No. 07-36048

(United States District Court,
Western District of Washington at Seattle,
No. C07-1098)

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

NORTH COUNTY COMMUNITY ALLIANCE, INC.,

Plaintiff/Appellant,

vs.

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.

APPELLANT'S OPENING BRIEF

Richard M. Stephens, WSBA No. 21776
Attorneys for Plaintiff/Appellant
North County Community Alliance

GROEN STEPHENS & KLINGE
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
Telephone: (425) 453-6206

CORPORATE DISCLOSURE STATEMENT

Plaintiff/Appellant North County Community Alliance is a non-profit corporation organized under the laws of the State of Washington. It has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

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I. JURISDICTIONAL STATEMENT

The Western District of Washington had jurisdiction over this matter under 28 U.S.C. § 1331 because Plaintiff/Appellant North County Community Alliance's claims arise under the laws of the United States, specifically the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et seq.*, the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.* *See* Excerpts of Record (ER) 1:6-11.[1] The district court had jurisdiction over the Alliance's IGRA claims under 25 U.S.C. § 2714 and the APA because they challenge Defendants' acts and failures to act under IGRA. The district court had the power to provide the Alliance's requested relief under 28 U.S.C. § 1361 (mandamus) and §§ 2201 and 2202 (declaratory relief).

This Court has jurisdiction over this matter under 28 U.S.C. §§ 1291 and 1294 because the Alliance is appealing a final order and judgment from the Western District of Washington. The order and judgment were entered on November 16, 2007 and granted Defendants' motion to dismiss all claims under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure

[1] Citations to the Excerpts of Record are in the following format: ER tab (docket) number : page number. The page numbers within each tab are located in either the top right corner, bottom left corner, or bottom center of each page.

(FRCP). *See* ER 16 and 17. The Alliance filed a notice of appeal on December 14, 2007. *See* ER 18. This notice was timely under Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure (FRAP) because it was filed within 30 days of the entry of the order and judgment. *See also* FRAP 4(a)(1)(B) (providing 60 days to file notice of appeal where officer or agency of the United States is a party).

II. STATEMENT OF THE ISSUES

A. The issues presented

1. The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et seq.*, provides that tribal gaming may only occur on "Indian lands" and charges the National Indian Gaming Commission (NIGC) with the duty of administering the act. Must the NIGC determine whether the site of a tribal gaming facility constitutes "Indian lands" within the meaning of IGRA? *See* ER 7:10-23, 9:5-9, 14:2-4, 16:9-13.

2. Is the failure to make an "Indian lands" determination as part of the approval of a tribal gaming ordinance under IGRA subject to a substantive challenge for purposes of triggering the statute of limitations? *See* ER 7:9-10, 9:9, 14:4-6, 16:8.

3. Does the statute of limitations run on a claim against a party when the party lacks standing to sue on the claim? *See* ER 7:9-10, 9:9, 14:4-6, 16:5-8.

4. Is an "Indian lands" determination a final decision subject to judicial review under IGRA? *See* ER 7:10-15, 9:3-9, 14:2-4, 16:9-13.

5. The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, requires governmental entities to undertake environmental review for all "major federal actions" which may significantly affect environmental quality. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.18. Is the "Indian lands" determination in this case (or the decision not to make such a determination) a major federal action under NEPA requiring environmental review, where such a decision will authorize the operation of a large casino in a rural residential area? *See* ER 7:15-18, 9:10-11, 14:6-7, 16:13.

B. The standard of review

All of the issues presented are legal questions or mixed questions of law and fact dismissed pursuant to Federal Defendants' motion under Rule 12(b)(6)[2] of the Federal Rules of Civil Procedure and are thus reviewed de

[2] The district court's order is unclear regarding whether it was granting Federal Defendants' motion under Rule 12(b)(1) or Rule 12(b)(6). However, the gravamen of both Federal Defendants' motion and the district

novo. *See, e.g., Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 932-33 (9th Cir. 2007) (questions of law and motions to dismiss reviewed de novo); *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004) (mixed questions of law and fact reviewed de novo; any underlying factual findings reviewed for clear error).

