UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF DULUTH, Plaintiff, v. NATIONAL INDIAN GAMING COMMISSION, and JONODEV CHAUDHURI, in his official capacity as Acting Chairman of the National Indian Gaming Commission. Defendants.	Case No. 1:13-cv-00246 CKK

UNITED STATES' REPLY TO PLAINTIFF'S OPPOSITION TO UNITED STATES' CROSS MOTION FOR SUMMARY JUDGMENT

The United States files this Reply Brief in support of summary judgment. Plaintiff, the City of Duluth ("City"), has failed to establish that the National Indian Gaming Commission ("NIGC") lacked authority or improperly issued the Notice of Violation ("NOV") challenged in this litigation. As a result, and for the reasons set forth in this Reply and the United States' Cross-Motion for Summary Judgment, summary judgment should be granted in favor of the United States on all claims asserted by the City, and the City's Motion for Summary Judgment should be denied.

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Under the Administrative Procedure Act, the City must demonstrate that the NIGC's decision to issue the NOV was arbitrary and capricious, 5 U.S.C. § 706(2)(A), or that the NOV was issued in excess of authority, 5 U.S.C. § 706(2)(C). The City fails to satisfy that high burden: the administrative record, Dkt. 19, fully supports the NIGC's issuance of the NOV and the finding that 1994 Agreements violate IGRA's "sole proprietary interest" mandate. The NIGC acted properly under its statutory enforcement authority in issuing the NOV; the NOV was not an improper retroactive adjudication; and policy concerns weigh in favor of upholding it. Accordingly, the NIGC respectfully requests that the Court deny the City's Motion for Summary Judgment and grant the United States' Cross-Motion for Summary Judgment on all counts.

The United States hereby incorporates the arguments from its Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment, Dkt. 26 [hereinafter U.S. Motion]. However, we believe it is necessary to correct and clarify certain factual errors and mischaracterizations of the NIGC's arguments in the City's Memorandum in Opposition to Defendants' Cross-Motion for Summary Judgment and Reply to Defendants' Opposition to Plaintiff's Motion for Summary Judgment, Dkt. 30 [hereinafter Response]. Moreover, the City now has adopted a new, and incorrect, claim that the NIGC acted under 25 C.F.R. § 575.6(b) when "approving" the settlement agreement between the Band and the City in 1994. Response at 8. That is incorrect both factually and legally. Additionally, the City has asserted that the United States has put forth mere litigating positions and has alleged that the United States has "conceded" various points that it does not concede. The United States therefore corrects, clarifies, and responds to those errors and mischaracterizations as follows.

A. The NOV Was Properly Issued Under NIGC's Statutory Enforcement Authority

The City argues that the NIGC exceeded its authority in issuing the NOV because the 1994 Letter, AR 325-26, was a final agency action that cannot properly be superseded by subsequent agency action. The City is wrong both as to the law and the facts. As to the law, it is axiomatic that an agency may modify its position or its interpretation of an ambiguous statute it implements whether that position was set forth in a previous advisory opinion or in a previous final agency action. As to the facts, the NIGC in issuing the NOV acted solely under IGRA, 25 U.S.C. § 2713, and the 1994 Letter was not final agency action. We begin with the law.

1. The City Mischaracterizes the Law Regarding a Change of Agency Position

As discussed at length in Part C.1. of the U.S. Motion, an agency is entitled to change its mind. This is true regardless of whether the agency position or interpretation being modified was set forth in an advisory opinion or in a final agency action. See, e.g., Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032 (D.C. Cir. 2012) (upholding amendment to formal rule); Nat'l Home Equity Mortgage Ass'n v. Office of Thrift Supervision, 373 F.3d 1355, 1360 (D.C. Cir. 2004) ("An agency's interpretation of a statute is entitled to no less deference, however, simply because it has changed over time."). The City cites to Watt v. Alaska, 451 U.S. 259 (1981), and INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), for the proposition that earlier or consistently held views should receive greater deference than new interpretations. Response at 5, 10. The cases the City relies on are no longer good law in light of the Supreme Court's 2009 decision in FCC v. Fox Television Stations, Inc., 556 U.S. 502. Fox Television makes clear, as this very Court has recognized, that "the [APA] makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." City of Duluth v. Jewell, 968 F. Supp. 2d 281, 292 (D.D.C. 2013) (quoting Fox Television, 556 U.S. at 515). Remarkably absent

