UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF DULUTH,

Plaintiff,

v. **Case No. 1:13-cv-00246 CKK**

NATIONAL INDIAN GAMING COMMISSION, and

JONODEV CHAUDHURI, in his official capacity as Acting Chairman of the National Indian Gaming Commission,

Defendants.

MEMORANDUM OF AMICUS CURIAE FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

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INTEREST OF AMICUS

The Fond du Lac Band of Lake Superior Chippewa is a federally recognized Indian tribe with a membership of 4,200 persons, whose main Reservation is located 20 miles southwest of Duluth, Minnesota. As set forth in greater detail in the Band's Motion for Leave to file this amicus Memorandum, this case concerns a 2011 ruling by the National Indian Gaming Commission (NIGC) about the legality of a series of 1994 contracts between the Band and the City of Duluth that relate to an Indian gaming casino operated by the Band on a small parcel of the Band's Reservation land that is located in downtown Duluth.

The Band, as the subject of the NIGC's enforcement action at issue here, has a direct and substantial interest in this case. For the reasons set forth below, the Band submits that the July 2011 "Notice of Violation" (NOV) challenged by the City—in which the NIGC found the City-Band contracts to be illegal because they gave Duluth an impermissible ownership interest in the Band's casino—was a lawful and reasonable exercise of the NIGC's plenary authority to administer, interpret and enforce the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§2701-2721.

INTRODUCTION

This case is one thread in a tapestry of litigation between the Band and the City that dates back to 1989,[1] but has been unceasing since 2009.[2] Three principal decisions by the federal district court for the District of Minnesota about the contractual relationship between the Band and the City, and one by the Court of Appeals for the Eighth Circuit, form the litigation backdrop to this case, which is a collateral APA challenge by the City to the NIGC's 2011 ruling that the 1994 City-Band contracts are in violation of a core tenet of IGRA: that an Indian tribe must have the "sole proprietary interest" in any Indian gaming operation on tribal lands. 25 U.S.C. §2710(b)(2)(A).

Though the work of the Minnesota federal courts is not yet complete, the several decisions to date have substantially mapped the terrain of the City-Band relationship in light of the 2011 agency ruling. The courts have given that ruling only prospective effect in concluding that the Band and the City are "relieved of any further prospective compliance with their obligations under the 1994 Agreements" that were reviewed by the NIGC. *Duluth II*, 830 F. Supp. 2d at 724.

The NIGC ruling has been given no retroactive effect: the agency and court decisions require no disgorgement by the City of any of the $75 million in funds that the Band paid the

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[1] *Fond du Lac Band of Lake Superior Chippewa v. City of Duluth*, No. 5-89-0163 (D. Minn.) (Order of Dec. 10, 1990); *see* AR 710-716. ("AR" refers to the administrative record filed in this case.)

[2] *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 708 F. Supp. 2d 890 (D. Minn. 2010) (*Duluth I*); *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F. Supp. 2d. 712 (D. Minn. 2011) (*Duluth II*), *aff'd in part and rev'd in part*, 702 F.3d 1147 (8th Cir. 2013) (*Duluth III*); *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 977 F. Supp. 2d 944 (D. Minn. 2013) (*Duluth IV*), *appeal pending*, No. 13-3408 (8th Cir.); *see also City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 843 N.W.2d 577 (Minn. 2014); *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, No. 14-912-SRN (D. Minn. Complt. filed Apr. 2, 2014).

City under the 1994 Agreements, nor do they impose any penalty for the past violations of IGRA. *See id.* at 726-27. Thus, unlike the cases of this Circuit which review (and indeed, often approve) "retroactive" agency action, here there is no retroactivity to review.

The City, however, contends that there has been "retroactivity" of another sort: that the agency changed its mind. In 1994, the chairman of the newly formed NIGC opined that the agreements at issue were permissible. In 2011—in light of the ensuing 17 years of the parties' experience operating under the agreements, and applying a substantial body of post-2000 agency law that the NIGC had developed to address a pattern of abusive contractual dealings between tribes and non-Indian entities—the agency found the same City-Band contracts to violate the law.

But agencies often change their minds. It is not impermissible for them to do so, nor is it considered to be improper "retroactivity" when an agency in an adjudicatory proceeding applies its current rules to past behavior. Here, in an adjudication conducted pursuant to the NIGC's broad statutory authority to enforce IGRA, the agency ordered the Band to "cease performance under the 1994 Agreements," AR 50, a ruling directed only to prospective behavior that the Minnesota federal courts have given only prospective effect.

In this APA review case, contrary to the City's arguments, the Court need not reach the question of whether the agency action was impermissibly retroactive since it was not retroactive at all. And otherwise, the NIGC's adjudicatory ruling in an administrative enforcement action was grounded on a well developed body of agency law, consistent with its past rulings, and well within the agency's discretion. Applying the deferential review required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984), the Court should reject the City's challenge.

STATEMENT OF FACTS

A. The 1986 Agreements.

In 1986, the City of Duluth and the Fond du Lac Band entered into a series of agreements to establish a joint venture to operate a gaming facility on Indian land in downtown Duluth. *See* AR 988-1068 (1986 Commission Agreement), AR 1069-1111 (1986 Business Lease); *see also Duluth I*, 708 F. Supp. 2d at 893-94. These agreements created a jointly controlled "Duluth-Fond du Lac Economic Development Commission" to own and operate the gaming business—the Fond-du-Luth Casino. *Duluth I*, 708 F. Supp. 2d at 894; AR 994-995. The Commission had four members appointed by the Band and three by the City, but required a vote of six members to take action. *Duluth I*, 708 F. Supp. 2d at 894. The Commission was to conduct and regulate the gaming activity on "Indian land" within the City, and was to receive half of the net profits, with the remaining half to be divided between the Band and the City. *See id*. In contemplation of the agreements, the Band asked the Secretary of the Interior to take into trust the casino site, which was land within the City owned by the Band in fee, and to have that trust land declared part of the Fond du Lac Reservation. The Secretary accepted the land into trust and subsequently proclaimed the land to be a part of the Band's Reservation. AR 3403-3404.

B. The Indian Gaming Regulatory Act.

In 1988, Congress enacted IGRA, 25 U.S.C. §§2701-2721, "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Id.* §2702(1). Congress made IGRA applicable to all Indian-gaming operations, including those—like the Fond-du-Luth Casino—that pre-dated IGRA's enactment. It also established the NIGC as the federal regulatory body to administer and enforce the Act. *Id.* §2702(3).

Among other requirements, IGRA mandates that any tribe conducting bingo or casino-type gaming enact a tribal gaming ordinance that must be approved by the NIGC. *Id.* §2710(a), (d). The ordinance must require the tribe to "have the sole proprietary interest and responsibility for the conduct of any gaming activity." *Id.* §2710(b)(2)(A). IGRA vests the NIGC with authority to enforce its requirements by imposing civil fines or closure orders. *Id*. §2713.

Following the enactment of IGRA, the Band adopted an ordinance to comply with IGRA's requirements. The Band also believed that the joint City-Band ownership of the Fond-du-Luth Casino had been made illegal by IGRA's "sole proprietary interest" requirement. *See* AR 686-701. When the City refused to renegotiate the 1986 Agreements, the Band in 1989 filed a declaratory judgment action against the City in federal district court for the District of Minnesota, alleging that those Agreements violated IGRA. *Id*.

The City responded by arguing that only the NIGC (which had not yet been organized) could review the agreements. AR 702-706. The City further argued that the 1986 Agreements constituted "a contract or agreement for management of gaming activities" which, under section 2712 of IGRA, was "valid under the Act unless disapproved." AR 703.

In November 1990, the Associate Solicitor for Indian Affairs of the Department of the Interior reviewed the 1986 Commission Agreement and concluded that it was not a "management contract" as defined by IGRA. AR 275. The Associate Solicitor also concluded that the 1986 Agreement violated IGRA's "sole proprietary interest" requirement, AR 276-277, and therefore was "unenforceable because it is a violation of the Gaming Act." AR 277.

At the City's request, the federal district court in December 1990 declined to adjudicate the validity of the 1986 Agreements, but instead concluded that the Band's suit should be dismissed without prejudice so that the matter might be considered by the NIGC. AR 710-716

(*Fond du Lac Band v. City of Duluth*, No. 5-89-0163 at 6 (D. Minn.) (Order of Dec. 26, 1990)). As the Court of Appeals for the Eighth Circuit later explained:

> The district court was concerned that a declaratory judgment could "confuse and unsettle" the relationship between the parties if it were not based on findings by the NIGC as to the legality of the 1986 Agreement. The Band's request for an injunction was therefore dismissed without prejudice pending a report and recommendation from the NIGC.

Duluth III, 702 F.3d at 1150.

