IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CITY OF VANCOUVER, a Washington municipal corporation,

Plaintiff,

v.

PHILIP N. HOGEN, in his official capacity as Chairman of the National Indian Gaming Commission, and the NATIONAL INDIAN GAMING COMMISSION,

Defendants.

Case No. C08-5192-BHS

CITY OF VANCOUVER'S MOTION FOR SUMMARY JUDGMENT

Noted for: August 29, 2008

ORAL ARGUMENT REQUESTED

1. INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to the parties' agreed briefing schedule and the Court's Order Extending Defendants' Time to File Answer (Dkt. No. 12), Plaintiff City of Vancouver (the "City") respectfully submits its Motion for Summary Judgment.

This case concerns the National Indian Gaming Commission's ("NIGC") approval of a gaming ordinance adopted by the Cowlitz Indian Tribe ("Cowlitz" or the "Tribe") with respect to land located in Clark County, Washington. With this motion, the City asserts that the NIGC's approval of the Tribe's gaming ordinance is contrary to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA"). IGRA, the applicable administrative rules and case law

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interpreting the statute all require the NIGC to determine that the Cowlitz' $500 million casino proposal is located on "Indian lands" before reviewing or approving any ordinance governing gaming at that site. Instead of making this jurisdictional "Indian lands" determination, the NIGC first issued an advisory opinion that the proposed site constitutes the Cowlitz' "restored lands," and then approved the Tribe's gaming ordinance contingent on the Bureau of Indian Affairs ("BIA") taking the land into trust.

The NIGC cannot dispute that the Cowlitz' proposed casino site is not "Indian lands" because the Cowlitz do not own the property and have never exercised tribal jurisdiction over the property, as required by IGRA. Consequently, under the plain language of the statute, the land is neither subject to IGRA nor eligible for gaming, and the NIGC lacked jurisdiction to approve any ordinance regulating gaming on non-Indian lands. To the extent the NIGC relied on its General Counsel's "restored lands" opinion as a substitute for the required jurisdictional "Indian lands" determination, the NIGC's approach runs counter to the plain language of IGRA and the applicable case law, as well as the NIGC's own administrative rules and testimony submitted on its behalf to Congress. In addition, IGRA prohibits the NIGC from making an "Indian lands" determination contingent on BIA taking the proposed site being taken into trust.

In the absence of jurisdiction over the proposed casino site, the NIGC's approval of the Tribe's gaming ordinance is arbitrary and capricious, an abuse of discretion, and contrary to law. Accordingly, with this motion, the City respectfully requests that the Court enter an order granting summary judgment for the City and declaring that the NIGC's approval of the Cowlitz' gaming ordinance is invalid until such time as the Tribe: (1) acquires title to the proposed casino site; and (2) exercises governmental jurisdiction over the proposed casino site. The City also requests that the Court enjoin the NIGC from proceeding with further consideration of the Tribe's gaming ordinance or any other ordinance adopted by the Tribe with respect to the proposed casino site until the Tribe presents evidence that the land on which it seeks to conduct gaming constitutes "Indian lands" as that term is defined by IGRA and the applicable regulations.

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2. STATUTORY BACKGROUND

2.1 The Indian Gaming Regulatory Act

Congress adopted IGRA in 1988 to establish a comprehensive statutory scheme governing Indian gaming.[1] In enacting IGRA, Congress sought "to balance the competing sovereign interests of the federal government, state governments and Indian tribes, by giving each a role in the regulatory scheme." *Artichoke Joe's v. Norton*, 216 F. Supp.2d 1084, 1092 (E.D. Cal. 2002), *aff'd*, 353 F.3d 712 (9th Cir. 2003). The federal component of Congress' statutory scheme is the NIGC, an independent federal agency within the Department of the Interior.[2]

2.2 Indian Gaming May Only Occur on Indian Lands

Under IGRA, Indian tribes may only conduct gaming activities on "Indian lands." IGRA recognizes three types of Indian gaming, each of which is subject to different levels of governmental regulation. Relevant to this case is Class II gaming,[3] which includes games like bingo, lotto, pull-tabs and punch boards, but which specifically excludes house-banked card games and slot machines.[4]

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[1] 25 U.S.C. §§ 2701- 2721.

[2] 25 U.S.C. § 2702(3) (establishing the NIGC as an "independent Federal regulatory authority for gaming on Indian lands").

[3] The Cowlitz' tribal ordinance No. 07-03, adopted on October 6, 2007, regulates Class II gaming on the proposed Cowlitz casino site. However, documents filed by the Tribe clearly demonstrate that the Cowlitz intend to conduct Class III, not Class II, gaming on the proposed casino site. *See, e.g.*, Tribe's June 6, 2006 Amended Fee-to-Trust Application at 6 ("Amended Fee-to-Trust Application") (stating that the Tribe will use "the parcel for a Class III gaming facility with hotel and entertainment facilities..."). While the City has requested that the NIGC include this document in the Administrative Record, the NIGC refused on the grounds that the Tribe's Fee to Trust Application was filed with BIA and not the NIGC. Accordingly, the City has submitted the Fee to Trust Application as an Exhibit to the First Declaration of Steven G. Jones ("1st Jones Dec."), filed concurrently, and asks the Court to take judicial notice of the Application. Despite a clear indication from the Tribe that it intends to proceed with Class III gaming, the Tribe has never adopted an ordinance specifically authorizing or seeking to govern Class III gaming on the proposed casino site and the City has accordingly limited its Amended Complaint and this motion to discussion of the requirements of IGRA that govern Class II gaming. If the Tribe conducts Class III gaming on the proposed casino site, in addition to meeting the requirements applicable to Class II gaming, the Tribe would have to enter into a valid compact with the State of Washington, 25 U.S.C. § 2710(d)(1)(C), something that it has not done. *See* 1st Jones Dec., Ex. 3. The lack of a tribal/State compact provides an additional basis under which the Court must prohibit the NIGC from authorizing the Tribe to proceed with its gaming proposal. Should the Court desire any discussion of the additional requirement of a tribal/State compact, the City will submit supplemental briefing on that question.

