UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF DULUTH, 411 W. 1st Street Suite 410 Duluth, MN 55802 *Plaintiff*, vs. The NATIONAL INDIAN GAMING COMMISSION and JONODEV CHAUDHURI, in his official capacity as Acting Chairman of the National Indian Gaming Commission 1441 L. Street Suite 9100 Washington, D.C. 20005 *Defendants*.	)	Civil Case No. **13-246 (CKK)**

PLAINTIFF CITY OF DULUTH'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANTS' OPPOSITION TO PLANTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

For its response to Defendants' (NIGC or agency) arguments in support of its cross-motion for summary judgment (ECF No.26), Plaintiff City of Duluth ("City") incorporates herein its factual statement and arguments presented in support of its motion for summary judgment (ECF No. 25) in order to eliminate repetition of information and arguments presently before the court, and utilizes this memorandum to respond to arguments raised by the NIGC in its opening memorandum.

The NIGC's action is subject to reversal because the Chair exceeded her statutory authority when she reopened an enforcement action that was the subject of the agency's 1994 final action. The NIGC's interpretation of its statutory authority is not entitled to Chevron deference because its authority is not ambiguous.

The NIGC reviewed the 1986 Agreements pursuant to its review authority under 25 U.S.C. § 2712. After concluding that the agreements violated the IGRA, the NIGC exercised its enforcement authority under § 2713, pursuant to the procedures in place in 1993-1994 and subsequently approved the revisions that became the 1994 Agreements. The NIGC's 1994 approval was a final agency action.

The NIGC's assertion of enforcement authority in 2010 and its issuance of the NOV was an improper retroactive action that improperly substituted new law for settled law and caused manifest injustice to the City.

Requiring the NIGC to abide by its final agency actions does not harm the policy concerns that inform the IGRA; instead it serves Congress's express policy of establishing of Federal standards for gaming on Indian lands.

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

Cases

Statutes

Federal Regulations

IV. ARGUMENT

A. The NIGC's Decision to Assert its Enforcement Authority is not Entitled to Chevron Deference.

The NIGC argues that it is entitled to Chevron deference regarding its interpretation of "sole proprietary interest" set out in the NOV. *See,* Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984). Its position is based on two arguments: (1) because the NOV functioned as the agency's adjudication, it carries the force of law. *See,* Bennett v. Spear, 520 U.S. 154 (1997); and (2) that because the term "sole proprietary interest" is not defined and is ambiguous, under Chevron jurisprudence "the question for the court is whether the agency's answer is based on a permissible construction of statute." Chevron, 467 U.S. at 843. The NIGC is correct that generally, when an agency's interpretation is the product of formal rulemaking, Chevron deference is normally applicable. It is also correct that generally, when an agency's interpretation is a product of its adjudicative authority authorized by Congress, Chevron deference is the norm. *See,* United States v. Mead Corp., 533 U.S. 218, 229(2001)("Mead Corp") ("We have recognized a very good indicator of delegation meriting Chevron treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.")*.* But acknowledging these general understandings of the appropriate context for the application of Chevron deference does not answer the question of what deference is due the NIGC's action in this case.

While the NOV served as an enforcement action and a platform for the NIGC's interpretation of the phrase "sole proprietary interest," that fact alone does not mandate

Chevron deference because the agency's exercise of its enforcement authority violated Congress's express limitation on the agency's authority and was *ultra vires*. As the Court explained in City of Arlington v. FCC, 133 S.Ct. 1863 (2013), Mead Corp "requires that for Chevron deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." 133 S.Ct. at 1874. City of Arlington thus instructs that an agency's interpretation of its jurisdictional authority is entitled to Chevron deference only if Congress has not expressly limited the authority exercised. Id at 1869. ("Both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires. Because the question—whether framed as an incorrect application of agency authority or an assertion of authority not conferred—is always whether the agency has gone beyond what Congress has permitted it to do…").

1. The NIGC's Exercise of § 2713 Enforcement Powers Violated the Express Limitations of its Authority.

Focusing on the NIGC's interpretation of "sole proprietary interest" to conclude that the 2011 enforcement action is entitled to Chevron deference ignores the foundational question at issue; namely, whether it exceeded its statutory authority when it engaged in the enforcement action. "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, applying the ordinary tools of statutory construction, the court must determine "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." Id., 133 S.Ct. at 1868, *quoting,* Chevron, 467 U.S at 842-843.

