No. 07-36048

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTH COUNTY COMMUNITY ALLIANCE, INC.,

Plaintiff - Appellant,

-v-

DIRK KEMPTHORNE, Secretary of the United States Department of the Interior, DEPARTMENT OF THE INTERIOR, THE NATIONAL INDIAN GAMING COMMISSION, and PHILIP HOGEN, Chairman of the National Indian Gaming Commission.

Defendants - Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON (HON. JOHN C. COUGHENOUR)

BRIEF OF DEFENDANTS-APPELLEES

RONALD J. TENPAS
Assistant Attorney General

AARON P. AVILA
ROBERT J. LUNDMAN
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 23795 (L'Enfant Plaza Station)
Washington, DC 20026-5307
(202) 514-2496

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STATEMENT OF JURISDICTION

Plaintiff-Appellant North County Community Alliance's ("the Alliance") complaint invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. The district court properly found that it lacked jurisdiction over the Alliance's claims in part because (1) they were barred by the statute of limitations found at 28 U.S.C. § 2401(a) (see *infra* Argument Part I) and (2) the Alliance did not challenge a final agency action (see *infra* Argument Parts II and III).

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The Alliance timely filed a notice of appeal on December 14, 2007, within sixty days of the district court's order and judgment entered on November 16, 2006. Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the six-year statute of limitations found at 28 U.S.C. § 2401(a) bars the Alliance's 2007 challenge to defendant National Indian Gaming Commission's ("NIGC") 1993 approval of the Nooksack Tribe's gaming ordinance.

2. Whether the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2501 *et seq.*, imposes a clear statutory duty on defendants to make an independent,

formal Indian lands determination in the absence of a site-specific gaming ordinance and divorced from the express obligations that IGRA imposes.

3. Whether the Alliance has failed to identify a final agency action by the NIGC necessary for jurisdiction.

4. Whether the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, requires an environmental review in the absence of a federal action.

STATEMENT OF THE CASE

Pursuant to IGRA, defendants National Indian Gaming Commission ("NIGC" or "the Commission"), the Commission's Chairman, the Department of the Interior ("Interior"), and Interior's Secretary (collectively, "defendants") are all involved in the regulation of Indian casinos and gaming. Among other things, IGRA requires the NIGC to review and approve tribal gaming ordinances. In 1993, the Nooksack Tribe submitted a tribal gaming ordinance to the NIGC. The NIGC reviewed it, approved it, and published notice of its approval in the Federal Register in December 1993.

In 2007, plaintiff North County Community Alliance ("the Alliance") filed suit against defendants in the district court challenging the 1993 approval. The Alliance claimed that the NIGC had an obligation in 1993, as well as an ongoing IGRA-imposed duty, to determine whether the Nooksack Tribe's announced

casino would be located on "Indian lands" as required by IGRA. The Alliance also claimed that defendants had a duty to perform a NEPA analysis.

The district court dismissed the Alliance's complaint for lack of jurisdiction and failure to state a claim. The court held that the statute of limitations barred the Alliance's challenge to the NIGC's 1993 action, that IGRA did not impose a duty on defendants to perform an independent Indian lands determination, and that there was no major federal action to trigger defendants' NEPA duties. The Alliance has appealed.

STATEMENT OF FACTS

A. Statutory and Regulatory Background

1. IGRA

Congress enacted IGRA in large part "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government" and "to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702(1)-(2); *see also, e.g., TOMAC v. Norton*, 433 F.3d 852, 865 (D.C. Cir. 2005).

By permitting tribes to establish and to regulate gaming on their lands, IGRA recognizes and accounts for tribes' sovereignty over their own lands.

"Indian tribal territory has always held a separate status under federal law. Tribes exercise substantial governing powers within their territory, they have important economic and property rights, and a number of federal laws also govern other relationships, all to the exclusion of state law." *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 735 (9th Cir. 2003) (quoting Felix Cohen, Handbook of Federal Indian Law 27 (2d ed. 1982)); *see also, e.g., United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975))). "IGRA is an example of 'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." *Artichoke Joe's*, 353 F.3d at 715.

IGRA classifies gaming into three classes. Class I gaming is defined as social games for minimal value prizes or traditional forms of Indian gaming engaged in as part of tribal ceremonies or celebrations. 25 U.S.C. § 2703(6). Class I gaming is within the exclusive jurisdiction of the Indian tribes and is not subject to regulation under IGRA. *Id.* § 2710(a)(1). Class II gaming includes bingo and similar games, and card games (excluding "banking card games" such

as blackjack). *Id.* § 2703(7). Class III gaming is all forms of gaming that are not Class I or Class II gaming (such as banked card games and slot machines). *Id.* § 2703(8). Class II and Class III gaming are subject to regulation under IGRA. *Id.* § 2710(a)(2)-(b) & (d). A tribe that wishes to conduct class III gaming must first enter a compact with the state in which the class III gaming is to occur, and the compact must be approved by the Secretary of the Interior. *Id.* § 2710(d)(3), (8).

A tribe that wishes to conduct gaming activities under IGRA must adopt a tribal gaming ordinance and the NIGC must approve it. *Id.* § 2710(b)(2), (d)(1)(A). IGRA requires the Chairman of the NIGC to approve a Class II or Class III gaming ordinance if it satisfies a number of conditions relating to, for example, ownership and control of the gaming, use of gaming revenues, and audits. *Id.* § 2710(b)(2). Additionally, any Indian tribe that wishes to contract with an outside manager for the management of a gaming facility must first obtain the NIGC's approval of the management contract. *Id.* § 2711.

A tribe may conduct gaming under IGRA only on "Indian lands." *See id.* §§ 2710(b)(1) (Class II) & 2710(d)(3) (Class III); Facility License Standards Final Rule, 73 Fed. Reg. 6,019, 6,022 (Feb. 1, 2008) ("IGRA requires that all gaming take place on 'Indian lands.'"). IGRA defines "Indian lands" as "(A) all lands

within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4); *see also* 25 C.F.R. § 502.12.

IGRA authorizes the NIGC to promulgate regulations and to monitor Indian gaming activities in order to achieve the purposes of the statute. 25 U.S.C. § 2706(b)(1), (10). It also authorizes the NIGC Chairman to bring enforcement actions and collect civil fines for violations of the statute, the NIGC regulations, or approved tribal gaming ordinances. *Id.* § 2713. The NIGC Chairman has the authority to close temporarily Indian gaming, with the NIGC having the authority to halt permanently gaming if it finds a substantial violation. *Id.* § 2713(b).[1/]

[1/] The NIGC recently promulgated a final rule that requires tribes to adopt and enforce certain standards for facility licenses. Facility License Standards Final Rule, 73 Fed. Reg. 6,019, 6,022 (Feb. 1, 2008); *see generally* 25 U.S.C. § 2710(b)(1) ("A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.") & (b)(2)(E) (providing that NIGC shall review and approve tribal ordinance so long as ordinance, among other things, provides that "the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety"). The new rule requires tribes to submit 120-day advanced notice to the NIGC for any new facility license, including information that relates to the Indian lands requirement of IGRA. 73 Fed. at 6,022, 6,024,

(continued...)

2. The Statute of Limitations

The relevant statute of limitations provides as follows: "Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a).

3. NEPA

The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, requires federal agencies to examine and disclose the environmental impacts of proposed federal actions. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). NEPA's requirements are purely procedural. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978). NEPA requires federal agencies to prepare an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting" the environment. 42 U.S.C. § 4332(2)(C).

[1/](...continued)
6,029 (to be codified at 25 C.F.R. § 559.2). The new facility provisions of this regulation do not apply to facilities – like the Nooksack Tribe's Northwood Casino – that opened prior to the regulation's effective date of March 3, 2008.

