UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF DULUTH, *Plaintiff*, vs. The NATIONAL INDIAN GAMING COMMISSION and JONODEV CHAUDHURI, in his official capacity as Acting Chairman of the National Indian Gaming Commission *Defendants*.	)	Civil Case No. **13-246 (CKK)**

PLAINTIFF'S MEMORANDUM OF LAW SUPPORTING ITS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The history of this gaming dispute begins in the 1980's, before the passage of the Indian Gaming Regulatory Act (herein the "IGRA"). *25 U.S.C.S. §2701, et.seq.* The issue for the court's resolution involves the July 12, 2011 decision (NOV) of the National Indian Gaming Commission ("NIGC"). The NOV has caused the destruction of a 20 year contractual relationship between the City of Duluth ("City") and the Fond du Lac Band of Lake Superior Chippewa ("Band"), and has interfered with the pending litigation between the City and the Band venued in the United States District Court of Minnesota. *See, City of Duluth v Fond du Lac Band of Lake Superior Chippewa, U.S. Dist. Court, D. Minn. File No. 09-cv-2668(SRN/LIB).*[1]

[1] Various decisions in that litigation include the following: City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, 702 F.3d 1147 (8th Cir. 2013)(affirming in part, and reversing in part order on Band's Rule 60(b) motion); City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, 977 F. Supp. 2d 944 (D. Minn. 2013)(order on remand denying

The City brings this action under 5 U.S.C.S. §§702, 704 and 25 U.S.C.S. §2714 on the following grounds:

1. The NIGC previously reviewed the 1986 and 1994 agreements between the City and the Band under its limited review authority and approved the 1994 agreements. The NIGC exceeded its authority by conducting a second review of the agreements and by retroactively reversing its prior decision.

2. The NIGC exceeded its authority by reviewing the 1994 agreements, which are not management, contract or collateral agreements to a management contract.

3. The NIGC acted in an arbitrary and capricious manner because its decision in not a product of the consistent application of a clearly articulated standard.

The City seeks entry of an Order reversing the decision of the NIGC, and ordering the NIGC to reinstate its 1994 approval of the 1994 Agreements.

II. TABLE OF AUTHORITIES

CASES

Band's Rule 60(b)(6) motion); City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, 708 F. Supp. 2d 890 (D. Minn. 2010)(order granting City partial summary judgment); City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, No. 09-2668, 2010 U.S. Dist. LEXIS 101144, 2010 WL 3861371 (D. Minn. July 12, 2010).

STATUTES, RULE AND REGULATIONS

OTHER AUTHORITIES

III. STATEMENT OF UNDISPUTED MATERIAL FACTS

In 1984 the City and the Band joined forces to explore the creation of a gaming casino within the boundaries of the city of Duluth ("Duluth") and to create a joint economic development entity. At that time, the Band did not have reservation lands in Duluth; instead, it was operating a bingo parlor on its rural Reservation located west of Cloquet, Minnesota.[2] This initiative resulted in the approval by the Secretary of the Interior (herein "Interior") of a series of agreement known as the 1986 Agreements. The following is a concise statement of the undisputed material facts:

A. The 1986 Agreements.

1. The 1986 Agreements created the legal framework for a government-to-government economic development partnership between the City and the Band. [AR217-228 excerpts[3]], [AR3328-3357], [AR231-235 excerpts[4]].

2. The first joint initiative was the development of a casino in the heart of Duluth's downtown district, which is the center of Duluth's tourist activity. [AR-559-562; 195-214].[5]

3. The Development Agreement acknowledged that the City and the Band had created an entity called the Duluth-Fond du Lac Economic Development Commission

[2] Cloquet, Minnesota is located 22 miles to the southwest of Duluth.
[3] A complete version of the Commission Agreement is found at AR 988-1058.
[4] A complete version of the Business Lease is found at AR 1069-1111.
[5] Decision published at City of Duluth v Fond du Lac Band of Lake Superior Chippewa, 708 F.Supp.2d 890, 893-894 (D.Minn. 2010).

("Commission") and that the initial activity to be undertaken by the Commission was the development of a bingo and/or gaming operation within Duluth. [AR 3323].

4. The Band agreed to acquire and remodel a building for the gaming operation. [AR 3329].

5. The City agreed to acquire land, redevelop a parking ramp, and lease the ramp to the Commission on a non-exclusive basis. [AR 3332 & 3338].

6. The City exercised its eminent domain to construct a public parking ramp. *See*, Duluth v. Alexander, 404 N.W.2d 24 (Minn.App. 1987).

7. On May 23, 1985, the Band petitioned the Secretary of the Interior to accept the casino parcel into trust pursuant to 25 U.S.C.S. §§465 & 467 and the reservation proclamation was approved effective January 7, 1986. [AR- 3403-3404).

8. On February 6, 1986, the Department of the Interior issued a policy statement indicating that it would deny requests of take off-reservation lands into trust status for the purpose of establishing gaming enterprises. [AR 11-12.]

9. The Band agreed to create a development Commission as a political subdivision of the Band, and delegate to it substantial governmental powers. [AR 222]

10. The Band created the Commission. [AR 223].

11. The Commission was empowered to operate business activities on "Indian Country" within Duluth. [AR 224].

12. The business activities that the Commission was empowered to engage in included, but was not limited to, a bingo and/or gaming operation. [AR 224 ¶d].

13. The parties agreed that the proceeds from the gaming operation would be split as follows: the Band (25.5%), the City (24.5%), and the Commission (50%). [AR 1020]

14. The Commission was also empowered to engage in joint economic development activities with the [Band] and/or the [City]. [Id. at ¶f.]

15. The City agreed not to enter into a similar agreement with "any other Indian Government for the conduct of activities the same as or similar to those to be conducted by the Commission within a radius of 250 miles of the City Hall." [AR 228 ¶ b]

16. The City granted to the Band exclusive gaming rights in Duluth as against any other Indian Government that was located within 250 miles of Duluth. [Id.]

17. The Band leased to the Commission the parcel the Band had purchased for the purpose of developing the casino. [AR235].

18. The lease term was 25 years with a right to renew for one additional term of 25 years. Id.

19. The Interior approved the agreements and the casino opened for business. [AR562].

B. The IGRA, the Amendment of the 1986 Agreements, the Approval and Endorsement of the NIGC.

20. Following enactment of the IGRA the legality of the casino operation came into question and the Band commenced suit. [AR 686-701]; *see also,* Fond du Lac Band of Lake Superior Chippewa Indians v City of Duluth and Duluth-Fond Du Lac Economic Development Commission, U.S. Dist. Ct. Minn. Civ. No. 5-89-0163 ("Fond du Lac I").

21. The parties received a letter dated November 2, 1990, from the Assistant Secretary of Indian Affairs, which was sent in response to the Band's request for a review of the 1986 Agreements. [AR274-277].

22. The Assistant Secretary provided the parties with the opinion of the Associate Solicitor of Indian Affairs in which the solicitor advised the parties that he was of the opinion

that the agreements constituted a joint venture that violated the sole proprietary interest requirement of the IGRA and, therefore, the Commission Agreement, to the extent it related to gaming conducted at the casino, violated the IGRA. [AR274-277].

23. On December 26, 1990, the U.S. District Court for Minnesota issued its decision on the parties' cross-motions for summary judgment. [AR 101].

23a. The court granted defendant's motion and dismissed the action without prejudice. In his memorandum Judge Paul A. Magnuson explained his decision, in part, as follows:

> "The court finds that a declaratory judgment will not clarify or settle the legal relations between the parties, nor will it terminate the present controversy. The IGRA provides that all collateral agreements to ordinances adopted prior to October 17, 1988, are valid unless disapproved under §2712. A declaration that the agreements violate the IGRA or the tribal ordinance will confuse and unsettle the legal relations between the parties. Furthermore, a declaratory judgment will not terminate the controversy because the Chairman retains the ability to review the agreements with the Secretary appoints the two associate members to the Commission. The court concludes that a declaratory judgment is, therefore, inappropriate."