Here, within 25 U.S.C. § 2512 Congress expressly provided for the contract review process that resulted in the NIGC's approval of the 1994 agreements. Congress did not grant to the NIGC the authority to subsequently reverse its 1994 decision. Because the NIGC asserted jurisdiction in a manner that violates the express statutory language, its decision to assert jurisdiction to initiate a second enforcement action is not entitled to deference.

> Under Section 2712(a) Congress mandated that the Chairman of the NIGC:
>
> (a) ….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. § 2712(a).

By this express language Congress mandated that tribes who adopted an ordinance or resolution authorizing in Class II and Class III gaming prior to enactment of the IGRA submit such ordinances or resolutions, including "all collateral agreements relating to the gaming activity" for review. Congress further provided for NIGC processes with regard

to approval of ordinances and resolutions (§ 2712(b)) and other contracts (§ 2712(c)), and enforcement actions (§ 2713).

The NIGC argues that Section 2712 does not authorize review of the 1986 agreements because the agreements were not management contracts. [ECF Doc. No. 26, pg. 16]. This argument ignores the express language of Section 2712(a), which does not limit the Chair's pre-IGRA review authority to management contracts. Section 2712 expressly includes authority to review management contracts, gaming ordinances, gaming resolutions, and "all collateral agreements relating to the gaming activity." The 1986 Agreements were collateral agreements to the Band's ordinance and related to the gaming activity authorized by the Band's ordinance.

It is important to note that in the NOV, the NIGC failed to discuss or analyze the statutory basis for Chairman Hope's exercise of his authority in 1994 or the basis for its assertion of authority to overrule Chairman Hope's approval of the 1994 agreements. Its argument that Hope's action was advisory only and did not constitute a final agency action is a new litigation position and does not represent the agency's interpretation of its review authority under Section 2712 or its enforcement authority under Section 2713. The litigation position of the agency is afforded no deference. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212(1988). In Bowen, the court rejected the agency's position that its interpretation of the statute was entitled to Chevron deference even if the interpretation is first advanced in litigation. The Court observed that "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.'" 488 U.S. at 212, *quoting,* Investment Company Institute v. Camp, 401 U.S. 617, 628 (1971).

Clearly, Chairman Hope concluded that he had the authority to review the agreements, and his determination of his authority carries more weight than the argument presented by the NIGC for the first time in this litigation. *See*, Watt v. Alaska, 451 U.S. 259, 272-273 (1981) (holding that agency's interpretation of amendment that was contemporaneous with amendment's passage was entitled to considerably more deference than agency's current, inconsistent interpretation). And to the extent the parameters of Chairman Hope's review authority under Section 2712 and enforcement authority under Section 2713 is ambiguous, the court must afford to Hope's interpretation of his authority and subsequent actions the Chevron deference to which they are entitled. City of Arlington, 133 S. Ct. at 1868 (Chevron "provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.")

That the Band's gaming ordinance and its collateral agreements with the City were subject to the review process provided for in § 2712 was recognized by the Minnesota District Court, in its Memorandum and Order, filed on December 26, 1990 [AR 101]. ("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. …..the Chairman retains the ability to review the agreements when the Secretary appoints the two associate members to the Commission." Id. at pg. 5.

In January of 1991, and in response to the December 26th Order, the City wrote to the NIGC Chairman and Secretary requesting an opportunity to be heard at the time of any review of the agreements. [AR 2812-2814]. In response, Chairman Hope advised the attorneys representing the City and the Band that the Commission would determine its proper role once the Commission appointments were completed. [AR 2811]. The Band then submitted a petition to the NIGC Chairman seeking review of the gaming agreements. [AR 2807-2808]. On July 1, 1993 the NIGC issued Bulletin No. 93-3 to address the submission of gaming-related contracts and agreements for review. [AR 2493]. In the bulletin the NIGC advised that agreements should be submitted to the NIGC for review and the NIGC would determine if the agreement required the approval of the NIGC. It further advised that if the NIGC determined that the agreement did not require NIGC approval, the submitter would be notified of that fact and the NIGC would forward the agreement to the BIA for its review. Id.

