

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CITY OF DULUTH,

Plaintiff,

vs.

FOND DU LAC BAND OF LAKE
SUPERIOR CHIPPEWA,

Defendant.

Civil Action No.: 09-CV-02668-SRN-LIB
(Related Case Nos.: 5-89-163 and 5-94-52)

**PLAINTIFF CITY OF DULUTH'S
MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION
TO STAY PROCEEDINGS
ON REMAND**

TO: THE HONORABLE SUSAN RICHARD NELSON, U. S. DISTRICT JUDGE

This memorandum is respectfully submitted in support of the motion of the City of Duluth to stay the proceedings on remand from the 8th Circuit Court of Appeals pending the outcome of an Administrative Procedures Act case currently pending before the U. S. District Court in the District of Columbia.

I. INTRODUCTION

On July 12, 2011, the National Indian Gaming Commission (NIGC) issued its Notice of Violation (NOV) regarding the Fond du Luth Casino. That casino is the subject of the 1994 Agreements between these parties and the U.S. District Court's Consent Decree¹ which is the judgment that is the subject of this Rule 60(b)(6) motion by the Band. This is a motion to stay proceedings on remand from the 8th Circuit pending the outcome of an Administrative Procedure Act (APA) action commenced by the City to

¹ Following the 8th Circuit, the term "Consent Decree" is used in lieu of Consent Order or Consent Judgment. See 8th Circuit Opinion, January 14, 2013, p. 2.

determine the validity of the NOV because the 8th Circuit mandate requires examination of “all the relevant factors” to the question of whether Rule 60(b)(6) relief should or should not be granted. The validity of the NOV, being determined in the APA action, is such a relevant factor which must be considered by this Court before it can grant Rule 60(b)(6) relief on this motion.

II. FACTS

A. Procedural History

The case is before this Court on remand from the 8th Circuit Court of Appeals. This Court issued its Order of November 21, 2011 ruling on the Band’s Rule 60(b) motion for relief from the Consent Decree. This Court denied Rule 60(b)(6) relief to the Band as to payments which were overdue regarding the Initial Term of the Agreements and Consent Decree which terminated March 31, 2011. On appeal, the 8th Circuit reversed that ruling. This Court is directed by the 8th Circuit mandate to consider “all relevant factors” in determining whether to grant or deny Rule 60(b)(6) relief.

B. Facts

This Court is well aware of the basic background facts of this case. They are stated in several of the briefs and orders issued herein² and need not be repeated in detail here. What is new and different for purposes of this motion to stay is the fact that the City has commenced an APA action in the U. S. District Court for the District of

² See, 8th Circuit Opinion, January 14, 2013, pp. 2-6; Judge Nelson Order of November 21, 2011, pp. 1-5; *City of Duluth v. Fond du Lac Band*, 708 F. Supp. 2d 890, 893-895 (D. Minn. 2010).

Columbia challenging the validity of the NOV and asking that court to set it aside under the law.

III. ISSUE

The issue on this motion to stay proceedings on remand is:

Should the Court stay the proceedings on remand pending the outcome of the City's Administrative Procedures Act action to set aside the NIGC's Notice of Violation of July 12, 2011?

The City's position is: **Yes, grant the motion to stay.** While the analysis mandated by the 8th Circuit shows no exceptional circumstances justifying relief and the Court, therefore, does not need the APA decision to deny relief, only by staying the remand, can this Court follow the mandate of considering "all relevant factors"³ in deciding whether to grant relief.

IV. DISCUSSION

A. Impact of the Requested Stay.

Throughout this litigation, the Band has repeatedly requested stays or continuances⁴ for the purpose of awaiting the NIGC decision that the Band said might be forthcoming. Timing was important and delay was harmful to the City because it was not being paid amounts which were overdue. More amounts were becoming due each quarter. Also, delay was harmful to the City because the 1994 Agreements and Consent

³ 8th Circuit Opinion, January 14, 2013, p. 12.

⁴ See, e.g., Band's motions on Dec 12, 2009, Dkt. # 22; May 17, 2010, Dkt. # 75; July 26, 2010, Dkt. # 93; Oct 10, 2010, Dkt. # 106.

Decree required arbitration within certain specified time deadlines to decide the amounts to be paid to the City in the Extension Term beginning April 1, 2011.

Now, the City requests a stay so this Court can follow the mandate of the 8th Circuit Court of Appeals. The stay is requested for the purpose of awaiting the D.C. District Court decision in the APA action which *will* be forthcoming. No harm or detriment to anyone exists to weigh against the granting of the requested stay.

The City's right to trial and arbitration was delayed two years in its pursuit of its breach of contract remedy for a breach of contract and violation of the Consent Decree which are freely admitted by the Band. A delay at this time does not prejudice the Band in any way. It remains in the same position as it has been since 2009, not paying.

The Band got its delays, even though they were harmful to the City. It is only just that the City should get its requested delay, which causes no harm and is for every bit as important a reason as that used by the Band.

