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No. 74764-9-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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OUTSOURCE SERVICES MANAGEMENT LLC,

Respondent,

v.

NOOKSACK BUSINESS CORPORATION,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY  
#11-2-00523-9

**BRIEF OF RESPONDENT**

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**ORIGINAL**

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## INTRODUCTION

This is a collection case. On December 21, 2006, Appellant Nooksack Business Corporation (NBC), a tribal corporation of the Nooksack Indian Tribe, borrowed \$15,315,856.00 from BankFirst in South Dakota. Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp., 172 Wn. App. 799, 805, 292 P.3d 147 (2013), aff'd, 181 Wn.2d 272, 333 P.3d 380 (2014). By January 2009, NBC had defaulted on the loan. In a series of forbearance agreements, the Corporation admitted it was in default, promised to make payments, and reconfirmed its waiver of sovereign immunity to suit in Washington State court. Outsource, 172 Wn. App. at 806.

Respondent Outsource Services Management LLC (Outsource) is BankFirst's successor. On February 28, 2011, Outsource filed this lawsuit to collect the loan balance, penalties, interest and reasonable attorneys' fees. NBC challenged the Superior Court's jurisdiction, and the trial court, Court of Appeals, and Washington Supreme Court all held that the Corporation waived its immunity to suit. The Supreme Court remanded the case for proceedings on the merits. Outsource, 181 Wn.2d at 282.

This appeal concerns what happened next. On May 7, 2015, Whatcom County Superior Court Judge Deborra Garrett granted

summary judgment for Outsource on the debt, but stayed execution “until further order of the Court.” (Summary Judgment Order at 3; CP 1076). Then, in a series of orders, Judge Garrett carefully delineated the assets and revenues subject to the judgment and lifted the stay. NBC now appeals, arguing the trial court exceeded its authority by allowing Outsource to collect on the debt.

This Court should affirm the trial court’s judgment and orders for three reasons: (1) the loan and forbearance agreements comply with federal law; (2) the trial court interpreted the agreements correctly; and (3) the trial court has jurisdiction to enter judgment against NBC. Respondent Outsource Services Management respectfully requests that the Court uphold the trial court’s judgment, award reasonable attorneys’ fees on appeal, and dismiss NBC’s appeal.

**I. RESTATEMENT OF ISSUES PRESENTED**

NBC’s appeal presents three issues:

A. Under 25 C.F.R. § 84.002, encumbrances on tribal real estate are “leasehold mortgages, easements, and other contracts or agreements that by their terms could give a third party exclusive or nearly exclusive proprietary control over tribal land.” Judge Garrett ruled that the loan agreements are not encumbrances under 25

U.S.C. § 81 because they “give the lender no authority to determine or influence the use of the [Nooksack Casino and property]”. (01/13/16 Opinion re Facilities Revenues at 2; CP 1688). Did the trial court appropriately rule the loan agreements are valid and enforceable?

B. In their December 21, 2006 Springing Depository Agreement, the parties defined pledged revenues to include “receipts, revenues and rents from...any other activities carried on within the Facilities.” (Depository Agreement at 9; Exhibit 1 to 3/20/15 Martin Dec.; CP 663). Judge Garrett held that the parties’ definition of pledged revenues encompassed “the right to revenues received by NBC or the Tribe from activities conducted at the Facilities.” (01/13/16 Opinion re: Facilities Revenues at 3; CP 1689). Did the trial court correctly construe the definition of pledged revenues?

C. “Nooksack chose to enter into a contractual agreement waiving its sovereign immunity and consenting to state court jurisdiction; therefore, allowing such jurisdiction does not infringe on its tribe's right to make decisions for itself.” Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp., 181 Wn.2d 272, 279, 333 P.3d 380 (2014). Despite the Supreme Court’s opinion, NBC again challenges

subject matter jurisdiction, arguing the Court has no jurisdiction over future pledged revenues. Did the Corporation waive sovereign immunity and consent to suit in State court?

## **II. STATEMENT OF FACTS**

This is NBC's second appeal. In its first, the Corporation argued unsuccessfully that it could not waive its sovereign immunity as a tribal entity or consent to suit in State court. This Court and the Supreme Court held the Corporation bound to the contracts it negotiated and signed.

