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74764-9

NO. 74764-9-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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OUTSOURCE SERVICES MANAGEMENT, LLC,

Respondent,

vs.

NOOKSACK BUSINESS CORPORATION,

Appellant.

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APPELLANT'S AMENDED REPLY BRIEF

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Connie Sue Martin, WSBA #26525  
Averil Budge Rothrock, WSBA #24248  
SCHWABE, WILLIAMSON & WYATT, P.C.  
U.S. Bank Centre  
1420 5th Avenue, Suite 3400  
Seattle, WA 98101-4010  
Telephone 206.622.1711  
Fax 206.292.0460

*Attorneys for Appellant Nooksack Business Corporation*

2016 OCT 15 PM 2:19  
CLERK OF COURT  
JENNIFER M. HARRIS  
COURT OF APPEALS  
DIVISION I  
1000 4TH AVENUE  
SEATTLE, WA 98101

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## I. REPLY

Judgment creditor OSM concedes that the parties' agreements prohibit "creating any encumbrances on tribal real estate,"<sup>1</sup> and created only limited recourse debt in personal property.<sup>2</sup> OSM concedes it has no security interest in *unpaid* rents and profits.<sup>3</sup> It then pays only lip service to these limitations when it defends the Superior Court rulings that allow OSM to collect its judgment from future rents and profits from any use of the former Casino building for the next twenty years.<sup>4</sup> OSM goes so far as to say it would be entitled to sale proceeds from this real property.<sup>5</sup> This Court should enforce the parties' agreements in form *and substance*.

The orders on review give OSM rights that either were forbidden without federal approval or were never bargained for. This foils Congress's clear intent in 25 U.S.C. § 81 to prevent third parties from tying up the real property resources of tribes. Tribes are free to use—and benefit from—their real property resources unless limitations on those rights that last beyond seven years are pre-approved. Here, despite the undisputed lack of federal pre-approval, the orders turn the real property

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<sup>1</sup> *Resp. Br.* 5.

<sup>2</sup> *Id.* at 6.

<sup>3</sup> *Id.* at 19-20.

<sup>4</sup> *See Resp. Br.* 23.

<sup>5</sup> *See Resp. Br.* 20.

into a debt servicing asset for OSM for the next twenty years regardless of the use to which the Tribe puts its trust real property. The agreements should be invalidated, or this portion of the orders should be overturned to ensure that the incidents of ownership—including the right to profits and revenues of real property held in trust for the Tribe—remain in the Tribe.

If the parties had agreed to secure the Casino loan with real property interests, they would have written that in their agreements. They did not. OSM tries to accomplish by fiat what the agreements never granted. Reversal is just.

**A. This Court Should Reject OSM's Narrow Construction of "Encumbrance" That Seeks to Avoid the Proper Conclusion That the Agreements Violate Section 81.**

OSM defends on appeal its declared right to collect future rents and profits from any use of the real property over the next twenty years even though this requires invalidation of the agreements and vacation of its judgment under Section 81. OSM does not dispute that it never obtained federal approval to enter agreements that would allow OSM to collect the rents and profits from any use of the Tribe's trust property for the next twenty years. OSM also does not dispute that the proper remedy, if pre-approval was required, is invalidation of the agreements. This consequence should be enforced here pursuant to federal law. OSM only

argues, incorrectly, that pre-approval was not required because NBC did not show that OSM can dictate the particular use of the land. That OSM cannot dictate the particular use of the land is not determinative of whether an “encumbrance” exists under Section 81 and does not vitiate the pre-approval requirement. It is a false test. Reversal and invalidation is proper.

1. The meaning of “encumbrance” is not limited to “proprietary control,” but even if it is, that standard is met and this Court should enforce Congress’s requirement of mandatory federal oversight of long-term interests in Tribal real property.

