Appeal No. A12-1324
STATE OF MINNESOTA
IN SUPREME COURT

City of Duluth,

Respondent

v.

Fond du Lac Band of Lake Superior Chippewa,

Appellant.

BRIEF OF RESPONDENT CITY OF DULUTH

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STATEMENT OF THE ISSUES

I. This Court accepted review on a single issue: Whether the Minnesota district court has jurisdiction.

This issue was raised by the band in response to the city's motion for temporary injunction. See, *Defendant Fond du Lac Band of Lake Superior Chippewa's Response to Plaintiff City of Duluth's Motion for Temporary Injunction (dated April 12, 2012).* The district court held that it lacked subject-matter jurisdiction. The Minnesota Court of Appeals reversed and held that the district court had the authority to interpret the 1994 agreements to determine their impact on the waiver of sovereign immunity contained in the 1986 commission agreement.

Apposite Authority: Minnesota Chippewa Tribe v State of MN Dept. of Labor and Industry, 339 N.W.2d 55 (Minn.1983); Motorsports Racing Plus, Inc. v Arctic Cat Sales, Inc., 666 N.W.2d 320 (Minn.2003); Hunter v Underwood, 363 F.3d 468 (8th Cir. 2004).

STATEMENT OF THE CASE

This appeal arises from the May 23, 2012 order of the district court, Honorable Mark A. Munger presiding, denying the city of Duluth's ("city") motion for temporary injunction, and dismissing the city's action without prejudice. The parties are the city and the Fond du Lac Band of Lake Superior Chippewa ("band").

The dispute arises from the band's effort to place a parcel of land (herein "Carter Hotel"), which is located in the heart of the city's downtown historic commercial district, and which is a contributing building to the district, into trust status and to manage the land as part of its reservation.

In 1986 the parties entered into a series of agreements (herein "1986 agreements"). The 1986 agreements were intended, in part, to support the development of the Fond du Luth Casino ("casino"), which is located in the downtown historic commercial district of Duluth, and which abuts the Carter Hotel. A commission agreement was one of the 1986 agreements. The commission agreement created an economic development entity known as the Duluth-Fond du Lac Economic Development Commission. The band's breach of the commission agreement is the subject of this present action.

Under the commission agreement the band agreed to obtain the city's consent prior to creating additional "Indian Country" within Duluth. The band also waived its sovereign immunity and agreed to be subject to the jurisdiction of the Minnesota state courts.

In 1994, the parties amended the 1986 agreements in response to the 1988 enactment of the Indian Gaming Regulatory Act ("IGRA"). *25 U.S.C. § 2701, et.seq.* Under the 1994 agreements, the state court retained jurisdiction over disputes unrelated to the casino and the business activities occurring within the casino, and federal court jurisdiction was required for disputes involving the casino-related activities.

On December 18, 2011, the city received a letter from the United States Department of the Interior notifying the city that the band had filed an application to place additional land located in Duluth into trust. The letter was the city's only notice of the band's application. The band did not seek or obtain the city's consent prior to initiating the process for creating additional "Indian Country" as required by the commission agreement.

The city commenced this action on April 2, 2012. In count I of the complaint, the city asserted a breach of contract claim. In count II, the city sought injunctive relief. The city served its motion for temporary injunction on April 5, 2012 and a hearing was held on April 19, 2012. The city served its amended complaint on April 6, 2012. By stipulation of the parties, the band did not serve an answer. The band filed a memorandum and supporting affidavits in opposition to the city's motion, but it did not assert a motion to dismiss under Rule 12 of the Minnesota Rules of Civil Procedure.

In response to the city's motion for temporary injunction, the band argued that the district court did not have jurisdiction, and that the commission agreement did not require the band to obtain the city's consent to its trust application.

The district court made two substantive decisions. It held that the court lacked jurisdiction, and after concluding that it did not have jurisdiction, the court exercised jurisdiction, construed the commission agreement, and determined that the city's claim was not ripe for adjudication.

On July 20, 2012 the city requested the district court's reconsideration. The city based its request on two events that occurred subsequent to the district court's order. The first event was the Secretary of the Interior's May 10, 2012 notice of cancellation of the lease between the band and the commission. The second was receipt of a copy of letter dated July 18, 2012 from the Midwest Regional Director of the Bureau of Indian Affairs to John M. Fowler, Executive Director of the National Advisory Council on Historic Preservation. This letter informed Director Fowler that the band, despite its

representations to the district court to the contrary, intended to manage the Carter Hotel as reservation land.

On July 23, 2012 Judge Munger recused himself. On July 24, 2012, Judge David M. Johnson was assigned to the case. Before Judge Johnson acted on the city's request, the time period for appeal expired. In order to preserve its right to appeal, the city filed its appeal on July 27, 2012.

The Minnesota Court of Appeals reversed the district court. It concluded that the district court had the authority to review all documents relevant to the jurisdictional question. It also held that the dispute between the parties was ripe for adjudication and remanded with instructions to the district court to decide the city's motion for temporary injunction.

