to Gateway indicating that CPI had purchased a Gateway plush cow from a "Gateway Country" retail store to create the initial sample of Cody Cow. The record shows that CPI intended for Cody Cow to mirror a Gateway plush cow. Also, Byer testified that he thought it would be beneficial to use A & A Plush, the company that manufactured Gateway's plush cows, to create Cody Cow. When Gateway rejected Byer's desire to include Cody Cow in Gateway's collection of merchandise, and informed Byer that Gateway held trademark rights to black-and-white cow spots, Byer did not discontinue sales.

Gateway produced adequate evidence of actual confusion. Gateway conducted a nationwide survey to determine actual confusion. Philip Johnson testified that approximately 39% of the people surveyed erroneously believed that Gateway manufactured or sponsored Cody Cow. This confusion rate substantially exceeds a rate we have previously found sufficient evidence of actual confusion. *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803, 817 (8th Cir.1969) (percentage ranged from 11% to 49%). Johnson testified that in his experience, this represents a high level of confusion. Jamie Hackett, an employee of Gateway until 2001, stated that the black-and-white cow spots on Cody Cow looked similar to the black-and-white cow spots used and trademarked by Gateway. Also, a retail seller of Cody Cow testified that the spots on Cody Cow were similar to the spots used by Gateway.

It is clear from the district court's opinion that the court concluded that CPI and Gateway are in close competitive proximity. The court found that both parties attract people who own computers and who purchase computer accessories. Both sell products in stores and on web sites related to computer goods. CPI's products often appear next to other novelty computer accessories that are similar to Gateway's products. These findings were adequately supported in the record.

Finally, the court considered the degree of care reasonably expected of potential customers. The court found that because Cody Cow sells for less than $20, consumers would not spend substantial time considering their purchase. Consumers typically exercise little care in the selection of inexpensive items that may be purchased on impulse. *Beer Nuts, Inc. v. Clover Club Foods Co.*, 805 F.2d 920, 926 (10th Cir.1986). Relying on the high degree of similarity between Cody Cow's black-and-white cow spots and Gateway's trade dress, the court concluded that consumers would infer that Gateway is affiliated with CPI's product and would not gather information sufficient to dispel the confusion.

The district court concluded that there was a likelihood of confusion by the consuming public. After evaluating the record before us, we conclude that the district court's findings are not clearly erroneous and should be affirmed.

For all of the above reasons, the judgment of the district court is affirmed.

UNITED STATES of America, ex rel. Maynard BERNARD, Appellant,

v.

CASINO MAGIC CORP., a Minnesota Corporation; Casino Magic American Corp., a Minnesota Corporation, Appellees.

United States of America, ex rel. Maynard Bernard, Appellee,

v.

Casino Magic Corp., a Minnesota Corporation; Casino Magic American Corp., a Minnesota Corporation, Appellants.

Nos. 03–3043, 03–3149.

United States Court of Appeals, Eighth Circuit.

Submitted: May 13, 2004.

Filed: Sept. 13, 2004.

Background: United States and its relator brought qui tam action against casino manager under Indian Gaming Regulatory Act (IGRA), disputing the legality of contracts for a casino project. After the district court granted summary judgment for casino manager, United States and its relator appealed. The Court of Appeals, 293 F.3d 419, declared the contracts illegal and remanded for a determination of damages. Upon remand, the United States District Court for the District of South Dakota, Richard H. Battey, J., awarded damages in the amount of $350,000. Parties cross-appealed.

Holdings: The Court of Appeals, Heaney, Circuit Judge, held that:

(1) borrowing fees arising out of management company's loans to tribe, made as part of a co-lender agreement through a bank, did not constitute management fees and thus were properly excluded from damages calculation;

(2) indirect costs, including licensing fees, legal fees, and a donation to a men's softball team, along with other unverifiable expenses did not constitute management fees;

(3) company was not entitled to offset its out-of-pocket expenses against the calculated damages; and

(4) district court's reasons for denying prejudgment interest, in damages calculation, did not rise to the level of exceptional circumstances justifying deviating from the general rule of awarding prejudgment interest.

Affirmed in part and reversed in part.

1. Federal Courts ⚿776

Court of Appeals reviews a grant of summary judgment de novo.

