UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

City of Duluth,

Plaintiff,

v. Case No. 0:09-cv-02668-SRN-LIB

Fond du Lac Band of Lake Superior Chippewa,

Defendant.

Defendant Fond du Lac Band of Lake Superior Chippewa's Response to the City's Motion to Stay Proceedings on Remand

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> "[T]he City asks for nothing more than to be treated as fairly as the Band has been treated[.]"
>
> — City of Duluth[1]

Introduction

Four years after commencing this action, the City asks this Court to wait while the City prosecutes *other* litigation that it *could* have brought almost 18 months ago (but didn't) and *could* have brought as a related case in this Court (but didn't) and that *may* (but likely will not) affect this Court's decision of the final issues in this case.[2] Though its argument is loaded with breathtaking overestimates and inaccuracies, the City was

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[1] Pl.'s Mem. of Law in Supp. of its Mot. To Stay Proceedings in Remand ("City's Motion"), Dkt. 258 at 8.

[2] The City similarly brought a motion to stay enforcement of the Eighth Circuit remand mandate. *See City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, Nos: 11-3883 and 11-3384, Feb. 26, 2013 Motion to Stay the Mandate. The Eighth Circuit summarily denied the motion three days later before the Band could even submit a response. *See id.*, Mar. 1, 2013 Judge Order; Mar. 1, 2013 Mandate Issued.

right on one point: this Court should treat it fairly by treating it as it treated the Band. That is, it should deny the City's motion.

Because the City has not—and cannot—meet its burden to show why a stay is appropriate, or even provided the Court with any legal argument in favor of its motion, the Band respectfully requests that the Court deny the City's motion, and believes that it is appropriate for the Court to do so without a hearing.

Background

During court-ordered arbitration to enforce a Consent Order that implemented certain agreements between the parties (the "1994 Agreements"),[3] the National Indian Gaming Commission ("NIGC") issued a Notice of Violation ("NOV") finding that the 1994 Agreements violated the Indian Gaming Regulatory Act ("IGRA").[4] The NOV directed the Band to "cease performance under the 1994 Agreements of those provisions identified in this NOV as violating IGRA[,]"[5] and the Band immediately sought relief from the Consent Order under Federal Rule of Civil Procedure 60(b).

Though the NOV "constituted a change in the governing law,"[6] such that "[f]urther performance of the bulk, if not the entirety, of the 1994 Agreements would be unlawful[,]"[7] the City waited nearly 18 months before exercising its legal right to

[3] July 29, 1994 Stipulation And Consent Order, *Fond du Lac Band of Lake Superior Chippewa Indians v. City of Duluth*, Civ. No. 5:94-82 (D. Minn.) ("Consent Order"), Dkt. 11-7.
[4] July 12, 2011 NOV-11-02, *Fond du Lac Band of Lake Superior Chippewa*, Dkt. 208-1 ("NOV").
[5] *Id.* at 18
[6] Memorandum Opinion and Order ("Rule 60(b)(5) Order"), Dkt. 231 at 19.
[7] *Id.* at 20 n.13.

challenge the NOV under the Administrative Procedures Act (the "APA Action").[8] During the 18-month wait, both this Court and the Eighth Circuit ruled on various aspects of the Band's requested Rule 60(b) relief.[9] Only *now—after* the Eighth Circuit upheld this Court's decision to afford the Band prospective relief from the Consent Order under Rule 60(b)(5) and *after* it remanded the case with instructions to consider additional relief under Rule 60(b)(6)—has the City challenged the NOV as it could have almost *two years ago*.

Discussion

Though the City did not explain (or even cite to) the legal standard or burden of proof governing motions to stay proceedings, clear rules govern when such relief is appropriate. The City does not meet them.

I. A stay of proceeding is only appropriate if the movant demonstrates that it would suffer hardship or prejudice absent a stay.

A district court has the "inherent power to stay the proceedings of an action, so as to control [its] docket, to conserve judicial resources, and to provide for the just determination of cases that pend before [it]."[10] While the Court's inherent power to manage its docket places this decision within the Court's broad discretion, "[t]he proponent of a stay bears the burden of establishing its need."[11] The movant "must make

[8] *See City of Duluth v. Nat'l Indian Gaming Comm'n* Docket, Dkt. 257 (showing the City filed its APA Complaint on February 26, 2013).
[9] Rule 60(b)(5) Order, Dkt. 231; *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147 (8th Cir. 2013).
[10] *Kemp v. Tyson Seafood Group, Inc.*, 19 F. Supp. 2d 961, 964 (D. Minn. 1998). *See also, generally, Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936).
[11] *Clinton v. Jones*, 520 U.S. 681, 708 (1997).

out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else."[12] So it is the City's burden to demonstrate that it is entitled to a stay of proceedings while it pursues new and collateral litigation against the United States. Although stays are appropriate upon a proper showing, "a stay is the exception, and not the rule[,]"[13] and "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both."[14]

II. The City has not met its burden to demonstrate that a stay is necessary or that it will suffer hardship or inequity if this proceeding moves forward.

