

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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CITY OF DULUTH,

Plaintiff,

v.

FOND DU LAC BAND OF LAKE  
SUPERIOR CHIPPEWA,

Defendant.

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Civ. No. 0:14-cv-00912

(Related Case Nos.: 5-89-163, 5-94-82 and  
09-cv-2668)

**PLAINTIFF’S MEMORANDUM  
OF LAW IN SUPPORT  
OF MOTION FOR  
PRELIMINARY INJUNCTION**

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**I. INTRODUCTION**

This breach of contract action arises, in part, out of a 1986 Commission Agreement between the City of Duluth (herein “Duluth”) and the Fond du Lac Band of Lake Superior Chippewa (herein “Band”).<sup>1</sup> The breach forming the basis Count I of the Complaint [Doc. No. 1] and Duluth’s motion for preliminary injunction relates to the Band’s application to the Secretary of the Interior to place property it owns in fee into trust for the Band’s benefit and to manage the parcel as reservation land. The parcel in question is located in the heart of downtown Duluth at 17-27 North Second Avenue East, Duluth (herein “Carter parcel”).

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<sup>1</sup> Duluth originally commenced this action in Minnesota State District Court, but in an opinion issued on March 12, 2014, the Minnesota Supreme Court held that the state court lacked jurisdiction. *See, City of Duluth v. Fond Du Lac Band of Lake Superior Chippewa*, 843 N.W.2d 577 (Minn. 2014).

Count I involves the failure of the Band to obtain Duluth's consent for the Band's trust application. Duluth's cause of action does not involve the gaming activities and ancillary business activities currently engaged in by the Band at the Fond du Luth Casino (herein "Casino"), located on their adjacent reservation on the corner of Superior Street and Second Avenue East at 129 E. Superior St.

Duluth seeks to maintain the status quo pending resolution of this litigation. Duluth's goal in this litigation is to maintain its regulatory control and taxing power over the Carter parcel unless the Band obtains Duluth's consent, because the Carter parcel is located within Duluth's corporate limits and within a vital part of Duluth's Old Downtown district. The Band's efforts to place the Carter parcel in trust and to manage it as reservation land will permanently eliminate Duluth's political authority and cause Duluth irreparable harm to its public policy goals and to the public interest.

## II. FACTUAL STATEMENT

The contractual background of this litigation and the history of the parties' relationship has been described in detail by the Court on numerous occasions in the related action entitled City of Duluth v Fond du Lac Band of Lake Superior Chippewa, U.S. Dist. Court, D. Minn. File No. 09-cv-2668(SRN/LIB).<sup>2</sup> Here, Duluth will limit its

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<sup>2</sup> For a more complete recitation of the facts, see City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, 702 F.3d 1147 (8th Cir. 2013); City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, 830 F. Supp. 2d 712 (D. Minn. 2011); City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, 708 F. Supp. 2d 890 (D. Minn. 2010); City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, No. 9-2668, 2010 U.S. Dist. LEXIS 101144, 2010 WL 3861371 (D. Minn. July 12, 2010).

factual statement to the factual issues directly relevant to its motion for preliminary injunction. The Court is directed to the related action for further background facts.

### 1. The 1986 Agreements.

The 1986 Agreements between the parties created the legal framework for a government-to-government economic development partnership between Duluth and the Band. The first joint initiative with the development of a casino in the downtown district of the city known as Old Downtown. *See, City of Duluth v Fond du Lac Band of Lake Superior Chippewa*, 708 F.Supp.2d 890, 893-894 (D.Minn. 2010); *Aff. Lutterman Ex. 1 (3-23-1984 Peacock letter)*. As part of the initiative the Band, on May 23, 1985 petitioned the Secretary of the Interior to accept the casino parcel into trust pursuant to 25 U.S.C. §§465 & 467.<sup>3</sup> *Aff. Lutterman, Ex. 2*. In its petition, the Band also requested approval of a Commission Agreement, a lease agreement, and the other related agreements. *Id.*

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<sup>3</sup> 25 U.S.C. §465 provides in part as follows: “The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians..... Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.”

25 U.S.C. §467 provides: “The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: **Provided**, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.”

The parcel placed into trust was real property located in downtown Duluth at 129 East Superior (herein “casino parcel”). A casino, known as the Fond du Luth Casino was opened and is currently operating on the casino parcel.

These negotiations and the ultimate agreement predated the 1988 enactment of the Indian Gaming Regulatory Act (IGRA). Pub.L.100-497, 102 Stat.2467 (1988) (codified as amended at 25 U.S.C. §§2701-2721). The agreements included, among several related agreements, a Commission Agreement and a business lease, both of which were approved by the DOI. *Aff. Lutterman, Ex. 6 (Excerpts from the Commission Agreement); Ex. 4 & 5 (DOI memoranda authorizing approval of agreements)*

Pertinent to the matter *sub judice* are the following provisions of the Commission Agreement:

C. In order for this project to proceed, Indian Country, as defined herein, has to be created.

D. As a practical matter, Indian Country, as defined herein, cannot be created without the consent and approval of the City of Duluth.

E. The consent and approval by the City of Duluth of the creation of Indian Country, as defined herein, is an essential element to the operation of the Commission.

*Id.*, Ex.3, pg. 1.

Paragraph (a) of the Commission Agreement, defined the term “Indian Country” as follows:

For purposes of this Agreement, “Indian Country” shall mean all land located within the corporate limits of the City of Duluth which is transferred by the Fond du Lac Band to the United States of America to hold in trust for the Fond du Lac Band pursuant to 25 U.S.C. §465, and which is made part of the Fond du Lac Indian

Reservation pursuant to 25 U.S.C. §467, and all buildings and structures located on such land.

*Id.*, Exh. 6, pg. 2.