[4] 25 U.S.C. § 2703(7)(A) and (B).

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Class II gaming is only lawful if: (1) the governing body of the Indian tribe having jurisdiction over Indian lands adopts an ordinance or resolution that is approved by the NIGC Chairman; and (2) the gaming is located within a state that permits such gaming.[5] IGRA defines "Indian lands" as:

> (A) all lands within the limit of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which the Indian tribe exercises governmental power.[6]

Under this definition, where Indian gaming will occur off-reservation, the land on which gaming is to take place must be either held in trust for the Tribe by BIA,[7] or held by the Tribe or tribal members in restricted status.[8] In addition, the Tribe must exercise governmental power over the property.[9] Under IGRA, the NIGC has jurisdiction to regulate gaming activities on "Indian lands."[10] By contrast, the NIGC has no authority to regulate gaming on non-Indian lands, and such lands are subject to state gambling laws.[11]

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[5] 25 U.S.C. § 2710(b)(1).

[6] 25 U.S.C. § 2703(4).

[7] "Trust land" is defined as" land or an interest therein, for which the United States holds fee title in trust for the benefit of an individual Indian or tribe." 25 C.F.R. § 151.2.

[8] "Restricted fee land" is defined as "land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations in the conveyance instrument pursuant to federal law." 25 C.F.R. § 151.2.

[9] 25 U.S.C. § 2703(4)(B). IGRA does not define the circumstances under which a tribe exercises "governmental power" over a tract of land. However, case law interpreting IGRA indicates that a tribe's exercise of governmental power may be established by evaluating specific factors evidencing governmental power on a case-by-case analysis. *See, e.g., State of R.I. v. Narragansett Tribe of Indians*, 19 F.3d 685, 702-03 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994) (application of IGRA requires that a tribe exercise jurisdiction over "Indian lands," as demonstrated by "concrete manifestations of [the Tribe's] authority."); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217-18 (D. Kan. 1998) (tribal jurisdiction is a threshold requirement to a tribe's exercise of governmental power).

[10] 25 U.S.C. § 2702(3) (establishing an "independent Federal regulatory authority for gaming on Indian lands …").

[11] *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp.2d 295, 323 (W.D.N.Y. 2007).

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In addition to limiting Indian gaming to Indian lands, IGRA generally prohibits gaming on lands acquired in trust by the United States after October 17, 1988, with limited exceptions. One of those exceptions is that tribes may conduct gaming on land that constitutes the "restored lands" of a newly-recognized tribe.[12]

3. STATEMENT OF UNCONTROVERTED FACTS

Based on documents appearing in the Administrative Record and the additional documents submitted to BIA which the City has tendered for the Court's consideration, the following material facts cannot be contested:

1. The proposed Cowlitz casino site is a ±151.87 acre property located in Clark County, Washington.[13] According to the Tribe's Amended Fee-to-Trust Application, the proposed casino site is located about 24 miles from the Tribe's existing government offices, which in turn are located on a small parcel of fee land in Longview, Washington.[14]

2. Title to the proposed Cowlitz casino site is privately held by Salishan-Mohegan, LLC, a Washington limited liability company formed by the Tribe's development partner, the Mohegan Tribe, and tribal member David Barnett.[15]

3. The Cowlitz Tribe currently does not exercise jurisdiction or governmental authority over any portion of the proposed Cowlitz casino site.[16]

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[12] 25 U.S.C. § 2719(b)(1)(B)(ii)-(iii), allowing gaming notwithstanding the general prohibition on gaming adopted on October 17, 1988 where the land is part of "(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process," or "(iii) the lands are taken into trust as part of 'the restoration of lands for an Indian tribe that is restored to Federal recognition.'" *See also* AR 001650 (Restored Lands Opinion); Facility License Standards, 73 Fed. Reg. 6019, 6019-6022 (Feb. 1, 2008) (to be codified at 25 CFR pts 502, 522, 559 and 573) (gaming that does not take place on Indian lands is subject to state and local gaming laws and federal laws apart from IGRA).

[13] 1st Jones Dec., Ex. 3 (Amended Fee-to-Trust Application); *see also* Administrative Record (hereinafter "AR") at 001645 (Memorandum from P. Coleman to NIGC Chairman P. Hogen, dated November 22, 2005) ("Restored Lands Opinion").

[14] 1st Jones Dec., Ex. 3 at 14 (Amended Fee-to-Trust Application); AR at 001657 (Restored Lands Opinion).

[15] AR at 003677-79 (Clark County Title); AR at 001446 (stating David Barnett is the "power behind the Cowlitz tribe").

[16] 1st Jones Dec., Ex. 4, (Amended and Reorganized Request for a Reservation Proclamation, dated August 11, 2006); AR at 001622-001623 (Letter from NIGC Chairman P. Hogen to Cowlitz Indian Tribe Chairman John Barnett, dated November 23, 2005); AR at 005617 (Cowlitz Tribe's Request for a Restored Lands Opinion stating that the Tribe will "eventually" exercise governmental jurisdiction over the site); AR at 005618-005619 (further discussing same).