2. Federal Civil Procedure ⚿2470

If there is no genuine issue as to any material fact, summary judgment is appropriate. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

3. Federal Civil Procedure ⚿2543

When ruling on a summary judgment motion, a court must view the evidence in the light most favorable to the nonmoving party. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

4. Indians ⚿24

An agreement is "relative to Indian lands," for purposes of statute mandating recovery of invalid payments by an Indian tribe, when it puts in play actual incidents and rights of property ownership. 25 U.S.C.A. § 81.

See publication Words and Phrases for other judicial constructions and definitions.

5. Indians ⚿32(12)

Borrowing fees arising out of casino management company's loans to Indian tribe, made as part of a co-lender agreement through a bank, did not constitute "management fees," even though company's management agreements with tribe violated Indian Gaming Regulatory Act (IGRA), and therefore United States was not entitled to recovery of those borrowing fees as damages in its qui tam action against the management company; pay-

ments resulted from company's status as a lender, not from management services rendered that were relative to the land. 25 U.S.C.A. § 81; Indian Gaming Regulatory Act, § 2 et seq., 25 U.S.C.A. § 2701 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

6. Indians ⚿32(12)

Indirect costs, including licensing fees, legal fees, and a donation to a men's softball team, along with other unverifiable expenses, allegedly reimbursed to a casino management company by an Indian tribe, did not constitute "management fees," even though company's management agreements with tribe violated Indian Gaming Regulatory Act (IGRA), and therefore United States was not entitled to recovery of those costs as damages in its qui tam action against the management company; costs were not paid in exchange for management services or as a result of services rendered relative to the land. 25 U.S.C.A. § 81; Indian Gaming Regulatory Act, § 2 et seq., 25 U.S.C.A. § 2701 et seq.

7. Indians ⚿32(12)

Casino management company's out-of-pocket expenses in connection with Indian tribe's casino project were properly excluded from calculation of damages in qui tam action in which casino management agreements were found to have violated Indian Gaming Regulatory Act (IGRA), such that company was not entitled to offset those expenses against the calculated damages. 25 U.S.C.A. § 81; Indian Gaming Regulatory Act, § 2 et seq., 25 U.S.C.A. § 2701 et seq.

8. Interest ⚿39(2.20)

District court's reasons for denying prejudgment interest, in calculating damages in qui tam action in which casino management agreements were found to have violated Indian Gaming Regulatory Act (IGRA), that casino management company had incurred out-of-pocket expenses for which it would not be reimbursed and that a smaller reimbursement would make the tribe whole again, did not rise to the level of exceptional circumstances justifying deviating from the general rule of awarding prejudgment interest. 25 U.S.C.A. § 81; Indian Gaming Regulatory Act, § 2 et seq., 25 U.S.C.A. § 2701 et seq.

9. Federal Courts ⚿830

Court of Appeals reviews a district court's decision to grant prejudgment interest for an abuse of discretion.

10. Interest ⚿39(2.6)

The purpose of awarding prejudgment interest in a damages award is to compensate the prevailing party for its true money damages, to encourage settlements, and to deter parties from benefiting from unfairly delaying litigation, and thus prejudgment interest should generally be awarded, absent exceptional circumstances.

Jay C. Schultz, argued, Rapid City, SD (Robert Gusinsky, on the brief), for appellant.

Mark. K. Briol, argued, Minneapolis, MN (Scott A. Benson and Joseph Musilek, Minneapolis, MN, Roberto A. Langue, Sioux Falls, SD, on the brief), for appellee.

Before MURPHY, HEANEY, and MAGILL, Circuit Judges.

HEANEY, Circuit Judge.

This is the second time this case has come before this court. The first time, the United States through its relator (collectively the United States or government) disputed the legality of contracts involving a casino project between the Sisseton–

Wahpeton Sioux Tribe (the Tribe) and Casino Magic Corporation (Casino Magic). We declared the contracts illegal and remanded for a determination of damages. On summary judgment, the district court awarded the United States $350,000. Both parties now appeal this amount. We affirm in part and reverse in part.

I. Background

In 1993, the Tribe contacted Casino Magic to help in the process of developing a casino on the Tribe's land. The two parties entered into three agreements that defined their business relationship: the Consulting Agreement, the Construction and Term Loan Agreement, and the Participation Agreement. The first round of litigation centered on whether the three agreements, collectively, constituted a management agreement that required approval from the National Indian Gaming Commission (NIGC). *United States ex rel. Bernard v. Casino Magic Corp.,* 293 F.3d 419 (8th Cir.2002) (*Bernard I*). On appeal, we held that, taken together, the agreements did constitute a management agreement. *Id.* at 426. Since they were not approved by the NIGC, the agreements were invalid and the United States was entitled to recovery of any fees paid by the Tribe for services rendered under the invalid contracts. Given that the record did not contain any fee information, we remanded for a determination of "fees . . . paid by the Tribe to Casino Magic." *Id.* at 427.

