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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

CROSBY LODGE, INC., a Nevada corporation, **Plaintiff,** **v.** **NATIONAL INDIAN GAMING COMMISSION, et al.** **Defendants.**	**No. 06-CV-657 LEH-RAM**

NATIONAL INDIAN GAMING COMMISSION'S MOTION FOR SUMMARY JUDGMENT

Pursuant to the Federal Rule of Civil Procedure 56 and the Court's Order of January 31, 2008, the National Indian Gaming Commission hereby files for summary judgment on the basis that this lawsuit is barred by the applicable statute of limitations (28 U.S.C. § 2401(a)) and because the Pyramid Lake Paiute Tribe is a "necessary and indispensable party" within the

meaning of Fed. R. Civ. P. 19(b) which cannot be joined because of tribal sovereign immunity. A Memorandum of Points and Authorities is appended hereto.

The Commission is filing simultaneously herewith its Proposed Findings of Uncontroverted Fact.

Dated this 21st day of May, 2008.

Respectfully submitted,

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Attachment

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff (a non-tribal class III gaming operator on the Pyramid Lake Paiute Reservation) challenges the lawfulness of a regulation adopted in 1993 by the National Indian Gaming Commission (hereinafter the "NIGC") (25 C.F.R. § 522.10(c)) which provides, in pertinent part, as follows: "For licensing of individually owned gaming operations other than those operating on September 1, 1986 . . . a tribal ordinance shall require . . . [t]hat not less than 60 percent of the net revenue be income to the Tribe." The Court's January 31, 2008 Order (which granted the NIGC's motion for reconsideration of the Court's August 10, 2007 Order), states: "It appears that the Tribal Gaming Commission did not attempt to collect 60 percent of Crosby Lodge's net revenue until February 7, 2006." (January 31, 2008 Order at 4).

The Court found that the "parties do not dispute that the six-year statute of limitations has run with respect to a facial challenge . . ." to the 1993 regulation at issue. Id. Yet, the **only theory** pled in the First Amended Complaint was that the regulation was **unlawful from the moment it was approved** in 1993. As the Court notes, the plaintiff **now** invokes the doctrine of equitable tolling which, if applicable, might toll the running of the six-year statute of limitations.

The Court refuses to dismiss this suit because it concluded that " . . . . there may be facts that would support a claim of equitable tolling." Id. The Court found that plaintiff had failed to cite any authority for the proposition that the application of a challenged regulation to a plaintiff by a third party (as opposed to the application of that regulation to plaintiff by the federal agency which had promulgated the regulation) has ever been held to have given rise to an "as applied" challenge. The January 31st Order also states that " . . . it is undisputed that NIGC has never applied 25 C.F.R. § 522.10 (c) to Crosby Lodge." Id. at 4.

Notwithstanding the findings referenced in the two preceding sentences, the Court, nevertheless, concluded that even if "a private entity or individual, such as Crosby Lodge, may have constructive notice of a regulation, that entity or individual may not discover the true state of affairs until the regulation is actually applied." Id. at 5 (emphasis added). In support, the Court

cites Wind River Mining Corp. v. United States, 946 F.2d 710, 715 (9th Cir. 1991).

Finally, the Court stated, in effect, that it would not rule on whether Crosby Lodge may now pursue a "substantive 'as applied' challenge" to the NIGC regulation in question until after the parties had addressed the issue of whether the doctrine of equitable estoppel applies to the plaintiff (by means of a motion (or cross-motions) for summary judgment) and the Court has decided that issue. January 31, 2008 Order at 5.

II. STANDARD OF REVIEW

With respect to summary judgment motions, the United Sates Supreme Court has stated: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). Summary judgment should be granted in circumstances where no genuine issue of material fact exists and the movant is " 'entitled to judgment as a matter of law.' " Time Warner Cable v. Cable Box Wholesalers, Inc., 920 F.Supp. 1048, 1049 (D. Ariz. 1996), citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Only genuine issues of material fact preclude grant of a motion for summary judgment. Time Warner Cable, 920 F.Supp. at 1049, citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). All reasonable inferences must be drawn in favor of the non-moving party. Triton Energy Corp. v. Square D. Co., 68 F.3d 1216, 1220 (9th Cir. 1995).