[Id].

24. With regard to the Band's motion for preliminary injunction, the court denied the motion and explained his decision as follows:

> "The court determines that the public interest is best served by allowing the Federal regulatory authority established by the IGRA to review the gaming operation and make its recommendations. The court concludes that an injunction against the City and the Fond du Lac Economic Commission from participating in activities pursuant to the City-Band agreements is inappropriate."

[AR 102].

25. The NIGC conducted a review of the 1986 Agreements. [AR285].

26. In a letter dated September 24, 1993, Anthony J. Hope, Chairman of the NIGC advised the parties as follows: "we have concluded that the current operation of the casino violates the [IGRA]. [AR285].

27. Chairman Hope also encouraged the parties to attempt to settle the issue as follows: "I urge the parties to begin an immediate effort to reach an agreement to resolve this matter. Toward that end, we will make NIGC staff and technical resources available to the parties. In addition, I am available to coordinate settlement negotiations, including the chairing of a settlement conference, if such a role would be considered helpful by the parties." [AR 286].

28. The parties worked with the NIGC to amend the agreements and obtain the approval of the NIGC. [AR 563; 573].

29. The negotiations were extensive. [AR 325; 573].

30. All parties were represented by excellent legal advisors. [AR 574].

31. The NIGC advised the City and the Band that "**this agreement returns full ownership and control of the Fond du Luth Casino to the Band and is consistent with the requirements of the IGRA**." [AR 325].

32. The Band commenced a second lawsuit against the City in the U.S. District Court of Minnesota. [AR 738]; Fond du Lac Band of Lake Superior Chippewa Indians v City of Duluth, U.S. Dist. Ct. (D.Minn.) Civ. No. 5-94-82 ("Fond du Lac II").

33. In a letter dated June 20, 1994, NIGC chairman Anthony Hope wrote to Judge Magnuson and provided the court with the NIGC's report and recommendation. [AR 327-328].

34. Chairman Hope advised the court as follows:

> "[p]ursuant to your December 25, 1990, Order, I am writing to report that the settlement agreement recently concluded between the Fond Du Lac (*sic)* Band and the City of DuLuth (*sic)* returns ownership and control of the Fond DuLuth Casino to the Band and is fully consistent with the IGRA. Accordingly, I recommend that this settlement agreement be approved."

[AR328].

35. In reliance upon the NIGC's favorable report and recommendation to the court, the City and the Band presented to the court its Stipulation and Consent Order dated June 22, 1994. [AR740].

36. In the stipulation, the parties advised the court that the NIGC had "convened discussions between the Band and the City to restructure the arrangement in order to bring it into compliance with the Act." [AR740].

37. The parties further advised the court that the new arrangement was set forth in an agreement entitled "Agreement Between the City…and the …Band…Relating to the Modification and Abrogation of Certain Prior Agreements." ("Umbrella Agreement"). Id.

38. This agreement was attached to the stipulation and included eight additional agreements, referred to as "Exhibits", which were also attached to the stipulation. Id.

39. The parties referred to the collection of agreements as the "the 1994 Agreements." [AR 741].

40. The parties expressly incorporated the 1994 Agreements into the stipulation. [AR 742, ¶10]

41. The parties also stipulated that "the 1994 Agreements restructure the gaming operation on the Band's tribal trust land in the City so that the Band has the sole proprietary interest in the gaming operation." Id., at ¶ 7.

42. The court approved the stipulation, dismissed the complaint with prejudice, and retained jurisdiction over the matter for the purpose of ensuring the obligations of the parties to comply with the 1994 Agreements. [AR 284].

43. The parties removed the Commission from all prior management or operation authority of the gaming operations and ancillary businesses occurring at the casino by the following methods:

43a. Section 1: The Commission subleased the premises to the Band and assigned to the Band all gaming rights. [AR 2937].

43b. The Band agreed to pay rent to the Commission plus a percentage of gross revenues from video games of chance. The percentage payment was assigned to the City. [AR 2937].

43c. The assets of the Commission were distributed between the Band and the City. [AR 2938].

43d. The Commission was removed from any authority relating to the operation of gaming or ancillary businesses at the "Premises" [the casino], and the Commission Agreement was rendered dormant, and of no force or effect on any matter relating to or arising from gaming or the Ancillary Businesses at the Premises. Id.

43e. The parking ramp lease between the City (lessor) and the Commission (lessee) was cancelled and the City retained sole ownership of the ramp. Id.

43f. The City assumed all financial liability for the parking ramp and cancelled the Band's and the Commission's guarantees. Id.

44. The Umbrella Agreement and its exhibits were also approved by the Secretary of the Interior by the Acting Area Director. [AR 1136]

45. The Tribal-City Accord provided for standards by which the Band would manage and operate all businesses and gaming activities at the sublease space. The Accord was approved by the Secretary. [AR 1239]

46. The Sublease and assignment of Gaming Rights Agreement provided for the Band's sublease of the premises from the Commission. [AR 1146, Section 3.1].

46a. It was made retroactive to September 30, 1993. Id.

46b. The initial term expired on March 31, 2011, but was extended for an additional term of 25 years by the Commission and thus expired on March 31, 2036. [AR 1147].

46c. The Band was granted the ownership, and right to operate, regulate and control all bingo, gaming and ancillary business on the premises. Id.,

46d. All equipment and property on the Premises became the property of the Band. Id.,

46e. The Band consented to the assignment of rent from the sublease to the City. Id.,

46f. The Commission assigned all right to conduct gaming activities, to the extent it had such rights, to the Band. [AR1148, Section 3.9].

46g. The rent was 19% of the gross revenues from video games of chance. [AR 1149, Section 4.2.2.2.]

46h. The parties agreed to renegotiate the rent for the extension term of the agreement beginning on April 1, 2011. [AR1151, Section 4.2.2.5]

46i. The parties agreed that if an agreement was not reached by June 30, 2010, the parties could request mediation by the chairman of the NIGC or, in the alternative, the parties would submit the dispute to binding arbitration. Id.

46j. The Sublease and Assignment of Gaming Rights was approved by the Secretary. [AR 1159].

47. Over the next 15 years the Band managed and operated the casino in accordance with the 1994 Agreements.

47a. The administrative record contains no reports of violations of the agreements or any other NIGC action related to the 1994 Agreements.

C. The Band's Breach, the Initiation of Litigation, Partial Summary Judgment for the City on Liability, and the NOV.

48. In a letter dated January 28, 2009, the Band informed the City that its auditors had advised the Band that the Fond du Luth Casino had been incorrectly treating certain promotional expenditures as operating expenses rather than as "contra-revenues," i.e., offsets against revenue. [AR 1352].

48a. The Band concluded that the City had been overpaid by $561,047.59 since 1994 and advised the City that it intended to recoup all alleged overpayments made over the intervening 14 years by applying and offset of $561,047.59 against future payments to the City. [AR 1352].

48b. The Band did not claim that the 1994 Agreements were invalid. Id.

48c. On January 30, 2009, the Band advised the City that it had withheld the claimed 14 years of overpayment from the 2008 fourth quarter payment. [AR1356].

49. The City responded in a letter dated May 12, 2009.

49a. In the letter, the City presented its analysis of the Band's accounting position and requested the return of the $561,047.59 withheld by the Band. [AR1358-1360]

50. In a letter dated August 6, 2009, the Band sent the City a resolution that had been passed by the Band's Business Committee, announcing that the Band was ceasing all payments to the City under the 1994 Agreements. [AR1366-1365].

