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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 NOOKSACK BUSINESS CORPORATION'S  
OPENING BRIEF

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**I. INTRODUCTION**

This appeal seeks a just and lawful result from the fallout of a failed commercial loan made by a commercial lender (“OSM”) to an arm of the Nooksack Indian Tribe (“NBC”) to refurbish and equip the River Casino on the Nooksack Reservation near Bellingham. The twenty million dollar judgment for default of the loan violates federal law because the agreements encumber Tribal trust property without the required pre-approval of the federal government. Pursuant to 25 U.S.C. § 81 (“Section 81”), the remedy for lack of the required pre-approval is invalidation of the agreements. This Court should declare the agreements invalid and vacate the twenty million dollar judgment.

Alternatively, this Court should revise the declaratory relief. The Superior Court misconstrued the agreements as a matter of law and misapplied Washington law when it declared the scope of assets available for collection. By recognizing a right to collect from future rents and profits from the real property, including the former Casino building, the rulings expand the lender’s limited recourse as negotiated by the parties. The rulings conflict with black letter Washington law defining as real property a security interest in future rents and profits from real property. Because the Casino is defunct and the agreements expressly disclaim real property as security for the loan, the lender does not have a right to collect

against future rents and profits from the real property. The declaratory relief should correctly limit the recourse according to the parties' bargain and state and federal law.

Finally, if the Court concludes the declaratory relief is not in error, the relief exceeds the jurisdiction of Washington State courts to grant. NBC neither waived its sovereign immunity nor consented to state court jurisdiction for enforcement of the judgment against real property interests like these. Jurisdiction is lacking for that relief.

## **II. ASSIGNMENTS OF ERROR**

1. The Superior Court erred as a matter of law in granting judgment to OSM and denying relief to NBC on its claims for declaratory relief. *See* CP 1676-85 (12/9/15 Judgment); CP 1687-90 (12/4/15 Order Granting Plaintiff's Post-Judgment Motion); CP 1678-80 (5/7/15 Order Granting Plaintiff's Motion for Summary Judgment); CP 1687-90 (1/13/16 "Opinion of the Court re: Facilities Revenues"); CP 1692-95 (11/9/15 "Opinion of the Court").
2. The Superior Court abused its discretion when it failed to reconsider the relief entered for errors of law. *See* CP 1704-06 (2/25/16 "Order Denying Reconsideration of Opinion Resolving NBC's Counterclaims").
3. The orders identified above also are invalid because Washington courts lack subject-matter jurisdiction to authorize enforcement of OSM's limited recourse judgment against the Tribe's trust property or to declare rights that encumber the Tribe's trust property, and the Tribe never waived its or NBC's sovereign immunity to permit collection of any judgment against real property interests.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Should this Court hold that the agreements are invalid pursuant to 25 U.S.C. § 81 because no federal pre-approval was obtained where the agreements encumber Indian lands, requiring vacation of the judgment and dismissal of OSM's claims? (Assignments of Error 1 and 2).
2. Should this Court require revision of the declaratory relief to exclude a security interest in, and right to collect against, future rents and profits from non-Casino use of the Tribe's real property because the loan agreements do not grant this security interest? (Assignments of Error 1 and 2).
3. Are the covenants in loan documents unenforceable after entry of judgment in OSM's favor based on the doctrine of merger? (Assignment of Error 1).
4. Do Washington courts lack subject-matter jurisdiction to authorize enforcement of OSM's judgment against future rents and profits earned from the Tribe's trust property? (Assignment of Error 3).
5. Does the doctrine of sovereign immunity require reversal and vacation of the orders because NBC expressly did not waive its immunity from orders that would allow enforcement of OSM's judgment against real property interests like these? (Assignment of Error 3).

### **IV. STATEMENT OF THE CASE**

NBC, a tribally-chartered corporation wholly owned by the Tribe, entered into loan agreements with an out-of-state lender. NBC owned and operated the Nooksack River Casino (the "Casino") on the Tribe's reservation. After declaring an event of default, OSM initiated an action for breach of the loan agreements against NBC. NBC counterclaimed for declaratory relief to establish the limited scope of assets available for

collection. After OSM commenced collection actions and garnished all of NBC's bank accounts, NBC closed the Casino due to insufficient operating funds and has permanently ceased operating the Casino.

The Tribe is not a party to these proceedings. The declaratory relief nonetheless authorizes collection of the limited recourse judgment from future rents and profits received by the Tribe (the beneficial owner of the property) from activities conducted at the former Casino property.

**A. NBC executed limited recourse loan agreements to finance the refurbishment and equipping of its River Casino on the Nooksack Indian Reservation.**

NBC is a tribally-chartered corporation of the Tribe, which was formed to, and did, operate the River Casino in Deming, Washington, within the boundaries of the Nooksack Reservation. CP 351, 354 (Loan Agmnt, §§ 4.1, 4.18(b)). The Casino building is on land held by the United States in trust for the Tribe. CP 1639 ¶¶ 2, 3; CP 1642 (describing owner of property as "USA ITF NOOKSACK INDIAN TRIBE"). The Tribe—not NBC—is the beneficial owner of the real property. CP 666 (Depository Agmnt). CP 876 at (k) and (l) (Tribal Agmnt). OSM did not dispute this evidence nor that the United States holds title to this property.

NBC obtained a \$15,316,856 loan from OSM's predecessor (a South Dakota bank) to pay off an approximately \$8 million balance on an existing construction loan and nearly \$1.9 million owed to a gaming

equipment manufacturer for refurbished machines. CP 6 (Complaint, ¶ 14); CP 345-49, CP 351, 354 (Loan Agmnt § 2.1, 4.1, 4.18(b)); CP 1022. The remainder was spent on improvements to the Casino building. CP 6 (Complaint, ¶ 14); CP 345-49 (Loan Agmnt § 2.1); CP 1022.

The loan agreements include a restraint on alienation of Tribal trust property preventing the Tribe or NBC from conveying the real property without the lender's consent. *See* CP 686 (Springing Depository Agmnt) (“Each of the Borrower and the Tribe agrees not to ... sell, transfer or convey all or substantially all of its interest in the Facilities, the Facilities Enterprise or in the Pledged Revenues to another Person, except with the consent of all Secured Payees.”); CP 368 (Loan Agmnt) (same); CP 880 at (l) (Tribal Agmnt) (same).

The agreements recite that real property interests are not encumbered in order that the agreements do not trigger 25 U.S.C. § 81. CP 720 ¶ 24 (“The parties agree that this Agreement does not encumber any land or interest in land of the Borrower, and that this Agreement is not subject to 25 U.S.C. § 81.”) (Security Agmnt (Borrower)); CP 701 § 9.16 (Springing Depository Agmnt) (same); CP 731 ¶ 24 (Security Agmnt (Tribal)) (same); CP 887 Section 17 (Tribal Agmnt) (same).

The debt was explicitly a “limited recourse obligation.” Section 3 of the Loan Agreement addresses “Security,” stating, “The Note and the

obligations of the Borrower [NBC] under the Loan Documents shall be limited recourse obligations, with enforcement related thereto limited as provided in Section 8.30. The Loan is also secured by the Tribe's obligations pursuant to the Tribal Agreement." CP 350-51 § 3. Each loan document, including Section 8.30 of the Loan Agreement, conspicuously identifies the agreements as "limited recourse," and states that NBC's obligations are "enforceable solely against the Pledged Assets" "notwithstanding any other provision," as follows:

Limited Recourse Obligations; No General Obligation.  
**Notwithstanding any other provision in any Loan Document or elsewhere expressed or implied, the obligations of the Borrower [NBC] to pay amounts due hereunder, on the Note and the other Loan Documents, as well as any other claims, liabilities or obligations of the Borrower hereunder or under any other Loan Document shall be limited recourse obligations of the Borrower, enforceable solely against the Pledged Assets. Neither the general obligation or the full faith and credit or taxing power of the Borrower is pledged to the payment of any amounts due on the Note or under any other Loan Document or any Tribal Document.**

CP 385 ¶ 8.30 (Loan Agmnt) (italics added; bold and underlined emphasis original). This limitation is repeated in every related loan document. *See* CP 702 § 9.21 (Springing Depository Agmnt) (same); CP 720 ¶ 25 (Security Agmnt (Borrower)) (same); CP 731 ¶ 25 (Security Agmnt (Tribal)) (same); CP 460 ¶ 23 (Promissory Note) (same); CP 887 § 16 (Tribal Agmnt) (similar).

The parties expressed their intention that no real property interests secured the loan. They included a specific limitation whereby the lender renounced any interest or “Lien” in real property or improvements:

No Management of Facilities; No Mortgage Lien in Real Property. NOTWITHSTANDING ANY OTHER POSSIBLE CONSTRUCTION OF ANY PROVISION HEREIN, THE LENDER ACKNOWLEDGES AND AGREES. . . .(B) IT NEITHER HAS, NOR SHALL ASSERT, ANY LIEN AGAINST ANY REAL PROPERTY OR ANY IMPROVEMENTS OF THE BORROWER THEREON (OTHER THAN PERSONAL PROPERTY SUBJECT TO THE LIEN OF THIS SECURITY AGREEMENT).

CP 720 ¶ 22 (Security Agmnt (Borrower)). *See also* CP 731 ¶ 22 (Security Agmnt (Tribal)) (same); CP 385 ¶ 8.32 (“LIEN IS RESTRICTED TO THE PLEDGED ASSETS, WHICH DO NOT CREATE A MORTGAGE LIEN ON THE FACILITIES.”) (Loan Agmnt); CP 701 § 9.15 (“No Mortgage Lien in Real Property. . . . LIEN IS RESTRICTED TO THE PLEDGED FINANCIAL ASSETS.”) (Springing Depository Agmnt). “Lien” is a defined term broadly including “any security interest, mortgage, pledge, lien, charge, encumbrance, title retention or analogous instrument, in, of, or on any of the assets or properties, . . .whether or not filed, recorded or otherwise perfected. . . .” *See, e.g.*, CP 339 (Loan Agmnt); CP 670 (Springing Depository Agmnt).

Thus, the parties agreed that the lender does not have nor will it assert against the real property a broad category of interests including a security interest, pledge, lien, charge, encumbrance or the like.

**B. The lender sued NBC for default and obtained a \$20 million limited recourse judgment.**

OSM sued NBC for default. CP 3-284 (Complaint). The appellate courts resolved subject-matter jurisdiction for the breach of contract dispute, including certain IGRA issues.<sup>1</sup> On remand, the trial court granted partial summary judgment to OSM, awarding a judgment of \$20,725,716.90, which was the full amount of the debt plus penalties and interest. CP 1076-79, 1495-504. The Superior Court ruled that “[e]nforcement of said judgment shall be limited by the terms of the loan documents and the Indian Gaming Regulatory Act (IGRA).” CP 1680 ¶ 2.

**C. NBC sought declaratory relief establishing the limited assets available for collection.**

NBC by counterclaim filed after remand sought declaratory relief to establish the limited scope of assets available for collection. CP 285-99 at 292-97 (Answer & Affirmative Defense and Counterclaims); CP 636-50 (NBC’s Cross-Motion for Summary Judgment). NBC submitted multiple

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<sup>1</sup> *Outsource Servs. Mgmt, LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799 (2013) (resolving IGRA issues) (“*OSM I*”), *aff’d on other grounds* 181 Wn.2d. 272 (2014) (resolving subject-matter jurisdiction issues for the lender’s Complaint) (“*OSM II*”).

briefs on that issue. *See* CP 1223-31 (Suppl. Br. Re: Assets Subject to Execution with Appendix); CP 1426-31 (Suppl. Response Br.); CP 1505-11 (NBC Brief re: Impact of River Casino Closure on Assets Subject to Execution); CP 1634-37 (Suppl. Br. Re: Encumbrance of Trust Property); CP 1650-54 (Motion for Reconsideration).