On remand, the district court awarded the United States $350,000. This amount reflected the Tribe's payments to Casino Magic pursuant to the terms of the Consulting Agreement. Both parties appeal the district court's determination. The United States maintains that it should have been awarded the following additional sums: the interest payments Casino Magic collected as a result of its construction loan to the Tribe; the origination fee on the same loan; the prepayment penalty fee the Tribe paid to Casino Magic; various indirect costs of the project that the Tribe reimbursed to Casino Magic; and prejudgment interest. Casino Magic, on the other hand, argues that because its out-of-pocket expenses on the casino project exceeded $350,000, the United States is not entitled to any payment.

II. Analysis

[1–3] We review a grant of summary judgment de novo. *Hammond v. Northland Counseling Ctr., Inc.,* 218 F.3d 886, 890 (8th Cir.2000). If there is no genuine issue as to any material fact, summary judgment is appropriate. Fed.R.Civ.P. 56(c). "When ruling on a summary judgment motion, a court must view the evidence in the light most favorable to the nonmoving party." *County of Mille Lacs v. Benjamin,* 361 F.3d 460, 463 (8th Cir. 2004) (citation and internal quotation marks omitted).

[4] Twenty-five U.S.C. § 81 [1] details the proper procedure for reimbursing the United States when an agreement relative to Indian lands,[2] between a tribe and a third party, has not been properly approved:

> All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of

1. Though Congress eliminated this section in 2000, we rely on the version of the statute that was in effect when the suit was filed. *See United States ex rel. Steele v. Turn Key Gaming, Inc.,* 260 F.3d 971, 973 (8th Cir.2001).

2. For an agreement to be "relative" to the land, the agreement must "put in play actual incidents and rights of property ownership." *Id.* at 978–79.

> value paid to any person by any Indian or tribe, or anyone else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States . . . .

The disputed payments here fall into four basic categories: borrowing fees, indirect costs, out-of-pocket expenses, and prejudgment interest. We examine each category in turn and affirm the district court in its damages calculation in three out of the four categories, reversing only the district court's denial of prejudgment interest.

A. Borrowing Fees

[5] In September 1994, Casino Magic loaned the Tribe $5 million (the Bridge Loan) so it could begin construction on the casino. Nearly two years later, the Tribe secured a loan with BNC National Bank of Bismarck (the Bank) for $17.5 million that was to be paid in installments at the Tribe's request. Casino Magic agreed to contribute $5 million of the $17.5 million loan. The loan was set up such that twenty-six lenders were each responsible for funding a percentage of the loan. When the Tribe made a draw on the loan, each of the lenders contributed its respective percentage share to the payment.

The Tribe's first draw on the loan was for $6 million. Casino Magic was required to contribute approximately $1.7 million; its proportionate share. The Tribe used its first draw to pay off the Bridge Loan in full, so Casino Magic netted approximately $2.3 million on the transaction—the difference between what the Tribe owed Casino Magic on the Bridge Loan and what Casino Magic owed the Tribe due to the first draw. Casino Magic did not charge interest or collect any fees on the Bridge Loan.

When the Tribe made payments on the Bank's loan, the Bank distributed the payments to each of the lenders based on their percentage of participation. This was also true of any interest payments the Bank accrued, and for the origination fee the Bank charged to the Tribe. Additionally, Casino Magic collected approximately $20,000 of the prepayment penalty the Tribe was charged for paying off the $17.5 million loan early.

The government argues that the district court erred by not including the payments that Casino Magic received from the Tribe via the Bank—the interest fees, the origination fee, and the prepayment penalty fee—in its damages award to the government. Because these payments were made pursuant to the Construction and Term Loan Agreement, the government reasons that the payments were made as part of the overall management scheme created by the Consulting Agreement, the Construction and Term Loan Agreement, and the Participation Agreement. Casino Magic, on the other hand, maintains that the money it collected in connection with the Bridge Loan and the bank loan were not due to management services rendered and are therefore not within the purview of 25 U.S.C. § 81.