III. ARGUMENT

I. This Lawsuit is Barred by the Applicable Statute of Limitations.

The NIGC reiterates that this lawsuit is clearly barred by the applicable statute of limitations provision - - 28 U.S.C. § 2401(a) - - because up until its Opposition to the NIGC's motion for reconsideration, Crosby Lodge consistently had articulated only a **facial** challenge to the NIGC's regulation adopted in 1993 which is clearly barred. See Wind River Mining Corp., 946 F.2d at 715-716; Conner v. U.S. Dep't of the Interior, 73 F. Supp. 2d 1215, 1217-18 (D. Nev. 1999). The purported "as applied" challenge which Crosby now pursues is merely an

attempt to circumvent the statute of limitations bar and is not viable. See 946 F. 2d at 716. The Court's January 31, 2008 Order rules out any facial challenge to the NIGC regulation at issue; the Order states: "The parties do not dispute that the six-year statute of limitations has run with respect to a facial challenge as 25 C.F.R. § 522.10(c) was adopted in 1993." Yet, although the First Amended Complaint clearly asserts a "facial" challenge, Crosby Lodge **now** maintains that it has a viable "as applied" challenge based upon the fact that the Pyramid Lake Paiute Tribe did not attempt to collect 60 percent of plaintiff's net gaming revenue until February of 2006. In short, plaintiff argues that its cause of action did not accrue until February, 2006, and is not barred by the statute of limitations. We demonstrate below that "final agency action" is a prerequisite to any "as applied" challenge and there has been no final agency action here. Furthermore, there are only two situations in which an "as applied" challenge may be made without regard for the statute of limitations and neither one is present here.

The Court's Order states, in essence, that Crosby Lodge may not have had actual notice of its cause of action against the NIGC until the Tribe applied the challenged regulation to the plaintiff. However, actual notice is not required. Constructive notice is sufficient for an "as applied" challenge. Cf. Lord v. Babbitt, 991 F. Supp. 1150, 1160 n.8 (D. Alaska 1997). Indeed, once the NIGC approved the Tribe's class III gaming ordinance on July 19, 2000, the plaintiff had constructive notice that the Tribe would be conducting gaming under IGRA. Section 2710(b)(4)(B)(i), subclause (III) of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, et seq., provides with respect to class II gaming conducted by a non-tribal entity that "not less than 60 percent of the net revenues is income to the Indian tribe." Section 2710(d)(10(A)(ii) makes subclause (III) applicable to class III gaming conducted by a non-tribal entity. See "NIGC's Proposed Findings of Uncontroverted Fact."

In short, the Court appears to be stating that **if** the doctrine of equitable tolling is applicable in the circumstances found in Crosby, then Crosby may be able to pursue a "substantive 'as applied' challenge" to the NIGC regulation at issue. But, as we show below, the doctrine of equitable tolling has no applicability to this case, the result of which is that no "substantive 'as applied' challenge" may be pursued by plaintiff.

A. Final Agency Action is Necessary Prior to the Initiation of an "As Applied" Challenge under the Adminstrative Procedure Act ("APA") for Review of a Regulation, and the NIGC Has Taken No Final Agency Action Here.