OSM’s declared right to collect future rents and profits from any use of the real property over the next twenty years is an “encumbrance” under Section 81 and its implementing regulations.<sup>6</sup> As shown by C.F.R. 84.002 and the D.C. District Court’s *Quantum* decision, an encumbrance includes a contractual right that “hinders” use of the land based on any “claim, lien, charge, right of entry or liability.”<sup>7</sup> That is what we have here. OSM’s declared right to future rents or profits earned from use of

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<sup>6</sup> In its Opening Brief, NBC left out an important “not” in this sentence: “The Superior Court accepted OSM’s position that its asserted interests are not ‘encumbrances’ under the Section 81.” *Op. Br.* 18. NBC apologizes. NBC plainly argues that the Superior Court’s conclusion that OSM’s interests are not encumbrances is incorrect.

<sup>7</sup> See *Op. Br.* 18, citing 25 C.F.R. 84.002 and *Quantum Entm’t, Ltd. v. United States Dep’t of Interior*, 848 F. Supp. 2d 30, 33 (D.D.C. 2012).

the land for the next twenty years hinders the Tribe's use of its trust property and its role as proprietor. Any commercial use of the land over the next twenty years will line the pockets of OSM—who seriously misjudged whether Casino operations could support the loan—instead of tribal coffers when the real estate is one of the Tribe's primary assets. The interest is not simply a contractual right to revenues from Casino operations, but a real property interest.

As *Gasplus* instructs, OSM's right is an "encumbrance" because it diminishes the value of the encumbered property to the Tribe.<sup>8</sup> The Tribe has lost a basic incident of ownership: the right to rents and profits from use of its real property. To conclude otherwise would be to promote form over substance, as OSM has done successfully so far by arguing that it only has won a right to cash, not to anything that affects the real property or its uses. To the contrary, the Superior Court orders allow OSM to co-opt the tribal property for its benefit. This is the type of "claim" or "liability" that required pre-approval.<sup>9</sup>

As NBC has already argued, the Bureau of Indian Affairs defined

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<sup>8</sup> See *Op. Br.* 21, citing *Gasplus v. United States Dep't of Interior*, 510 F. Supp. 2d 18 (D.D.C. 2007).

<sup>9</sup> OSM undermines its own argument that its interests are not like "liens" or "rights" in the real property when it later argues against application of merger by emphasizing its "special rights" that are like the right to enforce a lien. See *Resp. Br.* 25, citing *Boeing Employee's Credit Union v. Burns*, 167 Wn. App. 265, 277 (2012).

“encumber” expansively rather than restrictively, and indicated an intent to protect use of a tribe’s land from third party interests beyond seven years.<sup>10</sup> Only in the second sentence of the regulation did the Bureau include a statement that encumbrances “may” include contracts or agreements that “give to a third party exclusive or nearly exclusive proprietary control over tribal land,” not that they must.<sup>11</sup> OSM seizes on this language (“exclusive or nearly exclusive proprietary control”) as *the test*, ignoring other parts of the regulation and discussions in the case law. NBC need not show exclusive proprietary control, which is just one test. Now that the Casino has failed, OSM’s recognized right to the rents and profits generated from the property hinders the Tribe’s use of the property, takes all the economic benefit for a third party, and reduces the value of the property to the Tribe. This is an encumbrance.

Even accepting OSM’s “proprietary control” standard, which this Court need not, OSM’s recognized legal interest meets the standard. The interest divests the Tribe of “proprietary control.” While OSM is not able to dictate the uses to which the real estate is put, OSM is entitled to the proceeds of any use. This is a critical incident of proprietary control, as

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<sup>10</sup> *See Op. Br.* 18-20, citing 25 C.F.R. 84.002 and .004.

<sup>11</sup> *Id.*

NBC already has briefed.<sup>12</sup> OSM offered no authority to show that the right to all rents and profits from any use of the property unrelated to Casino operations is not a form of proprietary control. This Court should conclude it is.

