

**UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA**

CITY OF DULUTH,  
411 W. 1<sup>st</sup> Street  
Suite 410  
Duluth, MN 55802

Plaintiff,

vs.

NATIONAL INDIAN  
GAMING COMMISSION, and

TRACIE L. STEVENS, in her official  
capacity as chairwoman of the  
National Indian Gaming Commission  
1441 L Street, NW  
Suite 9100  
Washington, DC 20005

Defendants.

Case No. \_\_\_\_\_

**COMPLAINT**

Plaintiff City of Duluth, (herein "City"), for its Complaint states and alleges the following:

**Parties, Jurisdiction and Venue**

1. This action is brought under 28 U.S.C. § 2201, 5 U.S.C. §704, 5 U.S.C. §702 and 25 U.S.C. § 2714.
2. The City is a resident of the state of Minnesota, County of St. Louis. It is a municipal corporation and political subdivision of the state of Minnesota with its principal office at 411 W. 1<sup>st</sup> Street, Duluth, Minnesota.
3. Defendants are residents of the above-captioned district.

4. Venue of this action is proper in this district under 28 U.S.C. §1391(e).
5. This is an action for declaratory and injunctive relief challenging the enforcement action of the Defendants, which invalidated various provisions of the agreements existing between the Fond du lac Band of Lake Superior Chippewa (herein "Band") and the City through which the Band manages and operates the Fond du Luth Casino (herein "Casino"), located in the Old Downtown District of the city of Duluth (herein "Duluth").
6. The Defendants' decision, herein referred to as the Notice of Violation ("NOV-11-02") is a final agency action. The NOV-11-02 is dated July 12, 2011.
7. The City has standing as a party to the agreements which were the subject of NOV-11-02, and as the entity that is entitled to receive the payments under the agreements. Defendants' action has directly impacted the City's receipt of payments under the agreements in addition to other contractual obligations between the Band and the City.
8. The City also has standing as a party to Fond du Lac Band of Lake Superior Chippewa v. City of Duluth, United States District Court, District of Minnesota, Civ. No. 5-94-82, and to the final judgment and consent decree entered June 22, 1994. The action of the Defendants directly impacts the City's rights secured and protected by the final judgment and consent decree.

## **SUMMARY OF FACTUAL BACKGROUND**

### **A. The Creation of the Fond du Luth Casino.**

9. In 1984, representatives of the City and the Band came together to explore the creation of a gaming facility within the boundaries of Duluth. At that time the Band did not have reservation lands within Duluth; instead, it operated a bingo parlor on its rural reservation located west of Cloquet, Minnesota.

10. With the substantial assistance of the City, the Band acquired land in the downtown area of Duluth, had it placed into trust, and had it declared by the Secretary of the Interior a part of its reservation. This property is the site of the Casino.

11. The City also assisted the Band and its casino project by acquiring land adjacent to the Casino site through its eminent domain powers, and using City resources to finance and construct a municipal parking ramp adjacent to the Casino. The parking ramp was developed at City expense to serve Casino customers and other businesses in the downtown area.

12. In 1986 the City and Band entered into a series of agreements (herein "1986 Contracts"). The purposes of the 1986 Contracts, among other purposes, were to create an economic development entity known as the Duluth-Fond du Lac Economic Development Commission, and to develop a gaming facility on the Casino Property.

13. Among other provisions of the 1986 Contracts, the Commission was given the authority to operate gaming within the Band's Casino and the revenue from the Casino would be split as follows: the Band (25.5%), the City (24.5%), and the Commission (50%). The revenues retained by the Commission were required to be used for economic development both on the Band's reservation located near Cloquet, Minnesota and on its reservation within the downtown area of Duluth.

14. The Secretary of the Interior approved the 1986 Contracts, and in September of 1986 the Casino opened for business.

#### **B. Indian Gaming Regulatory Act and the 1994 Contracts.**

15. Following the 1988 passage of the Indian Gaming Regulatory Act (herein "IGRA"), 25 U.S.C. §2701, et.seq., the Band sued the City alleging that the 1986 Contracts violated IGRA.

