

NO. 67050-6-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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OUTSOURCE SERVICES MANAGEMENT, LLC,  
Respondent,

v.

NOOKSACK BUSINESS CORPORATION,  
Appellant.

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

Appellant Nooksack Business Corporation (“NBC” or “the Borrower”) borrowed more than \$15 million for its Casino in Washington and now seeks to avoid that obligation by claiming that Washington courts lack the power to enforce the Loan Agreement. NBC relies on two erroneous arguments. First, it contends that Washington superior courts lack jurisdiction over a tribal corporation,<sup>1</sup> even if that entity has waived its sovereign immunity. Second, it contends that the sovereign immunity waiver in this case should be disregarded because the loan agreement is unenforceable as a “management contract” under the Indian Gaming Regulatory Act (“IGRA”). Both of these arguments fail.

As the United States Supreme Court held in C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 414, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001), an Indian tribe (including tribal corporations such as the Borrower) is subject to suit in state court where “Congress has authorized the suit or the tribe has waived its immunity.” (citation omitted). Because the Borrower here waived immunity, its argument that Washington courts lack jurisdiction is directly contrary to this binding precedent.

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<sup>1</sup> It is undisputed that the Borrower is a Nooksack tribal corporation and enjoys the same sovereign immunity as the Nooksack Tribe (the “Tribe”).

Under C & L, state courts have jurisdiction where (1) a statute authorizes it or (2) there is a waiver of immunity. The Borrower focuses exclusively on the first of those two alternatives, whether a statute authorizes jurisdiction, and journeys down a long path analyzing Public Law 280 (“PL 280”) and Williams v. Lee, 358 U.S. 217, 223, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). But the entire discussion of PL 280 and Williams v. Lee (and other related cases) is off point because it is the second alternative, waiver of immunity, that applies here.

Public Law 280 is also off point because Congress passed that statute to clarify the circumstances under which nontribal courts can exercise jurisdiction over individual Indians and Indian lands and territory, so that the sovereignty of the relevant tribe is respected. But the law does not in any way purport to regulate jurisdiction over tribal entities, especially those that have waived sovereign immunity.

The Borrower’s argument that the Whatcom County Superior Court (the “Superior Court”) lacked jurisdiction because performance of the Loan Agreement occurs entirely on reservation land is also refuted—both by the terms of the Loan Agreement (which require the Borrower to perform outside the reservation) and by the decision of the U.S. Supreme Court in Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998), which held

that the question of whether a tribe has immunity does not turn on whether the tribal activities were on or off the reservation, but rather whether either the tribe or Congress has waived that immunity.

A recent Washington Supreme Court case confirms that where a sovereign waives its immunity, as here, Washington superior courts have “irreducible jurisdiction” to hear cases like this one, which is an ordinary suit for breach of contract, and the waiver of immunity does not raise an issue of parties attempting to confer jurisdiction by agreement. ZDI Gaming, Inc. v. State, --- P.3d ---, 2012 WL 90164, at \*3 (Wash. 2012); Const. art. IV, § 6. Several pages of the Borrower’s brief relate to its confused view on this issue, but the entire argument derives from the erroneous premise that a state court lacks jurisdiction over a tribal entity that has waived sovereign immunity, and C & L and Kiowa directly contradict that premise.

Apparently now regretting its waiver of immunity, the Borrower argues that the Loan Agreement violates IGRA by providing for “management” of the Borrower’s casino operations and is therefore void. But as the Superior Court held, the Loan Agreement does no such thing. The Loan Agreement contains standard features of a commercial loan, requiring that the loan be repaid while leaving the Borrower to run its business. It does not contain the features that have caused courts in other

cases to conclude that a lender has stepped beyond the role of lender and into the role of manager.

The Loan Agreement does not allow the Lender, Outsource Services Management (“OSM”),<sup>2</sup> to set up working policy for the Casino. To the contrary, the Borrower runs the Casino, making all of the decisions regarding personnel, employment policies, when to open and close, accounting procedures, advertising, and budgeting. The Lender has no interest in managing the Casino, as both parties expressly acknowledged in the Loan Agreement. Because the undisputed terms of the Loan Agreement do not constitute a management contract under IGRA, the Superior Court correctly held that the Loan Agreement was not void, and its decision denying the Borrower’s motion to dismiss should be affirmed.

## **II. STATEMENT OF THE ISSUES**

**Issue No. 1:** Does a Washington court of general jurisdiction have jurisdiction over a breach of contract claim against a tribal entity that has waived its sovereign immunity?

**Issue No. 2:** Does a contract for a commercial loan relating to an Indian casino that leaves all of the management, personnel, accounting,

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<sup>2</sup> OSM is a loan servicer acting on behalf of lender BankFirst, which is in receivership by the FDIC. For simplicity, OSM and BankFirst are interchangeably referred to here as the “Lender.”

budgeting, and operational control to the borrower constitute a “management contract” under IGRA?

### **III. STATEMENT OF THE CASE**

#### **A. Statement of Facts**

Respondent OSM seeks to enforce a binding contract (together with related loan documents, the “Loan Agreement”) through which the Borrower borrowed \$15,315,856 in connection with the operation of its River Casino (the “Casino”) located in Deming, Washington. The Loan Agreement is the product of extensive arms-length negotiation of sophisticated parties and counsel and is performed in multiple locations throughout Washington and the United States. It contains standard language securing the considerable amount being lent, leaving control of the Casino exclusively in the Borrower’s hands. In addition, the Loan Agreement provides for recourse in the courts of the State of Washington and thoroughly documents the Borrower’s valid, express waiver of its sovereign immunity as a fundamental assumption of the bargain.

#### **1. The Loan Agreement Secures the Loan and Leaves Management of the Casino to the Borrower.**

Like most loans, the Loan Agreement sets forth procedures for the Borrower to repay the \$15 million it borrowed, as well as providing security to back the Borrower’s promise in the event of a default.

Specifically, the Borrower pledged as security for the loan the receipts of the Casino's gaming operation (with certain exceptions), CP 540, as well as the Casino's furnishings and equipment, CP 516. The Loan Agreement does not provide for any security interest or recourse against the Borrower's or the Tribe's gaming rights or real property. CP 523.

The Loan Agreement provides a mechanism through which the Borrower is obligated to make monthly payments (referred to as "Monthly Debt Service Charges"). CP 542. So long as the loan was not in default, the Borrower was "entitled to collect and apply in its discretion any and all of the Pledged Revenues during any period." CP 541; see also CP 530.

In the event of a default, the Loan Agreement provides that the Borrower must deposit the Casino's receipts with a Depository in order to ensure that the Lender continues to receive payments on the loan. CP 530; CP 544. This mechanism provides for additional notice to the Lender concerning the Casino's revenues in the event that the Borrower breaches the Loan Agreement, but leaves management of the Casino exclusively to the Borrower. The Borrower implies that it has to obtain the Lender's approval in connection with its budgeting and operational decisions, using terms such as "certify" and "justify." See, e.g., Br. Appellant at 7. But the Loan Agreement contains no such requirement. For example, while the Borrower's default under the Loan Agreement triggered a requirement that

the Borrower “notify” the Lender of the Borrower’s daily cash-on-hand needs and that the Borrower provide “notice” to the Lender if it intends to increase the amount set aside for those needs, it is the Borrower that establishes those amounts in its discretion. CP 544. In a related provision, the Loan Agreement requires that in the event of a default, the Borrower must “provide” a monthly operating budget to the Depository, and further that if “the Borrower deems it necessary to revise the amount,” it need only “notify” the Depository and the Lender. CP 544-45. These notice provisions simply keep the Lender informed as to the Casino’s status at a time when the Borrower is in default on the loan, but do not allow the Lender to set, approve, or disapprove the Borrower’s operating expenses in connection with the Casino. If the Borrower states in its budget that it needs something for operations, provided it has generated the cash to cover those expenses, it is free to spend as it sees fit.

The Loan Agreement provides the Borrower with full discretion to set its operating budget, including which vendors to pay, regardless of whether the Borrower’s obligations to a particular vendor are past due. Though the Loan Agreement does speak of “current expenses” with respect to the Borrower’s operating expenses, there is no provision excluding past-due accounts from “current expenses,” and the fact that the Borrower might not generate enough cash in a given month to pay its bills

does not mean that it could not choose to pay those past-due obligations in a subsequent month. CP 536. In fact, in the event of a default by the Borrower under the Loan Agreement, even the default deposit procedures allow the Borrower to receive the funds that it determines are needed to run the Casino before the Lender receives any payment toward its \$15 million loan. CP 554. In other words, the default provisions of the Loan Agreement are based on net revenue; the Lender receives nothing before the Borrower gets the cash that the Borrower, in its discretion, determines it needs to manage its Casino. CP 554.