The prerequisite for any "as applied"challenge is that there must have been a final agency action under the APA prior to raising the challenge. 5 U.S.C. § 704. See Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv., 112 F.3d 1283, 1288 (5th Cir. 1997); P & V Enters. v. U.S. Army Corps of Eng'rs, 466 F. Supp. 2d 134, 143 (D.D.C. 2006). Absent some "final" agency action, the APA will "not provide a cause of action to challenge agency decisions." Dunn-McCampbell Royalty Interest, Inc., 112 F. 3d at 1288 (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990) and Veldhoen v. U.S. Coast Guard, T.A., 35 F.3d 222, 225 (5th Cir. 1994)). The Dunn-McCampbell opinion states, in pertinent part, as follows:

> " The Supreme Court has identified four factors for determining when agency action is final: (1) whether the challenged action is a definitive statement of the agency's position, (2) whether the action has the status of law with penalties for noncompliance, (3) whether the impact on the plaintiff is direct and immediate, and (4) whether the agency expects immediate compliance."

Dunn-McCampbell Royalties Interest, Inc., 112 F.3d at 1288 (citing Abbott Labs. v. Gardner, 387 U.S. 136, 149-53 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S. 99, 105 (1977)). Crosby Lodge does not meet this standard because the NIGC has taken no action against Crosby Lodge which requires "immediate compliance." See Dunn-McCampbell Royalties Interest, Inc., 112 F.3d at 1288. In other words, Crosby Lodge may not challenge 25 C.F.R. § 522.10(c) until the NIGC has applied this regulation to Crosby Lodge. Id.

B. The "As Applied" Exception to the Statute of Limitations is Applicable in Only Two Situations Neither of Which is Present Here.

An "as applied" challenge to an agency regulation may only be pursued in two situations neither of which is found here. Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 266 F. Supp. 2d 1101, 1120-21 (N.D. Cal. 2003). The first situation arises when the agency previously has brought an enforcement proceeding against the plaintiff entity, thereby applying the regulation to the plaintiff. Id. at 1120, citing Nat'l Labor Relations Bd. v. Fed. Labor Relations Auth., 834 F.2d 191, 195-96 (D.C. Cir. 1987). As this court found in its January 31st Order, the NIGC has never

applied the regulation at issue to plaintiff Crosby Lodge. The second situation arises when the plaintiff has petitioned the agency to rescind or amend the regulation in question, the agency had denied the petition, and the plaintiff has sought judicial review on substantive grounds. Envtl. Prot. Info. Ctr., 266 F.Supp. 2d at 1120 (citing Nat'l Labor Relations Bd., 834 F.2d at 196 and Public Citizen v. Nuclear Regulatory Comm'n, 901 F.2d 147, 152 (D.C. Cir. 1990)). Crosby Lodge has never petitioned the NIGC to rescind or amend the regulation at issue - - 25 C.F.R. § 522.10(c). In short, Crosby Lodge cannot escape the bar of the statute of limitations because neither of the two situations in which an "as applied" challenge is allowed (as described above) is found in this case.

C. Because the Facial Challenge to the NIGC Regulation is Barred by the Statute of Limitations, and No Action has been Taken that is Reviewable under the Narrow Judicial Review Allowed under IGRA, this Action Must be Dismissed.

The Indian Gaming Regulatory Act ("IGRA") contains its own specific judicial review provision that limits both judicial review and the waiver of sovereign immunity contained in the APA. Congress expressly addressed the reviewability of decisions of the Commission in Section 15 of the Act which provides as follows: "Decisions made by the Commission pursuant to sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5." 25 U.S.C. § 2714. Therefore, only certain decisions by the Commission are subject to review in accordance with the APA. Id.

This unique special review further expressly limits APA review. Absent a decision to take an action under any of the provisions cited in § 2714, there is no APA review. The Commission has taken no action that plaintiff complains of related to a gaming ordinance under 25 U.S.C. § 2710; has taken no action complained of by plaintiff under § 2711 related to any management contract or § 2712 which related to pre-existing ordinances and contract; and most importantly has taken no action under § 2713 by way of any enforcement action against the plaintiff for any perceived violation of IGRA.

