

NO. 67050-6-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

OUTSOURCE SERVICES MANAGEMENT, LLC,

Respondent,

vs.

NOOKSACK BUSINESS CORPORATION,

Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This Court should reverse for legal errors the denial of the Nooksack Business Corporation's motion to dismiss Outsource Services Management LLC's complaint. The trial court erred when it denied the Nooksack Business Corporation's motion to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction and failure to state a claim. Reversal is required to preserve the sovereignty of the Tribe under Washington and federal law and this Court's jurisprudence regarding jurisdiction, and to comply with the Indian Gaming Regulation Act.

As a matter of law, the trial court lacked subject matter jurisdiction. The Nooksack Business Corporation, a tribally-chartered corporation, is not subject to the general jurisdiction of Washington courts for this civil suit by a non-Indian where the cause of action arose exclusively on the reservation. The trial court incorrectly ruled that the Tribe could consent to subject matter jurisdiction. This was legal error.

Additionally, no valid basis exists to confer personal jurisdiction over the Nooksack Business Corporation's assertion of sovereign immunity. The agreements the trial court relied on as validly waiving sovereign immunity and consenting to personal jurisdiction were void as a matter of law. The trial court erred in not holding so. The agreements are subject to being voided under the Indian Gaming Regulation Act because they vest significant management control of all or part of the casino operation in the lender. The Indian Gaming Regulation Act required the

agreements to be approved by the Chairman of the National Indian Gaming Commission. The agreements never were even submitted to the Commission for the required approval. They are, therefore, unenforceable under 25 C.F.R. § 533.7. Where the agreements were void and unenforceable, the trial court also should have dismissed the claims under CR 12(b)(6) for failure to state a claim.

For any one of the trial court's legal errors, and for the legal deficiencies of the lawsuit, this Court should reverse and mandate that the lawsuit be dismissed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in denying dismissal of the complaint for lack of subject matter jurisdiction, where the case was brought by a non-Indian entity against an Indian tribal corporation for actions arising on an Indian reservation and Washington courts lack subject matter jurisdiction over such actions.
2. The trial court erred as a matter of law in denying dismissal of the complaint for lack of subject matter jurisdiction on the basis that the parties' agreements conferred subject matter jurisdiction where the law does not permit parties to confer subject matter jurisdiction.
3. The trial court erred as a matter of law in denying dismissal of the complaint for lack of personal jurisdiction, where the Nooksack Business Corporation's limited waiver of sovereign immunity was unenforceable as part of agreements that are void under the Indian Gaming Regulation Act.
4. The trial court erred as a matter of law in denying dismissal of the complaint for failure to state a claim upon which

relief may be granted, where the agreements at issue are void under the Indian Gaming Regulation Act.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was it legal error to deny the Nooksack Business Corporation's motion to dismiss the complaint for lack of subject matter jurisdiction where the case was brought by a non-Indian entity against an Indian tribal corporation for actions arising on an Indian reservation? (Assignment of Error 1).
2. Was it legal error to deny the Nooksack Business Corporation's motion to dismiss the complaint for lack of subject matter jurisdiction where the trial court erroneously concluded subject matter jurisdiction could be established by the Nooksack Business Corporation's limited waiver of sovereign immunity and the venue selection clause in the agreements, but the law does not permit parties to confer subject matter jurisdiction by agreement? (Assignment of Error 2).
3. Was it legal error to deny the Nooksack Business Corporation's motion to dismiss the complaint for lack of personal jurisdiction where the Nooksack Business Corporation's limited waiver of sovereign immunity was unenforceable as part of agreements that are void as an unapproved "management agreement" under the Indian Gaming Regulation Act? (Assignment of Error 3).
4. Does the holding in *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp.*, 658 F.3d 684 (7th Cir. 2011), apply here and mandate that dismissal was required because the agreements at issue constituted an unapproved "management agreement" under the Indian Gaming Regulation Act? (Assignment of Error 3).
5. Was it legal error to deny the Nooksack Business Corporation's motion to dismiss the complaint for failure to state a claim where the Loan Agreement was void and unenforceable as an unapproved "management agreement"?

under the Indian Gaming Regulation Act? (Assignment of Error 4).

IV. STATEMENT OF THE CASE

The Nooksack Business Corporation (“NBC”) seeks relief from the trial court’s failure to dismiss the complaint of Outsource Services Management LLC (“OSM”). The matter involves agreements between an out-of-state lender and NBC, a Nooksack Indian Tribe (the “Tribe”) tribally-chartered corporation that owns and operates the Tribe’s Nooksack River Casino (the “Casino”) on the Tribe’s reservation.

NBC moved to dismiss based on the absence of (1) subject matter and (2) personal jurisdiction, and on (3) failure to state a claim for which relief may be granted because the underlying agreements are void and unenforceable, rendering all of their terms, including NBC’s sovereign immunity waiver, void and unenforceable. The trial court denied the motion.

A. Nooksack Business Corporation entered into agreements to finance its Nooksack River Casino on the Nooksack Indian Reservation.

NBC is a tribally-chartered corporation of the Tribe, which operates the Casino in Deming, Washington, within the boundaries of the Nooksack Reservation. CP 414–417 (Loan Agreement, §§ 4.1, 4.18(b)). NBC obtained a \$15,315,856 loan from BankFirst, a South Dakota bank, on December 21, 2006. CP 380–381 (Complaint, ¶ 2). OSM is a loan servicer acting on behalf of the Federal Depository Insurance Corporation

as a receiver for BankFirst. CP 380; CP 382 ¶ 10. For purposes of this appeal, OSM and BankFirst are synonymous.

B. The agreement vested control over all of the proceeds of the Casino's operations in the lender.

The BankFirst loan paid off the \$8,129,694 balance of the existing construction loan, the \$1,895,019 owed to gaming equipment manufacturer Bally's for the purchase of refurbished machines, and financed improvements to the Casino building. CP 383 (Complaint, ¶ 14); CP 408–409 (Loan Agreement § 2.1). The loan was secured by all of the gaming equipment in the Casino and all proceeds from gaming in the Casino, as well as any operations financed in whole or in part by proceeds from the Casino. CP 383 (Complaint, ¶ 15).

The Loan Agreement solely concerns on-reservation affairs. It was executed and performed by NBC and the Tribe on the Reservation. NBC was required under the Loan Agreement to locate all parts of its Casino gaming operations on the Reservation. CP 432 (Loan Agreement, § 6.30).¹ The collateral purporting to secure the debt is located solely on the Reservation. CP 516 (Security Agreement (Borrower)), § 1 (Exh. B to the Complaint)). NBC was required to make monthly payments of

¹ Even in the absence of a contractual provision requiring Casino operations to be located on the Reservation, gaming can only occur on the Reservation. *See, e.g., Alzheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 811 (N.D. Ill. 1993) (“The very existence of the bingo operations arises from the Indian tribe’s sovereignty over tribal trust lands . . . but for its land, state law would not permit it.”); *see, also*, RCW 9.46.010; and 25 U.S.C. §§ 2710(a)(1), (b)(1), (d)(1)(A)(i) and (d)(2)(A), for which the consistent and overarching requirement common to each class of permissible Indian gaming under IGRA is that it be sited on Indian land within the tribe’s jurisdiction.

principal and interest solely out of the proceeds of the Casino's operations in excess of normal operating expenses. CP 383 (Complaint, ¶ 14). The revenues pledged under the Loan Agreement and related documents were generated only at the Casino, on the Reservation. Enforcement under the limited recourse loan agreement would be against the collateral, all of which is located on the Reservation. CP 396 (Loan Agreement, § 1.1, defining Collateral), 516 (Security Agreement (Borrower), § 1(a) granting security interest in Collateral). The breach of the Loan Agreement alleged to have occurred on January 9, 2009 occurred when the Casino failed to transfer proceeds from its on-Reservation Casino operation to the depository bank sufficient to satisfy the Monthly Debt Service under the Loan Agreement. CP 384 (Complaint, ¶ 19). *See also* CP 382 ¶¶ 11, 13, 14; CP 430 ¶ 6.16; CP 432 ¶ 6.28; CP 400 ("Facilities" and "Facilities Enterprise").