The City recites its belief—with *literally no* reference to law or reliance on facts—that a stay will not harm the Band, that it is likely to prevail in the APA Action (which will, by the way, not take long), and that the validity of the NOV must be resolved before the Court can conduct its Rule 60(b) analysis. Juxtaposing this "rawest of speculation"[15] against the facts and the law makes clear that the City will not suffer hardship or inequity if this case moves forward, but the Band will suffer harm from the likely several-year delay the City requests. Accordingly, the City has not met its burden and the Court should deny its motion.

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[12] *Landis*, 299 U.S. at 255.
[13] *KK Motors, Inc. v. Checkmate Boats, Inc.*, 1999 WL 246808, *2 (D. Minn.).
[14] *Landis*, 299 U.S. at 255.
[15] Report and Recommendation re. the Band's Renewed Motion to Stay ("R&R Denying Band's Mot. for Stay"), Dkt. 148 at 11.

A. Because the NOV is entitled to great deference, the City overestimates the likelihood that the APA Action will impact the NOV.

The City astonishingly claims *without any factual support* that "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."[16] But the Band has already disputed *everything* the City lists in this section,[17] and it is hard to believe the NIGC will offer less protest.

Although the merits of the APA Action are not before this Court, it is important to acknowledge the uphill battle the City faces in overturning the NIGC's NOV. Courts' APA review of agency actions is "extremely narrow."[18] Under this standard, "the [agency] must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record,"[19] or that the decision is "reasonable [and] based upon factors within the [agency's] expertise."[20] Even if this demonstration is made with "less than ideal clarity," the Court will uphold the action "if the agency's path may reasonably be discerned."[21] And the Supreme Court recently made clear that it will not require a more searching review when an agency reverses policy.[22] The agency must supply the usual "reasoned explanation" for the NOV, which on its face "display[s] awareness that it

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[16] City's Motion at 5.
[17] *See* Band's 2012 Rule 60(b) Reply, Dkt. 227 at 5-21.
[18] *U.S. Postal Service v. Gregory*, 534 U.S. 1, 7 (2001).
[19] *Northern States Power Co. v. Fed. Energy Reg. Comm.*, 30 F.3d 177, 180 (D.C. Cir. 1994) (internal citations omitted).
[20] *AT&T Corp. v. Fed. Communications Comm.*, 394 F.3d 933, 936 (D.C. Cir. 2005) (Roberts, J.) (internal quotation omitted).
[21] *Alaska Dep't of Env. Conservation v. Env. Protection Agency*, 540 U.S. 461, 497 (2004) (citations omitted).
[22] *Fed. Communications Comm. v. Fox Television*, 556 U.S. 502, 514-15 (2009).

is changing position."[23] But the NIGC "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better."[24]

Moreover, to the extent the City challenges the NIGC's legal interpretation of IGRA (the heart of the NOV), the D.C. District Court must apply the deferential *Chevron* standard.[25] The NOV applied IGRA's requirement that "Indian tribe[s] will have the sole proprietary interest and responsibility for the conduct of gaming activity[,]"[26] but IGRA does not define or otherwise directly address the precise question of what constitutes a proprietary interest. Where, as here, "the statute is silent . . . 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."[27]

The City clearly doesn't like the NIGC's application of its sole-proprietary-interest standard. But "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[28] Even if it were true (it's not), the City's cavil that "[t]he NOV is loaded with inaccurate statements, improper inferences and conclusions not based on accurate facts"[29] simply cannot demonstrate that that the NIGC's interpretation of the sole-proprietary-interest

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[23] *Id.* at 515.
[24] *Id.* (emphasis in original).
[25] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
[26] 25 U.S.C. §§ 2710(b)(2)(A), (d)(1)(A)(ii).
[27] *Chevron*, 467 U.S. at 843.
[28] *Id.* at 843-44.
[29] City's Motion at 5.

requirement is contrary to IGRA or otherwise unreasonable in light of the language of the statute. There is little reason for the Court to stay its own hand while the City tilts at windmills.

B. Any unlikely effect the APA Action *may* have on these proceedings is speculative and resolution of the APA Action is not necessary to determine the Band's requested Rule 60(b)(6) relief.

The City argues that *if* the NOV is invalid, this Court may never have to address the Band's Rule 60(b)(6) motion. That's true. But *if* the D.C. District Court *upholds* the NOV (the more likely scenario), this Court *would* indeed have to address the Band's Rule 60(b)(6) motion. In that case, all a stay would accomplish is lengthy delay; the parties would be in the exact same position, just several years in the future.