OSM's recognized interest is in derogation of the Tribe's role as proprietor of its lands, and extends far beyond operation of the now defunct Casino. The *Gasplus* court made a point of recognizing Congress's desire to protect a tribe's role as proprietor of its real property, stating, "Congress decided to 'leave[ ] the [amended] provision in place to address a limited number of transactions that could place tribal lands beyond the tribe's ability to control the lands in its role as proprietor.'"<sup>13</sup> The *Gasplus* court identified a "key question" as "whether a contract gives a third party a legal *interest* in tribal lands that encumbers a tribe's ability to control the land as proprietor."<sup>14</sup> The *Gasplus* court also recognized Section 81 to be "a safeguard that protects Indian lands from being alienated or encumbered by legal claims that could interfere with Indian

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<sup>12</sup> *Op. Br. 24*, citing 73 C.J.S. *Property* § 46 (West 2016), *Aiassa v. Aiassa*, 151 Wash. 468 (1929), *Great-West Life & Annuity Assurance Co. v. Parke Imperial Canton, Ltd.*, 177 B.R. 843, 852 (N.D. Ohio 1994), *State v. O'Connell*, 121 Wash. 542 (1922).

<sup>13</sup> *Gasplus, supra*, 510 F. Supp. 2d at 28, citing S. Rep. 106-50 at 9 (emphasis added). See also 65 Fed. Reg. 43,952 (July 14, 2000).

<sup>14</sup> *Id.* at 32.

tribes' ability to use the land to their benefit.”<sup>15</sup> The contract at issue in *Gasplus* merely gave a third party a right to control gas station operations in an enterprise located on Indian lands. This did not trigger Section 81. Here, the interest is distinguishable where OSM established a legal interest in rents and revenues from the tribal property for the next twenty years that eliminates the Tribe's ability to benefit from the land “as proprietor.” The interest goes beyond a contractual right to cash proceeds from a specific operation.

OSM fails to defend the Superior Court's incorrect analysis that an “ownership interest” had to be shown.<sup>16</sup> OSM may concede the issue—or may be obfuscating it—by stating not that an *ownership* interest must be shown but that an “interest in tribal land” must be shown. *Resp. Br.* 16-17. In any event, the Superior Court's conclusion is contrary to the plain language in the regulation. It is contrary to the discussion of “encumbrance” in *Gasplus*, *Quantum*, and *Chemehuevie Indian Tribe*.<sup>17</sup> It was an erroneous legal conclusion.

Pre-approval was required because the recognized interest sufficiently hinders the Tribe's rights as owner of these lands far beyond

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<sup>15</sup> *Id.* at 34.

<sup>16</sup> *See Op. Br.* 21-22, addressing Superior Court's conclusion at CP 1673.

<sup>17</sup> *See Op. Br.* 18, 20, citing *Chemehuevie Indian Tribe v. Jewell*, 767 F.3d 900 (9<sup>th</sup> Cir. 2014).

seven years.

2. Washington law, in concert with federal law, further shows that the agreements violate Section 81.

The federal regulation and the case law discussed above are sufficient to support reversal. NBC additionally offered RCW 7.28.230(2) and RCW 62A.9A-109(d)(11) to show that security interests in unpaid rents and profits are real property interests under Washington law, not personal property interests.<sup>18</sup> OSM objects that Washington law is either foreclosed or irrelevant, and then argues that the Superior Court only recognized interests in cash, not real property.<sup>19</sup> The Court should reject OSM's positions.

The Washington statutes do not conflict with the federal law. OSM does not urge this Court to hold that a conflict exists, instead equivocating that "if" there was conflict, the federal definition would control.<sup>20</sup> But OSM does not offer or rely on any federal definition, any dictionary meaning or any definition whatsoever of terms like "claim," "lien," "right," "liability" that conflicts with RCW 7.28.230(2) and RCW 62A.9A-109(d)(11). Further, the parties contracted for the application of

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<sup>18</sup> *Op. Br.* 22-23.

<sup>19</sup> *Resp. Br.* 19-20.

<sup>20</sup> *Id.*

Washington law to their agreements. *See, e.g.*, CP 729 ¶ 15 (Tribal Security Agreement); CP 696 ¶ 9.3 (Springing Depository Agreement). OSM did not dispute this or proffer other law. This Court should determine the interests created by the parties' agreements by application of state law, and then determine if those interests are claims, liens, rights or liabilities in the real property for purposes of Section 81. They are.