On July 16, 1991 Chairman Hope advised the attorneys for the City and Band that the NIGC would undertake a review and determine what role the NIGC would play prior to the completion of NIGC regulations. [AR 2806]. The administrative record does not include what, if any, further communications to the City or the Band were issued until September of 1993. Significantly, it does not contain any record that the NIGC

determined that it did not have jurisdiction over the 1986 agreements, that the NIGC forwarded the agreements to the BIA for review, or that the BIA conducted a review of the agreements. Instead, the NIGC completed its § 2712 review, disapproved of the agreements pursuant to its express authority under § 2712 to do so, and then asserted jurisdiction pursuant to its enforcement authority under § 2713 by issuing the September 24, 1993 violation notice. [AR285-288]. [1]

25 U.S.C. § 2713 provides in part that:

> (a) Authority; amount; appeal; written complaint.
>
> (1) Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $ 25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this Act, any regulation prescribed by the Commission pursuant to this Act, or tribal regulations, ordinances, or resolutions approved under section 11 or 13 [25 U.S.C. §§ 2710 or 2712].

The regulations promulgated by the Commission on January 22, 1993 provided for the enforcement process by which Chairman Hope issued his September 24th violation notice. *25 C.F.R. 573.3; 58 FR 5844, Jan. 22, 1993.* The regulation read in relevant part as follows:

> § 573.3 Notice of violation.
>
> (a) The Chairman may issue a notice of violation to any person for violations of any provision of the Act or this chapter, or of any tribal ordinance or resolution approved by the Chairman under part 522 or 523 of this chapter.
>
> (b) A notice of violation shall contain:

[1] The NIGC agrees that Chairman Hope exercised his enforcement authority under §2713. [ECF Doc. No. 26 at pgs. 15-16.

> (1) A citation to the federal or tribal requirement that has been or is being violated;
>
> (2) A description of the circumstances surrounding the violation, set forth in common and concise language;
>
> (3) Measures required to correct the violation;
>
> (4) A reasonable time for correction, if the respondent cannot take measures to correct the violation immediately; and
>
> (5) Notice of rights of appeal.

58 FR 5833

Chairman Hope's September 24th violation notice informed the City and Band that "the current operation of the Fond du Luth Casino, therefore, is in violation of a valid gaming ordinance adopted by the Band." [AR 286]. It provided citation to the statutory authority for his conclusion, provided measures required to correct the violation, provided the parties time to correct the violations, and significantly, offered the services of NIGC staff and technical resources, including the Chair's offer to chair a settlement conference. Id.

The parties were able to settle this violation to the satisfaction of the Chair [AR325-326] and pursuant to 25 C.F.R. § 575.6(b). *58 FR 5833.* ("(b) Settlement. At any time prior to the filing of a notice of appeal under part 577 of this chapter, the Chairman and the respondent may agree to settle an enforcement action, including the amount of the associated civil fine. In the event a settlement is reached, a settlement agreement shall be prepared and executed by the Chairman and the respondent. If a settlement agreement is executed, the respondent shall be deemed to have waived all

rights to further review of the violation or civil fine in question, except as otherwise provided expressly in the settlement agreement.").

Chairman Hope expressed his approval as follows: "I am pleased to inform the parties that the finalization of this settlement agreement will make it unnecessary for the NIGC to initiate an enforcement action to bring the Fond du Luth Casino into compliance with IGRA. I applaud both parties in achieving this desirable result. Your actions should result in substantial benefits to the Fond du Lac Band and the City of Duluth for many years to come." Id.

By reviewing the gaming related agreements under § 2712, advising the parties that the NIGC disapproved them, initiating an enforcement process under § 2713, providing NIGC services to negotiate a settlement, and approving the settlement under 25 C.F.R. § 575.6(b), the NIGC engaged in a final agency action under 25 U.S.C. §2714. ("Decisions made by the Commission pursuant to sections 11, 12, 13, and 14 [25 U.S.C. §§ 2710-2713] shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code [5 U.S.C. §§ 701 et seq.].").