**2. The Loan Agreement Was Performed in Numerous Locations Outside of the Reservation.**

The Loan Agreement required performance in a number of different locations in Washington and elsewhere. The Borrower is a corporation organized under the laws of the Nooksack Tribe, CP 394, and was represented throughout the negotiations of the Loan Agreement by the law firm Miller Nash in Seattle, CP 439. The Borrower borrowed the \$15 million to operate its Casino from the Minnesota offices of BankFirst, a South Dakota state bank. CP 394; CP 453; CP 491. In connection with its debt-service obligations, the Borrower agreed to deposit receipts of its Casino with Banner Bank in Washington, CP 463, and those receipts were distributed by the Depository, First National Bank & Trust Co. of Williston in North Dakota, CP 530. Later, BankFirst was taken into

receivership by the FDIC in Washington, DC, and OSM, based in Minnesota, acts as the loan servicer. CP 638.

**3. The Borrower Continued to Manage the Casino During the Forbearance Period.**

As the Borrower continued to experience difficulty repaying the \$15 million it borrowed, the Lender negotiated with the Borrower over a nearly two-year period to avoid the Borrower completely defaulting on the loan. From January 2009 to October 2010, the Borrower and the Lender operated under three successive forbearance agreements through which the Lender agreed to forbear certain of its rights regarding collecting on the loan. CP 577; CP 603; CP 638.

In order to induce the Lender to continue to forego its right to call the \$15 million loan due, the Borrower agreed to provide the Lender with information regarding the Borrower's finances and plans throughout the various forbearance periods. CP 608. As with the provisions in the original loan agreement providing that the Borrower notify the Lender of its operating budget in the event of a default, these provisions in the forbearance agreements left the Borrower with the discretion to govern its finances and operations and required only that it keep the Lender informed while the loan remained in forbearance. In that respect, the Borrower is incorrect when it asserts that it "was required to negotiate forbearance agreements with all of its vendors." Br. Appellant at 10. To the contrary,

the Second Forbearance Agreement provided that the Borrower should give copies to the Lender of any forbearance agreements that the Borrower negotiated with its vendors, “to the extent such vendor has executed a forbearance agreement.” CP 608 (emphasis added). In other words, like every other provision in the original loan agreement and the forbearance agreements, the Borrower was free to act or to not act, and if it acted, it needed to keep OSM, as the Lender, as the secured party on a \$15 million loan on which the Borrower was perpetually in default, informed.

**4. The Borrower Agreed that the Loan Agreement Was Not a Management Contract.**

Though the Loan Agreement and each of the forbearance agreements left management of the Casino to the Borrower, the parties included language in the Loan Agreement expressly stating that the Borrower would manage the Casino and that the Lender would have no managerial control whatsoever:

No Management of Facilities . . . . NOTWITHSTANDING ANY OTHER POSSIBLE CONSTRUCTION OF ANY PROVISION HEREIN, THE LENDER ACKNOWLEDGES AND AGREES (A) THAT IT NEITHER HAS, NOR SHALL IT ASSERT, ANY RIGHTS TO MANAGE THE FACILITIES, (B) THAT IT WILL NOT INTERFERE WITH THE BORROWER’S RIGHT TO DETERMINE STANDARDS OF OPERATION AND EFFICIENT MANAGEMENT OF THE FACILITIES, INCLUDING BUT NOT LIMITED TO, BUDGETING MATTERS AND POLICIES RELATING TO GAMING AND CASINO SERVICES, AND (C) THAT ITS LIEN IS RESTRICTED TO THE

PLEDGED ASSETS, WHICH DO NOT CREATE A  
MORTGAGE LIEN ON THE FACILITIES.

CP 448; see also CP 565. Consequently, by its express terms, the Loan Agreement from the beginning vested management of the Casino exclusively in the Borrower, and the context in which the Loan Agreement was negotiated reflects that the parties to the Loan Agreement proceeded deliberatively, fully intending that the Borrower manage its Casino and repay the \$15 million it borrowed.

The parties reaffirmed their intent that the Loan Agreement remain as a mere loan agreement and not a “management contract” when they amended it on May 27, 2010 to include a provision regarding substantive compliance with IGRA (the “IGRA Compliance Provision”) that employed language preferred by the National Indian Gaming Commission (the “Commission”) itself. CP 614-15 (amending Loan Agreement by adding § 8.36, effective as of the original date of the Loan Agreement). Specifically, Section 8.36 states in part that, “[n]otwithstanding any provision in any Loan Document, or any other right to enforce the provisions of any Loan Document, none of the Lender or Depository . . . shall ever engage in . . . planning, organizing, directing, coordinating, or controlling all or any portion of the Borrower’s gaming operations.” CP

614.<sup>3</sup> The provision then sets out a number of specific “Management Activities” that NBC agreed were not included in the Loan Agreement.

Id. Importantly, the IGRA Compliance Provision also stated that:

upon the occurrence of a Default or Event of Default, the Secured Parties will not be in violation of the foregoing restriction [as to management activities] solely because any one of them: (i) enforces compliance with any term in any Loan Document that does not require the gaming operation to be subject to any third-party decision-making as to any Management Activities; (ii) requires that all or any portion of the revenues securing the Loans be applied to satisfy valid terms of the Loan Documents; or (iii) otherwise forecloses on all or any portion of the Collateral securing the Obligations.

Id. In addition, the IGRA Compliance Provision provided that “no Lending Party ever shall seek the appointment of a receiver with respect to all or any portion of the gaming operations.” CP 615. Moreover, as a further assurance in connection with the execution of the Second Forbearance Agreement and the IGRA Compliance Provision, general counsel for the Tribe provided his opinion in relevant part that the Loan Agreement “is a valid agreement of the Borrower and the Tribe, enforceable against the Borrower and the Tribe.” CP 630. Therefore, the Borrower and the Lender anticipated and expressly agreed that the Loan Agreement was not a management contract under IGRA.

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<sup>3</sup> This language is preferred by the Commission. See infra at 35 (discussing Commission Bulletin 94-5).

**5. The Borrower Expressly Waived Its Sovereign Immunity Throughout the Loan Agreement.**

As a condition and fundamental assumption of the Loan Agreement, the Borrower provided “an irrevocable limited waiver of its sovereign immunity from suit or legal process with respect to any Claim,” and thus agreed to be sued in federal court, Washington state court, or if neither of those courts had jurisdiction, a Nooksack tribal court. CP 446; CP 459; CP 466; CP 491; CP 521; CP 563. Additionally, the Nooksack Tribal Council adopted a resolution approving the Loan Agreement. CP 58. Though the Borrower signed the Loan Agreement in 2006, it reiterated its waiver of sovereign immunity in each of three subsequent forbearance agreements, executed between January 2009 and July 2010. CP 584; CP 612; CP 648. Moreover, as further assurance to the Lender, the Nooksack Tribal Council adopted resolutions in connection with each forbearance agreement, stating that “in particular, . . . the provisions related to [among other things] the Tribal Parties’ . . . waiving sovereign immunity . . . will continue to remain in full force and effect.” CP 596; CP 625; CP 655. General counsel for the Tribe also provided his legal opinion and assurance that “[t]he Borrower and the Tribe has each duly, expressly and irrevocably waived their respective sovereign immunity subject to and in accordance with the terms of the Forbearance Agreement, and such waiver is valid and enforceable against the Borrower and the

Tribe under all laws of the Borrower, the Tribe, the State, and the United States against the Borrower and the Tribe.” CP 630 (emphasis added).

In addition, the Loan Agreement allowed either party to select arbitration in lieu of judicial resolution in the event of a dispute. CP 446. The Loan Agreement specifically provides for enforcement of any arbitration award “only in the courts permitted by the terms of the Loan Documents, or if necessary for effective enforcement and consented to by the Lender, any tribal court of the Tribe.” CP 447 (emphasis added).