OSM next argues incorrectly that its interest falls outside RCW 7.28.230(2) because this definition only applies until such rents and profits are paid, stating,

[U]ntil a tenant pays rent to the landlord, the right to collect the unpaid rent is an interest in real property. But once the rent is paid to the landlord, it becomes personal property that a creditor may recover.<sup>21</sup>

OSM has the law right, but misapplies this law to the facts of this case. OSM has only the right to collect *paid* rents and profits. OSM knows, and the record demonstrates, none are left because OSM received all cash receipts when it swept NBC's accounts.<sup>22</sup> But the Superior Court did not recognize an interest in *paid* rents and profits. The Superior Court recognized a right to collect *future* rents and profits. That right is a real

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<sup>21</sup> *Resp. Br.* 19. This concedes the case.

<sup>22</sup> Put another way, there is no cash in which OSM could have an attached security interest that the Superior Court could recognize. *See Op. Br.* at 39, discussing attachment of a security interest. The Superior Court has necessarily recognized an interest in an asset that is not a cash asset.

property interest that RCW 7.28.230(2) excludes from Article 62A.9 RCW (the statute that governs security interests in personal property). That real property interest triggers Section 81.

The law does not support the tautological argument that the security interest recognized in future rents and profits that violates Section 81 should not be held to violate Section 81 because once those future rents and profits are received they will be “paid,” and then the interest will be in cash and be permissible under Section 81. It is a truism that any interest in real property can be reduced to cash at some point; that does not transform the interest into one in personal property.

OSM cites *In re Freeborn*<sup>23</sup> for the off-point proposition that a creditor’s right to receive real estate contract payments is an interest in personal property. This does not advance the discussion where real estate contract payments are not at issue. OSM presumably could find no authority to support the actual rulings in this case. OSM fails to engage relevant authorities like *Kezner v. Landover Corp.*, which describes RCW 7.23.230 as “a statute of broad application” that “not only provides that rents and profits are excluded from Article 9, but also applies the recording act to such rents and profits.”<sup>24</sup>

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<sup>23</sup> *Resp. Br. 20*, citing 94 Wn.2d 336, 340 (1980).

<sup>24</sup> *See Op. Br. 34*, citing 87 Wn. App. 458, 466 (1997).

OSM attempts a policy argument that reversal would “call into question” “virtually all lending to tribes for commercial enterprises.”<sup>25</sup> The Court should reject this hyperbole. OSM refuses to content itself with its bargain to secure the loan through personal property. Reversal would call into question, and appropriately so, the assertion of disguised security interests in tribal real property meant to evade Section 81 yet require that rents and profits from use of tribal real property long past seven years belong to a third party.

This Court should conclude that the Superior Court erred when it held that OSM has a security interest in future rents and profits and this does not violate Section 81.

3. This Court should hold that provisions barring alienation of the real property without OSM’s consent violate Section 81.

NBC has argued that not only do the security provisions trigger Section 81 invalidity, but so do the provisions against alienation of the real property.<sup>26</sup> OSM responds that the issue should not be decided based on RAP 2.5(a) because the alienation restrictions in the parties’ agreements were not called to the trial court’s attention.<sup>27</sup> The issue should be

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<sup>25</sup> *Resp. Br.* 20-21.

<sup>26</sup> *Op. Br.* 25-28.

<sup>27</sup> *Resp. Br.* 21.

decided, and decided in NBC's favor, either because it was sufficiently raised or based on the Court's discretion.

The issue was sufficiently raised to warrant a legal ruling in this appeal. The controlling law regarding Section 81 was extensively briefed and argued and all material facts are uncontested and apparent in the record. The issue of invalidity of the agreements under Section 81 was undisputedly joined and rejected by the trial court. This was sufficient to avoid application of RAP 2.5(a) to prevent a legal ruling on appeal whether the agreements do or do not contain provisions that trigger Section 81. NBC may point out more provisions in the contract that support its same argument.