In Section 10 of the Commission Agreement, the City and the Band agreed as follows:

The City of Duluth and the Fond du Lac Band agree that the provisions of this Article 10 apply whether or not the Commission is in existence. The Fond du Lac Band acknowledges that the creation of Indian Country, as defined herein, is dependent upon the approval of the creation of Indian Country, as defined herein, by the City of Duluth, and that, without the approval and consent of the City of Duluth, Indian Country, as defined herein, cannot be created, and the activities to be conducted by the Commission could not be done.

a. Initial Approval. The City of Duluth hereby agrees to approve the transfer by the Fond du Lac Band of the land described on Exhibit A attached hereto [the Casino Parcel], which the Fond du Lac Band has purchased, to the United States of America to hold in trust for the Fond du Lac Band, pursuant to 25 U.S.C. §465 and the making of such land part of the Fond du Lac Reservation pursuant to 25 U.S.C. §467.

b. Subsequent Approval. The City of Duluth shall approve the creation of additional Indian Country, as defined herein, whenever the Mayor and the City Council of the City of Duluth determine that such additional land is essential to the activities of the Commission, and the making of such additional land Indian Country, as defined herein, will not be detrimental to the City of Duluth. The City, in its sole discretion, shall have the right to disapprove the creation of additional Indian Country, as defined herein. The Fond du Lac Band shall not create any additional Indian Country, as defined herein, unless the City of Duluth approves the creation of additional Indian Country as provided in this Paragraph b.

*Id.*, pg. 15-16.

As part of its obligations under the 1986 Agreements, Duluth exercised its eminent domain powers in order to gain ownership of land adjacent to the Casino Parcel and construct a public parking lot, which solved a parking problem in the eastern part of the

downtown district and the parking needs for the new casino. *See, Duluth v Alexander*, 404 N.W.2d 24 (Minn.App. 1987)

## **2. The 1994 Amendments.**

In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA). *See 25 U.S.C. Chapter 29*. The enactment of IGRA brought into question the legality of the 1986 Agreements between the City and the Band and on September 24, 1993; the National Indian Gaming Commission ruled that the 1986 Agreements violated IGRA and gave the parties time to rework the agreements to comply with IGRA. *Aff. Lutterman, Ex. 7*.

The parties were able to negotiate amendments to the agreements and on June 16, 1994, the National Indian Gaming Commission wrote to the parties indicating its approval of the new 1994 Agreements. *Id., Ex. 8*.

During city council discussions on whether Duluth should approve the agreements, Mr. Maki, the attorney who represented Duluth in the negotiations, advised the council that “under the new agreement, there are no proceeds to private parties and that both parties agree to no adverse lobbying of the federal gaming commission.” *Aff. Lutterman, Ex. 11 (Certification of Council Proceedings for June 20, 1994)* Also addressing the council was Alan Fedman, of the National Gaming Commission. Fedman advised the council that “this agreement would produce the best regulated casino in the country that he has worked with.” *Id.* Fedman also advised the council that “the city should be very proud of its negotiating team with their openness and concern for the tribe....” *Id.*

On June 20, 1994, the parties executed the “Agreement Between the City of Duluth and the Fond du Lac Band of Lake Superior Chippewa Indians Relating to the Modification and Abrogation of Certain Prior Agreements” (herein “1994 Agreements”). *Id. Ex. 9 and 10*. The 1994 Agreements were approved by the Secretary of the Interior, by its Acting Area Director.<sup>4</sup> The 1994 Agreements modified the Commission Agreement. *See*, Exhibit C to the 1994 Agreement, the Amended Commission Agreement. *Id. Ex. 10*.

Section 1 of the 1994 Agreements provided for a Sublease Agreement whereby the Commission, which was the lessee of the Casino Parcel, agreed to sublease its leasehold interest to the Band. The Casino Parcel thereafter is described as the “sublease space”. *Id., Ex. 9. at pg. 2, Section 1*.

The Amended Commission Agreement abrogated portions of the original Commission Agreement but it did not terminate the Commission or abrogate Article 10 of the Commission Agreement. Instead, Section 2 of the Amended Commission Agreement provided as follows:

“Section 2. Sections 1 through 4, 7(a), 9 through 13 and 15 through 38 of the 1986 Commission Agreement, **insofar as they pertain to gaming activities and Ancillary Businesses at the Sublease space**, shall be dormant and of not force or effect **for so long as the Sublease is in effect.**” *Id., Ex. 10, at pg. 3*.

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<sup>4</sup> In an earlier related action the Court issued a consent decree approving the parties’ stipulation for entry of a consent order, which incorporated the parties 1994 Agreements. *See Fond du Lac Band of Lake Superior Chippewa v City of Duluth*, U.S. Dist. Ct. Minn. File No. 5-94-82; *see also*, *City of Duluth v Fond du Lac Band of Lake Superior Chippewa*, 708 F.Supp.2d 890, 895 (D. Minn. 2010).