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4. On January 4, 2002, the Tribe filed its initial Fee-to-Trust application with BIA, requesting that the United States take the proposed casino site into trust for the benefit of the Tribe.[17] On March 12, 2004, the Tribe submitted an Amended Fee-to-Trust application with BIA with respect to this same parcel of property that identified the Tribe's intent to use the property for gaming purposes.[18] On June 6, 2006, the Tribe submitted another Amended Fee-to-Trust application to the BIA.[19]

5. In its Amended Fee-to-Trust application, dated June 6, 2006, the Tribe informed the United States that "[t]itle to the Cowlitz Parcel…is either held or controlled by Salishan-Mohegan, LLC, the Tribe's development partner…" and further stated that the Tribe's acquisition of title to the proposed site from Salishan-Mohegan, LLC was contingent upon the United States accepting the property into trust.[20]

6. The United States has not issued a final decision with respect to the Cowlitz Tribe's Amended Fee-to-Trust application.[21]

7. On August 22, 2005, the Cowlitz Tribe adopted Tribal Council Ordinance No. 05-2 ("Gaming Ordinance No. 05-2") for the purpose of governing "Class II gaming operations on the Tribe's Indian Lands."[22]

8. In Gaming Ordinance No. 05-2, the Tribe defined the Tribe's Indian land as "including but not limited to" the parcel owned by Salishan-Mohegan, but conceded that the parcel would not be deemed the Tribe's Indian Lands "until such time as the United States has acquired trust title to it and the Tribe exercises governmental power over it."[23] The Tribe submitted Gaming Ordinance 05-2 to the NIGC for approval on August 29, 2005.[24]

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[17] 1st Jones Dec., Ex. 3 at 1 (Amended Fee-to-Trust Application); AR at 001643 (Restored Lands Opinion).

[18] 1st Jones Dec., Ex. 3 at 1 (Amended Fee-to-Trust Application); AR at 001643 (Restored Lands Opinion).

[19] 1st Jones Dec., Ex. 3 (Amended Fee-to-Trust Application).

[20] 1st Jones Dec., Ex. 3 at 6 (Amended Fee-to-Trust Application).

[21] AR at 001643 (Restored Lands Opinion); AR at 005348 (Letter from Assistant Attorney General Jerry Ackerman to NIGC Chairman P. Coleman, dated August 15, 2005) (observing that the process of accepting the land into trust was not complete); AR at 001682-83 (Letter from Attorney General Rob McKenna to NIGC Chairman P. Hogen, dated November 21, 2005) (noting that the trust determination is "pending").

[22] AR 005315 (Cowlitz Tribal Council Ordinance No. 05-2 (August 22, 2005)).

[23] AR at 005317 (Cowlitz Tribal Council Ordinance No. 05-2 (August 22, 2005)).

[24] AR at 005248 (Letter from V. Heather Sibbison, Counsel for the Cowlitz Tribe, to Jeff Nelson, NIGC Staff Attorney, dated August 29, 2005) (transmitting Cowlitz Tribal Council Ordinance No. 05-2)).

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9. On November 22, 2005, the NIGC's office of General Counsel issued an advisory opinion that the proposed casino site would constitute the Tribe's "restored lands."[25] The NIGC's Restored Lands Opinion was issued at the behest of the Tribe.[26] The NIGC's General Counsel determined that such an opinion was necessary in order to allow the NIGC to make a decision to approve or disapprove of the Tribe's proposed Gaming Ordinance within 90 days, even though this was the only time the NIGC had ever made a restored lands determination with respect to property that was not either owned by the tribe or held in trust for the benefit of a the tribe making such an application.[27]

10. On November 23, 2005, NIGC Chairman Hogen issued a letter approving Gaming Ordinance No. 05-2.[28] In that letter, NIGC Chairman Hogen stated that the Tribe's Gaming Ordinance followed the NIGC's model ordinance, except for the ordinance's definition of the "Tribe's Indian Lands."[29] As a result, Chairman Hogen expressly made approval of the Tribe's Gaming Ordinance No. 05-2 contingent upon the Department of Interior taking the land into trust and the Tribe's exercising control over the site.[30]

11. On October 6, 2007, the Cowlitz Tribe adopted Tribal Council Ordinance No. 07-02 "Environmental, Public Health and Safety Protections for the Construction and Operation for the Cowlitz Indian Tribe Gaming Facility," which specified mitigation measures related to the construction and operation of the Cowlitz Tribe's gaming facility.[31] On October 6, 2007, the Cowlitz Tribe adopted Tribal Council Ordinance No. 07-03 (the "Amended Gaming Ordinance"), which revised Section 22 of the Tribe's previously approved Gaming Ordinance No. 05-2 with respect to the Environment, Public Health, and Safety. Ordinance No. 07-03 incorporates Ordinance No. 07-02.[32]

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[25] AR at 001643-001659 (Restored Lands Opinion).

[26] AR at 005408-005445 (The Cowlitz Indian Tribe Request for a Restored Lands Opinion, dated March 15, 2005); AR at 005336-005338 (Restored Lands Opinion Withdrawn and Resubmitted on August 18, 2005).

[27] Off-Reservation Gaming: Oversight Hearing for the Process for Considering Gaming Applications Before the Senate Comm. On Indian Affairs, 109th Cong. 2nd Sess. 9-10 (Feb. 1, 2006) (statement of Penny Coleman, Acting General Counsel, National Indian Gaming Commission); *see also* AR at 000748 (referring to Ms. Coleman's testimony).

[28] AR 001622-001623 (Letter from NIGC Chairman P. Hogen to Cowlitz Indian Tribe Chairman Barnett, dated November 23, 2005).