"It is axiomatic that the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Gilligan v. Jamco Devel. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citing Wright & Miller, 5 FEDERAL PRACTICE & PROCEDURE § 1357, at 958 (1969)) (quotations omitted). This is because "[t]he Rule 8 [pleading] standard contains a powerful presumption against rejecting pleadings for failure to state a claim." *Id.* (quotations omitted).

Thus, in reviewing the district court's dismissal of the Alliance's claims, not only must the Court accept "all allegations of material fact as true and construe them in the light most favorable to the [plaintiff]," *Parks*

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court's order was that the Alliance failed to state a claim under either IGRA or NEPA, or its claims were barred by the statute of limitations. Both of these grounds properly fall under Rule 12(b)(6) and this brief reviews the issues accordingly. *See Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 951 (9th Cir. 1999) ("any non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction"); *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 n.2 (9th Cir. 1995) (motion to dismiss based on statute of limitations properly brought under FRCP 12(b)(6)).

Sch. of Business v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995), the Court must also assume "that all general allegations embrace whatever specific facts might be necessary to support them," *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994), and must accept all "reasonable inferences" that may be drawn from the allegations in the Alliance's favor. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). Moreover, "in reviewing the sufficiency of a complaint, the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Gilligan*, 108 F.3d at 249 (quotations omitted). Whether the chances of recovery appear "very remote and unlikely" is therefore irrelevant to the Rule 12(b)(6) inquiry. *Id.*

Because neither IGRA nor NEPA provides a private right of action, *see Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000) (IGRA) and *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) (NEPA), the Alliance's claims under both statutes are brought under the aegis of the Administrative Procedure Act, 5 U.S.C. §§ 701-06. Under the APA, the Court must (1) "compel agency action unlawfully withheld or unreasonably delayed," and (2) "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"

or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706.

Here, there are numerous questions regarding the legality of a tribal gaming casino on the Northwood property. Given these questions and the "powerful presumption against rejecting pleadings for failure to state a claim," *Gilligan*, 108 F.3d at 249, it was improper for the district court to dismiss the Alliance's claims under Rule 12(b)(6).

III. STATEMENT OF THE CASE

Plaintiff/Appellant North County Community Alliance is a non-profit corporation organized under the laws of the State of Washington to protect the environment, preserve the peace and quality of life for all the citizens of Whatcom County – located in the far northwestern corner of Washington State – and to insure all applicable laws are followed and obeyed in connection with proposed development projects in northern Whatcom County, which projects could have material negative impacts on the environment and nearby communities. The Alliance's members include residents, property owners, and Nooksack tribal members who are negatively affected by the Northwood Crossing Casino, a tribal gaming facility recently completed by the Nooksack Indian Tribe about a mile south of the Canadian border. *See* ER 1:2-3.

The Alliance filed this suit in order to compel Defendants/Appellees – federal officers and agencies with regulatory authority over Indians and Indian gaming (hereinafter referred to collectively as "Federal Defendants") – to exercise their statutorily-mandated, regulatory duties over the Northwood Crossing Casino project. The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et seq.*, commands that tribal gaming activities may only occur on "Indian lands" and invests the National Indian Gaming Commission and its Chairman, Philip Hogan, with the power and duty to determine whether proposed gaming activities are located on such lands. Moreover, because an "Indian lands" determination constitutes "major federal action" under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, Federal Defendants are required to assess whether the casino will have any significant, adverse impacts on the surrounding environment.

The Alliance's complaint alleged that Federal Defendants violated IGRA, NEPA and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*, through their failures to fulfill these duties in connection with the Northwood Crossing Casino. Federal Defendants moved to dismiss the Alliance's complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. *See* ER 7. Federal Defendants argued that the Alliance

impermissibly sought to compel enforcement action; that the Alliance failed to challenge a final action taken or required to be taken under IGRA or NEPA; that the Alliance's claims were barred by the applicable statute of limitations; and that the district court lacked jurisdiction to grant mandamus relief. *Id.*

The district court granted Federal Defendants' motion on the grounds that (1) the Alliance's challenge to the NIGC's approval of the Nooksack's gaming ordinance was barred by the statute of limitations, (2) IGRA does not otherwise specify when or how Federal Defendants must make an "Indian lands" determination for any particular project, nor does it provide for judicial review for such determinations outside of a few defined instances, and (3) because there has not been any triggering "major federal action," NEPA does not apply here. *See* ER 16. The Alliance appealed.