The NIGC attempts to avoid the impact of its final action in 1994 by arguing that its enforcement authority includes under its regulations the authority to issue letters of concern prior to the Chair taking enforcement action; therefore, Chairman Hope's approval letter did not constitute a final agency action. It cites to 25 C.F.R. § 573.2. [ECF Doc. 26, pg. 6] This argument may be easily rejected because the regulation relied upon was not in effect in 1993 when Chairman Hope initiated his enforcement action, or

in 1994 when he approved the agreements constituting the settlement. *See*, 77 FR 47517 August 9, 2012 (adding 25 C.F.R. § 573.2). In describing the purposes for the 2012 amendments the NIGC advised that, "The National Indian Gaming Commission (NIGC or Commission) is amending its enforcement regulation to include a graduated pre-enforcement process through which a tribe may come into voluntary compliance." 77 FR 47517. Thus, the September 24, 1993 letter was, at that time, the Chair's notice of violation issued pursuant to his authority under §2713.

In the NOV the NIGC did not interpret C.F.R. § 573.2 or conclude that Chairman Hope's action was not a final agency action, its argument here is yet another after-the-fact justification for the exercise of its enforcement authority, which fails to defer to its 1993 and 1994 actions as to the most appropriate procedural method to carry out its duties. "The NIGC is best left to determine the appropriate procedural method to carry out its duties." Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 524 (1978) (emphasizing that the formulation of procedures is left to the sound discretion of the administrative agency). An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is "entitled to considerably less deference" than a consistently held agency view. INS v. Cardoza-Fonseca, 480 U.S. 421, 446 N. 30 (1987) *citing*, Watt v. Alaska, 451 U.S. 259, 273 (1981). In the NOV the NIGC failed to explain why Chairman Hope's decision was not a final agency action under Section 2714. In 1993, the NIGC made its determination as to the appropriate procedural method to carry out its duties. Pursuant to its authority, Chairman Hope concluded that

the 1994 Agreements complied with the IGRA, notified the parties and the Minnesota District Court, and took no further enforcement action.

The NIGC fails to cite to any provision of the IGRA or its regulations that grants to the agency the authority to reopen an enforcement action subject to a final agency action. Because its assertion of jurisdiction is in violation of the express language of Sections 2712, 2713 and 2714 and because it ignores the implementing regulations in effect in 1993 and 1994, its interpretation that it had jurisdiction to review the 1994 Agreements is not entitled to deference. Its action was arbitrary and capricious because it was *ultra vires* and the action of the Chair must be reversed. 5 U.S.C. §706(2)(C) (reversal of the action is required when it is taken in "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right...")

2. The NIGC's Exercise of its Enforcement Authority was an Improper Retroactive Action.

a. An agency's retroactive action is not immunized from reversal by the use of adjudication rather than rule-making.

The NIGC argues that the Bowen prohibition against retroactive action does not control because by issuing the NOV it was acting through adjudication not regulation. [ECF Doc. No. 26, pg. 26] *See,* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988). The NIGC's argument misses the point and relies upon case law that is distinguishable. The issue is not whether an adjudicatory action is retroactive, the issue is whether the agency may apply new statutory interpretation retroactively and by doing so substitute new law for old law that is reasonably clear.

The NIGC relies on Eagle Healthcare, Inc. v. Shalala, 52 F. Supp. 2d 1(D.D.C.1999). That case, unlike here, did not involve a second review and reversal of a prior agency action. In that case, the agency action under challenge was the denial of a cost reimbursement request during which a new standard for the cost reimbursement was applied. The nature of the statutory provision was inherently retroactive because it involved reimbursement of costs already incurred. But more importantly, the court viewed the propriety of the application of the new challenged cost calculation to the plaintiff's cost reimbursement as a "close question" Id. at 7. Ultimately, the court concluded that the application of the new reimbursement formula to the reimbursement request was not improperly retroactive because the plaintiff had the opportunity during the administrative review process to offer a sufficient justification to the Secretary's representatives for the costs incurred. Id. at 7-8.