In 1993, the NIGC, like the Associate Solicitor, determined that the 1986 Agreements violated IGRA's "sole proprietary interest" requirement, "and it issued a notice of violation letter." *See Duluth III*, 702 F.3d at 1150; AR 285-287. The NIGC deferred enforcement action to give the Band and the City an opportunity to negotiate a new arrangement. AR 286-287; *Duluth III*, 702 F.3d at 1150.

C. The 1994 Agreements.

In 1994, the City and Band restructured their relationship through a series of new agreements that modified the terms of the 1986 Agreements. AR 1135-1337 (1994 Agreement). *See Duluth I*, 708 F. Supp. 2d at 894-95. The 1994 Agreements provided that, for an initial term (from 1994 until 2011), the Band was to pay the City (through the Fond-du-Luth Commission) 19 percent of the Casino's gross revenues from gaming machines, with payments for a second term (from 2011 to 2036) to be negotiated at the end of the first term. AR 1149, 1151 (1994 Sublease §4.2.2.2, §4.2.2.5). These payments were denominated as "rent" to be paid by the Band for "subleasing" the gaming facility from the Commission, even though the Band was the owner of the facility it was "subleasing."[3]

[3] In May 2012, the Secretary of the Interior cancelled the Band's 1986 lease to the Commission. That lease cancellation is the subject of a second APA challenge filed by the City, also pending in this Court. *City of Duluth v. Jewell*, No. 12-1116 (D.D.C. filed July 6, 2012).

The NIGC Chairman by letter of June 20, 1994 advised the district court that the 1994 settlement agreements were "consistent with IGRA" and recommended their approval. AR 328. Pursuant to a stipulation by the parties, the district court entered the 1994 Agreements as a consent decree and retained continuing jurisdiction over matters arising under the decree. *Duluth III*, 702 F.3d at 1151; AR 738-743.

D. The NIGC's refinement of the "sole proprietary interest" rule.

In 2005, the then-Chairman of the NIGC, Philip N. Hogen, reported to the Senate Indian Affairs Committee that the agency had "became more and more concerned about contracts [with Indian tribes] that included egregious terms benefitting contractors rather than tribes." AR 447-453.

Over the ten year period beginning in the early 2000's, the NIGC's general counsel issued more than 50 opinions on this topic, and the agency took several enforcement actions, finding that various contractual arrangements between gaming tribes and non-Indian parties—particularly those involving payments based on a percentage of gaming revenues—violated IGRA's "sole proprietary interest" standard. Specifically, the agency concluded that where a non-Indian party takes little risk, makes little capital investment and receives compensation in the form of a percentage of gaming revenues that is disproportionate to any services provided, the non-Indian party has an impermissible ownership interest in a tribe's gaming activity. *See* AR 44-46 (NOV summarizing agency law on "sole proprietary interest" issue).[4]

[4] *See also, e.g.*, AR 1558-1567 (Washburn Affidavit); AR 1581-1591 (NOV in *In re Ong*); AR 1600-1614 (NIGC Op. to Cypress); AR 3444-3451 (*Ong* civil fine). The NIGC opinion letters dating back to 2004 are available at http://www.nigc.gov/Reading_Room/Sole_Proprietary_Interest_Letters.aspx.

E. *Duluth I*: the start of the litigation between the City and the Band.

Between 1994 and 2009, the Band paid the City approximately $75 million in "rent" for the Fond du Luth gaming facility, based on the City's 19 percent share of gross revenues from gaming machines. *Duluth III*, 702 F.3d at 1151; AR 49 (NIGC's NOV); AR 329 (Radke Affidavit). Because of its fiduciary responsibility to manage Band assets for the benefit of the Band and its members, the Band's Reservation Business Committee (its tribal governmental body), in 2008 and 2009 undertook a review of the 1994 Agreements. AR 435-436 (Diver Affidavit ¶¶15-20). In light of the growing number of published NIGC decisions finding similar arrangements to be illegal, the Band concluded that the law regarding IGRA's "sole proprietary interest" requirement had substantially changed since 1994, and that the City-Band agreements violated the law as it was then being construed by the NIGC. *Id.*

Accordingly, in August 2009, the Band stopped its "rent" payments to the City because it believed that making any further payments would be illegal under IGRA, and would therefore both violate the Band's fiduciary duty to its members and jeopardize the Band's operation of the Casino. AR 435-436 (Diver Affidavit ¶¶15-20); AR 1416-1419 (Band Resolution and letter to City); *see also* AR 447-453 (2005 Hogen letter stating "any agreement that violates IGRA's sole proprietary interest requirement places the tribe at risk of fines and closure of its casino.").[5]

In September 2009, the City filed suit against the Band in federal district court in Minnesota to enforce the 1994 Agreements. AR 646-658. The Band answered and counterclaimed, challenging the legality of the payments required by those Agreements. AR 1425-1446.

[5] In addition, the Band in early 2009 withheld $561,047.59 in "rent" payments to the City after being informed by the casino's auditors that the Band had overpaid the City that amount in "contra-revenues" between 1994 and the last quarter of 2008. AR 1352, AR 1356. The City disputes this overpayment.

In April 2010, the district court ruled that the 1994 Agreements were binding on the parties because they had been entered by the court as a Consent Order, but that the Order was subject to modification under Fed.R.Civ.P. 60(b) if the Band could show that there had been "changes in either statutory or decisional law." *Duluth I*, 708 F. Supp. 2d at 896-902. The court said, however, that only a ruling by the NIGC about the City-Band agreements and "on the substantive issue of proprietary interest" would suffice as a basis to modify the Consent Order. *Id*. at 902. The district court further stated that "until the NIGC initiates an enforcement action," *id.*, the Band was bound by the 1994 Consent Order and by the 1994 Agreements approved by that Order, *see id.*

F. Proceedings before the NIGC.

At the time of the district court's decision in *Duluth I*, the first term of the 1994 Agreements was nearing its end. Because the Band and the City had not agreed on any rate to be paid for "rent" during the second term of the agreements, the Band on May 17, 2010, sent a letter to the NIGC requesting that the agency mediate the issues regarding the second term rent, as provided in the contract. AR 616-619. The Band's mediation request also advised the NIGC of the Band's "good-faith belief that the arrangement under the 1994 Agreements" had become illegal under IGRA, "at least during the last decade when the NIGC has issued opinion letters construing the sole-proprietary-interest provision of IGRA." AR 617. Recognizing its duty to comply with the federal court's April 2010 order, the Band also advised the NIGC that it sought "NIGC review pursuant to the terms of the 1994 Agreements themselves." *Id.* The City agreed to mediation by the NIGC, but also advised the agency of its view that mediation applied only to the rental rate for the second term of the 1994 Agreements and that any further agency review of the Agreements was unwarranted. AR 664-665.

In mid-July 2010, the parties submitted initial mediation position papers to the NIGC. On August 13, 2010, the NIGC Chairwoman sent a letter to the parties advising them that the agency declined to engage in mediation, and recommended that the parties proceed to arbitration to determine the rental rate for the 2011-2036 term. AR 671-672.

By letter to the agency Chairwoman dated August 16, 2010, the Band argued that even in arbitration, it would still be necessary for the agency to make a determination about the legality of the 1994 Agreements, because the arbitrators would be required to address the second term rental rate in the context of the legal constraints imposed by IGRA's requirements. AR 674-676. Taking note of the district court's 2010 holding, AR 675, the Band "formally request[ed] that the NIGC perform a full review of the 1994 Agreements for IGRA compliance in its capacity as regulator, rather than as neutral mediator." AR 674.

The City responded to the Band's August 16 letter on September 2, 2010. AR 1680-1681. The City there advised the NIGC that since the matter was now proceeding to arbitration, the NIGC should "decline the Band's request for further 'regulatory review.'" AR 1680. On October 20, 2010 the NIGC Chairwoman sent a letter to the Band and City advising them that she had referred the matter to the NIGC enforcement division and office of general counsel, and requested the parties to submit all documents related to the agreements and their implementation as well as "briefing on whether the agreements as executed and implemented are consistent with IGRA." AR 614.[6]

[6] Meanwhile, the litigation in federal district court was continuing on the issue of damages which the City claimed the Band owed to it. Following the NIGC Chairwoman's October 20, 2010 letter, the Band advised the district court of the NIGC's decision to review the 1994 Agreements, and moved for a stay of the litigation pending that review. *See* AR 108-112. The district court by a decision issued on February 22, 2011 denied the Band's request, reasoning that although the matter had been referred to the NIGC's enforcement decision, it remained uncertain as to what action, if any, the NIGC might take. *Id.*

On November 19, 2010, both the Band and City submitted extensive briefs and exhibits to the NIGC in support of their respective positions regarding whether the 1994 Agreements complied with the "sole proprietary interest" requirement under IGRA.[7]

G. The NIGC's 2011 Notice of Violation.

On July 12, 2011, "[b]ased on a thorough review of the parties' submissions and the 1994 Agreements," the NIGC "conclude[d] 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," AR 39, and issued a Notice of Violation (NOV) against the Band. AR 33-51. The NIGC concluded that the 1994 Agreements were illegal because (i) the level of compensation paid by the Band to the City, coupled with (ii) the City's degree of control over gaming operations and (iii) the lengthy term of the agreements, gave the City an impermissible proprietary interest in the Fond-du-Luth Casino. AR 39-40.

