

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

STATE OF NEBRASKA, ex rel.
JON BRUNING, Attorney General of
the State of Nebraska,

v.

UNITED STATES DEPARTMENT OF
INTERIOR; DIRK KEMPTHORNE, in his
official capacity as Secretary of the United
States Department of the Interior; NATIONAL
INDIAN GAMING COMMISSION; PHILIP N.
HOGEN, in his official capacity as Chairman of
the National Indian Gaming Commission,
CLOYCE V. CHONEY, in his official capacity
as Vice Commissioner of the National Indian
Gaming Commission; and NORMAN H.
DESROSIERS in his official capacity as
Commissioner of the National Indian Gaming
Commission,

Case No: 1:08-cv-00006-CRW-TJS

BRIEF OPPOSING UNITED STATES'
MOTION TO DISMISS

INTRODUCTION

The State of Nebraska and its Attorney General, Jon Bruning, file this brief opposing the United States' Motion to Dismiss. In this action, Nebraska challenges a decision made by the National Indian Gaming Commission (NIGC). The NIGC's decision would allow the Ponca Tribe of Nebraska (Tribe) to build and operate a casino in Carter Lake, Iowa – a community accessible only via Nebraska. The United States Department of Interior, the NIGC, and its commissioners filed a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure.¹ Nebraska asks this Court to deny the United States' Motion to Dismiss because Nebraska has standing to challenge the NIGC's decision.

¹ The United States' motion also requested dismissal under Rule 12(b)(6) and summary judgment in its favor on the merits. As ordered by this Court, Nebraska will file a brief in response to the 12(b)(6) portion of the United States' motion to dismiss and its summary judgment motion after this Court rules on the standing issue.

BACKGROUND

Carter Lake is a city in Pottawattamie County, Iowa. Prior to 1877, the Missouri River snaked around Carter Lake, putting the city on the east side of the river, along with the rest of Iowa. AR000222. See also *Nebraska v. Iowa*, 143 U.S. 359 (1892); *Nebraska v. Iowa*, 406 U.S. 117 (1972). However, that year the river suddenly shifted. The geography of the area has remained unchanged since then: the river now forms just a small part of Carter Lake's southern border and separates it from the city of Council Bluffs, Iowa. The remainder of Carter Lake is completely surrounded by Nebraska. Carter Lake is the only city in Iowa west of the river and has no land connection with the rest of the state on the other side of the river – Carter Lake can *only* be reached by land by traveling through Nebraska. A map showing the area is included in the administrative record. AR000222.

In July 2007, the Tribe submitted an amended gaming ordinance to the NIGC. The amended ordinance authorized gaming on about 5 acres of land owned by the Tribe in Carter Lake. Under the Indian Gaming Regulatory Act, tribal gaming ordinances or resolutions must be reviewed and approved by the chairman of the NIGC. 25 U.S.C. § 2710(b)(2). The chairman disapproved the ordinance because the Tribe's land in Carter Lake was not "restored land" within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii). The Tribe appealed the chairman's decision to the full NIGC, which reversed the chairman's conclusion and approved the Tribe's ordinance.

In January 2008, Nebraska filed this action. With regard to its standing, Nebraska alleged that its "residents and citizens are substantially affected by NIGC's decision to

allow Indian gaming on the Carter Lake Tract because of its unique geographical relationship with Nebraska, in that one cannot access the Carter Lake Tract from Iowa without first traveling through Nebraska.” Complaint, ¶ 4.

STANDARD OF REVIEW

To properly dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the moving party must successfully challenge the plaintiff’s complaint on its face or the factual truthfulness of its averments. *Thompson v. Deloitte & Touche LLP*, 503 F. Supp. 2d 1118, 1121 (S.D. Iowa 2007). The United States has challenged Nebraska’s complaint on its face – the only evidence submitted by the United States was submitted in support of its summary judgment motion. See Document #14-2.

“Facial challenges are limited to analyzing the face of the complaint.” *Thompson*, 503 F. Supp at 1121. “Under a facial challenge, each factual allegation concerning jurisdiction is presumed to be true.... Thus, the moving party’s motion can [only] be successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction.” *Id.*

ARGUMENT

I. Nebraska has Standing to Challenge the NIGC’s decision.

The United States argues that Nebraska’s Complaint should be dismissed because Nebraska lacks standing to challenge the NIGC’s decision. On the contrary, the NIGC’s decision allowing the Tribe to build a casino in Carter Lake will substantially affect Nebraska. Many negative secondary effects accompany casinos: increased crime rates, increased gambling addiction, domestic abuse, and a loss of jobs, wages, and revenue.

Given Carter Lake's unique location as, essentially, an island in Nebraska, it will be Nebraska that must deal with those effects and the costs associated with them.

A. Courts Have Recognized the Interests of Governments in Preventing the Negative Secondary Effects Produced by Certain Businesses.