We agree with the district court that the government is not entitled to the return of payments the Tribe made to Casino Magic in connection with the Bridge Loan or the subsequent $17.5 million loan. It is true that in *Bernard I* we examined the interplay between all three contracts in determining that a management agreement implicating property rights existed between the Tribe and Casino Magic. The issue of damages, however, requires a slightly different analysis. According to the language of 25 U.S.C. § 81, only fees resulting from illegal services, in this case management fees, need to be returned.

While there may have been language in the three agreements between the Tribe and Casino Magic indicating that Casino Magic was attempting to create a management relationship that required NIGC approval, it does not follow that all of the payments it collected were solely as a result of the unapproved *management* relationship. Casino Magic received those payments as a result of its lender status, not because of management services it rendered that were relative to the land. *See United States ex rel. Yellowtail v. Little Horn State Bank,* 828 F.Supp. 780, 787 (D.Mont.1992) (finding loan agreements between a bank and a tribe not to be service contracts as contemplated by 25 U.S.C. § 81 because the loan agreements were not "relative" to the land). The district court was correct in its interpretation of *Bernard I:* We required Casino Magic to return the management fees it collected, and borrowing fees do not constitute management fees. *See Bernard I,* 293 F.3d at 426 ("The law is clear that management agreements must be approved by the Chairman of the NIGC. Without that approval, invalid management fees must be recovered on behalf of the Tribe.").

B. Indirect Costs

[6] The government has identified several costs the Tribe reimbursed to Casino Magic that it maintains were not directly related to the casino project and should therefore be returned by Casino Magic. These costs included licensing fees, Casino Magic's legal fees, and a donation to a men's softball team (totaling approximately $206,000). The government also cites to other, "unverifiable" expenses, totaling $41,440.71 that it believes it is owed. As with the borrowing fees, we agree with the district court that these indirect costs were not paid by the Tribe in exchange for management services, or as a result of services rendered relative to the land, and are therefore not recoverable under 25 U.S.C. § 81.

C. Out–of–Pocket Expenses

[7] Casino Magic maintains that it should not be required to pay any damages because it expended over $600,000 of its own money in connection with the casino project, and to allow the government to collect $350,000, without a deduction of out-of-pocket expenses, would result in an unfair double-billing. To support its argument, Casino Magic primarily relies on language from *Bernard I* stating, "If the agreements were in fact invalid, the Tribe expects Casino Magic to return any fees paid to it under the terms of the invalid agreements, excluding the Tribe's secured loan repayment to Casino Magic and any other out-of-pocket expenses." *Bernard I,* 293 F.3d at 424. Casino Magic's reliance on this language from *Bernard I* is misplaced. This portion of the opinion is merely stating what the parties' expectations were—not what we eventually held.

Additionally, Casino Magic cites to one case in which a South Dakota district court found that a management agreement was not properly authorized by the United States, but did not require the casino management company to return its fees to the government. *See Rita, Inc. v. Flandreau Santee Sioux Tribe,* 798 F.Supp. 586 (D.S.D.1992). This case, however, does not intersect with ours. The district court in *Rita* was deciding whether to grant a temporary restraining order that would have prevented the tribe from removing the management company from the casino. In deciding to deny the temporary restraining order, but allowing the case to go forward, the district court stated that the tribe induced the management company into investing $3 million in the casino—a fact that the district court stated may entitle the company to "some relief." *Id.* at

589. *Rita* does not, however, suggest that a management company must return only the *profits* it obtained as the result of an illegal contract under 25 U.S.C. § 81.

Casino Magic's out-of-pocket expenses should not be deducted from the damages award. The controlling statute, 25 U.S.C. § 81, does not contemplate such a result: The statute says that "all money" paid for services should be returned, without any reference to compensating the third party for its expenditures. The district court acted properly in excluding these costs from its damages calculation.

D. Prejudgment Interest

[8–10] Finally, the district court denied the government's request for prejudgment interest. We review a district court's decision to grant prejudgment interest for an abuse of discretion. *Children's Broad. Corp. v. Walt Disney Co.,* 357 F.3d 860, 868 (8th Cir.2004). The purpose of awarding prejudgment interest is to compensate the prevailing party for its true money damages, to encourage settlements, and to deter parties from benefitting from unfairly delaying litigation. *Val–U Constr. Co. v. Rosebud Sioux Tribe,* 146 F.3d 573, 582 (8th Cir.1998). To that end, generally prejudgment interest should be awarded, absent exceptional circumstances. *See Turn Key Gaming, Inc. v. Oglala Sioux Tribe,* 313 F.3d 1087, 1093 (8th Cir.2002). Often cited examples of such circumstances include the claimant's bad faith, the claimant's assertion of frivolous claims, and the claimant's repeated delay tactics. *See e.g. City of Milwaukee v. Cement Div., Nat'l Gypsum Co.,* 515 U.S. 189, 196, 115 S.Ct. 2091, 132 L.Ed.2d 148 (1995); *Stroh Container Co. v. Delphi Indus., Inc.,* 783 F.2d 743, 752 (8th Cir.1986).