In the first appeal, the Court of Appeals acknowledged the “limited recourse obligation of NBC” that is “enforceable against certain security that NBC pledged to the bank. The security includes all of the gaming equipment in the casino and certain proceeds from gaming at the casino.” *See OSM I*, 172 Wn. App. at 805. This correct explanation, which OSM itself described in its appellate briefing (see CP 961), arises from the Loan Agreement, which identifies security for the loan as “solely” “Pledged Assets.” CP 385 ¶ 8.30. “Pledged Assets” includes four terms: (1) Depository Funds (as defined in the Depository Agreement); (2) Collateral; (3) Net Insurance Proceeds; and (4) Pledged Revenues as defined in the Depository Agreement. CP 342 (definitions of “Pledged Assets” and “Pledged Revenues”). *See also* CP 676 Section 2.1 (Springing Depository Agreement) (granting security interest in “Pledged Revenues”). Of these, *only Pledged Revenues is now at issue*.

OSM asserts that future rents and profits earned through any use of the real property and building that formerly housed the Casino are

“Pledged Revenues.” But only proceeds from “operation” of the Casino and its complementary activities are Pledged Revenues, according to any reasonable construction of the agreements and this definition:

*Pledged Revenues:* whether now existing or hereafter arising, and wherever located, all receipts, revenues and rents from the operation of any portion of the Facilities, including, without limitation, receipts from: (a) class II and class III gaming (as such terms are used in IGRA), including, without limitation, receipts from bingo, slot machines, and card games; (b) on-site facilities for dining, food service, beverage, restaurant and other concessions derived therefrom; (c) any other facilities financed in whole or in part with Recourse Debt; (d) the lease or sublease of space or Equipment within, on or at the Facilities; (e) the disposition of all or any portion of any Facilities; and (f) any other activities carried on within the Facilities, including license fees or the net proceeds of business interruption insurance (or its equivalent) obtained by or on behalf of the Borrower with respect to the Facilities; . . . Notwithstanding the foregoing, the Borrower may retain and need not pledge an amount equal to the Daily Cash-on-Hand Requirements.

CP 674 (Springing Depository Agmt). The definition is premised on Borrower’s “operation” of the gaming Facilities. This included rent NBC collected through operation of activities complementary to the River Casino, i.e., “other activities” carried on by NBC at or near the Casino. No language extends these rights beyond operation of the Casino; i.e., if the Casino fails and stops operating, there will be no more revenue.<sup>2</sup>

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<sup>2</sup> The “Facilities” are defined as the part of the Equipment, land and Improvements financed in whole or in party by the loan and used in

NBC thus pledged its “receipts, revenues and rents” from its Casino operations on any portion of the Facilities. This is as far as the pledge goes. It does not extend to receipts, revenues and rents received in the future by unknown businesses on the Tribe’s real property if the Casino closes.

**D. NBC closed the River Casino during the litigation.**

NBC closed the failed Casino. CP 1507 ¶ 4. This closure was precipitated by OSM’s service in December 2015 of a writ of garnishment that swept NBC’s accounts, including payroll funds. CP 1586-87 ¶¶ 2-4.

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connection with the Nooksack River Casino or used for complementary activities, as follows:

*Facilities:* to the extent located on any land owned, held in trust for the benefit of, leased to or otherwise in the possession of or subject to use by the Borrower or any Affiliate of the Borrower:

(a) **all Equipment and Improvements used in connection with the Nooksack River Casino**, as the same may be improved or extended or that is financed in whole or in part by Recourse Debt; and

(b) to the extent financed in whole or in part by Recourse Debt, **all Equipment, land and Improvements used for** dining, food service or food preparation, permanent or temporary lodging (including hotels, motels and/or recreational vehicle parks), entertainment, recreation, a commercial business or related parking facilities, or used in connection with or supportive of any casino or gaming regulated by the IGRA, whether now or hereafter existing or acquired and financed in whole or in part by Recourse Debt.

CP 669 (Springing Depository Agmnt) (emphasis added). *See also* CP 337 (Loan Agmnt). Like the entire agreement, the definition of “Facilities” assumes that the real property is used by NBC in connection with the Casino or complementary activities like dining, lodging, and parking.

NBC was forced to use funds from the Casino's "cage" (or the Daily Cash-on-Hand) to pay its employees and its payroll taxes. *Id.* at ¶ 3. Without the required Daily Cash-on-Hand, NBC was no longer in compliance with gaming regulations or its state Compact and had to cease its operations. NBC permanently ceased its operations and closed the Casino at midnight on December 11, 2015. *Id.* at ¶ 4.

By then the economic failure was not surprising. Upon the economic downturn in 2008, the Casino never met revenue projections. CP 1007-08 ¶ 2; CP 1031, 1033-36. As soon as NBC was required to make capital and interest payments in August 2007 (rather than interest-only payments), NBC was unable to pay. CP 653 ¶ 2. From January 2008 through December 2014, the Casino could not pay its annual Operating Expenses or annual Debt Service, much less finance critical maintenance and repairs or provide revenue for the Tribe. *Id.* As OSM described it, the Casino has "not lived up to expectations." CP 1066:20.

NBC offered OSM the opportunity to collect all existing personal property. OSM had already swept the accounts and obtained available cash. No more "receipts, revenues and rents from the operation of any portion of the Facilities" exist. The defunct Casino has been squeezed dry.

E. **The Superior Court denied NBC's requested declaratory relief and issued orders recognizing a security interest in, and permitting collection from, future rents and profits from use of the former Casino building for non-Casino operations on the Nooksack's trust property.**

To address NBC's claim for declaratory relief, the Superior Court correctly declared that the loan documents did not grant any interest in the Tribe's land or the River Casino building. *See* CP 1693:16-18 (11/9/15 *Opinion of the Court*) (describing "Pledged Assets" to exclude such interests). The Court held, "'The Facilities' – the Casino building and the land on which it is located – are not included in Pledged Assets. The Facilities are the property of the Nooksack Tribe, and the loan agreements clearly state that the lender has no legal interest in them." CP 1673:3-4 (1/13/16 *Opinion of the Court re Facilities Revenues*). OSM sought neither revision nor reconsideration of this declaration nor cross-appealed.

This should have ended the dispute, but the Superior Court then undermined that declaration when it declared OSM had the right to future revenues earned by NBC or the Tribe through any future use of the former Casino building. CP 1674:5-6 (1/13/16 *Opinion of the Court re Facilities Revenues*) ("Pledged Revenues" "include the right to revenues received by NBC or the Tribe from activities conducted at the Facilities.>"). The Court

awarded OSM the “revenue stream” from the building that formerly housed the Casino. VR 156:8-16.<sup>3</sup>

**V. ARGUMENT**

The declaratory relief establishes an “encumbrance” that violates Section 81. This declaratory relief has grave consequences for the enforceability of the loan agreements. Because the declaratory relief—and other provisions—establishes an encumbrance on the Tribe’s real property, the agreements are invalid under federal law. Thus, the judgment should be vacated and OSM’s claims denied with prejudice.

If the Court denies that relief, this Court should reach the issue of construction of the agreements and revise the declaratory relief. After correctly declaring that OSM did not have a security interest in, or right to enforce the judgment against, the Tribe’s real property, the Superior Court

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<sup>3</sup> The transcript from the December 18, 2015 hearing reads:

COURT: . . . The parties agree the Plaintiff has no right to the land and the Plaintiff has no right to fixtures and improvements on the land in terms of possession of those fixtures and improvements. But the Plaintiff contends that as to the building that housed the casino that that building was built with funds from these loans and that that fact entitles the Plaintiff to collect the revenue stream, if any, from that building. Am I characterizing your position correctly, Mr. Miranowski?

MR. MIRANOWSKI (Counsel for OSM): Yes, Your Honor, Yes. . . .

The Superior Court further explained that “the Tribe is free as it likes to do with that building with the caveat that revenue that comes from whatever the Tribe decides to do is subject to OSM’s collection rights.” VR 162:4-8. *See also* VR 172:16-24.

then handed NBC exactly that right. An interest in future rents or profits from the real property is a real property interest. RCW 7.28.230 demonstrates this. Future rents and profits are not included in the definition of “Pledged Revenues.” The portion of the declaratory relief that allows OSM to enforce its limited recourse judgment against future rents and profits from the Tribe’s trust land is legally wrong. If correct, it exceeds the jurisdiction of Washington State courts.

**A. Standards of review are *de novo*.**

NBC presents legal issues for review. The parties contested no facts and the Superior Court ruled summarily under Civil Rule 56. Appellate courts review summary judgment orders *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658 (1998). Statutory interpretation is a question of law reviewed *de novo*. *Beggs v. Dep’t of Soc. & Health Servs.*, 171 Wn.2d 69, 75 (2011). A trial court’s denial of a request for declaratory relief under the Uniform Declaratory Judgments Act, Ch. 7.24 RCW, is reviewed *de novo* if no factual findings are contested, like here. *See To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410 (2001); *Wash. Pub. Trust v. City of Spokane*, 120 Wn. App. 892, 899 (2004) (declaratory judgments reviewed *de novo*). Construction of a contract is an issue of law reviewed *de novo*. *Underwood v. Sterner*, 63 Wn.2d 360, 364 (1963); *Berg v. Hudesman*, 115 Wn.2d 657, 667-68 (1990). The parties chose Washington

law to govern their agreements. *See, e.g.*, CP 382 § 8.25. Whether a court has subject-matter jurisdiction is a question of law reviewed *de novo*. *Crosby v. Spokane County*, 137 Wn.2d 296, 301 (1999). Whether a court has personal jurisdiction over a party asserting tribal sovereign immunity is a question of law reviewed *de novo*. *Wright v. Colville Tribal Enter. Corp*, 159 Wn.2d 108, 112-13 (2006).

This Court substitutes its judgment for that of the trial court on *de novo* review. *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 42 (2001); *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880 (2003).

An appellate court reviews orders on motions for reconsideration for abuse of discretion. *Rivers v. Wash. State Conf. of Mason Contrs.*, 145 Wn.2d 674, 685 (2002). Legal error, including an erroneous view of the law, constitutes an abuse of discretion. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684 (2006).

In applying these standards, this Court should reverse and require the entry of declaratory relief in NBC's favor.

**B. The loan agreements are invalid based on 25 U.S.C. § 81 because they create encumbrances on the Tribe's trust property, requiring vacation of the judgment and dismissal of OSM's claims.**

The agreements create encumbrances on the Tribe's trust property. Section 81 requires reversal and invalidation of the agreements in their

entirety. This should result in dismissal of OSM's claims with prejudice.

Federal law prohibits an agreement with an Indian tribe "that encumbers Indian lands for a period of 7 or more years" unless the Secretary of the Interior approved the agreement. 25 U.S.C. § 81(b) (2000).<sup>4</sup> Where such agreements lack approval, they are invalid and unenforceable in any respect. *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200 (11<sup>th</sup> Cir. 2012) (provision that lack of agreement renders contract "not valid" renders it invalid in its entirety), citing 25 U.S.C. 81(b) (2000). *See also A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986) (statute's provision that lack of approval renders contract "null and void" renders contract null and void in its entirety), citing 25 U.S.C. § 81 (1982).<sup>5</sup> In

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<sup>4</sup> 25 U.S.C. § 81(b) reads, "No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary." "Indian lands" includes "lands the title to which is held by the United States in trust for an Indian tribe. . . ." *Id.* at (a)(1).