**B. Statement of Procedure**

**1. The Superior Court Correctly Found that It Had Jurisdiction and that the Loan Agreement Was Not a Management Contract.**

Four years into the Loan Agreement, with the Borrower continually in default under three successive forbearance agreements, and despite numerous good-faith attempts by the Lender to negotiate a path forward for the Borrower, the Lender was forced to file suit to recover the \$15 million it loaned the Borrower. CP 380-87. The Borrower moved to dismiss the suit, arguing that the Superior Court lacked subject matter jurisdiction and that the Loan Agreement was void as a management contract that had not been approved by the Commission. CP 83-97.

In rejecting the Borrower’s Motion to Dismiss, the Superior Court found that it had jurisdiction to adjudicate the dispute and that the Loan

Agreement was not a void management contract. CP 7-13. As to the former, the Superior Court found as a threshold matter that there was nothing in the law preventing the Borrower from waiving its sovereign immunity and consenting to suit in a Washington court. CP 10. Having found that the Borrower was free to waive its sovereign immunity, the Superior Court looked to the Loan Agreement and determined that the Borrower had in fact provided such a waiver. CP 8-10. With respect to the Borrower's second argument, the Superior Court found that the Loan Agreement "does not have the features of a management contract, but rather is simply a loan agreement." CP 10. Consequently, the Superior Court found that the Borrower's waiver of sovereign immunity in the Loan Agreement was valid and that the Superior Court had complete jurisdiction to hear the Lender's claims regarding the \$15 million it loaned to the Borrower. CP 10. This appeal followed.

#### **IV. ARGUMENT**

##### **A. Standards of Review**

The court's subject matter and personal jurisdiction over the Borrower are questions of law to be decided de novo. Dougherty v. Dep't of Labor & Indus., 150 Wn.2d 310, 314, 76 P.3d 1183 (2003) (reviewing subject matter jurisdiction de novo); SeaHAVN, Ltd. v. Glitnir Bank, 154 Wn. App. 550, 563, 226 P.3d 141 (2010) (reviewing personal jurisdiction

de novo). The Loan Agreement's status under IGRA and its related regulations is also reviewed de novo as a question of statutory interpretation. See Kruger Clinic Orthopaedics, LLC v. Regence Blue Shield, 157 Wn.2d 290, 298, 138 P.3d 936 (2006) (en banc) (noting that the "interpretation of a statute and its implementing regulations" is a question of law reviewed de novo) (quoting In re Impoundment of Chevrolet Truck, 148 Wn.2d 145, 154, 60 P.3d 53 (2002)).

The Borrower sought dismissal in the Superior Court pursuant to CR 12(b)(1), (2), and (6). In a CR 12(b) motion, the plaintiff's allegations are presumed true, and the movant has the burden to show that the plaintiff can prove no set of facts under the complaint that would result in jurisdiction or recovery. Regan v. McLachlan, 163 Wn. App. 171, 177-78, 257 P.3d 1122 (2011) (applying standard of review to CR 12(b)(6) motion); Wright v. Colville Tribal Enter. Corp., 159 Wn.2d 108, 118-19, 147 P.3d 1275 (2006) (Madsen C.J., concurring) (describing standard of review for CR 12(b)(1) motion); SeaHAVN, 154 Wn. App. at 563 (applying standard of review to CR 12(b)(1) motion). "Such [CR 12(b)(6)] motions should be granted 'sparingly and with care,' and only in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief." San Juan Cnty. v. No New

Gas Tax, 160 Wn.2d 141, 164, 157 P.3d 831 (2007) (quoting Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 330, 962 P.2d 104 (1998)).

**B. The Superior Court Had Subject Matter Jurisdiction to Adjudicate the Claim**

**1. Binding U.S. Supreme Court Authority Allows the Borrower to Waive Immunity and Be Sued in a Washington Court.**

Washington courts have subject matter jurisdiction to hear contract disputes. Const. art. IV, §6. The presence of a sovereign tribal entity in this case does not alter the analysis, because nothing in PL 280, RCW 37.12, or any of the authorities cited by the Borrower strip away that preexisting subject matter jurisdiction. Thus, when the Borrower repeatedly argues that it could not “confer” or “extend” a court’s subject matter jurisdiction in a contract, Br. Appellant at 19-21, it incorrectly assumes that subject matter jurisdiction was not there to begin with and consequently asks the wrong question.<sup>4</sup> Washington courts certainly have subject matter jurisdiction in this type of case, and the only question here is whether the Borrower waived its sovereign immunity.

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<sup>4</sup> The Borrower cites cases in which litigants attempted to force appellate courts of limited jurisdiction to hear cases that were outside of the court’s legislatively conferred authority. See Skagit Surveyors & Eng’rs, L.L.C. v. Friends of Skagit Cnty., 135 Wn.2d 542, 555-56, 958 P.2d 962 (1998) (parties could not waive statutory requirements necessary to achieve limited appellate jurisdiction); Barnett v. Hicks, 119 Wn.2d 151, 153-54, 829 P.2d 1087 (1992) (parties could not stipulate to full appellate review in court of limited appellate jurisdiction where statute granted only limited appellate review). These cases’ holdings that parties cannot by agreement confer jurisdiction on a court of limited jurisdiction do not apply here where the court already has general jurisdiction to hear all disputes.

U.S. Supreme Court precedent undermines the Borrower's contention that even with a valid waiver, state courts lack jurisdiction over an Indian tribe. See 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). In C & L, the Citizen Band Potawatomi Indian Tribe entered into a contract with a non-Indian company for installation of a roof on a building owned by the Potawatomi outside of its reservation. Id. at 414-15. The contract contained an arbitration clause, governed by the Construction Industry Arbitration Rules of the American Arbitration Association, providing for enforcement "in any court having jurisdiction thereof." Id. at 415 (citation omitted). In addition, the contract had a choice-of-law clause providing for the application of Oklahoma state law. Id. (citation omitted). The Potawatomi eventually breached the contract, and the company obtained an arbitration award, filing suit against the Potawatomi in an Oklahoma state court "of general, first instance, jurisdiction" to enforce the award. Id. at 416. As here, the Potawatomi asserted that they were immune from suit in an Oklahoma state court. Id.

The C & L Court began by reaffirming the scope of its tribal sovereign immunity jurisprudence: "[A]n Indian tribe is not subject to suit in a state court—even for breach of contract involving off-reservation commercial conduct—unless Congress has authorized the suit or the tribe

has waived its immunity.” Id. at 414 (quoting Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998)) (emphasis added). There was no question presented in C & L as to whether the Oklahoma state court would have jurisdiction to hear a contract dispute—as here, a state court of general jurisdiction can certainly adjudicate such cases. Rather, “[t]he question presented is whether the Tribe has waived its immunity.” Id. at 418.

Following C & L, numerous courts have confirmed that a tribe’s waiver of sovereign immunity is sufficient to allow the tribe to be sued in a state court of general jurisdiction. See Doe v. Santa Clara Pueblo, 141 N.M. 269, 276, 153 P.3d 644 (2007) (“C & L Enterprises suggests that when a sovereign tribe waives its immunity from suit, it may also choose the forum in which the resulting litigation will occur, including state court, whether or not it has express congressional authority to do so.”);<sup>5</sup> Garcia v. Akwesasne Housing Auth., 268 F.3d 76, 86-87 (2d Cir. 2001) (stating that “courts consistently have [held that waiver of a sovereign’s immunity] ‘encompasses not merely whether it may be sued, but where it may be

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<sup>5</sup> In Santa Clara Pueblo, the tribe similarly asserted that sovereign immunity should be distinguished from subject matter jurisdiction. The court rejected that argument: “We do not believe that sovereign immunity and subject matter jurisdiction are as distinct as the Pueblos argue. A waiver of immunity in state court inherently involves a state court’s subject matter jurisdiction, and immunity waiver claims are often phrased as subject matter jurisdiction claims.” 141 N.M. at 276 (citing Kiowa, 523 U.S. at 754).

sued’’) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985)); Bradley v. Crow Tribe of Indians, 315 Mont. 75, 81, 67 P.3d 306 (2003) (“We have previously acknowledged . . . that Indian tribes may waive their right to sovereign immunity and consent to suit in state courts.’’) (citations omitted); Jena Band of Choctaw Indians v. Tri-Millennium Corp., 387 F. Supp. 2d 671, 673-74 (W.D. La. 2005) (referring to state court’s determination that it had subject matter jurisdiction due to tribe’s waiver of sovereign immunity); Yavapai–Apache Nation v. Iipay Nation of Santa Ysabel, 201 Cal. App. 4th 190, --- Cal. Rptr. 3d ---, 2011 WL 5924341, at \*16, \*17 (Cal. Ct. App. 2011) (holding that tribe’s waiver of sovereign immunity justified state court jurisdiction in suit for breach of loan agreement relating to casino). These courts recognize that because state courts already have general subject matter jurisdiction, a tribe’s waiver of sovereign immunity is all that is required for a tribal entity to be subject to suit in state courts.<sup>6</sup>

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<sup>6</sup> Oddly, the Borrower cites In re Prairie Island Dakota Sioux, 21 F.3d 302, 304-05 (8th Cir. 1994), a case that involved claims against an Indian tribe under both state and federal law. Br. Appellant at 21. The federal court remanded the case to state court when the federal claims were dismissed, eliminating federal question jurisdiction. Id. The case thus confirms that state courts, which are courts of general jurisdiction, have subject matter jurisdiction over state law cases against Indian tribes.