Under the terms of the Loan Agreement and its Springing Depository Agreement ("SDA"), all proceeds from the Casino operations were Pledged Revenues, as that term is defined in the SDA, except those amounts that had to be retained by the Casino as its Daily Cash-on-Hand Requirements, as follows:

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. SDA, at § 1.1, p. 9.

Daily Cash-on-Hand Requirements: 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). SDA, at § 1.1, p. 2.

CP 538 (SDA, at § 1.1, p. 9, Exh. C to Complaint); CP 531 (SDA, at § 1.1, p. 2, Exh. C to Complaint) (emphasis added).

Under the terms of the Loan Agreement and SDA, NBC was required to make daily deposits of all Pledged Revenues into accounts controlled by the lender, which made daily sweeps of the accounts. CP 544 (SDA, at § 3.1). On a daily basis, NBC had to certify its Daily Cash-on-Hand Requirements, to justify not depositing that portion of the daily receipts. CP 544 at § 3.1(b). Each month, NBC was required to provide the lender an Operating Budget of that month's Operating Expenses. CP 544–545 at § 3.2. “Operating Expenses” was defined very broadly, as follows:

Operating Expenses: the current expenses of operation, maintenance and repair of the Facilities, as determined consistently with GAAP, excluding capital expenditures and excluding those items expressly excluded below, but including Permitted Tribal Gaming Commission Expenses. ***Operating Expenses shall include, without limitation,*** prizes, wages, salaries and bonuses to personnel, the cost of materials and supplies used for current operation and maintenance, security costs, utility expenses, trash removal, cost of goods sold (other than with respect to tribal crafts sold in the gift shop), advertising, insurance premiums, rental payments for real or personal property (other than capital lease payments), payments of property taxes owing to the State or any political subdivision of the State, payments to the State pursuant to the Compact or any political subdivision of the State as required by the Compact, or any applicable Gaming Regulations, payments made pursuant to Gaming Device Agreements, payments required to be made to the National Indian Gaming Commission pursuant to IGRA, and ***current expenses*** that are not recurrent monthly but may be reasonably expected to be incurred in accordance with GAAP. Notwithstanding the foregoing, ***Operating Expenses shall not include*** any interest expense or other payment constituting Debt Service on any Debt, Monthly Debt Service Charges, any allowance for depreciation, renewals or replacement of capital assets or any other non-cash charges. Operating Expenses shall also not include any amount paid to a firm, corporation or other business entity under a Management Agreement, Monthly Governmental Payments or any other distribution of money or property to the Tribe other than Permitted Tribal Gaming Commission Expenses or other payments for good or services that if paid to a Person not an Affiliate of the Tribe would be treated as an Operating Expense (but only so long as the amount so paid does not exceed that which would be reasonably payable to a Person who is not such an Affiliate). ***This definition of “Operating Expenses” differs from use of the term “operating expenses” in IGRA, its implementing regulations. Since this Depository Agreement is not a***

Management Agreement, however, the IGRA definitions are not applicable to this Depository Agreement.

CP 535 – 536 (SDA, at § 1.1, pp 6–7) (emphases added).

Funds to cover that month's Operating Budget were thereafter to be transferred to an Operating Account and so long as permitted by Bankfirst, NBC could withdraw and use those funds to pay authorized Operating Expenses. CP 544 – 545 (SDA, at §§ 3.1–3.3). Authorized Operating Expenses included only current expenses, and did not include any aged accounts. CP 535–536 (SDA, at § 1.1, p. 6). As a consequence, if NBC was late on a payment to a vendor and its account became past due, the Loan Agreement and SDA prohibited the payment of the past due invoice—in effect, allowing the lender to determine which vendors NBC was able to pay, and which would not be paid. The funds in the Operating Account remained Pledged Assets under the agreements, and in the event of a default, the Loan Agreement and SDA permitted the lender to appropriate without any notice any and all Pledged Financial Assets in any account, including the Operating Account. CP 553 at § 6.2.

C. The agreements contained limited waivers of sovereign immunity.

The various loan documents between the lender and NBC included a limited waiver of sovereign immunity contained in a forum selection clause. In these provisions, NBC consented to arbitration or to be sued in three alternative venues, in the following order of priority: (1) the United States District Court for the Western District of Washington, (2) any state

court of general jurisdiction, or, (3) if neither of the first two courts had jurisdiction, in tribal court. CP 446 (Loan Agreement, § 8.26); CP 459 (Promissory Note, § 16); CP 521 (Security Agreement (Borrower), § 16); CP 563 (SDA, at § 9.12); CP 584 – 585 (1st Forbearance, § 15); CP 612 – 613 (2nd Forbearance, §17); and CP 648 (3rd Forbearance, § 17).

These forum selection clauses recognized that the federal and state courts may not have jurisdiction, stating that “if none of the foregoing courts shall have jurisdiction” the dispute would proceed before “all tribal courts and dispute resolution processes of the Tribe.” CP 446 (Exhibit A to Complaint, § 8.26).

D. Nooksack Business Corporation defaulted and Outsource Services Management required it to enter into a series of forbearance agreements.

BankFirst declared that an event of default had occurred on January 2, 2009, and BankFirst and NBC entered into a series of three forbearance agreements. CP 384 – 385 (Complaint, ¶¶ 19–20, 24, 28), CP 576–601 (Exh D-1st Forebearance); CP 0602 – 0636 (Exh. E-2nd Forebearance); CP 637 – 661 (Exh. F-3rd Forebearance). Under the Second Forbearance Agreement (“2nd Forbearance”), the term “Operating Expenses” was amended to include the cost of the lender’s legal fees and expenses, and payments to the tribal government out of the Pledged Assets was reduced to \$0, as was the amount to be paid to the “Repair and Replacement Account Deposit.” CP 607 at § 7(b). NBC was required to negotiate forbearance agreements with all of its vendors owed in excess of \$10,000. CP 608 at § 8(b)(i). NBC was required to prepare monthly

unaudited financial statements, comparisons of actual and projected monthly income, accounting reconciliations in a form that was satisfactory to the lender, and an accounts payable and aged payables report. CP 608–609 at § 8(b)(iv).

Without regard for the lender’s actual, practical control over NBC’s relationships with its vendors, its accounting systems and procedures, and its budgeting of its operating expenses by virtue of the terms of the forbearance agreements, the 2nd Forbearance Agreement contained a disclaimer that the lender was not exercising any control over all or any portion of NBC’s gaming operations, including NBC’s relationships with its vendors, its accounting systems and procedures, and its budgeting of its operating expenses. CP 614 – 615 at § 21.

E. The trial court denied the Nooksack Business Corporation’s motion to dismiss Outsource Services Management’s complaint for defects fatal to this lawsuit.

OSM filed a lawsuit against NBC in Whatcom County Superior Court. CP 380–387 (Complaint). Nooksack Business Corporation moved to dismiss the complaint for defects fatal to the lawsuit. CP 83–98 (Motion to Dismiss). Oral argument occurred March 25, 2011, focusing primarily on the issue of subject matter jurisdiction. 3/25/11 VR.

The trial court denied the motion. CP 15–21 (Order). The trial court determined that it possessed subject matter jurisdiction based on the parties’ agreement. CP 9–10, ¶¶ 14–21. The trial court rejected NBC’s arguments that the agreements at issue were void and unenforceable as a

matter of law under the IGRA. CP 10, ¶ 22. The trial court also determined that the limited waivers of sovereign immunity in the agreements permitted personal jurisdiction over NBC. *Id.* The trial court certified the denial order as final and appealable pursuant to CR 54(b) and stayed the litigation pending appellate review. CP 7–13.