50a. In the resolution the Band admitted that the City did not have a proprietary interest in the Fond du Luth Casino. Id.

50b. The Band claimed that the Reservation Business Committee's fiduciary duty to the Band required the termination of all payment to the City. Id.

50c. The Band did not otherwise announce the intent to terminate the 1994 Agreements. Id.

51. The City commenced suit in the United States District Court-District of Minnesota on September 29, 2009. [AR646-658]; *see also,* City of Duluth v Fond du Lac Band of Lake Superior Chippewa, U.S. Dist. Court, D. Minn., Civ. No. 09-2668 (ADM/RLE).

52. On April 21, 2010 Judge Ann D. Montgomery issued her Order and Memorandum granting in part, and denying in part the City's motion for summary judgment. [AR-620-639]; *see also,* 708 F.Supp. 890 (D.Minn. 2010).

52a. In her memorandum, Judge Montgomery rejected the Band's change in law defense. Id. 708 F.Supp. at 900-901.

52b. The court concluded that the accounting dispute involved questions of fact that could not be resolved by summary judgment. Id. at 902.

53. On April 27, 2010, the court issued a Settlement Conference Order and scheduled a conference for June 1, 2010. [AR666-667]; *see also,* City of Duluth v Fond du Lac Band, Civ. No. 09-2668, Doc. No. 74.

54. On April 30, 2010, the Band's legal counsel wrote to the City's legal counsel suggesting that the parties meet to discuss settlement prior to the June 1 settlement conference. [AR668].

55. Before the City responded to this request, the Band also wrote to the NIGC on May 17, 2010. [AR616-619].

55a. The May 17, 2010 letter is the first evidence of NIGC contact with the City or the Band in the administrative record produced by the NIGC since Chairman Hope's June 20, 1994 Report and Recommendation to Judge Magnuson.

55b. In the letter Chairwoman Diver indicated the Band's intent to comply with Judge Montgomery's order. [AR617].

55c. The Band requested the assistance of the NIGC in mediating the dispute between the Band and the City. [AR619].

56. On May 17, 2010, the Band filed a motion for a continuance of the matter pending before the District Court. [AR3224-3226].

56a. In its motion the Band asserted that a continuance was warranted in order to obtain NIGC mediation and avoid an enforcement action. Id.

57. In a letter dated May 20, 2010, the City responded to the Band's request for settlement discussions. [AR669].

57a. The City indicated that since a settlement conference had already been scheduled by the court and since the parties were already preparing for that conference, the City would participate in the conference scheduled by the court. Id.

58. The City also wrote to the NIGC and advised the commission that the City was willing to participate in any mediation facilitated by the NIGC. [AR664-665].

58a. The City also noted that the scope of the NIGC's mediation authority was limited to the payments that would be due under the second term of the sublease. Id.

59. In a letter dated June 28, 2010, John R. Hay, Senior Attorney to the NIGC responded the Chairwoman Diver's May 17, 2010 letter. [AR2219].

59a. Hay advised that he had been assigned to handle the mediation. Id.

59b. Hay also reminded the parties that under the terms of the 1994 Agreements the NIGC had until midnight of October 1, 2010 to assist the parties in reaching agreement. Id.

59c. Hay then scheduled a conference call for July 12, 2010 to set a schedule for the mediation. [AR2219].

60. Following the call, on July 16, 2010, Hay issued a mediation schedule which set the mediation to occur in Washington D.C. on August 25-26, 2010. [AR2207].

61. In a letter dated August 13, 2010 Tracie L. Stevens, NIGC Chairwoman, advised the parties the parties as follows:

> "Based on a review of the opening statements provided by both parties, it does not appear that mediation is likely to be productive. Rather, binding arbitration appears to be the most appropriate and efficient mechanism given that the only issue to be decided under the Sublease is the appropriate percentage of gross revenue to be paid by the Tribe to the City from April 1, 2011 to March 31, 2036.
>
> I do not arrive at this decision lightly or without concern for the continued relationship between the parties. It is my sincere hope that the Band and City come to a suitable agreement."

[AR673-672].

61a. Stevens' letter did not indicate in any fashion that the NIGC would initiate a review of the 1994 Agreements. Id.

62. In response to Stevens' letter, the City filed a letter with the Minnesota District Court on August 13, 2010 to update the court on the matter. [AR1848].

63. At that time, the Band had asserted a motion for continuance based on the pending mediation before the NIGC. Id.

64. Magistrate Judge Erickson, in a report and recommendation dated July 12, 2010, recommended denial of the motion.

65. The Band had filed an objection to the recommendation. Id.

66. The City advised the court that given that the NIGC had declined to mediate, that the Band's objections were moot. Id.

67. On August 16, 2010, the Band filed a letter with the Minnesota District Court in response to the City's August 13 filing in which the Band stated that it did not believe its request for continuance was moot because it had now made a formal request to the NIGC to review the entirety of the 1994 Agreements. [AR673; 1824-1827]

68. On August 25, 2010, NIGC staff exchanged e-mail with the Band's attorneys arranging for an August 26th conference call "for a preliminary lawyer discussion of the Fond Du Lac Band's August 16, 2010 letter to Chairwoman Stevens." [AR1805-1806].

69. The City's legal representatives were not invited to participate in the "preliminary lawyer discussion". Id.

70. The administrative record does not contain the information exchanged during this "preliminary lawyer discussion".

71. The administrative record does not contain any evidence that the City was informed that the NIGC was engaging in the *ex parte* "preliminary lawyer discussion".

72. The City, unaware of the *ex parte* communications occurring between the NIGC and the Band regarding agreements to which the City was a party, continued to proceed pursuant to the terms of the 1994 Agreements. [AR1801-1802].

73. In a letter dated August 27, 2010, the City presented its formal demand for arbitration to the Band. Id.

74. On August 31, 2010, the Band informed the NIGC of the City's demand for arbitration. [AR1691-1692].

74a. The Band advised the NIGC that its response to the City's demand was due on September 16, 2010. Id.

74b. The Band also advised the NIGC that "this underscores that time is of the essence in learning whether the NIGC will accept these agreements for review. As we have discussed, proceeding any further with either the litigation or the arbitration is extremely undersirable without first obtaining NIGC evaluation of the legality of the 1994 Agreements. We have not yet heard whether the Court will continue the litigation…" [AR1691-1692].

74c. The administrative record provides no evidence that the City was ever informed of this *ex parte* communication.

75. In a letter dated September 2, 2010 and delivered via facsimile, the City responded to Stevens' August 13, 2010 letter. [AR1679-1681].

75a. The City also advised the Chairwoman that the City had demanded arbitration and requested that the NIGC decline the Band's request for further review. Id.

75b. The Band's legal counsel was copied on this correspondence. Id.

76. On September 24, 2010 Judge Montgomery issued her Memorandum Opinion and Order denying the Band's motion for continuance. [AR842-846].

76a. In her order, Judge Montgomery described the alleged threat of an NIGC enforcement action as "entirely speculative." Id.

76b. Judge Montgomery further observed that "none of the NIGC's actions cited by the Band squarely address the IGRA issue presented by the 1994 Agreement—namely the limits, in light of the sole proprietor requirement, on revenue contributions to a municipality. In fact, the acts by the NIGC that the Band claims cast doubt on the validity of the 1994 Agreements are between two and seven years old. In that time, the NIGC has declined to commence an

enforcement action against the parties here. There is no evidence to believe that the NIGC would depart from its course of several years and commence an enforcement action now." Id.

77. In yet another *ex parte* communication to the NIGC, on September 30, 2010, Chairwoman Diver send via facsimile a letter to Chairwoman Stevens requesting a meeting with Stevens and NIGC staff to discuss the Band's request for review. [AR1626-1627].