Given that Nooksack made the decision to enter into that contract and consent to those provisions, we do not see how state court jurisdiction would infringe on the tribe's right to self-rule.

In fact, we believe the opposite is true: ignoring the tribe's decision to waive sovereign immunity and consent to state court jurisdiction would infringe on the tribe's right to make those decisions for itself.

Outsource, 181 Wn.2d at 278–79.

The same is true in this second appeal. As detailed in the next section, NBC negotiated and signed a series of loan documents that meticulously complied with federal law governing loans to tribal entities.

A. The Parties Signed Loan Documents That Expressly Incorporated Federal Restrictions on Encumbrances

To establish the terms and conditions of NBC's loan, the parties signed eight interrelated agreements. They are:

- December 21, 2006 Loan Agreement (Exhibit A to 2/13/15 Moore Dec.; CP 326);
- December 21, 2006 Promissory Note (Exhibit B to 2/13/15 Moore Dec.; CP 453);
- December 21, 2006 Springing Depository Agreement (Exhibit 1 to 3/20/15 Martin Dec.; CP 663);
- December 21, 2006 Security Agreement (Borrower) (Exhibit 2 to 3/20/15 Martin Dec.; CP 713);
- December 21, 2006 Security Agreement (Tribal) (Exhibit 3 to 3/20/15 Martin Dec.; CP 724);
- January 30, 2009 First Forbearance Agreement (Exhibit C to 2/13/15 Moore Dec.; CP 463);
- May 27, 2010 Second Forbearance Agreement (Exhibit I to 2/13/15 Moore Dec.; CP 582); and
- October 5, 2010 Third Forbearance Agreement (Exhibit J to 2/13/15 Moore Dec.; CP 600).

The first five agreements, all signed on December 21, 2006, established the terms of the loan, the events of default, and the lender's remedies on default. All five agreements prohibit creating any encumbrances on tribal real estate. (Loan Agreement § 8.32; CP 385) ("lien is restricted to the pledged assets, which do not create

a mortgage lien on the facilities”); (Promissory Note ¶ 20; CP 460) (“this Note does not encumber any land or interest in land of the Borrower, and accordingly this Note is not subject to 25 U.S.C. § 81”); (Depository Agreement §§ 9.15-9.16; CP 701); (Security Agreements ¶ 24; CP 720 & 731).

As NBC notes in its Opening Brief, the parties created a limited recourse debt. (Opening Brief at 29) (“noteholders are entitled to repayment only from specified assets”). The specific asset at issue in this appeal are “pledged revenues”. The Depository Agreement defines pledged revenues as:

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) 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.

(Depository Agreement at 9; CP 674).

On December 21, 2006, NBC borrowed \$15,315,856.00 from BankFirst, the loan originator. (Loan Agreement § 4; CP 331). In the related Promissory Note, NBC agreed to pay the debt monthly, first through interest-only payments beginning February 1, 2007, and then through monthly interest and principal payments starting August 1, 2007. (Promissory Note § 6; CP 455). The Corporation agreed to repay the entire debt by the maturity date of January 1, 2012. (Promissory Note § 6; CP 455).

By January 2, 2009, NBC was in default. BankFirst provided notice of an Event of Default under the Loan Agreement, documenting the Corporation's failure to make required payments. To restructure the debt, the parties – including the Nooksack Tribe – signed the January 30, 2009 Forbearance Agreement, modifying the payment schedule and other obligations. (First Forbearance Agreement §§ 2-4; CP 463 - 465). In the Forbearance Agreement,

NBC as Borrower “acknowledge[d] and agree[d] that...the Borrower is obligated to pay the lender [all unpaid principal and interest, fees, and costs], and such obligation is subject to no defense, offset or counterclaim.” (First Forbearance Agreement § 4(b); CP 464-465).