B. Factual Background and Administrative Actions at Issue

The Nooksack Tribe ("the Tribe") is a federally recognized Indian Tribe. *See, e.g.*, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648, 13,649 (March 22, 2007). The Tribe's reservation is located in northwestern Washington. ER Tab 1 ¶ 14 (complaint).[2/]

In 1993, the Nooksack Tribe submitted a Class II and Class III tribal gaming ordinance to the NIGC for approval pursuant to IGRA, 25 U.S.C. § 2710. The Tribe's ordinance did not specify where on Nooksack lands the gaming would occur and did not limit the number of gaming facilities that the Tribe may operate. ER Tab 1 ¶ 13. The gaming ordinance provides in relevant part that the Nooksack Gaming Commission "shall issue a separate license to each place, facility, or location on Indian lands where Class II gaming is conducted under this ordinance." ER Tab 1 ¶ 13 (quoting Nooksack Tribal Code 56.04.030). The NIGC approved the Tribe's gaming ordinance and published notice of that approval in the Federal Register on December 14, 1993. Notice of Approval of

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[2/] In this brief, "ER Tab __" refers to the document found at the cited tab in the Alliance's Excerpts of Record. A page or paragraph number is provided as well. The factual background is drawn from the allegations in the Alliance's complaint, as the district court dismissed the complaint for lack of jurisdiction and failure to state a claim. *See infra* at 10-16.

Class III Gaming Ordinances, 58 Fed. Reg. 65,406 (Dec. 14, 1993).[3/]

Pursuant to the NIGC's approval, the Nooksack Tribe established a gaming facility on its reservation in Deming, Washington. ER Tab 1 ¶ 14. The Nooksack Tribe has an approved tribal-state compact for class III gaming at this facility.[4/] The Alliance does not challenge the operation of that established gaming facility in this suit.

The Tribe has also recently constructed a second gaming facility, approximately 33 miles by road from its reservation called the Northwood Casino. ER Tab 1 ¶ 20; *but see* Alliance Br. at 20 (Northwood Casino is located "approximately twenty miles away" from reservation.). This lawsuit concerns the Northwood Casino. The Tribe has not pursued a tribal-state compact to permit

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[3/] The precise date that the NIGC's letter approving the gaming ordinance was signed and mailed is not in the district court record and apparently was not recorded in the agency's records. In any event, the public was provided notice of this final agency action on December 14, 1993. Notice of Approval of Class III Gaming Ordinances, 58 Fed. Reg. 65,406 (Dec. 14, 1993).

[4/] Notice of Approved Tribal-State Compact, 57 Fed. Reg. 27,985 (June 23, 1992); Notice of Approved Amendment to Tribal-State Compact, 59 Fed. Reg. 37,142 (July 20, 1994); Notice of Approved Second Amendment to Tribal-State Compact, 60 Fed. Reg. 18,704 (April 12, 1995); Notice of Amendment to Approved Tribal-State Compact, 64 Fed. Reg. 4,459 (Jan. 28, 1999); Notice of Approved Tribal-State Class III Gaming Compact, 70 Fed. Reg. 74,331 (Dec. 15, 2005); Notice of Amendment to Approved Tribal-State Compact, 72 Fed. Reg. 30,392 (May 31, 2007).

class III gaming at the Northwood facility; thus it is limited to only class I and II gaming. 25 U.S.C. § 2710(d)(3), (8).[5]

C. Procedural History

The Alliance filed its complaint on July 13, 2007. ER Tab 1. The Alliance's "members include residents and property owners within an area that will be affected by a casino proposed by the Nooksack Indian Tribe" along with some tribal members. ER Tab 1 ¶¶ 3, 4. The complaint alleges that defendants violated IGRA and NEPA, and both the IGRA and NEPA claims are brought pursuant to the APA. Alliance Br. at 5 ("Because neither IGRA nor NEPA provides a private right of action, [citations omitted], the Alliance's claims under both statutes are brought under the aegis of the Administrative Procedure Act, 5 U.S.C. §§ 701-706."). As to IGRA, the Alliance alleges that Defendants have not ensured the Northwood site is on "Indian lands," see 25 U.S.C. § 2710(b)(1); 25

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[5] In its brief, the Alliance discusses a number of facts that are not alleged in its complaint concerning, among other things, the status of the land on which the Northwood Casino is located, the casino itself, and the Tribe. *See, e.g.*, Alliance Br. at 9-11, 19-21. The district court did not make any findings relating to these facts, as it dismissed the complaint for lack of jurisdiction and failure to state a claim. Although defendants do not agree with all of the Alliance's factual characterizations, it is neither necessary nor appropriate to set forth those disagreements in an appeal from the dismissal of a complaint.

U.S.C. § 2703. ER Tab 1 ¶¶ 25-26.[6] As to NEPA, the Alliance claims that defendants' actions amount to "major federal actions" that trigger NEPA requirements and defendants have failed to satisfy NEPA's requirements. ER Tab 1 ¶ 38.

The NIGC and Interior moved to dismiss for lack of subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)) and failure to state a claim (Fed. R. Civ. P. 12(b)(6)). The district court granted the motion and dismissed the Alliance's complaint. ER Tab 16 (order); ER Tab 17 (judgment).

The district court first held that the Alliance's challenge to defendants'

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[6] In its complaint and in the district court, the Alliance also argued that defendants violated IGRA because they failed to make the allegedly required determination "whether the construction of the facility is conducted in a manner which adequately protects the environment and public health and safety[,]," citing 25 U.S.C. § 2710(b)(2)(E). ER Tab 1 ¶ 25; ER Tab 26 at 13-14 (district court order). The Alliance does not make this argument on appeal and thus has waived the issue. *See, e.g., Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir.1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived."). In any event, the district court properly dismissed Alliance's claim because nothing in section 2710(b)(2)(E) requires defendants to undertake preproject environmental reviews. Section 2710(b)(2)(E) requires the Chairman to approve any tribal ordinance or resolution that includes provisions requiring the subject tribe to ensure that "construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety * * * ." 25 U.S.C. § 2710(b)(2)(E). The Alliance inaccurately cites this provision to place a construction approval responsibility on the NIGC, when the provision directs the NIGC Chairman only as to when he must approve a tribal gaming ordinance or resolution.

approval of the Tribe's gaming ordinance was barred by the applicable six year statute of limitations, 28 U.S.C. § 2401(a). ER Tab 16 at 4. The court held that the Alliance's cause of action challenging defendants' approval of the gaming ordinance accrued in 1993, when defendants approved the gaming ordinance and published notice of that approval in the Federal Register. ER Tab 16 at 4-5. The court noted that "[o]rdinarily, '[p]ublication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance.'" ER Tab 16 at 5 (quoting *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667–68 (9th Cir. 1989), second alteration in original). The court rejected two arguments made by the Alliance in support of its attempt to evade the ordinary rule.

The court rejected the Alliance's argument that its claim accrued when the NIGC again published notice of its approval of the Nooksack gaming ordinance in the Federal Register in 2002. The court reasoned that simply republishing a list of approved gaming ordinances does not reset the statute of limitations clock. ER Tab 16 at 4-5 (citing, e.g., *Impro Prods., Inc. v. Block*, 722 F.2d 845, 850 n.9 (D.C. Cir. 1983)). "In sum, approval of the Nooksack gaming ordinance was first published in the Federal Register in 1993 and subsequent notices issued by the

NIGC could do nothing to revise this operative date." ER Tab 16 at 5.[7]

In addition, the court rejected the Alliance's argument that its causes of action did not accrue until "announcement of the Northwood Crossing project." ER Tab 16 at 4. The court "conclude[d] that the circumstances of this case do not justify a departure from the general rule" that publication in the Federal Register is legally sufficient notice to start the running of the statute of limitations. ER Tab 16 at 6. The court reasoned that the Alliance's "theory is that the NIGC did not make a required determination" – that is, the NIGC did not determine whether the gaming described in the ordinance would take place on "Indian lands." That "procedural claim * * * should have been apparent at the time the NIGC approved the Nooksack's gaming ordinance." ER Tab 16 at 6. Moreover, the court found that "it is apparent in this case that Plaintiff's claims are procedural. The complaint repeatedly characterizes the problem as a failure to make required determinations, rather than a failure to reach the right result." ER Tab 16 at 8.