The band petitioned for review. This Court granted review on a single issue; namely, review was granted "on the issue of the jurisdiction of the district court." *Order dated June 26, 2013.*

STATEMENT OF THE FACTS

1. The 1986 Agreements.

Between 1984 and 1986, the city and the band engaged in negotiations for the creation of a gaming casino at a site located in downtown Duluth. *Aff. Lutterman dated 4-5-2012, Ex. 1 (3-23-1984 Peacock letter).* In May of 1985, the band petitioned the Secretary of the Interior to approve the 1986 agreements and to accept what became the casino property into trust for the band in accordance with 25 U.S.C. §465 and §467. *App. A179.* In June of 1985 the Deputy Assistant Secretary–Indian Affairs, based upon the

recommendation of the Director, Office of Trust Responsibilities, approved the petition and agreements and advised the Minneapolis Area Director of the Bureau of Indian Affairs that the casino property could be accepted into trust on behalf of the band. *Aff. Lutterman, Exs. 4 & 5.*

The negotiations between the city and the band resulted in a series of agreements including, but not limited to the 1986 commission agreement. *App. A19-88.* The commission agreement was approved by the authorized representative of the Secretary of the Interior on April 10, 1986. *Id. A88.*

The commission was not established simply to develop and operate a casino. The commission was intended to initiate much broader economic development activities. The purposes of the commission were provided in Paragraph 3. Among the purposes were the following:

> *a. To license and/or operate business activities on Indian Country located within the City of Duluth……*
> *b. To actively promote, attract, encourage and develop economically sound industry and business with the City of Duluth and the Fond du Lac Reservation.*
> *c. To engage in businesses* ***including, but not limited to,*** *bingo and/or gaming activities, that provide employment opportunities within the City of Duluth and/or on the Fond du Lac Reservation.*
> *d. To carry on* ***any other business or activity****, in addition to the foregoing, which provides economic benefit to the City of Duluth and the Fond du Lac Band and enhances economic opportunity for the City of Duluth and/or the Fond du Lac Band….*
> *f.* ***To engage in joint economic development activities*** *with the Fond du Lac Band and/or the City of Duluth for developments within the City of Duluth and/or on the Fond du Lac Reservation.*

Id., A25-26(emphasis added).

In Article 10 of the commission agreement, the city and the band dealt with the issue of the creation of "Indian Country" within the boundaries of the city of Duluth. They agreed as follows:

> *The City of Duluth and the Fond du Lac Band agree that the provisions of this Article 10 apply whether or not the Commission is in existence. The Fond du Lac Band acknowledges that the creation of Indian Country, as defined herein, is dependent upon the approval of the creation of Indian Country, as defined herein, by the City of Duluth, and that, without the approval and consent of the City of Duluth, Indian Country, as defined herein, cannot be created, and the activities to be conducted by the Commission could not be done.*
>
> *a. Initial Approval. The City of Duluth hereby agrees to approve the transfer by the Fond du Lac Band of the land described on Exhibit A attached hereto [the Casino Property], which the Fond du Lac Band has purchased, to the United States of America to hold in trust for the Fond du Lac Band, pursuant to 25 U.S.C. §465 and the making of such land part of the Fond du Lac Reservation pursuant to 25 U.S.C. §467.*
>
> *b. Subsequent Approval. The City of Duluth shall approve the creation of additional Indian Country, as defined herein, whenever the Mayor and the City Council of the City of Duluth determine that such additional land is essential to the activities of the Commission, and the making of such additional land Indian Country, as defined herein, will not be detrimental to the City of Duluth. The City, in its sole discretion, shall have the right to disapprove the creation of additional Indian Country, as defined herein. The Fond du Lac Band shall not create any additional Indian Country, as defined herein, unless the City of Duluth approves the creation of additional Indian Country as provided in this Paragraph b.*

Id.,A38-39.

The parties expressly provided for the band's waiver of sovereign immunity and the selection of the Minnesota state court in Paragraph 19 of the agreement as follows:

> ***The Fond du Lac Band consents to be sued in any Minnesota state court or in federal court in connection with this Agreement or any agreement executed and delivered pursuant to the Agreement or any activity undertaken by the Fond du Lac Band pursuant to this Agreement and***

> ***does hereby waive forever any and all immunity granted it under any treaties or laws or the Constitution of the United States or of any state or otherwise from any suits or claims, whether at law or in equity, by the City of Duluth or the Commission against the Fond du Lac Band arising from this Agreement or any activity undertaken by the Commission under this Agreement.***

Id., A62 [emphasis added]

2. The 1994 Agreements.

In 1988, Congress enacted IGRA. *See, 25 U.S.C.§2701, et.seq*. The enactment of IGRA brought into question the legality of the 1986 agreements. On September 24, 1993 the National Indian Gaming Commission ("NIGC") determined that the 1986 agreements violated IGRA and it granted the parties time to alter their agreements. *Aff. Lutterman dated 4-5-2012, Ex.7 (9-24-1993 Hope letter)*. The parties were able to negotiate amended agreements and, on June 16, 1994, the National Indian Gaming Commission notified the parties of its approval. *Id., Ex. 8.* The 1994 agreements were subsequently entered as a consent decree in *Fond du Lac Band of Lake Superior Chippewa Indians v City of Duluth, Civ.No. 5-94-82 (D.Minn.)(July 29, 1994).App. A173.*

On June 20, 1994 the parties executed the "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"). *App. A129-136*. Section 1 of the umbrella agreement provided for a sublease and assignment of gaming rights whereby the commission, which under the 1986 agreements held a lease from the band for the casino property and operated the casino, agreed to sublease its leasehold interest to the band and transfer to the band all

operation and regulation of "gaming and Ancillary Businesses (as defined in the Sublease) conducted on the Premises for the term of the Sublease." *Id. A131.*

Of significance to this appeal are the definitions of "Ancillary Businesses" and "Sublease space" provided in the sublease. "Ancillary Businesses" is defined as:

> "*all businesses operating or to be operated* ***at the Sublease space*** *as part of and for the purpose of serving the bingo and gaming operation, including but not limited to a restaurant and beverage concession, gift shop, check cashing service and ATM service, but shall not include Restricted Uses."*

Id. A141 (emphasis added).