<sup>5</sup> On matters of federal law, Washington courts are bound by the decisions of the U.S. Supreme Court and give "great weight" to decisions of the federal circuit courts. *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 62 (2014). When interpreting a federal statute, the primary goal is to effectuate Congressional intent. *Burton v. Twin Commander Aircraft, LLC*, 171 Wn.2d 204, 216 (2011). The court must give effect to a statute's plain meaning as an expression of legislative intent. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471 (2011). The plain meaning of a statute is discerned from the ordinary meaning of the language at issue, the context in which that provision is found, related provisions, and the statutory scheme as a whole. *Id.*

other words, noncompliance with the approval requirement means the entire agreement is invalid, not merely a portion of it. Severance of provisions that trigger Section 81 is not available.

Here, it is undisputed that the Casino building is located on “Indian lands” and that the agreements received no approval. The Superior Court accepted OSM’s position that its asserted interests are “encumbrances” under Section 81. *See* CP 1673 (“[T]here are significant differences between a legal ownership interest and the right to collect revenues, and the loan agreements recognize this fact.”) (Opinion of the Court re Facilities Revenues). This conclusion is incorrect.

1. The security interest in future rents and profits from the Tribal trust property is an encumbrance under Section 81.

Federal regulations state that “encumbrance” is not a technical term and that legal rights including any “liability” attached to real property are included in Section 81, stating,

Encumber means to attach a **claim, lien**, charge, right of entry or **liability to real property** (referred to generally as encumbrances). Encumbrances covered by this part may include leasehold mortgages, easements, and other contracts or agreements that by their terms could give to a third party exclusive or nearly exclusive proprietary control over tribal land.

25 C.F.R. § 84.002. *See also Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900, 904-06 (9th Cir. 2014) (citing same). On its face this is not a narrow definition. An “encumbrance” includes multiple similes for claims and

interests attached to real property. Such interests are “generally” encumbrances. A federal court has paraphrased the statutory language as requiring approval of contracts that “hinder the use of [a Native American tribe’s] land for a period of 7 years or more.” *Quantum Entm’t, Ltd. v. United States Dep’t of Interior*, 848 F. Supp. 2d 30, 33 (D.D.C. 2012). The interests recognized by the Superior Court impose a “liability” against the real property that follows the land and is not a personal obligation of NBC. The interest hinders the Nooksack’s use of its land indefinitely.

Despite the express direction that a general and not technical meaning of “encumbrance” is intended, the Superior Court adopted a technical meaning when it reasoned that the declaratory relief did not conflict with Section 81 because the relief did not award a “legal ownership interest.” OSM argued without authority that to find an “encumbrance” under Section 81 requires proof that the interest gives a third party nearly exclusive proprietary control over tribal land. *See* CP 1647:15-1648:55; 1661:1-9. OSM misreads the regulation. The regulation establishes no such burden. Showing nearly exclusive proprietary control is *one way* that an encumbrance “may” be established, not the only way.<sup>6</sup>

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<sup>6</sup> OSM’s argument echoes the standard for the requirement of federal approval of management contracts under IGRA, 25 U.S.C § 2711. But the two approval requirements are different. The approval requirement imposed in the 2000 version of Section 81 applies when a contract

Contracts that do not “encumber Indian lands” under Section 81 are identified by these examples of interests that “could not involve interests in land”:

contracts for personal services; construction contracts; contracts for services performed for tribes on tribal land; and bonds, loans, security interests in personal property, or other financial arrangements that do not and could not involve interests in land.

25 C.F.R. § 84.004. The determination of encumbrance is conducted “on a case-by-case basis.” *Id.* Here, the agreements are unlike these categories. The Superior Court recognized a security interest that, unlike these examples, *does* involve interests in Indian lands.

The Ninth Circuit provides a useful history of the 2000 amendments to Section 81, explaining Congress’s decision to narrow the statute’s former reach. See *Chemehuevi Indian Tribe, supra*, 767 F.3d at 904-06. The Ninth Circuit found it significant that, while Congress might have chosen to do away with Section 81 altogether, Congress rejected that option to retain protections for the real property interests of tribes. These

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encumbers Indian land without any requirement that “management” or “control” be established. The second sentence of 25 C.F.R. § 84.002, in an effort to broaden (not narrow) the meaning of “encumber,” states that encumbrance “may” be shown by a contract that permits control of the property. For the distinction between approval requirements under IGRA and Section 81, see Rice, G. William, *Indian Gaming Regulatory Act Symposium: Article: Some Thoughts on the Future of Indian Gaming*, 42 *Ariz. St. L.J.* 219, 226-33 (2010).

protections, therefore, should not be dismissed nor reduced to limited, technical arguments that do not serve the policy of protecting those real property interests. So far, OSM has succeeded in avoiding these protections precisely where Congress determined in 2000 that they remained justified. OSM's right to capture all future earnings from the Tribe's commercial building indefinitely to service the debt is "a claim, lien or liability" on the real property within the meaning of Section 81.

OSM relied on *Gasplus v. United States Dep't of Interior.*, 510 F. Supp. 2d 18 (D.D.C. 2007), a case that supports reversal. In *Gasplus*, the D.C. District Court defined an "encumbrance" under the Act as "a claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest." 510 F. Supp. 2d at 28. The Court further noted that "[t]he term 'encumbrance' is broader than 'lien' and includes a variety of rights or interests in land (e.g. liens, easements, or restrictive covenants) which may diminish the value of the encumbered property but which are not inconsistent with the transfer of fee simple title." *Id.*, citing 11 *Thompson on Real Property* § 93.03(a)(2) (2d ed. 1994).

These explanations of "encumbrance" directly contradict the Superior Court's rationale that OSM's interest did not qualify as an encumbrance because it was not "a legal ownership interest." *See* CP

1673. *Gasplus* demonstrates the opposite: encumbrances pursuant to Section 81 are not limited to ownership interests. The declaratory relief creates an encumbrance within the meaning of Section 81.

2. Washington law shows the security interest is a real property interest, further establishing an encumbrance in conflict with Section 81.

Not only does the plain language of Section 81 and federal precedent lead to the conclusion that the declaratory relief recognizes “encumbrances” as that term is meant in Section 81, Washington law bolsters that conclusion. Under Washington law, “rents” and “profits” from future use of real property are real property interests when they are pledged as security for a debt, like here. They are not personal property interests. Consequently, even under a very technical reading of Section 81, the declaratory relief establishes an encumbrance by recognizing in OSM real property interests in the Tribal land.

RCW 7.28.230(2) provides that assignment of future revenues generated through a use of real property is itself a real property interest. RCW 7.28.230(2) characterizes unpaid rents and profits as real property, as follows:

**(2)** Until paid, the rents and profits of real property constitute real property for the purposes of mortgages, trust deeds, or assignments whether or not said rents and profits have accrued. The provisions of [the Recording Act] RCW 65.08.070 as now or hereafter

amended shall be applicable to such rents and profits, and such rents and profits are excluded from \*Article 62A.9 RCW.

RCW 7.28.230(2). The statute treats a pledge of security in future rents and profits as a real property interest, and excludes them from the secured transaction laws that create security interests in personal property. The statute goes on to require recording to perfect a lien in such assets, like in any real property interest. *See* RCW 7.28.230(3). This scheme is mirrored in the UCC, which states that, subject to inapplicable exceptions, Article 9 does not apply to “[t]he creation or transfer of an interest in or lien on real property, including a lease or rents thereunder.” RCW 62A.9A-109(d)(11).

This statutory scheme shows that the declaratory relief recognizes a real, not personal, property interest. This interest will persist more than seven years because it is of indefinite duration and tasked to satisfy a twenty million dollar judgment. The Superior Court overlooked that uncollected, future rents and profits generated by real property *are* real property interests when it reasoned that it was simply recognizing “the right to collect revenues,” not a “legal ownership interest.” The Superior Court failed to recognize that the declaratory relief burdens the Tribe’s proprietary interests in its land.

OSM has argued that because RCW 7.28.230(2) characterizes the rents and profits as real property “until paid,” the declaratory relief is

proper. CP 1661. This is incorrect. OSM did not insist upon a right to *paid* rents and profits. It sought an ongoing right to the revenue stream from the property, i.e., to *future, unpaid* rents and profits. This falls squarely within RCW 7.28.230 and is a real property interest.

“The right to receive income from real property is a basic incident of ownership....” 73 *C.J.S. Property* § 46 (West 2016). Ownership rights necessarily include the right to the benefits of the land such as collection of rents and profits. *See Aiassa v. Aiassa*, 151 Wash. 468 (1929) (equal ownership rights in real property necessarily include right to rents). “Profits” generally means “[t]he benefit, advantage, or pecuniary gain accruing to the owner or occupant of land from its actual use; as in the familiar phrase ‘rents, issues and profits....’” *Great-West Life & Annuity Assurance Co. v. Parke Imperial Canton, Ltd.*, 177 B.R. 843, 852 (N.D. Ohio 1994), citing *Black’s Law Dictionary* at 1185 (5<sup>th</sup> ed. 1979). Our Supreme Court has recognized (unfortunately while analyzing and applying an anti-alien land law) the inconsistency in claiming one has no property interest when one in fact holds such beneficial rights, stating, “[I]f one be entitled to the rents and issues of land, and also the sales price, in which would be included any increase of value, he would have all the real substance of actual ownership, and would, at most, be deprived only of the actual legal title, personal possession, and personal control.” *State v.*

*O'Connell*, 121 Wash. 542, 547-48 (1922). Here, the declaratory relief grants such proprietary rights, while OSM and the Superior Court cling to the false premise that no property rights are implicated. This Court should focus on the substance of the relief to determine if an “encumbrance” within the meaning of Section 81 exists. One does.

The Superior Court orders recognize an encumbrance on the Tribe’s real property that never received pre-approval. This interest necessarily leads to invalidation.

3. Provisions in the agreements barring alienation of the real property without lender approval also trigger Section 81 and require invalidation of the agreements.

Provisions that prevent the Tribe or NBC from conveying the real property independently require invalidation under Section 81.

OSM argued that its right to the income stream from the Casino building is “protected” by provisions that “ensure that the Nooksack Tribe may not transfer ownership of the building to any other person or entity without OSM’s approval.” VR 1591:3-5. *See also* CP 1445:6-9 (*Plaintiff’s Response to Defendant’s Supplemental Brief re: Assets Subject to Execution*) (same, citing Tribal Agreement § 8(1)); CP 1445:13-15 (“Unless OSM consents, the Casino Facilities must remain with NBC...”); CP 1594:13-15 (“NBC would have to obtain OSM’s approval for the sale [of the Facilities], or else the Tribe would be subjected to liability.”). The

Springing Depository Agreement, for example, bars a transfer, stating, “Each of the Borrower and the Tribe agrees not to ... sell, transfer or convey all or substantially all of its interest in the Facilities, the Facilities Enterprise or in the Pledged Revenues to another Person, except with the consent of all Secured Payees.” CP 686 (Springing Depository Agreement).<sup>7</sup> Similar provisions are in the other agreements. CP 368 (Loan Agreement) (same); CP 880 at (l) (Tribal Agreement) (same). These provisions require invalidation.