The court also found that the 1993 approval of the gaming ordinance, coupled with the public record information showing that the Tribe owned the

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[7] In its brief, the Alliance has abandoned the argument that the 2002 re-publication reset the statute of limitations. *See, e.g., Smith*, 194 F.3d at 1052 ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.").

Northwood land, made a part of the public record "all necessary information for identifying the land potentially affected by the decision." ER Tab 16 at 6. "With an approved gaming ordinance authorizing class III gaming under IGRA, the Nooksack Tribe needed to do nothing more, with respect to the NIGC, in order to conduct class II gaming on its own 'Indian lands.'" ER Tab 16 at 6. "[T]he theory of constructive notice that assumes familiarity with prevailing law is no different in kind from that which assumes familiarity with the content of the Federal Register." ER Tab 16 at 6.

"Therefore, to the extent that Plaintiff challenges Defendants' approval of the Nooksack's gaming ordinance based on [25 U.S.C.] § 2710(b)(1) ('Indian lands') and § 2710(b)(2)(E) ('environment . . . public health and safety'), the claims are time-barred under 28 U.S.C. § 2401(a), with the six–year limitation period having begun to accrue upon publication in the Federal Register in December 1993. Accordingly, the Court lacks subject matter jurisdiction over these claims under Federal Rule of Civil Procedure 12(b)(1)." ER Tab 16 at 8-9.

The Alliance also claimed that IGRA "implicitly imposes a duty on the NIGC to make ongoing 'Indian lands' determinations as individual gaming projects develop." ER Tab 16 at 10. The court rejected the Alliance's claim: "The Court concludes that neither the provisions of IGRA, the underlying logic of

IGRA's statutory scheme, or the relevant case law, support Plaintiff's position that such a duty exists." ER Tab 16 at 11. The district court also found that IGRA does not provide for judicial review of the Alliance's claim: "[b]y what it specifically includes, and therefore excludes, this provision [25 U.S.C. § 2714] plainly does not support a right to judicial review for an alleged failure to make a formal 'Indian lands' determination." ER Tab 16 at 9-10. In conclusion, the court stressed that "the statutory scheme is one that necessarily relies upon the NIGC's enforcement authority to ensure compliance with the Act." ER Tab 16 at 14.[8]

Finally, the district court rejected the Alliance's NEPA claim. As the court explained, the Alliance's NEPA claims "hinges on the theory that Defendants had an implicit obligation to make a formal 'Indian lands' determination before construction on the Northwood Casino could commence. Since the Court has determined that no such formal, ongoing obligation exists, Plaintiff's NEPA claim fails on its own terms, as there is no 'major federal action' that would require

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[8] The district court also rejected the Alliance's now-abandoned claim (*see supra* at 11 n.6) that the NIGC has a mandatory duty "to make formal findings as to whether 'the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety.'" ER Tab 16 at 13-14 (quoting 25 U.S.C. § 2710(b)(2)(E)). The court explained that "[t]his claim fails for the same reason as the 'Indian lands' theory * * *. Plaintiff offers no support for the assertion that a formal determination has to be made on an ongoing, site-specific basis." ER Tab 16 at 14.

environmental review under that statute." ER Tab 16 at 13.

SUMMARY OF THE ARGUMENT

Defendants have taken only one final agency action at issue here: the NIGC's 1993 approval of the Nooksack Tribe's gaming ordinance. Because that approval and the publication of notice of the approval in the Federal Register in 1993 occurred more than six years before the Alliance filed its complaint in 2007, the Alliance's challenge to that approval is barred by the statute of limitations, 28 U.S.C. § 2401(a). The Alliance's argument that the NIGC should have made an Indian lands determination while approving the gaming ordinance is a quintessential procedural argument – i.e., the Alliance is claiming that the agency did not include a required determination in its decision. Because the Alliance's challenge is a procedural, and not substantive, challenge and Alliance does not challenge the application of the approval to the Alliance, the Alliance's claim accrued when the NIGC published notice of the approval in 1993. This Court has held that a plaintiff's standing is irrelevant to the issue of when a statute of limitation accrues in *Shiny Rock Mining Corp. v. United States,* 906 F.2d 1362, 1365 (9th Cir. 1990). This binding precedent defeats the Alliance's argument to the contrary. *See* Part I below.

The Alliance also argues that defendants have a duty to issue a formal

"Indian lands determination" when the Tribe announced its intention to build the Northwood casino. This argument fails because IGRA imposes no such duty on defendants. IGRA requires the NIGC to review and approve gaming ordinances and third-party management contracts. IGRA requires Interior to review and approve tribal-state compacts. In the context of making those decisions, Indian lands determinations are made, but only if the ordinance, management contract or compact is site-specific. While all management contracts are site-specific because they relate to the management of a particular facility or facilities, nothing in IGRA or the NIGC regulations require gaming ordinances to be site-specific. If the tribe submits a gaming ordinance that does not identify particular sites for gaming activity, as happened here, then no Indian lands determination is necessary. While the NIGC has the authority to bring an action against a tribe to enforce the IGRA, that enforcement authority is committed to its discretion and cannot be compelled by an APA action. *See* Part II below.

The Alliance's argument that defendants have an obligation to make a formal Indian lands determination here also fails because the IGRA's limited authorization of judicial review does not encompass Indian lands determinations. Judicial review under the APA is limited to final agency action and does not provide for review of actions that are unreviewable under the statute governing the

agency. Here, IGRA's judicial review provision specifies the agency actions that are reviewable under the APA. Because the judicial review provision does not specify Indian lands determinations, no judicial review of an Indians land determination, or the failure to make such a determination, is available here. *See* Part III below.

Finally, the Alliance has no NEPA claim here because defendants have not taken any "major federal action" to trigger NEPA within the statute of limitations. *See* Part IV below.

STANDARD OF REVIEW

This Court "review[s] de novo dismissals under Rules 12(b)(1) and 12(b)(6)." *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007) (quoting *Holcombe v. Hosmer*, 477 F.3d 1094, 1097 (9th Cir. 2007)). "'[F]or the purposes of' reviewing such dismissals, and where, as here, no evidentiary hearing has been held, 'all facts [alleged in the complaint] are presumed to be true.'" *Rhoades*, 504 F.3d at 1156 (quoting *Holcombe*, 477 F.3d at 1097).

This Court also reviews de novo the district court's dismissal of a complaint on statute of limitations grounds, issues of statutory construction, and whether there is final agency action sufficient to support APA jurisdiction. *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1135 (9th Cir. 2001) (statute of

limitations); *United States v. Angwin*, 271 F.3d 786, 800 (9th Cir. 2001) (statutory construction); *Hale v. Norton*, 476 F.3d 694, 697-98 (9th Cir. 2007) (final agency action and lack of subject matter jurisdiction).

ARGUMENT

I. The Alliance's challenge to the NIGC's approval of the gaming ordinance is barred by the statute of limitations.

A. The Alliance's claims arise under the APA and are subject to the general six-year statute of limitations in 28 U.S.C. § 2401(a).

Because IGRA does not provide a cause of action for the Alliance's claims, the Alliance's claims under IGRA are reviewable, if at all, under the APA. *See, e.g., Turtle Island Restoration Network v. U.S. Dep't of Commerce,* 438 F.3d 937, 942-43 (9th Cir. 2006); 25 U.S.C. § 2714 (IGRA judicial review provision referencing APA). Claims under the APA are subject to the statute of limitations set forth in 28 U.S.C. § 2401(a). *Wind River Mining Corp. v. United States,* 946 F.2d 710, 713 (9th Cir. 1991); *see also* Alliance Br. at 25-26 (not contesting that the six-year statute of limitations in section 2401(a) applies here); ER Tab 16 at 4 ("The parties agree on the applicable statutory limit, * * * 28 U.S.C. § 2401(a)."). That section provides in relevant part that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). Failure to sue the United

States or its agency within the limitations period operates to deprive the federal courts of jurisdiction:

> The doctrine of sovereign immunity precludes suit against the United States without the consent of Congress; the terms of its consent define the extent of the court's jurisdiction. The applicable statute of limitations is a term of consent. The plaintiff's failure to sue within the period of limitations is not simply a waivable defense; it deprives the court of jurisdiction to entertain the action.

Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 592 (9th Cir. 1990).[9]

B. The Alliance's claim concerning the NIGC's approval of the gaming ordinance accrued in 1993.

The Alliance's 2007 challenge to the NIGC's 1993 approval of the Nooksack gaming ordinance is barred by the six-year statute of limitations because the challenge accrued in 1993.

"Under federal law, a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action." *Cline*

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[9] However, in *Gros Ventre Tribe v. United States*, 469 F.3d 801, 808-09 (9th Cir. 2006), this Court has noted that there is conflicting authority in this Circuit as to whether the "final agency action" requirement is a condition of the sovereign immunity waiver or instead a limit on the cause of action created by the APA. The Court need not resolve that conflict because the Alliance's claim must fall within the statutory requirements for judicial review under the APA (including the final agency action requirement) in order for the Alliance to have a cause of action. Therefore, regardless whether the statute of limitations issue is or is not jurisdictional, the dismissal was proper for failure to state a claim.

v. Brusett, 661 F.2d 108, 110 (9th Cir. 1981); *see also Shiny Rock,* 906 F.2d at 1364-65 (right of action first accrues when the plaintiff has actual or constructive knowledge of the alleged wrong and can bring a cause of action). Whether the pertinent events have occurred is determined under an objective standard; a plaintiff does not have to possess actual knowledge in order for the cause of action to accrue. *Shiny Rock,* 906 F.2d at 1365; *Sisseton-Wahpeton Sioux Tribe,* 895 F.2d at 594. The proper focus for statute of limitations purposes is upon "the time of the [defendant's] acts, not upon the time at which the consequences of the acts became most painful." *Delaware State College v. Ricks,* 449 U.S. 250, 258 (1980).

A claim under the APA challenging final agency action on procedural or policy grounds accrues at the time of the final agency action, because the "grounds for such challenges will usually be apparent to any interested citizen" at that time. *Wind River,* 946 F.2d at 715; *see also, e.g., Sendra Corp. v. Magaw,* 111 F.3d 162, 165 (D.C. Cir. 1997) ("The right of action first accrues on the date of final agency action."). As this Court explained in *Wind River,* in cases with constructive but no actual notice, the government's interest in finality "outweighs a late-comer's desire to protest the agency's action as a matter of policy or procedure." 946 F.2d at 715. Publication in the Federal Register is legally sufficient notice to all

interested or affected persons regardless of actual knowledge or hardship resulting from ignorance. *Shiny Rock*, 906 F.2d at 1364; *Friends of Sierra R.R., Inc. v. Interstate Commerce Comm'n*, 881 F.2d 663, 667-68 (9th Cir. 1989) ("Publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance."); *see generally* 44 U.S.C. § 1507.

The only type of APA challenge that can be brought in this Circuit *more* than six years after the relevant final agency action is an "as applied" challenge. As this Court explained in *Wind River*, a challenger who contends an agency decision is unconstitutional or *ultra vires* "may do so later than six years following the decision by filing a complaint for review *of the adverse application of the decision to the particular challenger*," provided the complaint is filed "within six years of the agency's *application of that decision to the specific challenger*." *Wind River*, 946 F.2d at 715-16 (emphasis added).

This exception to the six-year statute of limitations has no application here, however, because the Alliance is not challenging any application by the NIGC of its approval of the gaming ordinance. In fact, it would be impossible for the approval of the gaming ordinance to be applied to the Alliance. The Alliance makes no argument in its brief that the NIGC's decision to approve the gaming

ordinance has ever been applied to the Alliance.

The Alliance instead argues that its claim is "substantive" rather than "procedural." Even assuming it is substantive (and it is not as explained below), that would get the Alliance only halfway to the *Wind River* exception because the decision has never been applied to the Alliance. Application of the decision to the specific challenger at a later date is critical because it is that application that may restart the statute of limitations.

Further, the Alliance's claim here is procedural, not substantive. The Alliance is not challenging the substance of any decision on Indian lands but instead challenges defendants' failure to make such a decision. Alliance Br. at 11-12. With respect to the NIGC's ordinance approval, the Alliance is challenging only the NIGC's failure to make an Indian lands determination in approving the ordinance, not any substantive determination made by the NIGC in approving the ordinance.[10/] As the district court explained, that allegedly improper failure was

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[10/] If Alliance's claim here was a substantive challenge to whether the land at issue is Indian land, then that challenge would raise the issue of whether the United States has waived its sovereign immunity. *See, e.g., United States v. Mottaz*, 476 U.S. 834, 843 (1986); *Metropolitan Water Dist. of S. Cal. v. United States*, 830 F.2d 139, 143 (9th Cir. 1987), *aff'd by equally divided Court, California v. United States*, 490 U.S. 920 (1989); *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 961-62 (10th Cir. 2004). However, as explained above, the Alliance here is challenging only the failure of defendants to make an

(continued...)

apparent in 1993 when the NIGC approved the ordinance without addressing the Indian lands question. ER Tab 16 at 6. If the NIGC had made an Indian lands determination and the Alliance had challenged whether that determination was correct, then the claim would be substantive.[11/]

The Alliance argues that *Utu Utu Gwaitu Paiute Tribe v. Dep't of Interior*, 766 F. Supp. 842 (E.D. Cal. 1991), supports its argument. Alliance Br. at 27-28. It does not. In *Utu Utu*, the agency applied its rule on attorney's fees to deny the plaintiff's claim for fees. *Id.* at 843-45. This is a quintessential example of an agency applying a rule to a party, unlike the situation here where the NIGC has not applied any rule to the Alliance. Nor does *Artichoke Joe's California Grand Casino v. Norton*, 278 F. Supp.2d 1174 (E.D. Cal. 2003), support the Alliance's argument. Unlike the situation here, the plaintiff in *Artichoke Joe's* actually challenged the substance of the agency's earlier decision – i.e., whether a tribe had been properly recognized. *Id.* at 1182-83.

[10/](...continued)
Indian lands determination, not the substance of a determination.

[11/] In addition, as the district court explained, when the NIGC approved the gaming ordinance in 1993 "all necessary information for identifying the land potentially affected by the decision" was part of the public record. ER Tab 16 at 6. The Alliance could have determined what lands were held by the Tribe and, therefore, where gaming might occur.

In this case, the NIGC approved the Nooksack Tribe's gaming ordinance authorizing Class II and Class III gaming pursuant to IGRA, 25 U.S.C. § 2710, no later than December 14, 1993, when public notice of such approval was provided in the Federal Register. Notice of Approval of Class III Gaming Ordinances, 58 Fed. Reg. 65,406 (Dec. 14, 1993) ("The Chairman [of the NIGC] has approved tribal gaming ordinances authorizing class III gaming for the following Indian tribes: * * * Nooksack Indian Tribe."). The Alliance sought to challenge this ordinance approval in the district court almost 14 years after the final agency action. ER Tab 1 ¶¶ 1, 12, 27-32, 44, Prayer for Relief ¶ 2. The Alliance's challenge to the NIGC's approval of the gaming ordinance is accordingly barred by the statute of limitations.

C. The Alliance's standing is irrelevant to issue of when the statute of limitations begins to run.

The Alliance argues that the statute of limitations did not accrue until it gained standing in 2006. Alliance Br. at 30-32. The Alliance's standing is irrelevant to the commencement of the statute of limitations.