The Great Recession wiped out BankFirst’s assets, and on July 17, 2009, the Federal Deposit Insurance Corporation took over as receiver. (2/13/15 Moore Dec. ¶ 5; CP 322). Through a series of agreements, Respondent Outsource Services Management purchased the rights to service and collect BankFirst’s loan to NBC. (2/13/15 Moore Dec. §§ 6-9; CP 322).

On May 27, 2010, Outsource, NBC, and the Nooksack Tribe signed the Second Forbearance Agreement, requiring NBC to pay a minimum of \$30,000 per month in debt service and fees to prevent collection of the full debt. (Second Forbearance Agreement; CP 582-598). NBC again acknowledged that its obligation to repay was not “subject to a defense, offset, deduction or counterclaim of any kind.” (Second Forbearance Agreement § 5(b); CP 584).

Despite this, the Corporation defaulted again. On October 5, 2010, but retroactive to July 15, 2010, NBC and Outsource signed the Third Forbearance Agreement. The Corporation agreed to pay Outsource \$27,500 per month in debt service, and once again

acknowledged its obligations were not subject to defense, offset, deduction or counterclaim of any kind. (Third Forbearance Agreement § 5(b); CP 602).

A month later, NBC defaulted for the last time. On November 23, 2010, Outsource notified NBC and the Tribe that NBC was in default under the Loan, that interest would accrue on the outstanding principal at the default rate specified in Section 3(c) of the Promissory Note, and that the debt was immediately due and payable. (2/28/11 Outsource Complaint § 32; CP 9). Outsource filed this lawsuit on February 11, 2011, and after appeals to the Court of Appeals and Supreme Court, the case returned to Whatcom County Superior Court for proceedings on the merits.

B. Judge Garrett Carefully Tailored Outsource's Judgment And Its Right to Collect

Given the size of NBC's debt, and the complications of collecting it from a tribal entity, Whatcom County Superior Court Judge Deborra Garrett authorized collection in measured steps. The court would ultimately enter four orders that NBC now appeals. First, on May 7, 2015, Judge Garrett granted summary judgment on NBC's default and the amount of the outstanding debt. "Judgment is entered against the defendant Nooksack Business Corporation

(“NBC”) and for OSM, in the amount of \$20,725,716.90, increasing by \$3,523.86 in unpaid interest per day after February 9, 2015.” (Summary Judgment at 2; CP 1077). NBC does not dispute the amount of the unpaid debt or the default interest rate.

The first order then set the groundwork for executing on the judgment. “Enforcement of said judgment shall be limited by the terms of the loan documents and the Indian Gaming Regulatory Act (IGRA).” (Summary Judgment at 3; CP 1078). The trial court also stayed execution of the judgment until the parties identified the specific assets subject to collection. (Summary Judgment at 3; CP 1078) (“the parties shall by agreement note for further hearing the issue of those assets available for execution”).

Finally, the court prohibited NBC and the Nooksack Tribe from transferring pledged assets from the River Casino. (5/7/15 Summary Judgment at 3; CP 1078) (“prohibited from transferring or other disposal of or interference with the property of the Nooksack Business Corporation which constitute Pledged Assets as defined in the Loan Agreement”).

The trial court took its second step on December 4, 2015. (Order Granting Post-Judgment Motion; CP 1491-1494). In her second order, Judge Garrett permitted Outsource to execute the

judgment on specified assets, including Pledged Revenues. (Order Granting Post-Judgment Motion at 2). The court interlineated the definition of Pledged Revenues,

meaning all receipts, revenues and rents from the operation of any portion of the facilities (as that term is defined in the Loan Agreement), whether now existing or hereafter arising, and wherever located, including receipts from: (a) class II and class III gaming, including without limitation, receipts from bingo, slot machines, and card games; and (b) on-site facilities for dining, food service, beverage, restaurant and other concessions derived therefrom.

(12/4/15 Order Granting Post-Judgment Motion, insert (C) at 3; CP 1493).

Acting on this Order and the court's Judgment Summary entered December 9, 2015, Outsource garnished NBC's bank accounts, recovering \$249,555.74. (3/24/16 Judgment and Order to Pay; Sub #121; CP \_\_)\*. The next day, the Nooksack Tribe closed the River Casino, despite having the ability to preserve its operating revenues under the Depository Agreement. (Exhibit D to 12/16/15 Miranowski Dec.; CP 1612) ("waterfall accounts identified in the Springing Depository Agreement...are open and have been for some time").