[29] AR at 001622 (Letter from NIGC Chairman P. Hogen to Cowlitz Indian Tribe Chairman J. Barnett, dated November 23, 2005).

[30] AR at 001622-001623 (Letter from NIGC Chairman P. Hogen to J. Barnett, dated November 23, 2005).

[31] AR at 000779-000786 (Cowlitz Tribal Council Ordinance No. 07-02 (October 6, 2007)).

[32] AR at 000773 (Cowlitz Tribal Council Ordinance No. 07-03 (October 6, 2007)). Throughout its Motion for Summary Judgment, the City has used the term "Amended Gaming Ordinance" to refer to both the amendment of the 2005 Gaming Ordinance in Ordinance No. 07-03 and the substance of the amendment in Ordinance No. 07-02.

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12. On October 17, 2007, the Tribe submitted the Amended Gaming Ordinance to the NIGC.[33] On January 8, 2008, NIGC Chairman Hogen approved the Tribe's Amended Gaming Ordinance.[34]

13. In Chairman Hogen's January 8, 2008 letter approving the Tribe's Amended Gaming Ordinance, he approved the "tribal gaming ordinances and ordinance amendments if the submissions do not conflict with IGRA, the NIGC's regulations, or other federal law."[35] Chairman Hogen further stated that "nothing in the amendment conflicts with IGRA, the NIGC regulations, or other federal law…." [36]

4. ARGUMENT

4.1 Summary Judgment Standard

Summary judgment requires that "the Court is satisfied 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (*quoting* Fed. R. Civ. P. 56(c)) (internal quotations omitted). For a material issue of fact to exist, there must be sufficient evidence favoring the nonmoving party that a reasonable jury could return a verdict for that party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986). If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Id*. at 249-250 (internal citations omitted).

Final agency actions by the NIGC pursuant to IGRA are reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The APA authorizes a court to "set aside agency actions, findings, and conclusions" that the court finds to be "arbitrary and capricious, an abuse of discretion,

[33] AR at 000761-000763 (October 17 2007 letter from Cynthia K. Shaw to NIGC Chairman P. Hogen, submitting gaming ordinance amendment and substituting the new ordinance for a prior amendment that was submitted on July 9, 2007 and withdrawn on October 5, 2007); *see also* AR at 000770-000772 (same); AR at 000764-000768 (October 17, 2007 letter from the Tribe's counsel at Patton Boggs to George Skibine, Deputy Assistant Secretary for Policy and Economic Development of the Bureau of Indian Affairs in Washington, D.C., and Stanley Speaks, Regional Director of the Bureau of Indian Affairs in Portland, Oregon, enclosing the and describing the Tribe's gaming ordinance); AR at 000774-000778 (same).

[34] AR at 000001-000002 (Letter from NIGC Chairman P. Hogen to W. Iyall, dated January 8, 2008); AR at 000004-000005 (same).

[35] AR at 000002 (Letter from NIGC Chairman P. Hogen to W. Iyall, dated January 8, 2008).

[36] *Id.*

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or not otherwise in accordance with law." 5 U.S.C. § 706(2)(A); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-414 (1971). In reviewing agency action under the arbitrary and capricious standard, the Court "must determine whether the agency articulated a rational connection between the facts and the choice made." *National Ass'n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003). An agency's action is arbitrary and capricious if "the agency has 'relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id. (quoting Pac. Coast Fed'n of Fishermen's Ass'ns v. National Marine Fisheries Service*, 265 F.3d 1028, 1034 (9th Cir. 2001)).

Courts ruling on challenges to NIGC action where the Commission failed to make an Indian lands determination have required that the record demonstrate the NIGC's consideration of evidence showing that the tribe in question had jurisdiction and exercised government control over the land proposed for Indian gaming. *Apache Tribe of Okla. v. United States*, Slip. Op., 2007 WL 2071874 (W.D. Okla. July 18, 2007) at *4. Where the record indicates that the Commission "entirely failed to consider an important aspect of the problem," the NIGC's action is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins.*, 463 U.S. 29, 43 (1983).

4.2 IGRA Prohibits Contingent Approval of Tribal Gaming Ordinances

The City is entitled to summary judgment on its APA claims because the NIGC was required to make an "Indian lands" determination prior to approving the Cowlitz Tribe's Amended Gaming Ordinance. Instead of making this jurisdictional determination, the NIGC approved the Tribe's ordinance contingent on BIA accepting the land comprising the proposed casino site into trust, and the Tribe exercising governmental power over it. Until such time as the Tribe acquires title to the proposed casino site or those holding title to the site restrict its alienation, the site cannot constitute "Indian lands" under IGRA, and the NIGC lacked jurisdiction to review or approve the Tribe's Amended Gaming Ordinance.

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By the NIGC's own admission, the Cowlitz' proposed casino site does not constitute Indian lands – this single fact is dispositive of the primary issue in the case. Because the NIGC may not appropriate to itself jurisdiction that Congress did not see fit to grant to it, the NIGC is precluded by IGRA from making its approval of the Tribe's Amended Gaming Ordinance contingent on subsequent actions of either the BIA or the Tribe.

