RONALD J. TENPAS
Acting Assistant Attorney General
DANIEL G. BOGDEN
United States Attorney
District of Nevada

GREGG ADDINGTON
Assistant United States Attorney
Nevada Bar. No. 6875
100 West Liberty Street, Suite 600
Reno, Nevada 89101
(775) 784-5438
(775) 784-5181 (facsimile)

/s/ James M. Upton
JAMES M. UPTON
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 663
Washington, D.C. 20044-0663
(202) 305-0482
(202) 305-0506 (facsimile)
E-mail address: james.upton@usdoj.gov

Attorneys for the National Indian Gaming Commission

UNITED STATES DISTRICT COURT
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 REPLY TO PLAINTIFF'S OPPOSITION TO COMMISSION'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

The Commission's Reply is devoted primarily to the following issues: (1) does Crosby

have a viable "as applied"challenge to the NIGC regulation at issue; (2) does the doctrine of "constructive notice" encompass only the "existence" of the challenged NIGC regulation published in the Federal Register in 1993, as Crosby Lodge now argues, but instead, also the contents of that regulation; and (3) should the court apply the doctrine of equitable tolling to this suit. We also address several other issues including the NIGC's enforcement powers as to Class III gaming, whether the Pyramid Lake Paiute Tribe is an indispensable party, and whether there has been any "final agency action."

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE COMMISSION'S REPLY

ARGUMENT

I. Crosby Lodge Does not Have a Viable "As Applied" Challenge to the NIGC Regulation at Issue.

At the outset of this lawsuit, the plaintiff raised a "facial challenge" to the lawfulness of Section 522.10(c) of the Commission's regulations 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." 25 C.F.R. § 522.10(c). At the beginning of 2008, in its January 31st Order in this case, the Court stated, in pertinent part: "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." Since that time, the plaintiff has been contending that it has an '"as applied' challenge to the above quoted NIGC regulations.

Crosby Lodge contends that none of the cases cited by the NIGC "expressly holds that an agency must apply the regulation to the plaintiff in order for a substantive 'as applied' challenge to proceed." Pl's Opp'n at 9. Crosby Lodge argues that the Environmental Protection Information Center v. Pac. Lumber Co., 266 F. Supp. 2d 1101 (N.D. Cal. 2003) decision does not expressly limit "as applied" challenges to the "two situations" discussed: (1) the agency had applied the regulation at issue to the plaintiff by a prior enforcement action; and (2) the plaintiff

had petitioned the agency to rescind or amend the regulation at issue, but the petition was denied. Plaintiff focuses on the word "may" in the cited opinion to argue that there may be other/additional situations in which an "as applied" challenge may be raised, but this interpretation is at odds with a common sense reading of the opinion. Plaintiff goes on to complain that the "lack of direct case law" makes this an issue of "first impression." Yet, even if this complaint is technically accurate, the Commission believes the Environmental Protection Information Center decision is strongly supportive of its position. Indeed, the "two situations" are both premised on actions by the agency which promulgated the regulation at issue.

A. Crosby Cites No Case law Holding that an "As Applied" Challenge Is Viable Where the Challenged Regulation Has Been Applied to the Plaintiff by a Non- Federal Entity.

Crosby stresses that "a regulation need not be applied by the promulgating agency in order for court to grant review." Pl's Opp'n at 10. In support, Crosby cites Artichoke Joe's California Grand Casino v. Norton, 278 F. Supp. 2d 1174 (E.D. Cal. 2003); and Alaska Constitutional Legal Defense Conservation Fund, Inc. v. Norton, No. AOO-0167-CV-HRH 2005 WL 2340702 (D. Alaska, August 19, 2005). These cases are distinguishable from the matter at hand.

1. Artichoke Joe's.

The plaintiff, a non-Indian gaming business, challenged the Secretary's decision to designate the Lytton Rancheria as a federally recognized tribe. Although Interior granted the Rancheria federal recognition in 1991, plaintiff did not file suit until 2001 when it was evident that Interior was about to take land situated near plaintiff's gaming business into trust for the Lytton Rancheria. Artichoke Joe's, 278 F. Supp. 2d at 1177-79. Invoking the "rule in Wind River", the district court held that the suit was not barred by Section 2401(a) (the applicable 6-year statute of limitations); the court stated that this rule "provides that notwithstanding the six year statute of limitations, substantive challenges to agency action can be made up to six years

from the date the action was applied to the challenger," Id. at 1182-83. The court also held the rationale of the Wind River decision - -namely, "[t]he government should not be permitted to avoid . . . challenges to its actions, even if *ultra vires,* simply because the agency took the action long before anyone discovered the true state of affairs" applied to that suit. Id at 1182-83. The court noted that in 1991 the "plaintiffs could have had no idea the Lytton's tribal status would affect them." Id. at 1183. In addition, the court stated that there was "no one with standing [including the plaintiff] to challenge the recognition decision at the time it was made." Id. Finally, the court concluded that for the above reasons "the statute of limitations did not start running on plaintiff's tribal status claim until IGRA gaming in San Pablo [the parcel of land which the Rancheria was requesting Interior to put into trust] by the Lyttons became probable." Id.