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\* Respondent has filed a supplemental designation of clerk's papers and CP cites do not yet exist for these documents. The brief cites to the sub number to identify the document.

After the Casino closed, the trial court entered its third order. This third step concerned the remaining dispute: what assets are subject to collection after closure of the Casino? On January 13, 2016, Judge Garrett ruled that Outsource could execute on revenues the Tribe or NBC collected from any future use of the Casino facilities.

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

(Opinion re Facilities Revenues at 2: CP 1688).

In response to NBC’s argument that this created an illegal encumbrance on the Casino, Judge Garrett made the same distinction as the parties did in their loan documents.

[T]here are significant differences between a legal ownership interest and the right to collect revenues, and the loan agreements recognize this fact. The agreements make clear that NBC and the Tribe are the Facilities’ sole owners and decision makers. They give the lender no authority to determine or influence the use of the Facilities. *NBC and the Tribe may choose to use the Facilities in a manner that generates no income; the agreements give them that option.* If the Facilities are used in a manner that generates income, however, that income is a Pledged Revenue subject to collection. The loan agreements are consistent with the law.

(Opinion re Facilities Revenues at 2; CP 1688) (emphasis added).

NBC took one last shot at the issue in a motion for reconsideration, which Judge Garrett denied. (2/29/16 Order Denying Motion for Reconsideration; CP 1704-1706). This fourth order confirmed that “OSM’s right to enforce the Judgment through execution on Pledged Revenues includes the right to all revenue from activities conducted at the Facilities.” (Order Denying Reconsideration at 3; CP 1706). NBC now appeals.

## **ARGUMENT**

### **III. STANDARD OF REVIEW**

This Court reviews the trial court’s summary judgment and subsequent orders de novo. Piris v. Kitching, \_\_\_ Wn.2d. \_\_\_, 375 P.3d 627, 630 (2016).

### **IV. THE TRIAL COURT CORRECTLY INTERPRETED AND ENFORCED THE PARTIES’ LIMITED RECOURSE LOAN.**

#### **A. The Loan Agreements Are Valid And Enforceable Under Federal Law**

NBC concedes that it defaulted on its \$15 million loan and that Outsource has a contractual right to collect NBC’s Pledged Assets. (Opening Brief at 9) (“correct explanation...arises from the Loan

Agreement, which identifies security for the loan as ‘solely’ ‘Pledged Assets’”). According to the Corporation, “only Pledged Revenues is now at issue.” (Opening Brief at 9).

NBC asserts that the trial court erred by including future revenues from the Casino facilities in the scope of Pledged Revenues. This alleged error then either (1) invalidates all the Loan Agreements; (2) requires modification of the trial court’s declaratory judgment; or (3) deprives Washington courts of subject matter jurisdiction. None of these arguments are persuasive. NBC pledged the *revenues* from “any other activities carried on within the Facilities.” (Depository Agreement at 9; CP 674). Neither federal nor State law prohibits the Corporation from making this pledge.

Recovering revenues from a business is substantially different from owning or controlling the property the business sits on. Under 25 U.S.C. § 81(b), the Secretary of the Department of Interior must approve any encumbrance of tribal land that lasts more than seven years. Federal regulations define an encumbrance as,

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. Nothing in the loan documents gives Outsource the right to lien Nooksack real property or exercise exclusive or nearly exclusive proprietary control over tribal land.