Here, the City was not afforded an opportunity to respond to the new position taken by the NIGC in the NOV. The City's request to appeal the Chair's action to the Commission pursuant to 25 C.F.R. §577.12 was denied because the Band did not appeal the NOV. [AR 25]. Thus, unlike the plaintiff in Eagle Healthcare, the final decision here was not the product of an adjudication that provided the City with a full and fair opportunity to respond to the NIGC's new position. If in Eagle Healthcare, the "close call" was resolved by the fairness of the process, then here, the unfairness of the process should result in an opposite conclusion as to the propriety of the retroactive decision.

In Catholic Health Initiatives Iowa Corp. v. Sebelius, 718 F.3d 914(D.C. Cir.2013), the court noted that under Wyman-Gordon, an adjudication must have

retroactive effect, or else it would be considered a rulemaking. Id. at 921, *citing* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 763-66 (1969); Bowen, 488 U.S. at 221 ("Adjudication deals with what the law was; rulemaking deals with what the law will be.") (Scalia, J., concurring). An agency action is retroactive if the rule itself effected a clear change in the legal landscape and attached new legal consequences to past actions. Id. at 922, *citing* Arkema Inc. v. EPA, 618 F.3d 1, 7 (D.C. Cir. 2010).

An agency's authority to act retroactively through adjudication is not *carte blanche*. Retroactive application of a new rule through adjudication does not automatically protect the action from reversal. In Catholic Health, the court noted that "Even 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.'" Id., *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 (D.C. Cir. 1986)). The court also made clear that "By 'retroactive effect'…, we typically refer to an order or penalty with economic consequences, not retroactive application of the rule itself." Id.

The NOV is retroactive because it has had economic consequences to the City. As a result of the NOV, the Band returned to the Minnesota District Court and was successful in avoiding the grant of summary judgment to the City on the City's breach of contract claim, and its rent obligations under the second term of the agreement. *See,* City

of Duluth v Fond du Lac Band of Lake Superior Chippewa, 702 F.3d 1147 (8th Cir. 2013). The Band has also used the NOV to continue to withhold payments due under the first term of the contract and is attempting to use the NOV to avoid its obligation to tender those payments. Id., (on remand 977 F. Supp. 2d 944 (D. Minn. 2013)(appeal pending, 8th Cir. Ct. of Appeals, Appeal No. 13-3408)).

b. The NOV is not Prospective.

In order to avoid the improper retroactive effect of its action the NIGC now asserts that NOV did not apply a new rule for the first time. It argues that because its view of the "sole proprietary interest" standard had been evolving over time that the City was on notice of its changing view. This argument is simply inconsistent with its own arguments. First, none of the opinions and actions it relies upon involved a government-to-government agreement. The NIGC concedes that its opinions have been rendered in the context of management contracts. [ECF Doc. No. 26, pg. 28] It also views the 1994 Agreements as "unique". Id. pg. 2. It also concedes that its advisory opinions and enforcement letters issued in response to its review of these management contracts should not be relied upon by others nor should parties assume that the ruling will be applied in connection with any transaction other than the one that is the subject of the ruling. Id. pg. 18, *citing* Mead Corp., 533 U.S. at 223-24. Given that its rulings have been rendered in the context of its management contract review authority, its ruling should not be assumed to apply in different contexts. Given the unique nature of the 1994 Agreements, it is incredible that the NIGC now argues that the the NOV did not improperly substitute new law for old law that was reasonably clear.

In a further effort to avoid the improper retroactive effect of its action the NIGC argues that while the 1994 Agreements were not management contracts or collateral agreement to a management contract, an ordinance, or a tribal-state compact, they are still agreements that must comply with the sole proprietary interest mandate. It further argues that the NIGC's evolving view on this mandate as applied to management contracts was properly applied in 2011 to the previously reviewed and approved government-to-government 1994 Agreements. The NIGC rejected the City's comparison with tribal-state compacts and argues here that these comparisons were not appropriate because while those compact must also meet the "sole proprietary interest" mandate they are subject to their own set of statutory and regulatory provisions. Id. pg. 28-29. But the same can be said of management agreements. In fact, Congress set out many detailed requirements for management contracts. 25 U.S.C. §2711. Among the details Congress mandated for management contracts, it required approval by the NIGC for such contracts. §2711(a)(1). It required complete background information for each person or entity "having a direct financial interest in, or management responsibility for" the contract. §2711(a)(1)(A). Congress specified the maximum percentage of revenue the management contractor could obtain. §2711(c). It specified the length of the management contract's term. §2711(b)(5). It is apparent that Congress engaged in such detailed legislation for management contracts because of its stated policy to "provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences…." 25 U.S.C. § 2702(2).