These promissory restraints on alienation “encumber” the land and independently require either pre-approval or resulting invalidity under Section 81. *See Guidiville Band of Pomo Indians v. NGV Gaming, LTD.*, 531 F.3d 767, 771-72 (9th Cir. 2008) (“the Bureau [of Indian Affairs] ‘determined that the Tribe has an interest in “Indian land” as defined in § 81(a),’ and that interest was encumbered by its contractual provision with NGV that ‘affirmatively require[s] the Tribe to refrain from selling or disposing of any part of an interest the Tribe has in Indian land . . .’”).<sup>8</sup>

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<sup>7</sup> Recall that Facilities include “Equipment, land and Improvements.” CP 669 (Springing Depository Agreement); CP 337 (Loan Agreement).

<sup>8</sup> It is not surprising that prohibitions on alienability of tribal land are encumbrances under New Section 81. Such prohibitions were repeatedly at issue under Old Section 81 (requiring approval of agreements “relative to Indian land”), and federal courts had recognized this factor to trigger invalidity even under Old Section 81. *See United States ex. Rel. Steele v.*

*See also* 25 C.F.R. § 84.004 (“An agreement whereby a tribe agrees not to interfere with the relationship between a tribal entity and a lender, including an agreement not to request cancellation of the lease, may encumber tribal land, depending on the contents of the agreement.”).

Alienability is a prominent incident of ownership of property, as our Supreme Court recognized in *Alby v. Banc One Financial*, 156 Wn.2d 367, 373 (2006). Restraints on alienation are potentially harmful to landowners because they constitute “impediments to the operation of a free market in land, limits on the prospects for improvement, development, and redevelopment of land, and limits on the mobility of landowners and would-be purchasers.” *Alby*, 156 Wn.2d at 373, citing *Restatement (Third) of Property* § 3.4 cmt. C at 442 (2000). *See also id.* at 375, Alexander, C.J., Dissenting (free alienability of property is a “cherished” value in Washington law).

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*Turn Key Gaming, Inc.*, 260 F.3d 971, 976 (8th Cir. 2001), citing *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613, 614 (7th Cir. 1985) (contract violated Old Section 81 in part because it prohibited the tribe from encumbering the property), *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, *supra* (contract violated Old Section 81 in part because it prohibited the tribe from operating any other bingo games on its property), and *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 810-12 (7th Cir. 1993) (agreement fell outside Old Section 81 in part because it did not prevent the tribe from encumbering land).

The promissory restraints in the agreements at issue substantially reduce the Tribe's proprietary control of its land, a condition that even OSM has argued justifies invalidity under Section 81. *See* CP 1647:15-1648:55; 1661:1-9. Preventing transfer of the trust land without OSM's approval keeps the Tribe and the federal government from using the property—including the former Casino building—to pursue the Tribe's best interests. This encumbers the property within the meaning of Section 81, as the Bureau of Indian Affairs and relevant regulations have recognized. This alone supports invalidation as a matter of federal law.

The multiple encumbrances in the agreements require vacation of the judgment and dismissal of OSM's claims with prejudice.

C. **Alternatively, the declaratory relief requires revision because the limited recourse loan agreements did not grant a security interest in, and right to enforce its judgment against, future rents and profits from use of the former Casino building for non-Casino operations.**

If the Court does not invalidate the agreements under Section 81, which it should, the Court should revise the declaratory relief to hold that OSM only acquired a security interest in rents and profits currently held by NBC as a result of Casino operations, not in *future* rents and profits generated from other activities on the Nooksack's real property. NBC never pledged or created security in the latter. Such rights are real property interests specifically excluded from security for the loan.

The limited recourse nature of the debt is undisputed. Where notes are limited recourse, noteholders are entitled to repayment only from the specified assets. *Bank of New York v. First Millennium, Inc.*, 607 F.3d 905, 913 (2d. Cir. 2010); accord, *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec. LLC*, 2013 U.S. Dist. LEXIS 49665, \*\*47-48 (S.D. N.Y. 2013) (limited-recourse creditors only have right to the collateral and its revenue). A limited recourse obligation is “a financing secured by and payable from specific collateral pledged by the tribal obligor where, in the event of a default or upon acceleration, the creditor’s recourse is limited to the pledged revenues and other collateral specifically pledged to repay the debt.” See Hyatt, Townsend and Muraski, Courtney, Orrick, Herrington & Sutcliff LLP, *Glossary of Tribal Finance Terminology*, “Limited Recourse” at 67 (1<sup>st</sup> ed. 2012);<sup>9</sup> see also Jarboe, Mark A., *Recourse and Limited Recourse in Casino Financings*, Indian Gaming at 94 (April 2004).<sup>10</sup> OSM has rights to collect from only specified assets to the extent that those rights do not violate Washington or federal law.

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<sup>9</sup> <https://www.orrick.com/Events-and-Publications/Documents/4552.pdf> (last visited June 24, 2016).

<sup>10</sup> [http://files.dorsey.com/files/upload/Indian\\_Gaming\\_Recourse.pdf](http://files.dorsey.com/files/upload/Indian_Gaming_Recourse.pdf) (last visited June 24, 2016) (CP 740).

OSM initially agreed that the basis of the bargain for the loan was enforcement rights limited to personal property interests, excluding real property interests. *See* CP 1646:7-20 (“OSM has never argued that it has such a right” “to NBC’s real property.”); CP 1646:7-8 (“OSM’s collateral rights under the Loan Documents... are limited to personal property....”) This arrangement is common in Indian country between tribes and lenders entering loans for gambling operations, as OSM has conceded. *See* CP 787-88 (OSM addressing typical Indian gaming financing terms). In opposing NBC’s cross-motion for summary judgment, OSM argued not for expanded rights in any future profits generated on trust land but only for its right to “*Casino Revenue and all other Personal Property.*” CP 785:16 (Response to Cross-Motion) (emphasis added). OSM asserted that its right to Pledged Assets includes Collateral and Pledged Revenues, and that this included “all gaming and non-gaming revenue *of the River Casino.*” CP 785-86, 786:8-9 (emphasis added). Similarly, in the first appeal, OSM characterized the security for the loan as “the receipts *of the Casino’s gaming operation* (with certain exceptions), ...as well as the Casino’s furnishings and equipment.” CP 961 (emphasis added).

After OSM garnished the Casino’s bank accounts including its payroll funds, forcing closure of the Casino, OSM sought to expand its rights. OSM no longer sought just “all gaming and non-gaming revenue of

the River Casino”; it wanted *any revenue* from *any activity* conducted in the future in the building that formerly housed the Casino. CP 1648:14-15; VR 172:8-23 (asserting that OSM has the right to collect against “any income from any activity in the building that generates income.”). OSM sought to reach not just rents and profits received by NBC, but future payments to the Tribe. VP 159:18-160:1. OSM insisted that “despite” closure of the Casino, “OSM’s rights continue to encompass revenues that NBC generates through use of the building, leasing space in the building, *or even the sale of the building.*” *Id.* at 1590:23-25 (emphasis added). At the last hearing, OSM made its most extreme argument that, despite the numerous exclusions throughout the documents and its prior concessions, “Pledged Revenues” includes real property interests. VP 188:9-190:5.

OSM’s variable characterizations of its security interests are unreliable. The Court should conclude that the agreements do not grant OSM the right to collect future rents and profits from the real property from activities other than operation of the Casino, including from new business activities now that the Casino is defunct.

1. The burden to establish the correct scope of the security interest is OSM’s, and it failed to meet it.

The creditor has the burden to show that the debtor has property or income subject to execution or subject to a security interest. *Kirk v.*

*Monroe County Tire*, 585 N.E.2d 1366 (1992) (burden on creditor to show that debtor has property subject to execution); *In re Enfolinc, Inc.*, 233 B.R. 351, 357 (Bankr. E.D. Virg. 1999) (burden on party asserting security interest to prove security interest in the property), citing *Simon v. Chrysler Credit Corp. (In re Babaeian Transp. Co.)*, 206 B.R. 536, 549 (Bankr. C.D. Ca. 1997) (creditor has burden of proof regarding perfection of its security interests); *In re Grant Broadcasting of Philadelphia, Inc.*, 75 B.R. 819, 823 (E.D. Pa. 1987) (noteholders have burden of establishing nature of their interests); *In re Union Meeting Partners*, 178 B.R. 664, 677 (Bankr. E.D. Pa 1995) (burden of proving validity of security interests in the debtor's property is on the creditor). OSM did not meet its burden.

2. The exclusions in the loan documents are controlling and exclude from security all real property interests such as future rents and profits earned on the trust property.

The loan documents unequivocally exclude the collection rights that OSM now asserts and the Superior Court erroneously recognized.

Section 3 of the Loan Agreement begins with the clear statement that the “Note and obligations of the Borrower... shall be limited recourse obligations, with enforcement related thereto limited as provided in Section 8.30.” CP 350-51 Section 3. That Section 8.30, entitled “Limited Recourse Obligations; No General Obligation,” states at length in a bolded paragraph that the liabilities and obligations of the borrower NBC “shall

be limited recourse obligations” “enforceable solely against the Pledged Assets.” CP 385 ¶ 8.30. The provision “No Management of Facilities; No Mortgage Lien in Real Property,” which appears in multiple loan documents, states in all capital letters that “notwithstanding any other possible construction of any provision” the lender does not have, nor shall assert, “any lien against any real property or improvements of the borrower thereon.” CP 720 ¶ 22 (Security Agreement (Borrower)); CP 731 ¶ 22 (Security Agreement (Tribal)) (same); CP 385 ¶ 8.32 (Loan Agreement); CP 701 § 9.15 (Springing Depository Agreement). Recall that under the agreements a “lien” broadly includes “any security interest, mortgage, pledge, lien, charge, encumbrance, title retention or analogous instrument, in, of, or on any of the assets or properties, ...whether or not filed, recorded or otherwise perfected. . . .” *See, e.g.*, CP 339 (Loan Agreement); CP 670 (Springing Depository Agreement). Thus, the agreements exclude from OSM’s recourse any security interest, pledge, lien, charge or encumbrance in, of or on real property or improvements, such as the Casino building.

In yet another provision, the documents expressly state that real property interests are not encumbered, so as not to trigger Section 81. CP 720 ¶ 24 (Security Agreement (Borrower)); CP 701 § 9.16 (Springing Depository Agreement); CP 731 ¶ 24 (Security Agreement (Tribal)); CP

887 Section 17 (Tribal Agreement). This leads to the conclusion that parties intended that OSM would have no interest that follows the land, such as the former Casino building, or entitles OSM to future rents and profits from the former Casino building or to proceeds in the event the building were sold. When NBC ceased operating, its personal property was at OSM's disposal and was fixed. The River will not generate, and NBC will not collect, new proceeds. But the Superior Court orders entitle OSM indefinitely to the revenue stream *of the real property*.

RCW 7.28.230 and RCW 62A.9A-109 further support this conclusion, demonstrating that in Washington security interests in future rents and profits from property are real property interests. See *supra*, at V.B.2. This Court has recognized that RCW 7.23.230 is 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.” *Kezner v. Landover Corp.*, 87 Wn. App. 458, 466 (1997) (interests in unpaid rents are “real property” even after foreclosure).

The specific exclusions in the agreements should control. “It is a well-known principle of contract interpretation that ‘specific terms and exact terms are given greater weight than general language.’” *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354 (2004). Here, the exclusions are plain and deserve great weight. The parties’ intent not to grant security in

real property is evident. Courts construing contracts endeavor to determine the intent of the parties by focusing on their objective manifestations as expressed in the agreement. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503 (2005). “Contracts should not be given a strained or forced interpretation, but a practical and reasonable one.” *Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 296 (1999). Security agreements are subject to the same rules of construction as are other contracts. *Parker Roofing Co. v. Pac. First Fed. Sav. Bank*, 59 Wn. App. 151, 155 (1990).