OSM's collateral rights under the Loan Documents are broad, but those rights are limited to personal property and, consistent with federal law, do not encompass the real estate owned by NBC. The parties' Security Agreement excludes from the definition of Collateral "fixtures and any real estate or interest in real estate." (Security Agreement § 1(a); CP 713) The Note and Tribal Agreement also both state that nothing in either agreement serves to "encumber any land or interest of the Tribe and accordingly . . . is not subject to 25 U.S.C. § 81." (Promissory Note § 20 at 8; CP 460) (Tribal Security Agreement § 17 at 7; CP 730)

OSM's right to ongoing proceeds and revenue generated through the use of the River Casino building does not constitute an "encumbrance" prohibited under federal law. As stated above, the parties both acknowledged in the Loan Documents that no provision of any of the contracts constitutes a Section 81 encumbrance. (Promissory Note § 20 at 8; CP 460; Tribal Agreement § 17 at 18; CP 730) The parties so acknowledged because OSM's right to

NBC's personal property is not a Section 81 encumbrance. GasPlus, L.L.C. v. U.S. Dep't of Interior, 510 F. Supp. 2d 18, 29 (D.D.C. 2007).

The District Court's decision in GasPlus details three reasons why section 81 does not invalidate the parties' agreements. First, in 2000, Congress amended 25 U.S.C. § 81 to grant tribal authorities more autonomy over business transactions on reservations.

The amended statute would still require a limited number of transactions to be submitted for BIA approval, but the overall goal of the amendments was to reduce Government oversight of Indian economic activity. That a tribe and its business partner may arrive at a dispute over a particular contract, and thereby acquire divergent legal interests, does not mean that tribal business partners' interests are generally inconsistent with the tribes' or with the objectives of Section 81.

GasPlus, 510 F. Supp. 2d at 25. Tribes and tribal entities benefit from greater access to capital. Invalidating loan agreements simply because they involve business activity on tribal land would undermine the statute's purpose. GasPlus, 510 F. Supp. 2d at 25 ("argument reflects the very sort of paternalistic view towards Indian tribes that motivated Congress to amend Section 81").

Second, to qualify as an encumbrance, a contract must create an interest in tribal land, not simply collect revenues from activity on the land.

The statute and regulations could not be more clear that an encumbrance under Section 81 means a legal interest in *land*. See 25 U.S.C. § 81 (“No agreement or contract with an Indian tribe that encumbers Indian *lands* for a period of 7 or more years shall be valid unless ....”) (emphasis added); 25 C.F.R. § 84.002 (“Encumber means to attach a claim, lien, charge, right of entry or liability to *real property* (referred to generally as encumbrances).”) (emphasis added). The BIA's conclusion that an encumbrance is broader than a “mere interest in land” finds no support in the statutory text.

GasPlus, 510 F. Supp. 2d at 33.

Third, 25 U.S.C. § 81 does not provide tribal entities a release from otherwise binding contracts.

Congress has determined that it is in the interest of Indian tribes to be free from bureaucratic oversight of their economic endeavors in all but a narrow category of circumstances. See S. Rep. 106–150 at 9. That the Nambe Pueblo had a change of heart after entering into a contract with GasPlus and its new leaders sought to avoid the Tribe's voluntarily assumed legal duties is irrelevant to whether Section 81 applies. Section 81 is not an escape hatch for Indian tribes who enter into unfavorable business arrangements; it is a safeguard that protects Indian lands from being alienated or encumbered by legal claims that could interfere with Indian tribes' ability to use the land to their benefit.

GasPlus, 510 F. Supp. 2d at 33–34. The Nooksack Tribe retains complete control over the Casino building and property. It can use the Facilities for any purpose it chooses. If it chooses a use that

generates revenues, however, those revenues only are subject to Outsource's Judgment.

Next, NBC cites two federal cases as support for a contrary reading of the statute. (Opening Brief at 19-20, citing Chemehuevi Indian Tribe v. Jewell, 767 F.3d 900 (9<sup>th</sup> Cir. 2014) and Quantum Entm't, Ltd. v. United States Dep't of Interior, 848 F. Supp. 2d 30 (D.D.C. 2012)). Yet both opinions reinforce the reasoning and ruling in GasPlus. The Ninth Circuit in Chemehuevi affirmed that § 81 applies to control over land, not revenues.

Congress narrowed the scope of those transactions that require approval. Section 81 [as amended] will no longer apply to a broad range of commercial transactions. Instead, it will only apply to those transactions where the contract between the tribe and a third party could allow that party to exercise exclusive or nearly exclusive proprietary control over the Indian lands.