This Court has rejected the argument that a statute of limitations does not accrue until a plaintiff has standing. *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1366 (9th Cir. 1990). In *Shiny Rock*, a 1964 agency order withdrew a section of land within the Williamette National Forest from

appropriation for mining. The plaintiff applied for a mining patent more than fifteen years later. The agency denied the application based on the earlier order, over the plaintiff's argument "that there were errors and violations of statutes and regulations in the formulation and publication" of the order. *Id.* at 1363. This Court held that the six-year statute of limitations in section 2401(a) applied and rejected plaintiff's argument that the statute of limitations did not accrue until plaintiff had standing to sue. *Id.* at 1366. The court explicitly "decline[d] to accept the suggestion that standing to sue is a prerequisite to the running of the limitations period." *Id.* at 1365-66. This decision is binding on the panel here.[12]

The Alliance relies on *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393 (9th Cir. 1986), in support of its argument that the statute of limitations does not accrue until a plaintiff has standing. Alliance Br. at 30. *Acri* stands for no such thing. It does not even address the issue of standing. It rather addresses the issue of when the statute of limitations accrues for a claim by a union member against his union for breach of the duty of fair representation, *id.* at 1395-96, far removed from the agency action context at issue here and

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[12] The Alliance appears to concede that *Shiny Rock* is on point. Alliance Br. at 14 (arguing that the statute of limitations should not accrue until the Alliance has standing but conceding that "some case law in this Circuit holds otherwise" and citing *Shiny Rock*).

addressed in *Shiny Rock*. In the *Acri* context, the Court held that the claim for damages did not accrue until the union members suffered damages – i.e., a breach of a duty that did not cause damages did not start the running of the statute of limitations. *Id.* at 1396. That holding, which predates *Shiny Rock*, is not relevant here.

Finally, a rule contrary to this Court's rule in *Shiny Rock* would replace the existing approach to the issue of accrual with one that incorporates all of the nuances of standing. The statute of limitations inquiry would be greatly complicated by importing standing considerations such as injury in fact, causation of injury, redressability, prudential standing versus Article III standing, and the zone of interests. And the contrary rule "would virtually nullify the statute of limitations for challenges to agency orders." *Shiny Rock*, 906 F.2d at 1365. For example, if an agency finalized and published a plan with environmental impacts on a wilderness area, a putative plaintiff who moved to the area seven years after publication, whose use of the area was harmed by the plan, and who believed the plan to be inconsistent with the law, could still sue because she did not have standing until after the statute of limitations appeared to have run. This Court

wisely rejected such an approach in *Shiny Rock*.[13]

II. Defendants have not failed to take a final agency action required by IGRA.

As explained above, the statute of limitations bars the Alliance's challenge to the NIGC's 1993 decision to approve the Tribe's gaming ordinance. The Alliance's next argument is that "even assuming the Alliance is barred from challenging the NIGC's approval of the Nooksack gaming ordinance, the announcement of the Northwood Crossing project sparked an independent obligation to determine the Indian lands status of the site that the NIGC has failed to fulfill. This failure constitutes final agency action subject to judicial review." Alliance Br. at 15. The Alliance's argument should be rejected because IGRA imposes no obligation on defendants to perform an independent, formal Indian lands determination when a tribe announces a casino project. Because defendants do not have a statutory or regulatory duty to perform the action that the Alliance seeks to compel, the district court properly dismissed the Alliance's claim.

Under APA section 706(1), a claim that a final agency action has been "unlawfully withheld" or "unreasonably delayed," such as the Alliance's claim here, can only survive if the agency has "a statutory duty [to perform the action] in

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[13] The district court did not address whether the Alliance has standing in this suit, nor do we concede that the Alliance has standing here.

the first place." *San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 885 (9th Cir. 2002). To establish that an agency unlawfully withheld or unreasonably delayed a final agency action, a plaintiff must demonstrate "agency recalcitrance * * * in the face of clear statutory duty * * * of such a magnitude that it amounts to an abdication of statutory responsibility." *Confederated Tribes of Umatilla Indian Reservation v. Bonneville Power Admin.*, 342 F.3d 924, 930 (9th Cir. 2003) (quoting *Montana Wilderness Ass'n Inc. v. U.S. Forest Serv.*, 314 F.3d 1146, 1150 (9th Cir. 2003)). The term "failure to act" means a failure to take an "agency action" – that is, a failure to take one of the agency actions (or its equivalent) defined in 5 U.S.C. § 551(13) that is legally required. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004) ("The important point is that a 'failure to act' is properly understood to be limited, as are the other items in § 551(13), to a discrete action. * * * [T]he only agency action that can be compelled under the APA is action legally required.").

IGRA simply does not require defendants to perform an independent, formal Indian lands determination when a tribe announces its intention to construct a casino. While IGRA limits a tribe's right to conduct gaming to "Indian lands," 25 U.S.C. § 2710(b)(1) & (d)(3), it nowhere mandates that defendants resolve the Indian lands issue in an independent proceeding. As the district court explained,

"[t]he statute offers not even a hint as to when or how the NIGC is to make an 'Indian lands' determination." ER Tab 16 at 11. Thus, the IGRA provisions relied upon by the Alliance do not require defendants to make any determinations prior to a tribe's construction of a building intended to be used as a casino. Because no provision in IGRA directs defendants to perform an independent, formal Indian lands determination, defendants have not failed to perform "a clear statutory duty."

Of course, IGRA does impose several "clear statutory duties" on defendants. The NIGC must review and approve tribal gaming ordinances. 25 U.S.C. § 2710. The NIGC must review and approve management contracts between tribes and outside managers. 25 U.S.C. § 2711. And Interior must review and approve tribal-state compacts for Class III gaming. 25 U.S.C. § 2710(d).

And in satisfying these duties, if a tribe submits a site-specific gaming ordinance or management contract that indicates the proposed location of the gaming, then a determination must be made whether the location of the gaming is on Indian lands. But that sort of formal Indian lands determination is ancillary to defendants' performance of one of their mandated statutory duties. Performing this ancillary analysis in those instances does not impose a mandatory obligation on defendants to make an Indian lands determination where the ordinance or

management contract is not site-specific.[14/]

The cases relied on by the Alliance are inapposite to this case and do not support the theory that the Alliance is trying to advance. They are all instances where the Indian land analysis was ancillary to an actual statutory duty. In *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295 (W.D.N.Y. 2007), *modified at* 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007), the court effectively treated the gaming ordinance at issue as a site-specific gaming ordinance. Indeed, the locations of the gaming sites were described in the tribal-state compact reviewed by Interior and Interior in letting the compact go into effect had determined that the sites were on Indian lands. *Id.* at 303, 307-09, 322. The tribe submitted that compact as part of its gaming ordinance submission. *Id.* at 307. Regardless whether *Citizens Against Casino Gambling* was correctly decided, This decision is irrelevant here because the Alliance's challenge to the approval of the Nooksack's Tribe's gaming ordinance is barred by the statute of limitations. Ultimately, the district court in *Citizens Against Casino Gambling* did

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[14/] Management contracts are always site-specific and, therefore, require an Indian lands determination for the gaming sites at issue. Management contracts are subject to the approval of the NIGC Chairman. *See* 25 U.S.C. § 2711. Disapprovals of management contracts may be appealed to the NIGC Commission, and the Commission decision constitutes final agency action for purposes of review by a federal court. *See* 25 U.S.C. § 2714; 25 C.F.R. part 539.

not hold that defendants have any independent obligation to make an Indian lands determination except as part of the determination whether to approve a gaming ordinance that effectively was site-specific.

In *Apache Tribe v. United States*, No. 04-1184, 2007 WL 2071874 (W.D. Okla. July 18, 2007), the required Indian lands determination was ancillary to Interior's[15] review of a tribal-state compact that specified where the gaming was to occur. Specifically, Interior was reviewing a "gaming compact between the Chickasaw Tribe of Oklahoma and the State of Oklahoma providing for off-track betting at sites in Oklahoma, specifically in Carter, Garvin, Marshall, and Stephens counties." *Id.* at *1. While the district court there found Interior's analysis of the Indian lands issue to be insufficient, the court did not address the issue of whether IGRA requires a stand-alone Indian lands determination.