In particular, the NIGC found that the 19 percent of gross revenues paid to the City—which totaled approximately $75 million from 1994 to 2009—was equivalent to between 26.6 percent and 33.5 percent of the net profits. AR 48-49. It found that the City, in return, had made no capital investment in the Casino since 1994, nor had any on-going financial or other risk. AR 41, 49. The NIGC said, "The Band is paying rent on a property it already owns and, according to the Summary Appraisal Report supplied by the Band, for a far higher rental rate than market rental rates." AR 39; *see also* AR 358-433 (appraisal report).

Further, the NIGC concluded that the City did not provide any services to the Casino beyond the municipal services provided to any other citizen or business located in the City. AR 49. The NIGC, applying its precedent, also found that the intangible value of the City's support

[7] *See* AR 556-604 (City Brief and list of 97 Exhibits); AR 171-194 (Band Brief and List of 34 Exhibits).

in 1986 for the Secretary's trust acquisition of the Casino site was not the type of quantifiable economic benefit that would justify a revenue sharing arrangement. AR 42 ("support of a trust acquisition is not of tangible economic benefit justifying a share of gaming revenue").

The City retained the services of an economist, Alan Meister, who undertook an analysis of tribal-state gaming compacts which the City submitted to the NIGC and relied upon to argue that the 1994 City-Band contracts were similar to existing tribal-state compacts. *See* AR 1447-1501. The NIGC considered this argument, but found such a comparison to be misplaced because IGRA establishes a comprehensive legal framework for tribal-state gaming compacts which does not apply to agreements between tribes and cities. AR 42; *see also* 25 U.S.C. §2710(d).

The NIGC also considered the level of control that the City exercised over the Casino under the 1994 Agreements. The NIGC found that under the 1994 Tribal-City Accord, the Band cannot "modify its gaming ordinance or regulations, as they apply to the Fond Du Luth casino, unless the City of Duluth consents to the modification or the modification is required by Federal law or a tribal-state compact." AR 40. The NIGC also found that "the Accord provides the City with the right to review and object to the Band's licensing decisions." *Id.* The NIGC concluded that "the City's power to directly control the regulation of the Band's gaming activity infringes on the Band's authority as confirmed by Congress. Accordingly, the Band does not retain the sole proprietary interest in, and responsibility for, the gaming activity." *Id.*

The NIGC directed the Band to "cease performance under the 1994 Agreements of those provisions identified in this NOV as violating IGRA." AR 50. It also said that continued performance "may result in the assessment of a civil fine against the Band" and "in the issuance of an order of temporary closure." AR 51.

H. *Duluth II*: the district court's November 2011 Rule 60(b) decision.

Immediately following the issuance of the NOV, the Band sought relief under Rule 60(b) to modify the 1994 Consent Order. *Duluth II*, 830 F. Supp. 2d at 716. The City opposed the Band's motion, arguing, *inter alia*, that the NIGC's application of the "'sole proprietary interest'" test was beyond the authority granted by Congress, that the relief could not be applied retroactively and that the required showing for relief under Rule 60(b) had not been made. *Id*. at 717 n.2.

The district court rejected the City's argument that the NIGC lacked authority to review the 1994 Agreements. The court explained that "under the particular circumstances at issue here, the City thus may not now argue that the 1994 Agreements—which have governed the parties' business relationship for the last seventeen years—evade the reach of the NIGC's statutory authority, particularly where the City, in reliance on the NIGC's earlier approval of the deal, enjoyed many years of rental income and other benefits." *Id*. at 719. The court further found that for purposes of determining whether Rule 60(b) relief was available, an adjudicatory decision by the NIGC, as reflected by the NOV, was a change in law that would permit such relief if the other factors applicable to relief under that rule were also satisfied. *Id*. at 722-723.

The district court then determined that prospective relief under Rule 60(b)(5) was appropriate in light of the NOV, and relieved the Band and the City from "any further prospective compliance with their obligations under the 1994 Agreements and Order." *Id*. at 724.[8] The district court, however, denied the Band's request for relief to require the City to

[8] In so doing, the district court found nothing improper in the Band's request to the NIGC for review of the 1994 Agreements, concluding that "[a]lthough the Band communicated with the NIGC leading up to the NOV, the Court cannot conclude that the Band lacks the clean hands for equitable relief." *Duluth II*, 830 F. Supp. 2d at 717 n.2.

return the $75 million in "rent" the Band had already paid from 1994 until 2009. *Id.* at 727. The district court reasoned that the 1994 Agreements "were not illegal when made," *id*. at 724 n.13, but that in light of the NIGC's 2011 decision, "further performance of the bulk, if not the entirety, of the 1994 agreements would be unlawful." *Id.* The district court also denied the Band's request for relief from an obligation to pay approximately $10.4 million in accrued rent that the Band had withheld from 2009 until the date of the NOV in 2011. *See id.* at 728.[9]

The Band appealed from the portion of the decision denying it relief with regard to the 2009-2011 withheld payments. *See Duluth III*, 702 F.3d at 1152. The Band did not appeal the district court's denial of retroactive relief that would have required the City to return of the $75 million it had received from 1994 to 2009. *See id*. The City cross-appealed from the district court decision that granted the Band prospective relief from any obligation to make payments to the City after 2011. *See id.*

I. *Duluth III*: the Eighth Circuit's January 2013 decision.

In January 2013, the Court of Appeals for the Eighth Circuit affirmed the district court's ruling that the NOV constituted a change in law that warranted prospective relief from the 1994 Consent Order under Rule 60(b)(5). *Duluth III*, 702 F.3d at 1152-54. The Court of Appeals agreed with the district court that "a binding adjudication by a federal agency, which has been tasked with interpreting and enforcing a statute enacted by Congress, represents a change in the law for purposes of Rule 60(b)." *Id.* at 1153. The Court further noted that "Indian gaming is an area subject to intense federal oversight, and the City does not explain how the government's regulatory interest would be protected if the Duluth casino were somehow exempted from the

[9] The court also directed further proceedings on a subsidiary issue of whether prior payments by the Band had been erroneously calculated because certain "contra-revenues" should have been deducted from gross revenues for purposes of the rent calculation. *Id.* at 728; *see* n.5, *supra*.

NIGC's most recent interpretation of the sole proprietary interest rule." *Id.* The Eighth Circuit declined to address the City's criticism of the NOV itself, stating that any such challenge must be made in a suit under the APA in which the NIGC was a party. *Id.*[10]

J. The present action.

In February 2013, the City filed this suit against the NIGC under the Administrative Procedures Act challenging the July 12, 2011 NOV as arbitrary and capricious, and contrary to law.

ARGUMENT

I. The NIGC Issued the NOV Pursuant to Its Plenary Authority in 25 U.S.C. §2713 to Enforce IGRA.

The Eighth Circuit Court of Appeals has already determined that the NIGC "had the power to issue its 2011 determination." *Duluth III*, 702 F.3d at 1153.

Nonetheless, the City argues that the NIGC lacked the authority to "disapprove" the 1994 Agreements in 2011 because they were not management contracts subject to the agency's approval authority under section 2711 of IGRA, and no other provision of IGRA confers authority on the agency to approve (or disapprove) contracts. City Br. at 25-27. Inconsistently, the City also argues that the 1994 Agreements had previously been approved under section 2712 of IGRA because they were management contracts, and that approval insulated the contracts from any further review by the agency in 2011. City Br. at 27-33.

[10] The Eighth Circuit also reversed and remanded the district court's denial of the Band's request for relief with regard to the $10.4 million in "rent" payments for 2009 to 2011 that had been withheld by the Band, finding that the district court had made an error of law regarding the scope of relief available under Rule 60(b)(6). *Duluth III*, 702 F.3d at 1154-56. On remand, the district court again denied the Band's request for relief under Rule 60(b)(6). *See Duluth IV*, 977 F. Supp. 2d at 944. The Band's appeal of that decision is pending before the Eighth Circuit. *City of Duluth v Fond du Lac Band*, No. 13-3408 (8th Cir. filed Nov. 4, 2013).

The City is wrong on both counts. The 1994 Agreements are not management contracts, and they were not reviewed by the agency under either section 2711 or section 2712. Instead, the agency operated pursuant to its plenary enforcement authority in section 2713 to ensure that Indian gaming operations comply with IGRA.