## 2. Washington Superior Courts Have Original Jurisdiction Over This Case.

The Washington Constitution establishes the “irreducible jurisdiction”<sup>7</sup> of the superior courts in Article IV, Section 6, which provides, in relevant part:

The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property . . . and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law. . . and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court . . . .

Const. art. IV, §6. The legislature cannot in any way take away this jurisdiction. ZDI Gaming, 2012 WL 90164 at \*3. Although a sovereign can invoke the doctrine of sovereign immunity to avoid being subjected to that jurisdiction, where there is an unequivocal waiver, that roadblock to the jurisdiction of the superior courts is removed. Id. at \*6 (noting “[T]he State may not create procedural barriers to access to the superior courts favorable to it based upon a claim of immunity it has unequivocally waived.”).

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<sup>7</sup> ZDI Gaming, Inc. v. State, --- P.3d ---, 2012 WL 90164, at \*3 (Wash. 2012).

**3. The Authorities Relied Upon by the Borrower Do Not Apply to Eliminate the Subject Matter Jurisdiction of a Washington Court Where a Sovereign Tribal Entity Is Involved.**

Washington courts have subject matter jurisdiction in disputes involving sovereign tribal entities, and no state or federal law prohibits such jurisdiction. The Borrower is incorrect when it argues that PL 280, RCW 37.12, and federal case law restrict state court subject matter jurisdiction here. Br. Appellant at 15-19. Those authorities do not apply here because they relate to individual Indians, not a sovereign tribal entity like the Borrower. Thus, the Superior Court here had subject matter jurisdiction over this case from the beginning, and the Borrower's lengthy argument that it could not "confer" subject matter jurisdiction via the Loan Agreement is simply not relevant.

The state and federal authorities cited by the Borrower apply to individual Indians and do not apply here where there is a sovereign present. Nowhere in the Borrower's extended argument concerning the supposed applicability of RCW 37.12 and PL 280 is there any mention of sovereign tribal entities. Instead, as the Borrower acknowledges, those laws relate to "[s]tate power over Indians on a reservation," "criminal and civil jurisdiction over Indians," and apply "when an Indian is being sued." Br. Appellant at 16-18 (citations omitted) (emphasis added). As enumerated in the statute, PL 280 applies to "criminal offenses committed

by or against Indians in . . . Indian country” and “civil causes of action between Indians or to which Indians are parties which arise in . . . Indian country.” See 25 U.S.C. § 1321 (criminal jurisdiction); 25 U.S.C. § 1322 (civil jurisdiction). Moreover, the legislative history of PL 280 and its embodiment in RCW 37.12 confirm that these statutes were enacted to address “the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement” caused by the federal government’s inadequate “enforcement of law and order among the Indians in Indian country.” Bryan v. Itasca Cnty., 426 U.S. 373, 379-80, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976) (emphasis added). Congress drafted the law in a way that protected the sovereignty of the tribe, requiring its consent before the state authorities intrude on that sovereignty to provide the needed law enforcement resources with respect to individual Indians on the reservation.

Pursuant to PL 280, the Washington Legislature assumed criminal and civil jurisdiction “over Indians and Indian territory, reservations, country, and lands within this state” in eight specific areas relating to school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption, dependent children, and motor vehicles. RCW 37.12.010. Consistent with PL 280, these eight areas focus exclusively on the policing of individual Indian persons, not sovereign

tribal entities. Consequently, the Borrower misapprehends the law when it argues that it is an “individual defendant” and is not subject to suit in Washington courts because the Tribe has not consented to such suits under PL 280 and because the Governor has not issued a proclamation to that effect. Br. Appellant at 16-17. That argument is essentially a straw man because “there is notably absent any conferral of state jurisdiction over the tribes themselves” in PL 280. Bryan v. Itasca Cnty., 426 U.S. at 388-89; see also Cohen v. Little Six, Inc., 543 N.W.2d 376, 381 (Minn. Ct. App. 1996) (“[W]e construe Public Law 280 as inapplicable to tribal corporate entities that are equivalent to the tribe for purposes of sovereign immunity.”) (cited in Br. Appellant at 21).<sup>8</sup> In other words, it is disingenuous of the Borrower to argue that Washington courts lack jurisdiction over this action because the Tribe has not consented to such jurisdiction over the Tribe itself under PL 280, when in fact there is no such provision in PL 280 to begin with. The Borrower is not an individual defendant in the sense that PL 280 applies to individual Indians and requires the tribal sovereign to consent to jurisdiction over individual Indian persons. The Borrower is the tribal sovereign, and nothing in PL 280 or RCW 37.12 prevents a Washington court from adjudicating a suit involving a sovereign tribal entity—as distinguished from an individual

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<sup>8</sup> In Cohen, the court held that there was no waiver of sovereign immunity. Id. at 380. Accordingly, it is inapplicable here.

Indian—provided (as discussed further below) the tribal sovereign waives its immunity.

**4. The Location of the Tribal Activities Is Not Relevant in Light of the Tribe’s Waiver of Its Sovereign Immunity, and, Regardless, the Loan Agreement Requires Performance Outside of the Reservation.**

In Kiowa, the U.S. Supreme Court analyzed whether a tribe that had not waived immunity could be sued in state court for a contract that was performed off the reservation. The Court expressly noted that the cases on tribal immunity had never drawn “a distinction based on where the tribal activities occurred.” 523 U.S. at 754; see also id. at 760 (“Tribes enjoy immunity from suits on contracts . . . whether they were made on or off a reservation.”). Kiowa questioned whether tribes should even continue to be granted immunity, noting that “[t]here are reasons to doubt the wisdom of perpetuating the doctrine.” Id. at 758. Ultimately, it declined to revisit the prior case law on tribal immunity and held that the lack of a waiver of immunity defeated the state contract claim. Id. at 760. But it also expressly held, as was reiterated more recently in the C & L case, that, “[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” Kiowa, 523 U.S. at 754; see also C & L Enters., Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla., 532 U.S. 411, 414, 121

S. Ct. 1589, 149 L. Ed. 2d 623 (2001); Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla., 63 F.3d 1030, 1038 n.30 (11th Cir. 1995) (“Absent tribal waiver or congressional abrogation, an Indian tribe is shielded from suit by sovereign immunity.”) (emphasis added) (cited in Br. Appellant at 40-41).<sup>9</sup>

The Borrower does not once mention Kiowa in its brief, and it argues that C & L is not applicable here because C & L involved a contract for a structure outside of the reservation, whereas the Loan Agreement here was allegedly confined entirely to the Nooksack Reservation. Br. Appellant at 26-27. Thus, the Borrower argues, the contract in C & L did not implicate analysis under Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959), which it argues is required here. Br. Appellant at 17-19, 26. But the Borrower’s cases dealing with individual Indians in matters purportedly confined exclusively to reservations are not applicable to this case, where the defendant is the sovereign tribal entity—not an individual tribal member—and where, in any event, the Loan Agreement requires performance outside of the Nooksack Reservation. The facts and the legal issues raised in Williams and the cases applying it are completely distinct

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<sup>9</sup> Given that the Borrower acknowledges this legal principle on page 42 of its brief, it is difficult to understand how it can continue to proceed on its arguments here in good faith.

from those here. In Williams, an individual non-Indian operated a general store on the Navajo Reservation. Williams, 358 U.S. at 217. Two individual members of the Navajo Tribe allegedly bought goods from the general store on credit but later failed to pay their debt. Id. at 218. Thereafter, the non-Indian owner of the store located on the Reservation filed suit against the individual Indians in an Arizona state court. Id. at 217-18. The U.S. Supreme Court held that the suit by the individual non-Indian “would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.” Id. at 223. The Court observed that “the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.” Id. at 200. Enforcement of a contract that was freely agreed to by a tribal entity that waived sovereign immunity in no way infringes on that right to self-governance, and Williams does not apply here.