77a. Diver advised Stevens that "the Band and the City of Duluth are involved in ongoing litigation in federal district court concerning the 1994 Agreements….The Minnesota federal district court issued an order September 24, 2010 denying the Band's motion to continued the case pending review by the NIGC….This is an urgent matter for the Band." [AR1627]

77b. In an exchange of e-mail between NIGC staff and the Band's legal counsel, the Band provided the NIGC with a copy of the court's September 24th order and a meeting was scheduled for the following week. [AR1623].

78. The administrative record contains no evidence that the City was invited to attend this meeting.

79. The meeting occurred on October 5, 2010. [AR1622].

79a. The participants included Fond du Lac Band Chairwoman Karen Diver, Attorney Henry Buffalo, NIGC Senior Attorney John Hay, Counselor to Stevens Larry Echo Hawk, NIGC General Counsel Larry Roberts, NIGC Chief of Staff Paxton Myers, and NIGC Chairwoman Tracie Stevens. [AR 1622].

79b. The administrative record is devoid of evidence revealing the information exchanged during this meeting.

80. Following the October 5, 2010 meeting, NIGC Chairwoman Stevens, in a letter dated October 20, 2010, advised the Band and the City that she had directed the Enforcement Division and the Office of General Counsel to review the agreements between the City and the Band. [AR614-615].

80a. She also requested that the parties file briefing to the NIGC by November 19, 2010. Id.

81. The City submitted its briefing on November 19, 2010. [AR554; 556-595 (extensive exhibits contained in the administrative record but not cited here)].

82. While the NIGC conducted its internal review the Band once again sought a stay of the ongoing proceedings pending before the Minnesota District Court. [AR108-111].

82a. On February 22, 2011, the court issued its order denying the motion. Id.

83. In a letter dated March 2, 2011 and addressed to John Hay, the City advised the NIGC that on February 7, 2011 it had received a copy of the Band's *ex parte* letter of September 16, 2010 to the NIGC. [AR92-96].

83a. The City then presented its response to the Band's arguments presented its letter. Id.

83b. The Band's attorney was copied on the letter. Id.

84. The arbitration process moved forward and, on May 4, 2011, the arbitration panel issued its Preliminary Hearing Scheduling Order in which it established a commencement date for the arbitration hearing of July 11, 2011. [AR52-54].

85. On July 12, 2011, while the arbitration was proceeding, the NIGC issued its Notice of Violation ("NOV-11-02"). [AR33-52].

86. In response to NOV-11-02 the Band's business committee, in a special meeting held on July 19, 2011, approved Resolution #1242/11 in which the committee resolved to cease all activities under the 1994 Agreements and directed its officers and officials to comply with the NOV. [AR6-8].

87. On July 21, 2011, the City filed with the NIGC its Petition to Intervene pursuant to 25 C.F.R. §577.12. [AR25].

88. On August 15, 2011, the NIGC denied the City's Petition. [AR1].

89. The Band subsequently moved the Minnesota District Court for relief from the consent decree pursuant to Rule 60(b), Fed. R. Civ. P. *See*, City of Duluth v Fond du Lac Band, 830 F. Supp. 2d 712 (D.Minn. 2011)(denying in part, and granting in part Defendant's motion for relief under Rule 60(b); on appeal at 702 F.3d 1147 (8th Cir. 2013)(affirming in part, and reversing in part and remanding); on remand at 977 F. Supp. 2d 944 (D. Minn. 2013)(denying the Band's renewed motion for Rule 60(b)(6)).[6]

ARGUMENT

A. Legal Standards.

1. APA Review Standard

"[I]n APA review cases, whether agency action was contrary to law is a legal issue that a Court resolves on the basis of the administrative record." Coalition for Parity v. Sebelius, 709 F. Supp. 2d 10, 16-17 (D.D.C. 2010), *citing,* Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Serv., 416 F. Supp. 2d 92, 97 (D.D.C. 2006). "Where there are no disputed facts and review is based solely on the administrative record, summary judgment is appropriate

[6] The Band's appeal of the October 8, 2013 Order is currently pending before the 8th Circuit as Appeal No. 13-3408. The matter awaits scheduling for oral argument.

for the party entitled to judgment as a matter of law. Id., *citing*, Young v. Gen. Servs. Admin., 99 F. Supp. 2d 59, 65 (D.D.C.), aff'd, 11 F. App'x 3 (D.C. Cir. 2000).

2. The NIGC's NOV is not Entitled to Deference under Chevron.

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-843 (U.S. 1984). "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Id. at 843, n.9. "If the statute is silent or ambiguous 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." Id. at 843; *see also*, Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997) (holding that, when agency is interpreting its own regulation, interpretation is "controlling unless plainly erroneous or inconsistent with the regulation"). A court is empowered to overturn an agency interpretation when the interpretation conflicts with the plain meaning of a statute, Id. at 842-43, when the interpretation is an unreasonable construction of an ambiguous statute, Id. at 844-45, or when an agency acted arbitrarily or capriciously in adopting its interpretation. Id. at 844; 5 U.S.C.S. § 706; *see also*, San Luis Obispo Mothers for Peace v. United States NRC, 789 F.2d 26, 30 (D.C. Cir. 1986) ("courts are not at liberty to set aside an agency's interpretation of its own regulations unless that interpretation is plainly inconsistent with the language of the regulations.") *citing*, United States v. Larionoff, 431 U.S. 864, 872-73, 53 L. Ed. 2d 48, 97 S. Ct. 2150 (1977).

While agency interpretations of the statutes they administer receive deference, "interpretation contained in an opinion letter…..like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant Chevron-style deference." Christensen v. Harris County, 529 U.S. 576, 587, 120 S. Ct. 1655 (2000). They "are 'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'" Id., *quoting,* Skidmore v. Swift, 323 U.S. 134, 140, 65 S. Ct. 161(1944); *see e.g.*, Catskill Development, LLC v Park Place Entertainment Corp., 547 F.3d 115, 127 (2nd Cir. 2008) ("Because this position was set forth in an opinion letter and has not been promulgated by an NIGC regulation, this Court owes it only the limited deference set forth in Skidmore v Swift & Co. ******; First American Kickapoo Operations, LLC v Multimedia Games, Inc., 412 F.3d 1166, 1174 (10th Cir.2005) ("The informal pronouncements of an agency, which are not subject to agency rule-making procedures, do not warrant Chevron deference."); NGV Gaming, Ltd. V. Upstream Point Molate, LLC, 355 F.Supp.2d 1061, 1065 (N.D. Cal. 2005) (concluding that "an advisory opinion of the NIGC's General Counsel ***has no legal effect because it is not a final decision of the agency.").

Here, because the NIGC's sole proprietary interest analysis is not the product of the application of clear statute or promulgated regulation, it is not entitled to Chevron deference. It is entitled only to Skidmore deference and here, because it is not persuasive, it should be rejected.

B. Legal Standards.

1. The NIGC Chairwomen did not have Statutory Authority to Review the 1994 Agreements.

The question to be answered is whether the IGRA, 25 U.S.C. §§ 2701-2721, grants to the chairperson of the NIGC the authority to invalidate agreements that have been previously

reviewed and approved where there has been no amendments to the approved agreements and no changes to the statutory or regulatory law. Because Congress did not grant to the chairperson the authority to engage in the retroactive review conducted in this case, the answer to this question is "no".

In Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n, 466 F.3d 134 (D.C. Cir. 2006), the court discussed the purposes for which the NIGC was created. It concluded that "Congress enacted the [IGRA] in the wake of the Supreme Court's decision that state gaming laws could not be enforced on Indian reservations within states otherwise permitting gaming ***. The Act established the Commission as an agency within the Department of the Interior. 25 U.S.C.S. § 2704(a). The Commission has the authority to investigate and audit certain types of Indian gaming, to enforce the collection of civil fines, and to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions" of the Act. § 2706." Id. at 135 (internal citation omitted) *citing*, Cabazon Band of Mission Indians v. Nat'l Indian Gaming Comm'n, 14 F.3d 633, 634 (D.C. Cir. 1994). The NIGC chairperson is authorized to "…(3) approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 11 [25 U.S.C.S. § 2710]; and (4) approve management contracts for class II gaming and class III gaming as provided in sections 11(d)(9) and 12 [25 USCS §§ 2710(d)(9) and 2711]. §2705(a)." The chair's authority to void or terminate agreements is limited to management contracts and collateral agreements and may only do so after notice and hearing. 25 U.S.C.S. § 2711(f). ("Modification or voiding. The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.").

The NIGC has defined the term "management contract" as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation." 25 CFR § 502.15. The term "collateral agreement" is defined as "any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)." 25 CFR § 502.5.

In the NOV the chairwoman conceded that the "IGRA limits the Chair authority to approval of tribal gaming ordinances and management contracts. *See* 25 U.S.C. §§ 2710(e) and 2711(b). Thus, the 1994 Agreements fall outside of any review under IGRA because they are not an ordinance or management contract." [AR43]. Despite her acknowledgement that the 1994 Agreements did not come within her review authority, she still conducted a review and concluded that: "Based on a thorough review of the parties' submissions and the 1994 Agreements, I concluded that the 1994 Agreements, as written and as implemented, violate IGRA's mandate that the Band retain the sole proprietary interest in and responsibility for its gaming activity." [AR39, Summary of Violation].

"The APA requires the reviewing court to set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Muwekma Ohlone Tribe v. Salazar, 813 F. Supp. 2d 170, 189 (D.D.C. 2011); 5 U.S.C.S. § 706(2)(A); *see also,* Nebraska ex rel. Bruning v. United States DOI, 625 F.3d 501 (8th Cir. Iowa 2010) (NIGC abused its discretion when it exceeded the statutory authority granted to it.). It also requires reversal if the action is "in excess of statutory jurisdiction, authority, or limitations, or short of

statutory right..." 5 USCS § 706(2)(C). The NOV was not in accordance with the law because the NIGC chair exceeded her statutory authority by its issuance since she had no authority to review the 1994 Agreements which were neither an ordinance, a management contract, or a collateral agreement to a management contract.

2. The NIGC Chairwoman did not have the Authority to Issue a Retroactive Action Under Section 2712.

Congress did not grant the NIGC or its chair the authority to engage in the type retroactive enforcement at issue here. The NIGC chair applied recent advisory opinions related to review of management agreements for compliance with the "sole proprietary interest mandate of §2710(b)(2)(A) to the 1994 Agreements. The review was conducted despite the fact that the 1994 Agreements were previously reviewed and approved by the NIGC chairman on June 16, 1994 [AR325], and despite the fact that the agreements were endorsed by the chair to the Minnesota District Court as "fully consistent with the IGRA" on June 20, 1994. [AR328]. The review was conducted despite the fact that the NIGC has not promulgated a regulation defining the term "sole proprietary interest." Retroactive action that destroys legitimate contract backed expectations that were previously expressly approved, and which is taken in excess of statutory authority, arbitrary and capricious action that must be reversed. 5 U.S.C.S. §706(2)(C).

In Bowen v. Georgetown University Hospital, 488 U.S. 204, 109 S.Ct. 204 (1988), the Supreme Court held that an administrative agency's power to promulgate regulations is limited to the authority delegated by Congress, saying further: "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." Id. at 208. "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority

will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." Id. at 208. "'The power to require readjustments for the past is drastic. It…ought not to be extended so as to permit unreasonably harsh action without very plain words.'" Id., *quoting,* Brimstone R.Co. v. United States, 276 U.S. 104, 122(1928). "Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." Id. at 208-209; *see also,* Catholic Health Initiatives Iowa Corp. v. Sebelius, 718 F.3d 914 (D.C. Cir. 2013) ("[i]t is well settled that an agency may not promulgate a retroactive rule absent express congressional authorization." Id. at 920, *citing* Bowen).

Congress did not expressly grant to the NIGC retroactive rule-making authority. Section 2706 delineates the powers of the NIGC. *25 U.S.C.S. § 2706.* Section 2706(b)(10) authorizes the promulgation of rules and guidelines appropriate to implement the provisions of IGRA, but does not suggest that such rules or guidelines can be applied retroactively. Nowhere in Section 2706 is retroactive application of NIGC rulings or regulations authorized at all, much less "expressly authorized."

That Congress did not authorize or intend to authorize retroactive action by the NIGC is clear from Section 2712, which deals with the review of ordinances, management contracts, and collateral agreements that predated the enactment of IGRA. Section 2712(a) directs the NIGC as follows:

> §2712. Review of existing ordinances and contracts
>
> (a) Notification to submit. As soon as practicable after the organization of the Commission, the Chairman shall notify each Indian tribe or management contractor who, prior to the enactment of this Act [enacted Oct. 17, 1988], adopted an ordinance or resolution authorizing class II gaming or class III gaming or entered into a management contract, that such ordinance, resolution, or contract, including all collateral agreements relating to the gaming activity, must

> be submitted for his review within 60 days of such notification. Any activity conducted under such ordinance, resolution, contract, or agreement shall be valid under this Act, or any amendment made by this Act, unless disapproved under this section.

25 U.S.C.S. §2712(a).

Section 2712 further provides that if the NIGC finds that an ordinance or resolution predating IGRA does not comply with IGRA, Congress directed the NIGC to "provide written notification of necessary modifications to the Indian tribe which shall have not more than 120 days to bring such ordinance or resolution into compliance." 25 U.S.C.S. §2712(b)(3).

If the NIGC finds that a management contract or collateral agreement predating IGRA is out of compliance, Congress directed the NIGC to "provide written notification to the parties to such contract of necessary modifications and the parties shall have not more than 120 days to come into compliance. If a management contract has been approved by the Secretary prior to the date of enactment of this Act [enacted Oct. 17, 1988], the parties shall have not more than 180 days after notification of necessary modifications to come into compliance." 25 U.S.C.S. §2712(c)(3).

"When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." Christensen v. Harris County, 529 U.S. 576, 583 (U.S. 2000), *quoting*, Raleigh & Gaston R. Co. v. Reid, 80 U.S. 269, 13 Wall. 269, 270, 20 L. Ed. 570 (1872). Here, where Congress intended to grant the NIGC retroactive authority, it did so expressly. Section 2712 specifically prohibits retroactive application of the results of such review by providing for the validity of conduct under the ordinance or agreement prior to the review, by providing for the timing within which such ordinances are to be submitted to the commission for review and by further saying, "Any activity conducted under such ordinance, resolution, contract, or agreement shall be valid under this chapter, or any amendment made by this chapter, unless disapproved

under this section." 25 U.S.C.S. § 2712(a). By Section 2712 Congress expressed the limits of the NIGC's retroactive authority and necessarily imposed a prohibition against any other retroactive agency action. Thus, by engaging in retroactive enforcement action with regard to the 1994 Agreements, the NIGC chair exceeded the limits of her retroactive authority.

Whether the 1986 Agreements were subject to review under Section 2712 was discussed by the Minnesota District Court in its December 26, 1990 Memorandum and Order. [AR710-716]. The court held that declaratory judgment would not clarify or settle the matter or terminate the controversy. [AR714]. The court also recognized that "[t]he IGRA provides that all collateral agreements to ordinances adopted prior to October 17, 1988, are valid unless disapproved under § 2712…..[A] declaratory judgment will not terminate the controversy because the Chairman retains the ability to review the agreements when the Secretary appoints the two associate members to the Commission." Id. It also concluded that "[t]he Band has no cause of action in Federal district court under the IGRA." [AR715].