Unlike management contracts, Congress did not provide for detailed requirements for agreements between tribes and local governments. Its sole direction was its authorization for tribes to utilize gaming revenues to "to help fund operations of local government agencies." 25 U.S.C. § 2710(b)(2)(B)(v). By imposing its evolving management contract analysis to a tribal-local government agreement, the NIGC was establishing new law and replacing old law with the new law. By doing so it destroyed the settled expectations of those who had relied on the preexisting rule.

The NIGC also makes the incredible argument that the NOV is not retroactive because it is "forward-looking." [ECF Doc. No. 26, pg. 34]. This argument is completely unsupported by the administrative record, including the express language of the NOV and deliberately ignores the financial impact this ruling caused to the City.

The NIGC concedes that it expressly applied the NOV to the entire 42 year term of the 1994 Agreements, and ordered the Band to cease performance under the 1994 Agreements of those provisions identified in the NOV as violating the IGRA. One of those provisions was the rent payments to the City. But the NIGC argues, "as a matter of language and logic, one cannot 'cease' performance of something that has already been performed". Id. This argument ignores its own administrative record. The NIGC was fully aware when it issued the NOV the Band continued to withhold millions of dollars of rent payments due the City during the first term of the agreement and was seeking relief from the consent decree. [AR 33, n.1] It was fully aware that the Band had been ordered to arbitrate over the amount of rent due during the second term. It was fully aware that by expressly applying the NOV to the entire 42 year term and by ordering the Band to

cease performance of those provisions identified as violating the IGRA, it was ordering the Band to cease performance of something it had yet to perform—tendering its unpaid first-term rent and arbitrating for the rent payment to be paid during the second term.

The Chairwomen was fully aware that her order would allow the Band to avoid arbitrating for the second term rent. The Chairwomen stated "Regardless of the outcome of this arbitration, it is my view that performance under the 1994 Agreements will prevent the Band from maintaining the sole proprietary interest in and responsibility for the gaming activity. While the percentage of income paid to the City is an important factor in my decision, as detailed below, it is not the only factor. **A reduction in the fee will not remedy fees paid over the last 17 years**….." [AR 40].

The Band then used the order to return to the Minnesota District Court and attempt to avoid its rent payment obligations. *See,* City of Duluth v Fond du Lac Band, 830 F.Supp. 2d 712 (D.Minn. 2011)(granting Band prospective relief under Rule 60(b)(5) F.R.Civ.P. and denying retroactive relief); 702 F.3d 1147 (8th Cir. 2011)(affirming grant of prospective relief and reversing and remanding issue of Band's entitlement to retroactive relief); 977 F.Supp. 2d 944 (D. Minn. 2013)(on remand, denying Band's motion for Rule 60(b)(6) retroactive relief)(appeal pending, 8th Cir. Appeal No. 13-3408).

The NOV was an improper retroactive action of the NIGC. The NIGC has overturned a prior decision of the NIGC, disrupted the settled expectations of the City and Band, effected a clear change in the legal landscape, attached new legal consequences to past actions, and has caused significant economic harm to the City.

The NIGC also attempts to avoid the improper retroactive effect of its action by asserting the astounding statement that "the City did not rely reasonably to its detriment on the NIGC's past actions." [ECF Doc. 26 at pg. 31] It argues that the 1994 action could not have been relied upon by the City when it entered into the 1986 agreements. Id. But it is not the City's decision to enter into the 1986 Agreements which is the reliance at issue in this case. It is the City's decision to agree to enter into the 1994 Amended Agreements, negotiated under the auspices of the NIGC, and approved and endorsed by the NIGC that the City relied upon. In essence, the NIGC is asserting that it is unreasonable for parties who have submitted to the enforcement authority of the NIGC to rely upon the agency's action.

The NIGC also argues that the City could not rely upon a certain revenue stream because revenues were uncertain. While it is true that the exact amount of revenue to be received was uncertain, it was certain that the City would receive a percentage as long as the Casino operated at a profit during the two terms of the agreement. While the NIGC is correct that the Band has the right to close the Casino, the fact is that it has not closed the Casino. While the Casino operates, under the 1994 Agreements the City is entitled it to a share of revenue.