If for any reason the stay should become inappropriate under the circumstances, the Court can stop the stay at any time on motion for good cause shown.

B. Impact of the APA case.

If the City prevails in the APA case, the NOV will be set aside. Since the NOV is the only basis for the Band's Rule 60(b)(6) motion, as it has expressly stated, its motion will fail without the NOV. Without a stay of these proceedings on remand, and in the event of an adverse ruling without the APA decision, the City would have to come back to this Court on a Rule 60(b) motion for relief from any judgment adverse to the City.

The 8th Circuit recognized the validity of proceeding under the APA.⁵

C. Likelihood of prevailing in the APA case.

While it is not the City's intent to argue the merits of the APA case here, there are several undisputed reasons why the City should and is likely to prevail before the D.C. District Court in seeking to set aside the NOV.

The NOV is loaded with inaccurate statements, improper inferences and conclusions not based on accurate facts. It amounts to selective prosecution against this particular casino at the request of the Band while ignoring other similar and nearly identical government-tribe arrangements. These include contracts with cities like Duluth with nearly identical provisions which continue in operation. The NOV sets forth no rulings or opinions by the NIGC regarding what monetary payments are permissible. The NOV ignores the notice and comment procedure which the NIGC commenced on this very topic ("sole proprietary interest" definition), which left the time for comments open to February 2011 or later and which process has apparently not yet been completed.⁶ After receiving comments, the NIGC issued a regulatory review schedule to review the same. The last consultation schedule was scheduled for February 7 - 8, 2012.⁷

Timing and status of the APA case.

On February 26, 2013, the City commenced the APA action in the U.S. District Court of the District of Columbia entitled "City of Duluth vs. The National Indian

⁵ See, 8th Circuit Opinion, p. 7-8.

⁶ 75 Fed. Reg. 70685, November 18, 2010

⁷ 76 fed. Reg. 18459, April 4, 2011.

Gaming Commission and Tracie L. Stevens in her official capacity as Chairwoman of the National Indian Gaming Commission,” U.S. District Court, District of Columbia (Washington, DC), Case No. 1:13-cv-00246-CKK.

The Court well knows that we cannot predict exactly how long the APA action will take, as much as we would like to. But, rest assured, no delay will be caused by the City. The City will aggressively pursue this remedy and ask the D.C. District Court for a procedure without delay because this Court is awaiting the outcome.

The Administrative Procedures Act provides a method of challenging agency action. While governed by the Federal Rules of Civil Procedure, these cases do not usually involve the length and complexity of pre-trial procedures involved in other civil cases. There is no jury trial. Because the judicial review is of the record before the agency, 5 U.S.C. §706, there is little need for other discovery once the record is established as, normally, it would add nothing to the record. The disposition of the case is usually by motion such as for judgment on the pleadings or summary judgment.

In this case, the record would simply include all communications between the NIGC and the parties, any information or evidence provided NIGC by the parties and any records NIGC has relating to the original actions and decisions of the NIGC related to the Fond du Luth Casino and its underlying agreements. All of this material should be readily available to the NIGC and easily produced by it in the APA action.

In the APA action commenced by the City to set aside the NOV, service was effected on March 29, 2013. The Meet & Confer Order will be issued shortly after issue

is joined. The parties will then proceed to agree on the record, and present the issues for decision by the court.

The City has a right to pursue this remedy which is specifically allowed by the APA. The City maintained and still believes that the validity of the NOV is and was a relevant factor on this Rule 60(b) motion without the necessity of bringing an APA action. How could it not be? Only since January 14, has that position of the City been conclusively rejected. That decision became the law of this case on January 14, 2013. Upon receiving the 8th Circuit opinion, the City commenced the APA action without delay.

V. CONCLUSION

Because the validity of the NOV is relevant to the issue of whether to grant or deny Rule 60(b)(6) relief from the Consent decree herein and because the 8th Circuit has mandated that “all relevant factors” be considered, the City’s motion for a stay of the remand proceedings should be granted.

This Court does not need the APA decision setting aside the NOV to resolve this case at this time in accordance with the mandate. The analysis as discussed in the City’s brief to be filed opposing the Band’s Rule 60(b)(6) motion on remand shows that the proper exercise of this Court’s discretion on the basis of the facts without the APA decision is to deny relief. But to grant relief without the APA decision would be an abuse of discretion because an important “relevant factor” would not have been considered.

This Court could take this motion for stay under advisement and hear the Rule 60(b)(6) motion on remand to determine if relief is to be denied on the facts there

presented. If relief is denied, the stay is not necessary. If the question of whether the granting of relief remains open for further consideration, that would require knowing the outcome of the APA action as one of the relevant factors. In that case, the stay should be issued and the outcome of the APA case known before deciding the Rule 60(b)(6) motion.

Given the Band's repeated requests for stays and continuances in this litigation, the City asks this Court for nothing more than to be treated as fairly as the Band has been treated, which the City deserves under these facts and law.

Dated this 8th day of May, 2013.

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