A. Section 2713 expressly vests the NIGC with broad enforcement authority.

Congress delegated to the NIGC and to the NIGC's Chairman broad authority to enforce all of IGRA's requirements, vesting the agency with the power to conduct investigations, initiate enforcement actions through written complaints, levy civil fines and issue closure orders. 25 U.S.C. §§2705, 2706(b), 2713(a), (b). Moreover, under IGRA, the NIGC is to enforce not only the requirements of the Act itself, but also the provisions of the tribal gaming ordinances that are mandated by the Act. *Id.* §2713(a), (b).[11]

IGRA further requires that if the NIGC "has reason to believe" that a tribal operator of an Indian game is in violation of IGRA or of a tribal ordinance, the NIGC "shall" inform the tribal operator by "a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission" to enforce compliance. *Id.* §2713(a)(3). The authority and responsibility to issue written complaints has been delegated to the NIGC Chairman pursuant to 25 U.S.C. §2705(b) and is implemented by the

[11] In addition to the "sole proprietary interest" requirement, IGRA imposes other mandates on Indian gaming, not relevant here. For example, IGRA requires that: (1) tribes have adequate systems for conducting background checks and licensing key management officials and key employees, *id.* §2710(b)(2)(F); (2) Indian gaming be conducted on "Indian lands" as defined by IGRA, *id.* §§2710(b)(1), 2710(d)(1), and (3) class III gaming be conducted only pursuant to a tribal-state compact. *Id.* §2710(d)(1)(C).

issuance of a "notice of violation" (NOV) as set out in the NIGC's regulations. 25 C.F.R. §573.3 (2011).[12]

IGRA further empowers the NIGC Chairman to levy civil fines and issue orders for temporary closure of gaming facilities that are in violation of any of IGRA's requirements. 25 U.S.C. §2705(a), (b); §§2713(a)(1), (b)(1). A NOV issued by the NIGC Chairman is subject to appeal to the full Commission, *see id*. §§2705(a), 2713(a)(2), (b)(2), and is subject to judicial review, *id.* §2714. The NIGC's orders are also enforceable by the Attorney General acting through the United States Attorneys. *See United States v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558, 562 (8th Cir. 1998).

The NIGC's enforcement authority is "broad,"[13] and its duty to take enforcement action is "mandatory." *Citizens Against Casino Gambling*, 2008 WL 4057101, at *3. As stated by that court, section 2713(a)(3):

> . . . connotes immediacy, and it is entirely consistent with Congress's charge to the NIGC to safeguard the integrity of Indian gaming. Congress directs the NIGC to act upon any indication of the existence of a violation; it does not give the Commission discretion to ignore violations or choose not to issue a complaint.

Id.

It is this enforcement authority—established by Congress in sections 2713, 2705 and 2706—which the NIGC Chairwoman exercised when she issued the July 12, 2011 Notice of Violation against the Fond du Lac Band.

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[12] *See Citizens Against Casino Gambling in Erie Cnty. v. Hogen*, No. 07-CV-0451S, 2008 WL 4057101, at *3 (W.D.N.Y. Aug. 26, 2008) (a §573.3 notice of violation is a "written complaint" under §2713(a)(3)). *See also Cheyenne-Arapaho Gaming Comm'n v. NIGC*, 214 F. Supp. 2d 1155, 1170 n. 7 (N.D. Okla. 2002).

[13] *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 762 (8th Cir. 2003) ("IGRA grants the Chairman broad authority to fashion remedies to cure perceived gaming violations . . . .").

B. The NIGC's enforcement authority is not limited to review of ordinances and management contracts.

The City argues that the NIGC Chairwoman exceeded her statutory authority in issuing the 2011 NOV because "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." City Br. at 27. Under the City's view, the NIGC has no authority to review any contract or arrangement related to Indian gaming if it is not a management contract or collateral agreement. *Id.* at 26-27.

If this were the rule, the requirements of IGRA, including especially the requirement that tribes have the "sole proprietary interest" in tribal gaming operations, could easily be skirted simply by crafting joint venture-type agreements with tribes that take a form other than a management contract (or an agreement collateral to one). If the use of such contracts could serve to insulate a joint venture arrangement from NIGC review, there would be an open invitation for tribes and non-Indian entities to violate the "sole proprietary interest" requirement simply by manipulating the form of the contract.

Indeed, it was precisely this problem that the NIGC found necessary to address more than a decade ago. As the NIGC began implementing IGRA, it found that non-Indian parties were undermining IGRA's "sole proprietary interest" requirement by structuring their agreements with tribes through the use of various consulting and development contracts that were designed to both avoid IGRA's requirements for approval of management contracts, and to mask violations of the "sole proprietary interest" mandate. In his 2005 report to the Senate Indian Affairs Committee, then-NIGC Chairman Hogen explained the agency had a responsibility to review these types of alternative contract arrangements to ensure that they did not violate the expressed congressional intent that tribes have the "sole proprietary interest" in gaming on Indian land:

> [T]he Commission [began] to realize that some contractors were apparently receiving an ownership interest in tribal casinos because they were certainly not providing services worth the enormous sums of money they were receiving.

AR 451.

Of particular relevance here, the Chairman cited several examples where agreements between tribes and non-Indian partners were structured for tribes to provide large "rent" payments to the non-Indian interests for use of a casino building and equipment, years after the tribe had paid for the property in full—in other words, to require the tribes to "rent" back property and facilities they already owned. These "rent" payments sometimes constituted more than 30 percent of the tribe's net gaming revenues. The NIGC Chairman explained the illegality of such arrangements:

> In one agreement, for example, the tribe had a 10-year obligation to pay its contractor 35% of its net gaming revenues each month as so-called "rent" for gaming equipment and the casino building, all of which the tribe had already paid for in full within the first 6 months of the 10-year term.
>
> . . . .
>
> These agreements, and others like them, violate IGRA's sole proprietary interest requirement because the developer's compensation is paid from the casino's profits, and it is paid in such a way and in such quantity as to bear little or no relationship to the value of the services provided or to the risk assumed. Rather, profits are distributed to the developer as to one with a fractional ownership interest—a proprietary interest—in an enterprise and its profits. <u>The Commission's review has enabled tribes to avoid such illegal and unconscionable agreements and has thus assured that they are the primary beneficiaries of their casinos.</u>

AR 451-452 (emphasis added).

The NIGC Chairman added: "the review of contracts, both for management contract and sole proprietary interest violations, has, without exaggeration, saved Indian tribes tens of millions of dollars. In so doing, review has helped ensure that tribes are the primary beneficiaries of their casinos, as IGRA intends. 25 U.S.C. §2702(2)." AR 450.

In this letter, the NIGC Chairman further explained the basis for the NIGC's authority. He pointed out that while management contracts and collateral agreements were subject to formal NIGC review under section 2711, AR 449, 451, the NIGC's authority to ensure compliance with IGRA's other mandates, including its "sole proprietary interest" requirement for agreements that are not management contracts, arises under section 2713. AR 452. The Chairman further explained that over the years, the NIGC has encouraged the voluntary submission of agreements to the NIGC for review which may result in advisory opinions that are intended to avoid enforcement actions, *id.*, but that if voluntary compliance ceases, the Chairman may bring a formal enforcement action under section 2713. AR 453.

The NIGC Chairman's 2005 report to Congress summarized a body of law that the NIGC had then developed and which it continued to develop and apply after 2005. Between 2003 and the time of the 2011 NOV under review in this case, the NIGC had issued more than 50 decisions on the "sole proprietary interest" standard. AR 45. Many of these were in the form of opinions by the NIGC's office of general counsel, issued at the behest of parties seeking to avoid an enforcement action. Others were made in the context of enforcement actions, issued in the form of NOVs under section 2713. AR 45-46.

In short, under long-standing agency practice sanctioned by Congress, the NIGC has properly and consistently exercised its enforcement authority under section 2713 to ensure that Indian tribes retain the "sole proprietary interest" in an Indian gaming operation. That is precisely what the agency did in this case in issuing the 2011 NOV challenged by the City.

C. The NIGC did not review the 1994 Agreements under either section 2711 or section 2712.

After arguing that the NIGC lacked power to review the 1994 Agreements under section 2711 because they are <u>not</u> management contracts, the City then argues that the NIGC previously

reviewed the City-Band agreements under section 2712 because they are management contracts, but that provision authorized only a one-time review of pre-IGRA management contracts and, after that initial review, the agreement is thereafter forever insulated from further scrutiny. City Br. at 29, 31, 33.[14]

The City misstates the record when it argues that the parties' 1986 Agreements were reviewed by the NIGC "under 2712," and that because the 1994 Agreements followed from that review, the 1994 Agreements are therefore immune from further agency review. City Br. at 30-31.