NBC timely appealed. CP 5–13. Commissioner Mary Neel ruled that the finality certification was proper and determined the appeal would proceed.

V. ARGUMENT

This Court should reverse one or more of the trial court's legal errors and mandate dismissal. On *de novo* review, this Court should determine the superior court lacked subject matter jurisdiction over a matter brought by a non-Indian against an Indian tribal corporation for an action arising on an Indian reservation. The trial court erroneously concluded that NBC had subjected itself to both the subject matter and the personal jurisdiction of Washington state courts by virtue of the forum selection clause in the Loan Agreement. But, it is black letter law both that (1) parties cannot confer subject matter jurisdiction by agreement, where it otherwise does not exist; and (2) Washington courts do not have subject matter jurisdiction to decide matters involving non-Indian plaintiffs, Indian tribal defendants, and claims for acts or omissions arising on an Indian reservation. Dismissal was required.

This Court also should reverse, on *de novo* review, the superior court's determination that it had personal jurisdiction over NBC. As a matter of law, the NBC's limited waiver of sovereign immunity was void where it was contained in agreements that are unenforceable pursuant to the Indian Gaming Regulation Act. The agreements constitute a "management agreement" for which approval by the Chairman of the National Indian Gaming Commission was required. It is undisputed that approval was never obtained. Without approval, such agreements are void. 25 C.F.R. § 533.7. The void agreements, therefore, were an invalid basis upon which to premise personal jurisdiction over NBC.

As a third basis for reversal as a matter of law, the complaint should have been dismissed for failure to state a claim upon which relief can be granted. OSM may not enforce the void agreement, nor amend a void agreement to sever the invalid portions or insert additional terms.

This Court will consider at any time the issues of lack of jurisdiction or failure to state a claim. RAP 2.5(a). The asserted jurisdictional defects relate equally to this Court's jurisdiction. OSM states no enforceable claim. The trial court should have dismissed the complaint.

A. Standards of Review All Are *De Novo*.

NBC presents legal issues for review.

Whether a court has subject matter jurisdiction is a question of law reviewed *de novo*. *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971

P.2d 32 (1999). Similarly, 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, 111, 147 P.3d 1275 (2006) (citing *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wn.2d 862, 876, 929 P.2d 379 (1996)). Whether an enforceable contract exists and proper construction of its terms are also questions of law reviewed *de novo*. *Underwood v. Sterner*, 63 Wn.2d 360, 364, 387 P.2d 366 (1963) (reviewing conclusions of law regarding the existence of the essential elements of a contract); *O.R.S. Distilling v. Brown-Forman Corp.*, 972 F.2d 924, 926 (8th Cir. 1992) (“Where the relevant facts are not in dispute, the existence of a contract is a question of law for the court.”); *Berg v. Hudesman*, 115 Wn.2d 657, 667-68, 801 P.2d 22 (1990). Finally, whether to dismiss for failure to state a claim upon which relief can be granted presents a legal question reviewed *de novo*. *Contreras v. Crown Zellerbach*, 88 Wn.2d 735, 742, 656 P.2d 1173 (1977).

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, 26 P.3d 241 (2001); *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

In applying these standards, this Court should reverse and dismiss.

B. Dismissal Was Proper Because The Trial Court Lacks Subject Matter Jurisdiction.

The trial court never had subject matter jurisdiction of OSM's claims. It should have dismissed the action. The trial court erred by concluding that the parties' agreements could confer subject matter jurisdiction on the court. The agreements could not. This Court should reverse for dismissal.

1. Washington State courts lack subject matter jurisdiction over civil suits by non-Indians against Indians where, as here, the cause of action arises on an Indian reservation.

Washington State courts lack subject matter jurisdiction over claims like OSM's. "Jurisdiction is the power of the court to hear and determine the class of action to which a case belongs." *State v. Buchanan*, 138 Wn.2d 186, 196, 978 P.2d 1070 (1999). "Subject matter jurisdiction" is the authority of the court to hear and determine the particular type of controversy before it. *In re Adoption of Buehl*, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976). Subject matter jurisdiction does not turn on agreement, stipulation, or estoppel. *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998); *Wesley v. Schneckloth*, 55 Wn.2d 90, 93-94, 346 P.2d 658 (1959). Either a court has subject matter jurisdiction or it does not. *Wesley*, 55 Wn.2d at 93.

Absent jurisdiction over the subject matter of the action, a trial court is powerless to pass on the merits of a controversy brought before it. *Davis v. Wash. State Dep't of Labor & Indus.*, 159 Wn. App. 437, 442,

245 P.3d 253 (2011). In such a case, it is the court's duty to dismiss the case. *Id.*; see also *Fortier v. Fortier*, 23 Wn.2d 748, 749–50, 162 P.2d 438 (1945). A judgment entered without subject matter jurisdiction is void. *In re Marriage of Ortiz*, 108 Wn.2d 643, 649, 740 P.2d 843 (1987).

Here, the superior court did not have authority to pass on the merits of the controversy between OSM and NBC, a tribally-chartered corporation. State power over Indians on a reservation is limited to the power granted by Congress in 25 U.S.C. § 1322 (1976) (originally enacted as Act of August 15, 1953, ch. 505, § 7, 67 Stat. 590, commonly known as Public Law 280). *Powell v. Farris*, 94 Wn.2d 782, 784, 620 P.2d 525 (1980). Public Law 280 (“PL 280”) authorized five states, including Washington, to assume jurisdiction over “civil causes of action” and “criminal offenses” occurring on a reservation. 67 Stat. 590.

Pursuant to that grant of authority, the Washington legislature enacted RCW 37.12, in which the state bound itself to exercise “criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state” in accordance with PL 280. RCW 37.12.010. Washington's statute specifies that, with the exception of eight enumerated categories of law not applicable here, tribal consent is necessary for the assumption of state jurisdiction. RCW 37.12.010(1) – (8); .021. A tribal council, acting for the Tribe, cannot unilaterally cede jurisdiction to a state. *Nelson v. Dubois*, 232 N.W.2d 54, 56 (N.D. 1975). To give consent to effectuate the state's assumption of jurisdiction, the governing body of a tribe must present to the governor a resolution

expressing the tribe's desire for state jurisdiction. RCW 37.12.021. The governor must then issue a proclamation to that effect. *Id.* An individual defendant such as NBC is no more able to confer jurisdiction upon the state than is a tribal council or a state, acting unilaterally. *Nelson*, 232 N.W.2d at 57.

The Tribe has not consented to Washington's assumption of subject matter jurisdiction over general civil disputes related to transactions occurring exclusively within the boundaries of the Nooksack Reservation. *See State v. Cooper*, 130 Wn.2d 770, 774, 928 P.2d 406 (1996) ("The Nooksack Tribe has not consented to the assumption of state jurisdiction.").

As a matter of general Indian Law, moreover, state courts are not free to exercise jurisdiction over civil suits by non-Indians against Indians where the cause of action arises on an Indian reservation. *Williams v. Lee*, 358 U.S. 217, 223, 79 S. Ct. 269, 272, 3 L. Ed. 2d 251 (1959); *Powell*, 94 Wn.2d at 786; CR 82.5. That is the case here. This matter involves an agreement with a tribal corporation, executed on the Reservation, performed on the Reservation, and allegedly breached on the Reservation. The funds advanced by the lender were for repaying prior Casino indebtedness, and expanding and renovating the Casino. CP 380. The lender required that Casino operations take place *only* on the Reservation. CP 432 (Loan Agreement, § 6.30). The collateral purporting to secure the debt is located on the Reservation. CP 516 (Security Agreement (Borrower), § 1 (Exh. B to the Complaint)). NBC was required to make

monthly payments of principal and interest solely out of the proceeds of the Casino's operations in excess of normal operating expenses. CP 383 (Complaint, ¶ 14). The revenues allegedly pledged under the Loan Agreement were generated only at the Casino, on the Reservation. Enforcement under the limited recourse loan agreement would be against the collateral, which is located on the Reservation. The breach of the Loan Agreement alleged to have occurred on January 9, 2009 occurred when the Casino failed to transfer proceeds from its Casino operation to the depository bank sufficient to satisfy the Monthly Debt Service under the Loan Agreement. CP 384 (Complaint, ¶ 19). *See also* CP 382 ¶¶ 11, 13, 14; CP 430 ¶ 6.16; CP 432 ¶ 6.28; CP 400 ("Facilities" and "Facilities Enterprise").