There are no exceptional circumstances here that warrant the denial of prejudgment interest. The district court explicitly recognized the justifications underlying a grant of prejudgment interest, but cited two reasons for refusing to award prejudgment interest. The entirety of the court's analysis follows: "Casino Magic has incurred $632,000 in out-of-pocket expenses for which it will not be reimbursed. Furthermore, the reimbursement of $350,000 will make the Tribe whole again." (Dist. Ct. Op. at 8–9.)

The district court's analysis of the equities in this case is incomplete in our view. While it may be true that Casino Magic incurred out-of-pocket expenses for which it will not be reimbursed, it is also true that Casino Magic profited from the loan arrangement it had with the Tribe. The district court's second rationale, that the Tribe would be made whole by the $350,000 damage award, ignores the time value of money. The Tribe "has been denied the use of money which was legally due." *Stroh Container Co.,* 783 F.2d at 752. An award of prejudgment interest recognizes that the Tribe can only be made whole by awarding prejudgment interest. *See Kansas v. Colorado,* 533 U.S. 1, 10, 121 S.Ct. 2023, 150 L.Ed.2d 72 (2001) ("Our cases since 1933 have consistently acknowledged that a monetary award does not fully compensate for an injury unless it includes an interest component.").

We do not find that the district court's reasons for denying prejudgment interest in this case rise to the level of exceptional circumstances that justifies deviating from the general rule of awarding prejudgment interest. Accordingly, we reverse the district court's denial of prejudgment interest.

III. Conclusion

For the reasons stated above, we affirm the district court's award of $350,000 to the government, but reverse and remand for a determination of prejudgment inter-

est owed to the government on that amount.

CITY OF MARSHALL, MINNESOTA, suing as City of Marshall, Minnesota, by and through the Marshall Municipal Utilities, Appellee,

v.

HEARTLAND CONSUMERS POWER DISTRICT, Appellant.

No. 03–3115.

United States Court of Appeals, Eighth Circuit.

Submitted: May 10, 2004.

Filed: Sept. 13, 2004.

Background: City sued provider of electrical power, alleging breach of a prior settlement agreement through failure to return excess reserve funds to customers. The United States District Court for the District of Minnesota, Michael James Davis, J., granted city's motion for summary judgment and denied provider's counterclaim for summary judgment. Provider appealed.

Holding: The Court of Appeals, Smith, Circuit Judge, held that provider did not breach agreement by changing the level of its budgeted cash reserves, even though that action resulted in a failure to pay refunds to customers.

Reversed.

1. Federal Courts ⚿776

Court of Appeals reviews a district court's interpretation of a settlement agreement, and its grant of summary judgment, de novo.

2. Compromise and Settlement ⚿2

A settlement agreement between two parties is a contract, and is governed by contract principles.

3. Contracts ⚿147(1)

If possible, the intentions of the parties to a contract should govern.

4. Contracts ⚿152

Court of Appeals construes unambiguous contract language according to its plain meaning.

5. Contracts ⚿10(1)

Judicial review of an unambiguous contract that leaves a decision to the discretion of one party is not warranted unless there is fraud, bad faith, or a grossly mistaken exercise of judgment.

6. Municipal Corporations ⚿1018

Electrical power provider did not breach its settlement agreement with city by changing the level of its budgeted cash reserves, even though that change resulted in a failure to pay refunds to customers; plain language of agreement allowed provider to change the level of its reserves at its sole discretion, and there was no evidence of fraud, bad faith, or a grossly mistaken exercise of judgment on the part of the provider in making that change.

Richard D. Casey, argued, Sioux Falls, SD (James V. Roth and Cheryl A. Stanton, Minneapolis, MN, on the brief), for appellant.

Michael P. May, argued, Madison, WI, for appellee.

Before LOKEN, Chief Judge, BRIGHT, and SMITH, Circuit Judges.