In *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001), the NIGC, as part of its analysis of a gaming management contract, relied on an Indian lands analysis performed by Interior. *See also Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419 (D. Kan. 1996) (describing agency proceedings in greater detail). This case provides no support for the Alliance's argument because

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[15] The Alliance incorrectly states that the NIGC rather than Interior reviewed and approved the compact. Alliance Br. at 23.

the plaintiffs were challenging the substance of the Indian lands determination rather than arguing, as here, that defendants have failed to make such a determination. Moreover, unlike the situation here, that determination was made as part of the analysis of a gaming management contract. The case does not hold that IGRA requires defendants to perform an independent, formal Indian lands determination either as a stand-alone analysis or in the context of approving non-site-specific gaming ordinances.

Even though IGRA does not impose an obligation on defendants to make a formal, independent Indian lands determination, that does not mean that they have no authority to examine the issue. For instance, IGRA grants the NIGC the authority to take enforcement actions if gaming is conducted in a manner that violates IGRA, NIGC regulations, or an approved tribal gaming ordinance. 25 U.S.C. § 2713. In addition, IGRA directs the NIGC to refer information indicating a violation of other laws to the appropriate law enforcement officials. 25 U.S.C. § 2716(b). Therefore, if a tribe opens a gaming operation on a site that qualifies as Indian lands under IGRA, but is ineligible for gaming under 25 U.S.C. § 2719,[16]

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[16] A site may be on "Indian lands" as defined by IGRA, 25 U.S.C. § 2703(4), and yet still be ineligible for gaming. For example, IGRA contains a general prohibition against gaming on Indian lands acquired into trust after IGRA's enactment date of October 17, 1988, unless any one of certain exceptions apply. (continued...)

then the tribe is in violation of IGRA and the NIGC could exercise its enforcement powers. If defendants determine that the gaming site does not qualify as Indian lands under IGRA, then state gambling laws would apply, and defendants could refer the matter to the subject state for enforcement.

That enforcement authority, however, is subject to the NIGC's enforcement discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (The "decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."); *Sierra Club v. Whitman*, 268 F.3d 898, 903 (9th Cir. 2001) (An agency's decision to not take an enforcement action is "typically committed to the agency's absolute discretion * * * ."). It does not appear that the Alliance is seeking review of the NIGC's decision not to bring an enforcement action against the Nooksack Tribe. In any event, the Alliance has made no showing that the NIGC has abused its discretion in not bringing an enforcement action here. Nor could it, as the APA provides that its judicial review provisions are not available where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).[17]

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[16](...continued)
25 U.S.C. § 2719.

[17] The Alliance argues that a letter from an Interior official indicates that defendants have a duty to make an Indian lands determination here. Alliance Br. (continued...)

III. The Alliance fails to challenge a final NIGC decision reviewable under IGRA and the APA.

The Alliance cannot avoid the unreviewablity of the prosecutorial discretion protected by *Heckler v. Cheney* by making an end run around the NIGC's enforcement authority. Congress carefully crafted the review mechanism permitted under IGRA. It does not permit the Alliance to override that discretion by asserting the NIGC has an ongoing IGRA-imposed duty to issue an independent, formal determination addressing whether the Nooksack Tribe's announced casino would be located on "Indian lands" as required by IGRA. As the district properly noted: "Again, the question is not whether the NIGC must ensure compliance with IGRA, but rather how it must do so. IGRA delegates responsibility for Indian gaming to the NIGC, which exercises wide discretion in overseeing the interplay of federal, state, and tribal authorities in this area." ER Tab 16 at 14.

The Indian Gaming Regulatory Act contains its own specific judicial review

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[17](...continued)
at 22; ER Tab 13 at 5. The letter is in no way inconsistent with defendants' position here. The letter explains that the land was taken into trust for the benefit of the Tribe in 1984 and answers several questions about IGRA. The letter does not state that IGRA imposes an obligation on defendants to issue an independent, formal Indian lands determination, as the Alliance seeks to compel here. Rather, consistent with defendants' interpretation of IGRA, the letter reflects that an Indian lands determination is a matter within defendants' enforcement discretion.

provision that limits both judicial review and the waiver of sovereign immunity contained in the APA.[18] Congress expressly addressed the reviewability of decisions of the NIGC in IGRA:

> Judicial review
>
> Decisions 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. Only the final decisions by the NIGC that are specified in section 2714 are subject to review in accordance with the APA. *Id.*

Review under the APA is similarly limited to "final agency action." 5 U.S.C. § 704; *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). To be "final," an agency action must mark the "'consummation' of its decisionmaking process and [] the action [must be one that] determines the 'rights and obligations' of the parties or is one from which 'legal consequences will flow.'" *Rattlesnake Coalition v. EPA*, 509 F.3d 1095, 1103 (9th Cir. 2007) (quoting *Bennett v. Spear*,

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[18] While the Alliance's complaint appears to allege that defendants have violated IGRA (ER Tab 1 ¶¶ 21-33 (alleging violation of IGRA) & ¶¶ 42-45 (alleging violation of APA)), IGRA does not contain a provision allowing for a private right of action. *See Hartman v. Kickapoo Tribe Gaming Comm'n*, 319 F.3d 1230, 1232-33 (10th Cir. 2003) (finding no private right of action in favor of an individual seeking to enforce compliance with IGRA's provisions). And the Alliance has disavowed any IGRA-based claim independent of the APA. Alliance Br. at 5.

520 U.S. 154, 177-78 (1997)). Absent such a specific and final agency action, the APA's waiver of sovereign immunity is inapplicable and a federal court lacks jurisdiction. *Id.*

In addition, the APA does not create an independent basis of jurisdiction. *California v. Sanders*, 430 U.S. 99, 105-07 (1977). Rather, it confers a general cause of action upon persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702; that cause of action is limited to the extent that a relevant statute "preclude[s] judicial review." 5 U.S.C. § 701(a)(1); *see also Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984) (determining whether and to what extent a statute precludes judicial review by considering express language of statute, legislative history, and nature of the administrative action). Consequently, "the APA's presumption of judicial review may be overcome if congressional intent to preclude review can be 'fairly discerned' from the statutory scheme underlying the agency action being challenged." *Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan v. Ashcroft*, 360 F. Supp. 2d 64, 67 (D.D.C. 2004) (citing *United States v. Fausto*, 484 U.S. 439, 452 (1988)).

The "relevant statute" in the case here, IGRA, clearly demonstrates Congress' intent to limit judicial review to specific final agency actions. IGRA

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 [the APA]." 25 U.S.C. § 2714. "The omission of a provision [in IGRA] thereby shows Congressional intent to prohibit judicial review over any other agency actions as opposed to the few already granted express jurisdiction." *Lac Vieux*, 360 F. Supp. 2d at 67 (internal quotation marks and citations omitted); *see also Hartman*, 319 F.3d at 1232 ("Although Congress did provide that certain decisions by the NIGC made under various provisions of IGRA are subject to federal court review under the Administrative Procedures Act, the district court correctly pointed out that nowhere does IGRA expressly authorize private individuals to sue directly under the statute for failure of a tribe, a state or the NIGC to comply with its provisions." (internal citation and footnote omitted)). As the district court here explained, "[b]y what it specifically includes, and therefore excludes, this provision [25 U.S.C. § 2714] plainly does not support a right to judicial review for an alleged failure to make a formal 'Indian lands' determination." ER Tab 16 at 9-10. 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, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3090 ("[C]ertain Commission decisions

will be final agency decisions for purposes of court review.").