Under *Williams v. Lee* and its progeny, Washington courts lack subject matter jurisdiction to hear this suit because Congress has not authorized it, the Tribe has not consented to Washington courts exercising general jurisdiction over civil disputes arising from activities occurring on the Reservation with tribal parties, and the Washington Legislature has not provided that its courts will exercise such jurisdiction. *Williams v. Lee*, 358 U.S. at 223 (Arizona state court had no subject matter jurisdiction to decide a case brought by a non-Indian against an Indian where cause of action arose on Indian reservation). "As a general rule, 'exclusive tribal jurisdiction exists . . . when an Indian is being sued by a non-Indian over an occurrence or transaction arising in Indian country.'" *Found. Reserve Ins. Co. v. Garcia*, 734 P.2d 754, 756 (N.M. Supreme Court 1987)

(citations omitted). “There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.” *Williams v. Lee*, 358 U.S. at 223.

The trial court lacked subject matter jurisdiction. In such circumstances, the reviewing court must reverse and dismiss. *Davis*, 159 Wn. App. at 442; *Fortier*, 23 Wn.2d at 749–50. This Court should grant NBC relief.²

2. The trial court erred as a matter of law in concluding that it obtained subject matter jurisdiction by virtue of the parties’ forum selection clause.

The trial court erroneously denied NBC’s motion to dismiss when it concluded that the parties’ contractual agreement conferred subject matter jurisdiction over the matter. *See* CP 9–10, ¶¶ 14–21. The trial court misinterpreted federal and Washington case law. This Court should reverse on *de novo* review.

² In its motion to dismiss, NBC alternatively argued that these grounds support dismissal for improper venue under CR 12(b)(3) or failure to state a claim under CR 12(b)(6) because some courts facing similar circumstances have interpreted such motions to dismiss as motions on the alternative grounds. *See* CP 0083–098 (citing *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 244 n.5, 178 P.3d 981 (2008) (citing *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833 n.5, 161 P.3d 1016 (2007) (“some federal courts have treated a motion to dismiss under a forum selection clause as a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), others as a motion to dismiss for improper venue under Fed. R. Civ. P. 12(b)(3), and others as a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6)”))). Such analysis is available to this Court and shows error. Litigation in state court of OSM’s claims against NBC is improper on all of these grounds.

The trial court's decision was contrary to multiple holdings of the Washington Supreme Court that subject matter jurisdiction may not be conferred by agreement of the parties or by stipulation, and that the lack of subject matter jurisdiction is not subject to waiver. *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 319, 76 P.3d 1183 (2003) ("Jurisdiction exists because of a constitutional or statutory provision. A party cannot confer jurisdiction; all that a party does is invoke it."); *Skagit Surveyors*, 135 Wn.2d at 556; *Barnett v. Hicks*, 119 Wn.2d 151, 161, 829 P.2d 1087 (1992); *Fortier*, 23 Wn.2d at 749–50. Despite the forum selection clause in the various loan documents, subject matter jurisdiction may not be conferred by agreement. *Id.*; see also *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 620, 937 P.2d 1158 (1997).

The Washington Supreme Court has noted that a court's power to hear the case is unaffected by the parties' actions, stating:

The word 'jurisdiction' is derived from the Latin 'juris' and 'dico.' It means 'I speak by the law.' . . . 'Jurisdiction does not relate to the rights of the parties, as between each other, but to the power of the court.' . . . ***A constitutional court cannot acquire jurisdiction by agreement or stipulation. Either it has or has not jurisdiction.*** If it does not have jurisdiction, any judgment entered is void *ab initio* and is, in legal effect, no judgment at all. Jurisdiction should not be sustained upon the doctrine of estoppel, especially where personal liberties are involved.

Wesley, 55 Wn.2d at 93–94 (emphasis added, internal citations omitted).

In *Wesley*, the Court went on to hold that federal courts have exclusive

jurisdiction over prosecutions of Indians for on-reservation crimes under the Major Crimes Act, 18 U.S.C. § 1153. *Id.*

The trial court's denial of NBC's motion to dismiss conflicts with this precedent, and persuasive authority from other jurisdictions that have considered the issue. *See, e.g., Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 378 (Ct. App. Minn. 1996) ("While sovereign immunity and lack of subject matter jurisdiction both deprive courts of the authority to hear certain matters, they differ in that parties may waive the former jurisdictional defect, but not the latter"); *In re Prairie Island Dakota Sioux*, 21 F.3d 302, 304-305 (8th Cir. 1994) (Tribal sovereign immunity may be waived in certain circumstances and is subject to the plenary power of Congress; lack of subject matter jurisdiction may not be waived. Subject matter jurisdiction is primary and an absolute stricture on the court; a waiver of sovereign immunity cannot extend a court's subject matter jurisdiction.

An Indian tribe's limited waiver of sovereign immunity in a forum selection clause cannot confer subject matter jurisdiction on a court that otherwise had none. The fact that NBC may have consented to personal jurisdiction with respect to a suit in state court in a forum selection clause in the loan documents *does not* confer subject matter jurisdiction. Subject matter jurisdiction cannot be stipulated. *Barnett v. Hicks*, 119 Wn.2d at 161. The trial court erred if it considered these authorities distinguishable because they did not involve Indian tribes. The nature of subject matter jurisdiction does not differ on this basis.

Subject matter jurisdiction, moreover, refers to the authority of a court to adjudicate a particular *type* of controversy, not a particular *case*. *State v. Franks*, 105 Wn. App. 950, 956, 22 P.3d 269 (2001); *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994). Individual agreements among parties cannot affect the authority of a court to adjudicate a type of controversy, and NBC's limited waiver of sovereign immunity in this transaction does not supersede the Tribe's refusal to consent to the state's general civil jurisdiction under PL 280. State jurisdiction over Indian country may be obtained only by state and tribal compliance with Public Law 280. *Nelson*, 232 N.W.2d at 56.

As argued above, adjudication in Washington state courts of civil suits by non-Indians against Indians is barred where the cause of action arises on an Indian reservation. *Williams*, 358 U.S. at 223; RCW 37.12.010(1) – (8); .021. OSM did not dispute that the cause of action arises on the Tribe's Reservation. *See* CP 64–82 (OSM's opposition briefing).³ The trial court, accordingly, lacks subject matter jurisdiction to adjudicate this case.

³ In its argument to the trial court, OSM asserted that the location of the Casino was not important, because the determinative issue, in OSM's view, was the waiver of sovereign immunity. RP 25:16 – 26:19. OSM's position is that regardless of where the contract was performed, if an Indian tribe waives its sovereign immunity and agrees to a forum selection clause, that forum has both personal and subject matter jurisdiction to adjudicate. *Id.* The trial court agreed, holding that the waiver of sovereign immunity was NBC's consent to the personal jurisdiction of Washington state courts, and that the consent to personal jurisdiction impliedly contains an acknowledgment that the subject matter of the dispute is to be heard in the subject court. CP 9-10. That holding was erroneous as a matter of law.