In 1989, the Band sued the City in federal district court in Minnesota, alleging that the 1986 Agreements did not comply with the newly enacted IGRA because they established an impermissible joint venture to operate a gaming casino on Indian land. AR 686-701. The City, in opposing the Band's suit, contended that the 1986 Agreements constituted "a contract or agreement for management of gaming activities" which, under 2712, was "valid under the Act unless disapproved." AR 703. Based on this, the City further argued that Band's suit should be dismissed so that the NIGC, instead of the court, could address the matter. AR 705. It was in this context, and because of the City's reliance on section 2712, that the federal district court dismissed the case without prejudice so that the matter might be considered in the first instance by the agency. AR 713 (Dec. 26, 1990 Mem. & Order). In describing the background, the court referenced section 2712, but declined to adjudicate the issues raised in the case, including whether section 2712 properly applied.

[14] Even if the NIGC had acted pursuant to section 2712, there is no basis for the claim that an approval under section 2712 would forever immunize agreements from re-examination if later enforcement review was warranted by a change in law or other appropriate circumstances.

The federal officials who then reviewed the 1986 Agreements did not do so under section 2712. Indeed, the Associate Solicitor, in his November 1990 opinion, expressly rejected the City's contention that section 2712 applied, stating that the 1986 Agreements were not management contracts under IGRA. AR 275. The Associate Solicitor determined that the 1986 Agreements were invalid because they violated IGRA's "sole proprietary interest" requirement, AR 276-277, concluding: "Nothing in the Gaming Act grandfathers or exempts the joint venture arrangement of the Band and the City from the requirements of the Gaming Act. Therefore, my view is that the Agreement is unenforceable because it is a violation of the Gaming Act." AR 277.

When the matter was (at the City's insistence) thereafter submitted to the NIGC, the NIGC followed the reasoning of the Associate Solicitor and also found that the 1986 Agreements violated IGRA's "sole proprietary interest" requirement. AR 285-287. In so doing, the NIGC Chairman did not claim to be reviewing the 1986 Agreements under either section 2711 or section 2712. He was, instead, exercising the NIGC's general authority to ensure compliance with the requirements of IGRA, as well as with the requirements of the Band's gaming ordinance. AR 286. As he there explained, the Band was required to adopt a gaming ordinance which fully complied with IGRA, the Band had done so post-IGRA and its new ordinance had been approved by the NIGC. He stated that because the casino's operation under the 1986 Agreements violated both IGRA and the Band's post-IGRA gaming ordinance, the NIGC intended to initiate an enforcement action to bring the casino into compliance, AR 285-286—thereby exercising enforcement authority granted to the Commission under section 2713.

Thereafter, the City and Band restructured their arrangement and entered into the 1994 Agreements. The Chairman then reviewed the new contracts and opined to the parties and to the

district court that they complied with IGRA. But again, he did not invoke either section 2711 or section 2712 to do so, nor would those authorities even apply to the 1994 Agreements, which neither pre-dated IGRA nor were management contracts.

Accordingly, the City's effort to use sections 2711 and 2712 as a shield to immunize the 1994 Agreements from the NIGC's 2011 enforcement action fails because those provisions did not apply before (or now), and were not invoked by the agency before (or now). Instead, the NIGC in 2011 reviewed the 1994 Agreements pursuant to its on-going authority under section 2713 to enforce compliance with IGRA's requirements.

II. The NOV Is Not "Retroactive" Agency Action.

A. The NIGC is not precluded from changing its views on the legality of the 1994 Agreements.

The City challenges the NIGC's authority to "retroactively reverse" its prior position on the 1994 Agreements. City Br. at 34. The City's argument boils down to this: an agency is irrevocably bound by its prior legal position, even if the agency later concludes that its previous position is incorrect, obsolete, or inconsistent with current law.

But this is emphatically not the law. The Supreme Court has consistently affirmed an agency's prerogative to change its views and shift its policy through adjudication. "[T]he fact that an agency had a prior stance does not alone prevent it from changing its view . . . ." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 519 (2009); *see also NLRB v. Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 351 (1978) ("An administrative agency is not disqualified from changing its mind."); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975) ("To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking."). Indeed, in *Fox*, the Supreme Court upheld a change in agency policy

implemented through adjudications and, in so doing, refused to apply a heightened standard of review. 556 U.S. at 514.

The D.C. Circuit has stressed that an agency "should [not] be prevented from stating the law correctly merely because it may have misconstrued the applicable rules in the past." *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1100-01 (D.C. Cir. 2001) (holding agency had authority to find companies liable for imposing charges that had previously been approved by the agency). The Circuit has further pointed out that "'[a]n initial agency interpretation is not instantly carved in stone,'" *Verizon v. FCC*, 740 F.3d 623, 636 (D.C. Cir. 2014) (quoting *Chevron*, 467 U.S. at 863), adding that "so long as an agency 'adequately explains the reasons for a reversal of policy,' its new interpretation of a statute cannot be rejected simply because it is new," *id.* (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)); *see also Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009) (upholding FERC order that changed the applicable test, noting that the "fact that FERC changed its approach required no additional or special explanation").

The principle that an agency can change its mind holds true even when the agency's evolving interpretation of a statute affects the validity of an ongoing contract. This is well-illustrated by *Churchill Tabernacle v. FCC*, 160 F.2d 244 (D.C. Cir. 1947), where the D.C. Circuit held that although the FCC had initially approved a contract under which a church reserved a 100-year right to use a radio station it was conveying to a corporation along with its broadcasting license, the FCC was not precluded from subsequently reversing its decision. *Id.* at 244-46. After approving the contract and regularly renewing the license for ten years, the agency reconsidered its position and determined that the contract had the effect of depriving the licensee of "its power and duty to exercise full and complete control of its station." *Id.* at 245-

46. The FCC required the corporation to file a new application and show "that it would thereafter have the exclusive use and control of the station, and that no further effect would be given to the agreement with the Church." *Id.* at 246 (emphasis added).

The church appealed the agency's decision, arguing that it was arbitrary and capricious due to the agency's "failure to abide by its decision, i.e., its prior approval of the terms of the contract of sale." *See id.* at 246. The D.C. Circuit rejected this argument, holding that the FCC was not bound by its previous approval of the sale contract. Although analyzed under principles of estoppel, the Court held "that the Commission is empowered to establish a new policy, and apply it to the renewal of an old license, despite the fact it is inconsistent with a previous decision." *Id.* at 246.[15]

Likewise, this Circuit has rejected arguments proffered by injured parties who claim that a new agency policy should not apply where contracts were negotiated in reliance on a previous agency rule. For example, in *General American Transportation Corp. v. ICC*, 872 F.2d 1048, 1052-53 (D.C. Cir. 1989), the agency reversed a 40-year old policy that prevented railroads from charging owners of private railcars for the cost of transporting their cars (when empty) to repair depots for maintenance. The petitioner argued it was arbitrary and capricious for the agency to ignore the effect of the new rule on "those long-term contractual relationships between railroads, car providers, and shippers which were negotiated in reliance on [the old rule]." *Id.* at 1058. The D.C. Circuit gave little weight to this argument:

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[15] Other courts have similarly upheld agency changes in position even though it affected the validity of a contract. *See Massachusetts v. O'Leary*, 925 F. Supp. 857, 864-65 (D. Mass. 1996) (agency could apply new policy to plaintiff's contract, even though agency official had previously expressed a different legal position); *Shakopee Mdewakanton Sioux Community v. Pan American Management Co.*, 616 F. Supp. 1200, 1209-10 (D. Minn. 1985) (agency's review and disapproval of contract under 25 U.S.C. §81 was not barred by agency's previous position that the contract was not subject to section 81), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986).

> The gist of petitioners' objection, it seems to us, is that the Commission's previous policy induced railroads, car providers, and shippers to do business one way, and that these settled business practices cannot be overridden by developments in the Commission's regulatory policies no matter how compelling the statutory justifications. This argument assumes incorrectly, we think, that industry practices may prevent the Commission from implementing even a justified and well-explained departure from previous policy. That is simply not sound administrative law.

Id. at 1058-59; *see also Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993).

The City does not offer any legal authority for the proposition that the NIGC was precluded from applying its current interpretation of the "sole proprietary interest" standard to the 1994 Agreements. To the contrary, the Supreme Court has emphasized that when an agency changes its course, "it need not demonstrate to a court's satisfaction that the reasons for the new policy are <u>better</u> than the reasons for the old one. It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency <u>believes</u> it to be better, which the conscious change of course indicates." *Fox*, 556 U.S. at 515 (emphases in original); *accord*, *City of Duluth v. Jewell*, 968 F. Supp. 2d 281, 292-93 (D.D.C. 2013) (further quoting *Fox*, 556 U.S. at 515, to add that "[a]s the Supreme Court has made clear, there is 'no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review.' . . . 'The statute makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.'" (second ellipsis in original)). The NOV at issue here and the administrative record provide ample legal and factual support for the NIGC's changed views on the 1994 Agreements.