IV. STATEMENT OF FACTS

Lynden, Washington is a small farming community situated in the middle of a broad, flat river valley and located a few miles south of the Canadian border. In amongst the berry patches and dairy fields outside of town, the Nooksack Indian Tribe controls a twenty-acre parcel upon which they recently opened a gaming casino called the Northwood Crossing Casino.

Northwood Crossing is not located on the Nooksack Reservation. The reservation is about twenty miles southeast of the Northwood Crossing site in the town of Deming. The Tribe has operated a casino on the Deming reservation for over a decade.

The Northwood Crossing parcel was originally granted to a person of Indian decent named Louis Sacquilty. This property was not part of any land reserved for Indian or tribal use. It was not an allotment under a treaty or the Dawes Act.[3] Rather, the land was part of the public domain, available to any homestead claimant under the Homestead Act[4] and not subject to any pre-existing claim to title by any Indian or tribe.

Sacquilty submitted a homestead claim for the Northwood Crossing parcel in 1885 under the Act of March 3, 1875. *See* ER 11:2, 11-13 (referring to Act of Mar. 3, 1875, ch. 131, § 15, 18 Stat. 402 (repealed 1976) (formerly codified at 43 U.S.C. § 189)). This act extended the provisions of the Homestead Act to Indians who, like Sacquilty, "abandoned . . . [their] tribal relations." Act of March 3, 1875, ch. 131, § 15; *see also* ER 11:2 (declaration of Sacquilty stating "I have abandoned my relations with [the Nooksack] Tribe and adopted the habits and pursuits of civilized life...");

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[3] *See* 24 Stat. 388 (repealed 2000) (formerly codified as amended at 25 U.S.C. §§ 331-33.)

[4] *See* 12 Stat. 392 (repealed 1976) (formerly codified as amended at 43 U.S.C. §§ 161-63, 169, 171, 173, 175, 183, 211, 254).

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 16.03(2)(e), at 1044-45 (2005). The United States issued a patent to Sacquilty in 1892. Whatcom County records indicate that the government held the land in trust with the trust restriction to expire twenty-five years later, *see* ER 13:2-3.

Upon Sacquilty's death in 1934, the Northwood Crossing parcel passed to his daughter, Matilda Tom Carson. Carson sold the parcel to the Nooksack Indian Tribe in 1975 via a deed in which she describes her ownership as "sole separate property." ER 7:28. Upon conveyance, title was purportedly held in trust by the United States for the Nooksacks' benefit. *See* ER 7:28-29. Apparently based on the assumption that the Northwood parcel was not Ms. Carson's "sole separate property", but was held by the United States in trust, this conveyance received final federal approval in 1984. *See* ER 7:29.

For over two decades, the Northwood Crossing parcel lay largely untouched. In the meantime, Congress passed the Indian Gaming Regulatory Act in 1988 and, five years later, the National Indian Gaming Commission approved a gaming ordinance for the Nooksack Tribe pursuant to the act. *See* ER 14:19. The tribe has operated a casino on its reservation in Deming, Washington since that time.

In 2006, the Nooksack Tribe announced plans for a second casino, this one located on the Northwood Crossing parcel, and began construction. Tribal documents indicate that the casino may include a gaming facility up to 107,000 square feet in size containing hundreds of electronic gaming devises and gaming tables, a parking lot for up to 1,050 vehicles, a 200-room hotel and spa, and an on-site wastewater treatment facility. *See* ER 12:2 (Environmental Report: Northwood & Halverstick Roads Commercial Development prepared for the Nooksack Indian Tribe at 2 (May 16, 2006)), 4-5 (Northwood Crossing employment flier). In addition, the facility is expected to generate thousands of extra vehicle trips along the narrow two-lane roads that serve the site every day. *See* ER 12:7 (Environmental Report at 31). Federal Defendants have taken no public action in connection with the Northwood Crossing project.