Chemehuevi, 767 F.3d at 908.

The District Court in Quantum also underscored the narrow scope of section 81 as amended. “[W]hereas Old Section 81 required DOI approval of any agreement between Native Americans and others regarding Native American land, New Section 81 only requires DOI approval if an agreement with a Native American tribe would hinder the use of its land for a period of 7 years or more.”

Quantum, 848 F. Supp. 2d at 33. Neither Chemehuevi nor Quantum supports NBC's excessively broad interpretation of encumbrance.

Finally, NBC asks this Court to substitute a Washington statutory definition of encumbrance for the federal definition. (Opening Brief at 22) ("RCW 7.28.230(2) characterizes unpaid rents and profits as real property"). There are a number of problems with this argument. First, if there was a conflict between 25 C.F.R. § 84.002 and RCW 7.28.230(2), the federal definition would apply to a federal statute. Stenberg v. Carhart, 530 U.S. 914, 942, 120 S. Ct. 2597, 2615, 147 L. Ed. 2d 743 (2000) ("when a statute includes an explicit definition, we must follow that definition"). Second, the Washington statute expressly states that rents and profits are real property "until paid". RCW 7.28.230(2) ("until paid, the rents and profits of real property constitute real property"). In other words, until a tenant pays rent to the landlord, the right to collect the unpaid rent is an interest in real property. But once the rent is paid to the landlord, it becomes personal property that a creditor may recover.

Here, Outsource has no right to collect unpaid rents or profits from the Casino. Only the Nooksack Tribe or NBC may lease the Facilities. But once a tenant pays rent to the Tribe or NBC, Outsource may collect those revenues to satisfy the unpaid

Judgment. As Judge Garrett ruled, “if the Facilities are used in a manner that generates income...that income is a Pledged Revenue subject to collection.” (Opinion re Facilities Revenues at 2; CP 1688).

Third, RCW 7.28.230(2) only applies to mortgages and deeds of trust. The statute does not apply to OSM’s right to all revenues, which is an ongoing interest in the stream of payments and proceeds generated by NBC’s operation of the River Casino building. See, e.g., In re Freeborn, 94 Wn.2d 336, 340, 617 P.2d 424 (1980) (creditor’s right to receive real estate contract payments is an interest in personal property, not the underlying real property).

OSM’s right to personal property does not fall within the federal definition of encumbrance. Even OSM’s right to proceeds from the sale of the River Casino building does not provide OSM with “exclusive or nearly exclusive proprietary control” over NBC’s real property. NBC maintains sole discretion as to the use and disposition of the building. OSM’s rights concern only the revenue and proceeds from NBC’s use and disposition of the building.

If NBC were correct, virtually all lending to tribes for commercial enterprises would be immediately called into question. Because of the limitations imposed by federal law, lenders to tribes

only have recourse against a tribe's personal property, such as revenue and proceeds from operations. If that collateral were likewise forbidden under federal law, except through a cumbersome process of gaining federal approval, no tribe could obtain a bank loan for any purpose. NBC's interpretation of federal law is incorrect both as a matter of law and public policy.

NBC raises a new argument on appeal, asserting that provisions in the loan documents prohibiting the Tribe from dissolving NBC or transferring the Corporation's assets to another entity create an encumbrance. (Opening Brief at 25-28). Under RAP 2.5(a), Outsource respectfully requests the Court to refuse to consider this belated argument.

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.

State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (citations omitted).

Furthermore, the provision at issue concerns only NBC's assets, not the Tribe's interest in its land. (4/6/15 Buri Dec. § 10; CP

797) (“shall not allow the Borrower 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 Facilities Enterprise or in the Pledged Revenues to another Person, except with consent of the Lender”). Because NBC never raised the argument, no one, especially Judge Garrett, has construed the loan documents to create an encumbrance prohibiting sale of the Nooksack’s property.

B. Judge Garrett Correctly Interpreted The Parties’ Definition of Pledged Assets

In the Opinion re Facilities Revenues, Judge Garrett ruled that the parties’ agreed definition of Pledged Revenues included revenues from all activities conducted in the Facilities – the Casino building and the land on which it is located. (Opinion re Facilities Revenues at 2; CP 1688) (“the loan agreements resolve the issue with their definition of Pledge Revenues”). NBC alleges the trial court misread the scope of Pledged Revenues, and erred because “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.” (Opening Brief at 33).