"Sublease space" was defined as:

> "*the Premises,* ***which are subleased to the Band pursuant to this Sublease and Assignment,*** *subject to the license to the City as provided in Section 3.4 herein."*

Id. A144 (emphasis added).

The 1994 agreements also modified the commission agreement. Exhibit C to the 1994 agreements is the amended commission agreement. *Id. A169-172.* The amended commission agreement abrogated and replaced portions of the 1986 agreement. In abrogating and replacing some of the 1986 provisions the parties used the following language: ***"Section [__] is permanently deleted in its entirety and replaced by the following:****……". Id. A170 (abrogating and replacing sections 5,6,7(b) and A171 (abrogating and replacing sections 8(a) and 14).*

The parties did not abrogate and replace Paragraph 19 (Waiver of Sovereign Immunity) of the 1986 commission agreement. Instead, the parties created a partial dormancy provision in Section 2 of the 1994 amendment that provides as follows:

> *Section 2. Sections 1 through 4, 7(a), 9 through 13 and 15 through 38 of the 1986 Commission Agreement,* ***insofar as they pertain to gaming activities and Ancillary Businesses at the Sublease space****, shall be dormant and of not force or effect for so long as the Sublease is in effect.*

Id. A171 (emphasis added).

The parties also limited the functions of the commission related to gaming activities in Section 5 which provides as follows:

> *The Band and the City agree that for so long as the Sublease is in effect, the Commission shall have no authority relating to, and shall take no action relating to, the operation of gaming or the Ancillary Businesses at the Premises, and the Commission Agreement shall be dormant and of no force or effect on any matter relating to or arising from* ***gaming or the Ancillary Businesses at the Premises.*** *The Sublease and the Tribal-City Accord, and such other documents or agreements referred to therein, shall be the exclusive agreements between the parties governing gaming and the Ancillary Businesses at the Premises during the Term of the Sublease.*

Id. A132(emphasis added).

3. The Breach of Contract.

On October 17, 2011, the Fond du Lac Reservation Business Committee ("business committee") resolved to place the Carter Hotel parcel, which is adjacent and contiguous to the Fond du Lac Reservation located in Duluth, into trust. *Id. A184-185*

On November 17, 2011, the business committee submitted the trust application. *Id. A200.* The application seeks the inclusion of land located in Duluth and identified by the street address 17-27 North Second Avenue East. The application identifies this property as the location of the "Former Carter Hotel Property". *Id.A186.* The band identified its date of acquisition of the Carter Hotel as December 28, 2010. *Id. A187.* The band argued as justification for its application that "The Fond du Lac Reservation

was promised to the Band as its permanent homeland in the 1854 Treaty. That homeland was dismantled in part as a result of federal policies that the IRA is intended to reverse. Therefore, accepting the transfer of the Subject Property is an act in fulfillment of the promise the United States made in the 1854 Treaty to reserve a permanent homeland for the Band over 150 years ago." *Id. A189.*

On December 18, 2011, the City received a letter from the United States Department of the Interior notifying the City that the Band had filed the application. *Id.A203-204.* This letter was the city's first and only notice of the band's application. *Aff. Johnson, dated April 5, 2012 (supporting the city's motion for temporary injunction).* The band did not notify the city of its intent to put additional land located within Duluth into trust and it did not obtain the city's approval as provided in Article 10(b) of the 1986 Commission Agreement. *Id.*

As a result of the band's failure to obtain the city's consent to its efforts to create additional "Indian Country" within its jurisdiction, the city commenced this action.

ARGUMENT

I. Standard of Review

The city concurs with the Band's statement that review of jurisdictional issues are *de novo.* Johnson v. Murray, 648 N.W.2d 664, 670 (Minn. 2002)

Because resolution of the jurisdictional issue is dependent upon contract interpretation, the standard of review applicable to contract interpretation is also applicable. This Court's review is *de novo.* Halla Nursery, Inc. v City of Chanhassen, 781 N.W. 2d 880, 884 (Minn. 2010).

II. The Court Has The Authority To Review All Of The Evidence Related To Determining Its Jurisdiction.

A. Summary of the issue.

This Court granted review of a single issue—"the jurisdiction of the district court." *Order dated June 26, 2013 (granting petition in part).* While the band and the amicus curiae present arguments related to sovereign immunity and waiver, these arguments miss the point. This case does not involve a dispute over whether tribal governments generally enjoy sovereign immunity under federal law. *See,* Gavle v Little Six, 555 N.W.2d 284, 288-289 (Minn.1996) (discussing the historical development of tribal sovereign immunity). The band has not claimed that it is immune from the city's suit. Its defense is that the district court does not have subject-matter jurisdiction.

This case also does not involve a dispute over whether the band has a legal right to waive its immunity or limit its sovereign authority for clearly it does. Id. at 296. The band does not claim that it did not expressly waive its immunity. In fact, the band has conceded that it waived immunity. *See Band's Brief pg. 20* ("This case is not about whether the City has a remedy for its contract claim, but rather in which courthouse that remedy lies.").

This case does not involve the band's new issues, raised for the first time before this Court, that the court does not have the authority to enjoin the band's sovereign authority to engage in what the band now argues is an "on-Reservation action". *Band's Brief, pg. 30.* The band clearly has the authority to enter contracts that limit its sovereign powers. Id. ("We begin with the basic tenet of Indian law that tribal sovereign immunity

may be waived…"). Here, the band did exactly that in exchange for the ability to create reservation land in Duluth.