Even where the parties stipulate to venue or personal jurisdiction, a court is powerless to pass on the merits of a controversy where it does not have subject matter jurisdiction. *Davis*, 159 Wn. App. at 442. In such a case, it is the court's duty to dismiss the case. *Id.*; *see also Fortier*, 23 Wn.2d at 749–50.⁴

The agreements, moreover, do not express NBC's consent – express or implied – to subject matter jurisdiction. The language at issue expressly recognizes that the listed courts may not have such jurisdiction. Section 8.26 of the Loan Agreement is a forum selection clause in which the parties agreed to three alternative venues in which to proceed with a lawsuit. *See* CP 0446. The parties openly acknowledge that one or more of the venues may lack jurisdiction to adjudicate the claims asserted, as follows:

. . . [T]he Borrower hereby consents with respect to any Claim: (A) to arbitration in accordance with the provisions of Section 8.27, and (B) to be sued in (i) the United States District Court for [the] Western District of Washington (and all federal courts to which decisions of the United States District Court for the Western District of Washington may be appealed), (ii) any court of general jurisdiction in the State (including all courts of the State to which decisions of

⁴ In contrast to subject matter jurisdiction, a party may consent to both venue and personal jurisdiction. *Kysar v. Lambert*, 76 Wn. App. 470, 484-85, 887 P.2d 431 (1995) (*citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (personal jurisdiction requirement is a waiveable right; there are a “variety of legal arrangements” by which a litigant may give “express or implied consent to the personal jurisdiction of the court.”)). *See also Dougherty*, 150 Wn.2d at 316 (“Venue is a procedural, rather than jurisdictional, issue.”). A forum selection clause is one in which the parties agree on a presiding tribunal, and consent to personal jurisdiction even where sufficient contacts may be lacking. *Kysar*, 76 Wn. App. at 485.

such courts may be appealed), and (iii) only **if none of the foregoing courts shall have jurisdiction**, or only to permit the compelling of arbitration in accordance with Section 8.27, or the enforcement of any judgment, decree or award of any foregoing court or any arbitration permitted by Section 8.27, **all tribal courts and dispute resolution processes of the Tribe. . .**

CP 446 (Exhibit A to Complaint, § 8.26) (emphasis added).

Mere consent to be sued, even consent to be sued in a particular court, does not alone confer jurisdiction upon that court to hear a case if that court would not otherwise have jurisdiction over the suit. *Weeks Constr., Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668, 671 (8th Cir. S.D. 1986); *R.C. Hedreen Co. v. Crow Tribal Housing Authority*, 521 F. Supp. 599, 606 (D. Mont. 1981); *Nelson v. Dubois*, 232 N.W.2d 54, 57 (N.D. 1975). This Court should conclude that section 8.26 cannot, and does not, create subject matter jurisdiction.

If, as OSM contended and the trial court incorrectly accepted, this forum selection clause could confer subject matter jurisdiction on Washington state courts, then the language “if none of the foregoing courts shall have jurisdiction,” would be unnecessary. Its inclusion reflects Bankfirst’s and NBC’s recognition from the outset that the parties, by agreement, cannot confer subject matter jurisdiction on a particular court.

This Court will not be denying OSM a forum in which to seek relief by reversing. On the contrary, the federal courts may have jurisdiction, and the Nooksack Tribal Court most certainly has

jurisdiction. The matter also may be arbitrable and the award, if any, confirmable in the Nooksack Tribal Court.

This Court should reject OSM's arguments against dismissal. Before the trial court, OSM relied on foreign authority which conflates personal jurisdiction, to which a party can consent, with subject matter jurisdiction. *See* CP 71–75. With the single exception of OSM's citation to the Montana Supreme Court's divided opinion in *Bradley v. Crow Tribe of Indians*, 315 Mont. 75, 67 P. 3d 306 (2003) (*see* CP 74), all of the cases cited by OSM involved disputes between non-Indians and Indians regarding claims and causes of action that arose *outside* the reservations and *within* the state. The issues in these cases never implicated *Williams v. Lee*. In contrast, OSM cannot, and does not, dispute the fact that the loan transaction and all activities of the Casino occur entirely on the Nooksack Reservation.

As to the Montana *Bradley* decision, this Court should reject it. As the dissent readily points out, the court's analysis was incomplete. *See Bradley*, 67 P.3d. at 312. The dissent noted that the majority inadequately addressed subject matter jurisdiction when it examined, based on what the parties raised, only the contract to determine if the lawsuit could proceed, stating:

There are two fundamental issues of jurisdiction present in this case, tribal sovereign immunity from suit and tribal court jurisdiction versus state court jurisdiction. Because proper subject matter jurisdiction can be raised at any time and can be raised *sua sponte* by this Court, these

jurisdictional issues should be raised and addressed by this Court. *Thompson v. Crow Tribe of Indians*, 1998 MT 161, P12, 289 Mont. 358, P12, 962 P.2d 577, P12 (holding tribe immune from suit). By virtue of its decision reversing the District Court on a contract analysis alone, the majority opinion fails to properly address either of these issues.

Id. (emphasis added). Because the majority never undertook this analysis, the decision was wrongly decided. The decision is not binding on this Court, and conflicts with Washington precedent.

This case at hand concerns subject matter jurisdiction as analyzed in *Williams v. Lee*. This Court should also reject OSM's citation to *C & L Enters. Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001), where the matter involved a contract performed entirely outside the reservation, on non-trust property, and the Band had waived its sovereign immunity and agreed to binding arbitration of disputes arising from the contract. The question addressed by the Supreme Court was not whether a state court had subject matter jurisdiction over the suit, but "whether the Tribe waived its immunity from suit in state court when it expressly agreed to arbitrate disputes with C & L relating to the contract, to the governance of Oklahoma law, and to the enforcement of arbitral awards in any court having jurisdiction thereof." *C & L Enters.*, 532 U.S. at 414. The Supreme Court's conclusion was limited to determining "that under the agreement the Tribe proposed and signed, the Tribe clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court; the Tribe thereby waived its sovereign immunity from C & L's

suit.” *Id* at 423. The Court neither considered nor determined the question of subject matter jurisdiction. Indeed, because the matter arose entirely off-reservation, the subject matter jurisdiction analysis required under *Williams v. Lee* was not implicated.

This action should have been dismissed for lack of subject matter jurisdiction. This Court should reverse and require the dismissal of OSM’s complaint.

C. **Dismissal Was Proper Because the Trial Court Lacks Personal Jurisdiction and the Lender Failed to State a Claim Upon Which Relief Can Be Granted Where the Agreements Are Void and Unenforceable under the Indian Gaming Regulation Act.**

The agreements at issue are void and unenforceable under the Indian Gaming Regulation Act. As a matter of law, the trial court erred in not holding so. Because the agreements are void and unenforceable, the trial court lacked personal jurisdiction over NBC, and OSM failed to state a cause of action. Dismissal was warranted.

1. **The Loan Agreement and Forbearance Agreements are void and unenforceable under the Indian Gaming Regulation Act.**

This Court should hold on *de novo* review, based on the 7th Circuit Court of Appeals’ comprehensive analysis in *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp.*, 658 F.3d 684 (7th Cir. 2011), that the agreements at issue are void and unenforceable.

Under the law governing tribal gaming and casino operations, “management agreements” for tribal casinos that have not been approved

by the Chairman of the National Indian Gaming Commission (“NIGC”) are void and unenforceable. In the *Wells Fargo* case, the 7th Circuit held that void means void, even where the end result is that a Trust Indenture securing repayment of \$50 million of bonds cannot be enforced. 658 F.3d at 699. In addition, because the tribal corporation’s limited waiver of sovereign immunity was contained in the void Trust Indenture, it was similarly unenforceable and could not provide the tribe’s consent to personal jurisdiction, so the district court lacked jurisdiction. 658 F.3d at 702.