The "relevant statute" in the case at bar, IGRA, clearly demonstrates Congress' intent to limit judicial review to very specific final agency actions. Section 15 of IGRA expressly

provides that only "[d]ecisions made by the Commission pursuant to sections 2710, 2711, 2712, and 2713...shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5." 25 U.S.C. § 2714. " 'The omission of a provision thereby shows Congressional intent to prohibit judicial review over any other agency actions as opposed to the few already granted express jurisdiction.' " Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Ashcroft, 360 F. Supp. at 64, 67 (D.D.C. 2004) Further, the legislative history is consistent with a Congressional intent to limit judicial review to "certain" agency decisions. See S. Rep. No. 100-446, at 20 (1988) U.S.C.C.A.N. 1090 ("certain Commission decisions will be final agency provisions for the purposes of court review.").

There is simply no final agency action and no final decision by the agency that plaintiff is aggrieved and which it can appeal under the APA or the judicial review mechanism of the Indian Gaming Regulatory Act. This is simply a dispute between the Tribe and the its licensee. To the extent that the plaintiff believes that the fees demanded by the Tribe are unlawful for any reason, the plaintiff can refuse to pay the tribe; force the tribe to sue; or petition the tribal council on the grounds that the amount is unlawful. But the NIGC has not taken an enforcement action or any final agency action applying this regulation to this plaintiff.

II. The Doctrine of "Equitable Tolling" is Not Applicable to this Lawsuit.

In general, the doctrine of equitable estoppel is applicable "when the plaintiff despite all due diligence is unable to obtain vital information bearing on the existence of his claim." See Chung v. U.S. Dep't. of Justice, 333 F.3d 273, 278 (D.C. Cir. 2003) (internal quotations marks omitted).

A. Ninth Circuit Jurisprudence.

The usual justification for applying the doctrine of equitable tolling is the existence of "extraordinary circumstances" which are "beyond the plaintiff's control." Stoll v. Runyon, 165 F.3d 1238,1242 (9th Cir. 1999) (held that equitable tolling doctrine applied to plaintiff who had been sexually harassed by her supervisors at the Sacramento Post Office and even raped by one of them, and had suffered mental illness as a result and, thereafter, was unable to hold any job).

Crosby Lodge cannot point to any "extraordinary circumstances" which delayed its filing of the present lawsuit. In Runyon, the Ninth Circuit declared: "Equitable tolling applies when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff's control made it impossible to file a claim on time." Id. Crosby Lodge has already conceded in its Opposition to the NIGC's motion for reconsideration that the equitable estoppel doctrine is used "sparingly." Plaintiff has not identified any "extraordinary circumstances" which justify its late filing of this lawsuit, nor does it allege that the NIGC was guilty of conduct which prevented plaintiff from asserting its claim.

The Ninth Circuit has also held that the inquiry which controls the applicability of the "equitable tolling" doctrine is "whether there was excusable delay by the plaintiff" in filing suit. Johnson v. Henderson, 314 F. 3d 409, 414 (9th Cir. 2002). Given the plaintiff's concession that it had "constructive" notice of the NIGC's regulation because it was published in the Federal Register in 1993 (Plaintiff's Opposition to NIGC's Motion for Reconsideration at 11); the fact the plaintiff is contending the NIGC had no authority to issue the regulation; and the fact that class III gaming on the reservation became "probable" on July 19, 2000, when the NIGC approved the gaming ordinance of the Pyramid Lake Paiute Tribe (6 years, 4 months before suit was filed), the delay by Crosby Lodge in filing suit is not "excusable."

The NIGC submits that the doctrine of "equitable tolling" is not available to "avoid the consequences of one's own negligence." Lehman v. United States, 154 F.3d 1010, 1016 (9th Cir. 1998), cert. denied, 526 U.S. 1040 (1999). Given the plaintiff's concession of constructive notice of the publication of the NIGC regulation at issue; given the only theory pled in the First Amended Complaint that 25 C.F.R. Part 522 was that this regulation was unlawful from the moment it was adopted in 1993 (that is, plaintiff was making a "facial" challenge); and given the NIGC's approval of the Tribe's gaming ordinance in July of 2000, Crosby Lodge's failure to timely file this lawsuit can only be attributed to its own negligence.