And while the band attempts to turn this issue into a forum selection dispute, the essential issue for this Court to decide is the extent of a court's authority to determine its jurisdiction. Does a court, whose jurisdiction has been challenged, possess the authority to review all evidence relevant to a determination of jurisdictional defense? The band's position, if adopted, would have the effect of depriving a court of its inherent authority to determine its own jurisdiction by prohibiting the court from reviewing all evidence relevant to the jurisdictional defense.

In amending the contracts in 1994, the parties were focused on reforming the management structure of the casino to conform to the new federal laws and regulations applicable to Indian Gaming. The parties did not wholly eliminate the provisions of the 1986 agreements to the extent those provisions did not involve gaming at the casino. Thus, the issue here, which does not involve gaming at the casino, remains subject to Paragraph 19 of the 1986 Agreements and the district court has jurisdiction.

B. A court possesses the inherent authority to consider the evidence relevant to the jurisdictional issue.

District courts are courts of general jurisdiction and, with a few exceptions, have the power to hear all types of civil cases. State ex.rel. Swan Lake Area Wildlife Ass'n v Nicollet County Bd. of County Com'rs, 771 N.W.2d 529, 535 (Minn.App.2009) ("Swan Lake II"); Minn.Const. Part.VI, §3. Subject-matter jurisdiction involves the court's " 'authority to hear and determine a particular class of actions' and 'the particular questions

the court assumes to decide'." Minnesota Bd. of Chiropractic Examiners v. Cich, 788 N.W.2d 515, 519 (Minn.App.2010) *quoting,* Anderson v Cnty of Lyon, 784 N.W.2d 77, 80 (Minn.App.2010). Certainly, one of the exceptions to this general statement of jurisdiction is in the realm of jurisdiction over tribal government; however, as this Court observed in *Gavle v Little Six, 555 N.W.2d 284 (Minn.1996),* jurisdiction and sovereign immunity may be related, but they are not the same issue. Gavle at 288.

The issue presented to this court does not involve concurrent jurisdiction. "Concurrent jurisdiction describes a situation where two or more tribunals are authorized to hear and dispose of a matter and the choice of which tribunal is up to the person bringing the matter to court." Gavle, at 290, *citing,* Black's Law Dictionary 291 (6th ed.1990). The band argues that because the district court must review the 1994 agreements to determine its jurisdiction the district court does not have jurisdiction. *See, Band's Brief, pgs. 32-33.* This argument is at odds with this Court's statement in *Gavle* that "Minnesota state courts have a strong interest in determining for our citizens the nature of the legal claims that they may assert against tribal business entities and the defenses that may be raised in response." Gavle, 555 N.W.2d at 292.

This Court's decision in *Minnesota Chippewa Tribe v State of MN Dept. of Labor and Industry, 339 N.W.2d 55 (Minn.1983)* is an analogous case where the Court was deciding whether subject-matter jurisdiction was present even though the issue could be litigated in a different forum. The tribe brought a declaratory judgment action seeking a declaration that it was not involuntarily subject to the Minnesota Workers' Compensation Act and that it enjoyed sovereign immunity from such claims. The district court

dismissed the action concluding that it lacked jurisdiction because there were two workers' compensation claims pending and remanded the matter to the workers' compensation court for a determination of the applicability of the Act in view of the immunity claims. This Court reversed and held that the court had subject-matter jurisdiction over the declaratory judgment action because the issue presented was whether or not the Act applied to the tribes, which was a proper subject for declaratory judgment. Id. The Court did so because the issue was the applicability of the Act to the tribes. In order to determine its jurisdiction, the Court was required to review the Act.

Much the same can be said here. The jurisdictional issue is the applicability of the 1994 agreement to a claim arising under the 1986 commission agreement. The court is empowered to determine the existence of its jurisdiction. In doing so it must review the evidence which forms the basis for the defense. It is the Band's obligation to demonstrate the lack of jurisdiction and that can only be accomplished by reviewing the basis of its jurisdictional defense.

In reversing the district court's conclusion that it lacked jurisdiction to determine the impact of the 1994 agreements on Paragraph 19 of the 1986 commission agreement (the waiver), the appeals court determined that the "district court has the authority to decide legal issues necessary to determine whether it has jurisdiction." *Band's Addendum, pg. 8, Opinion, citing J.E.B. v Danks, 785 N.W.2d 741, 747 (Minn.2010) (court has the authority to determine legal issues applicability to an immunity defense even where factual disputes preclude summary judgment).* The appeals court also cited to *Hunter v Underwood, 363 F.3d 468 (8th Cir. 2004)* as an example of the application of

the principle that a court has the "inherent power to determine as a preliminary matter its own subject matter jurisdiction." *Id.* at 475 (quotation omitted). If the court has the inherent authority to determine its jurisdiction, this necessarily includes the authority to review the evidence offered in support of or against the court's assertion of jurisdiction.

The band offers no citation to authority that supports its position that the district court did not have the authority to review the 1994 agreements to determine the merits of the jurisdictional defense. Instead, the band discusses cases related to forum selection clauses. *Band's Brief pgs. 25-27.* But the principle Minnesota case the band relies on, *Hauenstein & Bermeister, Inc. v Met-Fab Indus., Inc. 320 N.W.2d 886 (Minn.1982),* supports the city's position that the district court had the authority to review the agreements to determine the applicability of Paragraph 19 of the commission agreement and the appeals court correctly reversed the district court's dismissal on jurisdictional grounds. In *Hauenstein*, the court was required to determine its jurisdiction and in doing so was required to construe the forum selection clause presented as the evidence supporting the jurisdictional defense. Id. at 888.