*See, Fond du Lac Band v City of Duluth, et.al.*, United States District Court for the District of Minnesota, No. 5-89-163.

16. In an unpublished decision the United States District Court for the District of Minnesota (herein “district court”), by Order dated December 26, 1990, dismissed the case without prejudice and referred the parties to the National Indian Gaming Commission (herein “NIGC”) for a report and recommendation.

17. The Band then filed a petition with the NIGC seeking an expedited review of the legality of the 1986 Contracts in light of the enactment of IGRA.

18. On September 24, 1993, the NIGC issued a determination that the operation of the Casino under the 1986 Contracts violated IGRA. The NIGC deferred the commencement of any enforcement action in order to allow for mediation between the parties and offered its mediation services.

19. Under the auspices of the Chairman of the NIGC, the Band and the City commenced negotiations. The parties desired to restructure the 1986 Contracts to bring them into compliance with IGRA, gain the approval of the NIGC and the Secretary, and allow for the continued operation of the Casino.

20. With the NIGC’s assistance, the City and the Band reached an agreement that restructured the ownership and control of the gaming operation at the Casino. The terms of the settlement were set forth in an agreement entitled “Agreement Between the City of Duluth and the Fond du Lac Band of Lake Superior Chippewa Indians Relating to the Modification and Abrogation of Certain Prior Agreements” (herein “1994 Contracts”).

21. The 1994 Contracts consisted of one umbrella agreement entitled “Agreement Between the City of Duluth and the Fond du Lac Band of Lake Superior Chippewa Indians Relating to

the Modification and Abrogation of Certain Prior Agreements” (herein “Umbrella Agreement”) and six subcontracts serving as exhibits to the Umbrella Agreement.

22. The 1994 Contracts memorialized the settlement, which was comprised of the following key elements:

a. Pursuant to a Sublease and Assignment of Gaming Rights Agreement (herein “Sublease”), the Band sublet the Casino from the Commission, took control of the operation and regulation of all gaming at the Casino, and obtained sole propriety interest in such gaming.

1. The rent paid by the Band to the Commission under the Sublease was assigned by the Commission to the City. Pursuant to the Sublease, the Band agreed to pay to the City nineteen (19%) of the gross revenues from video games of chance as rent for the Band’s sublease during the initial term of the Sublease.

2. The expiration of the initial term of the Sublease was to end on March 31, 2011. An extension term provided for in the Sublease was a period of time beginning on March 31, 2011 and ending on March 31, 2036.

3. The amount of rent for the extension term was not determined; instead, the Sublease required the City and the Band to meet and negotiate the rent for the extension term on or before January 1, 2010, and in the absence of an agreement, to submit the issue to arbitration.

b. In addition to receiving the sole proprietary interest in gaming at the Casino, the Band assumed sole propriety interest of all ancillary businesses conducted at the Casino. These businesses included, but were not limited to, food and liquor concessions and gift shops.

c. The Commission was restructured to consist of a two-person entity. The members of the Commission were the City's mayor (or the mayor's designee) and the chair of the Band (or the Band's designee).

d. All funds held in escrow and other assets of the Commission were distributed between the City and the Band. The City separately received funds held in escrow for the municipal parking ramp. Through this distribution, the Band became the sole owner of all net assets and equipment located at the Casino.

e. The parties cancelled a lease between the City and the Band for the operation of the municipal parking ramp, and the City assumed management of the ramp. The Band was released from its parking ramp guaranty to the City and the City assumed all financial liability for repayment of municipal bonds issued for the development of the ramp.

f. The City and the Band entered into a Tribal-City Accord. The Accord established regulatory standards and requirements for gaming at the Casino.

23. The City and the Band submitted the 1994 Contracts to the NIGC for review and approval. The NIGC determined that the 1994 Contracts fully complied with IGRA. The 1994 Contracts were approved by the Secretary of the Interior, by its Acting Area Director.

24. In reliance upon the NIGC's and Secretary's approval of the 1994 Contracts, the City and the Band entered into and filed with the district court a Stipulation and Consent Order (herein "Stipulation") seeking approval of the settlement agreement, which was comprised of the 1994 Contracts. *See, Fond du Lac Band of Lake Superior Chippewa v. City of Duluth*, United States District Court for the District of Minnesota, Civ. No. 5-89-0163.

