clint L. Sargent, Attorney for Charles Colombe
clint@meierhenrylaw.com

DATED this 4th day of September, 2012.

/s/ Dana L. Hanna
Dana L. Hanna