In contrast to Williams, this action does not involve a suit against an individual Indian. The suit here is against the sovereign tribal entity. In other words, there is no question of a state judge in Whatcom County Superior Court reaching into the Nooksack Reservation and haling an individual Nooksack tribal member into state court to answer for conduct and actions taking place exclusively on the Nooksack Reservation. If

those were the facts, then Williams, PL 280, and RCW 37.12 might be applicable. But those are not the facts. In this case, the sovereign tribal entity has freely and willingly waived its sovereign immunity and consented to suit in the courts of this state.

The Borrower's argument that the Loan Agreement was performed entirely within the confines of the Nooksack Reservation, Br. Appellant at 17-18, was properly rejected by the Superior Court. There is absolutely no merit to the Borrower's bold assertion that the Lender "did not dispute that the cause of action arises on the Tribe's Reservation." Id. at 22. As the Lender emphatically stated in the Superior Court, it rejects "the idea the entire contract was performed within the confines of the reservation." RP 25:13-15 (emphasis added). The plain terms of the Loan Agreement, which are not in dispute, require the Borrower to perform its obligations outside of the Nooksack Reservation. The Lender, based in Minnesota, acts as the loan servicer on behalf of the Federal Depository Insurance Corporation, based in Washington, DC, which in turn is the receiver for the original lender, BankFirst, a South Dakota state bank. CP 638. Pursuant to the Loan Agreement, the Borrower is required to make payments into an account with Banner Bank in Washington, located outside of the Nooksack Reservation. CP 463. The funds in Banner Bank in Washington are then transferred to First National Bank & Trust Co. of

Williston in North Dakota, CP 530; CP 561, and distributed to the Lender in Minnesota. See also RP 25:8-13. The Superior Court understood the flaw in the Borrower's argument that the Loan Agreement was confined to the Reservation:

I'm assuming that the money went into a bank somewhere. I'm not aware of a bank on the Nooksack Indian Reservation. They put the money in a bank off the reservation and presumably payments were made to the plaintiff from a bank account that was off the reservation. How is this strictly on the reservation?

RP 20:18-24. In addition, the Loan Agreement required the Borrower to provide certain reports to the Lender, which necessarily could not be performed within reservation boundaries given the Lender's location in another state. See, e.g., CP 608. Because the Borrower's performance and breach occurred outside the boundaries of the Tribe's Reservation, the authorities regarding activities occurring entirely within reservation boundaries do not apply.

There is no question of subject matter jurisdiction because Washington courts have such jurisdiction. There is no question concerning the location of performance under the Loan Agreement because under Kiowa that is irrelevant to the question of immunity. The only question is whether the Borrower waived its sovereign immunity.

**5. The Borrower Provided a Clear Waiver of Its Sovereign Immunity and Is Therefore Subject to Suit in a Washington Court.**

In the Loan Agreement, the Borrower irrevocably waived “its sovereign immunity from suit or legal process,” consented to suit in “any court of general jurisdiction in [Washington],” and agreed to a Washington state choice-of-law clause. CP 445-46; CP 459; CP 466; CP 491; CP 521; CP 563. And the Borrower’s in-house counsel issued an opinion letter concluding, after reviewing the Loan Agreement and all applicable laws, including the entirety of IGRA, that the Washington choice-of-law clause was legal, valid, and enforceable against the Borrower and that the agreement’s provisions superseded tribal court claims to jurisdiction, an opinion that the Lender was entitled to rely upon. CP 57-63.

Despite the clarity of its waiver of sovereign immunity, the Borrower makes the strained argument that while it “may have consented to personal jurisdiction,” it was not thereby conferring subject matter jurisdiction. Br. Appellant at 21. But as discussed above, Washington courts of general jurisdiction already have subject matter jurisdiction to hear commercial contract disputes, and none of the authorities cited by the Borrower strip that jurisdiction.

The same argument was attempted unsuccessfully in the C & L case. The Potawatomi Tribe contended that “[t]he phrase in the clause providing for enforcement of arbitration awards ‘in any court having jurisdiction thereof,’ . . . ‘begs the question of what court has jurisdiction.’” C & L, 532 U.S. at 421 (citation omitted).<sup>10</sup> The Supreme Court rejected this argument. As in C & L, and contrary to the Borrower’s argument, the Borrower’s waiver of sovereign immunity does not beg the question of which court has jurisdiction, and its waiver of sovereign immunity from suit in a Washington Court “has a real world objective; it was not designed for regulation of a game lacking practical consequences.” Id. at 422. Moreover, the agreement at issue in C & L did not even use the phrase “sovereign immunity,” and yet the Court implied a clear waiver. Id. at 420-21. This Court need not imply a waiver as in

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<sup>10</sup> Counsel for the Potawatomi Tribe clarified at oral argument in C & L that its position was that “no court, on earth or even the moon” had jurisdiction. 532 U.S. at 421 (internal quotation marks omitted). The Borrower here has not stated its position quite so openly, but it notably has not conceded that the Lender has any forum at all in which to bring its claims. In the Superior Court, the Borrower stated that “in this case in particular the federal court has jurisdiction [, and] [t]here’s an arbitration provision.” RP 7:20-22; RP 11:20-23 (the Borrower agreeing that a federal court would have diversity jurisdiction). But the Borrower is now backing away from that, stating in its opening brief that “the federal courts may have jurisdiction” and that this matter “may be arbitrable.” Br. Appellant at 24-25 (emphasis added). Regardless of the Borrower’s shifting positions on federal jurisdiction or arbitration, it is still arguing that because the Loan Agreement is (allegedly) a management contract, it is “void and unenforceable.” Br. Appellant at 40-41. The logical consequence of that argument is that even if the Borrower agrees that there is diversity jurisdiction in federal court (a concession that it is now backing away from), it will still argue that the Loan Agreement itself is void and unenforceable. In other words, the Borrower is arguing that under no circumstance should it be required or is it subject to suit to repay the \$15 million it borrowed.

C & L because the Borrower here explicitly waived its sovereign immunity throughout the Loan Agreement. CP 445-46; CP 459; CP 466; CP 491; CP 521; CP 563.

At the same time it asks this Court to ignore the language in which it agreed to be subject to suit in Washington courts, the Borrower has the temerity to raise a “surplusage” argument; it contends that the Lender’s reading of the Loan Agreement should be rejected because it would mean that the language in the Loan Agreement providing for tribal court jurisdiction if no federal or Washington court has jurisdiction is superfluous. Br. Appellant at 24. The Borrower asserts that this language “reflects [the Lender’s] and the [Borrower’s] recognition from the outset that the parties, by agreement, cannot confer subject matter jurisdiction on a particular court.” Id. (emphasis added). But it is the Borrower’s interpretation that would render language in the Loan Agreement meaningless. As the Superior Court recognized, the Loan Agreement does not discuss subject matter jurisdiction, because the ability of a Washington court to hear a contract dispute was never in doubt. Under the Borrower’s interpretation, there should be no reference in the Loan Agreement to Washington courts, because supposedly the parties knew from the beginning that a Washington court would not be able to hear any dispute related to the Loan Agreement. If the Borrower’s interpretation were

correct, then not only would the Borrower's entire irrevocable waiver of sovereign immunity be meaningless, but a fundamental assumption of the bargain and context in which the negotiations took place will have been vitiated.<sup>11</sup>

**C. The Loan Agreement Is Not a Management Contract**

The Loan Agreement here requires little more of the Borrower than that it repay the \$15 million it borrowed. The Borrower's argument is essentially that because the Lender required the Borrower to actually pledge security for the loan and because the Lender expects to be repaid, this constitutes a management contract that would require approval of the Commission. But it is not enough for the Borrower to point to these very basic provisions of a commercial loan and argue in hindsight that they turned over management of the Casino to the Lender.