The agreements at issue exclude from security exactly what the Superior Court mistakenly recognized: a “Lien” (which includes “any security interest, ... pledge, lien, charge, encumbrance, title retention or analogous instrument”) “against any real property or improvements of the borrower thereon.” The Superior Court’s construction is impractical and unreasonable and leads to absurd results in light of the repeated terms excluding security interests in real property.

OSM attempts to reach beyond the interests it received in the transaction like the plaintiffs in *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec. LLC*, *supra*.<sup>11</sup> There, creditors of collateralized debt

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<sup>11</sup> This case was reversed on other grounds but the analysis of the fraudulent conveyance claims was confirmed. *Loreley Fin. (Jersey) No. 3*

obligations (CDOs) attempted to assert fraudulent conveyance claims and claw back the purchase price paid for the bad collateral for the CDOs. The Court rejected the theory because the plaintiffs “are limited-recourse creditors who only have a right to the collateral assets and revenue generated by those assets.” 2013 U.S. Dist. LEXIS at \*47-48. The district court observed that “[g]iven their limited recourse, they have no right to funds that the CDOs used to purchase the collateral assets.” *Id.* at \*48. Thus, having no interest in the funds used to buy the bad collateral, the plaintiffs could not state a fraudulent conveyance claim.

Similarly to those plaintiffs, OSM asserts a right to property in which it has no rights. Like the district court rejected the plaintiffs’ claims in the CDO litigation, this Court should reject OSM’s attempt to reach property that was never security for the limited recourse loan.

3. “Pledged Revenues” do **not** include future rent or revenues earned in the former Casino building after Casino operations cease.

Not only are the interests that OSM asserts expressly *excluded*, which specific exclusion should control, but they are not *included* in the definition of Pledged Revenues. The terms of the loan do not support OSM’s expansive reading subjecting any revenues of any future

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*Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 191 n. 22 (2nd Cir. 2015).

businesses in the former Casino building to collection.

When construing “Pledged Revenues,” this Court should hold that “all receipts, revenues and rents from the operation of any portion of the Facilities, including receipts from any other activities carried on within the Facilities,” captures all income received by NBC in the course of operating the Casino on the Facilities.<sup>12</sup> The agreement does not subject to collection *future* receipts from the operation by someone other than NBC or a business other than the Casino and its complementary business activities. The agreements must be read in the context of the transaction. The subject matter of the transaction was financing of NBC’s River Casino on trust property. NBC likewise received the right to collect the nonrecourse debt against proceeds received from *that* operation, not any operation in the future if the Casino failed. The parties never agreed that, should the Casino fail, OSM would have a right to future profits from the land. No such term is included. OSM cites no provision indicating an intent to create a security interest that follows the land and improvements

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<sup>12</sup> NBC does not dispute that “Pledged Revenues” includes rents and receipts received by NBC from operations incidental or complementary to the Casino, the anchor business. Often an Indian gaming operation includes complementary businesses like dining, hotel, parking, gift shop and the like. NBC acknowledged that held rents and receipts incidental to NBC’s Casino operations are “Pledged Revenues.” VR 159:19-160:11; 162: 2-164:23, 192:5-20. This remains undisputed.

and attaches to profits generated from any future activity unrelated to operation of NBC's Casino. Conspicuously absent from the definition is the word "future" or "unpaid."

OSM originally supported NBC's common sense reading of "Pledged Revenues," stating, "Pledged Revenues are defined in the Springing Depository Agreement to include all gaming and non-gaming revenue of the River Casino." CP 786 at 8-9 (OSM's Response to Defendant's Cross-Motion for SJ) (emphasis added). *See also* CP 961 (same assertion to Court of Appeals). OSM further argued that it could demand payment in full and "cause the bankruptcy or insolvency of the gaming operation." CP 787-88. OSM has done that, causing NBC's insolvency and forcing its operations to cease. NBC will acquire no new cash holdings from Casino operations in the future. Faced with this, OSM then sought different recourse rights than what it bargained for.

The Superior Court rulings allow OSM to expand its recourse beyond what the parties contemplated and agreed. The Superior Court would not reconsider its construction of "Pledged Revenues" even when NBC explained the significance of RCW 7.28.230. CP 1645-54 (motion for reconsideration under CR 59(a)(7)); VR 187:3-188:2 (hearing on reconsideration); CP 1704-06 (order denying reconsideration). This error

of law was an abuse of discretion supporting reversal. *See Mayer v. Sto Indus., Inc., supra* (errors of law constitute abuses of discretion).

Further, even if properly characterized as personal property interests, no right in future rents and profits from the real property is enforceable. Under the UCC, a creditor must establish “attachment” of its interest, which only occurs once the debtor has rights in the collateral. RCW 62A.9A-203(a)-(b)(2). The comments note that “in accordance with basic personal property conveyancing principles, the baseline rule is that a security interest attaches only to whatever rights a debtor may have, broad or limited as those rights may be.” *Id.* at Cmnt. 6. See also *Kuemmerle v. United N.M. Bank at Roswell, N.A.*, 831 P.2d 976, 981 (N.M. 1992) (a security interest cannot attach until the debtor has rights in the collateral that would be subject to the security agreement). OSM failed to show that NBC *has* any rents and profits not already seized by OSM. No attached security interests in rents and profits exist as a predicate to the declaratory relief.

This Court should hold that OSM does not have a right to enforce its judgment against future rents and profits generated from Tribal trust property; only rents and profits held by NBC as a result of Casino operations were subject to collection, and OSM obtained those in

existence. Closure of the Casino ends the accumulation of Pledged Revenues against which OSM may execute.

4. This Court should clarify that entry of judgment extinguishes the right to enforce provisions from the loan agreements based on the doctrine of merger.

The parties disputed whether OSM could continue to enforce provisions from the loan agreements after it received judgment. CP 1426:20-1429:15 (NBC); CP 1097-98, 1441:13-1442:6, 1447 (OSM “strongly opposes” extinguishment “of any of its contract rights...”); VR 60:22-90:17. These provisions include the requirement that NBC place cash in certain accounts to prevent OSM from reaching it, but also include, for example, the prohibition on dissolving NBC (CP 1438) or the prohibition on alienation of the former Casino building. CP 1445:6-15. The Superior Court rejected the doctrine of merger and accepted OSM’s position that the provisions persisted. CP 1694:3-1695:8. This Court should clarify that merger prevents continued enforcement of such provisions if OSM’s judgment survives the appeal. Clarification will assist the parties, and is authorized by RAP 12.2.

“As a general rule, when a valid final judgment for the payment of money is rendered, the original claim is extinguished, and a new cause of action on the judgment is substituted for it.” *Caine & Weiner v. Barker*, 42 Wn. App 835, 837 (1986). The original claim loses its character and

identity and is merged in the judgment. *Restatement of Judgments* § 47. In *Caine & Weiner*, the Court of Appeals held that after judgment on a promissory note plus interest, costs, and attorney's fees, "the entire obligation was reduced to a money judgment and, therefore, extinguished. Wise and Barker's former joint obligation on the note then became an obligation on the judgment." *Caine & Weiner*, 42 Wn. App. at 838. Similarly, in an action to enforce a foreign judgment in Washington, one party obtained fees according to a provision in the underlying promissory note that had supported the Alaska judgment. *Woodcraft Const. v. Hamilton*, 56 Wn. App. 885 (1990). The Court of Appeals reversed, holding that the fee provision was no longer available after entry of the judgment because "[t]he attorney fee provision of the note merged into the judgment and ceased to exist." *Id.* at 888.<sup>13</sup> As in these cases, after entry of judgment for OSM, provisions from the agreements merge into that

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<sup>13</sup> See also *Huntington Nat'l Bank v. Sproul*, 861 P.2d 935, 938-39 (N.M. 1993) ("the note's contractual obligations were superseded by new rights and obligations upon rendition of judgment" and choice-of-law provisions in the note did not control enforcement of the judgment); *Bassett v. Eagle Telecommunications, Inc.*, 750 P.2d 73, 76 (Colo. App. 1987) (upon entry of judgment, defendant's liability under preceding claims ceased to exist and merged into the judgment, meaning that the multiple claim theories that added up to one judgment amount became irrelevant); *Neel v. First Fed. Sav. & Loan Ass'n*, 675 P.2d 96, 101 (Mont. 1984) ("[W]hen a claim on a contract is reduced to judgment, '[t]he contract between the parties is voluntarily surrendered and canceled by merger in the judgment and ceases to exist. It is no longer looked to for any purpose except as evidence supporting the judgment.'").

judgment. NBC is then obligated not on provisions in the agreements but on the judgment.

The rule of merger is an aspect of claim preclusion that applies generally to a judgment for a plaintiff in an action to recover money. *Caine & Weiner*, 42 Wn. App. at 837. Thereafter, the plaintiff cannot maintain an action on the original claim or any part thereof. *Restatement (Second) of Judgments* § 18 (cited with approval in *Caine & Weiner*). OSM has no right to compel compliance with contract terms. The judgment supersedes these former obligations.

These cases show that the contractual limitations no longer apply after the debt is reduced to judgment. They “merged into the judgment and ceased to exist” as separately enforceable contract terms. This Court should hold that OSM possesses no enforceable contract rights against NBC upon the finality of any judgment, because those rights are extinguished by the judgment.

**D. Jurisdiction to enforce or recognize execution rights in trust property is lacking, and NBC has sovereign immunity from orders permitting enforcement of the judgment against trust property.**

The Superior Court orders recognizing a right by OSM to enforce its judgment against trust property, i.e., future rents and profits from the real property, are beyond the jurisdiction of state courts under the

agreements and exceeded the relief the Court could grant. NBC objected before the Superior Court to subject-matter jurisdiction to enforce or recognize collection rights in trust real property. CP 1635-37. NBC also never waived its sovereign immunity for purposes of allowing enforcement of a judgment against real property of the Tribe. Its waiver was “subject to” the provisions that excluded real property from the security for the loan. CP 383 § 8.26. This Court has concluded that waiver of sovereignty is an issue of subject-matter jurisdiction. *OSM I*, 172 Wn. App. at 811, n. 33, 815. An objection to subject-matter jurisdiction may be raised at any time. RAP 2.5(a)(1). As noted *supra*, V.A., these jurisdictional issues are legal. A judgment is “void” when the issuing court lacks personal jurisdiction over the party or subject-matter jurisdiction over the claim. *Marley v. Labor & Indus.*, 125 Wn.2d 533, 539 (1994).

These jurisdictional issues remain undecided. In the prior appeal, the Washington State Supreme Court held that Washington State courts have subject-matter jurisdiction to resolve OSM’s contract claims because Washington State courts possess the general jurisdiction to resolve contract disputes, and the Tribe consented to jurisdiction in Washington State courts for claims related to the contract. *OSM II*, 181 Wn.2d at 276, 281. NBC’s claim for declaratory relief (which had not yet been pleaded) was not before the Supreme Court. The Supreme Court did not address

jurisdiction to enforce collection of a future judgment, particularly against trust property. Since that appeal, OSM received a limited recourse judgment and asserted a right to enforce against trust property, i.e., future rents and income from the former Casino building located on Tribal land.