The NIGC was fully aware of the legal deficiencies in the Tribe's Amended Gaming Ordinance, yet proceeded to review and issue a contingent approval of the Ordinance. The administrative record indicates that the Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde") pointed out that it was completely improper for the NIGC to approve site-specific mitigation for the proposed casino site until the Tribe had acquired title to the property and was exercising jurisdiction over it. As the Grand Ronde appropriately noted: "the [proposed casino] site does not qualify as 'Indian lands' as it is not part of the Cowlitz Reservation and is not held in trust by the United States for the benefit of the Cowlitz Tribe. The land is, in fact, not owned by the Cowlitz Tribe."[37]

4.3 IGRA's Plain Language Precludes the NIGC from Approving an Ordinance Governing Indian Gaming on non-Indian Lands

The plain language of IGRA precludes approval of a gaming ordinance regulating gaming on lands that are not "Indian lands" subject to the governmental jurisdiction of a tribe. Because the Cowlitz' proposed casino site is not Indian lands, the Commission's contingent approval of the Cowlitz Tribe's gaming ordinance is arbitrary and capricious, an abuse of discretion and contrary to law.

In enacting IGRA, Congress made clear that Indian gaming may only occur on "Indian lands." *See, e.g.*, 25 U.S.C. § 2710(b)(1) (Class II gaming is only lawful if the governing body of the Indian tribe having jurisdiction over Indian lands adopts an ordinance or resolution which is then

[37] AR at 001399 (Letter from Rob Greene, Trial Attorney for the Grand Ronde, to NIGC Chairman P. Hogen, dated August 23, 2007).

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approved by the NIGC Chairman). As is evident from both the text and the purpose of IGRA, the NIGC only has jurisdiction to regulate gaming on Indian lands. *See* 25 U.S.C. § 2702(3) (declaring that, in enacting IGRA, Congress found necessary the "establishment of independent Federal regulatory authority for gaming on Indian lands"); *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp.2d 295, 323 (W.D.N.Y. 2007) ("the NIGC's jurisdiction extends only to Indian gaming that occurs *on Indian lands*") (emphasis in original opinion).

IGRA's plain language requires a threshold determination by the NIGC that gaming will occur on Indian lands as part of its review of proposed gaming ordinances. Section 2710(b)(2) states: "[t]he Chairman shall approve any tribal ordinance or resolution concerning the conduct of class II gaming *on the Indian lands within the tribe's jurisdiction* if such ordinance or resolution" satisfies an additional set of enumerated criteria.[38] This threshold determination is necessary because "[i]f gaming is proposed to occur on non-Indian lands, the Chairman is without jurisdiction to approve the ordinance." *Citizens*, 471 F. Supp.2d at 324.

The NIGC's stated policy and administrative rules follow these same requirements. In a recent Memorandum of Agreement between the Department of the Interior and the NIGC, the Chairman stated: "It is the position of the Chairman not to approve tribal ordinances or management contracts that are site specific when they call for gaming on Indian lands that have not yet been acquired into trust."[39] In addition, in February of this year, the NIGC issued its Final Rule regarding Facility License Standards for Class II and Class III Gaming. In that Rule, the NIGC stated that:

> [t]he Commission has jurisdiction only over gaming on Indian lands and therefore must establish that it has jurisdiction as a *prerequisite* to its monitoring, enforcement and oversight duties.
>
> . . .

[38] 25 U.S.C. § 2710(b)(2) (emphasis supplied).

[39] Mem. of Agreement between Nat'l Indian Gaming Comm'n and the Dep't of the Interior (Feb. 26, 2007). For the Court's ease of reference, a copy of this Memorandum of Agreement is attached to the 1st Jones Dec. as Exhibit 5. Based on communication between counsel for the City and counsel for the NIGC, the NIGC does not oppose the Court's consideration of the Memorandum of Agreement. 1st Jones' Dec., ¶ 5.

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> IGRA requires that all gaming take place on "Indian lands." *See, e.g.*, 25 U.S.C. 2710(b)(1), 2710(d)(1). Gaming that does not take place on Indian lands is subject to all state and local gambling laws and federal laws apart from IGRA. The Chairman therefore has the authority to request Indian lands information for any facility as part of a routine investigation in order to establish whether gaming is, in fact, occurring under IGRA. . . . The rule also requires submission of minimal information for determining Indian lands. Again, *the location of a gaming facility on Indian lands is a necessary prerequisite to gaming under IGRA*.
>
> . . .
>
> IGRA gives the ability to make Indian lands determinations both to the Secretary [of Interior] for example, while taking land into trust, and to the Commission. Again, the location of a gaming facility on Indian lands *is a necessary prerequisite* to gaming under IGRA and to the Commission's jurisdiction under IGRA. *A reading of IGRA under which the Commission is unable to determine its own jurisdiction would undermine, if not make meaningless, the Chairman's enforcement authority under 25 U.S.C. 2713*.

Facility License Standards, 73 Fed. Reg. 6019, 6019-6022 (Feb. 1, 2008) (to be codified at 25 CFR pts 502, 522, 559 and 573) (emphasis supplied).

In this case, despite the statute's clear language and the NIGC's interpretation of that language in the Memorandum of Agreement and in its Final Rule on Facility License Standards as requiring an "Indian lands" determination as a prerequisite to jurisdiction, the NIGC Chairman approved the Cowlitz Tribe's Amended Gaming Ordinances, notwithstanding the fact that the proposed casino site does not qualify as Indian lands under IGRA.[40]

There is no dispute that the proposed casino site is not part of an Indian reservation; in fact, the Cowlitz have asked BIA to proclaim the proposed casino site as the Tribe's "initial reservation."[41] The site is not held in trust for the Tribe's benefit by the United States, nor owned in

[40] The Gaming Ordinance defines the Tribe's Indian land as "including but not limited to" the Cowlitz casino site. As a result, the NIGC's approval of the Ordinance must also be rejected to the extent that the NIGC has approved gaming on other undefined lands contingent upon the NIGC accepting the Cowlitz parcel into trust and the Cowlitz exercising jurisdiction over that parcel.