Under Article III of the United States Constitution, a plaintiff must satisfy three elements to establish standing. First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. *Id.* Finally, it must be likely that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 561. “[T]he gist of the question of standing’ is whether petitioners have ‘such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.’” *Massachusetts v. EPA*, 549 U.S. ___, ___, 127 S. Ct. 1438, 1453 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

In addition to the constitutional limitations on federal court jurisdiction, the prudential doctrine of standing encompasses judicially-imposed limits on its exercise. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996). Among the prudential considerations is the requirement that a plaintiff's complaint fall within the “zone of interests” protected by the law invoked. *Allen v. Wright*, 468 U.S. 737 (1984).

The NIGC's decision clears the way for the Tribe to build a casino on its land in Carter Lake. No one doubts that certain businesses produce significant negative secondary effects in the areas surrounding those businesses. The United States Supreme Court recognized these negative secondary effects in *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986). There, an ordinance was passed by the city restricting where adult theaters could be located. The ordinance was designed to "prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserve[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life'" from any adult theaters that might locate within the city. *Renton*, 475 U.S. at 48. The Supreme Court upheld the ordinance against a First Amendment challenge. The Court held that the city could rely on studies produced by other cities that documented the negative secondary effects generally produced by adult theatres. *Renton*, 475 U.S. at 51-52. Other courts have agreed: a city does not need empirical data specifically tailored to that city to support an ordinance targeting the negative secondary effects of certain activities. *World Wide Video of Washington v. City of Spokane*, 227 F. Supp. 2d 1143, 1155 (E.D. Wash. 2002).

Courts have applied the same analysis to casinos and their negative secondary effects. In *Valley Broadcasting Company v. United States*, 107 F. 3d 1328 (9th Cir. 1997), a ban on advertisements for casino gambling was challenged on First Amendment grounds. The ban was motivated in part to "discourage[e] public participation in commercial lotteries, including casino gambling, and thereby minimize[e] the wide variety of social ills that have historically been associated with these forms of gambling." *Valley Broadcasting Company*, 107 F. 3d at 1331. The court was clear in its response:

“we are persuaded that the harms sought to be avoided are real.” *Id.* at 1332. See also *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 341 (1986) (holding that the Puerto Rico Legislature had a substantial interest in minimizing the “serious harmful effects on the health, safety, and welfare” of its citizens, such as “the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.”).

As the negative effects of a casino in Carter Lake, Iowa will unavoidably impact Nebraska, the NIGC’s decision falls within Nebraska’s zone of interests in protecting its citizens, and the Court should deny the United States’ Motion to Dismiss.

B. The Negative Secondary Effects Produced by Casinos are Well Documented.

The Tribe’s planned casino in Carter Lake would produce the same negative secondary effects that were feared in the cases cited above. And with no way to access or leave that casino other than to travel through Nebraska, Nebraska will bear the brunt of those well-documented effects.

A study released through the United States Department of Justice’s National Institute of Justice found that almost 15 percent of people arrested for crimes in Las Vegas were either problem or compulsive gamblers. “*Gambling and Crime Among Arrestees: Exploring the Link*,” National Institute of Justice, July 2004, pg. 5. In Des Moines, Iowa, just under 10 percent of arrestees were problem or compulsive gamblers. *Id.* These figures are 3 to 5 times higher than the percentage of people in the general population who fit those criteria. *Id.* The study also found that more than one third of the compulsive gamblers arrested in Las Vegas and Des Moines had been arrested on at least one felony count, and more than 30 percent of compulsive gamblers who had been

arrested in those two cities reported having committed a robbery within the past year – nearly double the percentage for non-compulsive gamblers. *Id.* Almost one third admitted to committing a robbery to pay for gambling or to pay gambling debts. *Id.* Thirteen percent also said they had assaulted someone to get money to fund their gambling problem. *Id.*, pg. 6. The study also found that compulsive gamblers who were arrested were much more likely to have sold illegal drugs than arrestees who had no gambling problem. *Id.*

University of Nebraska Medical Center researchers found that women who were involved in relationships with compulsive gamblers were at a much higher risk of being abused by their partners. Robert Muelleman, et al., “*Violence: Recognition Management and Prevention*,” *The Journal of Emergency Medicine*, vol. 23, no. 3, pgs. 307-312 (2002). The research, conducted at the University Hospital of Nebraska Health System in Omaha, found that women whose partners were problem gamblers were more than 10 times more likely to be abused than those whose partners were not problem gamblers. *Id.*

In one of the most comprehensive analysis of the link between crime and casinos, researchers found that new casinos increased property crime in their locales by 8.6 percent and violent crime by 12.6 percent. Earl L. Grinols, et al., “*Casinos, Crime, and Community Costs*,” *Review of Economic & Statistics*, v. 88 (2006). More significantly, the researchers also found that casino-produced crime spilled over into neighboring counties after 4-5 years. *Id.*