V. SUMMARY OF THE ARGUMENT

It is undisputed that federally-sanctioned tribal gaming may only occur on "Indian lands" as defined in the Indian Gaming Regulatory Act. It is also undisputed that Federal Defendants have not made any sort of public determination regarding whether the Northwood Crossing parcel qualifies as "Indian lands" under this definition. Instead, both Federal Defendants and the district court have asserted that Federal Defendants are not required to

make this determination. They have further asserted that the Alliance cannot challenge Federal Defendants' failure to make this determination because (1) the statute of limitations bars their challenge to the NIGC's 1993 approval of the Nooksack gaming ordinance and its concomitant failure to ensure that Nooksack gaming was limited to Indian lands, and (2) outside of the NIGC's approval of the Nooksack ordinance, there has been no final agency action subject to judicial review.

None of these assertions supports the district court's dismissal of the Alliance's complaint. IGRA's text and structure indicate that Federal Defendants have the duty to determine whether the Northwood Crossing site constitutes "Indian lands" within the meaning of the statute. As the Western District of New York recently held, "the findings, purpose and language of the IGRA relative to the NIGC's jurisdiction implicitly require such a determination. Whether proposed gaming will be conducted on Indian lands is a critical, threshold jurisdictional determination of the NIGC. Prior to approving an ordinance, the NIGC Chairman must confirm that the situs of proposed gaming is Indian lands." *Citizens Against Casino Gambling in Erie County v. Kempthorne* (*Erie County*), 471 F. Supp. 2d 295, 323-24 (W.D.N.Y. 2007) *reconsideration granted on other grounds*, No. 06-CV-0001S, 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007).

Indeed, while the issue is not directly presented here and need not be decided, it is likely that the Northwood Crossing site does not qualify as "Indian lands" within the meaning of IGRA. To qualify as "Indian lands," the Northwood Crossing parcel must be held in trust and must have been historically subject to the exercise of tribal governmental power. *See* 25 U.S.C. § 2703(4). As just noted, it is undisputed that Federal Defendants have not publicly made an "Indian lands" determination. Moreover, there are serious questions as to whether this property was properly taken into trust and there is absolutely no evidence whatsoever that the Nooksacks have historically exercised governmental power over the parcel as required under IGRA. *See* 25 U.S.C. § 2703(4); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994).

Finally, the Alliance is not barred from challenging Federal Defendants' failures here. Case law indicates that an Indian lands determination is final agency action subject to judicial review under IGRA and the APA, whether made as part of the review of a tribal gaming ordinance or otherwise. *See Kansas v. United States*, 249 F.3d 1213, 1222 (10th Cir. 2001). Moreover, the statute of limitations, *see* 28 U.S.C. § 2401(a), does not bar the Alliance's claims for two reasons. First, because the Alliance's challenge to the NIGC's approval of the Nooksack gaming

ordinance goes to the substantive question of whether the NIGC can approve a tribal gaming ordinance without determining whether the gaming site is "Indian lands" – an inherent problem with a gaming ordinance that does not specify the sites to be authorized for gaming – the statute of limitations was not triggered until the ordinance approval resulted in an injury to the Alliance with the announcement of the casino in 2006. *See Wind River Mining Corp. v. United States*, 946 F.2d 710, 714-16 (9th Cir. 1991); *Artichoke Joe's California Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1182-83 (E.D. Cal. 2003).

Similarly, while the Nooksack's gaming ordinance was approved in 1993, it had no concrete applicability to the Northwood Crossing parcel until the tribe announced its plans for the casino. Given that the Alliance's only interests in the Nooksack ordinance arise in connection with the Northwood Crossing parcel, it is quite clear that the Alliance lacked standing to challenge the ordinance until the announcement of the casino. While some case law in this circuit holds otherwise, it simply defies common sense, simple fairness and basic principles of federal law to conclude that a statute of limitations can run on a party's claim when the party lacks standing to sue on the claim. *Compare Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990) *with Artichoke Joe's*, 278 F. Supp. 2d 1174.