This Court should hold that jurisdiction for the declaratory relief entered by the Superior Court is lacking. NBC specifically excluded recourse to trust real property from its limited waiver of sovereign immunity and consent to jurisdiction, making its waiver and consent “subject to the limitations on recourse provided in Section 8.30.” CP 383 § 8.26. *See also* CP 699 § 9.12 (same in Springing Depository Agreement). Thus, no waiver of sovereign immunity and no consent to jurisdiction—the predicates of the jurisdiction recognized by the Supreme Court in the first appeal to allow resolution of the breach of contract claim—exist for Washington State courts to authorize recourse to trust real property for enforcement of the judgment.

Further, jurisdiction to adjudicate interests in trust real property or allow enforcement of a judgment against trust real property is lacking based on state law, which specifically rejects it. “[T]he enabling act that brought Washington State into the union limited the State’s authority over Indian lands, which ‘remain[ed] under the absolute jurisdiction and control of the Congress of the United States.’” *State v. Shale*, 182 Wn.2d 882, 886

(2015), citing *State v. Paul*, 53 Wn.2d 789, 790-91 (1959) (emphasis omitted) (quoting Enabling Act, ch. 180, 25 Stat. 676 (1889)). When acting on the offer of jurisdiction through PL 280, our Legislature recognized that the general jurisdiction of our state courts excluded the ability to adjudicate property interests like those at issue, stating,

Nothing in this chapter shall authorize the alienation, encumbrance, or taxation of **any real or personal property**, including water rights and tidelands, **belonging to any Indian or any 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; **... or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein ....**

RCW 37.12.060 (emphasis added). This is consistent with the text of PL 280. *See* 25 U.S.C. § 1322. This express carve-out controls.

The resulting lack of state court jurisdiction is demonstrated by *In re Marriage of Landauer*, 95 Wn. App. 579 (1999), in which Division I held that the trial court exceeded its jurisdiction when it attempted to enforce a community property agreement that affected ownership of Indian trust lands. *See also Bryan v. Itasca County*, 426 U.S. 373, 376 n. 2, 391 (1976) (PL 280’s prohibition of any “‘alienation, encumbrance, or taxation’ of any trust property can be read as prohibiting state courts, acquiring jurisdiction over civil controversies ... from applying state laws

or enforcing judgments in ways that would effectively result in the ‘alienation, encumbrance, or taxation’ of trust property.”).<sup>14</sup>

RCW 37.12.060 and case law make clear that Washington State courts lack jurisdiction to adjudicate any interest in trust property of “any Indian tribe.” Here, the Superior Court orders created an encumbrance upon, and authorized enforcement against, interests held in trust for the Nooksack, exceeding the court’s jurisdiction.

Furthermore, if it were necessary to reach application of the Infringement Test, which it should not be given the prohibition on jurisdiction, the outcome should result in declination of jurisdiction. The Infringement Test requires evaluation whether the assertion of jurisdiction would infringe on the rights of the Nooksack to govern as a sovereign.

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<sup>14</sup> *Accord, Inland Casino Corp. v. Superior Court*, 8 Cal. App. 4th 770, 778, 10 Cal. Rptr. 2d 497 (1992) (“The trial court is without jurisdiction to hear a mechanic’s lien foreclosure on the Indian realty.”); *Rowley v. Conklin*, 94 N.W. 548 (Minn. 1903) (standing timber on Indian reservation was trust property; could not be taxed, sold under execution, or subjected to state lien law). Federal courts have held that PL 280 does not require application of state statutes of limitation where the dispute involves Indian trust land, *Capitan Grande Band of Mission Indians v. Helix Irrigation Dist.*, 514 F.2d 465, 467-69 (9th Cir. 1975), *cert. denied*, 423 U.S. 874 (1975); *see also Alaska Dep’t of Public Works v. Agli*, 472 F. Supp. 70, 73-74 (D. Alaska 1979) (PL 280 bars state courts from adjudicating equitable interests in a Native allotment in a quiet title or ejectment action); *In re Humboldt Fir, Inc.*, 426 F. Supp. 292, 295-96 (N.D. Cal. 1977) (Section 1360 does not confer jurisdiction on state courts where the dispute directly involves the use of Indian property), *aff’d*, 625 F.2d 330 (9th Cir.1980).

*OSM II*, 181 Wn.2d at 277, citing *Powell v. Farris*, 94 Wn.2d 782, 784-85 (1980) and *Williams vs. Lee*, 358 U.S. 217 (1959). The Superior Court's orders affecting trust real property without the Tribe's consent *do* infringe on the rights of the Tribe. In the first appeal, the Supreme Court found subject-matter jurisdiction premised on the Tribe's consent to jurisdiction for claims related to the contract. Here, the Tribe expressly did not consent to state court jurisdiction over its interests in Tribal trust property. This refusal should be persuasive, in addition to the Tribe's strong interest in determining and controlling the uses and interests in its trust lands. Future use of—and benefit from—the Tribe's trust real property now that the Casino has failed is exclusively a reservation affair.

Additional to these subject-matter jurisdiction objections, sovereign immunity exempts NBC (and the Tribe) from the force of the Superior Court orders that exceed the limitations of Section 8.30 of the Loan Agreement. *See Wright v. Colville Tribal Enter. Corp*, 159 Wn.2d 108, 112-13 (2006) (tribes are sovereign nations immune from state court jurisdiction without a waiver or intentional statutory abrogation of their sovereignty). As noted, NBC's waiver of sovereign immunity (and the Tribe's) was limited and does not extend to the relief granted in these orders. Waivers of sovereign immunity must be “construed strictly in favor of the sovereign” and not “enlarge[d] ... beyond what the language

requires.” *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992). Nothing in the record shows any submittal to Superior Court authority to recognize and enforce an encumbrance on trust lands.<sup>15</sup>

NBC’s request for declaratory relief should not be viewed as a submission to the Court’s jurisdiction to recognize and enforce encumbrances on NBC’s (or the Tribe’s) real property interests. NBC sought the opposite: a declaration that OSM had *no* rights in trust property. The jurisdictional issue presented here, not at issue in *OSM I* and *II* and not apparent until OSM sought to expand the scope of its security after judgment was entered, is whether NBC submitted to jurisdiction for purposes of enforcement of a security interest in future rent and proceeds earned from use of the Tribe’s real property. It did not.

In summary, reversal is due because the Superior Court lacked subject-matter jurisdiction based on RCW 37.12.060, *In re Marriage of*

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<sup>15</sup> Similar to NBC’s limited waiver of sovereign immunity, Washington State itself has waived sovereign immunity for tort claims but does not open itself to unlimited execution on State property. See Stephens, Debra L. & Harnetiaux, Bryan P., *The Value of Government Tort Liability: Washington State’s Journey from Immunity to Accountability*, 30 SEATTLE U.L. REV. 35, 42 (2006) (“The Washington legislature’s waiver of **sovereign immunity** is ... not without limitations. Rather, the waiver contains some procedural limitations, including provisions in the 1963 act requiring notice of claims, **restricting execution on judgments**, and providing for a specific fund from which payment of claims and judgments must be made.”), citing RCW 4.92.040 (“No execution shall issue against the state on any judgment.”).

*Landauer, Bryan v. Itasca County* and *Williams v. Lee*, and because NBC possesses sovereign immunity from orders that recognize an encumbrance on, and would permit collection from, real property interests including the former Casino building.

The Court should vacate the orders.

**E. Request for attorney fees Under RAP 18.1.**

If NBC succeeds on appeal, NBC has a right to recover attorney fees and costs pursuant to § 8.3 of the Loan Agreement and RCW 4.84.330. The Loan Agreement contains a one-sided fee provision permitting the Lender to recover “all reasonable costs and expenses actually incurred, including without limitation reasonable attorney’s fees incurred in connection with the enforcement” of the Loan Documents. CP 46-47 § 8.3 (Loan Agreement). *See also* CP 6-7 ¶ 18 (Complaint). RCW 4.84.330 converts one-sided fee provisions to a mutual provision benefitting the prevailing party. Fee awards pursuant to contract provisions are mandatory, not discretionary. *Singleton v. Frost*, 108 Wn.2d 723, 729 (1987). A contractual provision supporting award of attorney fees at trial supports an award of attorney fees on appeal. *Draper Mach. Works, Inc. v. Hagberg*, 34 Wn. App. 483, 490 (1983).

**VI. CONCLUSION**

The orders conflict with federal law and should be reversed because the agreements are invalid pursuant to Section 81. OSM could have self-protected by obtaining approval on the front end of this transaction, and by not requiring the Tribe and NBC to agree to restrictions on alienability of trust property. Federal law compels reversal.

Alternatively, the declaratory relief should be revised to prevent OSM from avoiding the recourse limitations of its agreements. By recognizing an interest in future rents and profits that follows the land, the Superior Court obliterated the parties' basic bargain regarding recourse. OSM has no right to enforce its limited recourse judgment against future rents and profits generated from the Nooksack's land, including the building that housed the Casino. If OSM's judgment survives this appeal, this Court should make that clear.

Respectfully submitted on this 24<sup>th</sup> day of June, 2016.

SCHWABE, WILLIAMSON & WYATT, P.C.

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Nooksack Business Corporation*

# APPENDIX

**APPENDIX - A**

**Key Terms, Conditions, and Definitions of River Loan Documents**

<p>To secure payment of all obligations of the Borrower to the Lender hereunder and under the Note the Borrower shall execute and deliver the Loan Documents The Borrower hereby designates the Note as a Secured Obligation under the Depository Agreement with the Lender as the Secured Payee therefor payable from and secured by the Pledged Revenues on parity with all other Secured Obligations. The Loan is further secured by all Collateral pursuant to the Security Agreement (Borrower) and Security Agreement (Tribal). The Note and the obligations of the Borrower under the Loan Documents shall be limited recourse obligations with enforcement related thereto limited as provided in Section 8.30. The Loan is also secured by the Tribe's obligations pursuant to the Tribal Agreement.</p>	<p>Loan Agreement, § 3.</p>
<p><b>Grant of Security Interest:</b> As security for the payment and performance of the Note the Loan and all other liabilities obligations and indebtedness of Borrower to Lender due or to become due direct or indirect absolute or contingent joint or several howsoever created arising or evidenced now or hereafter at any time created arising or evidenced under or pursuant to the Loan Documents (collectively, the "<u>Obligations</u>"), the Borrower does hereby transfer assign and grant to the Lender a security interest (the "<u>Security Interest</u>") in all of Borrower s right title and interest in and to the following (collectively, the "<u>Collateral</u>") whether now owned or hereafter acquired or arising:</p> <p>(a) All personal furnishings, equipment and tangible personal property of any nature whatsoever used in the Facilities or on the Premises, exclusive of fixtures and any real estate or interest in real estate, together with all improvements, accessions, appurtenances, substitutions and replacements to the Equipment and insurance proceeds and condemnation awards payable with respect to the Equipment, together with all proceeds and products thereof and all rights thereto (collectively, the "<u>Equipment</u>"); and</p> <p>(b) All Enterprise Accounts including all financial assets related thereto within the meaning of the State UCC.</p>	<p>Security Agreement (Borrower), ¶ 1 at page 1.</p>
<p><b>Grant of Security Interest:</b> As security for the payment and performance of the Note, the Loan, the Tribal Agreement and all other liabilities obligations and indebtedness of Borrower and the Tribe to Lender due or to become due, direct or indirect, absolute or contingent, joint or several, howsoever</p>	<p>Security Agreement (Tribal), ¶ 1 at 1-2.</p>

Appendix A

created, arising, or evidenced, now or hereafter at any time created, arising or evidenced under or pursuant to the Loan Documents (collectively, the "Obligations"), the Tribe does hereby transfer assign and grant to the Lender a security interest (the "Security Interest") in all of Borrower's and the Tribe's right, title and interest in and to the following (collectively, the "Collateral") whether now owned or hereafter acquired or arising:

(a) All personal furnishings, equipment and tangible personal property of any nature whatsoever used in the Facilities or on the Premises, exclusive of fixtures and any real estate or interest in real estate, together with all improvements, accessions, appurtenances, substitutions and replacements to the Equipment and insurance proceeds and condemnation awards payable with respect to the Equipment, together with all proceeds and products thereof and all rights thereto (collectively, the "Equipment"); and

(b) All Enterprise Accounts, including all financial assets related thereto within the meaning of the State UCC.