B. The NOV did not have retroactive effect.

The City relies primarily on *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1998), for the proposition that "Congress did not expressly grant to the NIGC retroactive rule-

making authority," City Br. at 28, and more broadly, that "Congress did not grant the NIGC or its chair the authority to engage in the type of retroactive enforcement at issue here," *id.* at 27.

But *Bowen* was a case about agency rulemaking. *See Bowen*, 488 U.S. at 206. The NOV here was not an agency rulemaking at all; it was, as the Eighth Circuit has already said, an adjudication conducted under the NIGC's enforcement authority. *See Duluth III*, 702 F.2d at 1153 (NOV was "a binding adjudication by a federal agency, which has been tasked with interpreting and enforcing [IGRA]"). And as the D.C. Circuit has said, "[i]t is black-letter administrative law that adjudications are inherently retroactive." *Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 921 (D.C. Cir. 2013). Indeed, for the City to argue that the NIGC lacks the ability to engage in "retroactive enforcement" of the law is tantamount to saying it lacks the ability to enforce the law at all, because law enforcement is necessarily a matter of applying the current law to past activity.

What the NIGC did in the 2011 NOV was to apply its then-existing body of agency law on the "sole proprietary interest" standard to the 1994 Agreements. As noted above, that agency law had evolved since 1994 over the course of more than 50 rulings in the years after 2000, in multiple other cases and proceedings. And in applying this body of law, the NIGC considered not just the bare text of the 1994 Agreements, but also the history of their implementation, AR 39—examining the amount of "rent" that the City actually received from 1994 to 2009, AR 48-49, against rental rates for comparable properties, AR 39, *see also* AR 358-433, and in light of the absence of any post-1994 capital investments, financial risks or services provided by the City that would justify the $75 million in payments it had received. AR 41, 49.

The NIGC did nothing impermissible in undertaking an enforcement action in 2011 that applied its then-existing standard for judging whether the Band held the "sole proprietary

interest" in the Duluth gaming operation to the then-existing contractual relationship between the City and the Band, all in the context of considering the facts bearing on how the agreements had been implemented. That is the nature of adjudications and the City's discussion of rulemaking authority and its reliance on *Bowen* are far off-point.

Courts address retroactivity in a different sense: whether the result of an adjudication should be given retroactive effect. But the D.C. Circuit has said that "[b]y 'retroactive effect,' of course, we typically refer to an order or penalty with economic consequences, not retroactive application of the rule itself . . . ." *Catholic Health*, 718 F.3d at 922. Here, the ruling made by the NIGC did not result in "an order or penalty with economic consequences" of a retroactive nature to the City of Duluth. This is made clear both by the NOV itself and particularly by the subsequent rulings made by the federal district court in Minnesota.

The NOV itself did not impose damages on the City or require the City to disgorge any part of the $75 million in "rent" payments the Band had paid to the City between 1994 and 2009. AR 50-51. Instead, the NOV granted only prospective relief by ordering the Band to "cease performance" under the 1994 Agreements from the date of the NOV forward. AR 50. There was no requirement for the City to repay any money it had previously received, nor to pay any penalty of any sort.

To reinforce this point, the extensive litigation in the Minnesota federal courts that followed the NOV directly addressed and foreclosed the possibility that the NOV would have any retroactive effect on the City. In *Duluth II*, the district court denied the Band's request for "retroactive relief from any obligation under the 1994 Agreements that it already has performed . . . ." 830 F. Supp. 2d at 727. The court stated that "ordering the City to return seventeen years of funds that it received in good faith—and, of course, already has spent on

public services—would hardly be equitable." *Id.* at 728; *see also* Doc. No. 12, at 9 (Mem. Op. Dec. 18, 2013) (this Court observed that the City cannot complain about "loss of rents" as to the first term because the Minnesota district court denied the Band's request for retrospective relief). The Band did not appeal this ruling and is now bound by it.[16]

The fact that the 2011 NOV does not meet the test for retroactive agency action is illustrated by the D.C. Circuit's decision in *National Cable & Telecommunications Association v. FCC*, 567 F.3d 659 (D.C. Cir. 2009). There, in the context of rulemaking—where retroactivity is presumptively prohibited—the question concerned whether a newly issued FCC regulation could, like the NOV here, be prospectively applied to pre-existing contracts. *Id*. at 670. The court said,

> [W]e think it readily apparent that the Commission's action has only "future effect" as the APA and our precedents use that term. The [new rule] purports to alter only the present situation, not "'the past legal consequences of past actions.'" *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006) (quoting *Bowen*, 488 U.S. at 219).

Id. The court further explained:

> We have thus repeatedly made clear that an agency order that only "upsets expectations based on prior law is not retroactive," *Mobile Relay Assocs.*, 457 F.3d at 11 (internal quotation marks omitted). That describes precisely this case. Here the Commission has impaired the future value of past bargains but has not rendered past actions illegal or otherwise sanctionable. "It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes." *Chem. Waste Mgmt. v. EPA*, 869 F.2d 1526, 1536 (D.C.Cir.1989). Such expectations, however legitimate, cannot furnish a sufficient basis for identifying impermissibly retroactive rules.

Id. (emphasis added).

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[16] There remains an issue pending on appeal before the Eighth Circuit about whether the Band is required to pay the City the withheld "rent" that accrued in the period from 2009 to 2011 but has not yet been paid. *See supra* n. 10.

Thus, the City's attempt to characterize the 2011 NOV as impermissibly "retroactive" misses the mark. It ignores the fact that the NOV did not have retroactive effect on the City because it did not "render[] past actions illegal or otherwise sanctionable," *Nat'l Cable*, 567 F.3d at 670—it did not impose any penalty for past conduct or any obligation to disgorge funds that had been received in the past. As such, and as specifically determined by the Minnesota federal courts, the effect of the NOV on the City is prospective only. Even though the NOV may have "upset[]" the City's "expectations based on prior law," agency action that does so "is not retroactive." *Mobile Relay Assoc. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006). There is no question that an administrative agency operates well within its authority when, as the NIGC did here, it makes an adjudicatory ruling in an enforcement action but imposes only prospective relief. No case cited by the City stands for a contrary proposition.

C. Even if the NOV had a retroactive effect, the City cannot demonstrate either detrimental reliance or "manifest injustice."

Even if the NOV is viewed as having caused a retroactive effect on the City, it is not thereby impermissible. Instead, the law in this Circuit is to apply a five-factor test "for evaluating retroactive application of rules announced in agency adjudications." *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987). The five factors are:

> (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 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.

Id. (quoting *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972)). Rather than "plow[ing] laboriously" through all five factors, the D.C. Circuit has said that the test really boils down to "'equity and fairness,'" *Cassell v. FCC*, 154 F.3d 478, 486

(D.C. Cir. 1998), and whether the petitioner can show detrimental reliance. *Pub. Serv. Co. of Colorado v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996) (stating that "the apparent lack of detrimental reliance . . . is the crucial point"). Here, the City can show neither detrimental reliance nor a manifest injustice.

1. The City cannot show detrimental reliance.

The fact that the City devotes only a single paragraph to its reliance argument, City Br. at 42-43, illustrates its weakness. The 1994 agency letter approving the 1994 Agreements was not based on "well established" law nor can the 2011 NOV be characterized as an "abrupt departure" in administrative practice.

In 1994, the NIGC was a brand new agency created to implement IGRA, a brand new statute. As the Eighth Circuit observed, "the City and the Band began to renegotiate [the Agreements] at a time when the full implications of the act were still unclear." *Duluth III*, 702 F.3d at 1150. The legal position the agency expressed in its 1994 opinion on the City-Band agreements—one of its first opinions on any matter—was based on no prior agency law. The 1994 letter contained no legal analysis. Indeed, the NOV asserts (and the City does not argue to the contrary) that the 1994 opinion did not even constitute a formal agency approval of the 1994 Agreements. To the extent the City now claims that it relied on the NIGC's initial approval of the 1994 Agreements, that approval was even more "tentative" than the "solitary" agency pronouncement found to be an insufficient basis for reliance in *Clark-Cowlitz*, 826 F.2d at 1083, and a far cry from the "well-established" law at issue in *Retail, Wholesale*, 466 F.2d at 391-92; *see also Pub. Serv. Co.*, 91 F.3d at 1490 (reliance on agency's interpretation of "a substantially new regulatory regime" would be "foolhardy").

So too, the agency's 2011 ruling was not an "abrupt departure" from its 1994 opinion but rather was based on the agency's careful development of law on the "sole proprietary interest" standard that unfolded over the period from 2000 to 2010. AR 447-453. It was that body of agency rulings which constituted the "well established" agency law. The Chairman's 1994 opinion on the City-Band contracts grew over time to be increasingly inconsistent, and ultimately irreconcilable, with the agency's subsequent development of the law. The 2011 NOV was a ruling by the agency to bring parties into compliance with its then well-established law, not an abrupt departure from well-established law.