from the City's Response is any attempt to distinguish the case law cited by the United States in its Motion—from Fox Television, to Good Samaritan Hospital v. Shalala, 508 U.S. 402 (1993), to Nat'l Cable & Telecommc'ns. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005), to Home Builders, 682 F.3d 1032 (D.C. Cir. 2012).

Moreover, nowhere in IGRA, including Section 2712 (review of existing contracts), did Congress forbid the NIGC from changing its mind or from re-evaluating a previous interpretation of an ambiguous statutory provision. The City's understanding of the law would preclude agencies from altering their interpretation of the law unless Congress includes in every statute an explicit authorization for agencies to change position. See Response at 11. This is not how administrative law functions nor is it consistent with the Supreme Court's interpretation of that law. An agency is entitled to change its mind unless that authority is unambiguously foreclosed. See City of Arlington v. FCC, 133 S.Ct. 1863, 1871 (2013). Thus, the NIGC was entitled to change its position and its interpretation of IGRA and issue the NOV. The City does not carry its burden in proving otherwise.

Also, a clarification is in order with respect to the NIGC's discussion of City of Arlington v. FCC, 133 S.Ct. 1863, 1871 (2013). As discussed at pages 12 to 13 of the U.S. Motion, the NIGC's authority to issue the NOV is *clear*. Through IGRA, Congress delegated to the NIGC the authority to enforce the provisions of IGRA at any time and for any violation. 25 U.S.C. § 2713(a)(1). Only in the event that the Court finds the delegation of authority to be unclear need it rely on the alternative argument that NIGC is due deference under Chevron as to the question of its authority. U.S. Motion at 13; see Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984). As the City writes in its own brief, "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." Response at 2 (quoting City of Arlington, 133 S.Ct. at 1869). Congress did not expressly limit the NIGC's authority. To the contrary, Congress gave NIGC broad powers of enforcement in Section 2713. See U.S. Motion at 6.

2. The City Mischaracterizes the Facts

With regards to the facts, the United States maintains that all of NIGC's actions in relation to this matter were properly conducted under its Section 2713 enforcement authority. U.S. Motion at 13-17. This includes the 1993 Letter, AR 285-87, the 1994 Letter, AR 325-26, and the Notice of Violation, AR 33-51. The 1994 Letter was not final agency action. None of these positions are a "litigating position": the agency's position was first articulated in the NOV. In light of the City's selective and incorrect view of the facts, it is important to briefly correct and clarify the facts and NIGC's arguments.

- The NIGC did not review the 1986 Agreements under 25 U.S.C. § 2712.
    - The City presents an inaccurate and non-chronological timeline of events with regard to NIGC's first review of the 1986 Agreements. Response at 6. The City appears to suggest that NIGC issued Bulletin 93-3, AR 2493, as a call for review of documents under Section 2712 and that the 1986 Agreements were submitted in response to that bulletin. To the contrary, Bulletin 93-3 concerns itself only with 25 U.S.C. § 2711 and was issued so that parties unsure of the status of their agreements could request that NIGC determine whether certain gaming-related agreements were management contracts that needed to be submitted to the NIGC Chairman for his review and approval. AR 2493; see 25 U.S.C. §§ 2710(d)(9); 2711(a)(1) ("Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II

gaming activity."). Moreover, the Band and the City submitted the 1986 Agreements for review in 1991, AR 2806, two years before Bulletin *93-3* was issued.