In Section 3 of the Amended Commission Agreement the parties addressed the possibility that the Sublease would be terminated before the expiration of its term. It provides that “If the Sublease is terminated before the expiration of its Term, Sections 1 through 4, 9 through 13 and 15 through 38 of the 1986 Commission Agreement shall thereafter become effective and binding on the City and the Band, subject to federal law. ...”. *Id.*

### **3. The Band’s 2011 application to expand its reservation in Duluth.**

On November 17, 2011, the Band submitted an application to the Secretary of the Interior, to place land in trust. (herein “application). *Aff. Johnson, Ex. 1.* The application pertains to a parcel of land located in Duluth and identified by the street address of 17-27 North Second Avenue East. (herein “Carter parcel”) *Id.* The application identifies this property as the location of the former Carter Hotel. *Id.* In its application, the Band informed the Secretary that the Carter parcel was acquired by the Band on December 28, 2010. *Id., Ex. 1, pg. 2.* The Band also informed the Secretary that its first listed primary purpose for the application was “**(1) reestablishing the Band’s reservation land base lost as a result of federal policies following the 1854 Treaty of LaPointe...**” *Id. at pg. 2, Part II A.* In discussing this purpose the Band advised the Secretary as follows:

It is essential that the Secretary consider the Band’s application in the context of the IRA’s historical remedial purpose of acquiring land in trust for the Band. The Fond du Lac Reservation was promised to the Band as its permanent homeland in the 1854 Treaty. That homeland was dismantled in part as a result of federal policies that the IRA is intended to reverse. Therefore, accepting the transfer of the Subject Property is an act



in fulfillment of the promise the United States made in the 1854 Treaty to reserve a permanent homeland for the Band over 150 years ago.

*Id. at pg. 4.*

On December 18, 2011, Duluth received a letter from the Department of the Interior notifying Duluth that the Band had filed the application to place additional land located in Duluth into trust. *Id. Ex. 2*. In this letter, Duluth was informed that among the Band's purposes for the application was "reestablishing the Band's reservation land base lost as a result of federal policies following the 1854 Treaty of LaPointe..." *Id.* This letter was Duluth's first and only notice of the Band's application. *Id.* On January 13, 2012, the City submitted its opposition to the trust application. *Id. Ex. 3 (exhibits to its opposition excluded)*.

In a letter dated May 25, 2012, the BIA-Midwest Regional Office ("BIA-MR") notified Duluth that the "Band wants to have the property taken into trust to enable its Reservation Business Committee to manage it as Reservation land. Management of the property will be in accordance with Band policies, procedures, and interests." *Id. Ex. 4*. Duluth was also informed that taking the property into trust was considered an undertaking with the potential of having adverse effects on a historic property because the Carter Hotel is a contributing building to the Duluth Commercial Historic District listed in the National Register of Historic Places. Duluth was invited to be a consulting party to the Section 106 review process provided in 36 C.F.R. 800, et.seq.

In a subsequent letter dated July 16, 2012, the BIA-MR notified the Advisory Council on Historic Preservation that the Band intended to manage the parcel as “Reservation land”. *Id. Ex. 5.*

On May 2, 2013, and in response to a request by Duluth, the BIA-MR notified Duluth that the bureau would not delay final consideration of the Band’s application despite the pendency of litigation in the Minnesota courts. *Id. Ex. 6.*

Duluth continues to participate in the consultation process. It most recently responded to the latest Draft Memorandum Agreement (“MOA”) proposed by the BIA-MR on May 22, 2014. *Id. Ex. 7.* Duluth has objected, in part, to the MOA because it fails to adequately address the city’s concerns, which include, among other concerns, ensuring that redevelopment of the site proceeds in compliance with the city’s development code and does not cause harm to the adjacent city-owned memorial. *Id.* The Band, in its most recent communication responding to Duluth’s concerns, ignores these legitimate concerns and instead accuses Duluth of using the consultation process as a “tool to delay and to frustrate the Band’s fee-to-trust application”. *Id. Ex. 7.*

The Carter parcel is not a parcel of land included within Duluth’s initial approval of the creation of trust land, as provided in Article 10(a) of the Commission Agreement. *Id.* The Carter parcel is not a parcel of land “pertaining to gaming activities and Ancillary Businesses at the Sublease space” as provided in Section 2 of the Amended Commission Agreement. *Id.* The Band did not notify Duluth of its intent to put additional land located within Duluth into trust and manage the land as part of its

reservation. *Aff. Johnson*. The Band did not obtain Duluth's approval as required by Article 10(b) of the Commission Agreement. *Id.*

#### **4. Lease Termination**

The Band's efforts to unwind the 1986 and 1994 Agreements and reverse the DOI's and NIGC's previous approval of the agreements, continued in 2012. On January 19, 2012, DOI officials met with the Band's legal representatives. *Aff. Lutterman, Ex. 12*. On February 15, 2012, the Band made a formal request to the DOI to cancel the lease and without providing notice to Duluth. *Id. Ex. 13*. The DOI then began its efforts to "discuss a timetable for reaching a decision point on the Fond du Lac Band's request that we cancel their gaming lease with the City of Duluth..." *Id. Ex. 14*. As part of these efforts the DOI advised "Joe and Henry" (legal counsel to the Band) that Newland would "reachout to you after we have had a chance to finish our reading." *Id. Ex. 15*.

In a letter dated March 26, 2012 letter, the DOI informed Duluth that it had concluded that the Commission was in violation of the lease dated April 1, 1986. *Id., Ex. 16*. The sole basis of this action was the Notice of Violation issued by the National Indian Gaming Commission in July of 2011. The Band lobbied for this action following Judge Montgomery's April 21, 2010 Order granting Duluth partial summary judgment and concluding that the 1994 Agreements were legal, binding agreements. *See, City of Duluth v Fond du Lac Band of Lake Superior Chippewa*, 708 F.Supp.2d 890 (D.Minn. 2010), Plaintiff's Complaint [Doc. No. 1].

Duluth responded to the DOI's notice on April 11, 2012. *Id. Ex. 17*.