The NIGC is also correct that the City was not entitled to a particular percentage of revenues during the second term, but that correct analysis of the contract misses the point. While determination of the second term percentage was subject to negotiation, mediation or arbitration, the City was entitled to a percentage.

The NIGC also argues that the City's reliance was unreasonable because its assumption that unclear law would ultimately be resolved in its favor is not a sufficient basis to defeat retroactivity. Id., pg. 33, *citing*, Qwest Servs. Corp. v Fcc, 509 F.3d 531, 540 (D.C.Cir. 2007). The fallacy in this argument is the assumption that when the City entered into the 1994 Agreements, the law was unclear. Chairman Hope, by approving the agreements, was providing clarity to a new law and creating precedent. That precedent was applied retroactively to conclude that the 1986 Agreements violated the IGRA, and as a result the parties amended the agreements. Thus, as of 1994, it was clear that the 1994 Agreements did not violate the IGRA. In Qwest, the court was discussing the appropriate use of retroactivity in adjudication and the factors that demonstrate when retroactivity will work manifest injustice. Id. at 539-540. The court noted that "clarifications, which obviously fall on the no-manifest-injustice side of the line drawn…must presuppose a lack of antecedent clarity. They stand in contrast to rulings that upset settled expectations—expectations on which a party might reasonably place reliance." Id. at 540.

In 1994, the NIGC reviewed the 1986 Agreements and concluded that they violated the IGRA. That conclusion did not work a manifest injustice because the agreements predated the law, the sole proprietary interest mandate was unclear, and the parties were provided a fair opportunity to amend the agreements to the satisfaction of the NIGC. In 2011 when the NIGC applied its new interpretation to the 1994 agreement, it engaged in improper retroactive action because its action upset the settled expectations of

the City and did not provide for any opportunity for the parties to once again revise the contracts to the satisfaction of the NIGC.

In essence, the NIGC has determined that a local government is not entitled to a share of the gaming revenue despite the fact that Congress expressly authorized tribes to use its gaming revenues to "to help fund operations of local government agencies". 25 U.S.C. § 2710(b)(2)(B)(v).

3. The Statutory Interest in Enforcing the NOV Does Not Justify the Retroactive Reversal of its 1994 Approval.

The NIGC argues that the purposes of the IGRA require it to engage in the enforcement action undertaken through the NOV. The fallacy of this argument is apparent in the fact that the NIGC already fulfilled its obligation to enforce this mandate when Chairman Hope issued the September 24, 1993 violation notice and subsequently assisted the Band and the City in amending the 1986 Agreements. The 1994 Agreements will not authorize the violation of the IGRA for the next 25 years because the NIGC has already ruled that the agreements are fully consistent with the IGRA. The purposes the NIGC now expresses concern for were fully implemented and fulfilled in 1994.

The purposes of the IGRA include "….the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue. 25 U.S.C. § 2702(3)

The goal of establishing Federal standards for gaming is not advanced if the NIGC is allowed to retroactively reverse its prior enforcement decisions where, as here, there is no claim that the City violated the 1994 Agreements. If parties who submit to the enforcement authority of the NIGC, who participate in settlement negotiations under the auspices of the NIGC, and who amend their agreements and settle their disputes based upon the approval of the NIGC, are subject to the retroactive invalidation of the NIGC's approval, then there is, in effect, no Federal standards for gaming and the purposes of the IGRA are not served, they are frustrated.

The NIGC argues that while the IGRA authorizes gaming revenues to be used to "help fund operations of local government agencies," 25 U.S.C.§2710(b)(2)(B)(v), local governments are not entitled to receive such funds. [ECF Doc. 26, pg. 34, n. 22]. While this may be true, the argument misses the point. The Band entered into agreements with the City wherein it agreed to share its gaming revenues with the City. While the Band did not have to enter into such agreements, it chose to do so. The purposes of the IGRA are not advanced by allowing the NIGC to use its enforcement authority to assist a tribal government to avoid the obligations of its contracts when the tribal government decides it no longer desires to be bound by their contracts. If the NIGC is authorized to assist a tribal government to avoid the obligations of contracts that have been approved by the NIGC, tribal governments will soon find themselves unable to find states willing to allow gaming within their jurisdictions or management entities willing to enter into management contracts. Tribal governments will also face substantial opposition from

local communities during the negotiation of State-Tribal compacts if the NIGC is allowed to retroactively reverse prior approvals.