There is a basic distinction between the facts in Artichoke Joe's and the factual circumstances in this case. The agency granting the Lytton Rancheria federal recognition was Interior and the agency which was being requested to put the particular parcel of land into trust [pursuant to Congressional direction] (on which gaming was to be conducted by the Lytton Rancheria) was Interior. In other words, the federal agency granting federal recognition to the Rancheria was the same federal agency which was being requested to put land into trust which would be used by the Rancheria for gaming regulated by IGRA. **Here**, the NIGC promulgated the challenged regulation, but the NIGC **did not apply this regulation to the plaintiff. Rather, the Pyramid Lake Paiute Tribe which is not a federal agency/entity applied it.**

The court in Artichoke Joe's concluded that when **IGRA gaming** on the parcel (which the Rancheria had requested Interior to take into trust and which Congress had directed Interior to do) "became probable," the running of the statute of limitations period began. In its Opposition to the NIGC's Rule 59(e) Motion, Crosby noted this conclusion and argued that the Artichoke Joe's opinion supported its position on claim accrual "because the cause of action here did not accrue until application of the regulation to Crosby became **apparent**." (Emphasis added) Dkt #41 at 11-12. The Commission submits that "IGRA gaming"became highly probable, and, a fortiori, the

application of the challenged regulation became readily apparent, once the Commission approved the Tribe's gaming ordinance. This is because the Tribe-Nevada Compact provides that regulation of Class III gaming is limited to the extent it "is consistent with IGRA." Of course, this means consistent with IGRA and the regulations promulgated thereunder. Thus, the reasoning of the Artichoke Joe's opinion would dictate that the six-year statute of limitations period here **began to run on July 19, 2000**. Since Crosby did not file the instant suit until 6 years and four months after July 19, 2000, its suit should be barred even under the ruling in Artichoke Joe's as to when the statute of limitations period began to run.

2. Alaska Constitutional Legal Defense Conservation Fund, Inc.

In Alaska Constitutional Legal Defense Conservation Fund, Inc. v. Norton, No. AOO-0167-cv-HRH, 2005 WL 2340702 (D. Alaska, August 19, 2005), the plaintiffs contended that the Federal Subsistence Board (a component of the Interior Department) had unlawfully denied them "hunting and fishing opportunities on federal public lands because they are not rural residents of Alaska." 2005 WL 2340702 at * 1. This decision was based upon an interpretation of the regulations promulgated under the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101, et seq. Plaintiffs also challenge the constitutionality of three final ANILCA regulations which were promulgated in 1992; the suit had been filed in 2000. They argued that their suit was not barred because the regulations were not applied to them until 1997, 1998 and 1999. Relying on Wind River, the court ruled: "Because plaintiffs brought their complaint within six years of the regulations being applied to them, their claims based upon the three regulations are not barred by the statute of limitations." 2005 WL 2340702 at * 3.

There is a crucial distinction between the facts in that case and the facts in Crosby - - namely, the Interior Department promulgated the three regulations at issue and the application of the three regulations was by the Federal Subsistence Board - - a component of the Interior Department to which the ANILCA regulations had delegated authority to determine whether an area or community in Alaska is "rural." Thus, the application of the three regulations to plaintiffs

was by a component of the Interior Department - and thus part of the same agency which promulgated the three regulations. By contrast, in Crosby, the Pyramid Lake Paiute Tribe - - not the NIGC which promulgated the challenged regulation - - has applied that regulation to Crosby Lodge. This decision does not support Crosby's argument that a "regulation need not be applied by the promulgating agency for a court to grant review." This is because the entity applying the regulation in this case, the Federal Subsistence Board, was a component of the promulgating agency, the Department of the Interior.

Even focusing on the delegation of authority from Interior as a whole to a component of Interior (Federal Subsistence Board) does not help Crosby. Plaintiff attempts to make use the concept of "delegation" to argue that since the "NIGC does not have enforcement authority to apply the regulation, so 25 C.F.R. § 522.10(c) in effect delegates enforcement authority to the Tribe." Pl's. Opp'n at 11.