On May 10, 2012 the DOI issued its final determination cancelling the lease. *Id.* *Ex. 18.* The DOI again relied only on the NIGC's NOV. At the present time the lease is not in effect; thus, the Sublease is not in effect, and the provisions of the 1986 agreement are operative without reference to the dormancy clause of the 1994 agreements.<sup>5</sup>

### III. ARGUMENT

#### A. Legal Standard

"Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." Dataphase Sys. v. C L Sys., 640 F.2d 109, 113 (8th Cir. Mo. 1981). "In balancing the equities, no single factor is determinative." *Id.* The moving party has the burden of proving all factors. Gelco Corp. v Coniston Partners, 811 F.2d 414, 418 (8<sup>th</sup> Cir. 1987); Aircraft Mechanics Fraternal Ass'n v Northwest Airlines Corp., 394 F. Supp. 2d 1082, 1086 (D. Minn. 2005). The primary function of preliminary injunction relief is to maintain the status quo until a decision on the merits can be rendered. Kansas City Southern Transport Co. v Teamsters Local Union 41, 126 F. 3d 1059, 1065 (8<sup>th</sup> Cir. 1997). The factors must be balanced to determine whether they tilt toward or away from granting

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<sup>5</sup> The city has commenced litigation against the DOI challenging the lease cancellation. That litigation is pending in the U.S. District Court for the District of Columbia. City of Duluth v Sally Jewell, Secretary of the Interior, in her official capacity. Civ. No. 12-1116 (CKK). That matter is stayed pending the outcome of related litigation in which the city is suing the National Indian Gaming Commission.

injunctive relief. *See, West Pub. Co. v Mead Data Cent., Inc.*, 700 F.2d 1219 (8<sup>th</sup> Cir. 1986).

## **B. Analysis of Factors**

### **1. Likelihood of Success**

#### **a. Legal standard**

In a case such as this involving a contract dispute rather than a challenge to "government action based on presumptively reasoned democratic processes.....[Duluth] need only show a reasonable probability of success, that is, a "fair chance of prevailing". Kroupa v. Nielsen, 731 F.3d 813, 818 (8th Cir. 2013) *citing*, Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 732 (8th Cir. 2008) (en banc); Dataphase, 640 F.2d at 114. This factor does not require Duluth to demonstrate a "greater than 50% likelihood that it will prevail on the merits". Dataphase, 640 F.2d at 114. " '[W]here the balance of other factors tips decidedly toward plaintiff a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation.'" Planned Parenthood Minn., 530 F.3d at 731, *quoting*, Dataphase, at 113.

#### **b. Analysis**

##### **i. Minnesota contract interpretation standards.**

The focus of Duluth's request for injunctive relief relates to the violation of Section 10 of the 1986 Commission Agreement. *Aff. Lutterman, Ex. 6*. In Section 10 the Band agreed that it would not attempt to create additional Indian Country in Duluth without first obtaining Duluth's consent. It is undisputed that the Band has initiated the process necessary to create Indian Country by making application to the DOI to accept

the Carter Parcel in trust pursuant to 25 U.S.C. §465. The Band has previously denied that its trust application implicates its obligations under the 1986 Commission Agreement because it has not yet applied for a reservation proclamation under 25 U.S.C. §467; therefore, it claims that it has not attempted to create “Indian Country” as that term is defined in Paragraph 3(a).<sup>6</sup> Thus, the meaning of Section 10 of the 1986 Commission Agreement is the essential dispute between the parties and requires the invocation of contract interpretation jurisprudence.

Minnesota law provides that a court determines whether a written contract is ambiguous, and if it is unambiguous, the court is to construe the contract as a matter of law. Cherne Contr. Corp. v. Marathon Petroleum Co., 578 F.3d 735, 740 (8th Cir. Minn. 2009), *citing*, Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 346 (Minn. 2003). In determining the question of ambiguity, “the court is not to give words cramped, unnatural, or out-of-context readings but to assess ‘the meaning assigned to the words or phrases in accordance with the apparent purpose of the contract as a whole’.” *Id.*, *quoting*, Art Goebel, Inc. v. North Suburban Agencies, 567 N.W.2d 511, 515 (Minn. 1997). The goal is to “ascertain and enforce the intent of the parties.” Valspar Refinish, Inc. v Gaylord’s, Inc., 764 N.W.2d 359, 364 (Minn.2009). The court must look to the contract language when determining the parties’ intent. Savela v City of Duluth, 806 N.W. 2d 793, 796 (Minn.2011). The court assigns unambiguous contract language its

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<sup>6</sup> *See*, City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, 2013 Minn. App. Unpub. LEXIS 317 at 13 (Minn. Ct. App. Apr. 15, 2013) *reversed on jurisdictional grounds*, City of Duluth v. Fond Du Lac Band of Lake Superior Chippewa, 843 N.W.2d 577 (Minn. 2014)

plain meaning. Id. A contract is ambiguous when the language is susceptible of more than one reasonable interpretation. Dykes v Sukup Mft. Co., 781 N.W.2d 578, 582 (Minn.2010). But in order to ascertain intent, the court must also look to the contract as a whole, “the terms of a contract are not read in isolation.” Halla Nursery, Inc. v City of Chanhassen, 781 N.W. 2d 880, 884 (Minn.2010). Intent is not ascertained “by a process of dissection in which words or phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given a meaning in accordance with the obvious purpose of the contract \*\*\* as a whole.” Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc., 666 N.W.2d 320, 324 (Minn.2003) *quoting*, Republic Nat’l Life Ins. Co. v Lorraine Realty Corp., 279 N.W.2d 349, 354 (Minn. 1979) (alteration in original). The court cannot assume that the parties intended an illogical result. Id. at 326. The law does not presume that the parties intended a result that is “incredible, inequitable, and contrary to the obvious purpose” and intent of the contract. Kane v Oak Grove Co., 221 Minn. 500, 503, 22 N.W.2d 588, 590 (Minn.1946). “ ‘\* \* \* Words which admit of a more extensive or more restrictive signification must be taken in that sense which will best effectuate what it is reasonable to suppose was the real intention of the parties.’ ” Id., *quoting*, 12 Am.Jur., Contracts, s 231. To understand the parties’ intent, the court places itself “in the position of the parties at the time the agreement was negotiated and executed and, upon consideration of the agreement as a whole and the plain meaning of the language used, viewed in the light of the surrounding circumstances, endeavoring to arrive at what the parties must have reasonably contemplated.” Midway Center Assc. v. Midway Center, Inc., 306 Minn. 352, 356, 237 N.W.2d 76, 78

(Minn.1975). Courts should also avoid a construction that would render one or more provisions meaningless. Current Technology Concepts, Inc. v Irie Enterprises, Inc. 530 N.W. 2d 539, 543 (Minn.1995).