The City argues that it would be an "abuse of discretion" for this Court to consider the Band's Rule 60(b) motion without *first* knowing whether the NOV was a proper exercise of agency power—the question presented by the APA Action.[30] That must not be the case, since *both* this Court *and* the Eighth Circuit have *already* decided the propriety of Rule 60(b)(5) relief.[31] The mere fact of the City (finally) filing an APA action cannot change this. Federal agencies are presumed to have acted correctly,[32] even when their actions are challenged.[33] Perhaps implicitly acknowledging this, the City seeks to shoehorn its own presumption of *invalidity* into the Eighth Circuit's direction to consider "relevant factors" on remand. But the Eighth Circuit did not once question the

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[30] City's Motion at 7.
[31] Rule 60(b)(5) Order, Dkt. 231; *City of Duluth*, 702 F.3d 1147.
[32] *See, e.g.*, *Solid State Circuits, Inc. v. U.S.E.P.A.*, 812 F.2d 383, 392 (8th Cir. 1987).
[33] *See generally*, 2 AM. JUR. 2D *Administrative Law* § 484 (2013).

validity of the NOV. In fact, although the Eighth Circuit expressly acknowledged the City's concerns,[34] it did not even inkle that the City's questions about the NOV are a relevant factor under *this* Court's Rule 60(b) analysis. So this Court may consider the Band's Rule 60(b)(6) request—just as it and the Eighth Circuit already considered the Band's Rule 60(b)(5) request—before the APA Action concludes.

To be sure, the City is right that *if* this Court grants the Band's Rule 60(b)(6) relief *and if* the D.C. District Court overturns the NOV *and if* that ruling is upheld after all all-but-inevitable appeals are exhausted, *then* the City would have to return to this Court to seek its own Rule 60(b) relief. But the Court should not stay the present proceedings because there is a *possibility* that, many years in the future, the City may need additional relief. "[T]he prospect that some non-specified, indefinite [court] action might possibly impact this litigation in some undefined way continues to be entirely speculative."[35] That the City must wait and see what happens is the price of the City's decision to litigate around one issue in multiple forums (the City could have filed its APA Action as a related action in *this* Court[36]) after significant delay (even the *Band* suggested that the City seek APA relief as early as *August 2011*[37]). The City chose multi-forum litigation.

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[34] *City of Duluth*, 702 F.3d at 1153.

[35] R&R Denying Band's Mot. for Stay, Dkt. 148 at 12.

[36] 28 U.S.C. § 1391(e)(1)(B) (venue is proper in a district where a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated).

[37] Defendant Fond du Lac Band of Lake Superior Chippewa's Reply in Support of Motion for Relief from Consent Order, Summary Judgment Order, and Order Compelling Arbitration under Rules 60(b)(5) and 60(b)(6), Dkt. 227 at 5.

It's cumbersome and difficult. But it is not grounds to grant a motion to stay, especially at this late stage.

C. The City's "equity" argument that the Court should give it the same stay treatment as the Court gave the Band significantly omits that the Court never granted the Band's request for stay.

With an astonishing lack of candor, the City argues that because the Band requested stays of this case earlier in this litigation,[38] now, as a matter of equity, "[i]t is only just that the City should get its requested delay [.]"[39] But when the City boldy asserted "[t]he Band got its delays,"[40] it was much less than truthful. The Court has *never* granted the Band's request for a stay or continuance.[41] It would hardly be equitable for the Court to grant a stay to the City that it refused to grant the Band.

III. An indefinite delay of these proceedings would harm the Band—and the Court—by avoiding resolution of this case for years.

Although the City offers no demonstration that it will suffer hardship or inequity if this case moves forward, it understates the effect of its request on the Band and this Court. Contrary to the City's protestations, it's requested stay is likely to last—and keep the Court from resolving this case—for years.

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[38] City's Motion at 3.
[39] *Id.* at 4.
[40] *Id.*
[41] *See* Dkt # 42—Order denying Band's motion to continue City's motion for summary judgment pending discovery; Dkt # 105—Memorandum order and opinion denying Band's motion to continue pending review by the National Indian Gaming Commission; and Dkt # 156—Order adopting report and recommendation denying City's renewed motion for stay.

A. The City has been less than forthright about the duration of APA Actions.

The City's paints an impressionist's picture of rapid disposition of its APA Action—again without any citation to facts or law. But APA appeals are rarely quick. Indeed, what is even more certain than the uphill battle the City faces in the APA Action is that the battle is likely to last for years.[42]

The City first suggests that APA Appeals are easily disposed of because the D.C. District Court review will be on the record and there is little need for additional discovery. But there is often significant dispute over the administrative record. For example, in *City of Duluth v. Salazar*—the *other* APA Action the City brought concerning the Fond-du-Luth Casino—after the Secretary of the Interior filed the administrative record, the City brought a motion to supplement the administrative record.[43] That motion has been pending before the D.C. District Court since December 31, 2012—*almost five months*.