The band then proceeds to present arguments related to the factors a court should consider in determining whether to enforce a forum selection clause. The flaw in this argument is that it assumes that Paragraph 19 of the commission agreement is completely superseded by Section 9 of the umbrella agreement. The dispute here is unlike *Hauenstein,* which did not involve a dispute about the applicability of a forum selection clause but whether such clauses should be enforced as a matter of public policy. Id. at 890 ("We agree with these authorities and therefore hold that when the parties to a

contract agree that actions arising from that contract will be brought in a particular forum, that agreement should be given effect unless it is shown by the party seeking to avoid the agreement that to do so would be unfair or unreasonable.")

The court of appeals correctly concluded that the district court had the authority to construe the 1994 agreements to determine whether the state court had jurisdiction over this dispute.

C. The waiver provision of the 1986 agreement is not modified by the 1994 agreement if the dispute does not involve gaming and related activities occurring at the casino.

In recognition that the district court has jurisdiction to review the evidence relevant to a determination of its jurisdiction, the band asserts that the appeals court erred in its contract interpretation. The band advances a new interpretation and concludes that the question is "not whether the designated property— the Carter Hotel—is itself 'at the Sublease space.' Rather, the dormancy applies to the listed provisions of the 1986 Agreement "insofar as they pertain to gaming activities….at the Sublease space…" Thus, the focus is on the operation of a particular contractual provision of the 1986 Agreement, not on the location of the property at issue." *Band's Brief at 35-36.* This argument ignores the express language of the 1994 agreements, ignores the definitions the parties gave to various terms, and ignores the reasons for the 1994 agreements. While the band may choose to ignore the contract language and the historical context to manufacture its new interpretation, this Court may not do so.

When a court is required to interpret a contract, its goal is to "ascertain and enforce the intent of the parties." Valspar Refinish, Inc. v Gaylord's, Inc., 764 N.W.2d

359, 364 (Minn.2009). The court must look to the contract language when determining the parties' intent, *Savela v. City of Duluth, 806 N.W. 2d 793, 796 (Minn.2011),* and assign unambiguous contract language its plain meaning. Id. A contract is ambiguous when the language is susceptible of more than one reasonable interpretation. Dykes v. Sukup Mft. Co., 781 N.W.2d 578, 582 (Minn.2010). But in order to ascertain intent, the court must look to the contract as a whole, "the terms of a contract are not read in isolation." Halla Nursery, 781 N.W. 2d at 884. Intent is not ascertained "by a process of dissection in which words or phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given a meaning in accordance with the obvious purpose of the contract *** as a whole." Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc., 666 N.W.2d 320, 324 (Minn.2003) *quoting,* Republic Nat'l Life Ins. Co. v Lorraine Realty Corp., 279 N.W.2d 349, 354 (Minn.1979) (alteration in original).

The court does not assume that the parties intended an illogical result. *Id.* at 326. The law does presume that the parties intended a result that is "incredible, inequitable, and contrary to the obvious purpose" and intent of the contract. Kane v Oak Grove Co., 22 N.W.2d 588, 590 (Minn.1946). " '* * * Words which admit of a more extensive or more restrictive signification must be taken in that sense which will best effectuate what it is reasonable to suppose was the real intention of the parties.' " Id. *quoting,* 12 Am.Jur., Contracts, s 231. To understand the parties' intent, the court places itself "in the position of the parties at the time the agreement was negotiated and executed and, upon consideration of the agreement as a whole and the plain meaning of the language used,

viewed in the light of the surrounding circumstances, endeavoring to arrive at what the parties must have reasonably contemplated." Midway Center Assc. v. Midway Center, Inc., 306 Minn. 352, 356, 237 N.W.2d 76, 78 (Minn.1975).

The band asserts the position that the only waiver clause that applies to the entirety of the two sets of agreements is Section 9 of the 1994 agreement because "a claim cannot be said to arise under the 1986 Agreement alone…" *Band's Brief pg. 23*. This argument fails to distinguish between contract language that creates a contractual obligation and the process for enforcing that obligation, and ignores the context of the 1994 agreements. The contract obligation the city is seeking to enforce is the consent requirement found *only* in Article 10 of the 1986 commission agreement. The claim arises under the 1986 commission agreement because that is the agreement where the performance obligation is found.

The limited purpose of the 1994 agreements was to remove the commission from the ownership or management control of the casino operation and the ancillary businesses operating within the casino in order to comply with IGRA. The 1994 agreements did not have as their purpose the entire restructuring of the commission agreement or its complete suspension. The limited purpose of the 1994 agreements and the continued validity of the commission agreement, except as it relates to the operation of the casino, was made very clear in the Paragraphs D, E, F and Section 5 of the umbrella agreement. "**There has arisen a dispute……whether the Commission may continue to conduct a gaming operation on the Premises.**" *App. A31(umbrella agreement, ¶D)*. The NIGC "**issued a letter stating that the conduct of gaming on tribal trust land pursuant to**

the 1986 Agreements violates the IGRA." *Id.* ¶*E*. **"The City and the Band have engaged in discussions to resolve the dispute…"** *Id.*¶*F*. **"The Band and the City agree that …the Commission shall have no authority relating to…the operation of gaming or the Ancillary Businesses at the Premises, and the Commission Agreement shall be dormant and of no force or effect on any matter relating to or arising from gaming or the Ancillary Businesses at the Premises."** *Id. Section 5*. Given the clear purpose of the 1994 agreements to deal only with the restructuring of the casino operation to comply with IGRA, the application of the Section 9 waiver to only the 1994 agreements and not to any claim arising under the 1986 agreements is consistent with the express language of the 1994 agreements and the limited purpose of those agreements.