The Alliance's attempt to force the NIGC to make an independent, formal Indian lands determination does not involve any final agency decisions subject to judicial review under IGRA. IGRA only provides for judicial review for the following final Commission decisions: 25 U.S.C. §§ 2710 (decisions on tribal gaming ordinances), 2711 (decisions on management contracts), 2712 (review of existing ordinances and contracts), 2713 (final enforcement actions). Under all of these sections, for the agency to take any action, the Commission must make a final decision, 25 U.S.C. §§ 2710-2713. *See* 25 U.S.C. § 2714 ("Decisions made by the Commission * * * shall be final agency decisions * * * ."). The "implied corollary of section 2714 is that other agency actions are not final and thus not reviewable." *Lac Vieux*, 360 F. Supp. 2d at 67-68 (internal quotation marks omitted). Courts have found that agency actions under IGRA, short of a final decision by the Commission, do not constitute final agency actions under the APA. *See Miami Tribe of Oklahoma v. United States*, 2006 WL 2392194, *4 (10th Cir. 2006) (finding that Interior opinion letter regarding status of land was not final agency action); *In re: Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 756-57 (8th Cir. 2003) (finding that Chairman's temporary closure order was not final agency action); *United States,*

ex rel. the Saint Regis Mohawk Tribe v. President R.C. St. Regis Mngmt. Co., 451 F.3d 44, 49 n.4 (2d Cir. 2006) (finding that opinion letter offered by NIGC Acting General Counsel regarding construction contract was advisory and did not constitute final agency action).

Here, the Alliances' claims do not fall within any of these statutory categories. The Alliance essentially claims that defendants failed to make certain pre-construction determinations and "allowed" the Tribe to begin constructing a casino in violation of IGRA and the APA. The Alliance has failed to challenge a final agency action under section 2714 and the district court correctly found that it did not have jurisdiction.

IV. No NEPA review is required here because defendants have not taken any action triggering such a review.

As explained above in part II, IGRA does not require defendants to take the action that the Alliance seeks to compel. Because no federal action is required here, the Alliance's NEPA claim fails as well, as NEPA is triggered only by a major federal action.

NEPA seeks to ensure that federal agencies consider environmental impacts of proposed major federal actions. 42 U.S.C. §§ 4321, 4332(2)(C); 40 C.F.R. § 1501.1(c); *Vermont Yankee Nuclear Power v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978). Only "proposals" for "major federal actions" trigger

the requirements for NEPA review. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.18 (emphasis added). Under 40 C.F.R. § 1508.23, a proposal for federal action exists when "an agency * * * has a goal and is actively preparing to make a decision * * * ." *Churchill County v. Norton*, 276 F.3d 1060, 1078 (9th Cir. 2001) (internal quotation marks and citations omitted).

Because there is no federal action here, or even a proposal for a federal action, no NEPA review is required. As the district court explained, "[s]ince the Court has determined that no such formal, ongoing obligation [to make an Indian lands determination] exists, Plaintiff's NEPA claim fails on its own terms, as there is no 'major federal action' that would require environmental review under that statute." ER Tab 16 at 13.[19/]

CONCLUSION

For the foregoing reasons, the district court should be affirmed.

[19/] If the Court here were to hold that an Indian lands determination is required, it should simply remand to the agency for the agency to determine in the first instance what it needs to do, if anything, to comply with NEPA. *See, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.").

Respectfully submitted,

RONALD J. TENPAS
Acting Assistant Attorney General

Robert J. Lundman

AARON P. AVILA
ROBERT J. LUNDMAN
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 23795 (L'Enfant Plaza Station)
Washington, DC 20026
(202) 514-2496

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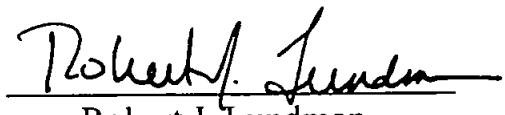
90-2-4-12282

STATEMENT OF RELATED CASES

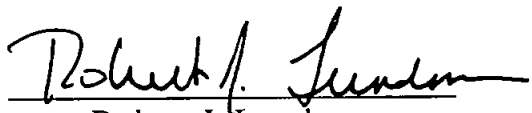
Undersigned counsel is not aware of any related cases under Ninth Circuit Rule 28-2.6.



Robert J. Lundman

CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 32(a)(7)(C)

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) and 28.1(e)(3), I hereby certify that the Brief of Defendants-Appellees was prepared in Word Perfect 12.0, that is uses a proportionately spaced typeface of 14 points or more, and that it contains 9,906 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

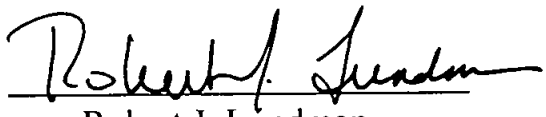


Robert J. Lundman

CERTIFICATE OF SERVICE

I certify that the foregoing Brief of Appellee United States is being filed in accordance with Federal Rule of Appellate Procedure 25(a)(2)(B), and has been dispatched to the clerk by Federal Express, standard overnight delivery, on this 18th day of June, 2008. I further certify that two copies of the foregoing Response Brief of Federal Appellees were served by Federal Express, standard overnight delivery, delivery this 18th day of June, 2008, on the following counsel of record:

Richard M. Stephens, Esq.
Brian D. Amsbary, Esq.
Groen Stephens & Klinge, LLP
11100 N.E. Eighth St., Suite 750
Bellevue, WA 98004-4469



Robert J. Lundman

STATUTORY ADDENDUM

Indian Gaming Regulatory Act (selected sections)

§ 2701. Findings

The Congress finds that--

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

§ 2702. Declaration of policy

The purpose of this chapter is--

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and

to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

§ 2703. Definitions

For purposes of this chapter--

(1) The term "Attorney General" means the Attorney General of the United States.

(2) The term "Chairman" means the Chairman of the National Indian Gaming Commission.

(3) The term "Commission" means the National Indian Gaming Commission established pursuant to section 2704 of this title.

(4) The term "Indian lands" means--

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which--

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term "class II gaming" means--

(I) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)--

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that--

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include--

(I) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term 'class II gaming' includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

(9) The term "net revenues" means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

(10) The term "Secretary" means the Secretary of the Interior.

§ 2704. National Indian Gaming Commission

(a) Establishment

There is established within the Department of the Interior a Commission to be known as the National Indian Gaming Commission.

(b) Composition; investigation; term of office; removal

(1) The Commission shall be composed of three full-time members who shall be appointed as follows:

(A) a Chairman, who shall be appointed by the President with the advice and consent of the Senate; and

(B) two associate members who shall be appointed by the Secretary of the Interior.

(2)(A) The Attorney General shall conduct a background investigation on any person considered for appointment to the Commission.

(B) The Secretary shall publish in the Federal Register the name and other information the Secretary deems pertinent regarding a nominee for membership on the Commission and shall allow a period of not less than thirty days for receipt of public comment.

(3) Not more than two members of the Commission shall be of the same political party. At least two members of the Commission shall be enrolled members of any Indian tribe.

(4)(A) Except as provided in subparagraph (B), the term of office of the members of the Commission shall be three years.

(B) Of the initial members of the Commission--

(I) two members, including the Chairman, shall have a term of office of three

years; and

(ii) one member shall have a term of office of one year.

(5) No individual shall be eligible for any appointment to, or to continue service on, the Commission, who--

(A) has been convicted of a felony or gaming offense;

(B) has any financial interest in, or management responsibility for, any gaming activity; or

(C) has a financial interest in, or management responsibility for, any management contract approved pursuant to section 2711 of this title.

(6) A Commissioner may only be removed from office before the expiration of the term of office of the member by the President (or, in the case of associate member, by the Secretary) for neglect of duty, or malfeasance in office, or for other good cause shown.

(c) Vacancies

Vacancies occurring on the Commission shall be filled in the same manner as the original appointment. A member may serve after the expiration of his term of office until his successor has been appointed, unless the member has been removed for cause under subsection (b)(6) of this section.

(d) Quorum

Two members of the Commission, at least one of which is the Chairman or Vice Chairman, shall constitute a quorum.