Relying on the definition of “Indian Country” found in Article 3(a), the Band has taken the position that it has not breached the contract because the Band has yet to apply to place the Carter Hotel Parcel into reservation status. The Band believes that Paragraph 10 only applies if the Band seeks to add previously created trust land to its reservation. The Band’s position is belied by its own statements to the contrary, ignores the purpose behind the consent requirement of Paragraph 10(b), and requires the court to allow for an illogical result.

**ii. The Band’s representations demonstrate its intent to expand its reservation in Duluth.**

The Band has announced its intention to increase its reservation land base and the trust application is only step one in the two-step process provided by 25 U.S.C. §§465, 467. In its trust application, the Band informed the Secretary that its acquisition of the Carter parcel was in part for the purpose of “(1) reestablishing the Band’s reservation land base lost as a result of federal policies following the 1854 Treaty of LaPointe...” *Aff. Johnson, Ex. 1, pg. 2, Part II A*. In discussing this purpose the Band advised the Secretary as follows:

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



*Id. at pg. 4.*

Not only has the Band, through its application, announced its intention to add the Carter parcel to its reservation land base, the BIA has proceeded with that understanding. In its letter of December 16, 2011, the BIA-MN Agency informed Duluth that the property acquisition is “(1) reestablishing the Band’s reservation land base...”. *Aff. Johnson, Ex. 2.* The BIA again notified Duluth of the Band’s intent in a letter dated May 25, 2012. In this letter, the BIA-MR informed Duluth that the “Band wants to have the property taken into trust to enable its Reservation Business Committee to manage it as Reservation land. Management of the property will be in accordance with Band policies, procedures, and interests.” *Id., Ex. 4; see also, Id. Ex. 5.*

The Band has clearly communicated that the purpose of its trust application is to reestablish its reservation land base and Paragraph 10(b) of the 1986 Commission Agreement obligated the Band to obtain Duluth’s consent.

**iii. The parties intended for Duluth to be protected from further land losses to Band governance and the Band’s interpretation would deprive Duluth of its bargained for protection.**

The Band’s argument that it may place more land located in the city into trust without Duluth’s consent ignores a purpose of the Commission Agreement. That agreement was about more than a gambling casino. The essential purposes of the 1986 Commission Agreement are presented in Paragraphs A and B, which express the parties’ intent as follows:

A. The City of Duluth and the Fond du Lac Band desire to encourage economic development and growth within the City of Duluth.

B. By combining the talents and resources of the City of Duluth and the Fond du Lac Band, economic development activities not otherwise possible may be accomplished.

*Aff. Lutterman, Ex. 6.*

Creating economic development that benefitted both parties was the purpose of the agreement. The Band's stated purpose for placing the Carter parcel into trust has nothing to do with economic development that benefits both parties; instead it frustrates that purpose. The Band's stated purpose is to (1) reestablish its reservation land base; and (2) enhancing existing Reservation economic activity. *Aff. Johnson, Ex. 2, pg.2.* The Band intends to manage the property "in accordance with Band policies, procedures, and interests." *Id. Ex. 4.* Had the parties intended to allow the Band to annex additional land without Duluth's consent, and without regard for Duluth's interests, Section 10 would have been unnecessary. The Band's interpretation only makes sense if you ignore the stated purposes for the agreement and Section 10.

The parties also agreed that the intended joint economic activity required the creation of "Indian County"; and therefore, the "consent and approval of the City of Duluth." *Aff. Lutterman, Ex. 6, ¶D.* The parties agreed that Duluth's consent was "an essential element to the operation of the Commission". *Id., ¶E.* But why was Duluth's consent so important—because it is the act of placing land into trust, not reservation status, that results in Duluth's loss of the right to tax the land, and apply Duluth's tourism taxes to future activities developed on the parcel. *See, 25 U.S.C. §465.* At the time land

is placed into trust, Duluth also loses the right to regulate use and development of the land. 25 C.F.R §1.4(a).<sup>7</sup>

The parties clearly understood the consequences of placing land into trust and also understood the authority of the “Secretary of the Interior or his authorized representative [to] in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property.” 25 CFR 1.4(b). Accordingly, Duluth demonstrated its concern over the loss of regulatory authority through Paragraph 10(c) wherein the Band agreed to “adopt and make applicable all zoning regulations, building codes, fire codes and life safety codes applicable in the City of Duluth, on all Indian Country, as defined herein.” *1986 Commission Agreement, ¶10(c)*.

Essentially, the Band argues that there are two phases to the creation of Indian Country: (1) the conversion to trust status pursuant to 25 U.S.C. §465; and (2) the reservation proclamation pursuant to 25 U.S.C. §467. The Band then argues that Duluth’s consent was only required for phase two, not phase one. This argument is inconsistent with the purposes of the agreement and with the protections Duluth

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<sup>7</sup> “(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.”

negotiated. If the Band's interpretation is an accurate expression of the parties' intent, then Paragraph 10(a) would have been different. Paragraph 10(a) deals with Duluth's "initial approval" as follows:

The City of Duluth hereby agrees to approve the transfer by the Fond du Lac Band of the land described on Exhibit A attached hereto, which the Fond du Lac Band has purchased, to the United States of America to hold in trust for the Fond du Lac Band, pursuant to 25 U.S.C. §465 and the making of such land part of the Fond du Lac Reservation pursuant to 25 U.S.C. §467.