In short, under the facts of this case and the controlling Ninth Circuit precedent, there is no justification for applying the "equitable tolling" doctrine to Crosby Lodge.

B. The U.S. Supreme Court Has Recently Rejected the Applicability of the Doctrine of Equitable Tolling to 28 U.S.C. § 2501.

The governing statute of limitations for suits filed in the United States Court of Federal Claims is 28 U.S.C. § 2501 which provides, in pertinent part, as follows:

> Every claim of which the United States Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.
>
> * * *

In August, 2006, the United States Court of Appeals for the Federal Circuit ruled that the governing statute of limitations in the Federal Circuit was "jurisdictional" in nature and could not be waived. John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1354-55 (Fed. Cir. 2006). The Court expressly rejected the plaintiff-appellant's argument that the doctrine of "equitable tolling" applied to 28 U.S. C. § 2501. On January 8, 2008, the United States Supreme Court affirmed the Federal Circuit's decision. John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750 (2008). The Court was emphatic about the **jurisdictional** nature of Section 2501. It was equally emphatic that the doctrine of "equitable tolling" did not apply to Section 2501 because of Section 2501's jurisdictional nature. Id. at 756.

The governing statute of limitations in Crosby Lodge is 28 U.S.C. § 2401(a) which provides, in pertinent part, as follows:

> (a) Except as provided in the Contract Disputes Act of 1978, every civil action action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. * * *

The key language of Section 2401(a) is nearly identical to the key language in the first sentence of Section 2501. Both statutes provide that a suit against the United States shall be barred unless filed within six years after the right/cause of action first accrued. Indeed, in her dissent in John R. Sand & Gravel Co., Justice Ginsburg stated that the majority opinion could be read as support for the proposition that Section 2401(a) (whose wording is nearly identical to that of Section 2501) is also jurisdictional in nature. 128 S.Ct. at 760-761.

In 1990, the Ninth Circuit ruled that Section 2401(a) is jurisdictional in nature. Sisseton-Wahpeton Sioux Tribe v.United States, 895 F.2d 588, 592 (9th Cir.), cert. denied, 498 U.S. 824

(1990); in 1996 it did so again in UOP v. United States, 99 F. 3d 344, 347 (9th Cir. 1996). However, in 1999, the Ninth Circuit called the viability of its ruling in UOP into doubt. Cedars-Sinai Med. Ctr. v. Shalala, 177 F.3d 1126, 1129 n.1 (9th Cir. 1999). However, there exists other authority for the proposition that Section 2401(a) is jurisdictional in nature. See e.g., Martinez v. United States, 333 F.3d 1295, 1316 (Fed. Cir. 2003); Kendall v. Army Board for Correction of Military Records, 996 F.2d 362, 365-66 (D.C. Cir. 1993); but see P & V Enters. v. U.S. Army Corps of Eng'rs, 466 F. Supp. 2d 134, 147-151 (D.D.C. 2006) (holding that Section 2401(a) is not jurisdictional in nature); Harris v. FAA, 353 F.3d 1006, 1013 n.7 (D.C. Cir. 2004) (expressing doubt about whether Section 2401(a) is jurisdictional in nature).

We submit that **both** 28 U.S.C. § 2501 and 28 U.S.C. § 2401(a) are **jurisdictional** in nature, based upon the reasoning of the majority opinion in John R. Sand & Gravel Co. Accordingly, the doctrine of equitable estoppel should not apply to Section 2401(a), either.

III. Even if the Court Were to Apply the Doctrine of Equitable Tolling to Plaintiff, the Court Would Still Lack Subject Matter Jurisdiction Over this Case.