The band's arguments related to Sections 10 (Choice of Law) and 11(Enforcement of this Agreement) of the 1994 agreements also ignore the context and language of the entirety of the 1994 agreement. When the parties used the phrase "this Agreement," they were referring to the 1994 agreements, not the 1986 agreements. The limitation of the applicability of Sections 9, 10 and 11 to only the 1994 agreements is supported by the first paragraph of the 1994 umbrella agreement which provides: "THIS AGREEMENT dated as of June 20, 1994….." Id., pg. 130. Had the parties intended that all disputes arising under either the 1986 agreements or the 1994 agreements were to be resolved in the federal courts, they would have expressly repealed Paragraph 19 of the commission agreement in its entirety. They would have used the phrase— all claims or disputes arising under the 1986 agreements or the 1994 agreements and all exhibits to such

agreements. The fact that Paragraph 19 was not permanently deleted demonstrates the limited scope of Sections 9, 10 and 11.

The amendments to the commission agreement did not delete and permanently replace Paragraph 19. Instead, the parties created a partial dormancy provision in Section 2 of the 1994 amendment that is consistent with the limited purpose of the 1994 agreements. It provides as follows:

> *Section 2. Sections 1 through 4, 7(a), 9 through 13 and 15 through 38 of the 1986 Commission Agreement**, insofar as they pertain to gaming activities and Ancillary Businesses at the Sublease space,** shall be dormant and of not force or effect for so long as the Sublease is in effect.*

Id. A171 (emphasis added).

The 1994 Agreement was narrowly drawn for one purpose—compliance with the new federal law and implementing regulations related to Indian gaming. Understood in its historical context, it makes since that the applicability of the dormancy clause was limited to gaming and ancillary businesses occurring in the casino.

The band's fall-back argument is that its trust application pertains to gaming activities at the sublease space because the band's intent is to redevelop the parcel to enhance the band's on-reservation activities. This interpretation again ignores the factual context of the 1994 agreements and the definitions the parties assigned to the terms "Ancillary Businesses" and "Sublease space".

As discussed above, the parties were required to revise the 1986 agreements by the NIGC because of the enactment of IGRA. The purpose of the negotiations was to ensure that the gaming and business activities occurring at the casino complied with IGRA.

Given that purpose, the 1994 agreements were not intended to modify all of the activities provided for in the commission agreement because, as discussed above in the Statement of Facts, the commission was created for broader purposes than just operating a casino. Accordingly, when the parties chose to use the terms "gaming activities", "Ancillary Businesses", and "Sublease space", they were, in fact, referring only to the activities occurring upon the casino parcel because those were the activities that were the subject of the NIGC's regulatory action. If the parties had intended to include any and all activities occurring off-casino, which might incidentally benefit the profitability of the casino, the limitation language of the dormancy clause ("insofar as they pertain to gaming activities and Ancillary Businesses at the Sublease space") would have served no purpose because with a clever argument one could find some beneficial connection to the casino and thereby avoid the limited applicability of the dormancy clause. An interpretation of contract language that ignores the historical context of the agreement and creates an absurd result is to be avoided under contract the interpretation principles discussed above.

The conclusion that the dormancy clause applies to the various provisions of the commission agreement only if the activity at issue occurred at the casino is also consistent with the language used in the definitions.

The term "Ancillary Businesses" was limited to activity occurring at the casino because this term is defined as:

> "all businesses **operating or to be operated at the Sublease space** as part of and for the purpose of serving the bingo and gaming operation, including but not limited to a restaurant and beverage concession, gift shop, check cashing service and ATM service, but shall not include Restricted Uses."

Id. A141 (emphasis added).

The term "Sublease space" is limited to the casino because this term is defined as:

> "the Premises, which are subleased to the Band pursuant to this Sublease and Assignment, subject to the license to the City as provided in Section 3.4 herein."

Id. A144.

Based upon the history of the parties and the reasons for the 1994 amendments, the appeals court correctly concluded that Section 2 of the 1994 amendments to the commission agreement (the dormancy clause) did not apply to Article 10 of the commission agreement because expansion of Indian Country in Duluth does not involve the gaming and business activities presently occurring at the sublease space.

III. The Band's Comity Argument is not Properly Before the Court and the Doctrine does not Apply.

A. Summary of Issue

The Band presents arguments in its brief that exceed the scope the Court's order granting review. It has included a new issue by asserting an argument that principles of comity justify the Court's declination of jurisdiction it might otherwise have. This issue is improperly before the Court because it is not an issue raised below, it was not an issue presented to this Court for review, nor was it an issue this Court accepted for review. Accordingly, this Court should decline to consider these new arguments.

On the merits the band's arguments should be rejected. The band relies upon the pending federal litigation between the parties and the administrative process under which it's pending trust application proceeds to support its argument that this Court should

decline jurisdiction under comity principles. Comity is not properly` applied to this matter because the pending federal litigation between the parties does not involve the same issue, and the pending trust application has yet to ripen into a justiciable dispute and does not involve the breach of contract at issue in this case.