*1986 Commission Agreement, ¶10a).*

Through Paragraph 10(a) Duluth gave its consent to **both** phases of the conversion process, the §465 trust process and the §467 reservation process. If, as the Band had argued, it had not agreed to obtain Duluth's consent for the §465 trust process, there would have been no need for the City to express its consent to that process in Paragraph 10(a).

That the parties understood the relationship of Sections 465 and 467 to be a two-step process, which would cause harm to Duluth during the Section 465 trust process, is consistent with the Department of the Interior's processes as that time. Recently the Department discussed revisions to 25 CFR part 151. *See, 067928 Federal Register, Vol. 78, No. 219, published November 13, 2013.* The Department described its process prior to 1996 as follow: "Prior to 1996, the Department announced decisions to take land into trust simultaneously with the action of taking the land into trust. According to then-prevailing court decisions, once the land was taken in trust, judicial review was very limited." Id. Given the process of the Department when the 1986 Commission

Agreement was being negotiated, the protections Duluth obtained in Section 10 only work if the Band is obligated obtain Duluth's consent prior to a trust application. Focusing only on the definition of "Indian Country" found in Paragraph 3(a), without reference to Section 10, does not accord the words and phrases of the agreement a meaning that is in accordance with the obvious purpose of the contract as a whole and would leave Duluth with a meaningless consent power.

That the real harm to Duluth occurs when the land is placed in trust is also demonstrated in the July 30, 2009 Memorandum issued by the Bureau of Indian Affairs to Superintendents of the Midwest Region. *Aff. Lutterman, Ex. 3*. In this memorandum the superintendents were advised that the "30-day Notice (Notice) of proposed Reservation Proclamation to the state, county and municipal governments, should not invite the governments to comment. Rather, the letter is simply a Notice of the proposed action which explains that the action is an administrative function. *Id.* The description of the reservation proclamation as merely an "administrative function" is consistent with the text of 25 U.S.C. §467 under which the Secretary is granted broad authority.

Because the Secretary has broad authority to add trust land to reservations, Duluth has limited ability to stop additions to the Band's reservation at the end of the two-phase conversion process. Accordingly, Duluth protected itself by negotiating for the right to consent at the beginning of the two-phase process. Placing the consent requirement at the point prior to the Section 465 application, is the only meaningful time for Duluth to have protected itself from the loss of tax base and regulatory control—the clear purpose of Section 10. It would be a hollow and meaningless protection indeed if the parties

intended to allow the Band to create as much trust land in the city as it wanted and obtain Duluth's consent only if the land is added to the Band's Reservation. Such an interpretation would be absurd.

**iv. The applicability of the dormancy provisions of the 1994 Amendment ended when the DOI cancelled the lease between the Band and the Commission.**

The 1994 Amendments to the 1986 Commission Agreement included a so-called dormancy provision in Section 2 as follows:

Sections 1 through 4, 7(a), 9 through 13 and 15 through 38 of the 1986 Commission Agreement, insofar as they pertain to gaming activities and Ancillary Businesses at the Sublease space, shall be dormant and of no force or effect **for so long as the Sublease is in effect.**

*Aff. Lutterman, Ex. 10 (emphasis added).*

The parties acknowledged that the amendments did not wholly supersede the 1986 Commission Agreement in Paragraph D as follows: "During the pendency of the Sublease, the parties agree that certain provisions of the Commission Agreement as set forth herein shall be dormant and of no force or effect." *Id.*

The sublease is not currently in effect. In a letter dated May 10, 2012, the Department of the Interior cancelled the lease between the Band (Lessor) and the Commission (Lessee); thus also cancelling the sublease entered into in 1994 between the Commission (Sub-lessor) and the Band (Sub-lessee). *Id., Ex. 18.* The DOI's action was a "final determination of the Department of the Interior." *Id.*

Because the sublease is not currently in effect, the dormancy provisions of the 1994 Amendments are not currently operative and the provisions of the Commission

Agreement apply without reference to the dormancy provisions in Section 2 of the 1994 Amendments.

**v. The dormancy provisions apply only to gaming activities and ancillary businesses at the sublease space, they do not apply to the Carter parcel.**

Even if the DOI had not cancelled the lease, the dormancy clause would not bar the operation of Section 10 of the 1986 Commission Agreement. Section 2 of the 1994 Amendment created a limited dormancy provision that causes the various provisions of the Commission Agreement to lie dormant, “insofar as they pertain to gaming activities and Ancillary Businesses at the Sublease space...” *Id.*, *Ex. 10*. The current dispute does not pertain to the Band’s “gaming activities and Ancillary Businesses at the Sublease space.” This dispute relates to the Carter parcel located at Second Ave. E., purchased by the Band in 2010. This land is not now “Sublease space”, and has never been “Sublease space”. The parcel has never been the location of the Band’s gaming activities, and the parcel has never been the location of “Ancillary Businesses at the Sublease space.” *Id.*

If the parties had intended the dormancy clause to apply to efforts by the Band to expand its reservation base in Duluth, the parties would not have expressly limited the applicability of the dormancy clause to “gaming activities and Ancillary Businesses at the Sublease space...”. The Band remains contractually bound under Article 10(b) to obtain Duluth’s consent to the creation of additional Indian Country in Duluth.

The Band has not obtained Duluth’s consent and has breached the contract. Duluth has demonstrated a likelihood of success on the merits of its action and this factor favors granting Duluth preliminary injunctive relief.