An agreement can constitute a “management agreement” under the Indian Gaming Regulatory Act, triggering the requirement that it be approved by the NIGC, even if the agreement is not called a management agreement, as was the case in *Wells Fargo*, and as is the case here. The BankFirst Loan Agreement and the ensuing forbearance agreements at issue here constitute a management contract that has not been approved by the NIGC. They are therefore void and unenforceable.

“If an agreement is void, it is by definition not a contract. Rather than saying that a contract is void, it would be more exact to say that no contract has been created. . . . The result is that the contract is of no effect, is null, and is incapable of being enforced.” 25 David K. Dewolf & Keller W. Allen, *Washington Practice: Contract Law and Practice* § 1.7, at 12 (2nd ed. 2007). “[T]he law neither gives [parties to a void contract] a remedy nor otherwise recognizes a duty of performance by the promisor,” because “such a promise is not a contract at all.” *Golden Pisces, Inc. v.*

Fred Wahl Marine Constr., Inc., 495 F.3d 1078, 1081 (9th Cir. 2007) (quoting Restatement (Second) of Contracts § 7 cmt. a (1981) in distinguishing between contracts that are void as opposed to divisible or voidable); accord *Vedder v. Spellman*, 78 Wn.2d 834, 839–40, 480 P.2d 207 (1971) (Neill, J., concurring) (noting the difference between contracts that are null and void and contracts that are merely unenforceable by certain parties).

A contract that is either illegal or violates public policy is void and unenforceable. *Fluke Corp. v. Hartford Accident & Indem. Co.*, 102 Wn. App. 237, 245, 7 P.3d 825 (2000), *aff'd*, 145 Wn.2d 137, 34 P.3d 809 (2001); *Sherwood & Roberts-Yakima, Inc. v. Leach*, 67 Wn.2d 630, 636, 409 P.2d 160 (1965). A contract that “seriously offends law or public policy” is “void ab initio” or “null from the beginning” *Helgeson v. City of Marysville*, 75 Wn. App. 174, 180 n.4, 881 P.2d 1042 (1994) (quoting BLACK’S LAW DICTIONARY 1574 (6th ed. 1990)). An instrument that is “intimately connected” to an illegal instrument is likewise tainted and unenforceable. *Sherwood*, 67 Wn.2d at 637. In an illegal contract, there is no obligation to perform even if the other party has performed or received a benefit from the bargain. *Cascade Timber Co. v. N. Pac. Ry. Co.*, 28 Wn.2d 684, 708, 184 P.2d 90 (1947).

An agreement that is void *ab initio* cannot thereafter be amended to render it enforceable. *See, e.g.*, 25 David K. Dewolf & Keller W. Allen, Washington Practice: Contract Law and Practice § 1.7, at 12 (2nd ed. 2007); *Golden Pisces, Inc. v. Fred Wahl Marine Constr., Inc.*, 495 F.3d

1078, 1081 (9th Cir. 2007); *First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1176 (10th Cir. 2005). If there is no contract *ab initio*, there is nothing to amend. *Berg v. Ting*, 125 Wn.2d 544, 554, 886 P.2d 564 (1995) (void agreement is not subject to reformation or specific performance).

The agreements at issue are void as a “management agreement” for a tribal casino that has not been approved by the Chairman of the NIGC. In 1988, Congress passed the “Indian Gaming Regulation Act.” (“IGRA”). IGRA establishes “a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.” 25 U.S.C. § 2702(1). IGRA was also enacted to “shield [Indian tribes] from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players.” 25 U.S.C. § 2702(2). IGRA achieves these goals, in part, by requiring federal oversight of contracts between tribes and non-tribal entities for the management of tribal gaming operations. *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 677 F. Supp. 2d 1056 (W.D. Wis. 2010), *motion to amend denied*, 2010 WL 1687877 (W.D. Wis. April 23, 2010), *aff’d in part, reversed and remanded in part*, 658 F.3d 684 (7th Cir. 2011).

Tribes may enter into contracts for the management of gaming operations only with the approval of the NIGC Chairman. *See* 25 U.S.C. § 2711(a)(1); 25 U.S.C. § 2710(d)(9). Unapproved management contracts

are void. *See* 25 C.F.R. § 533.7; *First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1176 (10th Cir. 2005) (“Lacking the formality of NIGC approval, an agreement to manage does not become a contract: it is void”).

The NIGC is charged with the duty to review and approve casino management contracts and related agreements between Indian tribes and management contractors. *See* 25 U.S.C. §§ 2705(a)(4), 2711(b). Under its regulations, the NIGC must review and approve, among other things, gaming management contracts and agreements effectuating a change in persons with a direct or indirect financial interest in or management responsibility for management contracts. *See* 25 U.S.C. § 2711; 25 C.F.R. Parts 533, 535.

The authority of the NIGC to review and approve gaming-related contracts applies to management contracts and collateral agreements to management contracts to the extent that they implicate management. *Catskill Dev.t L.L.C. v. Park Place Entm’t Corp.*, No. 06-5860, 2008 U.S. App. Lexis 21839, at *38 (2nd Cir. Oct. 21, 2008) (“a collateral agreement is subject to agency approval under 25 C.F.R. § 533.7 only if it ‘provides for management of all or part of a gaming operation.’”); *Machal Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d 659, 666 (W.D. La. 2005) (“collateral agreements are subject to approval by the NIGC, but only if that agreement ‘relate[s] to the gaming activity’”). *Accord*, *Jena Band of Choctaw Indians v. Tri-Millennium Corp.*, 387 F. Supp. 2d 671, 678 (W.D. La. 2005); *United States ex rel. St. Regis Mohawk Tribe v. President R.C.-*

St. Regis Mgm't Co., No. 7:02-CV-845, 2005 WL 1397133, at *3 (N.D. N.Y. June 13, 2005), *aff'd on other grounds*, 451 F.3d 44, 50, n.5 (2nd Cir. 2006) (the approval provisions that apply to management contracts apply equally to collateral agreements).

A “collateral agreement” is “any contract, whether or not in writing, that is related either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, organizations) and a management contractor or sub-contractor (or any person or entity related to a management contractor or subcontractor).” 25 C.F.R. § 502.5. The NIGC created a “broad definition of the term ‘collateral agreement’ to insure that it can review all the documents needed for meaningful management contract review.” Kevin K. Washburn, *The Mechanics of Indian Gaming Management Contract Approval*, 8 GAMING L. REV. 333, 346 (2004) (“Washburn Article”).

A contract is a “management contract” even where it only provides for partial management of the gaming operation. A “management contract” is “any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation.” 25 C.F.R. § 502.15.

Although NIGC regulations do not define management, the term has its ordinary meaning. Under that ordinary meaning, “management” encompasses activities such as planning, organizing, directing,

coordinating, and controlling. CP 0298 – 0300 (NIGC Bulletin No. 94-5: “*Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)*”). A “primary management official” is “any person who has the authority to set up working policy for the gaming operation.” 25 C.F.R. § 502.19(b)(2). “Management employees” are “those who formulate and effectuate management policies by expressing and making operative the decisions of their employer.” *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288, 94 S. Ct. 1757, 40 L. Ed. 2d 134 (1974). Whether particular employees are “managerial” is not controlled by an employee’s job title, but is based upon the employee’s actual job responsibilities, authority, and relationship to management. *Waldau v. Merit Sys. Prot. Bd.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994). Courts have recognized *de facto* managers as those who recommend discretionary actions to be implemented by others. *Id.* 19 F.3d at 1399 (*citing N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683, 100 S. Ct. 856, 63 L. Ed. 2d 115 (1980)).