Even if the Court were to rule that the doctrine of "equitable tolling" tolls the running of the statute of limitations (Section 2401(a)), the Court would still lack jurisdiction over this lawsuit. This is because the Pyramid Lake Paiute Tribe is a "necessary and indispensable" party to this case within the meaning of Fed. R. Civ. P 19(b), which cannot be joined because of tribal sovereign immunity. See e. g., Manybeads v. United States, 209 F.3d 1164, 1166 (9th Cir. 2000), cert. denied, 532 U.S. 966 (2001) (held that Hopi Tribe was a "necessary" and "indispensable" party to a suit by members of the Navajo Nation challenging the constitutionality of the Navajo-Hopi Land Settlement Act); Shermoen v. United States, 982 F. 2d 1312, 1317 (9th Cir. 1992), cert. denied, 509 U.S. 903 (1993) (Hoopa Valley Tribe held to be "necessary and indispensable" party to suit by the Yurok Tribe challenging the constitutionality of the Hoopa-Yurok Settlement Act). The Tribe is a "necessary and indispensable"party, even if the Court were to find that the Plaintiff has an "as applied" challenge, because it has an overriding interest in collecting 60 percent of Plaintiff's "net gaming revenues." The

Commission cannot adequately represent the Tribe's interest because the NIGC's interest (that is, in preventing Crosby Lodge from pursuing an "as applied" challenge to the NIGC regulation in question) is not the same as the Tribe's interest. See e. g., Manybeads, 209 F.3d at 1166.

Indeed, Crosby Lodge originally sued both the Pyramid Lake Paiute Tribe and the Tribal Gaming Commission when it sued the NIGC. However, the Court dismissed the Tribe, Tribal Gaming Commission, and all other tribal parties from this suit on the grounds that they had not waived tribal immunity to suit. See August 10, 2007 Order at 6.

IV. Even if the Court Were to Find that Equitable Tolling Applies to Crosby Lodge, and that the Pyramid Lake Paiute Tribe is not a "Necessary and Indispensable" Party in this Lawsuit, the Plaintiff Still Would Not Have a "Substantive 'As Applied" Challenge."

Even if the Court were to rule that the equitable tolling doctrine is applicable to Section 2401(a), and that the Pyramid Lake Paiute Tribe is not a "necessary and indispensable" party within the meaning of Fed. R. Civ. P. 19, it does not follow that the plaintiff has any viable "substantive 'as applied' challenge" to the NIGC regulation in question. Or stated another way, what facts could plaintiff show to support the application of the "equitable tolling" doctrine which could compensate for the **absence of Ninth Circuit authority** that the application of a federal regulation to a plaintiff by a third party gives rise to an "as applied" challenge? The NIGC submits that if the Court were to rule that the doctrine of equitable tolling is applicable to Crosby Lodge and that the Pyramid Lake Paiute is not a "necessary and indispensable" party within the meaning of FRCP 19, the Court must then make an inquiry into whether the plaintiff **has any** "substantive 'as applied' challenge" to pursue. Defendant reiterates that Crosby Lodge has cited no cases which hold that the application of a challenged regulation to a plaintiff by a **third party,** as opposed to the agency which promulgated the regulation, gives rise to a viable "as applied" challenge. The Commission is at a loss to understand how application of the doctrine of "equitable tolling" could somehow give rise to a "substantive "as applied" challenge" to NIGC's regulation.

V. The Fact that Crosby Lodge Might be Left Without a Remedy Does Not Confer Subject Matter Jurisdiction Over this Lawsuit.