- The City also argues—in direct contravention of its version of the facts in its Motion for Summary Judgment—that the 1986 Agreements are collateral agreements. Response at 4; City Motion at 2, 25-26. The term collateral agreements refers only to agreements that are collateral to management contracts. U.S. Motion at 5; 25 C.F.R. § 502.5. Both the NIGC and the City have discussed ad infinitum why neither the 1986 Agreements nor the 1994 Agreements are management contracts. See, e.g., U.S. Motion at 15-16. The City's argument that the 1986 Agreements were somehow collateral to the tribe's gaming ordinance has no basis in IGRA or its implementing regulations. The submission requirements for tribal gaming ordinances do not include agreements such as the 1994 Agreements. See 25 C.F.R. § 522.2.

- The United States' Motion did not argue that the 1993 Letter was a letter of concern.
  - The City erroneously accuses NIGC of arguing that the 1993 Letter was a "letter of concern" under 25 C.F.R. § 573.2(a). Response at 9-10.
  - In the Statutory Background of the U.S. Motion, we discussed letters of concern to illustrate that NIGC has broad enforcement powers under Section 2713. In addition to issuing NOVs, for example, the NIGC may issue letters of concern or orders of temporary closure. U.S. Motion at 6. Nowhere in the Argument portion of the brief does the NIGC identify the 1993 Letter as a letter of concern.

- The NIGC did not act under 25 C.F.R. § 575.6(b).
    - The City, for the first time, argues that Chairman Hope sanctioned the 1994 Agreements under 25 C.F.R. § 575.6(b). Response at 8. As quoted by the City, Section 575.6(b) provides that "a settlement agreement shall be prepared and executed by the Chairman and the respondent." Id.
    - Quite simply, the Chairman did not *prepare* nor did he *execute* a settlement agreement with the Band and the City. There is no evidence of such a settlement agreement in the record. The Band and the City reformed the 1986 Agreements into the 1994 Agreements and entered a consent decree in U.S. District Court in an action to which NIGC was not a party. AR 47.
- The 1994 Letter did not constitute final agency action under Section 2714.[1]
    - IGRA is explicit about what constitutes final agency action. 25 U.S.C. § 2714. Specifically, those actions are limited to:
        - Approval of tribal gaming ordinances. 25 U.S.C. § 2710(b)(2), (d)(2)(B).
        - Approval of management contracts and collateral agreements to management contracts. 25 U.S.C. § 2711(b),(e).
        - Approval of tribal gaming ordinances and management contracts that pre-date IGRA. 25 U.S.C. § 2712(b),(c).
        - Enforcement actions. 25 U.S.C. § 2713.

[1] NIGC provides this information for clarification purposes. As noted *supra* at Part A.1, an agency is entitled to change its position or its interpretation of the statute it implements regardless of whether the original agency position was set forth in an advisory opinion or in a final agency action.

- As highlighted in the NOV, "Chairman Hope's recommendation to the U.S. District Court could not constitute a formal agency approval of the 1994 Agreements because IGRA limits the Chair [sic] authority to approval of tribal gaming ordinances and management contracts." AR 43. IGRA authorizes the NIGC to approve management contracts and tribal ordinances, nothing else. 25 U.S.C. §§ 2710(e), 2711(b). NIGC is without authority to formally approve agreements between tribes and local governments like the 1994 Agreements, and it did not attempt to do so in 1994.
- Section 2714 requires a "decision" by the "Commission." The 1994 Letter was a letter; not a decision. The letter merely offers the opinion that the 1994 Agreements are "consistent" with IGRA. AR 325. The 1994 Letter was written by the Chair in his sole capacity, not by the three members that make up the National Indian Gaming Commission. AR 326. For these reasons, the 1994 Letter does not satisfy the requirements for final agency action under Section 2714.
- That the 1994 Letter is not final agency action is not a litigating position, as alleged by the City. Response at 10. The NOV only refers to the 1994 Letter as a "letter," never as a "decision" or an "action." See generally AR 33-51. The NOV highlights the lack of substantive analysis in the 1994 Letter. AR 43. Most importantly, the NOV points out that the 1994 Letter "could not constitute a formal agency approval." Id.[2]

[2] The City also alleges that the NOV does not discuss the "basis for its assertion of authority to overrule Chairman Hope's approval of the 1994 Agreements." To the contrary, the NOV asserts

In sum, all of NIGC's actions with regard to these Agreements were properly conducted under its Section 2713 enforcement authority. NIGC had a statutory duty to correct a mistaken interpretation of IGRA in light of experience. Therefore, the NOV was not *ultra vires*.