## **2. Duluth Will Suffer Irreparable Harm**

### **a. Legal standard**

"The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." Watkins Inc. v. Lewis, 346 F.3d 841, 844 (8th Cir. Minn. 2003). When there is an adequate remedy at law, a preliminary injunction is not appropriate. Id. Therefore, Duluth must demonstrate that the harm caused to it is not compensable by money damages. *See*, Packard Elevator v I.C.C., 782 F. 2d 112, 115 (8<sup>th</sup> Cir. 1986); In re Travel Agent Com'n Antitrust Litigation, 898 F.Supp. 685, 688 (D.Minn. 1995). Taxpayer's Choice Volunteer Committee v County of Roseau, MN, 903 F.Supp. 1301, 1307. (D.Minn.1995). Even where the harm has some component that is recoverable in damages, the threat of unrecoverable economic loss qualifies as irreparable harm. Iowa Utils. Bd. v. FCC, 109 F.3d 418, 426 (8th Cir. Iowa 1996)( loss of customer good will represents a form of unrecoverable harm).

### **b. Analysis**

#### **i. Duluth will be irreparably harmed by loss of its governmental control over the Carter parcel.**

Duluth will be irreparably harmed if the Band is allowed to place the Carter parcel into trust and manage it as part of its reservation because Duluth will lose the ability to protect the public health, safety, and general welfare through the regulation of activities on, and the development of, the Carter parcel, now provided for in Duluth's Unified



Development Chapter (UDC). *See, Duluth Legislative Code, Chapter 50 (DLC).*<sup>8</sup> Loss of its governmental control would be inconsistent with Minnesota policy.

The Minnesota Legislature has determined as state policy that:

...municipalities are faced with mounting problems in providing means of guiding future development of land so as to insure a safer, more pleasant and more economical environment for residential, commercial, industrial and public activities, to preserve agricultural and other open lands, and to promote the public health, safety, and general welfare. Municipalities can prepare for anticipated changes and by such preparations bring about significant savings in both private and public expenditures. Municipal planning, by providing public guides to future municipal action, enables other public and private agencies to plan their activities in harmony with the municipality's plans. Municipal planning will assist in developing lands more wisely to serve citizens more effectively, will make the provision of public services less costly, and will achieve a more secure tax base.

*Minn. Stat. § 462.351*

Pursuant to this state policy the Minnesota Legislature enacted the Municipal Planning Act. *See Minn.Stat. §462.351-462-365.* Among the powers granted to a municipality are the powers to prepare a comprehensive plan “for guiding the future development and improvement of the municipality..., *see Minn.Stat. §462.353*, and the power to implement a comprehensive plan through zoning regulations, *see Minn.Stat. §462.357.*

The parcel at issue is located in the heart of Duluth’s Commercial Historic district.<sup>9</sup> The power to control the use and development of land has a direct impact on Duluth’s ability to achieve the goals of its comprehensive plan in the identifying center and in an important part of the city. The purposes of the UDC are identified in Section

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<sup>8</sup> Duluth’s legislative code is published on-line at [municode.com](http://municode.com).

<sup>9</sup> Aff. Eng.; Aff. Johnson, Ex. 7.

50-2 as: “to protect public health, safety, and welfare and to implement the goals and objectives of the Comprehensive Land Use Plan using those authorities over the development, redevelopment, use, and occupancy of land and structures, and over the protection of the environment, granted to the city by the state.” *DLC §50-2*. In particular the general purposes include the following:

- (c) To protect and enhance the city’s attractions to residents, tourists and visitors, and serve as a support and stimulus to business and industry; ...
- (e) To promote the use and preservation of historic landmarks and districts for the educational and general welfare of the people of the city;...”

*Id.*

The Duluth City Council also codified its factual findings related to planning and development regulation. *See, DLC§50-3*. The Council expressly found, in part, as follows:

In order to implement the Comprehensive Land Use Plan and to promote the orderly development and redevelopment of property in the city, several ordinance related to land use, permitted construction , and environmental protection need to be consolidated into a single unified development chapter;...

(b) Regulation of permitted uses in each zone district, and the designation of uses that require the issuance of a special use permit, are necessary to protect the comprehensive land use plan and to conserve and protect property and property values in neighborhoods;...

(g) Regulation of land disturbance activities is necessary to control or eliminate soil erosion and sedimentation within the city. It establishes standards and specifications for conservation practices and planning activities that minimize soil erosion and sedimentation and provides a permit system to secure the enforcement of these standards and specifications;...and

(h) The preservation, protection, perpetuation and use of areas, places, structures, lands, districts and other objects having a special historical, cultural or aesthetic interest or value is a public necessity and is required in the interest of public health, prosperity, safety and welfare of the people of the city;..

*DLC*§50-3.

The purposes for zoning districts are described in the UDC, in part, as follows: “...to regulate land and implement the comprehensive land use plan.” *DLC* §50-13. The parcel in question is zoned F-8. *DLC, Ch. 50, Base Zoning Map 18*. The F-8 zone is one of nine form-based district utilized by Duluth. *DLC* §50-16.1. The F-8 district is one of the form districts regulating the downtown area of Duluth. *DLC*§50-16.9. Land located in a form district is subject to greater development restrictions than non-form districts—making the Carter parcel currently subject to some of the most strict development regulation under the UDC. Form-based zoning not only regulates land use within the zone, but “regulates the types of buildings, development and rezoning permitted in each district.” *DLC* §50-16.1. The type of uses allowed in the F-8 zone are regulated in Article III of the UDC and specified in Table 50-19.8. The type of buildings and form of the buildings allowed in the zone are regulated by Section 50-22 and the subparts to that section. The form districts are subject to building type and form regulations that are not applicable to other zoning districts. *DLC* §50-22. By removing the Carter parcel from Duluth’s governmental control, an island will be created in the heart of Duluth’s Old Downtown that the Band will be able to use and redevelop without regard to the legitimate governmental interests of Duluth as expressed in its comprehensive plan and UDC—interests that are supported by the legislative policy of the Minnesota Legislature.