B. The NIGC Does Have Authority to Enforce 25 C.F.R. § 522.10(c).

Crosby's delegation argument rests upon an invalid premise. The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, ("IGRA") contains many provisions which explicitly give the Commission a role in Class III gaming. In this regard, the Chairman may enforce IGRA's requirement that the tribes conduct Class III gaming in accordance with a Tribal-State Compact. See Section 2710(d)(1)(C). For example, the Chairman of NIGC has authority to enforce all provisions of IGRA. See 25 U.S.C. § 2713(a). Further, Section 2710 (d)(1)(A)(iii) provides that Class III gaming can only be conducted if the tribal gaming ordinance has been approved by the Chairman. The NIGC is also charged with interpreting the statute and promulgating regulations. See 25 U.S.C. §2706(b)(10). Contrary to plaintiff's assertion, the NIGC also has authority to bring enforcement actions for violations of its regulations. See 25 U.S.C. § 2713. Finally, the Chairman may issue a fine or closure order to a tribe for operating without an approved ordinance, or failing to operate in accordance with the terms of an approved tribal ordinance, as well as NIGC regulations. Entrance into a Compact by a tribe does not relieve

a tribe of these two requirements. See 25 U.S.C. § 2713.

In addition to the provisions of IGRA, the language of the Pyramid Lake Paiute Tribe-State of Nevada Compact makes clear the power to regulate Class III gaming is limited to the extent it is "consistent with IGRA." See "Definitions" section, ¶ 22. Article II of the Compact provides that "the tribe has exclusive jurisdiction, subject to any jurisdiction the United States may concurrently exercise, to regulate Class III gaming on the Reservation." Compact at 13. Finally, the Compact requires that any entity managing a gaming operation on the Pyramid Lake Reservation must "meet any and all requirements as set forth in the Tribal gaming ordinance and IGRA." Id. at 16. These provisions constitute an express acknowledgment by the Tribe and the State that the Commission has a role in the regulation of Class III gaming under the Compact.[1/]

Crosby cites Colorado River Indian Tribes v. National Indian Gaming Commission, 383 F. Supp. 2d 123 (D.D.C. 2005), aff'd, 466 F.3d 134 (D.C. Cir. 2006), for the proposition that "NIGC lacks authority to regulate class III gaming." However, this case made no such ruling; rather, it held only that the NIGC could not enforce "minimum internal control standards" on Class III gaming operations. In other words, the reading of this case must be restricted to its facts.

In sum, the plaintiff's argument that Section 522.10(c) amounts to a delegation of the NIGC's enforcement authority to the Pyramid Lake Paiute Tribe is totally devoid of merit and should be rejected out of hand. IGRA explicitly states that the NIGC has authority to promulgate regulations and enforce them; however, the NIGC has not enforced its regulations against Crosby in this instance.

II. The Doctrine of "Constructive Notice" Extends to the Content of the Challenged Regulation.

With respect to the doctrine of "constructive notice", Crosby Lodge asserts the following: "[i]n this case, Crosby may have had constructive notice of the regulation, but it did not have knowledge of any potential claim. Constructive notice of **the existence of a regulation** is not

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[1/] Previously, the NIGC has addressed its authority over Class III gaming in Dkt. # filed on

enough. Crosby must have had knowledge of a potential claim against NIGC." (Emphasis added). Pl's Opp'n at 17. Crosby fails to meet the standard it would impose upon the NIGC's legal arguments with respect to the issue of the reach of the "constructive notice" doctrine. Not only does Crosby fail to cite any "direct case law", but it also fails to cite **any** case law in support of the quoted argument. In addition, Crosby asserts that it had "no actual knowledge" of the publication of the challenged regulation or of the regulation. Id. at 15.

In 2007, the federal district court for the Western District of Washington State held that the publication of the NIGC's approval of a tribal ordinance is sufficient notice for initiating the running of the statute of limitations period. N. County Cmty. Alliance v. Kempthorne, No. C07-1098-JCC, slip op. at 5-6 (W.D. Wash., Nov. 16, 2007). If the publication of the NIGC's tribal gaming ordinance in the Federal Register is sufficient notice to initiate the running of the governing statute of limitations, then it follows that publication of a final NIGC regulation in the Federal Register should be sufficient notice for having the statute of limitations period begin to run. Moreover, Ninth Circuit caselaw supports NIGC's contention about the scope of the "constructive notice" doctrine. In Lord v. Babbitt, 991 F. Supp. 1150 (D. Alaska 1997), the plaintiff - - a recipient of an unfavorable decision by the Bureau of Land Management - - argued that the BLM decision did not explicitly notify plaintiff of his right to file an administrative appeal from this decision. The court ruled that the plaintiff had "notice of that right [to take an administrative appeal] by publication of the [BLM] regulations in the *Federal Register*." Id. at 1168. If Lord, the plaintiff, had notice of the **right to take an administrative appeal**, then that signifies that he had notice of the **content/substance** of the regulation - - **not merely the existence** of the regulation that Lord was claiming was unlawful. The Lord decision stands for the proposition that the "constructive notice" doctrine encompasses the content/substance of a challenged regulation and clearly refutes Crosby's argument.