The City tries to minimize the legal significance of the NIGC's post-1994 opinions by characterizing them as "new agency interpretation developed in other unrelated matters." City Br. at 38. But the City certainly was aware of the evolving law (or should have been). As the Eighth Circuit observed, "[b]y the time the Band began withholding rent in 2009, the City was on notice that the NIGC's views on the validity of the 1994 agreement might well have changed." *Duluth III*, 702 F.3d at 1155.[17]

Finally, even if the July 2011 NOV had come at the City like a bolt from the blue, the City in any event had no basis for further reliance on the 1994 agency opinion. The first term of the 1994 Agreements had already ended in March 2011, and the parties had to renegotiate from first principles (or failing that, to arbitrate) the rental rate for the second term. Thus, the City had

[17] The City implies it relied on the NIGC's 1994 position by "participat[ing] in negotiations under the auspices of the NIGC chairman and settl[ing] its legal dispute with the Band based upon the NIGC's recommendation." City Br. at 42-43. But an agency may apply newly formulated rules even to previous settlements. As an example, in *Williams Natural Gas Co.*, the petitioner complained that the agency's new rule should not be applied to two settlement agreements on a retroactive basis because "if it had known what to expect, it would have obtained the appropriate contract language" when negotiating those settlement agreements. 3 F.3d at 1553. The D.C. Circuit rejected this argument, holding that agency rules can be applied retroactively to the prior settlement agreements so long as the new rules "do not represent a shift from 'a clear prior policy.'" *Id.* at 1554. For the reasons discussed above, that is the case here.

no contractual right to a continuing rental rate of 19 percent, or to any particular amount at all. A new rental rate for the renewal term of the agreement had to take into account the agency's post-1994 rulings on the "sole proprietary interest" standard. Given that the rental rate set in 1994 and evaluated in the agency's 1994 opinion letter had expired, the City had no residual reliance interest in that rate, or in that 1994 opinion, at all.

2. The NOV does not result in "manifest injustice."

The City argues the NOV represents "manifest injustice" because the agency's ruling threatens its ability to engage in arbitration for the second term and to recover the remaining payments from the first term (2009-2011). City Br. at 43-44.

But both of these asserted "harms" do not implicate retroactivity. The City's "right" to arbitrate relates purely to setting a rental rate for the second term of the Agreements—for 2011 through 2036, a matter which obviously is directed to prospective relief only. And the issue of the 2009-2011 withheld payments, which is still on appeal before the Eighth Circuit, *see* n. 16, *supra*, relates to whether the Band will have to make future payments to the City for rental amounts that accrued in the past. In short, both of these asserted injuries relate to the prospective application of the NOV. Neither the NOV nor the subsequent decisions of the Minnesota federal courts requires the City to disgorge the $75 million that it has already collected from the Band or to pay any fines or damages. *See Clark-Cowlitz*, 826 F.2d at 68-69 (burden imposed on petitioner "marginal at best" where agency action did not involve fines or damages).

The City also claims an injustice from the fact that in reliance on NIGC's 1994 opinion, it assumed a $2 million debt service from the construction of a parking ramp adjacent to the casino that had been developed under the 1986 Agreements. City Br. at 44. But the City fails to disclose that as part of the 1994 restructuring (and in conjunction with assuming the risk of that

debt service), it received a payment of over $3 million from a "Parking Ramp Escrow Fund," plus over $5 million in a cash distribution of other Casino assets. AR 1324-25 (distribution of assets between the Band and the City).

More broadly, the NIGC correctly concluded in the NOV that, based on the record before it, the City made no capital investments in connection with the 1994 Agreements, "assum[ed] no risk" and "provid[ed] no services commensurate with the payments received." AR 41. The distribution of $8 million to the City as part of the 1994 restructuring and then the payment of an additional $75 million to the City over the first term of the 1994 Agreements hardly constitute a "manifest injustice" to the City.

Absent a showing of either detrimental reliance or manifest injustice, the City cannot succeed on its argument that the 2011 NOV had an impermissible retroactive effect because, indeed, it had no retroactive effect at all.

III. The 2011 NOV Is Entitled to *Chevron* Deference.

An agency's interpretation of a federal statute which it has been entrusted to administer is entitled to deference where: 1) the statute does not expressly address the precise matter at issue, or it contains an ambiguity or a "gap" to be filled, *Chevron*, 467 U.S. at 842-43, and 2) Congress has delegated to the agency authority to implement the statute by making rules that have the force of law (whether through rulemaking or adjudication). *United States v. Mead Corp*. 533 U.S. 218, 226-27, 230-31 & n.13 (2001); *see also Gonzalez v. Oregon*, 546 U.S. 243, 255-56, 258 (2006); *Citizens Exposing Truth about Casinos v. Kempthorne (CETAC)*, 492 F.3d 460 (D.C. Cir. 2007).

Where these factors are satisfied, a court will uphold an agency's interpretation if it is a reasonable and permissible construction of the statute—even if the court might have interpreted

the statute differently. *Chevron*, 467 U.S. at 843-44; *see also Brand X Internet Servs.*, 545 U.S. at 982-986.

A. Congress gave the NIGC authority to define the "sole proprietary interest" requirement in IGRA.

If "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron*, 467 U.S. at 843 (footnote omitted). "Rather, 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*.

An agency interpretation made in an adjudication is entitled to *Chevron* deference. *Mead*, 533 U.S. at 226-27, 230-31 & n.13; *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57, 263 (1995); *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 330-32 (D.C. Cir. 2011); *BP W. Coast Prods., LLC v. FERC*, 374 F.3d 1263, 1272-73 (D.C. Cir. 2004); *In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000). This applies to agency enforcement actions, *see NationsBank*, 513 U.S. at 256-57, including even an agency's decision not to initiate an enforcement action where such decision was "part of a detailed statutory framework for civil enforcement," *In re Sealed Case*, 223 F.3d at 780.

Here, Congress in IGRA required tribes to "have the sole proprietary interest and responsibility for the conduct of [Indian] gaming," 25 U.S.C. §§2710(b)(2)(A); *see id.* §2710(d)(1)(A), but Congress did not otherwise define the term, nor articulate the criteria by which the "sole proprietary interest" standard should be met. Instead, Congress authorized the NIGC to determine when and how that statutory requirement was to be satisfied in light of the newly emerging Indian gaming industry and the unforeseen situations that might impair effective regulatory oversight of that industry.

Congress also authorized the NIGC to implement IGRA both by promulgating rules and through enforcement actions. *Id*. §§2705, 2706, 2713. When the NIGC promulgated its initial regulations, it concluded that the meaning of the "sole proprietary interest" requirement was best left to determination in the context of specific circumstances. AR 450 (quoting 58 Fed. Reg. 5804 (Jan 22, 1993)). It has since addressed this issue through both advisory opinions issued by the NIGC Office of General Counsel, as well as through formal enforcement actions taken under section 2713.[18]

The NOV here was one such formal enforcement action. The NOV was issued by the NIGC Chairwoman pursuant to the NIGC's statutory authority to enforce IGRA by issuing formal complaints under section 2713(a). It was issued following notice to the Band and to the City of the NIGC Chairwoman's decision to refer the matter to the NIGC enforcement division, AR 614, and following consideration of extensive briefing and voluminous exhibits submitted by both parties.[19] The NOV here was issued as "part of a detailed statutory framework for civil

[18] To be sure, as the City notes, *Chevron* deference does not apply to opinion letters that lack the force of law, City Br. at 24, including opinions issued by the NIGC's general counsel. But the City errs in reading the cases as limiting *Chevron* deference only to regulations promulgated by the agency. As discussed above, *supra* p. 35, well-established law holds that agency adjudications and other agency proceedings that have "the force of law" are entitled to *Chevron* deference. *See also CETAC*, 492 F.3d at 461 (Secretary of the Interior's decision under IGRA to take land into trust for gaming purposes entitled to deference); *Pharm. Research & Mfrs. of America v. Thompson*, 362 F.3d 817, 822-24 (D.C. Cir. 2004) (HHS decisions approving State Medicaid plans which reflected the Secretary's interpretation of the statute, entitled to *Chevron* deference as the Secretary had to ensure that each plan complied with a "vast network of specific statutory requirements"); *Mylan Labors. Inc. v. Thompson*, 389 F.3d 1272, 1279 (D.C. Cir. 2004) (FDA's letters advising parties of its decision on approval of a drug application and use of a patented product fell within *Chevron*.); *Fed. Election Comm'n v. Nat'l Rifle Ass'n of America*, 254 F.3d 173, 185-86 (D.C. Cir. 2001) (FEC advisory opinions issued by the Commission itself, not staff, and which are given the force of law, entitled to *Chevron* deference).