[41] 1st Jones Dec., Ex. 3 (Amended Fee-to-Trust Application); 1st Jones Dec., Ex. 4 (Amended and Reorganized Request for a Reservation Proclamation dated August 11, 2006); AR at 005616 (Request for Restored Lands Opinion); AR at 005658-005659 (Resolution Requesting Land be Taken into Trust, Proclaimed as Tribal Reservation, and Restored Lands, dated October 2, 2004).

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fee by either the Tribe or a tribal member, nor is it subject to any restriction against alienation. Instead, the land is held or controlled by the Tribe's development partner Salishan-Mohegan – an entity with solely economic, rather than jurisdictional ties to the site.[42] The Tribe exercises no governmental power over the site, as required under section 2703(4), such that the Tribe may lawfully conduct gaming at the site. Instead, the record establishes that the Cowlitz lack jurisdiction and governmental power over the site, which is located 24 miles from the Tribe's governmental office in Longview.

All of this is conceded by the NIGC.[43] Because the proposed Cowlitz casino site is not "Indian lands," the NIGC lacked jurisdiction to approve the Tribe's Amended Gaming Ordinance and its actions were contrary to a plain reading of IGRA and the NIGC's own administrative rules, and therefore arbitrary and capricious, an abuse of discretion, and are otherwise not supported by law.

4.4 Existing Case Law Requires the NIGC to Make an Indian Lands Determination Before Acting on a Proposed Gaming Ordinance

In addition to the statute's plain language, courts reviewing the issue have consistently required the NIGC Chairman to make a threshold Indian lands determination *before* the Chairman approves a proposed gaming ordinance. *See Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) ("a proper analysis of whether the tract is 'Indian lands' under IGRA begins with the threshold question of the Tribe's jurisdiction."); *Citizens*, 471 F. Supp.2d at 323-324 ("Whether proposed gaming will be conducted on Indian lands is a critical, threshold jurisdictional determination of the NIGC."); *Apache Tribe of Okla.*, 2007 WL 2071874, *3, *4 (inquiry under 25 U.S.C. § 2703 "includes elements of jurisdiction and governmental control," and "'begins with the threshold question of the tribe's jurisdiction.'") (*quoting Kansas*, 249 F.3d at 1229).

[42] AR at 003677-003679 (Clark County Title); 1st Jones Dec., Ex. 3 (Amended Fee-to-Trust Application).

[43] AR at 001643-1645, 001657 (Restored Lands Opinion); AR at 001622-001623 (Letter from NIGC Chairman P. Hogen to J. Barnett, dated November 23, 2005)

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The underlying facts in the *Citizens* and the *Kansas* cases are instructive on this point, while the *Apache Tribe* case has more relevance to the distinction between the "Indian lands" inquiry and the analysis of whether a site is gaming eligible under one of the exceptions listed at 25 U.S.C § 2719. In *Citizens*, the Seneca Nation executed a tribal-state compact with the State of New York that authorized the tribe to conduct gaming on (1) land within the City of Niagara Falls, (2) on the Seneca Nation reservation and (3) on property within the City of Buffalo or elsewhere in Erie County to be identified in the future. At the time the NIGC approved the Seneca Nation's gaming ordinance, the tribe had acquired property within the City of Buffalo, but title to that property was not held in trust by the United States.[44] The court found that the plain language of section 2710(b) "clearly necessitates a determination that gaming is proposed to be sited on Indian lands over which the tribe has jurisdiction." The court further concluded that:

> Beyond that, the findings, purpose and language of the IGRA relative to the NIGC's jurisdiction implicitly require such a determination. Whether proposed gaming will be conducted on Indian lands is a critical threshold jurisdictional determination of the NIGC. Prior to approving an ordinance, the NIGC Chairman must confirm that the situs of proposed gaming is Indian lands. [45]

Based on the NIGC's failure to provide a "reasoned explanation" of whether the Buffalo parcel constituted "Indian lands" subject to the NIGC's jurisdiction, the court rejected the United States' motion to dismiss the plaintiffs' claims that the NIGC's action violated IGRA.[46]

In *Kansas*, the Miami Tribe of Oklahoma sought approval for Class II gaming on lands that were not owned by members of the tribe. The NIGC initially rejected that application because the site "did not constitute 'Indian lands.'"[47] Following a tribal challenge, the district court remanded

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[44] *Citizens*, 471 F. Supp.2d at 309-310.

[45] *Id*. at 324. In *Citizens*, the Seneca Nation's Class III Gaming Ordinance included conditional language similar to the conditional language in the Cowlitz Tribe's Gaming Ordinance. The Seneca Nation's Ordinance proposed gambling on "lands of the Nation," which was defined to track the Indian lands definition in IGRA. *Id*. at 324. Further, as in the instant case, the NIGC conditionally approved the Seneca Nation's Ordinance "for gaming only on Indian lands, as defined in the IGRA, over which the Nation has jurisdiction." *Id*. at 309.

[46] *Id.* at 324, 326.

[47] *Miami Tribe of Oklahoma v. United States*, 5 F. Supp.2d 1213 (D. Kan. 1998) (*Miami I*).