**Limitations on Recourse; No General Obligation.** Notwithstanding any other provision in any Loan Document or elsewhere expressed or implied, the obligations of the Borrower or the Tribe as applicable to pay amounts due hereunder as well as any other claims against or liabilities or obligations of the Borrower or Tribe hereunder shall be limited recourse obligations of the Borrower enforceable solely against the Pledged Assets as defined in the Loan Agreement. Neither the general obligation nor the full faith and credit or taxing power of the Borrower or the Tribe is pledged to the payment of any amounts due or obligations created hereunder.

Security Agreement (Borrower), ¶ 25 at 8.

Security Agreement (Tribe), ¶ 25 at 8.

Springing Depository Agreement, § 9.21 at 37.

Loan Agreement, ¶ 8.30 at 55. [similar]

Tribal Agreement, § 16 at 18. [similar]

Appendix A

**Merger, Consolidation or Transfer of Assets.** [The Borrower covenants] Not to dissolve merge with or into or consolidate with any other Person or to sell transfer or convey all or substantially all of its interest in the Facilities the Premises the Facilities Enterprise or in the Pledged Revenues except with the consent of the Lender.

Loan Agreement, ¶ 6.23 at 38.

**INTEGRATION: CONFLICTING TERMS.** This Note, together with the other Loan Documents, comprises the entire agreement of the parties on the subject matter hereof and supersedes and replaces all prior agreements, oral and written, on such subject matter. If any term of any of the other Loan Documents expressly conflicts with the provisions of this Note or the Loan Agreement, the provisions of the Loan Agreement shall control and if any term of the Loan Agreement shall expressly conflict with a provision of this Note the provisions of this Note shall control; provided, however, that the inclusion of supplemental rights and remedies of the Lender in any of the other Loan Documents shall not be deemed a conflict between the Loan Agreement or this Note and (ii) the inclusion of supplemental provisions pertaining to or benefiting the Borrower in the Loan Agreement or in any of the other Loan Documents shall not be deemed a conflict between the Loan Agreement such other Loan Documents and this Note.

Promissory Note, ¶ 19 at A-9 to A-10.

<b>Affiliate</b>	With respect to any Person any other Person who directly or indirectly controls, is controlled by, or is under common control with the first Person	Springing Depository Agreement, at 1.
<b>Collateral</b>	<p>(a) All personal furnishings, equipment and tangible personal property of any nature whatsoever used in the Facilities or on the Premises, exclusive of fixtures and any real estate or interest in real estate, together with all improvements, accessions, appurtenances, substitutions and replacements to the Equipment and insurance proceeds and condemnation awards payable with respect to the Equipment, together with all proceeds and products thereof and all rights thereto (collectively, the "<u>Equipment</u>"); and</p> <p>(b) All Enterprise Accounts including all financial assets related thereto within the meaning of the State UCC.</p>	Security Agreement (Borrower), ¶ 1 at 1.
<b>Daily Cash-on-Hand Requirements</b>	The amount of cash which is reasonably determined and certified by the Borrower to the Depository as necessary to be retained on site to properly operate the Facilities which under Section 3.1(a) hereof is not required to be deposited with a Collection Bank or the Depository.	Springing Depository Agreement, at 2.
<b>Enterprise Account</b>	Any deposit or securities account in the name of the Borrower with a responsible bank or securities intermediary (within the meaning of the Uniform Commercial Code of the State) that is properly accounted for as an asset of the Facilities Enterprise and is not comingled with other funds of the Borrower that are not properly accounted for as assets of the Facilities Enterprise.	Loan Agreement, at 6.
<b>Equipment</b>	All personal furnishings equipment and tangible personal property of any nature used at or in connection with the Facilities.	Loan Agreement, at 6.
	All personal furnishings, equipment and tangible personal property of any nature.	Springing Depository Agreement, at 4.

## 4 – Terms, Conditions and Definitions

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Equipment (cont.)	All personal furnishings, equipment and tangible personal property of any nature whatsoever used in the Facilities or on the Premises, exclusive of fixtures and any real estate or interest in real estate, together with all improvements, accessions, appurtenances, substitutions and replacements to the Equipment and insurance proceeds and condemnation awards payable with respect to the Equipment, together with all proceeds and products thereof and all rights thereto.	Security Agreement (Borrower), ¶ 1 at 1.
Facilities	<p>To the extent located on any land owned held in trust for the benefit of leased to or otherwise in the possession of or subject to use by the Borrower or any Affiliate of the Borrower:</p> <p>(a) all Equipment and Improvements used in connection with the Nooksack River Casino as the same may be improved or extended or that is financed in whole or in part by Recourse Debt, and</p> <p>(b) to the extent financed in whole or in part by Recourse Debt, all Equipment, land and Improvements used for dining food service or food preparation permanent or temporary lodging (including hotels motels and or recreational vehicle parks), entertainment, recreation, a commercial business or related parking facilities, or used in connection with or supportive of any casino or gaming regulated by IGRA whether now or hereafter existing or acquired and financed in whole or in part by Recourse Debt.</p> <p>The term "Facilities" does not include the Nooksack Market Centre located adjacent to the Nooksack River Casino, as the same may be improved or extended in a manner that does not change its business, and only so long as no gaming is conducted therein, or any facilities related to a gaming operation not located in the City of Deming, Washington.</p>	<p>Loan Agreement, at p. 7.</p> <p>Springing Depository Agreement, at 4.</p> <p><i>[This provision excluding the Market Centre is contained in the Loan Agreement only, not in the Springing Depository Agreement. See "Intergration:</i></p>

		<i>Conflicting Terms, above]</i>
Facilities Enterprise	Collectively, all commercial endeavors or other businesses of the Borrower or any Affiliate of the Borrower carried on at or supportive of the Facilities.	Loan Agreement, at 7. Springing Depository Agreement, at 4.
Improvements	Any buildings and improvements to land.	Loan Agreement, at 9. Springing Depository Agreement, at 5.
Land	All parcels of real estate on which the Facilities are located, together with adjacent existing surface parking areas owned in fee or beneficially by the Tribe or the Borrower.	Loan Agreement, at 9.
Pledged Assets	All Depository Funds (as defined in the Depository Agreement), Collateral (including all Enterprise Accounts), Net Insurance Proceeds, Pledged Revenues, and any proceeds of the foregoing.	Loan Agreement, at 12.
Pledged Financial Assets	<p>(a) Pledged Revenues whether now or hereafter owned existing arising or acquired wherever held or located and whenever received;</p> <p>(b) all the Depository Agreement Accounts and related Financial Assets; and</p> <p>(c) all proceeds of the foregoing.</p> <p>Excluding, however, so long as no Event of Default has occurred and is continuing hereunder, any amounts applied to the payment of Operating Expenses, Monthly Debt Service Charges, costs paid by amounts withdrawn from the Repair and Replacement Account.</p>	Springing Depository Agreement, § 2.1 at 11.

Pledged Revenues	<p>Whether now existing or hereafter arising and wherever located all receipts revenues and rents from the operation of any portion of the Facilities, including, without limitation, receipts from:</p> <ul style="list-style-type: none"> <li>(a) class II and class III gaming as such terms are used in IGRA including without limitation receipts from bingo slot machines and card games;</li> <li>(b) on-site facilities for dining food service beverage restaurant and other concessions derived therefrom;</li> <li>(c) any other facilities financed in whole or in part with Recourse Debt;</li> <li>(d) the lease or sublease of space or Equipment within on or at the Facilities;</li> <li>(e) the disposition of all or any portion of any Facilities; and</li> <li>(f) any other activities carried on within the Facilities including license fees or the net proceeds of business interruption insurance or its equivalent obtained by or on behalf of the Borrower with respect to the Facilities.</li> </ul> <p>Provided that Pledged Revenues <b>shall not include</b></p> <ul style="list-style-type: none"> <li>(a) amounts collected and paid out for a sales or excise tax imposed by a Governmental Authority where such tax is billed to the purchaser as a separate item and remitted by the Borrower to such Governmental Authority;</li> <li>(b) credits for the exchange of goods or merchandise;</li> <li>(c) uncollected credit transactions written off as bad debt in accordance with GAAP;</li> <li>(d) any casualty insurance proceeds related to the Facilities except for business</li> </ul>	Springing Depository Agreement, at 9.
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	<p>interruption insurance or its equivalent and any insurance relating to losses in the armored transport of cash;</p> <p>(e) any trust lands or trust assets of the Borrower or any revenues or receipts of any Person other than the Borrower or any Affiliate including revenues and receipts of subtenants and</p> <p>(f) any other assets of the Borrower not listed in a through f above in this definition.</p> <p>Notwithstanding the foregoing the Borrower may retain and need not pledge an amount equal to the Daily Cash-on-Hand Requirements.</p>	
Premises	The Land, together with the Improvements, and all other land or Improvements used in connection with the Facilities Enterprise.	Loan Agreement, at 12.
Recourse Debt	Debt secured by any interest in or having recourse to all or any portion of the Pledged Assets other than Excess Pledged Revenues or the Facilities because the Borrower has waived its sovereign immunity with respect thereto or otherwise. Recourse Debt does not include the General Obligation Loan referred to in the Loan Agreement.	Springing Depository Agreement, at 10.





1 portion of the Facilities, including receipts from any other activities carried on within the  
2 Facilities.” (Loan Agreement, p. 12, Depository Agreement, p. 9).

3 The “Facilities” – the Casino building and the land on which it is located – are not  
4 included in Pledged Assets. The Facilities are the property of the Nooksack Tribe, and the loan  
5 agreements clearly state that the lender has no legal interest in them.

6 After NBC defaulted on loan repayment, OSM instituted this litigation. NBC contested  
7 this court’s jurisdiction, but the Court of Appeals upheld jurisdiction and this court entered a  
8 judgment for the amounts owed on the loans. NBC later closed the Casino, leaving the Facilities  
9 vacant and potentially available for other uses.

10 The issue now before this court is whether rents and other revenues from activities in the  
11 Facilities are “Pledged Revenues” which are available to collection. The loan agreements  
12 resolve the issue with their definition of Pledged Revenues as “all receipts, revenues and rents”  
13 from activities conducted in the Facilities.

14 NBC argues that the loan agreements are not valid because making Facilities revenues  
15 available to collection would be the equivalent of giving OSM a legal interest in the Facilities  
16 themselves – an interest prohibited by the loan agreements and by the law. But there are  
17 significant differences between a legal ownership interest and the right to collect revenues, and  
18 the loan agreements recognize this fact. The agreements make it clear that NBC and the Tribe  
19 are the Facilities’ sole owners and decision makers. They give the lender no authority to  
20 determine or influence the use of the Facilities. NBC and the Tribe may choose to use the  
21 Facilities in a manner that generates no income; the agreements give them that option. If the  
22 Facilities are used in a manner that generates income, however, that income is a Pledged  
23 Revenue subject to collection. The loan agreements are consistent with the law.