In accordance with decision of Judge Magnuson, and under Section 2712, the parties' 1986 Agreements were submitted to the NIGC and determined to be in violation of the IGRA. [AR285-287]. The parties renegotiated the agreements [AR325-326]; the NIGC approved the amended agreements [Id.]; the NIGC chairperson personally represented to the United States District Court of Minnesota that the agreement complied with the IGRA [AR327-328]; and, based upon the NIGC's approval and endorsement Duluth and the Band changed their legal positions in litigation and stipulated to the entry of a consent decree. [AR738-742 & 284]; s*ee also* City of Duluth v Fond du Lac Band of Lake Superior Chippewa, 708 F.Supp. 2d 890, 894-895 (D. Minn. 2010). The 1994 Agreements were the result of the proper application of the only retroactive powers granted to the NIGC.

Once having asserted authority under Section 2712 and completed the review process, the section does not grant further authority to the NIGC. In an effort to avoid the decision of Minnesota court and the prior determination of a predecessor NIGC chairman, Chairwoman Stevens concluded that Chairman Hope did not have review jurisdiction of the 1994 Agreements in the first instance. [AR43] By this statement, the chairwomen demonstrated her misunderstanding of what was under review in 1994. It was the 1986 Agreements that were under review, and it was subsequent to that review that the parties negotiated the 1994 Agreements. By her conclusion, the NIGC chairwoman acted in a manner inconsistent with a final decision of a federal court. She also failed to apply Section 2712 and understand that the approval of the 1994 Agreement was part of the exercise of authority by the prior NIGC chair. Chairwoman Stevens failed to cite to any authority that authorized her to ignore a final judgment or disregard a prior final decision of the NIGC pursuant to Section 2712.

After ignoring a judgment entered by a federal district court and Chairman Hopes' earlier decision, and after conceding that the 1994 Agreements did not come within her review authority, the chairwoman exceeded her authority by engaging in a second review. The IGRA grants no authority to the NIGC to conduct a second review of the same agreements previously approved pursuant to Section 2712. Once the new agreement is approved, the NIGC's authority under Section 2712 ends. This is so because that authority is expressly limited to ordinances, resolutions, and contracts that existed "prior to the enactment of this Act". 25 U.S.C.S. §2712(a). Once an ordinance, resolution, or contract is modified, the pre-Act version no longer exists. The NIGC's retroactive authority ends because the object of that authority no longer exists.

The case-by-case review of pre-IGRA agreements provided for in Section 2712 is similar to the case-by-case adjudication relied upon by the Secretary in Bowen. In that case, the Secretary seized upon the specific grant of authority to promulgate regulations to "provide for the making of suitable retroactive corrective adjustments." Bowen, 488 U.S. at 209. The Court, in rejecting the Secretary's argument stated that, "This provision on its face permits some form of retroactive action. We cannot accept the Secretary's argument, however, that it provides authority for the retroactive promulgation of cost-limit rules. To the contrary, we agree with the Court of Appeals that clause (ii) directs the Secretary to establish a procedure for making case-by-case adjustments to reimbursement payments where the regulations prescribing computation methods do not reach the correct result in individual cases. The structure and language of the statute require the conclusion that the retroactivity provision applies only to case-by-case adjudication, not to rulemaking." Id. "Had Congress intended the Secretary to promulgate regulations providing for the issuance of further amendatory regulations, we think this intent would have been made explicit." Id. at 211. Similarly, in this case, Congress provided the NIGC with limited retroactive authority on a case-by-case basis by limiting its retroactive authority to agreements that pre-dated the IGRA. Congress did not otherwise expressly or otherwise grant to the NIGC the authority to apply new interpretations to previously reviewed and approved agreements. Had that been the intent of Congress, that "intent would have been made explicit." Id.

The NIGC is not entitled to deference on the issue of the scope of its retroactive authority because in the chair ignored the question of whether Congress authorized the retroactive authority exercised in this case. In Bowen, the Court discussed the issue of deference in a similar context. There, the agency contended that it was entitled to deference under Young v.

Community Nutrition Institute, 476 U.S. 974, 980-981 (1986), Chemical Mfrs. Assn. v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985), and Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-844 (1984). In rejecting the agency's position, the Court stated: "We have never applied the principle of those cases to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'" Investment Company Institute v. Camp, 401 U.S. 617, 628 (1971); cf. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency [orders]")." Id. at 212.

The statutory provision establishing the NIGC's general rulemaking power (25 U.S.C.S. § 2706(b)(10)) contains no express authorization of retroactive rulemaking. Again, as noted by Bowen, "where Congress intended to grant the [Commission] the authority to act retroactively, it made that intent explicit." Id. 213. As discussed above, Section 2712 directs the chairperson to review agreements predating the IGRA, but once reviewed and approved, Congress provided no further retroactive review authority to the chairperson or the NIGC. "[I]n view of this indication that Congress considered the need for retroactive agency action, the absence of any express authorization for retroactive [post §2712 contract review] weighs heavily against the NIGC's position." Id. at 214. The NIGC has not promulgated any rule regulating when and how it might otherwise engage in retroactive reversal of agreements previously approved under Section 2712. Nor has the NIGC promulgated any rule regulating when it would engage in retroactive review

of management agreements previously approved except when amended [25 CFR §535.1], assigned [25 CFR§ 535.2] or in noncompliance cases [25 CFR§ 535.3 Here, the chair engaged in an *ad hoc* decision that is unsupported by statute or regulation and failed to explain in the NOV her theory as to why she had the authority to take such action.

What is clear is that the Band, after the City was granted partial summary judgment in the matter pending in the Minnesota federal district court, commenced a concerted effort to obtain the review. This effort included *ex parte* communication between NIGC staff and the Band and a meeting between the NIGC staff, including Chairwoman Stevens, and the Band on October 5, 2010. [AR1622] Of note is that the administrative record is devoid of any information regarding what information was considered by NIGC staff in conjunction with this meeting. What is known is that the NIGC, after reviewing the agreements in preparation for mediation, changed course, declined to mediate, and directed the parties to arbitration. [AR671-62]. It took no action in response to the Band's subsequent request for review until the matter was an "urgent" one for the Band given the fact that the Band's motion to continue the Minnesota litigation had been denied. [AR1627].

The NIGC's subsequent unexplained change of course was not the product of consistent application of its statutory and regulatory authority. It was the product of intensive lobbying by the Band, which was attempting to avoid it contractual obligations to the City. The Band had lost on liability and was facing trial on the contra-revenue issue and arbitration on the second term rent. The Band lobbied the NIGC to bail it out by engaging in a retroactive invalidation of the 1994 Agreements. The subsequent review exceeded the NIGC's statutory authority and must be reversed.

3. The NIGC Chair is not Authorized to Retroactively Reverse its Prior Approval as Part of its Enforcement Authority.

The IGRA does not grant to the NIGC the authority to retroactively reverse a prior decision in an adjudicatory proceeding, even a proceeding as truncated at the review at issue here. It is certainly black-letter administrative law that adjudications are inherently retroactive. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 763-66, 89 S. Ct. 1426, 22 L. Ed. 2d 709 (1969) (plurality opinion); SEC v. Chenery Corp., 332 U.S. 194, 203, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947); Qwest Servs. Corp. v. FCC, 509 F.3d 531, 539, 379 U.S. App. D.C. 4 (D.C. Cir. 2007), *see also* Bowen, 488 U.S. at 221 ("Chenery involved that form of administrative action where retroactivity is not only permissible but standard. Adjudication deals with what the law was; rulemaking deals with what the law will be.") (Scalia, J., concurring). But here, as discussed above, the only express retroactive authority granted to the NIGC chair relates to pre-IGRA agreements and the scope of that authority is provided for in Section 2712. The question then is: what is the statutory source for the NIGC's second review of the agreements and its retroactive invalidation—the answer is quite simple, no such authority exists. Certainly there are statutory schemes where Congress has granted an agency the authority to reopen a prior decision, *see e.g*. Catholic Health Initiatives Iowa Corp., 718 F.3d at 918 (Intermediary determination was reopened in 2005 after having previously made an adjustment for 1997 pursuant to express statutory authority. The impetus for the second reopening was an agency rulemaking in 2004). But the IGRA does not provide the NIGC with authority to initiate a new review of agreements and disapprove what was previously authorized.