The Lord opinion cites Shiny Rock Mining Corp. v. United States, 906 F.2d 1362, 1364 (9th Cir. 1990); in that decision the Court of Appeals for the Ninth Circuit ruled that the

publication of information in the Federal Register "is legally sufficient notice to all interested or affected persons **regardless of actual knowledge** or hardship resulting from ignorance." (emphasis added). Thus, Crosby's alleged lack of "actual knowledge" has nothing to do with "constructive notice". The Lord opinion also cites Government of Guam v. United States, 744 F. 2d 699, 701 (9th Cir. 1984), in which the Court of Appeals held that publication of information in the Federal Register constitutes "notice to the world" of that information.

In short, the publication of the challenged regulation in the Federal Register in 1993 did not merely constitute notice of the existence of this regulation, but of the content/substance of the regulation, as well. This means that Crosby had constructive notice of the requirement that 60 percent of the net gaming revenue of a non-tribal Class III gaming operator located on an Indian reservation was income to the Tribe. Since we have established that Crosby does not have a viable "as applied" challenge, Crosby should have brought, but did not, a "facial"challenge to the regulation within six years of the 1993 Federal Register publication of the challenged regulation.

In short, since the **parties agree** that any "facial" challenge is barred by the statute of limitations, and since no viable "as applied"challenge exists, this suit must be dismissed for lack of subject matter jurisdiction.

III. The Doctrine of Equitable Tolling is not Applicable to this Case.

The Commission submits that 28 U.S.C. § 2401 is jurisdictional, based upon the reasoning of the majority opinion in John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750 (2008), and circuit case law, and that the doctrine of equitable tolling does not apply to statutes of limitations which are jurisdictional. But, even if the court were to find that the doctrine is applicable, as a general proposition, in this case, we contend that the Ninth Circuit decisions dealing with the doctrine (which we have cited) establish that the doctrine does not apply to Crosby under the circumstances of this case.

A. Section 2401 is Jurisdictional and, Therefore, the Doctrine of EquitableTolling Does not Apply to It.

We reiterate that the United States, as a sovereign, is immune from suit unless it has

waived its sovereign immunity and the statute of limitations is a condition on that waiver and must be strictly construed. United States v. Mottaz, 476 U.S. 834, 841 (1986). In this regard, the Ninth Circuit has stated:

> As a sovereign, the United States is immune from suit without its consent, and the terms of its consent when granted define and circumscribe our jurisdiction. *United States v. Dalm,* 494 U.S. 596, 608 (1990). "The applicable statute of limitations is a term of consent. The failure to sue the United States within the period of limitations is not simply a waivable defense; it deprives the district court of jurisdiction to entertain the action." *Sisseton-Wahpeton Sioux Tribe v. United States,* 895 F.2d 588, 592 (9th Cir.), *cert. denied,* 498 U.S. 824 (1990); *see United States v. Mottaz,* 476 U.S. 834, (1986) ("In particular, '[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity.' " (quoting *Block v. North Dakota,* 461 U.S. 273, 278 (1983))). Moreover, because such statutes function as jurisdictional conditions, they must be "strictly construed." *Spannaus v. United States Dep't of Justice*, 824 F. 2d 52, 55(D.C. Cir. 1987) (applying 28 U.S.C. § 2401 to FOIA ... ").

Nesovic v. United States, 71 F.3d 776, 777 -778 (9th Cir.1995) (holding that Section 2401(a) is jurisdictional, but also that the doctrines of equitable tolling and estoppel are applicable to it).