(e) Vice Chairman

The Commission shall select, by majority vote, one of the members of the Commission to serve as Vice Chairman. The Vice Chairman shall serve as Chairman during meetings of the Commission in the absence of the Chairman.

(f) Meetings

The Commission shall meet at the call of the Chairman or a majority of its members, but shall meet at least once every 4 months.

(g) Compensation

(1) The Chairman of the Commission shall be paid at a rate equal to that of level IV of the Executive Schedule under section 5315 of Title 5.

(2) The associate members of the Commission shall each be paid at a rate equal to that of level V of the Executive Schedule under section 5316 of Title 5.

(3) All members of the Commission shall be reimbursed in accordance with Title 5 for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

§ 2705. Powers of Chairman

(a) The Chairman, on behalf of the Commission, shall have power, subject to an appeal to the Commission, to--

(1) issue orders of temporary closure of gaming activities as provided in section 2713(b) of this title;

(2) levy and collect civil fines as provided in section 2713(a) of this title;

(3) approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 2710 of this title; and

(4) approve management contracts for class II gaming and class III gaming as provided in sections 2710(d)(9) and 2711 of this title.

(b) The Chairman shall have such other powers as may be delegated by the Commission.

§ 2706. Powers of Commission

(a) Budget approval; civil fines; fees; subpoenas; permanent orders

The Commission shall have the power, not subject to delegation--

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 2717 of this title;

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 2713(a) of this title;

(3) by an affirmative vote of not less than 2 members, to establish the rate of fees as provided in section 2717 of this title;

(4) by an affirmative vote of not less than 2 members, to authorize the Chairman to issue subpoenas as provided in section 2715 of this title; and

(5) by an affirmative vote of not less than 2 members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 2713(b)(2) of this title.

(b) Monitoring; inspection of premises; investigations; access to records; mail; contracts; hearings; oaths; regulations

The Commission--

(1) shall monitor class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;

(3) shall conduct or cause to be conducted such background investigations as may be necessary;

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the

Commission under this chapter;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.

(c) Omitted

(d) Application of Government Performance and Results Act

(1) In general

In carrying out any action under this chapter, the Commission shall be subject to the Government Performance and Results Act of 1993 (Public Law 103-62; 107 Stat. 285).

(2) Plans

In addition to any plan required under the Government Performance and Results Act of 1993 (Public Law 103-62; 107 Stat. 285), the Commission shall submit a plan to provide technical assistance to tribal gaming operations in accordance with that Act.

§ 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if--

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that--

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than--

(I) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which--

(I) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes--

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such

background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if--

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (I) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(I) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)(I) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if–

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (I) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which--

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section

may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has--

(A) conducted its gaming activity in a manner which--

(I) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for--

(I) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation--

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706 (b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsection (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(I) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that--

(I) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(I) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (I) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection--

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (I) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(I) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a

State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that--

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over--

(I) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(I) An Indian tribe may initiate a cause of action described in subparagraph (A)(I) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph

(3)(A).

(ii) In any action described in subparagraph (A)(I), upon the introduction of evidence by an Indian tribe that--

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(I), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(I) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State

compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

§ 2711. Management contracts

(a) Class II gaming activity; information on operators

(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 2710(b)(1) of this title, but, before approving such contract, the Chairman shall require and obtain the following information:

(A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

(B) a description of any previous experience that each person listed pursuant to

subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had a contract relating to gaming; and

(C) a complete financial statement of each person listed pursuant to subparagraph (A).

(2) Any person listed pursuant to paragraph (1)(A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

(3) For purposes of this chapter, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

(b) Approval

The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least--

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;

(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity

require the additional time; and

(6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission.

(c) Fee based on percentage of net revenues

(1) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such tribal gaming activity require the additional fee requested by the Indian tribe.

(d) Period for approval; extension

By no later than the date that is 180 days after the date on which a management contract is submitted to the Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reason for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection.

(e) Disapproval

The Chairman shall not approve any contract if the Chairman determines that--

(1) any person listed pursuant to subsection (a)(1)(A) of this section--

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this chapter or has refused to respond to questions propounded pursuant to subsection (a)(2) of this section; or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this chapter; or

(4) a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract.

(f) Modification or voiding

The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) Interest in land

No management contract for the operation and management of a gaming activity regulated by this chapter shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.

(h) Authority

The authority of the Secretary under section 81 of this title, relating to management contracts regulated pursuant to this chapter, is hereby transferred to the Commission.

(I) Investigation fee

The Commission shall require a potential contractor to pay a fee to cover the cost of the investigation necessary to reach a determination required in subsection (e) of this section.

§ 2712. Review of existing ordinances and contracts

(a) Notification to submit

As soon as practicable after the organization of the Commission, the Chairman shall notify each Indian tribe or management contractor who, prior to October 17, 1988, adopted an ordinance or resolution authorizing class II gaming or class III gaming or entered into a management contract, that such ordinance, resolution, or contract, including all collateral agreements relating to the gaming activity, must be submitted for his review within 60 days of such notification. Any activity conducted under such ordinance, resolution, contract, or agreement shall be valid under this chapter, or any amendment made by this chapter, unless disapproved under this section.

(b) Approval or modification of ordinance or resolution

(1) By no later than the date that is 90 days after the date on which an ordinance or resolution authorizing class II gaming or class III gaming is submitted to the Chairman pursuant to subsection (a) of this section, the Chairman shall review such ordinance or resolution to determine if it conforms to the requirements of section 2710(b) of this title.

(2) If the Chairman determines that an ordinance or resolution submitted under subsection (a) of this section conforms to the requirements of section 2710(b) of this title, the Chairman shall approve it.

(3) If the Chairman determines that an ordinance or resolution submitted under subsection (a) of this section does not conform to the requirements of section 2710(b) of this title, the Chairman shall provide written notification of necessary modifications to the Indian tribe which shall have not more than 120 days to bring such ordinance or resolution into compliance.

(c) Approval or modification of management contract

(1) Within 180 days after the submission of a management contract, including all collateral agreements, pursuant to subsection (a) of this section, the Chairman shall subject such contract to the requirements and process of section 2711 of this title.

(2) If the Chairman determines that a management contract submitted under subsection (a) of this section, and the management contractor under such contract, meet the requirements of section 2711 of this title, the Chairman shall approve the management contract.

(3) If the Chairman determines that a contract submitted under subsection (a) of this section, or the management contractor under a contract submitted under subsection (a) of this section, does not meet the requirements of section 2711 of this title, the Chairman shall provide written notification to the parties to such contract of necessary modifications and the parties shall have not more than 120 days to come into compliance. If a management contract has been approved by the Secretary prior to October 17, 1988, the parties shall have not more than 180 days after notification of necessary modifications to come into compliance.

§ 2713. Civil penalties

(a) Authority; amount; appeal; written complaint

(1) Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this chapter, any regulation prescribed by the Commission pursuant to this chapter, or tribal regulations, ordinances, or resolutions approved under section 2710 or

2712 of this title.

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(3) Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this chapter, by regulations prescribed under this chapter, or by tribal regulations, ordinances, or resolutions, approved under section 2710 or 2712 of this title, that may result in the imposition of a fine under subsection (a)(1) of this section, the permanent closure of such game, or the modification or termination of any management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission. The allegation shall be set forth in common and concise language and must specify the statutory or regulatory provisions alleged to have been violated, but may not consist merely of allegations stated in statutory or regulatory language.

(b) Temporary closure; hearing

(1) The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this chapter, of regulations prescribed by the Commission pursuant to this chapter, or of tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

(2) Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. Not later than sixty days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation.

(c) Appeal from final decision

A decision of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court pursuant to chapter 7 of Title 5.

(d) Regulatory authority under tribal law

Nothing in this chapter precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not inconsistent with this chapter or with any rules or regulations adopted by the Commission.

§ 2714. Judicial review

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.