The NIGC also argues that revenue-sharing with local governments are typically carried out through municipal service agreements that delineate a fee-for-specific services. Id. Whether such agreements are typical is not demonstrated in the administrative record. This argument is not persuasive because the IGRA does not mandate that revenue sharing arrangements with local governments are intended to compensate local governments for the services they provide to the tribal government. Section§ 2710(b)(2)(B)(v) does not specify that the tribal government's ability to fund local government operations is limited to the value of local services provided. The NIGC has not promulgated a rule relating to how much is too much before the local government agreement will violate the "sole proprietary interest" mandate. Similarly, Section 2710(b)(2)(B)(v) does not provide a time limit on tribal-local government revenue sharing agreements.[2] If the NIGC's concern is that tribal governments should only pay for local services rendered, then one may reasonably assume that as long as the local government is providing local services it should receive a share of the gaming revenue. Here, the 1994 Agreements limit the time during which the City will participate in local revenue sharing, but the Band's right to operate the Casino continues as long as the Band

[2] Even if the NIGC initiated rule-making on this topic, its interpretation that local government agreements may be limited to a fee-for-service agreement of limited duration would violate the statute because the statute does not provide such a limitation or grant to the NIGC authority to promulgate a regulation to impose such restrictions.

chooses. The NIGC's post hoc rationalization is not only unsupported by the administrative record it is in conflict with the statutory language.

The NIGC also relies upon Clark-Cowlitz Joint Operating Agency v. FERC, 826 F. 2d 1074 (D.C.Cir. 1987) to support its policy argument. [ECF Doc. 26, pg. 34]. In Clark-Cowlitz, the court recognized that the case "involved fundamental issues of the power of an administrative agency to change its interpretation of law and to take regulatory action based upon that new interpretation." Id. at 1076. The factual context of the case was the agency's conclusion that the statutorily prescribed municipal preference did not apply in relicensing proceedings, in which the incumbent licensee was competing for the new license period. The agency's determination was a reversal of its conclusion articulated three years earlier in a different proceeding, in which both competitors for the license participated. The court concluded that the agency's reversal of its statutory construction was not improperly retroactive because it did not involve a new liability imposed on the parties for past actions taken in good-faith reliance on the agency's earlier pronouncement. Id. at 1084-1085.

Here, the City and the Band adjusted their agreements in good-faith reliance on the NIGC's earlier approval. No new matter was before the NIGC when the agency initiated its enforcement action. The NIGC was not engaged in a review of new or revised agreements. Thus, Clarke-Cowlitz was decided in a different procedural context and does not support the NIGC's present argument. The City is not seeking a new benefit to which it is not entitled under current law. The City is seeking payments due and payable to it before the NOV was issued. It is seeking to enforce its right to arbitrate for its share

of the gaming revenues for the second term of the 1994 Agreements — a right and a term that the NIGC already determined complied with the IGRA in 1994. What that share will be has yet to be determined. But its entitlement to a share is not a new entitlement; it is expressly authorized by the IGRA and expressly agreed to by the NIGC approved agreements. Thus, the City will not be receiving a benefit to which it is not entitled during the second term of the 1994 Agreements and the purposes of the IGRA are not violated by requiring the NIGC to be bound by its 1994 approval.

CONCLUSION

The City has demonstrated the Notice of Violation was arbitrary, capricious and in excess of the NIGC's statutory authority. The NOV has caused manifest injustice to the City by improperly imposing on a retroactive basis a revised interpretation of the 1994 Agreement. Accordingly, the City requests that the Court deny the NIGC's Motion for Summary Judgment and grant the City's Cross-Motion for Summary Judgment on all counts.

Because the NIGC's action was *ultra vires*, the City further requests the reversal of the agency's action pursuant to 5 U.S.C. §706(2)(C).

Dated this 12th day of September, 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

`