Even if the NIGC was authorized to revisit its prior approval, retroactive reversal was improper. In Catholic Health Initiatives Iowa Corp., the court discussed the propriety of applying retroactive effect to a new interpretation and stated : "[e]ven though adjudication is by its nature retroactive, we have recognized that 'deny[ing] retroactive effect to a rule announced

in an agency adjudication' may be proper where the adjudication 'substitut[es] . . . new law for old law that was reasonably clear' and where doing so is 'necessary . . . to protect the settled expectations of those who had relied on the preexisting rule.' " Catholic Health Initiatives Iowa Corp., 718 F. 3d at 922, *quoting,* Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1554(D.C. Cir. 1993)(*quoting,* Aliceville Hydro Associates v. Federal Energy Regulatory Com., 800 F.2d 1147, 1152, 255 U.S. App. D.C. 122 (D.C. Cir. 1986)); *see also,* Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972) ("courts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests.").

This circuit has also endorsed the reasoning of Judge Friendly in NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966). *See,* AT&T v. FCC, 454 F.3d 329, 332 (D.C. Cir. 2006). In AT&T, the court discussed Judge Friendly's reasoning as follows: "courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct." Nevertheless, he continued, 'judicial hackles' are raised when "an agency alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry that it regulates." Id. For our part we have drawn a distinction between agency decisions that "substitut[e] . . . new law for old law that was reasonably clear" and those which are merely "new applications of existing law, clarifications, and additions." Id., *citing also,* Verizon Tel. Cos. v. FCC, 348 U.S. App. D.C. 98, 269 F.3d 1098, 1109 (D.C. Cir. 2001). "The latter carry a presumption of retroactivity that we depart from only when to do otherwise would lead to manifest in justice." Id. (internal quotations omitted).

In Williams Natural Gas Co., the court discussed the factors the court is to consider when retroactivity is at issue. It noted that: "we have typically considered the five factors set forth initially in *Retail, Wholesale & Department Store Union v. NLRB, 151 U.S. App. D.C. 209, 466 F.2d 380 (D.C. Cir. 1972) ("Retail Union")*: (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of the law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard. Williams Natural Gas Co., 3 F.3d at 1553-1554. "From our experience in applying the various versions of the Retail Union test, there has emerged '[a] basic distinction … between (1) new applications of law, clarifications, and additions, and (2) substitution of new law for old law that was reasonably clear.' Aliceville Hydro Assocs. v. FERC, 255 U.S. App. D.C. 122, 800 F.2d 1147, 1152 (D.C. Cir. 1986) (quoting 4 Kenneth C. Davis, Administrative Law Treatise § 20:7, at 23). In the latter situation, which may give rise to questions of fairness, it may be necessary to "deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule." Id. at 1544.

Here, application of the retroactivity factors demonstrates that the NIGC wrongly reversed its prior approval of the 1994 Agreements.

a. This matter does not involve a case of first impression.

If this matter involved a case of first impression, this factor would weigh in favor or retroactive application of the new policy or rule. *See,* Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Com., 826 F.2d 1074, 1081-1082 (D.C. Cir. 1987) ("The first factor

of Retail, Wholesale recognizes that a number of reasons call for the application of a new rule to the parties to the adjudicatory proceeding in which it is first announced." (internal quotations omitted)). Here however, the City and the Band had already engaged in a NIGC review under Section 2712 and renegotiated its agreements.

The issue before the NIGC ended in 1994 when the NIGC approved the renegotiated agreements. The NIGC's application of its evolving sole proprietary interest interpretation developed subsequent to the 1994 Agreements does not represent the application of a new rule to a pending matter, it represents the reopening of a closed case to apply a new agency interpretation developed in other unrelated matters. Here the parties substantially relied upon the NIGC's approval of the 1996 Agreements. While the NIGC's legal counsel has issued advisory letters to other parties seeking initial contract approval involving management contracts and collateral agreements to management contracts, none of those matters involved retroactive reversal of a previously approved non-management government-to-government agreements. . None of examples discussed in the NOV involved enforcement of the undefined sole proprietary interest standard under contracts that were unchanged and implemented in compliance with the contractual terms. The NIGC's action here was an abrupt change in administrative practice. The severity of the penalty to be imposed is a substantial loss of revenue to the City. Because the NOV does not represent adjudication in a matter of first impression, this factor weighs in favor of reversing the agency decision.

b. The NIGC's reversal of its prior approval is unprecedented and unexpected.

"The second factor requires the court to gauge the unexpectedness of a rule and the extent to which the new principle serves the important but workaday function of filling in the interstices of the law. It implicitly recognizes that the longer and more consistently an agency has followed

one view of the law, the more likely it is that private parties have reasonably relied to their detriment on that view." Clark-Cowlitz, 826 F.2d 1082-1083, *citing*, e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 495-502, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968); *see also*, NLRB v. Majestic Weaving Co., 355 F.2d 854, 861 (2d Cir. 1966).

Here, there was no record of consistent action presented in the NOV. Instead, the chairwoman compared the 1994 Agreements to management contracts and collateral agreements and the standards applicable thereto, even while conceding that the 1994 Agreements were not such agreements. Had the comparison been made to other agreements involving governmental entities the proper conclusion would have been that the 1994 agreements are valid.

1. Revenue sharing.

In the NOV, the chairwomen criticized the rent structure through which the City received a percentage of the gaming revenues and stated: "[t]his structure appears deliberately designed to disguise payments of revenue of the casino to the City…" [AR39] This statement ignores the fact that IGRA expressly authorizes gaming revenues to be used to "to help fund operations of local government agencies." 25 U.S.C.S. 2710(b)(2)(v). Congress did not otherwise express a prohibition how a tribe and a local government structured a revenue sharing arrangement. While the chairwoman listed as a factor the fact that the City uses its share on its general operation "without regard to any provision of services to the Band" [AR48, ¶18], this standard directly conflicts with the express language of the statute, which authorizes revenue sharing with local governments to "to help fund operations of local government agencies." Id. Congress did not tie the amount of revenue sharing to the value of the public services received by a tribe engaged in gaming. A standard requiring such a tie is not consistent with the statute and properly reversed.

Nor was the conclusion that the amount of revenue sharing was excessive supported by the evidence. The City presented significant evidence that the revenue sharing in 1994 Agreements fell within the range of other gaming related agreements with governmental entities. This evidence was summarized in the Affidavit of Alan P. Meister. [AR1447]. Of the 256 agreements evaluated, 207 or 80.9% provided for payments to the governmental entities. [AR 1449 & 1470. And while the NOV suggested that the City's share was calculated from gross gaming revenues [AR42], this represented a misunderstanding of the agreements, which provided for the City's share of gaming revenues be derived from gross revenues of only one type of Class II gaming and not a share of all gaming revenues. *See,* [AR1143 ("Rent Item 2 means the City Percentage of Gross Revenues from Video Games of Chance, payable to the City")]. As explained by the City in its brief, the 19% of gross revenues from the one source was intended to be one-third of net revenues and the parties used this method to make computations easier. [AR 576]. The agency's conclusion that the City's share of revenues was out of the norm and inconsistent with other similar government-to-government arrangements is unsupported by the record. The sole proprietary interest standard applied by the Secretary and the NIGC has resulted in a variety of revenue sharing arrangements that defy a conclusion that a consistent standard exists. The decision here represents an abrupt change of course and this factor weighs in favor of reversal.