B. The NOV is Not an Improper Retroactive Adjudication

As demonstrated in the NIGC's opening brief, U.S. Motion at 27-29, the NOV is prospective. The Court, however, need not reach the question of the prospectivity or retrospectivity of the NOV. The NOV does not work a manifest injustice because the City did not rely to its detriment on the 1994 Letter. See Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1082 (D.C. Cir. 1987); see also U.S. Motion at 30-33. Thus, even if the City were correct, the NOV would not be impermissibly retroactive.

1. The NOV is Prospective

For the reasons discussed at Parts D.2. and D.3. of the U.S. Motion, the NOV is prospective. Although the City alleges that the NOV was designed to help the Band escape past obligations, Response at 16, the NOV in fact focused on the law and was directed at enforcing the law. The NIGC's interpretation of the sole proprietary interest mandate evolved over time. U.S. Motion at 3. In 2011, the Chairwoman found it necessary to initiate an enforcement action regarding the 1994 Agreements. Knowledge of the Band's litigating position was irrelevant to the decision to issue the NOV, as was any knowledge of past actions under the Agreements. When NIGC discovered that the 1994 Agreements violated the sole proprietary interest requirement, NIGC followed its statutory mandate under 25 U.S.C. § 2713(a)(3) and directed the Band to *prospectively* cease performance of those provisions identified in the NOV as violations

its authority under Section 2713 and specifically states that Chairman Hope provided no analysis. AR 35, 43.

of IGRA. AR 50. The NIGC reiterates its position that the Band was free at that time to cure the violation in a variety of ways, from ceasing gaming altogether to reforming the agreements.[3]

2. The City Did Not Detrimentally Rely

However, the Court need not address whether the NOV was solely prospective because the fact remains that the City did not detrimentally rely on the NIGC's actions in 1993 and 1994. As the D.C. Circuit has stated, it need not reach the retroactivity question when the Plaintiff has presented no explanation as to how it relied to its detriment on prior policy. Catholic Health Initiatives Iowa Corp. v. Sebelius, 718 F.3d 914, 922 (2013).

The City spends a page asserting, without showing, that it detrimentally relied. Response at 18. It opines that "[i]t is the City's decision 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." Response at 18. The City fails yet again to describe how its reliance on the NIGC, if any, was *detrimental*.

Indeed, there was no detrimental reliance. Imagine for a moment that the NIGC did not become involved with the Band and the City until 2010. Imagine that the 1993 Letter and 1994 Letter were never sent. The City would face two possible outcomes. First, the U.S. District Court might have decided that the 1986 Agreements violated IGRA and struck them down. The City would have received no benefits whatsoever. Second, the U.S. District Court might have decided that the 1986 Agreements were valid under IGRA. The Band and the City would have

[3] It is absolutely incorrect that the "NOV did not provide for any opportunity for the parties to once again revise the contracts to the satisfaction of the NIGC." Response at 20. The immediate need was to cease performance under the Agreements. Thereafter, the Band and the City were free to negotiate a new agreement that did not violate the sole proprietary interest requirement. NIGC stated as much in its Motion to Dismiss and its Motion for Summary Judgment. Dkt. 8 at 11; U.S. Motion at 27.

operated under the 1986 Agreements for 25 years, and the City would have received 24.5% of net revenues. AR 1019-20.