25. In the Stipulation the Band and the City agreed that the 1994 Contracts gave the Band sole proprietary interest in the gaming operations.

26. In a separate Report and Recommendation to the district court dated June 20, 1994, the NIGC Chairman advised the court of its approval of the 1994 Contracts and expressly informed the court that the agreements were “fully consistent with the IGRA”.

27. On July 29, 1994, the district court entered its Consent Decree approving the settlement of the parties based upon the 1994 Contracts. The court retained jurisdiction over the matter, to ensure the obligation of the parties to comply with all provision of the 1994 Contracts through the 1994 Consent Order.

28. The 1994 Contracts, which were approved by the Secretary, the NIGC, and the district court have not been modified.

**C. The Current Dispute Between the Band and the City.**

29. In January of 2009, the Band notified the City that it believed it had overpaid rent under the terms of the Sublease, and further advised the City that the overpayment included the entire period of the Sublease from its execution in 1994 through the third quarter of 2008. The Band also notified the City that the Band was withholding all further rent payments due to this alleged overpayment of rent during the preceding 14 years.

30. The City disagreed with the Band’s position on the accounting issue and demanded payment of the withheld rent.

31. On or about August 6, 2009, the Band through its Reservation Business Committee, and in violation of the 1994 Contracts and Consent Decree passed Resolution No. 1316/09 immediately ceasing all payments to the City due under the 1994 Contracts.

32. In response to the Band’s action, the City commenced an action against the Band seeking declaratory and injunctive relief to enforce the 1994 Contracts and Consent Decree.

*See, City of Duluth v. Fond Du Lac Band of Lake Superior Chippewa*, United States District Court for the District of Minnesota, Civ. No. 09-2668.

33. On April 21, 2010, the district court issued its Memorandum Opinion and Order granting in part, and denying in part, the City's motion for summary judgment. *See*, 708 F.Supp. 2d 890. The court granted the City's motion as to liability. In its Order, the court concluded that the Band failed to demonstrate a change in the law justifying the Band's actions. The court denied dispositive relief as to the amount of damages and held that the issue of the appropriate accounting method for the rent determination under the Sublease was to be tried.

34. The parties requested the NIGC's assistance in mediating the dispute regarding the right of the City to receive a percentage of gaming revenue for the second term of the 1994 Contract. On August 13, 2010, the NIGC declined and instructed the parties to proceed to arbitration. By letter dated August 16, 2010, the Band requested that the NIGC reexamine the 1994 Contracts and make a limited order prohibiting the Band from making further payments to the City, but otherwise allowing for the continued operation of the Casino.

35. In a letter dated October 20, 2010, Defendant Stevens notified the Band and City that the NIGC was reviewing the 1994 Contracts as requested by the Band. Both the City and Band participated in and submitted briefs to the NIGC's Enforcement Division. The review proceeded despite the fact that no changes in IGRA or regulations promulgated pursuant to IGRA impacted the validity of the 1994 Contracts. Thus, no statutory or regulatory basis existed to support the NIGC's review.

36. The NIGC's review was requested by the Band for the sole purpose of avoiding its contract obligations to the City under the 1994 Contracts and Consent Decree.



37. By Order dated May 13, 2011, the district court denied the Band's motion for a continuance pending the completion of the NIGC's review, and ordered the Band and City to submit to binding arbitration on the issue of the amount of rent for the twenty-five year extension term of the 1994 Contracts. *See City of Duluth v. Fond Du Lac Band of Lake Superior Chippewa*, Civ.No.09-2668 [Doc. No. 179 (adopting Report and Recommendation, Doc. No. 178)].