[19] Although neither IGRA nor the agency's regulations implementing IGRA require that the parties be given an opportunity to submit briefs or exhibits when the agency is evaluating whether to initiate an enforcement action through an NOV, *see* 25 U.S.C. §2713(a)(2); 25 C.F.R.

enforcement," s*ee In re Sealed Case*, 223 F.3d at 780, and unquestionably had the force of law, as failure to comply with it subjected the Band to civil fines or closure orders, AR 51. As the Court of Appeals for the Eighth Circuit found, the NOV was "a binding adjudication by a federal agency, which has been tasked with interpreting and enforcing a statute enacted by Congress." *Duluth III*, 702 F.3d at 1153.

The NIGC's interpretation of IGRA, applied in the context of an NIGC enforcement action, has been accorded *Chevron* deference in the past. *United States v. Seminole Nation of Oklahoma*, 321 F.3d 939, 945 (10th Cir. 2002); *see also CETAC*, 492 F.3d at 471 (Secretary of the Interior's decision under IGRA to take land into trust for gaming purposes entitled to deference). The same deference should apply to the agency's binding adjudicatory ruling in the 2011 NOV.

B. The NIGC's interpretation and application of IGRA's "sole proprietary interest" standard in the NOV was reasonable.

The NIGC's application of IGRA's "sole proprietary interest" requirement to the 1994 Agreements was a reasonable interpretation of that statutory mandate.

In reaching the conclusions set out in the NOV, the NIGC Chairwoman was careful to take into account the views expressed by the prior agency chairman in his 1994 letter to the federal court, as well as the April 2010 decision reached by the federal court in the then-pending litigation between the City and the Band. AR 33 & n.1, AR 37. However, based on the precedent established in a comprehensive body of law developed by the agency over the course of the preceding 10 years, the NIGC Chairwoman concluded that the 1994 Agreements violated IGRA's "sole proprietary interest" requirement due to the lengthy term of the agreement, the

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pt. 573 (2011), the NIGC here afforded the City and the Band full briefing rights, and thus provided more process than required by the law.

amount of revenue paid to the City, and the right of control given to the City over the gaming operation.

In reaching her conclusions, the NIGC Chairwoman carefully considered all of the arguments made by the City on each of these issues.

1. Revenue sharing.

As it did before the NIGC, the City here contends that the NIGC's decision was in error because IGRA contains a provision that permits Indian tribes to use net gaming revenues "to help fund operations of local government agencies," City Br. at 39 (citing 25 U.S.C. §2710(b)(2)(B)(v)). Relying on this, the City then contends that Congress did not prohibit "how a tribe and a local government structured a revenue sharing arrangement." *Id*.

But, as the NIGC correctly found, this a fundamental misreading of IGRA. While Congress in IGRA permitted tribes to expend a portion of their net gaming revenues (meaning revenues available after deducting operating expenses) to aid local governments, that provision nowhere authorizes a local government to receive a percentage of gross revenues. *See* 25 U.S.C. §2710(b)(2)(B)(v). Moreover, the allowance to use net revenues to aid local governments must be applied consistently with IGRA's other requirements, including its mandate that tribes have the "sole proprietary interest" in the gaming operations. The NIGC had to balance these two provisions, and did so, pointing out that the provision on aid to local governments simply cannot be read to permit payments which bear no relation to services provided, in derogation of IGRA's "sole proprietary interest" requirement. AR 42-43.

The NIGC's conclusion that the payments to the City were excessive because they bore no relation to any services provided by the City or any capital investment or risk borne by the City was amply supported by the record. The City does not dispute any of the NIGC's specific

findings on this point.[20] Instead it argues that the NIGC should have compared the 1994 Agreements to what the City describes as other "gaming related agreements with governmental entities." City Br. at 40.

But the other "gaming related agreements with governmental entities" cited by the City are of a fundamentally different character—they are all class III gaming compacts between tribes and states, the provisions of which are specifically delineated by IGRA and governed by a very detailed set of provisions under which tribes and state governments are authorized to address a range of issues regarding class III (casino-type) games within the state. 25 U.S.C. §2710(d)(3)(C). The Fond du Lac Band has a tribal-state gaming compact with the state of Minnesota, AR 3309-3324, under which Minnesota does not get "revenue-sharing" but is paid certain costs for services it provides in connection with gaming. While some tribal state gaming compacts provide for revenue sharing, it is typically done in exchange for certain concessions by the state—usually a commitment that the state will not allow non-Indian gaming, so as to provide the tribes with exclusive gaming rights within the state.

The NIGC expressly considered the City's reliance on the tribal-state gaming compacts it cited, and correctly concluded that "tribal-state compacts are fundamentally different than the agreements at issue here. Cities are not parties to such compacts. By law, compacts between an

[20] The NIGC's findings are correct. The only investment in the project made by the City was a $2 million expenditure in 1986 in connection with the construction of a parking ramp adjacent to the Casino. But in 1994, the City received a payment of $3,082,177 from a parking ramp escrow fund to more than cover this cost, plus an additional $5,378,102 in the distribution of the Commission's assets. And the City retained title to the parking ramp as well. AR 1324-1325. The City made no other capital investment in the project, and assumed no risk in the operation of the Casino. While the City, from 1994 to 2009, received a total of $75 million in "rent" from the Band, that rent was for a property that the Band already owned and for which the Band was paying all operating expenses. The City did not provide any services to the Casino beyond the municipal services that it provides to all other businesses in the City. And it presented no evidence to the NIGC to indicate otherwise.

Indian tribe and a state provide for regulation of class III gaming." AR 42. The NIGC further found that while "Interior has approved some compacts that provide for a share of the net revenue if the State provides an on-going tangible benefit, such as exclusivity from non-Indian gaming," the City's claim of exclusivity under the 1994 Agreements was at best dubious. The NIGC found, and the City does not dispute, that "the 250 mile area of exclusivity could not prevent another Indian tribe or a non-Indian entity from operating gaming because the City's jurisdiction does not extend beyond the City's limits." AR 42. The NIGC properly refused to credit the contract's illusion of "exclusivity" provided to the Band, and rejected the City's effort to analogize its agreement with the Band to the highly structured and carefully delineated tribal-state compacts specifically authorized by IGRA.

2. Term.

Again, without disclosing that its comparisons are to tribal-state compacts, the City contends that other "government-to-government" gaming agreements with tribes have various lengths of terms, alleging that a few of them are perpetual, while others are for shorter terms but subject to renewal. City Br. at 40-41. But the term lengths of tribal-state compacts vary as relevant to the specific, congressionally authorized matters being addressed in such compacts and provide no guidance as to the kinds of contractual relationships that are permissible outside the tightly regulated sphere of such compacts. The NIGC here too found inappropriate the comparisons made by the City between the City-Band agreements and tribal-state compacts.

3. City control.

The City also takes issue with the NIGC's finding that under the 1994 Agreements the City had an impermissible degree of control over the Band's Casino. But the City mischaracterizes the 1994 Agreements when it states that the contracts gave the City only "an

ability to comment on proposed changes to the Band's gaming regulations." City Br. at 41. The 1994 Agreements did much more. As the NIGC correctly found, those agreements expressly provided that the Band could not amend its gaming regulations as they applied to the Fond du Luth Casino "unless the City consents to the modification or the modification is required by Federal law or a tribal-state compact." AR 40; *see also* AR 1226 (1994 Tribal-City Accord §6(c)). The same is true of licensing, where the Agreements gave the City a right to object to Band licensing decisions, AR 1235, and a related level of unfettered access to all records relating to the Casino, AR 1228-1229. While the City again argues that tribal-state compacts allow for similar roles for states, the allocation of regulatory authority between tribes and states for purposes of class III gaming compacts is expressly listed in IGRA as a permissible subject for tribal-state compacts. 25 U.S.C. §2710(d)(3)(C). No such parallel authority regarding Indian gaming was given by Congress to local governments.

In sum, the NIGC carefully considered the requirements imposed by IGRA. The agency construed the "sole proprietary interest" requirement in a manner that balanced IGRA's various provisions and applied to the 1994 Agreements a substantial body of law that the NIGC had developed over the preceding decade. The NIGC Chairwoman's conclusion that the 1994 Agreements violated the "sole proprietary interest" requirement was an eminently reasonable application of IGRA that was fully consistent with the statute's principal goal of furthering the economic development and self-sufficiency of tribal governments. The NOV properly gave effect to both the text and congressional intent of the Act, and is accordingly entitled to *Chevron* deference.

IV. Conclusion.

The City's challenge to the 2011 NOV should be rejected and its complaint dismissed.

Respectfully submitted,

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