While plaintiff acknowledges, in effect, that panel decisions in the Court of Appeals for the Ninth Circuit are split as to whether Section 2401(a) is jurisdictional, it concludes that this split has no significance. But see Lord v. Babbitt, 943 F. Supp. 1203, 1209 n.4 (D. Alaska 1996); footnote 4 states, in pertinent part, as follows:

* * *

> It appears that some panels of the Ninth Circuit have differing views as to how far the Irwin holding should be stretched. On the one hand, the *Fadem* and *Garrett* panels interpret the *Irwin* holding to mean that federal statutory time limitations are no longer jurisdictional in nature. On the other hand, the Nesovic panel still recognizes that the federal statutory time limitations are jurisdictional in nature but can be subject to equitable tolling and estoppel.

* * *

Crosby is completely dismissive of D.C. Circuit caselaw cited by the Commission in support of its motion. Yet, two Ninth Circuit panels (Sisseton-Whapeton Sioux Tribe v. United States, 895 F. 2d 588, 592 (9th Cir.), cert. denied, 498 U. S. 824 (1990), and Neskovic,71 F.3d at 778), cited with approval the D. C. Circuit's decision in Spannaus v. United States Dep't of Justice, 824 F.2d 52 (D.C. Cir. 1987) which held that Section 2401(a) is jurisdictional. It is also

significant that just this year the D.C. Circuit Court of Appeals re-affirmed the Spannaus decision. See P & V Enters. v. U.S. Army Corps of Eng'rs, 516 F.3d 1021, 1025-26 (2008) (held that Section 2401(a) is jurisdictional in nature). In addition, P & V Enters. re-affirmed the decision in Kendall v. Army Board for Correction of Military Records, 996 F.2d 362, 365-66 (D.C. Cir. 1993) (which also held that Section 2401(a) is jurisdictional).

Both 28 U.S.C. § 2401(a) and 28 U.S.C. § 2501 are Congressional waivers of sovereign immunity which that effectively serve the same purpose; the only difference between them is that Section 2501 deals with claims filed in the U.S. Court of Federal Claims, a narrow subset of claims addressed more generally in Section 2401(a).

The Supreme Court's ruling in John R. Sand & Gravel Co. v . United States, 128 S. Ct. 750 (2008) that Section 2501 is jurisdictional strongly suggests that Section 2401(a) is also jurisdictional; indeed Justice Ginsburg's dissent in John R. Sand specifically points out that the majority opinion certainly could be construed precisely this way. Indeed, it is readily apparent that, in light of John R. Sand, that the Nesovic and Sisseton panels were correct about the jurisdictional nature of Section 2401(a) and, therefore, the recognized tension between various Ninth Circuit panel decisions on the issue of whether or not Section 2401(a) is jurisdictional must be resolved in recognition of the jurisdictional nature of Section 2401(a) and the non-applicability of the equitable tolling doctrine to it.[2/] Indeed, a recent D.C. Circuit district court decision discusses the same type of tension between various panel decisions in that Circuit on the nature of Section 2401(a). This decision concludes, in effect, that John R. Sand resolves this tension, as follows:

> **Moreover, John R. Sand helps to reconcile conflicting case law within this Circuit.** In P & V. Enters. v. U.S. Army Corps of Eng'rs, 466 F.Supp.2d 134

[2/] Crosby argues that the 1997 opinion in Cedars-Sinai (holding Section 2401(a) to be non-jurisdictional) is the conclusive and controlling decision on this matter both for the Ninth Circuit and in general. Yet, the court must take into consideration the differing views of various Ninth circuit panels on Section 2401(a), and more importantly, the fact that Cedars-Sinai was decided in 1999 - - long before John R. Sand was decided.

> (D.D.C.2006), another judge of this court held that "the 'rebuttable presumption of equitable tolling' applies to lawsuits governed by the six-year limitations period of § 2401(a)." Id. at 149. Critically, however, that decision was founded on two grounds that are no longer valid. First, the court expressly relied upon Irwin's holding with respect to § 2501, noting that § 2401(a) "is not substantially different from the language of 28 U.S.C. § 2501." Id. Because tolling could apply to § 2501, the court reasoned, it could apply to § 2401 as well. **But John R. Sand now forecloses that line of argument: § 2501 is unquestionably jurisdictional and equitable tolling doctrines have no effect on the application of the limitations period.**
>
> More importantly, the district court in P & V. Enters. also relied upon the government's concession that "Irwin may well have overturned the precedent that [§] 2401(a) is jurisdictional in nature." Id. at 148. That concession, in turn, was motivated by the D.C. Circuit's pronouncement in Harris v. FAA, 353 F.3d 1006, 1013 n.7 (D.C. Cir. 2004), that intervening Supreme Court decisions may have called the continuing vitality of Spannaus into question. But very recently, the D.C. Circuit has re-affirmed Spannaus. Tellingly, it did so when deciding P & V. Enterprises on appeal. There, the court affirmed "the dismissal of P & V's facial challenge to the 1986 rule for lack of subject-matter jurisdiction, rather than for failure to state a claim." P & V Enters. v. U.S. Army Corps of Eng'rs, 516 F.3d 1021, 1026-27 (D.C .Cir. 2008). **Significantly, the court explained that it "has long held that section 2401(a) creates 'a jurisdictional condition attached to the government's waiver of sovereign immunity.' " Id. (quoting Spannaus, 824 F.2d at 55).**

W.Va. Highlands Conservancy v. Johnson, 540 F. Supp. 2d 125, 142 (D.D.C. 2008) (emphasis added).