38. An arbitration hearing between the Band and the City commenced and the City completed presentation of its case-in-chief on July 12, 2011. On July 12, 2011, the NIGC issued NOV-11-02. By NOV-11-02 the NIGC, by Defendant Stevens, changed its previous opinion that the 1994 Contracts complied with the IGRA. Defendant Stevens concluded that the 1994 Contracts violated the IGRA's mandate that the Band retain "sole proprietary interest" in and "responsibility for" its gaming activity. The Band was ordered to cease performance under the 1994 Contracts "of those provisions identified in [the] NOV as violating IGRA". In NOV-11-02 Defendant Stevens failed to identify any change in IGRA or regulations promulgated under IGRA that changed the legal basis for, and the legal validity of, the initial approval of the 1994 Contracts by the NIGC.

39. In response to NOV-11-02, the parties stayed arbitration pending a determination of the impact of NOV-11-02 on the process.

40. The Band did not appeal NOV-11-02.

41. On July 21, 2011 the City filed a petition with the NIGC seeking to intervene in order to perfect an appeal of NOV-11-12. Despite the fact that the City participated in the review and submitted its position on the validity of the 1994 Contracts, the NIGC rejected this

petition contending that the City was not a respondent to NOV-11-12; therefore, the City could not initiate an appeal before the Commission.

42. In response to NOV-11-12, the Band took the following actions:

a. On July 19, 2011, the Band's Reservation Business Committee passed Resolution No. 1242/11, which in pertinent part, mandated the following actions:

1. adopted the NIGC's new interpretation of the IGRA's sole-proprietary-interest provision as set forth in NOV-11-12;

2. ceased all activities under the 1994 Contracts that could result in the imposition of sanctions under NOV-11-12;

3. repealed the Fond-du-Luth gaming regulations adopted under Resolution No. 1217/94, Ordinance No. 02/95 (making the City Building Code applicable to the Casino), Ordinance No. 09/93( relating to public meeting laws and public contracting standards), "and any other terms, codes, or regulations that may be interpreted as non-compliant with the NOV..."; and

4. applied the Band's gaming regulations adopted under Resolution No. 1174/93 and "all other Band ordinances and regulations applicable to its gaming operations shall apply with full force and effect to the Fond-du-Luth Casino..".

44. On July 22, 2011, the Band filed a motion for relief from the Consent Decree under Rule 60(b), Fed.R.Civ.P. See City of Duluth v. Fond Du Lac Band of Lake Superior Chippewa, United States District Court for the District of Minnesota, Civ.No.09-2668 [Doc. No. 207].

45. In a letter dated July 27, 2011, Karen Diver, Chairwomen of the Band notified Defendant Stevens of the Band's curative actions, and requested that the NIGC take no enforcement actions against the Band.

46. In the district court's Memorandum Opinion and Order, filed on 11/21/11 in City of Duluth v. Fond Du Lac Band of Lake Superior Chippewa, Civ.No.09-2668 [Doc. No. 231] (herein "Rule 60(b) Order"), the court ordered as follows:

a. granted, in part, the Band's motion for relief under Rule 60(b), insofar as it requested that the Band be relieved of any further compliance with its obligations under the 1994 Contracts;

b. denied, in part, the Band's motion, insofar as it requested retroactive relief, including relief from payments due the City for the years 2009-2011, and including the right to pursue its counterclaims seeking refund of all rent already paid to the City; and

c. ordered trial, to be confined to the issue of the accounting method to be used to determine the Band's rent due to the City under the Sublease.

47. Both the Band and the City appealed the Rule 60(b) Order to the United States Court of Appeals for the Eighth Circuit. On January 14, 2013 the Court issued its opinion affirming Rule 60(b)(5) relief and remanding for further consideration the Band's motion for Rule 60(b)(6) relief. The City's petition for *en banc* review was denied on February 20, 2013. *See, City of Duluth v Fond Du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147 (8<sup>th</sup> Cir. 2013).

48. The Band continues to operate the Casino and enjoy the economic benefits made possible only through the assistance, support, and consent of the City.

#### **D. CANCELLATION OF THE LEASE**

49. In a letter dated March 26, 2012, the Department of the Interior (Department) notified the Commission that the Commission was in violation of the 1986 Lease and that it was proposing to cancel the lease.