The Loan Agreement is not a management contract, and the applicable regulations, case law, and the express terms of the Loan Agreement completely refute the Borrower's argument. First, the Loan Agreement does not allow the Lender to set up the working policy of the Casino, the operative test for finding the existence of a management contract. The concept of management and working policy in the Indian gaming context entails involvement with casino operations, which is not

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<sup>11</sup> A much more logical reading is that the language in the agreement establishes that tribal court would be a court of last resort only.

found in the Loan Agreement. Second, loan agreements that leave the tribal entity with discretion over its operating expenses while providing the lender with a security interest have been found not to constitute management contracts. The Loan Agreement here makes the Lender's security interest in Pledged Revenues subject to the Borrower's operational needs and is entirely appropriate. Third, the Loan Agreement does not resemble the trust indenture in Wells Fargo Bank N.A. v. Lake of the Torches Economic Development Corp., 658 F.3d 684 (7th Cir. 2011) (hereafter, "Wells Fargo"), upon which the Borrower rests nearly its entire argument. To the contrary, the Borrower controls its budget and accounting, and the offensive provisions in the trust indenture in Wells Fargo are absent from the Loan Agreement here. Finally, there is no merit to the Borrower's argument that the effect of the Loan Agreement is to require the Borrower to operate the Casino solely for the Lender's benefit. The Borrower continues to operate its Casino to the benefit of tribal members. It is the Lender that has seen little to no benefit from the Loan Agreement, and the Borrower's argument would actually undermine the law and policies reflected in IGRA.

**1. Management Means "Setting Up the Working Policy" of the Casino.**

Loan agreements like the one here are not required to be approved by the Commission, because such agreements do not allow the lender to

set up the working policy of the casino. IGRA was enacted in part to shield tribal gaming “from organized crime and other corrupting influences,” 25 U.S.C. § 2702(2), not to prevent tribes from securing commercial loans for important tribal enterprises. Though contracts to manage a casino are subject to Commission approval, loan agreements for casinos are not the same as management contracts. IGRA defines “management contract” as a contract that “provides for the management of all or part of a gaming operation.” 25 C.F.R. § 502.15. The regulation simply begs the question, but “[w]hile neither the statute nor the regulations define management, the regulations do define a ‘primary management official’ as any person who has ‘authority . . . to set up working policy for the gaming operation.’” Wells Fargo Bank, N.A. v. Sokaogon Chippewa Cmty., 787 F. Supp. 2d 867, 878 (E.D. Wis. 2011) (quoting 25 C.F.R. § 502.19(b)(2)) (hereafter, “Sokaogon”). In addition, the Commission has stated that management includes “‘planning, organizing, directing, coordinating, and controlling . . . all or part of a gaming operation.’” Id. (quoting Commission Bulletin 94-5 at 2).<sup>12</sup>

With only limited guidance from the Commission as to what may constitute a management contract, courts look to the provisions of 25

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<sup>12</sup> The Borrower acknowledges the applicability of the regulation concerning setting up the working policy of a casino, yet takes the supposed “ordinary meaning” of management from a series of inapposite federal labor relations cases having nothing to do with IGRA. Br. Appellant at 32-33.

C.F.R. § 531.1, which sets out a number of responsibilities and authorities that are required to be enumerated and allocated in a management contract. See, e.g., Wells Fargo, 658 F. 3d at 698; First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc., 412 F.3d 1166, 1172-73 (10th Cir. 2005); Jena Band of Choctaw Indians v. Tri-Millennium Corp., Inc., 387 F. Supp. 2d 671, 676 (W.D. La. 2005). Included in this list of responsibilities are provisions for fundamentally managerial functions: maintaining and improving the gaming facility; establishing operating days and hours; hiring, firing, and training employees; providing for fire protection services; and several similar items. 25 C.F.R. § 531.1(b). Taken together, the courts and the Commission have stitched together a definition of management from the regulations that gives content to the concept of setting up “working policy” for a casino, emphasizing a role in actual day-to-day operational and personnel decisions.

**2. Loan Agreements that Leave Operational Discretion with the Tribe are not Management Contracts.**

A loan agreement that leaves management of the casino to the tribe while providing the lender with a security interest in revenues does not constitute a management contract. Sokaogon, 787 F. Supp. 2d at 878-81. In Sokaogon, the borrower tribe granted a security interest to the lender in the tribe’s “Pledged Casino Revenues,” which it defined as “the Gross

Revenue of the Casino Facility remaining after payment of Operating Expenses.” Id. at 871 (citation omitted) (emphasis added). This provision is similar to the Loan Agreement here, which grants the Lender “a security interest in Pledged Revenues . . . subject to the prior application of the Pledged Revenues to pay Operating Expenses.” CP 457 (internal quotation marks omitted) (emphasis added); CP 545-46 (providing for transfer of funds to the Secured Obligations Account only “after all amounts required to be transferred to the Operating Account . . . have been made”). Eventually, the tribe in Sokaogon stopped repaying the loan, and when the lender sued, the tribe argued that the loan agreement was void under IGRA as an unapproved management contract. 787 F. Supp. 2d at 872.

In holding that that the loan agreement was not a management contract, the Sokaogon court found that the security and loan repayment provisions in the agreement left managerial discretion to the tribe. Id. at 879-81. In particular, the court considered the Commission’s own opinion in the form of a declination letter that “[e]xcluding operating expenses from gaming revenues in which a party is granted a security interest ensures that the secured party cannot manage the gaming facility should the tribe default.” Id. at 879 (alteration in original) (citation omitted)

(emphasis added).<sup>13</sup> Moreover, the court distinguished the loan agreement before it from the trust indenture in Wells Fargo,<sup>14</sup> emphasizing that the agreement did not require the tribe to obtain approval of the lender or bondholders before making capital expenditures. 787 F. Supp. 2d at 881. Finally, the court noted that if the tribe requested to withdraw funds from its capital expenditure account, there was no provision in the loan agreement “giving the [lender] discretion to deny such a request.” Id. at 881. Thus, because the loan agreement granted the lender the necessary security for the loan while leaving operational discretion to the tribe, the court found that the agreement was not a management contract. Id. at 881. The same analysis and conclusion applies to the Loan Agreement here.

### **3. Operating Expenses and the Borrower’s Discretion Take Precedence Over the Lender’s Security Interest in the Loan Agreement.**

As in Sokaogon, the Loan Agreement here grants the Lender a security interest in the revenues of the Casino only after the Borrower gets its operating expenses. CP 457; CP 545. The Borrower argues that

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<sup>13</sup> The Borrower argues that the Lender entered into the Loan Agreement without Commission review “at its peril,” Br. Appellant at 39, and that the Lender could have requested a “declination letter” from the Commission, id. at 34. However, such “informal pronouncements of an agency” do not warrant deference, but may be accepted “only as they have power to persuade.” First Am., 412 F.3d at 1174 (citation omitted). There was no need to submit the Loan Agreement for Commission review because by its express terms and in practice, it is not a management contract. To the extent that such Commission guidance is at all persuasive, it bears noting that the court in Sokaogon considered the Commission’s opinion that a security interest in pledged casino revenues that set aside operating expenses did not constitute a management contract. Sokaogon, 787 F. Supp. 2d at 879.

<sup>14</sup> See discussion of Wells Fargo infra at 41.

because the Loan Agreement requires it to deposit “gross revenues” for distribution, the Lender thereby becomes the “de facto manager” of the Casino. Br. Appellant at 38.<sup>15</sup> But as the Sokaogon court held, citing guidance from the Commission, by excluding casino operating expenses from the monies constituting the security interest, the lender is not in a position to manage the gaming facility. In other words, because the Lender is not repaid until the Borrower has the money it needs to operate its Casino, the Lender is in no way managing the Casino simply by virtue of expecting the Borrower to pledge something as security for the loan. Furthermore, as a practical matter, it would not be in the Lender’s or the Borrower’s best interest to expect repayment before the Borrower has the funds it needs to operate the Casino. To the contrary, the Lender continues to believe in good faith that its best chance of having the \$15 million loan repaid is for the Borrower to operate the Casino.