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the decision to the NIGC, holding that the NIGC had not provided "a 'reasoned explanation'" why the Tribe could not obtain jurisdiction over the lands.[48] In response to that decision, the tribe changed its membership criteria and admitted the owners of the proposed gaming site as tribal members, modified its application to seek approval for Class III gaming on the site, and once again requested that the NIGC reconsider its determination. The NIGC changed its position based on the tribe's exercise of governmental powers over the land; however, the district court once again rejected this decision as arbitrary and capricious.[49] Upholding that decision, the Tenth Circuit held "[t]he NIGC's failure to thoroughly analyze the jurisdictional question in its most recent decision likely renders its conclusion that the tract constitutes 'Indian lands' within the meaning of IGRA arbitrary and capricious."[50]

Here, the NIGC's contingent approval of the Amended Gaming Ordinance based on BIA accepting the land into trust[51] does not act as an appropriate substitute for the NIGC's obligation to address the Indian lands issue. Under both *Kansas* and *Citizens*, the Indian lands determination is a jurisdictional, threshold decision. Until it has been demonstrated that the proposed casino site constitutes "Indian lands," the NIGC lacks jurisdiction to approve the Tribe's proposed gaming ordinance and the NIGC's failure to make this threshold decision renders its approval of the Cowlitz Tribe's Amended Gaming Ordinance arbitrary and capricious.

4.5 The NIGC May Not Rely on its Restored Lands Opinion as a Substitute for IGRA's Required Indian Lands Determination

The NIGC intends to rely on an advisory Restored Lands Opinion submitted by NIGC General Counsel Penny Coleman as a substitute for the Indian lands determination required by

[48] *Miami I*, 5 F. Supp.2d at 1217, 1218.

[49] *State of Kansas ex rel. Graves v. United States*, 86 F. Supp.2d 1094, 1099-1100 (D. Kan. 2000).

[50] *Kansas v. U.S.*, 249 F.3d at 1229.

[51] If upheld, the Chairman's approval letter will inevitably lead to Class II gaming on the Cowlitz parcel without any independent and affirmative determination by the NIGC regarding whether the land qualifies as Indian land, within the meaning of IGRA. AR at 001622-001623 (Letter from NIGC Chairman P. Hogen to Cowlitz Indian Tribe Chairman Barnett, dated November 23, 2005).

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IGRA.[52] The NIGC's decision to rely on the Restored Lands Opinion in lieu of an Indian lands determination was a deliberate action, taken by the NIGC in response to the Cowlitz' adoption of its initial Gaming Ordinance. According to NIGC General Counsel Penny Coleman, that ordinance was written in such a way that, "if the proposed site was taken into trust by BIA, the lands would be deemed Indian lands."[53] At the time the Restored Lands Opinion was issued, Ms. Coleman was aware that the Agency's actions diverged from the statutory language of IGRA. According to Ms. Coleman, under normal NIGC procedure, the land in question would already have been taken into trust by BIA before the NIGC would make a decision on whether it qualified as one of the exceptions to IGRA's prohibition on Indian gaming in 25 U.S.C. § 2719. Because the Cowlitz' proposed site was not owned by the Tribe, nor had it been taken into trust, Ms. Coleman characterized the NIGC's consideration of the Tribe's site-specific gaming ordinance as:

> really an anomaly. It is the only time that we have been in a situation where it was trust acquisition that had not happened, and we had a site-specific ordinance. . . . In fact, when the tribe came to us and told us they were going to do it, we were not exactly thrilled with it because we knew that this was a very unusual situation. It is generally much better to let the process go through.[54]

Prior to the NIGC's approval of the Tribe's subsequent Amended Gaming Ordinance, the Grand Ronde pointed out that the NIGC's consideration of any gaming ordinance prior to the Cowlitz acquiring title to the property and exercising jurisdiction over it would be "an abuse of the gaming ordinance approval process because the [proposed casino] site has not been taken into

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[52] *See* AR at 005477, 005482 (NIGC's Checklist for Review and Approval of Ordinances and Resolution, identifying "restored lands determination" as satisfying requirement for "site-specific definition requiring NIGC Indians lands"); AR at 001677, 001681 (November 21, 2005 Checklist for Review and Approval of Ordinances and Resolution completed by NIGC Senior Attorney Jeffrey Nelson, identifying "Restored Lands Opinion" as evidence for "Indian lands" citation.)

[53] *See* Off-Reservation Gaming: Oversight Hearing for the Process for Considering Gaming Applications Before the Senate Comm. On Indian Affairs, 109th Cong. 2nd Sess. 9 (Feb. 1 2006) (statement of Penny Coleman, Acting General Counsel, National Indian Gaming Commission) (providing testimony of NIGC General Counsel Penny Coleman before the United States Senate Committee on Indian Affairs on February 1, 2006, in response to question posed by Committee Chairman, Sen. John McCain (R-AZ)); AR at 000748 (referring to Ms. Coleman's testimony).

[54] Testimony of NIGC General Counsel P. Coleman, cited in full in note 53, at 9-10.

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trust."[55] The NIGC received similar input from the State of Washington. As part of its review of the Tribe's Gaming Ordinance, the NIGC alerted the State on July 18, 2005 that "the question arose as to whether the land on which the Tribe proposes to conduct gaming constitutes Indian lands over which the Tribe can lawfully conduct gaming pursuant to the Indian Gaming Regulatory Act and NIGC regulations."[56] The NIGC sought input from the Washington State Attorney General on that issue.[57] In response, the Attorney General informed the NIGC that the State did not consider the proposed casino site to be Indian lands.[58]

The Grand Ronde also pointed out that the NIGC had previously disapproved a tribal-state compact between the Warm Springs Tribe and the State of Oregon. There, the Commission's disapproval was based on the fact that the compact approved gaming on a site that had not yet been taken into trust and included conditional language similar to that contained in the Cowlitz' Tribe's Amended Gaming Ordinance.[59]

Despite this information and in the face of what Ms. Coleman described as an "anomalous" situation, the NIGC chose to rely on its Restored Lands Opinion as a substitute for the required Indian lands determination. Yet, the Restored Lands Opinion cannot act as a substitute for the Indian lands determination – in fact, it has nothing to do with IGRA's requirements under 25 U.S.C. §§ 2703 and 2710. Instead, the Restored Lands Opinion concerns a determination under 25 U.S.C. § 2719 regarding whether the proposed casino site is gaming eligible.