The statute covers financing documents like those at issue here. The statute provides that a management contract for the operation and management of a class II gaming activity “shall be considered to include all collateral agreements to such contract that relate to the gaming activity.” 25 U.S.C. § 2711(a)(3). Financing documents can establish the parties’ contractual relationship as one for management. *United States v. Casino Magic Corp.*, 293 F.3d 419 (8th Cir. 2002). In *Casino Magic*, the court held that the parties’ Consulting Agreement and Construction and

Term Loan Agreement, read together, were void as unapproved management contracts, even though the Consulting agreement, standing alone, was not a management contract. *Id.* at 424. “The three agreements . . . served as a management contract implicitly if not explicitly.” *Id.* at 425. If any type of contract requires the performance of any management activity with respect to all or part of a gaming operation, the contract is a management contract within the meaning of 25 U.S.C. § 2711 and requires the NIGC Chairman’s approval. *Id.*

Agreements with tribes have been found to constitute disguised, or implicit, management agreements even where not explicit. To protect themselves, parties will often request a “declination letter” from the NIGC. *Washburn Article* at 345 (“Upon request, the NIGC will review a contract and issue a letter indicating that the contract is not subject to the management contract review and approval process”). The NIGC examines all of the relevant transaction documents to determine which agreements are management contracts (and which agreements are not). *Id.*

The *Casino Magic* case presents an example of the NIGC’s active role in oversight of contracts related to Indian gaming. In *Casino Magic*, the tribe had submitted all of the related agreements to the NIGC. 293 F.3d at 423. The NIGC had concluded “after careful review” that the documents “when considered as a whole, are management contracts” and “require the approval of the Chairman of the NIGC.” *Id.* at 423. *See also Match-E-B-Nash-She-Wish Band of Pottawatomis Indians v. Kean-Argovitz Resorts*, 249 F. Supp. 2d 901, 906 (W.D. Mich. 2003), *vacated and*

remanded on other grounds, 383 F.3d 512 (6th Cir. 2004) (NIGC had issued a declination letter where agreement “is collateral to a management contract and must be reviewed in conjunction with the Management Agreement.”).

The facts of the instant case are analogous to those in *Wells Fargo*, where the United States District Court for the Western District of Wisconsin refused to enforce a Trust Indenture agreement because the agreement was a void “management contract.” 677 F. Supp. 2d 1056 (W. D. Wis. 2010). Defendant Lake of the Torches is a corporation of the Lac du Flambeau Band of Lake Superior Chippewa Indians, established under tribal law in Wisconsin to own and operate the Lake of the Torches Resort Casino. *Id.* at 1057. The tribe sought to expand its revenue base by participating in a project to build a riverboat casino, hotel and bed-and-breakfast. *Id.* In order to refinance and consolidate debt associated with the operation of the Lake of the Torches Resort Casino, and also to fund participation in the new project, the tribal corporation issued bonds and entered into a Trust Indenture with Wells Fargo to secure repayment of principal and interest on \$50 million in bonds issued by the Lake of the Torches Economic Development Corporation. *Id.* The agreements, similar to those at issue here, required mandatory daily deposits of funds relating to the tribe’s casino operations into a designated trust fund and the tribe could only draw funds to pay for operating expenses upon written certification to the bank that the funds being withdrawn were needed for operating expenses of the Corporation. *Wells Fargo*, 677 F. Supp. 2d at

1058. Even though many of the contractual provisions were contingent, they were considered to trigger IGRA because “the regulations’ definition of a management contract as an agreement that provides for the management of ‘all or part’ of a gaming operation suggests a definition of management that is partial rather than absolute, contingent rather than comprehensive.” *Id.* at 1060–61 (quoting *First Am. Kickapoo*, 412 F.3d at 1175).

The Seventh Circuit affirmed the district court’s determination that the Trust Indenture was void and unenforceable. *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684. The Seventh Circuit concluded, like the district court had, that the Trust Indenture was a management contract under IGRA and that, as a condition of its validity, it should have been submitted to the Chairman of the NIGC for approval. *Id.* at 699. Because it had not been, the agreement was void in its entirety, including the waiver of sovereign immunity. *Id.* at 702. The Seventh Circuit agreed that the unapproved “management agreement” could not provide the tribe’s consent to personal jurisdiction, so the district court lacked jurisdiction. 658 F.3d at 702.

The BankFirst Loan Agreement and SDA in this case are markedly similar. As in *Wells Fargo*, these agreements constitute a management contract under IGRA that, as a condition of validity, should have been submitted to the Chairman of the NIGC for approval. Because they were not, they are void. For example, all proceeds from the Casino were Pledged Revenues, as that term is defined in the SDA, except those

amounts that had to be retained by the Casino as its Daily Cash-on-Hand Requirements. CP 538 (SDA, at § 1.1, p. 9). NBC was required to make daily deposits of all Pledged Revenues into accounts controlled by OSM, which made daily sweeps of the accounts. CP 544 (SDA, at § 3.1). On a daily basis, NBC had to certify its Daily Cash-on-Hand Requirements, to justify not depositing that portion of the daily receipts. *Id.* at § 3.1(b). Each month, NBC was required to provide OSM an Operating Budget of that month's Operating Expenses. CP 544–545 (SDA, at § 3.2).

Similarly, all receipts from the Casino's operations, less the certified Daily Cash-on-Hand requirements, had to be deposited in accounts controlled by OSM, which were then swept by the depository bank for OSM's benefit. CP 544–545 (SDA, at §§ 3.1 – 3.3). Authorized Operating Expenses included only current expenses, and did not include any aged accounts. CP 535 (SDA, at §1.1, p. 6). The funds in the Operating Account remained Pledged Assets under the agreements, and in the event of a default, the Loan Agreement and SDA permitted OSM to appropriate without any notice any and all Pledged Financial Assets in any account, including the Operating Account. CP 553–554 (SDA, at § 6.2).

Like the example of the Muscogee Nation's loan documents referenced in the 1/23/09 NIGC letter which OSM presented to the trial court (see CP 77-78), the Loan Agreement here gives OSM "the authority to decide how and when operating expenses at the [Casino] are paid, *which is itself a management function*. . . . [A] party that controls gross revenue potentially can control everything about the gaming facility by

allocating or putting conditions on the payment of operating expenses.” CP 27. As originally executed,⁵ the Loan Agreement and the Springing Depository Agreement, when read together, prohibit NBC from paying aged and past-due accounts because of the definitions of “Operating Budget”⁶ and “Operating Expenses”.⁷ CP 535–536 (Exhibit C to Complaint, at 6–7). Any remaining question of NBC’s ability to pay its aged accounts and prevent its vendors from refusing to continue to do business with NBC for lack of payment was eliminated by the express terms of the 3rd Forbearance Agreement, which provided for payments to OSM, including its attorney’s fees and costs, set the monthly governmental payment to the Tribe and the payment to the repair and replacement account to \$0, and stated that “due and payable Operating Expenses” ***“does not and will not, in any event, include past due accounts of the Borrower.”*** CP 642–643 (Ex. F to Complaint, at 5–6).

Borrowing nomenclature from *Casino Magic*, these documents “served as a management contract implicitly if not explicitly.” Here, because the gross revenues were deposited into the OSM controlled accounts OSM is the *de facto* manager of NBC’s casino operation. OSM,

⁵ OSM inserted in the 2nd Forebearance Agreement a so-called “IGRA Compliance Provision,” attempting to amend language in the Loan Agreement to achieve compliance with IGRA. CP 614–615. This effort failed, as discussed at p. 29. OSM’s tardy effort to amend its Loan Agreement illustrates OSM’s knowledge that the Loan Agreement triggers IGRA.

⁶ For any period, a projected budget depicting in reasonable detail all Operating Expenses reasonably anticipated *to be incurred* during that period—which necessarily would exclude expenses already incurred.

⁷ The *current* expenses of operation, excluding any payment constituting Debt Service on any Debt.

not NBC, determines which vendors can be paid and which cannot, and passes on the adequacy of NBC's accounting systems, procedures and budgeting. That is management. As a matter of law, the agreements at issue are void because they constitute management contracts that lack the required approval of the Chairman of the NIGC.