B. Legal Standards

1. Summary of the *Thiele* doctrine

The band's comity issue is not properly before the Court under the principal discussed in *Thiele v Stich¸ 425 N.W. 2d 580 (Minn.1980)*. In *Thiele*, the appellant attempted to raise a new legal argument in response to a statute of limitations defense by asserting factual claims not presented to the district court or contained in the record. The court rejected this effort and observed that "an appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." Thiele, 425 N.W. 2d 582. While the *Thiele* court applied the rule in the context of new factual claims, the doctrine also applies to new legal theories. Midwest Family Mut. Ins. Co. v. Wolters, 831 N.W.2d 628, 633 (Minn. 2013) ("Generally, a party may not "obtain review by raising the same general issue litigated below but under a different theory." *citing* Thiele, 425 N.W.2d at 582.); *see also,* Oganov v. Am. Family Ins. Group, 767 N.W.2d 21, 24 n.1 (Minn. 2009) (declining to consider issue not addressed by either the district court or subsequently by the court of appeals or raised as an issue in the petition for review or brief to the Court); City of Morris v. Sax Invs., Inc., 749 N.W.2d 1, 14 (Minn. 2008) (declining to consider the city's

arguments not raised in the city's pleading, argued to either the district court or the court of appeals, or raised in connection with the petition for further review.)

Midwest Family is instructive on how the *Thiele* doctrine applies to new arguments versus new legal theories. *Midwest Family* involved a declaratory judgment action in which the insured was seeking defense and indemnification. At issue was the insurance policy's pollution exclusion. The issue being litigated was whether the policy was ambiguous. On appeal the insured advanced a different argument regarding ambiguity and a new legal theory related to the reasonable expectation doctrine. The Court concluded that the insured's new argument related to ambiguity was not a new legal theory, and noted that the insured's failure to raise the specific argument regarding the ambiguity of the word "pollutants" in the district court did not mean that the issue was not fully litigated. Id. at 633. The Court, however, also concluded that the insured's new argument related to the issue of the reasonable expectations doctrine, while not raised below, but would be considered in the interests of justice. The Court reasoned that "since we must decide whether to follow the majority or minority interpretation of the absolute pollution exclusion, and the "reasonable expectations" doctrine is critical to the reasoning of some jurisdictions constituting the majority view, it is in the interest of justice to consider appellants' arguments regarding "reasonable expectations." Id. at 635.

2. Summary of the comity principle.

"Where two courts have concurrent jurisdiction, the first to acquire jurisdiction generally has priority to decide the case. This rule is not intended to be rigid, mechanical, or inflexible, but should be applied in a manner serving sound judicial

administration. The first-filed rule is not truly a rule at all, but a principle, a blend of courtesy and expediency." Medtronic, Inc. v. Advanced Bionics Corp., 630 N.W.2d 438, 448-449 (Minn. App. 2001) (internal citations omitted); *See also,* Minnesota Mut. Life Ins. v. Anderson, 410 N.W.2d 80, 82 (Minn. App. 1987) (when two actions in courts of concurrent jurisdiction are substantially similar, comity requires that "the first court to acquire jurisdiction has priority in considering the case"); Orthmann v. Apple River Campground, Inc., 765 F.2d 119, 121 (8th Cir. 1985)(concluding that the comity doctrine was best served by allowing victim's action to continue in the Wisconsin federal district court since the controversy was further developed in that district); First State Ins. Co. v. Minn. Mining & Mfg. Co., 535 N.W.2d 684, 688 (Minn. App. 1995) (stating that "[i]n considering the first-filed status in conjunction with other equitable factors, Minnesota courts have long held that the [first-filed] rule recognizes the importance of comity…"). The factors to consider are "judicial economy, comity between courts, and the cost to and the convenience of the litigants; and must assess the possibility of multiple determinations of the same dispute." Medtronic, at 449. "The court should also consider judicial comity. Judicial comity is 'the respect a court of one state or jurisdiction shows to another state or jurisdiction in giving effect to the other's laws and judicial decisions.' Comity is not a formal rule but rather an informal policy of deference." Id. *quoting*, Black's Law Dictionary 262 (7th ed. 1999).

C. Discussion.

1. The interests of justice do not support the consideration of the Band's comity arguments.

The band did not raise its comity argument in its motion to dismiss, during the appeal to the Court of Appeals, or in its petition for further review and brief to this Court. And unlike the new legal theory raised in *Midwest Family*, here the interests of justice do not require consideration of the band's comity theory because it is not critical to a determination of the jurisdictional issue presented.

The argument relies, in part, upon the various cases proceeding in either the federal courts of Minnesota or the District of Columbia. The litigation pending between the parties in the Minnesota federal district court involves the band's failure to make gaming-derived rental payments to the city pursuant to the sublease.[1] The city has also commenced litigation against the United States Department of the Interior challenging the cancellation of the lease between the commission and the band.[2] The "important overlap" the band identifies as the basis for its argument involves a determination as to whether the sublease is in effect. *Brief of Appellant at pg. 47.* This argument is, in effect, a request that this Court consider an issue not raised below in the interests of justice. By arguing that the existence of the sublease is essential to the question of the district court's jurisdiction the band is attempting to rewrite the city's complaint and present the dispute as yet another edition of the gaming revenue litigation.

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[1] *See*, City of Duluth v Fond du Lac Band of Lake Superior Chippewa, 708 F.Supp.2d 890, 893-894 (D.Minn.) (April 21, 2010 order and memorandum opinion granting the city partial summary judgment and summarizing the contractual history of the parties); City of Duluth v Fond du Lac Band of Lake Superior Chippewa, 702 F. 3d 1147 (8th Cir. 2013).

[2] *See*, City of Duluth v Salazar, United States District Court, Dist. of Columbia, Case No. 1:12-cv-1116.