The distinction between these two parts of IGRA was analyzed by the court in the *Apache Tribe* case. In that case, the court considered a tribal-state gaming compact between the State of

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[55] AR at 000744-000751 (Letter from Grand Ronde Trial Attorney Rob Greene to NIGC Chairman P. Hogen, dated November 26, 2007); *see also* AR at 001424 (Letter from Dragonslayer, Inc. and Michels Development LLC to Mr. Artman and Mr. Skibine of the U.S. Department of the Interior, dated July 31, 2007) (noting that the ordinance approval is premature because the land is not yet in trust).

[56] *See* AR at 005491 (Letter from NIGC Acting General Counsel P. Coleman to Rob McKenna, dated July 18, 2005).

[57] *Id.*

[58] AR at 005348 (Letter from Assistant Attorney General J. Ackerman to P. Coleman, dated August 15, 2005).

[59] AR at 000747 (Letter from R. Greene to NIGC Chairman P. Hogen, dated November 26, 2007).

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Oklahoma and the Chickasaw Tribe governing gaming on land described as "former reservation land" for purposes of 25 U.S.C. § 2719. In reviewing the proposed compact, the court noted the distinction between the "Indian lands" determination required of the NIGC under section 2703(4) and section 2719's requirement that the Department of Interior ascertain whether land acquired by a tribe following the adoption of IGRA qualified under one of the exceptions to the general prohibition on gaming imposed by IGRA.[60]

In the instant case, the relevant exception being pressed by the Cowlitz Tribe arises under 25 U.S.C. §§ 2719(b)(1)(B)(ii)-(iii), which allows gaming notwithstanding the general prohibition adopted by IGRA where the proposed gaming site is part of "(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process," or "(iii) the lands are taken into trust" as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." As the court in *Apache Tribe* made clear, the

> inquiries under 25 U.S.C. § 2703 and 25 U.S.C. § 2719 are separate and distinct. The Indian land determination that must be made under § 2703 includes elements of jurisdiction and governmental control. If it is determined that gaming is to occur on Indian lands, there remains the issue of gaming on land acquired after 1988 and the applicability of an exception to the general prohibition.[61]

In the *Apache Tribe* case, because no Indian lands determination had been made prior to the determination that the land in question fell within the applicable exceptions outlined in section 2719, the court rejected the compact based on the fact that "there [was] no evidence in the record that the Chickasaw tribe exercises jurisdiction or governmental control over the parcel."[62] That same reasoning applies here, and compels the same result.

The Indian lands determination is a separate and distinct requirement under IGRA from the determination of the Secretary of the Interior regarding whether land acquired after October 17, 1988

[60] The applicable exception in the *Apache Tribe* case allowed tribes which did not have a reservation as of the date of IGRA's adoption (October 17, 1988) to conduct gaming on lands located in Oklahoma within the boundaries of the Indian tribe's former reservation. *See Apache Tribe*, 2007 WL 2071874 at *3, and 25 U.S.C. § 2719(a)(2)(A).

[61] 2007 WL 2071874, *3.

[62] *Id.* at *4.

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is gaming eligible.[63] That second inquiry does not even take place until the threshold question of whether the proposed site is "Indian land" has been answered. *Apache Tribe*, 2007 WL 2071874, *4 ("'A proper analysis of whether [a] tract is 'Indian land' under IGRA begins with the threshold question of the tribe's jurisdiction.'") (*quoting Kansas v. U.S.*, 249 F.3d at 1229). In addition to that threshold inquiry, the determination of gaming eligible land under section 2719 is restricted to lands that have already been taken into trust, a prerequisite that has not been met in the instant case. *See* 25 U.S.C. §§ 2719(b)(1)(B)(ii) – (iii), which allows application of exceptions for land acquired after October 17, 1988 on "lands taken into trust."

Because the inquiries under sections 2703 and 2719 are separate and distinct, and because the proposed casino site has not yet been taken into trust, the NIGC's reliance on its advisory Restored Lands Opinion as a substitute for the necessary Indian lands determination was arbitrary and capricious and must be rejected by the Court.

5. CONCLUSION

For the reasons set forth above, the City of Vancouver respectfully requests that the Court enter summary judgment in favor of the City, and enter an order declaring the NIGC's approval of the Cowlitz' gaming ordinance invalid until such time as the Tribe: (1) acquires title to the proposed casino site and (2) exercises jurisdiction over the tract on which gaming is proposed. The City also requests that the Court enjoin the NIGC from proceeding with further consideration of the Tribe's Amended Gaming Ordinances or any other ordinance adopted by the Tribe with respect to

[63] *See* 25 C.F.R. § 292; 73 Fed. Reg. 29354 (May 20, 2008) (stating standards that the Department of Interior must follow in interpreting exceptions to after-acquired trust lands found in 25 U.S.C. § 2719).

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the proposed casino site until the Tribe presents evidence that the land on which it seeks to conduct gaming constitutes "Indian lands" as defined by IGRA and the applicable regulations.

Dated this 2nd day of July, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of July, 2008, I electronically filed the document to which this Certificate of Service is attached with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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