24  
25  
OPINION of the COURT re  
FACILITIES REVENUES

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In summary, the loan agreements are valid and enforceable according to their terms. Those terms include income from use of the Facilities in the assets pledged to repayment of the loans. This Court's Order of December 4, 2015 reserved this issue and now should be supplemented with an Order providing that the Plaintiff's collection rights to Pledged Revenues, as that term is defined in the Depository Agreement, include the right to revenues received by NBC or the Tribe from activities conducted at the Facilities.

DATED this 13th day of January 2016.

  
Deborra Garrett, Judge  
Whatcom County Superior Court



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY

OUTSOURCE SERVICES  
MANAGEMENT, LLC,

Plaintiff,

vs.

NOOKSACK BUSINESS CORPORATION,  
Defendant.

No. 11-2-00523-9

OPINION of the COURT

The parties to this case are Nooksack Business Corporation (NBC) and Outsource Services Management, LLC (OSM). OSM's predecessor in interest, Bankfirst, made a series of loans to NBC. Loan terms are contained in several written agreements, including the Loan Agreement and the Depository Agreement, both made in December 2006, which are at issue here. These agreements are "limited recourse" contracts, in that they limit the NBC assets available for collection upon default. Both Agreements state the parties' shared intention that the Lender have no involvement in or influence upon the operations of the Nooksack River Casino, which is managed by NBC.

After NBC failed to make all required loan payments, the parties made three Forbearance Agreements in 2009 and 2010, each providing that the Lender would forebear exercising its collection rights and that NBC would make certain payments on a specified schedule. The Second Forbearance Agreement also amended the Loan Agreement to expand the lender's collection rights in the event of a default. The parties added the amendment to

1 the Loan Agreement as Paragraph 8.36, agreeing that it was to be effective continuously since  
2 December 21, 2006, the date of the Loan Agreement. The parties' Third Forbearance  
3 Agreement acknowledges the lender's rights under Section 8.36, again providing a new  
4 payment schedule.

5 After NBC defaulted on loan payments shortly after the Third Forbearance Agreement,  
6 OSM brought this action, seeking a judgment on the loans. NBC contested jurisdiction and this  
7 Court stayed further proceedings pending a decision from the Court of Appeals, which  
8 ultimately determined that this Court has jurisdiction and that the Loan Agreement, as  
9 amended, is lawful and enforceable. *Outsource Services Management LLC v. Nooksack Business*  
10 *Corp.*, 172 Wn.App. (2013).

11 Both parties then filed Motions for Summary Judgment in this Court, OSM seeking a  
12 Judgment and NBC seeking to limit OSM's collection rights. This Court entered judgment for  
13 the amounts owing on the loans and both parties requested clarification as to the assets  
14 available for execution.

15 The issue is resolved by the parties' several agreements, particularly the Loan  
16 Agreement, as amended, and the Depository Agreement. These Agreements describe the  
17 assets securing the loans as "Pledged Assets," excluding real property and fixtures from that  
18 definition. The Pledged Assets securing the loan are available for collection upon default. They  
19 include the following categories of assets:

- 20
- 21 • "Depository Funds": funds in any of the several bank accounts established under the  
22 Depository Agreement;
  - 23 • "Collateral": the property and equipment used in operating NBC's business, except for  
24 real property and fixtures. Also includes the funds in NBC Enterprise Accounts (accounts  
25 holding revenues from commercial activity by NBC or an NBC affiliate at NBC's  
Facilities);
  - Net Insurance proceeds, if any (the parties appear agreed that there are no such  
proceeds);

- 1       • "Pledged Revenues": revenues from gaming and other commercial activities at the NBC  
2       Facilities; from the lease of Facilities space; and/or from other activities at the Facilities  
3       which were financed with funds from these loans).

4       The Agreements require NBC to make monthly loan payments to an account maintained at  
5       a specified bank. If NBC defaults in payment, the Loan Agreement requires NBC to deposit all  
6       its revenues (except a limited amount of operating cash, held onsite) to a "Pledged Revenues"  
7       account at First National Bank of Williston. From that account, funds will be transferred to the  
8       NBC Operating Expenses account, up to a total that equals the full amount designated by NBC  
9       for operating expenses for that month. Additional funds are to be transferred to other  
10      accounts not at issue here with all remaining funds to be applied to the loan.

11      These provisions reflect the parties' efforts to balance the lender's right to be paid with  
12      NBC's broad discretion to manage casino operations. The Agreements give NBC sole authority  
13      to determine its operating expenses, and the Agreements prioritize those operating expenses  
14      by requiring that they be paid first from deposited revenues, in the amount NBC has  
15      determined necessary. The effect is to protect both the funds for operating expenses, and  
16      NBC's discretion to determine the amount of those funds and how they should be spent once  
17      allocated.

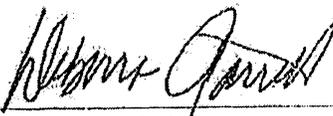
18      The Agreements do not specify what will occur if, after a default in payment, NBC does  
19      not deposit all revenues to the Pledged Revenues account as the Depository Agreement  
20      requires. But the Depository Agreement's protections are conditioned on NBC depositing all its  
21      revenues to an Operating Expenses account established and maintained at the specified bank.  
22      Otherwise, the Agreements permit the lender to execute on "Pledged Assets," a term defined  
23      broadly to include all other bank accounts maintained by NBC, even for payment of operating  
24      expenses. In other words, the protection of operating expense funds is available only for funds  
25      deposited to the "Pledged Revenues" account, as specified in the Depository Agreement. The

1 protections for operating expenses do not apply to NBC funds on deposit in any other account  
2 or financial institution.

3 Both parties indicated at oral argument that once the issues discussed in this opinion  
4 have been resolved, they may need clarification or interpretation of other contract terms. For  
5 this reason, this decision addresses only the issue on which both parties focused: the  
6 availability of NBC revenues for collection. Other issues of contract interpretation are reserved  
7 for future hearing if necessary. Upon motion of either party, this Court will enter an Order  
8 consistent with this opinion.

9 DATED this 9<sup>TH</sup> day of November, 2015.

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Deborra Garrett, Judge  
Whatcom County Superior Court



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The Honorable Deborra E. Garrett  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY

OUTSOURCE SERVICES  
MANAGEMENT, LLC,  
  
Plaintiff,  
  
v.  
  
NOOKSACK BUSINESS CORPORATION,  
  
Defendant.

Case No. 11-2-00523-9  
  
ORDER DENYING MOTION FOR  
RECONSIDERATION OF OPINION  
RESOLVING NBC'S  
COUNTERCLAIMS FOR  
DECLARATORY JUDGMENT  
  
[CLERK'S ACTION REQUIRED]

By Order dated May 7, 2015, the Court granted Plaintiff Outsource Services Management, LLC's ("OSM") Motion for Summary Judgment, and entered a judgment in OSM's favor for \$20,725,716.90, increasing by \$3,523.86 in unpaid interest per day after February 9, 2015.

The Court also granted in part and denied in part defendant Nooksack Business Corporation's ("NBC") cross-motion for summary judgment on its counterclaims for Declaratory Judgment, and stayed OSM's execution on its judgment pending further action by the Court. The Court left for further hearing the issue of the assets available for execution.

ORDER DENYING MOTION FOR  
RECONSIDERATION OF OPINION RESOLVING  
NBC'S COUNTERCLAIMS - 1  
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1 By Opinion of the Court dated November 10, 2015, the Court held that OSM had the  
2 right to execute on NBC's revenue, including funds NBC designated as operating expense  
3 funds, if those funds were not deposited to the Pledged Revenues account as specified in the  
4 Depository Agreement. The Court reserved for future hearing, as necessary, other issues of  
5 contract interpretation.  
6

7 By Order dated December 4, 2015, the Court lifted its stay on OSM's execution as to  
8 assets identified in the Order, but left for further hearing resolution of NBC's claims  
9 regarding the authority of OSM to enforce its judgment against revenue from other uses of  
10 the River Casino building by the Tribe or NBC.

11 On January 13, 2016, the Court entered its Opinion of the Court re: Facilities  
12 Revenues, holding that the Tribe and NBC are the sole owners and decision makers for the  
13 Facilities, as that term is defined in the loan documents. The Court further held that NBC  
14 and the Tribe may choose to use the Facilities in a manner that generates no revenue, but if  
15 the Facilities are used in a manner that generates revenue, the revenue is a Pledged Revenue  
16 subject to collection by OSM in enforcement of its judgment. The Court also held that  
17 OSM's "collection rights to Pledged Revenues . . . include[s] the right to revenues received  
18 by NBC or the Tribe from activities conducted at the Facilities." This ruling resolved the  
19 remaining claims of NBC.  
20

21 NBC timely moved pursuant to Civil Rule 59 for reconsideration of the Court's  
22 January 13, 2016 Opinion. The Court allowed response and reply briefing, and heard oral  
23 argument on NBC's motion on February 5, 2016.  
24

25 The Court DENIES NBC's motion for reconsideration and HEREBY ORDERS that:  
26

ORDER DENYING MOTION FOR  
RECONSIDERATION OF OPINION RESOLVING  
NBC'S COUNTERCLAIMS - 2

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## **APPENDIX - E**

**RCW 7.28.230**

**Mortgagee cannot maintain action for possession—Possession to collect mortgage, pledged, or assigned rents and profits—Perfection of security interest.**

(1) A mortgage of any interest in real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law: PROVIDED, That nothing in this section shall be construed as any limitation upon the right of the owner of real property to mortgage, pledge or assign the rents and profits thereof, nor as prohibiting the mortgagee, pledgee or assignee of such rents and profits, or any trustee under a mortgage or trust deed either contemporaneously or upon the happening of a future event of default, from entering into possession of any real property, other than farmlands or the homestead of the mortgagor or his or her successor in interest, for the purpose of collecting the rents and profits thereof for application in accordance with the provisions of the mortgage or trust deed or other instrument creating the lien, nor as any limitation upon the power of a court of equity to appoint a receiver to take charge of such real property and collect such rents and profits thereof for application in accordance with the terms of such mortgage, trust deed, or assignment.

(2) Until paid, the rents and profits of real property constitute real property for the purposes of mortgages, trust deeds, or assignments whether or not said rents and profits have accrued. The provisions of RCW 65.08.070 as now or hereafter amended shall be applicable to such rents and profits, and such rents and profits are excluded from \*Article 62A.9 RCW.

(3) The recording of an assignment, mortgage, or pledge of unpaid rents and profits of real property, intended as security, in accordance with RCW 65.08.070, shall immediately perfect the security interest in the assignee, mortgagee, or pledgee and shall not require any further action by the holder of the security interest to be perfected as to any subsequent purchaser, mortgagee, or assignee. Any lien created by such assignment, mortgage, or pledge shall, when recorded, be deemed specific, perfected, and choate even if recorded prior to July 23, 1989.

[ 2011 c 336 § 179; 1991 c 188 § 1; 1989 c 73 § 1; 1969 ex.s. c 122 § 1; Code 1881 § 546; 1877 p 114 § 550; 1869 p 130 § 498; RRS § 804.]

**NOTES:**

**\*Reviser's note:** Article 62A.9 RCW was repealed in its entirety by 2000 c 250 § 9A-901, effective July 1, 2001. For later enactment, see Article 62A.9A RCW.

**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 24 day of June, 2016, I arranged for service the foregoing APPELLANT'S OPENING BRIEF on the following parties via email by agreement of the parties:

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STATE OF WASHINGTON