B. Even if the Court were to Rule that Section 2401(a) is not Jurisdictional and the Doctrine of Equitable Tolling is therefore Applicable to this Case, Ninth Circuit Decsions Cited by the NIGC on Equitable Tolling Do Not Support its Application under the Circumstances of this Case.

Even if the court were to hold, as a general matter, that the doctrine of equitable tolling is applicable to this case, we submit that the Ninth Circuit's caselaw as to when the doctrine may be available to a particular plaintiff does not support its application in this particular case.

Plaintiff attempts to distinguish the three Ninth Circuit cases dealing with the doctrine of "equitable tolling" relied upon by the NIGC. [3/] Crosby distinguishes Stoll v. Runyon, 165 F.3d

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[3/] Plaintiff implies that the Commission totally confused the doctrine of "equitable estoppel" with the doctrine of "equitable tolling." While the Commission did make reference to one decision on "equitable estoppel," the other cases it cites discuss the doctrine of "equitable tolling." NIGC's Motion at 8-9.

1238 (9th Cir. 1999) on the ground that plaintiff had knowledge of her claim, unlike Crosby. Our response is that under Ninth Circuit law, Crosby had constructive notice of the **contents** of 25 C.F.R. § 522.10(c) and, therefore, had constructive notice of its **claim**. It follows that the Runyon decision cannot be distinguished on the grounds Crosby asserts. The NIGC cited Runyon for the proposition that the doctrine should be applied only in very compelling circumstances - - namely, circumstances beyond the plaintiff's control. Crosby asserts no circumstances beyond its control. Crosby concedes that Class III gaming became "probable," once the NIGC approved the Tribe's gaming ordinance on July 19, 2000. Even if the court accepts Crosby's argument that it had no actual knowledge of the contents of the challenged regulation, the fact remains that plaintiff easily could have discovered the contents of that regulation.

The second case cited by the Commission, Johnson v. Henderson, 314 F.3d 409 (9th Cir. 2002), involves a fact pattern akin to that in Crosby. That is, in Johnson v. Henderson, the Court of Appeals ruled that the plaintiff had constructive notice of the operative facts underlying her suit and rejected her equitable tolling claim. Again, we submit that Crosby had constructive notice of its **claim** as well, because it had constructive notice of the contents of 25 C.F.R. § 522.10(c).

In Lehman v. United States, 154 F.3d 1010 (9th Cir. 1998), the Ninth Circuit held that the doctrine of "equitable tolling" does not apply to a plaintiff who has been negligent. Crosby contends that this case can be distinguished on the grounds that Crosby was not negligent "because all of the information **available to it** demonstrated that there was no requirement that it pay 60 percent of its net gaming revenues to the Tribe." Pls. Opp'n. at 18. (Emphasis added). Even assuming, arguendo, that Crosby had no constructive notice of the **contents** of the challenged regulation, Crosby's argument that it was not negligent is extremely unpersuasive. The fact remains Cosby easily **could have discovered** the contents of the regulation through the exercise of due diligence, once Class III gaming upon the Pyramid Lake Reservation became "probable" (Crosby's term) - - that is, once the tribal gaming ordinance was approved by the Commission. Thus, Crosby's argument that the doctrine of "equitable tolling" should apply

because its delay in filing suit was a "reasonable" delay should be rejected by the court.

IV. The Pyramid Lake Paiute Tribe is an Indispensable Party under FRCP 19 in the Absence of the Final Agency Action Applying the Challenged NIGC Regulation to Crosby.