In addition to the increased crime and other social ills inflicted on Nebraska, the Tribe’s casino will also have a harmful effect on Nebraska’s economic well-being. In 2002, Creighton University Professor of Economics Ernest Goss produced a

comprehensive study of the impact of a possible casino in Omaha. Ernest Goss, “*The Economic Impact of an Omaha, Nebraska Casino*,” (2002). He concluded that the locale of the proposed casino – Omaha – would see job growth, an increase in sales, wages, and salaries, and an increase in tax revenues. *Id.* at 42. But he also found the spillover effect of the proposed casino in the rest of Nebraska painted a different picture. Outside of Omaha, he found that a casino would:

- cost Nebraska between 504 and 740 jobs,
- lower sales revenues in Nebraska by at least \$20.3 million, and as much as \$29.8 million, and
- result in lost wages and salaries for Nebraskans of at least \$5.2 million and as much as \$7.6 million.

Id. at 45.

The Tribe’s casino would result in similar economic losses for Nebraska. And with the casino located in Carter Lake, Nebraska would not enjoy any of the economic benefits that Professor Goss documented for a proposed casino located in Omaha. Instead, Nebraska’s economy would experience the same negative economic spillover effect that Professor Goss found an Omaha casino would have produced. At the same time, Nebraska would be powerless in regulating the activities of the Tribe’s casino and would receive no support from the Tribe to compensate for its negative effects. On this point the law is clear: a state may assert a quasi-sovereign interest in its general economy and in protecting the welfare of its citizens, and has standing “on the basis of substantial generalized economic effects.” *Com. Of Puerto Rico ex rel. Quiros v. Bramkamp*, 654

F.2d 212, 215 (2nd Cir. 1981). See also *Com. of Pa., by Shapp v. Kleppe*, 533 F.2d 668 (D.C. Cir. 1976).

“At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to support the claim.’” *Lujan*, 504 U.S. at 561 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)). The studies cited above support Nebraska’s allegation that it and its citizens will be substantially affected by the NIGC’s decision to allow casino gambling by the Tribe in Carter Lake and the fact that the casino is located on the other side of the state’s boundary should not preclude Nebraska from challenging the NIGC’s decision.

No more is necessary. The United States, citing *Lujan*, argues that because Nebraska was not the object of the challenged agency action, standing is more difficult to establish. But those comments in *Lujan* focused on the difficulty a plaintiff may have establishing causation and redressability. *Lujan*, 504 U.S. at 562. The Court acknowledged that in those situations – where someone other than the plaintiff was the subject of the challenged action – causation and redressability ordinarily hinge on the response of the third party that *was* the subject of the regulation. *Id.* Here, although Nebraska was not the object of the NIGC’s decision, the decision to allow the Tribe to build a casino in Carter Lake will cause significant negative secondary effects in Nebraska. Those effects can be redressed by allowing the State of Nebraska to seek reversal of the NIGC’s decision, resulting in the prohibition of the Tribe from going forward with its plan to construct and operate a casino.

CONCLUSION

Nebraska will be substantially affected by the NIGC's decision to allow the Tribe to build a casino in Carter Lake. The negative secondary effects of that casino will be borne largely by Nebraska because of Carter Lake's unique location. For all the reasons articulated above, Nebraska has standing to challenge the NIGC's decision, and this Court should deny the United States' Motion to Dismiss.

DATED this 18th day of August, 2008.

Respectfully submitted,

**STATE OF NEBRASKA; JON
BRUNING, in his official capacity as
Attorney General of Nebraska,
Plaintiffs,**

By: Jon Bruning #20351
Attorney General

By: s/ Katherine J. Spohn

Natalie S. Hazen, IA Bar: #19168
Special Assistant Attorney General
Katherine J. Spohn, NE Bar: #22979
Assistant Attorney General, Pro Hac Vice
2115 State Capitol Building
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel. (402) 471-2682
Fax (402) 471-3297
katie.spohn@nebraska.gov
Attorneys for Plaintiffs.

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2008, I electronically filed the foregoing **Brief Opposing United States' Motion to Dismiss** with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants in this case:

Gina L. Allery
Trial Attorney
United States Department of Justice
Environmental and Natural Resources Division
Indian Resources Section
P.O. Box 44378
L'Enfant Plaza Station
Washington, D.C. 20026-4378
(202) 305-0261
Gina.Allery@usdoj.gov

Natalie S. Hazen
BALLEW COVALT, P.C., L.L.O.
440 S. 13th Street
P.O. Box 81229
Lincoln, NE 68508-1229
402-436-3030
Fax: 402 436 3031
Email: nhazen@bsclawfirm.com

Respectfully Submitted,

/s/ Katherine J. Spohn
Katherine J. Spohn
NEBRASKA ATTORNEY GENERAL'S OFFICE
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682
Fax: (402) 471-2957
katie.spohn@nebraska.gov
Counsel for Plaintiff