Where a legal theory has been presented to the superior court, like here, Washington appellate courts do not strictly circumscribe the arguments that can be made for purposes of appeal. For example, in *Greenfield v. W. Heritage Ins. Co.*, the Court found a legal claim sufficiently raised where the appellant generally argued his theory of theft even though appellant failed to include citation to the controlling RCW chapter.<sup>28</sup> When appellant then raised the statute on appeal, the Court of Appeals performed the corresponding statutory analysis even though the

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<sup>28</sup> *Greenfield v. W. Heritage Ins. Co.*, 154 Wn. App. 795, 801 (2009) (argument made was sufficient to preserve the legal issue for review).

superior court had not.<sup>29</sup> Here, NBC argued Section 81 invalidity to the Superior Court. This Court should analyze whether the alienation restrictions referred to in the Opening Brief demonstrate Section 81 invalidity.

Review is more typically refused under RAP 2.5(a) when an entirely new legal theory is raised, such as new assertions of negligence *per se*<sup>30</sup> or the statute of frauds.<sup>31</sup> In contrast to the presentation of an entirely new legal theory, NBC simply offers further factual support from the existing record for its legal argument of invalidity under Section 81. This should not run afoul of RAP 2.5(a).

If the Court determines that consideration of the alienation prohibitions would be a new argument for purposes of RAP 2.5(a)—which would be an unnecessarily strict reading of RAP 2.5(a)—it should exercise its discretion to decide whether these provisions required pre-approval.<sup>32</sup>

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<sup>29</sup> *Id.* at 801-02.

<sup>30</sup> *Wilson v. Steinbach*, 98 Wn.2d 434, 440 (1982).

<sup>31</sup> *See Buck Mountain Owners' Ass'n v. Prestwich*, 174 Wn. App. 702, 720 (2013).

<sup>32</sup> *State v. Stivason*, 134 Wn. App. 648, 656 (2006) (appellate court has discretion to consider new argument); *Roberson v. Perez*, 156 Wn.2d 33, 39 (2005) (same). *See Postema v. Postema Enters., Inc.*, 118 Wn. App. 185, 195 (2003) (“But, all this being said, we conclude that determining the meaning of RCW 4.24.010 is critical to this case and resolving it is necessary to making a proper decision. In the interest of justice, we will review the question. . . .”); *Falk v. Keene Corp.*, 113 Wn.2d 645, 659 (1989) (“An appellate court has inherent authority to consider issues

OSM asserts no prejudice and these provisions are pertinent to the Section 81 analysis. This Court should make a complete disposition of the legal issue concerning Section 81.

On the merits, this Court should find the prohibitions on alienation of the real property triggered Section 81 and lack of pre-approval requires invalidation. The Ninth Circuit's *Guidiville* decision<sup>33</sup> demonstrates the Bureau of Indian Affairs' conclusion directly on point that such prohibitions encumber Indian lands. OSM offers no contradictory authority or a persuasive reason that, contrary to the discussion in the *Guidiville* decision, these prohibitions do not trigger invalidity under Section 81. These prohibitions hinder use of the land and prevent the Tribe from freely doing what it wishes with its property.

OSM appears to argue that the provision is not a prohibition on sale of the Casino building that would trigger Section 81 because it concerns only NBC's assets, not the Tribe's.<sup>34</sup> This is false. First, as already established and not contradicted by OSM, the Casino building is owned by the Tribe, not NBC.<sup>35</sup> Second, the Tribal Agreement as quoted

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which the parties have not raised if doing so is necessary to a proper decision.”).

<sup>33</sup> *Guidiville Band of Pomo Indians v. NGV Gaming, LTD.*, 531 F.3d 767, 771-72 (9<sup>th</sup> Cir. 2008).

<sup>34</sup> *Resp. Br.* 21-22.

<sup>35</sup> *See Op. Br.* 4 citing CP 1639 ¶¶ 2, 3, CP 1642, CP 666 (Depository

by OSM directly applies the alienation restrictions to *the Tribe*: the Tribe itself will not, and will not allow NBC to, “sell, transfer or convey all or substantially all of its interest in the Facilities, the Facilities Enterprise or in the Pledged Revenues....”<sup>36</sup> Finally, OSM’s present argument that the alienation prohibitions are not directed at the Tribe also contradicts its contrary position before the Superior Court.<sup>37</sup>

The restrictions trigger Section 81 and result in invalidity.