Judicial review under IGRA is governed by 25 U.S.C. §2714 that permits APA review of certain final Commission decisions. What plaintiffs complain of is not "final agency action" by the NIGC that causes it harm, but the assessment of fees by the Tribe. Because the Tribe is not a party to this action, the Tribe is not bound by any determination in this action and thus no matter what is determined here, the Tribe would likely still assess whatever fees it views as required by the licensing agreement. The Ninth Circuit has made it clear that plaintiffs cannot use the APA as a means to avoid the problems posed by the Tribe's sovereign immunity. Lewis v. Norton, 424 F.3d 959, 963 (9th Cir. 2005) (holding that plaintiffs could not "do an end run around tribal immunity . . . by bringing suit against the government, rather than the tribe itself"). Here, at best, all the plaintiff can get is an advisory opinion, not binding on the Tribe, the entity that plaintiff claims is improperly assessing a fee. Where the United States has not applied the regulation to the plaintiff, there is simply no legitimate APA claim that can rectify the injury of plaintiff. This attempted end run around the Tribe's sovereign immunity is barred by Ninth Circuit case law.

The Commission submits that the Pyramid Lake Paiute Tribe is a "necessary" and "indispensable" party within the meaning of FRCP 19, to the extent that there is no final agency action applying the regulation to Crosby and thus no APA jurisdiction. [4/] First, the plaintiffs argue that there is no conflict of interest and, therefore, the NIGC can adequately represent the tribe. This is wholly incorrect. The NIGC role is that of a regulator of Indian Gaming. By its nature as

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[4/] Crosby argues that the court previously rejected the Tribe's arguments that it was an "indispensable" party and this rejection automatically precludes the Commission's argument. Given the constraints on judicial review under Section 2714 of IGRA and the intertwined matters of "final agency action" and the "indispensability" of the Tribe, the NIGC has a unique interest - - which the Pyramid Lake Tribe did not (and does not) share - - in pursuing its "indispensability" arguments. Accordingly, the court's rejection of the Tribe's indispensability arguments should not preclude the NIGC from pursuing its "indispensability" arguments.

a regulator, it cannot advocate for the side of the tribes or those doing business with the tribes. The Commission has taken no final agency action on how this regulation should or should not be applied. As contrasted with cases in which it could be argued that the Secretary of the Interior is acting as a trustee and the interest of the beneficiary and the trustee are arguably identical, IGRA creates no fiduciary/trust relationships because the IGRA "cannot be fairly interpreted as imposing fiduciary obligations." Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1298 (D.N.M. 1996), aff'd, 104 F.3d 1546 (10th Cir. 1997).[5]

Second, the tribe has a unique interest in its own contractual licensing agreements. The Tribe's "interest . . . in its sovereign right not to have their [contractual rights] judicially determined without consent is an interest which the United States' presence in [the suit] cannot protect." Enter. Mgmt. Consultants v. United States ex rel. Hodel, 883 F.2d 890, 894 (10th Cir. 1989). The Tribe also has a unique interest in the Tribe-Nevada Compact, and the NIGC could not adequately represent the interests of the Tribe. See Am. Greyhound Racing, Inc. v. Hull, 305

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[5]Courts have consistently held that gaming revenues are tribal assets and have rejected claims that the United States has any fiduciary duties with respect to such revenues. Considering a claim of breach of fiduciary duty by the Shakopee tribe, the district court in Smith v. Babbitt, noted that "the funds used to make per capita gaming distributions do not form part of this trust corpus[,]" because "[t]hese funds are generated by the Community's corporate gaming enterprise, are managed by the Community, and have no different status than other revenues from tribal businesses." 875 F. Supp. 1353, 1369 (D. Minn. 1995). Similarly, in Vizenor v. Babbitt, 927 F. Supp. 1193, 1203 (D. Minn. 1996), the district court rejected a claim that the Department of the Interior had a fiduciary duty to take action as to misappropriation of gambling funds, in part, because "[t]he [gambling] monies that were the subject of the alleged misappropriations, however, do not constitute property held in trust by the federal government, but are instead tribal property"); See also Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States, 259 F. Supp. 2d 783, 791 (D. Wis. 2003) (noting that IGRA "does not create a situation in which the federal government holds resources in trust for the Indians"); Pueblo of Santa Ana, 932 F. Supp. at 1298 (D.N.M. 1996), aff'd, 104 F.3d 1546 (10th Cir. 1996). ("The Secretary has no detailed, comprehensive control over the daily management of the casino or the money earned by such operations."); Vizenor v. Babbitt, supra, 927 F. Supp. at 1201 (finding that "[u]nlike Mitchell II, no fiduciary duty created by an elaborate regulatory scheme exists [under the IGRA]."); United States v. 1020 Electronic Gambling Machines, 38 F. Supp. 2d 1213, 1216 (E.D. Wa. 1998) ("there is no basis for imposing specific trust duties upon the United States due to the Commission's role in Indian gaming.").