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<sup>15</sup> The Borrower cites language from United States v. Casino Magic, 293 F.3d 419, 425 (8th Cir. 2002), stating that the Loan Agreement here “served as a management contract implicitly if not explicitly.” Br. Appellant at 38. However, the contract in Casino Magic: (1) provided a “consultant to assist the Tribe in developing and operating the gaming enterprise,” 293 F.3d at 421; (2) included an agreement for the consultant to “conduct marketing feasibility studies, develop and identify marketing plans, and to provide an accounting system, written system of internal controls, security plan, and a job classification system with training,” id.; (3) “obliged the Tribe to accept and comply with all of the recommendations made by the Consultant under the Consulting Agreement,” id. at 422 (internal quotations omitted); and (4) gave the outside party “a percentage ownership interest in the Tribe’s indebtedness,” id. at 424. Like the other authorities cited by the Borrower, the troubling provisions found in the contract in Casino Magic are not present in the Loan Agreement in this case.

Simply put, the Lender does not take a cut of the Casino's gross revenues. Indeed, apart from equipment, the Borrower could not pledge any collateral at all for this \$15 million loan if it was not able to grant a security interest in the Casino's revenues, because neither the general obligation nor the full faith and credit or taxing power of the Borrower are pledged as security for the loan. CP 448. If the Borrower is correct that merely pledging net revenue, effectively the only item of potentially significant value to secure a \$15 million loan, amounts to management, then no tribal entity could ever obtain the funds it needs from a non-tribal lender to build a tribal gaming enterprise.

Additionally, as in Sokaogon, the Loan Agreement here leaves ultimate discretion with the Borrower concerning the disposition of funds. The Borrower states, incorrectly, that it can withdraw funds for operations only "upon written certification" to the Lender. Br. Appellant at 35. In fact, the Loan Agreement provides that, in the event of a default, the Borrower "shall provide a monthly Operating Budget," and if "the Borrower deems it necessary" to revise its budget, it need only "notify" the Lender. CP 544-45 (emphasis added). This provision is similar to that in Sokaogon, where the court found that the fact that the tribe had to issue a "draw request" to withdraw funds did not give managerial control to the lender because there was no provision giving the lender "discretion to

deny such a request.” 787 F. Supp. 2d at 881. As in Sokoagon, the Loan Agreement here does not require the Borrower to “certify” its withdrawals for operating expenses, and there is no provision giving the Lender the discretion to deny any amount the Borrower budgets for operations. Separately or taken together, these provisions vest management of the Casino in the Borrower—the Lender does not even begin to be repaid until the Borrower, in its discretion, takes what it needs.

**4. The Loan Agreement Bears No Resemblance to the Authorities Cited by the Borrower.**

The Loan Agreement has a number of clauses—because it was memorializing the parties’ exchange of promises involving millions of dollars. The Borrower has taken various disparate terms out of context and tried to cobble them together to support a claim that they somehow amount to casino management. But as discussed below, the provisions of the Loan Agreement emphasized by the Borrower are not analogous to the trust indenture in Wells Fargo and leave management to the Borrower.

**a. The Borrower Controls Its Budget and Operating Expenses.**

The Borrower points to two features of the Loan Agreement that it claims are analogous to the trust indenture in Wells Fargo, relating to the Borrower’s daily deposits and operating expenses. With respect to deposits, the Borrower argues that the Loan Agreement is “markedly

similar” to the trust indenture in Wells Fargo because “all proceeds from the Casino were Pledged Revenues,” except what the Borrower retained for operations. Br. Appellant at 36-37. But, as Sokaogon held, pledging casino revenues after operating expenses does not give the lender any managerial control. Here, the Borrower attempts to create the impression that the Lender is managing the Casino’s operations, claiming that it must “certify” its cash-on-hand requirements and provide a monthly operating budget. Br. Appellant at 37. But there is no provision giving the Lender control over cash-on-hand management. The Lender does not have discretion to deny the Borrower the funds it needs to operate the Casino.

The Borrower is also incorrect that the Loan Agreement prohibits it from paying past-due accounts. Br. Appellant at 37-38. The Borrower claims that the Lender controls the Borrower’s operating expenses, citing language from the Loan Agreement to the effect that “Operating Expenses does not and will not, in any event, include past due accounts of the Borrower.” Id. at 38 (misquoting CP 643). But the Borrower has taken this language in the Loan Agreement out of context, omitting the full passage, which reads “Operating Expenses does and will not, in any event, include past due accounts payable of the Borrower which may be paid in accordance with clause (vi) below.” CP 643 (emphasis added to portion omitted in Borrower’s brief). In fact, the clause referenced in the full

passage makes clear that excluded “past due accounts” refers to amounts due “in connection with the Loan Documents,” not amounts overdue to vendors. CP 643. In other words, the Borrower, who was already in default for failing to make payments on the loan, could not claim that its monthly operating expenses included monies it already owed the Lender. This makes sense: The Lender gets paid only after the Borrower takes out its operating expenses, and it would therefore be entirely circular and defeat the purpose of a forbearance agreement if the Borrower could withhold funds as operating expenses from the Lender by claiming that it needed those funds to repay the Lender for amounts past due.<sup>16</sup>

**b. The Borrower Controls Its Internal Accounting Procedures.**

Contrary to the Borrower’s assertions, the Loan Agreement does not allow the Lender to “pass[] on the adequacy of NBC’s accounting systems, procedures and budgeting.” Br. Appellant at 39. The Borrower apparently bases this argument on provisions in one of the three forbearance agreements where the Borrower agreed to provide financial information to the Lender. Br. Appellant at 10-11 (citing CP 608-09). However, there is nothing in the Loan Agreement giving the Lender any

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<sup>16</sup> The Borrower similarly misunderstands the meaning of the term “current expenses” in the Loan Agreement. Br. Appellant at 37 (quoting CP 535). While the Casino may at times not generate enough cash to meet its operating budget and pay its vendors, there is nothing in the Loan Agreement preventing the Borrower from paying past-due vendor accounts when and if it generates sufficient cash.

control over the Borrower's internal accounting procedures. To the contrary, the provisions cited by the Borrower speak of external documents to be prepared by the Borrower and given to the Lender, including projections, statements, comparisons, and reports. CP 608-09. These documents were a condition of the forbearance agreement. That is, if the Lender was going to agree to set aside the Borrower's default and continue to forbear its rights to call the \$15 million loan due, it wanted to know how the Casino was performing, all in order to assess when, if ever, it might be repaid. Such reporting provisions are typical in default situations in commercial loan agreements, and this requirement did not give the Lender any ability to set up the working policy of the Casino.<sup>17</sup>

**c. The Wells Fargo Holding Was Based on Provisions in the Trust Indenture that Are Not Found in the Loan Agreement.**

Not only are the supposedly analogous provisions cited by the Borrower significantly different from those in Wells Fargo, but the

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<sup>17</sup> Nor is the Borrower correct that the Lender can deny the Borrower access to funds to pay operating expenses in the event of a default. Br. Appellant at 37. In the event of a default, the Depository may appropriate Pledged Financial Assets as security for the loan, CP 553, which includes funds in the Operating Account, CP 540. However, any such appropriated funds must then be distributed in accordance with Article III of the Springing Depository Agreement, CP 554, which provides that the Operating Account be funded on a priority basis up to the amount of budgeted Operating Expenses before any funds can be applied to pay the amount payable to the Lender. CP 544-45. In other words, in the event of a default, the Borrower gets funding to pay its operating expenses before the Lender receives any repayment.

features of the trust indenture in that case amounting to management are nowhere to be found in the Loan Agreement here. For example:

- The Borrower argues that the fact that it is required to deposit its Pledged Revenues is analogous to the facts in Wells Fargo and therefore constitutes management. Br. Appellant at 36-37. However, the court in Wells Fargo stated that it “need not determine here the appropriateness of such an arrangement other than to note that, without some limitation on Wells Fargo’s discretion to allocate or condition the release of the Casino’s gross revenues even to pay operating expenses, this provision bestows a great deal of authority in an entity other than the Tribe.” Wells Fargo, 658 F.3d at 698 (emphasis added). Here, by contrast, the Lender’s security interest is “subject to the prior application of the Pledged Revenues to pay Operating Expenses.” CP 457 (emphasis added). If a limitation on the lender’s discretion was lacking in Wells Fargo, it is certainly not lacking in the Loan Agreement here.
- The trust indenture in Wells Fargo allowed the bondholders to require the tribe to “promptly retain an Independent management consultant,” who must be approved by the bondholders, and required the tribe to “use its best efforts to implement” the consultant’s recommendations. Wells Fargo, 658 F.3d at 698. The court found that such a provision allowed the lender to “effectively direct the operations of the casino.” Id. There is no such provision in the Loan Agreement here.
- The trust indenture in Wells Fargo prohibited the tribe from removing or replacing the casino’s general manager for any reason without the consent of a majority of the bondholders, which the court characterized as “strong control over management.” Id. at 698-99. There is no such provision in the Loan Agreement here.
- The trust indenture in Wells Fargo also provided that the bondholders could require the tribe to hire new management, which the court found placed “very significant management authority” in the hands of the lender. Id. at 699. There is no such provision in the Loan Agreement here.