The City also places weight on the fact that discovery is not necessary in an APA Action. But that is not to say that discovery is not available. Here, too, the City's track record in *Salazar* is instructive. After the City threatened that it would serve the Department of Interior with discovery, the D.C. District Court did not forbid it, but

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[42] *E.g. Citizens Against Casino Gambling in Erie County v. Stevens*, 09-cv-291S (W.D.N.Y. May 10, 2013) (resolving an APA challenge to the NIGC's approval of a tribe's gaming ordinance *four years* after the case was commenced).

[43] *City of Duluth v. Salazar*, 1:12-cv-01116 (D.D.C.), Dkt # 14. *Salazar* involves the City's challenge to the Department of the Interior's cancellation of a lease between the Band and the Duluth-Fond du Lac Economic Development Commission, which permits the Band to operate the Duluth gaming facility. This action is related, in part, to the NIGC's NOV. A docket report of that proceeding is attached as Exhibit A.

ordered that the City must request leave to serve discovery.[44] So not only may discovery slow down an APA Action—threshold motion practice regarding leave for discovery may also stall the APA Action.

The City pledges this Court that in the APA Action, "no delay will be caused by the City,"[45] but the City's history in *Salazar* and in the APA Action itself belie that promise. It was the City that let nearly 18 months pass after the NOV issued before it commenced the APA Action, and another month after that before it served its complaint. In the over 10 months that have passed since the City filed its *Salazar* complaint, the parties have yet to agree on the administrative record, let alone get to the heart of the matter. So the City's promise of an easy-peasy APA Action and quick return to this Court's determination of the Band's 60(b) motion is disingenuous at best. The APA Action is in its infancy, and accounting for appeals, is most likely to take years.

B. Delaying resolution of this case for years on the mere hope that the APA Action will affect this Court's resolution of the issues before it would prejudice the Band and the Court.

The law is clear that "stay orders should not issue when they would be immoderate or of an indefinite duration."[46] With good reason. If this Court were to grant the City's motion, then for the years the APA Action is likely to proceed, the Band would be forced to sit in judicial limbo while the City presses its claim against the United States—even though this case is almost resolved. "The usual reason for denying a stay is that the case

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[44] *See* Ex. A, Docket Report in *City of Duluth v. Salazar*, 1:12-cv-01116 (D.D.C.).
[45] City's Motion, p. 6.
[46] *Berreau v. Beucler*, Civ. No. 4-84-565, 1985 WL 511, *1 (D. Minn. Feb. 22, 1985). *Accord Landis*, 299 U.S. at 255 (recognizing that stays of indefinite duration in the absence of a pressing need may constitute an abuse of discretion).

has progressed through the bulk of pre-trial proceedings and is scheduled for trial shortly."[47] This case fits well within that usual reason. Not only have the parties gone through all pre-trial proceedings, but to date, the parties have *also* began (and then stopped) arbitration, and litigated the effect of the NOV on the Consent Order before this Court and the Eighth Circuit, and now back in this Court on remand.

This lawsuit—commenced by the City—has already been pending for almost four years, but only now when the decisions aren't going its way does the City want to delay resolution of its lawsuit. And it wants to do so while it *also* presses litigation about the Fond-du-Luth Casino against the Band in state court.[48] The Band is interested in reaching resolution of the City's claim-a-day litigation. And that finality can only come when this Court fulfills the Eighth Circuit mandate.

Conclusion

No party can hazard to guess just how long these proceedings would lie dormant while the APA Action and all appeals wend their way through the courts if the City's motion were granted. And no party can hazard to guess whether that APA Action will, eventually, affect these proceedings. Indeed, there is no guarantee that a stay of these proceedings will result in anything other than a delay. There is simply "no substantive reason to delay the completion of these present proceedings based only on the speculative

[47] *Card Technology Corp. v. Datacard Corp.*, Civ. No. 05-25462007 WL 551615, *7 (D. Minn. Feb. 21, 2007).

[48] The City commenced *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, Court File No. 69DU-CV-12-857, concerning the effect of the 1986 and 1994 Agreements on the Band's application to the United States to take a parcel adjacent to the Fond-du-Luth Casino into trust in St. Louis County Court in 2012.

possibility that some unspecified thing the [APA Action] might do—whatever and whenever that might be—has the potential to somehow in an as yet undefined way implicate the present proceedings. There are simply too many vague contingencies to warrant a stay of this litigation as it is nearing its conclusion."[49] The City has not demonstrated any hardship or any inequity in being made to go forward, but a stay would prejudice the Band and this Court. The Band respectfully requests that the Court cancel hearing on this motion and deny the motion in its entirety.

Dated: May 15, 2013

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

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[49] R&R Denying Band's Mot. for Stay, Dkt. 148 at 12