VI. ARGUMENT

Given the express limitation of tribal gaming to Indian lands, as well as the case law and statutory provisions discussed below, it is plain that the NIGC has a duty to determine whether the Northwood Crossing site constitutes Indian lands. This duty first arose during its review of the Nooksack gaming ordinance in 1993. The text and structure of IGRA indicate that tribes may not simply offer a non-site-specific gaming ordinance for NIGC approval, and then build and operate as many gaming facilities as they wish, free from further scrutiny regarding IGRA's basic, threshold requirements. Rather, the NIGC must ensure that the gaming ordinance specifies where gaming is to occur and review those sites accordingly, or provide for NIGC Indian lands review of future gaming sites.

Moreover, 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.

A. Legal background: the Indian Gaming Regulatory Act of 1988

"Congress passed the Indian Gaming Regulatory Act in 1988 in order to provide a statutory basis for the operation and regulation of gaming by Indian tribes." *Seminole Tribe v. Florida*, 517 U.S. 44, 48 (1996) (citing 25 U.S.C. § 2702). To this end, Congress created the National Indian Gaming Commission and charged it with monitoring, inspecting and examining tribal gaming and the facilities where such gaming occurs, 25 U.S.C. § 2706(b)(1) and (2), and well as promulgating regulations to implement IGRA's requirements. 25 U.S.C. § 2706(b)(10). Beyond this, at least two of IGRA's fundamental regulatory concepts bear on the Court's consideration of this case: the division of gaming into "classes," and the limitation of gaming to "Indian lands."

1. *Classes of gaming*

IGRA divides tribal gaming into three different classes, each subject to different legal requirements. "Class I gaming" includes "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," 25 U.S.C. § 2703(6), and is generally subject to the tribes' exclusive jurisdiction. 25 U.S.C. § 2710(a)(1).

"Class II gaming" generally includes bingo and certain card games, and expressly excludes "any banking card games, including baccarat, chemin de fer, or blackjack (21)" or "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7). To engage in class II gaming, a tribe must receive NIGC approval of a tribal gaming ordinance subject to the requirements of 25 U.S.C. § 2710(b).

"Class III gaming" encompasses "all forms of gaming that are not class I gaming or class II gaming," including "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B)(ii) and (8) Class III gaming is subject to all requirements placed on class II gaming, plus a requirement that such gaming be "conducted in conformance with a Tribal-State compact" entered into by the tribe and the relevant state. 25 U.S.C. § 2710(d)(1).

Here, the Nooksack Tribe claims that Northwood Crossing is a class II gaming facility. But, given that the casino contains hundreds of electronic gaming devices, *see supra* at 11, it certainly appears that Northwood Crossing is in reality a class III facility. The Alliance can only surmise that the Tribe's representation that it is not a Class III facility (despite the presence of electronic gaming devices) is motivated by a desire to avoid

NIGC or state scrutiny of Northwood Crossing. Operating Northwood Crossing as a class III facility would plainly violate the terms of the Tribe's most recent amendment to its tribal-state compact with the State of Washington.[5] However, such a motivation is certainly consistent with Nooksack statements and behavior leading up to the announcement of the Northwood Crossing project. It is also consistent with a desire to avoid scrutiny of the checkered past of the Tribe's current leadership. *See* ER 12:9-13 (article from the *Seattle Post-Intelligencer* (Jul. 11, 2000)).