Based on these provisions, the court in Wells Fargo explained the limitations of its holding:

We reiterate that we do not attempt here to delineate precise guidelines for parties to loan agreements involving an Indian gaming operation, a task better left to the Commission. Nevertheless, we are firmly convinced that, taken together, the provisions discussed above transfer significant management responsibility to Wells Fargo and the bondholders and therefore render the Indenture a management agreement.

Id. (emphasis added). Thus, the Wells Fargo court made clear that: (1) it was not purporting to announce a brightline rule for every loan agreement relating to an Indian casino; and (2) no single provision in the trust indenture was determinative, but rather the entire agreement taken together amounted to management.

The holding in Wells Fargo and the features of the trust indenture there illustrate just how different the Loan Agreement in this case is. At bottom, the Borrower's extensive argument over the supposed application of Wells Fargo comes down to the singular requirement that it repay the \$15 million it borrowed. The Borrower does not argue that the Lender can set the budget, fire or hire management, or in any way set up the working policy of the Casino. Instead, the Borrower argues that the fact that it was required to pledge collateral for the loan and that the Lender now wants to the Borrower to make good on its promise somehow amounts to

management. The Loan Agreement is nothing like the trust indenture in Wells Fargo and is much closer to the agreement in Sokaogon. For all of the Borrower's citations to and mischaracterizations of discrete parts of the Loan Agreement,<sup>18</sup> merely pointing to its obligations to pay the loan back does not equal a management contract. While it is true that both the trust indenture in Wells Fargo and the Loan Agreement here relate to tribal gaming, that is where their similarities end.

**5. The Only Party Not Benefitting from the Loan Agreement is the Lender.**

The Borrower's argument that the Loan Agreement's "sole purpose" is to benefit the Lender ignores the very purpose and operation of the loan. Br. Appellant at 39. While the Loan Agreement provided for

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<sup>18</sup> The Borrower improperly applies the law of judicial remedies to the Second Forbearance Agreement, asserting that the IGRA Compliance Provision was an invalid attempt to reform a void contract. Br. Appellant at 38 n.5. But the cases the Borrower cites simply hold that a court cannot apply the reformation remedy to a contract that the court has declared to be void. See Berg v. Ting, 125 Wn.2d 544, 554, 886 P.2d 564 (1995) (denying judicial remedy of reformation to void contract); Golden Pisces, Inc. v. Fred Wahl Marine Constr., Inc., 495 F.3d 1078, 1081 (9th Cir. 2007) (refusing to judicially sever terms of contract where contract was void because parties had not mutually assented to it). These judicial remedy cases have no bearing on this case, as the Second Forbearance Agreement and its IGRA Compliance Provision are not judicial remedies, but mutually agreed upon contractual amendments. The parties supported the Second Forbearance Agreement with consideration and thus made a new contract to be substituted for the original agreement as amended by the First Forbearance Agreement. See Duncan v. Alaska USA Fed. Credit Union, Inc., 148 Wn. App. 52, 74, 199 P.3d 991 (2008) (contractual modification requires meeting of minds and consideration). In drafting the Second Forbearance Agreement, the parties were free to clarify their understanding that the Loan Agreement complied with the IGRA. Their doing so was neither an assertion that the original agreement was invalid nor any sort of judicial "reformation." Moreover, the Borrower's citation to other provisions of the Second Forbearance Agreement should preclude its efforts to disavow the IGRA Compliance Provision.

a monthly payment to the Tribe after operating expenses and repayment toward the loan, this was not a guarantee of the Casino's success. CP 535. The parties agreed that the Borrower would operate the Casino, the Casino would generate revenue, the revenue would be used to fund the Casino's operations and repay the loan, and the Tribe would also receive monthly payments, "at its direction," "to the extent of amounts in the Pledged Revenues Account." CP 546. The fact that the Casino might not generate sufficient cash in a given month to fund operations, make its loan payment, and make a payment to the Tribe does not mean that the Tribe is not benefitting from the Casino. Indeed, the Borrower ignores the fact that the Casino provides jobs and income to many members of the Tribe, and in that regard most certainly benefits the Tribe and its members, particularly in a time of high national unemployment rates.

The Borrower's argument is essentially that its obligation to repay the loan should be subject to its discretion: The Borrower uses the Casino revenues to fund operations, gives what it wants to the Tribe, and if there is anything left over, the Borrower—in its sole discretion—might pay something to the Lender. That is simply not how a loan—any loan—works. In fact, it is the Borrower's actions and argument that undermine the policies enumerated in IGRA. As one court explained:

If any contract that relates to the eventual development of an anticipated gaming operation is construed as a management contract—collateral or otherwise—it would be more difficult for tribes to acquire the economic assistance often needed . . . . Potential investors would be unable to contract with tribes, and therefore, they would not be able to ensure that they could recoup any of the money they invested in the tribe.

It is in the best interest of the tribes that they be able to enter into enforceable contracts . . . . Without such contracts, many tribes would not be able to procure the financial backing that is often necessary for the creation of gaming operations. Such a state of affairs would thwart the policies underlying the IGRA.

Jena, 387 F. Supp. 2d at 678 (emphasis added). The Loan Agreement is entirely consistent with the law and policies enumerated in IGRA, while the rule proposed by the Borrower is inconsistent with the goals of IGRA.

Finally, the Borrower is simply wrong that the Lender took a “calculated risk” when entering into the Loan Agreement. Br. Appellant at 39. The extensive arms-length negotiations that produced the Loan Agreement were not intended to be a game of chance. Rather, the parties knew exactly what they were bargaining for. While the parties hoped that the Borrower would successfully operate the Casino and repay the \$15 million loan, the parties also agreed in substantial detail what would happen in the event of a breach. Unfortunately, that is where the parties now stand. The Borrower continues to operate the Casino, but the Lender has not seen a payment in many months. If the portions of the Loan

Agreement that the Borrower now complains of were eliminated, no lender would ever have been willing to agree to it.

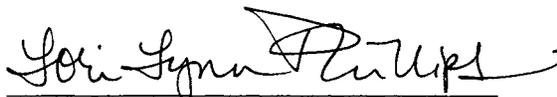
**V. CONCLUSION**

The Borrower's arguments, if accepted, would result in a significant departure from established U.S. Supreme Court precedent concerning the jurisdiction of state courts with respect to Indian tribal entities that have waived immunity. They would also have a devastating impact on the availability of financing for Indian gaming facilities and other tribal enterprises. This Court should reject those arguments, and, for the reasons set forth above, affirm the Superior Court's decision and uphold both the exercise of jurisdiction in this case and the rejection of the Borrower's assertion that the Loan Agreement is a "management contract" under IGRA.

DATED this 24th day of January 2012.

Respectfully submitted,

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NO. 67050-6-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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OUTSOURCE SERVICES MANAGEMENT, LLC,  
Respondent,

v.

NOOKSACK BUSINESS CORPORATION,  
Appellant.

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CERTIFICATE OF SERVICE FOR BRIEF OF RESPONDENT

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I, Malissa Tracey, do hereby certify and declare under penalty of perjury under the laws of the State of Washington, as follows:

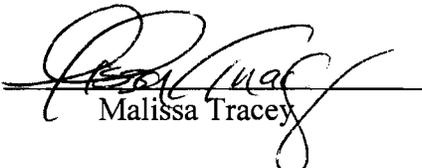
That I am an employee of Orrick, Herrington & Sutcliffe LLP, 701 5th Avenue, Suite 5600, Seattle, Washington 98104. On January 24, 2012, I caused the following documents to be filed with the Court of Appeals. In addition, I also caused the same documents to be served on counsel of record on January 24, 2012 at the address and in the manner described below:

1. Brief of Respondent; and this
2. Certificate of Service

**Via Hand Delivery**

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DATED this 24th day of January 2012.

  
Malissa Tracey