In its January 31, 2008 Order, the Court expresses great concern that Crosby Lodge might be left without a remedy if it cannot pursue a "substantive 'as applied' challenge" to the NIGC regulation at issue. See Makah Indian Tribe v. Verity, 910 F.2d 555, 560 (9th Cir. 1990). This Circuit has recognized that a lack of a remedy caused by the limitation of the waiver of sovereign immunity of an indispensable party does not justify allowing the case to go forward. In fact, the Ninth Circuit Court expressly addressed the consequences of the Quiet Title Act's exclusivity of remedy in Alaska v. Babbitt, 38 F.3d 1068, 1076-1077 (9th Cir. 1994). There, the State of Alaska made a policy argument similar to that of the Crosby plaintiffs, seeking to avoid dismissal there of its lawsuit under the Indian lands exception to the QTA. The Court held that the exception applied without regard to the availability of an alternative means of review: "As this court has previously stated: 'lack of an alternative forum does not automatically prevent dismissal of a suit. Sovereign immunity may leave a party with no forum for its claims.'" Id. at 1077 (quoting Makah Indian Tribe v. Verity, 910 F.2d 555, 560 (9th Cir. 1990) (citation omitted)). The Court further indicated that it "f[ound] no 'clearly expressed legislative intent' that the Indian lands exception should not apply * * * to cases in which the adversely affected party is precluded from further judicial review." Id. at 1077 (internal quotation marks omitted). [1/] But even if the Plaintiff is, in fact, in danger of being left without a remedy, this lack of a

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[1/] Contrary to the plaintiffs' contention, it does not appear that they are entirely deprived of a remedy. This Court has found that "[t]ribes maintain considerable authority over the conduct of both tribal members and nonmembers on Indian land, or land held in trust for a tribe by the United States." McDonald v. Means, 309 F.3d 530, 536 (9th Cir. 2002) (citations omitted). Similarly, the Supreme Court has held that "[n]onjudicial tribal institutions have also been recognized as competent law-applying bodies." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 (1978) (citing United States v. Mazurie, 419 U.S. 544 (1975)). It appears the plaintiffs could petition the tribal council or tribal court for a formal hearing at which they could present their claims. The plaintiffs do not contend that they have exercised this remedy or that they are in any way barred from doing so.

remedy does not somehow operate to confer subject matter jurisdiction over this case. The core of this case is the dispute between Crosby Lodge, on the one hand, and the Pyramid Lake Paiute Tribe and Tribal Gaming Commission, on the other hand. Crosby Lodge **would have had a remedy** against the Tribe and Tribal Gaming Commission **if** it had obtained a provision in its tribal gaming license which waived the Tribe's sovereign immunity with respect to any matter arising from Crosby Lodge's class III gaming operations on the Pyramid Lake Paiute Reservation. If Plaintiff had done so, it could have sued to enjoin the Tribe from collecting 60 percent of plaintiff's net gaming revenues; or, alternatively, obtain an order directing the Tribal Gaming Commission to calculate "net gaming revenues" in the manner urged by the plaintiff. But, Plaintiff did **not** do so, and it should suffer the consequences of its own negligence, as opposed to being allowed to continue to pursue this suit against the NIGC.

CONCLUSION

For the reasons stated above, the NIGC respectfully requests that the Court grant the NIGC's motion for summary judgment. [2/]

[2/] A proposed Order is appended hereto.

Dated this 21st day of May, 2008.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

CROSBY LODGE, INC., a Nevada corporation, **Plaintiff,** **v.** **NATIONAL INDIAN GAMING COMMISSION, et al.** **Defendants.**	**No. 06-CV-657 LEH-RAM**

ORDER

After careful consideration of the NIGC's Rule 56 Motion for Summary Judgment, Plaintiff's Opposition, and the NIGC's Reply, the Court has concluded that the NIGC's Motion for Summary Judgment should be granted. This is because we have concluded that 28 U.S.C. § 2401(a), the governing statute of limitations, bars this lawsuit; that the Pyramid Lake Paiute Tribe is a "necessary and indispensable" party to this suit within the meaning of Fed. R. Civ. 19(b); and that the plaintiff has failed to demonstrate the existence of any genuine issues of material fact.

Accordingly, it is ORDERED that the NIGC's Rule 56 Motion for Summary Judgment be granted, and it is ORDERED that this lawsuit be, and it hereby is, DISMISSED with prejudice.

Dated:

_____
LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2008, that I electronically served the foregoing National Indian Gaming Commission's Motion For Summary Judgment and Proposed Order upon the plaintiff's counsel at the following address:

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