F.3d 1015(9th Cir. 2002).

Crosby states that it does not challenge the "authority of the Tribe to tax Crosby's gaming revenues in a manner consistent with the Tribe-Nevada Compact." Pl's Opp'n at 24. However, Crosby ignores the fact that the Compact specifically limits the power to regulate Class III gaming to the extent it **"is consistent with IGRA." ("Definitions"** Section of Compact, para. 22). Moreover, Crosby's Class III gaming operations must meet all the requirements of the Tribal gaming ordinance **and IGRA**. In other words, the plaintiff's real challenge is to the authority of the Tribe to tax Crosby's gaming revenues in a manner **consistent with IGRA and 25 C.F.R. § 522.10(c).** Thus, Crosby is requesting the Court, in effect, to find that the Tribe-Nevada Compact is the exclusive source of regulatory requirements for Crosby's Class III operations.

In Hull, the plaintiffs sought to enjoin the Governor of Arizona from entering into new, renewed, or modified tribal-state Compacts which would allow Indian tribes to conduct " 'Nevada-style' "gaming; the federal district court granted injunctive relief, but the Court of Appeals vacated the grant of said relief and remanded the case to the district court. It did so because the plaintiffs had failed to join Indian tribes in Arizona (which were already parties to tribal-state gaming compacts) in the suit. The Court of Appeals deemed these tribes to be "necessary" and "indispensable" parties within the meaning of FRCP 19 because they each had a legally protected interest under their respective compacts. Hull, 305 F. 3d at 1024-25. It follows that the Pyramid Lake Paiute Tribe has a legally protected interest in how its gaming Compact with Nevada is interpreted and therefore, also qualifies as a "necessary" and "indispensable" party under FRCP 19. [6] [7]

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[6] Since the NIGC cannot not adequately represent the Tribe's interests for the reasons set forth in Argument IV, the Manybeads and Shermoen decisions are decidedly on point.

[7] Crosby argues that it has a valid substantive challenge to 25 C.F.R § 522.10(c), even if the Tribe were found to be an "indispensable" party and the court found the "equitable tolling" doctrine would not apply. This assertion makes no sense, since if the court made these two rulings, it would have to dismiss this case. In addition, Crosby does not have a viable challenge because IGRA contains the requirement that the Tribe receive 60 percent of the net gaming

V. The NIGC's Alleged Involvement With the Tribe's Insistence of 60 Percent of Crosby's Net Gaming Revenue Does not Amount to "Final Agency Action."

Plaintiff accuses the NIGC of prodding the Tribe to demand 60 percent of Crosby's net gaming revenue. Pl's Opp'n at 11. Regardless of whether or not this contention is true, there is no support for Crosby's assertion that such "prodding" would constitute "final agency action" by any stretch of the imagination. As explained in prior briefs, "final agency action" is defined in IGRA as actions by the Commission on gaming ordinances, management contracts, and enforcement actions. See 25 U.S.C. §2714. Once again, Crosby makes a legal argument devoid of any supporting caselaw.

CONCLUSION

In light of the arguments in its Reply, the NIGC submits there is more than ample reason to grant NIGC's motion for summary judgment.

Dated this 15th day of August, 2008.

Respectfully submitted,

RONALD J. TENPAS
Acting Assistant Attorney General

DANIEL G. BOGDEN
United States Attorney
District of Nevada

GREGG ADDINGTON
Assistant United States Attorney
Nevada Bar. No. 6875
100 West Liberty Street, Suite 600
Reno, Nevada 89101
(775) 784-5438
(775) 784-5181 (facsimile)

s/ James M. Upton
JAMES M. UPTON
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division

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revenues from Class III gaming.

P.O. Box 663
Washington, D.C. 20044-0663
(202) 305-0482
(202) 305-0506 (facsimile)
Email address: james.upton@usdoj.gov
Attorneys for the National Indian Gaming Commission

OF COUNSEL:

John Hay, Esq.
Office of the General Counsel
National Indian Gaming Commission
1441 L Street, N.W.
Washington, D.C. 20005

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2008, I electronically transmitted the foregoing **NATIONAL INDIAN GAMING COMMISSION'S REPLY TO PLAINTIFF'S OPPOSITION TO COMMISSION'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT** to the Clerk of the Court, using the CM/ECF system for filing and for transmittal of a Notice of Electronic Filing to the following ECF registrant:

Gordon J. DePaoli, Esq.
Woodburn & Wedge
6100 Neil Road, Suite 500
Reno, Nevada 8511

Attorney for Plaintiff

/s/ James M. Upton
JAMES M. UPTON