2. *Indian lands*

It is indisputable that IGRA only authorizes tribal gaming on "Indian lands." For example, all three "classes" of gaming authorized in IGRA are approved subject to the proviso that they occur on "Indian lands." *See* 25 U.S.C. §§ 2710 (a)(1), (a)(2), (b)(1), (d)(1). Also, one of IGRA's expressly declared purposes is the establishment of an "independent Federal regulatory

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[5] The State of Washington and the Nooksack Tribe amended the Nooksacks' class III gaming compact in 2005 to allow the Nooksacks to operate a second class III gaming facility in addition to their long-standing class III operation on the Deming reservation. However, the amendment to the compact expressly limits both Nooksack class III gaming facilities to "trust lands *within or contiguous to the boundaries of the Nooksack Reservation.*" Fourth Amend. to the Tribal/State Gaming Compact for Class III Gaming Between the Nooksack Indian Tribe and the State of Washington at 3 (Aug. 15, 2005) (emphasis added), approved by the Dep't of the Interior, 70 Fed. Reg. 74331-01 (Dec. 15, 2005). As noted above, Northwood Crossing is located about 20 miles from the Nooksack Reservation.

authority for gaming *on Indian lands*," 25 U.S.C. § 2702(3) (emphasis added) and to provide "clear standards or regulations for the conduct of gaming *on Indian lands*." 25 U.S.C. § 2701(3) (emphasis added).

> IGRA defines "Indian lands" as:
>
> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands [1] 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 [2] over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4) (bracketed numbers added). Similarly, the NIGC has defined "Indian lands" as:

> (a) Land within the limits of an Indian reservation; or
>
> (b) Land over which an Indian tribe exercises governmental power and that is either
>
> (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
>
> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12.

Whether a particular parcel is held in trust or subject to restriction against alienation is a fact-intensive inquiry governed by other statutes. To satisfy the governmental power portion of the definition, it is not sufficient to merely assert "theoretical authority," but requires "concrete

manifestations" of actual authority. *Narragansett Indian Tribe*, 19 F.3d at 703.

Here, there is significant doubt over whether the Northwood Crossing site qualifies as "Indian lands" in light of these requirements. The site plainly is not within the Nooksack Reservation, which is located approximately twenty miles away. Moreover, there is no evidence that the tribe "exercises governmental power" over the site. As noted above, it appears as though the tribe let the parcel lay empty and unused for over two decades. Such benign neglect is not sufficient to demonstrate "governmental power" under IGRA. As just noted, governmental power under IGRA is not established by an assertion of mere "theoretical authority," but requires "concrete manifestations" of authority. *Narragansett Indian Tribe*, 19 F.3d at 703. Here, there has been none.

It is also highly questionable whether the site was properly taken into trust by the United States. Government records indicate that the original homesteader, Louis Sacquilty, submitted his homestead claim in 1885 and therein "abandoned his relations with [the Nooksack] Tribe." ER 11:2. While Whatcom County land records indicate that the United States took the land into trust for Mr. Sacquilty's benefit in 1892, upon expiration of the twenty-five year trust period in 1917 the trust relationship ended by

operation of law unless expressly extended. *See Lewis v. Superintendent of the Eastern Navajo Agency*, 4 IBIA 147 (1975); Act of Jul. 4, 1884, ch. 180, § 1 (last paragraph), 23 Stat. 96 (repealed 1976) (formerly codified at 43 U.S.C. § 190); COHEN § 16.03(4)(b)(ii) at 1048-49 (citing 25 U.S.C. § 348). There is no evidence in the record showing that the trust period was ever extended beyond 1917.

Upon expiration of the trust period, the only way to return this site to trust is either by a specific act of Congress or through the fee to trust transfer provisions, *see* 25 U.S.C. § 465 and 25 C.F.R. Part 151, in the Indian Reorganization Act (IRA). 25 U.S.C. §§ 461 *et seq*. There is no record that the Northwood Crossing site was ever taken into trust pursuant to the IRA,[6] nor is there any specific act of Congress to bring about trust status of this parcel.

B. IGRA requires the NIGC to determine the "Indian lands" status of any property where tribal gaming is to occur.

Regardless of whether the Northwood Crossing site qualifies as Indian lands under IGRA, it was Federal Defendants' duty under IGRA to make this determination: first, during their review and approval of the Nooksack

[6] Moreover, transfer to trust status under the IRA appears highly unlikely given the terms of IRA § 8: "Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter." 25 U.S.C. § 468.

gaming ordinance in 1993 and, in the absence of review at that time, upon the Nooksack's announcement of Northwood Crossing in 2006.