Now consider what actually happened. After the 1993 Letter, the Band and the City changed the structure of the Agreements, but very little of substance actually changed. AR 34 ("A close review of the 1994 Agreements demonstrates that they incorporate many of the primary terms of the 1986 Agreements that Chairman Hope stated violated IGRA.") Instead of receiving 24.5% of net revenues, the City received 19% of gross revenues from video games of chance, which turned out to be more than 24.5% of net revenues provided for in 1986. AR 48 (¶19). As a result, there was no detriment to the City in entering into the 1994 Agreements. The term of the agreements stayed the same. AR 48 (¶¶13-14). No detriment. The City maintained many incidents of control over the Band. AR 49-50 (¶¶27, 28, 30). No detriment. The City received over $8 million dollars, easily covering its only liability of $2 million for a parking ramp. U.S. Motion at 31-32. Benefit, not detriment.

The City was, if anything, better off *because of* the NIGC's involvement, not worse off. The City did not detrimentally rely on the NIGC's previous position in the 1994 Letter. The NOV is therefore not improperly retroactive.

C. Policy Concerns Weigh In Favor of Upholding the NOV

While "policy concerns" are not strictly relevant to the Court's analysis under the Administrative Procedure Act, a discussion of IGRA's purposes serves to illustrate that NIGC did not act arbitrarily or capriciously in issuing the NOV. The City frames the discussion in the following manner: "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." Response at

21. To the contrary, the purposes of IGRA are advanced when the NIGC becomes aware of a violation of the sole proprietary interest requirement and takes enforcement action. See 25 U.S.C. § 2713(a)(3). The City in effect claims that IGRA's purposes are best advanced by NIGC ignoring legal violations—a claim that must be rejected on its face.

The City claims that if the Court upholds the NOV, tribes will have difficulty finding future gaming partners and that this will thwart the purposes of IGRA. Response at 21. To the contrary, NIGC is unlikely to encounter a similar situation in the future. As previously discussed, the 1994 Agreements are unique agreements not contemplated by IGRA, U.S. Motion at 14, and NIGC is unlikely to come across a similar agreement in the future. In fact, the NIGC's strong stance on the importance of the sole proprietary interest requirement in this NOV will encourage future gaming partners to carefully craft lawful agreements that respect the purposes of IGRA.[4]

Finally, the City states that "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 governments." Response at 22. To be sure, IGRA does not expressly provide for the minutiae of tribal-local government agreements.[5] However, IGRA does expressly require that tribes retain the sole proprietary interest for gaming. 25 U.S.C. §

[4]"Far from shutting down opportunities for tribes to build or expand casinos, 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. See generally AR 447-454.

[5] With regards to tribal-state compacts, IGRA does provide that "nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe." 25 U.S.C. § 2710(d)(4).

2710(b)(2)(A). The sole proprietary interest mandate is ambiguous, leaving the NIGC to interpret it with logic and expertise, and with a view to IGRA's purpose that tribes are to be the primary beneficiaries of gaming. 25 U.S.C. § 2702(2); U.S. Motion at 10. Here, NIGC properly concluded, in a lengthy and detailed NOV, that the 1994 Agreements violate the sole proprietary interest requirement. The Court should uphold the NOV.

CONCLUSION

The NIGC is authorized to address and enforce against violations of IGRA under 25 U.S.C. § 2713. That is precisely what NIGC did prospectively in this instance regarding the 1994 Agreements by issuing the NOV. Moreover, the City did not detrimentally rely on the 1994 Agreements. For these reasons, and those set forth in the U.S. Motion, the United States respectfully requests that the Court uphold the NOV and deny Plaintiff City of Duluth's Motion for Summary Judgment.

The United States notes that the City requested oral argument in its Motion for Summary Judgment, but did not renew that request in its Response. Because this case can be decided on the law, the United States does not believe that oral argument is in the interest of judicial economy. The United States respectfully requests that the Court decide this Motion on the papers.

Dated: September 26, 2014

Respectfully submitted,

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