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, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al. Defendants.	)	Case No. 1:08-cv-00006-CRW-TJS REPLY IN SUPPORT OF MOTION TO DISMISS PURSUANT TO RULE 12(b)(1)

Pursuant to Local Rule 7.g, Defendants, the United States Department of the Interior ("Interior"), Dirk Kempthorne in his official capacity as Secretary of the United States Department of the Interior, the National Indian Gaming Commission ("NIGC"), Philip N. Hogen, in his official capacity as Chairman of the NIGC, Cloyce V. Choney,[1/] in his official capacity as Vice Commissioner of the NIGC, and Norman H. DesRosiers, in his official capacity as Commissioner of the NIGC (collectively, the "United States"), by undersigned counsel, hereby respectfully submit this Reply in support of their Motion to Dismiss.[2/]

ARGUMENT

In its Complaint, Nebraska alleged standing based only on the unique geographic location of Carter Lake, Iowa. Compl. ¶ 4. However, this statement "fails to identify any concrete,

[1/]Commissioner Cloyce V. Choney retired on December 31, 2007. His position remains vacant.

[2/]Pursuant to the Court's order, Dkt. No. 23, the Court will first rule on the standing issue raised in the United States' Motion to Dismiss pursuant to Rule 12(b)(1) before considering the merits of the case in either the United States' Motion to Dismiss or Motion for Summary Judgment. Briefing as to the 12(b)(6) portion of the United States' Motion to Dismiss and the United States' Motion for Summary Judgment is stayed until the Court rules.

particularized, actual or imminent harm or injury" that is "unique to the geographic location" of Carter Lake, Iowa or to the building and operation of a casino. U.S. Mot. to Dismiss at 19-20.

In response to the United States' Motion, Nebraska argues that it does not need to provide specific details of an actual or imminent concrete harm that is a direct result of a casino operating in Carter Lake, but that it can rely on studies produced by others regarding the social ills of casino gambling to show the negative effects it will have on Nebraska. Br. Opp. U.S. Mot. to Dismiss ("Opp. Br.") at 4-6. In support, Nebraska attaches four studies discussing the general negative effects of casinos, such as increased crime and economic impact. Exs. A-D to Opp. Br. Nebraska then argues that a state may assert a quasi-sovereign interest in its general economy and in protecting the welfare of its citizens for purposes of establishing standing. Opp. Br. at 8. However, for the following reasons, Nebraska fails to establish standing.

A. Nebraska Cannot Rely on Generalized Information Regarding the Social Ills of Casino Gambling to Establish Standing.

To establish an actual or imminent concrete harm or injury, Nebraska first relies on cases concerning the propriety of regulating adult theaters and advertisements for casino gambling based on the effects of these activities on the surrounding community. Opp. Br. at 5. These cases are not on point for a number of reasons. First, these cases do not address constitutional or prudential standing requirements. They address the question of what showing must be made to establish a substantial government interest in regulating an area subject to First Amendment protections. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986) ("The First Amendment does not require a city, before enacting such an ordinance [zoning ordinance for adult theaters], to conduct new studies or produce evidence independent of that already generated

by other cities . . . ."); Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 340-47 (1986) (First Amendment challenge to regulations restricting advertising of casino gambling); Valley Broad. Co. v. United States, 107 F.3d 1328, 1331-33 (9th Cir. 1997) (First Amendment challenge to federal ban on broadcast advertisement of casino gambling); World Wide Video of Wash, Inc. v. City of Spokane, 227 F. Supp. 2d 1143, 1151-55 (E.D. Wash. 2002) (First Amendment challenge to zoning ordinances regulating adult retail use establishments).

Nebraska's cases are irrelevant to the standing inquiry because they address whether a substantial government interest exists to justify government regulation of something *over which a government has jurisdiction*. By contrast, Nebraska has no jurisdiction in Iowa and it remains unclear what interest, if any, exists to justify bringing this suit and invoking this Court's jurisdiction. Generalized studies may serve in the context of determining what areas are properly subject to government regulation, but they have no import in the context of standing where the test is designed to ensure that a litigant has a personal, concrete injury that was caused by the defendant and which can be redressed by the court. Nebraska has neither jurisdiction over the lands in Carter Lake, Iowa, held in trust by the United States for the benefit of the Ponca Tribe of Nebraska, nor jurisdiction over the city of Carter Lake, Iowa.[3/] Indeed, even if the gaming were conducted by a private company in Carter Lake, Nebraska would not have jurisdiction to regulate the activity – just as Nebraska has no authority to regulate gaming conducted on the border

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[3/]Pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, Indian tribes may "engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if . . . such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity." 25 U.S.C. § 2710(b)(1). Iowa permits gaming. I.C.A. §§ 99D.1, 99F.1. While Nebraska may prevent or regulate casino gambling within its state boundaries, it cannot impose its policy on Iowa. As long as Iowa permits gaming for any purpose by any person, Indian tribes in Iowa may operate gaming facilities pursuant to IGRA.

between Iowa and Nebraska in Council Bluffs, Iowa. The generalized studies Nebraska cites could just as easily be applied to the privately owned casinos already operating in Council Bluffs, but Nebraska cannot prevent their operation. The studies also cannot support the redressability requirement of standing because any ills that Nebraska suffers from the indirect effects of gaming presumably would already have occurred due to the existing Iowa casinos.

Finally, the First Amendment cases relied on by Nebraska are also easily distinguishable because they involve the regulation of activities, not their prohibition. Nebraska argues that courts have recognized the interests of governments in preventing the negative secondary effects produced by certain businesses, but the cases it cites involve the *regulation* of those activities in order to prevent the secondary effects, not the *prevention* of the activity. Opp. Br. at 5. It is certainly possible for Nebraska to regulate in-state advertisements for casino gambling or the zoning of adult retail, but not on federal land outside its boundaries. However, rather than regulating, Nebraska is litigating with the goal of trying to *prevent* an Indian tribe from operating a lawful class II gaming facility pursuant to IGRA on lands in Iowa over which the United States has jurisdiction. The decisions Nebraska cites do not support its assertion of standing.

B. Nebraska Cannot Sue on Behalf of Its Citizens

Nebraska alleges that because "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 it "may assert a quasi-sovereign interest in its general economy and in protecting the welfare of its citizens . . . ." Opp. Br. at 6, 8.[4/] However, standing to sue the

[4/]Prudential standing and its zone of interest inquiry do not focus on the entity alleging standing, but on the underlying statute. It is Nebraska that must fall within the zone of interest of IGRA. As the United States discussed in its Motion, Nebraska does not fall within the zone of interest of

federal government *parens patriae* on behalf of citizens within a state is expressly forbidden by Eighth Circuit case law. Iowa ex rel. Miller v. Block, 771 F.2d 347, 354-55 (8th Cir. 1985); Stenehjem v. Whitman, 2001 WL 1708825, *2 (D.N.D. 2001) (Block "articulates in broad terms a prohibition on all parens patriae suits brought by a state against the federal government."). The cases cited by Nebraska predate Block and were not decided within the Eighth Circuit.

CONCLUSION

For the foregoing reasons and those discussed in the United States' Motion to Dismiss, U.S. Mot. to Dismiss at 18-22, Nebraska has failed to establish an actual or imminent concrete harm or injury that it will suffer as a result of the decision in this case or that it falls within the zone of interest of IGRA's ordinance approval process. Therefore, the United States' Motion to Dismiss pursuant to Rule 12(b)(1) should be granted.

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Respectfully Submitted,

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IGRA. U.S. Mot. to Dismiss at 21-22.