The effect of the Loan Agreement and SDA, and the three forbearance agreements, moreover, has been that the sole purpose for operating the Casino is to pay OSM, not to provide essential services to Nooksack Tribal members. This offends the IGRA's purposes to provide "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The Loan Agreement and SDA also violate IGRA's purpose in ensuring "that the Indian tribe is the primary beneficiary of the gaming operation. . ." 25 U.S.C. § 2702(2). Because all of the revenue in excess of the bare minimum required for operations and regulatory compliance went to the lender under the agreements, it is OSM, not NBC or the Tribe, who is the primary beneficiary of the gaming operation.

Like Wells Fargo, OSM entered into the Loan Agreement without NIGC review at its peril. This was a calculated risk. The IGRA regulations provide explicitly that management contracts that have not been approved by the Chairman are void. 25 C.F.R. § 533.7. The IGRA is comprehensive legislation reconciling many competing interests and fulfilling the federal government's special obligation to protect Native

American tribes. *See Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 848 (8th Cir. 2003) (“The regulatory scope of IGRA is . . . far reaching in its supervisory power over Indian gaming contracts.”). One of IGRA’s principal purposes is to ensure that the tribes retain control of gaming facilities set up under the protection of IGRA and obtain effective benefit of the resulting revenue. *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d at 700–01. “Consequently, the statute provides for pre-screening of contracts between the tribes and parties desiring to establish business relationships with the tribes that might impair this fundamental purpose of the federal statutory scheme, and it is this comprehensive review that constitutes the core of Congress’s protection for Indian gaming establishments.” *Id.* OSM failed to avail itself of this available protection. Its agreements run afoul of IGRA.

OSM has not, and cannot, seek reformation. Given the Commission’s categorical statement about the consequences for failure to secure approval and the comprehensive regulatory framework involved, the Seventh Circuit concluded in *Wells Fargo* that the offending provisions were not subject to reformation by excision. *Wells Fargo*, 658 F.3d at 701 (citing *First Am. Kickapoo*, 412 F.3d at 1177 n.5 (“It may be questioned whether any part of a contract determined to be void *ab initio*, including the severability provisions, may be enforced.”)); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1047 & n.59 (11th Cir. 1995) (concluding that IGRA and NIGC

regulations so dominate the field of tribal gaming that they are incorporated into gaming contracts as a matter of law)).

OSM's tardy efforts fail to save its void agreement through amendatory language in the 2nd Forbearance Agreement. The terms in the "IGRA Compliance Provision" of the 2nd Forbearance Agreement purport to relate back to the date of execution of the Loan Agreement. CP 614–615 (2nd Forebearance Agreement, §21). Because no contract was created, the Loan Agreement cannot be amended through an amendatory provision executed more than three years later. *Berg*, 125 Wn.2d at 554; *Golden Pisces*, 495 F.3d at 1081; *First Am. Kickapoo*, 412 F.3d at 1176;

This Court should conclude as a matter of law that the agreements constitute void and unenforceable management agreements under IGRA.

2. Because the waivers of sovereign immunity in the void agreements are unenforceable, Washington courts lack personal jurisdiction over Nooksack Business Corporation.

Because the agreements are void, no part of them, including NBC's waiver of sovereign immunity, can be enforced. *See, e.g., Peterson v. Nichols*, 110 Wn. 288, 291, 188 P.2d 498 (1920) (a contract that is void in part is void as a whole); *Wells Fargo*, 658 F.3d at 701 (citing *First Am. Kickapoo*, 412 F.3d at 1177 n.5). Without an enforceable waiver of sovereign immunity, the Court cannot have personal jurisdiction over NBC. The trial court should have dismissed this lawsuit.

This same conclusion was drawn by the District Court in *Wells Fargo* and affirmed by the Seventh Circuit; the District Court noted that

where “the entire contract is void *ab initio* [as an unapproved management contract],” “the waiver [of the defense of personal jurisdiction] in the Trust Indenture is also invalid.” 677 F. Supp. 2d at 1061. *See also A.K. Mgt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986) (“the waiver of sovereign immunity is clearly part of the Agreement, and is not operable except as part of that Agreement. *Since the entire contract is inoperable without BIA approval, the waiver is inoperable and, therefore, the tribe remains immune from suit*”) (emphasis added).

Indian tribes, and tribal corporations, are exempt from suit absent express waiver or congressional abrogation of their common-law sovereign immunity. *Wright*, 159 Wn.2d at 112–13; *Smale v. Noretap*, 150 Wn. App. 476, 478, 208 P.3d 1180 (2009) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)).

In order for a trial court to have jurisdiction over a particular matter, it must have both subject matter jurisdiction and personal jurisdiction. *State v. B.P.M.*, 97 Wn. App. 294, 298, 982 P.2d 1208 (1999). The trial court had neither. Without the requisite jurisdiction, the trial court had no authority to hear this controversy and should have granted NBC’s motion to dismiss. By denying NBC’s motion to dismiss, the trial court erred. This Court should reverse and dismiss.

3. Because the agreements are unenforceable, the trial court should have dismissed the complaint for OSM's failure to state a claim.

The trial court also erred by not dismissing the complaint for failure to state a claim under CR 12(b)(6) where the agreements are unenforceable. This Court can dismiss the deficient claim pursuant to RAP 2.5(a). Whether a party states a claim upon which relief may be granted concerns the legal sufficiency of the allegations in a pleading. *Contreras*, 88 Wn.2d at 742. Dismissal is appropriate where there is no state of facts which plaintiff could have proven entitling her to relief under his claim. *Id.* at 742; *Orwick v. Seattle*, 103 Wn.2d 249, 255, 692 P.2d 793 (1984).

Where the agreements are void and unenforceable under IGRA, as discussed above, OSM has no claim. Dismissal is proper.

VI. CONCLUSION

The trial court incorrectly analyzed subject matter jurisdiction, personal jurisdiction, and the enforceability of the agreements. It erred when it denied NBC's motion to dismiss OSM's complaint. This Court should reverse on *de novo* review.

Washington state courts lack subject matter jurisdiction over OSM's claims. OSM is a non-Indian entity attempting to sue a tribal corporation for acts and omissions arising on an Indian reservation. Washington courts are constitutionally limited from entertaining the lawsuit. The defect of lack of subject matter jurisdiction could not be

remedied by the parties' agreement or acquiescence by NBC. The forum selection clause in the parties' agreement did not confer subject matter jurisdiction on the trial court as a matter of law. The trial court erred to hold otherwise. This Court must act to correct the mistake, and require dismissal.

The trial court also lacked personal jurisdiction over NBC. The limited waiver of NBC's sovereign immunity in the agreements was void and unenforceable because the agreements were void and unenforceable under the IGRA. The trial court erred when it rejected these grounds for dismissal. The agreements gave OSM at least partial managerial control of the casino operations. Because these "management contracts" were never approved by the Chairman of the NSGC, they are void pursuant to 25 C.F.R. § 533.7. To hold otherwise would undermine the important policies and objectives of IGRA and the broad language of the statute and regulations. The 7th Circuit's *Wells Fargo* decision supports dismissal.

The trial court also should have granted NBC's motion to dismiss for failure to state a claim because the agreements were void. Void contracts are unenforceable. Void contracts cannot be amended to preserve them. The Loan Agreement is void and unenforceable, and thus OSM has no contract claim.

This Court should reverse, and dismiss.

Respectfully submitted on this 27th day of December, 2011.

SCHWABE, WILLIAMSON & WYATT, P.C.



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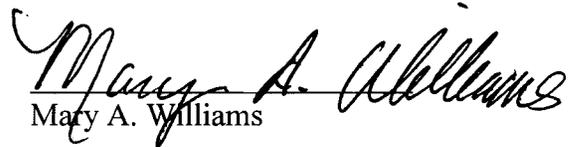
CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of December, 2011, I caused to be served the foregoing *APPELLANT'S OPENING BRIEF* on the following parties at the following address:

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