**B. The Agreements, Properly Construed, Do Not Grant OSM a Right to Collect from Future Profits, Revenue, and Sale Proceeds from the Real Property for Twenty Years.**

This Court should hold that the agreements do not grant OSM a right to collect its judgment from profits and revenue received over the next twenty years from the real property from a use unrelated to Casino operations. OSM has no blanket right to proceeds now that the Casino is defunct. Having limited itself to collection from personal property, OSM is now trying to re-write the agreements to include rights that flow from ownership of the real property.

OSM does not dispute that, as the secured party, it had the burden

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Agmnt.); CP 876 at (k) and (l) (Tribal Agmnt.).

<sup>36</sup> *Resp. Br.* 21-22, citing CP 797. The text as it appears in the Tribal Agreement can be found at CP 880 at (l).

<sup>37</sup> *See* citations at *Op. Br.* 25-26.

to establish the scope of enforcement of its security interest.<sup>38</sup> OSM did not meet that burden. If the parties intended that “Pledged Revenues” includes the property interests that OSM now asserts, they would have plainly stated so. To the contrary, they agreed upon express exclusions that contradict that intent. Even accepting OSM’s argument that the definition was intended to prevent NBC from shutting down and re-opening the Casino under another name to avoid its obligations,<sup>39</sup> that is not what has occurred. No provision states that OSM will enjoy all future rents and profits earned in the Casino building indefinitely even if the Casino goes under.

OSM asks this Court to approve an interpretation that uses the negotiated right to all proceeds from Casino operations (including incidental proceeds) to support an un-bargained for right to any proceeds the Tribe receives in the future from a changed use of the building after the Casino failed. And OSM does not stop here. OSM astonishingly claims it can collect against proceeds from sale of the building.<sup>40</sup> OSM fails to provide legal support for its arguments that these rights are in personal property and not real property. In particular, OSM fails to

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<sup>38</sup> *See Op. Br.* 31 (establishing the burden on OSM, which OSM did not dispute in its brief), which is un rebutted by OSM.

<sup>39</sup> *See Resp. Br.* 23-24.

<sup>40</sup> *Resp. Br.* 20.

dispute that under well-established contract interpretation principles, the specific exclusions in the agreements for real property interests should control.<sup>41</sup> And OSM fails to grapple with how any security interest could have attached to rents and proceeds that are unpaid.

The plain language in the agreements does not grant this right. The disclaimers and limitations in the agreements belie it.

**C. The Supreme Court Has Not Decided, and It Is Not the Law, That the Superior Court Can Order Enforcement of the Judgment Against Trust Real Property Interests Like It Has Done.**

Nothing establishes jurisdiction of Washington Courts to enforce OSM's judgment against trust real property interests. The Court should not reach this analysis because the Court should reverse based on the above arguments. If it does not, the Court should hold that the recognized security interests in the tribal real property may not be enforced against NBC or the Tribe. Sovereign immunity prevents this where the Tribe made only a *limited* waiver of sovereign immunity that did not include enforcement against tribal real property interests.

OSM incorrectly argues that the Supreme Court has already decided this issue. It has not. The Supreme Court, in fact, accurately quoted the limited waiver of sovereign immunity: "Subject to the

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<sup>41</sup> See *Op. Br.* 34-35.

limitations on recourse in Section 8.30, the Borrower hereby expressly grants to the Lender and all Persons entitled to benefit from any Loan Document an irrevocable limited waiver of its sovereign immunity from suit or legal process with respect to any Claim.”<sup>42</sup> These limitations on recourse were not at issue in the first appeal; the Supreme Court did not make a holding regarding those limitations. NBC’s claim for declaratory relief—and OSM’s responsive overreach seeking to exceed these limitations—had not yet been raised. The Supreme Court held only that Washington Courts have subject matter jurisdiction to hear OSM’s contract claims, and refused to decline jurisdiction because, under the *Washington v. Lee* factors, NBC’s limited waiver demonstrated the sovereign’s choice to allow the contract dispute to proceed in state court. This conclusion does not extend enforcing collection against trust real property interests.