The issue pending here is not related to the lease, the sublease, the casino, or the gaming-derived rents established under the sublease. This dispute does not relate to any gaming activity or gaming-related activity, or ancillary business activity occurring within the casino, *i.e. the sublease space*. This dispute relates to a separate parcel of land acquired by the band in 2010, and its efforts to remove the land from the city's governmental control without the city's consent. Whether the lease or the sublease is in effect, will not impact this dispute because the band's ability to make a trust application without first obtaining the city's consent is not dependent upon the existence of the lease, the sublease, the casino, or gaming-related revenues. The band is essentially arguing that the only purpose for the commission was the development of a casino in Duluth, and without the sublease, there is no commission and no commission agreement. This argument is immaterial because the band's agreement to obtain the city's consent survives the existence of the commission. *App. A38, Article 10 ("The City of Duluth and the Fond du Lac Band agree that the provisions of this Article 10 apply whether or not the Commission is in existence.")*

This argument is also an incorrect analysis of the purpose for the creation of the commission. The existence of the Duluth-Fond du lac Economic Development Commission is not dependent on the existence of the casino, the lease, or the sublease.
The parties created a joint economic development entity and provided it with the authority to do more than operate a casino. The commission was created for much broader purposes than to simply support the operation of a casino. Because the commission was granted broader powers than acting as a casino management entity, the

city protected itself from an expansion of the band's landholdings in Duluth by requiring the band to obtain the city's consent before the band sought to remove land within Duluth from the city's governmental control.

The parties created a joint economic development entity that would create business activities of economic benefit to **both** the city and the band. While the casino was the commission's first initiative, the agreement contemplated other joint initiatives. Even today, the commission exists and may create economic activity of mutual benefit to the parties. The fact that the parties are currently at odds does not mean that they cannot resolve their differences, re-establish a productive working relationship, and utilize the commission to achieve the original vision.

The dispute over the band's trust application will not be determined in the city's suit against the band pending in the Minnesota district court because that dispute involves the sublease and the payment of rent, not Article 10 of the commission agreement. This dispute will also not be determined in the city's suit against the Department of the Interior because that suit challenges the cancellation of the lease, not the band's obligations under Article 10 of the commission agreement.

This dispute is about the fact that the band is ignoring its existing obligation under the commission agreement to receive the city's consent to the removal of land from the governmental control of the city. It is about the fact that the band has breached the commission agreement. It is about the fact that the band's actions threaten to cause harm to the economic and governmental interests of the city. It is about the fact that the band is attempting to deprive the city of a protection it negotiated for itself in good faith and in

exchange for consenting to the band's removal of the casino site from the city's governmental control.

Because resolution of the lease and sublease matters will not resolve this dispute, the interests of justice do not require this court to consider the band's comity arguments.

2. The trust application process does not support dismissal under comity principles.

The band argues that because the Secretary of the Interior is currently reviewing the application, and because the city has the future ability to challenge the Secretary's decision, comity principles apply and support dismissal here on jurisdictional grounds. The band relies on two cases for its position, but neither case is supportive.

The band argues that *Orthmann* supports the proposition that the first-filed rule does not always dictate the appropriate forum. Reliance on *Orthmann* is misplaced because the court in *Orthmann,* was considering the comity issue in the context of two suits, involving the same issues, and the same parties, but being pursued simultaneously in two federal courts. Orthmann, 765 F.2d at 121("Generally, the doctrine of federal comity permits a court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district."). In concluding that the Minnesota district court should decline jurisdiction, the court observed that the purpose of the rule was "to promote efficient use of judicial resources." Id. It concluded that the Wisconsin court best served this purpose because while the plaintiff first-filed in Minnesota, "the decision by the Seventh Circuit means that the controversy is now further developed in the Wisconsin district court." Id.

The band also cites to *Green Tree Acceptance, Inc. v Midwest Fed. Sav. & Loan Ass'n of Minneapolis, 433 N.W. 2d 140 (Minn.App. 1988).* In that case, the petitioner commenced suit in state court, the next day the defendant in the state court action commenced suit in federal court and included additional parties. The state court stayed the action pending the outcome of the federal action. Id. at 141. Because the two cases involved the same parties and the same issues, the court denied the petition for writ of mandamus. Id. at 142.

Here, the trust application process does not involve the same parties, the same issue or simultaneous litigation. The application is proceeding under *25 CFR 151.10* as an on-reservation application because the Carter Hotel is contiguous to the casino. *App.A186-187 & 203.* The off-reservation process applies "when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated." *25 CFR 151.11.* The factors that must be considered under *25 CFR 151.10* do not include whether the band breached its contract and are less rigorous than the factors considered for an off-reservation process. Not only is the factor of concurrent litigation lacking, the issues are not the same. The city is not simply seeking to stop the band from continuing with its application by obtaining injunctive relief, it is also seeking a permanent injunction requiring the band to obtain the city's consent to any future trust applications involving land within the city's jurisdiction. *See, Amended Complaint, ¶38.* The existence of the decision making process under federal regulations does not provide support for the application of comity to deprive the city of its right to litigate in a forum it has the right to select.

CONCLUSION

Respondent City of Duluth respectfully requests that the Court affirm the decision of the court of appeals and remand this matter to the district court.

Respectfully submitted,

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and

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CERTIFICATE OF WORD COUNT COMPLIANCE

The undersigned states that she prepared the foregoing brief using Microsoft Word 2010 format and that the foregoing brief complies with Minn. R. Civ. App. P. 132.01, in that, apart from this certificate and the table of contents and authorities, the foregoing brief contains 8,597 words.

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