The Band has made it clear that it has no intention of using and developing the Carter parcel in a manner that is consistent with Duluth's development code. In its letter to the BIA-MR dated February 13, 2014, it informs the parties to the Section 106 consultation process, that a proposal that includes compliance with Duluth's development code is "unacceptable". . *See, Aff. Johnson, Ex. 6.* This position only confirms the information provided Duluth by the BIA-MR that "Management of the property will be in accordance with Band policies, procedures, and interests." *Id., Ex.4.*

Duluth's initiative to restore the NorShor Theater, located on Superior Street and only one-half block east of the casino, was recently supported by the Minnesota Legislature through a 6.95 million dollar grant. *Aff. Eng.* This area is a vital part of Duluth's tourism economy. *Id. Ex. 1.* Duluth has designated the city-owned Clayton Jackson McGhie Memorial, located immediately next to the Carter parcel, as a Duluth Heritage Preservation Landmark. *Aff. Johnson.* Given these important initiatives that are intended to improve the city's economy, and which will provide the Band with greater exposure for the Fond du Luth Casino, the loss of Duluth's authority to pursue its public policy related to comprehensive planning through the enforcement of its development code in an area that is at the heart of the city's downtown district is a damage that cannot be compensated with an award of monetary damages. Such a loss involves the essential right of local government to control and regulate its development. Just as the restriction on the fundamental right to engage in expressive activity is presumed to cause irreparable harm, *see e.g. Johnson v. Minneapolis Park & Rec. Bd.*, 729 F.3d 1094, 1101-02 (8th Cir. Minn. 2013), the permanent loss of Duluth's ability to implement its public policies

and control development within a vital core of the city presumptively causes irreparable harm.

**ii. Duluth will be harmed by loss of future property tax and sales tax.**

The value of the financial loss to Duluth's tax base simply cannot be quantified. The taxing history of the parcel is irrelevant because the Band has indicated an intent to demolish the Carter Hotel structure. The nature of the redevelopment intended by the Band, and the taxes that would be generated by that redevelopment is a product of pure speculation. All that can be known for certain is that removal of the parcel from Duluth's taxing authority will cause permanent damage to its financial interests in a way that cannot be calculated.

**iii. Duluth will lose the benefit of its bargain.**

Duluth will also lose the benefit of its bargain. The parties did not enter into the 1986 Agreements for the sole purpose of earning gambling profits. When Duluth gave its consent to the Band's petition to create trust and reservation land within the corporate limits of Duluth, it was taking a risk and it protected itself against additional, unwanted annexations by preserving its right to withhold its consent to the expansion of the Band's trust lands. Allowing the Band to proceed with its application while this case proceeds will deprive Duluth of one of the protections it bargained for in the agreement, given that the Department has refused to stay its consideration of the application.

**iv. The Balance of Harms Favors Granting Injunctive Relief.**

The equities of this matter favor granting the preliminary injunction. "The primary function of a preliminary injunction is to preserve the status quo until, upon final hearing, a court may grant full, effective relief." Kansas City S. Transp. Co., 126 F.3d at 1066. The Carter parcel has been a part of the city for 155 years, it is located next to several properties and real estate interests owned by Duluth or DEDA and it is in the heart of Duluth's Old Downtown. *Aff. Johnson, Ex. 3, pg.1; Aff. Eng.*

Old Downtown is the hub of the city's growing arts and entertainment district and is critical to the city's long-term economic viability. *Aff. Eng.* Duluth has been actively working to revitalize Old Downtown, an example of which is the NorShor Theater redevelopment project. *Id.* The Band's efforts to avoid its contractual obligations and expand its reservation base will directly impact Duluth's interest in guiding and regulating redevelopment in Old Downtown.

The Band will not be harmed by the injunction. It indicated in its application that it desired to protect "existing Reservation trust resources from the impact of noxious adjacent land use." *Aff. Johnson, Ex. 1 (Application, pg. 2).* The Band's stated intent for the property is to demolish the Carter Hotel, and remove and replace any decaying paving. The Band intends to improve the property but is undecided on the nature of the improvement. *Id., pg. 7.* The Band admits in its application that it does not need the land to be in trust in order to demolish the Carter Hotel or remove and replace the decaying paving. *Aff. Johnson, Ex. 1, pg.13.* Quite simply, the Band will lose nothing if an injunction is issued.

Duluth did not enter into the 1986 Agreements with the Band, spend \$2.5 million on a parking facility that benefits the Casino, and purchase the Temple Opera Building and NorShor Theatre, only to slowly lose its ability to exercise regulatory and taxing authority over an important part of the city. Duluth entered into the agreements with the Band to provide for the economic development of the city, to ensure that the city remained a vital economic community, and to protect the public welfare. This factor weighs in favor of granting the City's motion.

**v. The public interest favors issuance of a preliminary injunction.**

Duluth clearly has a vital public interest in exercising its government authority over an important part of the city. The prior discussion regarding the irreparable harm to Duluth supports the existence of that interest.

The Band cannot make a credible argument that its interests will be substantially harmed by entry of preliminary injunctive relief. The Band can demolish the Carter Hotel without placing the land in trust.

This factor weighs in favor of granting the City's motion.

**IV. CONCLUSION**

Duluth has demonstrated that all of the factors to be considered by the Court as part of its consideration of Duluth's motion for preliminary injunction favor granting Duluth's motion.

Dated this 12<sup>th</sup> day of June, 2014.

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