To find jurisdiction to enforce the judgment against tribal real property interests would conflict with the reasoning of the Supreme Court to respect the Tribe’s right to self-determination. The Tribe expressly did not consent to state court enforcement of recourse against its real property assets. Its limited waiver was “subject to the limitations on recourse in Section 8.30.”

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<sup>42</sup> *OSM II*, 181 Wn.2d 272, 274 (2014) (emphasis added).

OSM argues that because subject matter jurisdiction was established for the contract dispute, the court cannot “lose” jurisdiction if the court rules that OSM can collect against real property interests. To the contrary, the Superior Court can have jurisdiction, i.e., sovereign immunity can be waived, to decide an underlying dispute but not to enforce judgments against tribal trust property, as already established in *In re Marriage of Lander*.<sup>43</sup> OSM failed to address or rebut this authority. And, as NBC also briefed without response from OSM,<sup>44</sup> a court may have jurisdiction to hear a dispute based on a waiver of sovereign immunity that is not absolute. RCW 4.92.040 demonstrates this where the State of Washington has made a limited waiver of sovereign immunity that preserves a restriction against execution on judgments. Like the State of Washington, NBC made a limited waiver to allow Washington Courts to determine disputes arising from the agreements but not to permit enforcement against real property interests.<sup>45</sup> The jurisdiction of Washington Courts is, therefore, similarly confined.

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<sup>43</sup> *Op. Br.* 45, 48-49, citing 95 Wn. App. 579 (1999).

<sup>44</sup> *See Op. Br.* 47-48 n. 15.

<sup>45</sup> The United States Supreme Court has observed that private parties like OSM and its predecessors are free to negotiate for waivers of immunity by tribes, and are held to the terms negotiated. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (party asserting waiver of immunity “could have insisted on a different deal.”).

OSM also failed to address RCW 37.12.060, 25 U.S.C. § 1322, *State v. Shale*, and *State v. Paul*, all of which demonstrate the State's lack of subject matter jurisdiction to enforce a judgment against the Tribe's trust real property.

## II. CONCLUSION

This Court should reverse on *de novo* review because the relief OSM received exceeded limitations of federal law, the intent of the parties as expressed in their agreements, the limited waiver of sovereign immunity and, ultimately, the jurisdiction of Washington Courts. Federal law directs this Court to prevent enforcement of the agreements under Section 81. Alternatively, the limitations on recourse should be just that: limitations. OSM must content itself with recourse only to personal property to which the parties agreed and to which its security interests attached. That does not include future rents and profits from use of the former Casino building, or future sale proceeds. If it does include such assets, it exceeds the Court's jurisdiction.

Respectfully submitted on this 5<sup>th</sup> day of October, 2016.

SCHWABE, WILLIAMSON & WYATT, P.C.

By:   
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Connie Sue Martin, WSBA #26525  
Averil Budge Rothrock, WSBA #24248  
*Attorneys for Appellant,  
Nooksack Business Corporation*

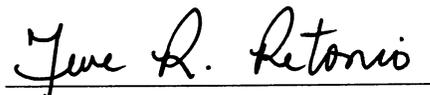
**CERTIFICATE OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 5<sup>th</sup> day of October, 2016, I arranged for service of the foregoing **APPELLANT'S AMENDED REPLY BRIEF** on the following parties via email by agreement:

Jerome A. Miranowski  
Michael M. Krauss  
Peter J. Farrell  
Faegre Baker Daniels LLP  
2200 Wells Fargo Center  
90 S. 7<sup>th</sup> Street  
Minneapolis, MN 55402  
E-Mail: [jerome.miranowski@faegrebd.com](mailto:jerome.miranowski@faegrebd.com)  
E-Mail: [Michael.krauss@faegrebd.com](mailto:Michael.krauss@faegrebd.com)  
E-Mail: [peter.farrell@faegrebd.com](mailto:peter.farrell@faegrebd.com)

Philip James Buri  
Buri Funston Mumford PLLC  
1601 F Street  
Bellingham, WA 98225  
E-Mail: [philip@burifunston.com](mailto:philip@burifunston.com)

  
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Feve R. Retonio, Legal Assistant

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CLERK OF SUPERIOR COURT