50. The alleged violation was based on NOV-11-02. No other basis was identified as supporting the proposed action.

51. The City, in its response to the proposed lease cancellation, addressed the following reasons why cancellation of the Lease was unsupported by the facts and law, or within the authority of the Department:

a. The City questioned the fairness of the process, given that the Band was in control of the cure to the identified violation, the Band was the entity seeking the cancellation of the Lease, and the Band had already announced in the April 2012 edition of the *Nahgahchiwanong Dibahimowinnan* that the Department had made the decision to cancel the Lease.

b. The validity of the Lease was subject to a final judgment of the district court, and that judgment remained valid and enforceable; thus, the Department lacked legal authority to take an action in conflict with a valid judgment, and lacked legal authority to take an action in conflict with a judgment the Department supported and assisted in obtaining.

c. The Lease was approved by the Department, no change in statutory law or regulation promulgated under the authority of the IGRA, had occurred subsequent to the Department's approval, and the 1994 Contracts had not been modified. Thus, no factual or legal basis existed to justify the Department's change in position.

d. That no violations existed because the Band had taken actions to cure the alleged violations identified in NOV-11-02, and that the NIGC had apparently accepted these curative actions by not taking further enforcement action.

52. On May 10, 2012, the Department issued its decision to cancel the Lease and advised the City that the decision constitutes a final determination of the Department of the Interior.

53. On July 7, 2012 the City commenced an action against the Secretary of the Department of the Interior challenging the lease cancellation decision. The action is currently pending in the United States District Court for the District of Columbia as *City of Duluth v Salazar*, Court File No. 1:12-cv-1116.

## **II.**

### **Causes of Action**

#### **Count 1-DECLARATORY JUDGMENT Arbitrary and Capricious Action**

54. The City restates and realleges paragraphs 1 through 53.

55. The decision of the Defendants to issue NOV-11-02 was arbitrary, capricious, or otherwise not in accordance with the law. No change of statutory law, regulatory law, or judicial decision occurred during the intervening period between the initial approval of the 1994 Contracts and July 12, 2012 to support the Defendants' action.

56. Pursuant to 5 U.S.C. §706(2)(A) the action of the Defendants may be properly declared unlawful and set aside.

#### **COUNT II-DECLARATORY JUDGMENT Action Exceeding Statutory and Regulatory Authority.**

57. The City restates and realleges paragraphs 1 through 56.

58. The directives issued in NOV-11-02 exceed the scope of Defendants' authority granted by the Indian Gaming Regulatory Act and the regulations promulgated pursuant to such statutory authority.

59. NOV-11-02 conflicts with a judgment of the United States District Court for the District of Minnesota in which the validity of the 1994 Contracts was determined. The provisions of IGRA do not grant to Defendants the authority to overturn a final judgment of the court through administrative action absent a change in statutory or regulatory law.

60. The City, as a party to the final judgment of the court, has standing to challenge an administrative action that deprives the City of the rights accorded it under the 1994 Consent Decree and 1994 Agreements.

61. Pursuant to 5 U.S.C. §706(2)(C) the action of the Defendants may be properly declared unlawful and set aside.

### **COUNT III- INJUNCTIVE RELIEF**

62. The City restates and realleges paragraphs 1 through 61.

63. As a result of the unlawful, arbitrary, and capricious actions of the Defendants, the City is entitled to an order setting aside NOV-11-02, all subsequent actions of the Defendants in enforcement of NOV-11-02 and a mandatory injunction requiring Defendants to reinstate its prior approval of the 1994 Contracts and issue orders pursuant to its regulatory authority as required to implement the mandatory injunction.

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff City of Duluth prays that this Court issue an Order as follows:

1. Declaring the actions of the Defendants arbitrary, capricious, or otherwise not in accordance with the law.

2. Declaring the actions of the Defendants outside the scope of their statutory and regulatory authority.
3. Reversing NOV-11-02, setting aside all actions taken in its enforcement and ordering Defendants to take all necessary corrective action to reinstate the preexisting legal rights of the City.
4. For such other and further relief as the Court may deem appropriate, including an award of the Plaintiff's costs, disbursement, and attorney fees as such may be authorized by statute and rule.

Dated: February 26, 2013.

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