2. The term.

The term of the 1994 Agreements was also cited as a justification for the NOV. The 1994 Agreements provided for a 25 year first term and an option for an additional term not to exceed 25 years. This term was similar to other agreements examined by the City's expert. [AR1449]. Other government-to-government agreements also provide for a variety of terms and

the City's agreement does not fall outside the range. These agreements provide for perpetual terms, 30 year initial terms with extensions, and shorter terms with multiple options for renewal terms. [AR1490-1493]. The compact between the Band and the State of Minnesota provides for a perpetual term. [AR3311]. All of these agreements are required to comply with the same sole proprietary interest mandate and all were approved. Because the evidence fails to demonstrate that the Secretary and the NIGC have applied one standard related to the term of agreements with governmental entities, this factor weighs in favor of reversing the agency decision.

3. Access to records.

The City's right of access to the Band's records was also cited as a basis for the decision. The chair assumed, without any supporting evidence, that the access was unusual, but the chair did not indicate whether it was unusual as compared to other government-to-government agreements; instead, it was implied that such access seemed to indicate that the City was asserting some type of role in regulating gaming. [AR40]. Once again, the City's expert opined, based upon his review of government-to-government agreements, that access to records varies but it is not uncommon. [AR1450] In fact, in the Band's compact with the State of Minnesota, the Band is required to provide the state with copies of all audits, current internal accounting and audit procedures, and accountant work papers if requested. [AR3322].

Because the evidence fails to demonstrate that the Secretary and the NIGC, in approving agreements under the IGRA, have applied a consistent standard on access gaming records, this factor weighs in favor of reversing the agency decision.

4. Amendment to gaming regulations.

The provision in the tribal-city accord giving the City an ability to comment on proposed changes to the Band's gaming regulations was also cited. Once again, the City presented expert

evidence that such arrangements are not uncommon. [AR1450]. In addition, the City's right was not without limits because changes required by federal law or state compact were excluded. The compact with the State of Minnesota also provides provisions on how the Band will operate Class III gaming, conduct background investigations, and license employees and managers. [AR3313, Section 4 & Section 5].

Because the evidence fails to demonstrate that the Secretary and the NIGC, in approving agreements under the IGRA, have applied one view of the law related to the manner in which gaming will be conducted and the hiring and licensing of employees and managers, this factor weighs in favor of reversing the agency decision.

In summary, the grounds used to justify the NOV discussed above are commonly found in government-to-government agreements. All of these agreements are subject to the "sole proprietary interest and responsibility for the conduct of any gaming" standard mandated by Section 2710(b)(2). If all of these other government-to-government agreements were subjected to the standards imposed in the NOV, they would all violate the sole proprietary interest requirement. The NOV does not represent an agency's application of a consistent view of the law. Instead, the evidence demonstrated that compared with other government-to-government agreements, the 1994 Agreements fell with the norm of approved agreements, and the City acted reasonably in its expectation that the agreements would continue through the second term.

c. The City substantially relied on the 1994 approval.

The third factor considers the extent to which the party against whom the new rule is applied relied on the former rule. Williams Natural Gas Co., 3 F.3d at 1553-1554. The City's reliance on the 1994 NIGC approval was substantial. It participated in negotiations under the auspices of the NIGC chairman and settled its legal dispute with the Band based upon the

NIGC's recommendation. Such reliance is substantial and weighs in favor of reversal of the NOV.

d. Retroactive reversal of the 1994 approval represents manifest injustice.

The fourth factor to consider is the degree of the burden which a retroactive order imposes on a party. Id. An agency's conclusions on manifest injustice is reviewed by the court with "no overriding obligation to the agency's decision." Qwest Servs. Corp. v. FCC, 509 F.3d 531, 537 (D.C. Cir. 2007). While agency decisions involving "a mere lack of clarity in the law does not make it manifestly unjust to apply a subsequent clarification of that law to past conduct… [t]hey stand in contrast to rulings that upset settled expectations--expectations on which a party might reasonably place reliance. Id. at 540. "[F]or reliance to establish manifest injustice, it must be reasonable-reasonably based on settled law contrary to the rule established in the adjudication. Id. at 540.

In Clark-Cowlitz Joint Operating Agency, the court found against the plaintiff on this factor because the situation "[was] not one in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements." 826 F.2d 1074, 1084-1085. Here, the exact opposite is the case. Past actions were taken in good-faith reliance of the NIGC's approval of the 1994 Agreements. Now, the City is faced with the potential loss of its ability to engage in arbitration for a share of the Band's gaming revenues during the extension term of the agreement. This represents a substantial amount of money. The City is also facing the possibility that it will lose the ability to recover the remaining payments due under the first term if the Band is successful in its appeal of the denial of its Rule 60(b)(6) motion.

When the City originally entered into the 1986 agreements with the Band, it invested two million dollars into the development of a parking ramp. [AR1112]. Under the 1994 agreements, it assumed all liability for the payment of that debt. It also agreed to not enter into a similar right-to-game in Duluth agreement with any tribe located within 250 miles of Duluth. And contrary to the NIGC's chairwomen's belief that no other tribe could enter into an agreement with Duluth [AR49], there are other Chippewa Bands located within 250 miles of Duluth that could seek to establish trust lands in Duluth and engage in gaming. [7]

It was reasonable for the City to rely on the agency's prior approval and the agency's advice to a federal district court that the agreements complied with the IGRA. The loss of 1994 Agreements has caused substantial harm to the City and resulted in manifest injustice. This factor weighs in favor of reversing the agency's decision.

e. The statutory interest in applying a new rule.

The final factor weighs the statutory interest in applying a new rule despite the reliance of a party on the old standard. Here, as discussed above, the statute expressly authorizes revenue sharing with local governments to fund local government operations. Prohibiting the Band from sharing gaming revenues to help fund the City's government operations does not promote the public policy as expressed by Congress; instead, it contradicts this express policy. The record is devoid of any evidence that the City violated the 1994 Agreements or in any way interfered with the Band's right to own, operate and manage the gaming activities. The Band will continue to enjoy a substantially larger percentage of the gaming revenues. At the conclusion of the second term the payment obligation ends and the Band may choose to continue to engage in gaming

[7] Two examples of tribal governments that Duluth could partner with are The Red Lake Band of Chippewa with headquarters in Red Lake, Minnesota, located 183 miles from Duluth, and the White Earth Nation of Chippewa located 209 miles from Duluth.

activities as its desirable downtown location until it chooses to stop or federal law prohibits continued operation. This factor weighs in favor of reversing the agency's decision.

IV. CONCLUSION

The NOV represents an arbitrary and capricious action that exceeded the NIGC's statutory authority. It was an improperly decided, retroactive action that has caused substantial harm to the legal rights of the City. For the reasons discussed above, the City requests that the court grant summary judgment to the City, reverse the July 12, 2011 decision of the NIGC, and order the NIGC chair to reinstate the approval of the 1994 Agreements.

Dated this 27th day of June, 2014

GUNNAR B. JOHNSON, City Attorney

and

s/M. Alison Lutterman
M. ALISON LUTTERMAN
(Minn. Lic. #017676x) *Pro Hac Vice*
Attorneys for Plaintiff
Deputy City Attorney
CITY OF DULUTH
410 City Hall
411 West First Street
Duluth, MN 55802
Telephone: 218-730-5490

`