Because it accurately read the plain words of the parties’ agreements, the trial court’s ruling is correct.

When interpreting an agreement, we focus on the agreement's objective manifestations to ascertain the parties' intent. We impute an intention corresponding to the reasonable meaning of the words used. The parties' subjective intent is irrelevant if we can ascertain their intent from the words in the agreement.

We give words their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. We interpret only what was written in the agreement, not what the parties intended to write. Additionally, a contract provision is not ambiguous merely because the parties to the contract suggest opposing meanings. We will not read ambiguity into a contract where it can reasonably be avoided.

Martin v. Smith, 192 Wn. App. 527, 532–33, 368 P.3d 227 (2016)  
(footnotes omitted).

NBC asserts without support that “the agreement does not subject to collection *future* receipts from operation by someone other than NBC or a business other than the Casino and its complimentary business activities.” (Opening Brief at 37). That is exactly what the loan agreements provide. Because BankFirst (and now Outsource) has only limited recourse on default, it required NBC to pledge the revenues of its existing Casino and revenues from “any other activities carried on within the Facilities.” (Depository Agreement at 9; CP 674). Otherwise, NBC could escape repaying the debt by closing the Casino and reopening under a different name and

corporate ownership. Revenues from the Facilities, regardless of the name or type of business, is available to satisfy the outstanding judgment.

Next, the Corporation alleges that the contractual definition conflicts with other terms prohibiting an encumbrance on real estate. “[T]he Superior Court orders entitle OSM indefinitely to the revenue stream of the real property.” (Opening Brief at 34). This simply repeats the argument made in earlier sections regarding 25 U.S.C. § 81, and for the same reasons, it is not persuasive.

Additionally, Outsource does not have an indefinite right to recover revenues from the facility. Under RCW 6.17.020, a judgment is enforceable for 10 years with one 10-year extension. “[N]o judgment is enforceable for a period exceeding twenty years from the date of entry in the originating court.” RCW 6.17.020.

Finally, NBC alleges that the loan agreements are no longer enforceable because they merged into Outsource’s judgment. (Opening Brief at 40). If this were correct, Outsource would not be limited to collecting only Pledged Assets, but could execute on any available asset subject to the judgment. Yet the doctrine of merger is not so broad. Merger is a form of claim preclusion that prevents a party from suing twice on the same contract. See, e.g., Boeing

Employee's Credit Union v. Burns, 167 Wn. App. 265, 276-77, 272 P.3d 908 (2012) (citing Caine & Weiner v. Barker, 42 Wn. App. 835, 837, 713 P.2d 1133 (1986)).

Merger does not extinguish a judgment creditor's "special rights", especially in the case of a secured creditor. Boeing, 167 Wn. App. at 277. Among those special rights are the creditor's security for the underlying debt and the creditor's rights under contract to enforce its lien. Boeing, 167 Wn. App. at 278-79. As Boeing held, a creditor "may first sue on a note and later enforce rights and remedies under the security interest securing that note." Boeing, 167 Wn. App. at 277.

In sum, the parties agreed to include as Pledge Revenues all revenues from any use of the Facilities. NBC now regrets that agreement, but it is valid, enforceable, and given the size of NBC's debt – understandable.

C. Washington Courts Have Jurisdiction To Enforce The Loan Agreements

The Washington Supreme Court in NBC's first appeal ruled that the Corporation waived its immunity and consented to suit in State court.

[A]llowing tribes and tribal enterprises to enter into such contracts expressing their consent to state court

jurisdiction and waiving sovereign immunity respects their right to self-rule. As the United States Supreme Court has recognized, “ ‘a party dealing with a tribe in contract negotiations has the power to protect itself by refusing to deal absent the tribe's waiver of sovereign immunity from suit.’ ” Michigan v. Bay Mills Indian Cmty., — U.S. —, 134 S.Ct. 2024, 2035, 188 L.Ed.2d 1071 (2014). As part of those contract negotiations, the tribe can choose whether to waive its sovereign immunity for claims related to that contract, and we respect its decision. The tribe can also choose to express consent to state court jurisdiction for claims related to that contract, and we respect that decision as well.

Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp., 181 Wn.2d 272, 281, 333 P.3d 380 (2014).

In its last assignment of error, NBC claims that the Superior Court did not have subject matter jurisdiction to “enforce collection of a future judgment, particularly against trust property.” (Opening Brief at 44). This is incorrect for two reasons.

First, the Supreme Court’s decision is binding on remand, and no reasonable dispute exists that the Superior Court had jurisdiction to rule on NBC’s cross-claim for declaratory judgment. The Corporation makes a contradictory argument – on the one hand, the Superior Court had jurisdiction to hear NBC’s claim for declaratory relief, but no jurisdiction to deny it. As it states, “the Court should hold that jurisdiction for declaratory relief entered by the Superior

Court is lacking.” (Opening Brief at 44). No support exists for this proposition.

Second, once a court has subject matter jurisdiction, it does not lose it by ruling a certain way. “Obviously the power to decide includes the power to decide wrong, and an erroneous decision is as binding as one that is correct until set aside or corrected in a manner provided by law.” Marley v. Dep’t of Labor & Indus. of State, 125 Wn.2d 533, 543, 886 P.2d 189 (1994). As the Marley Court held, “subject matter jurisdiction is the authority to adjudicate the type of controversy at issue.” Marley, 125 Wn.2d at 544. The Superior Court had subject matter jurisdiction to enter judgment against NBC and rule on Outsource’s remedies. The trial court’s particular ruling could not divest it of that jurisdiction.

NBC then repeats its argument that Judge Garrett impermissibly allowed collection against tribal real property. (Opening Brief at 42-43). For the reasons detailed above, the trial court permitted only what the parties’ agreed – collection against personal property including revenues from any use of the Facilities. The Supreme Court’s ruling is binding on remand, and the Superior Court’s orders fit squarely within its subject matter jurisdiction.

**V. OUTSOURCE IS ENTITLED TO REASONABLE ATTORNEYS' FEES ON APPEAL**

As NBC concedes, section 8.3 of the parties' Loan Agreement entitles the prevailing party to an award of reasonable attorneys' fees. (Loan Agreement § 8.3; CP 46-47) ("reasonable attorneys' fees incurred in connection with enforcement" of the agreement); (Opening Brief at 49). Because it is the prevailing party in the Superior Court and in this appeal, Outsource has a contractual right to an award of reasonable attorneys' fees on appeal.

**CONCLUSION**

Appellant Nooksack Business Corporation has fought doggedly to avoid the debt it acknowledges is owing. This appeal represents the final step in that fight. Because the Whatcom Superior Court correctly construed the parties' agreements and allowed execution only on NBC's Pledged Revenues, Respondent Outsource Services Management respectfully requests the Court to affirm the Superior Court's rulings, award reasonable attorneys' fees on appeal, and dismiss this appeal.

DATED this 24 day of August, 2016.

BURI FUNSTON MUMFORD, PLLC

By 

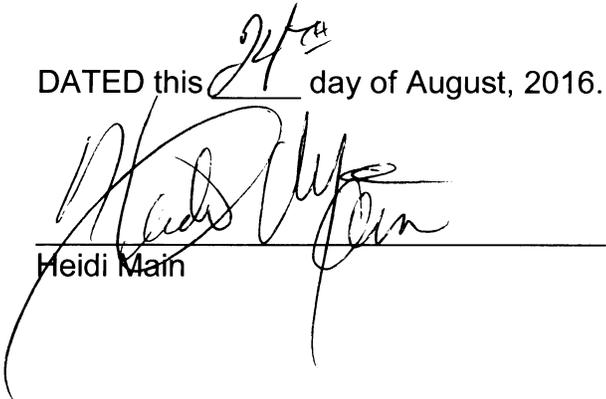
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### DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Brief of Respondent to:

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Heidi Main