Despite the arguments of their counsel in this lawsuit, Federal Defendants appear to recognize this duty. *See* ER 13:5 (Letter from Office of the Secretary, Dep't of Interior (by George Skibine), to Elaine Willman (Jul. 13, 2006) (stating **"[w]hether the Nooksack Tribe exercised governmental power over the parcel in question is a factual determination to be made by the NIGC."** (emphasis added)).[7] The courts have also recognized this duty in a wide variety of contexts. Last year, in reviewing the NIGC's approval of a tribal gaming ordinance, the Western District of New York stated:

> the findings, purpose and language of the IGRA relative to the NIGC's jurisdiction implicitly require such a determination. Whether proposed gaming will be conducted on Indian lands is a critical, threshold jurisdictional determination of the NIGC. Prior to approving an ordinance, the NIGC Chairman must confirm that the situs of proposed gaming is Indian lands. If gaming is proposed to occur on non-Indian lands, the Chairman is without jurisdiction to approve the ordinance.

Erie County, 471 F. Supp. 2d at 323-24 (W.D.N.Y. 2007). The court specifically rejected the contention that the NIGC could wait to deal with

[7] The expression by high ranking officials charged with the duty of administering the law, when consistent with the text and purpose of the law, should be given weight in the resolution of whether the NIGC needs to make the necessary factual determinations.

any controversy over the "Indian lands" status of a gaming site in an enforcement action. *Id.* at 324.

Similarly, in *Apache Tribe v. United States*, No. 04-1184, 2007 WL 2071874 at *4 (Jul. 18, 2007, W.D. Okla.), the Western District of Oklahoma reviewed the NIGC's approval of a state-tribe gaming compact for class III gaming. In rejecting the NIGC's approval, the court noted that "before a compact may be approved, it must be confirmed that the gaming is anticipated on Indian lands. . . . as required by 25 U.S.C. § 2703(4) and § 2710(d)." *Id.*

An examination of the statutory language confirms the conclusion that the NIGC has a duty to make an Indian lands determination for any proposed tribal gaming site. On balance, IGRA indicates that tribes may not simply offer a non-site-specific gaming ordinance for NIGC approval, and then build and operate as many gaming facilities as they wish, free from further scrutiny regarding IGRA's basic, threshold requirements. As noted above, 25 U.S.C. § 2710 quite directly states that "[a]n Indian tribe may engage in, or license and regulate, class II gaming," but only on "Indian lands within such tribe's jurisdiction." 25 U.S.C. § 2710(b)(1); *see also* §§ 2702(3), 2706(b). It goes on to provide:

> 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
> ....
> (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;

25 U.S.C. § 2710(b)(2) (emphasis added). This subsection rather plainly contemplates that the NIGC has a responsibility to determine whether the construction of any individual "gaming facility" is occurring on "Indian lands" and is being conducted "in a manner which adequately protects the environment and the public health and safety." The purpose of this statutory requirement cannot be accomplished if the NIGC can approve a gaming ordinance which is not site specific. The statute does not contemplate a blanket approval of untold numbers of gaming facilities that may exist in the future and in unknown locations. Instead, it only speaks of "**the** gaming facility" presumably known to the NIGC during its deliberations. *See Apache Tribe*, 2007 WL 2071874 at *4 ("before a compact may be approved, it must be confirmed that the gaming is anticipated on Indian lands."); *Erie County*, 471 F. Supp. 2d at 323-24 ("Prior to approving an ordinance, the NIGC Chairman must confirm that the situs of proposed gaming is Indian lands.").

Indeed, even if a gaming ordinance can somehow be approved in the absence of a specific parcel or parcels being identified as gaming sites, and determined by the NIGC to be Indian lands, the NIGC must have the duty to make an Indian lands determination when a new gaming facility under a non-site-specific ordinance is proposed. Otherwise the NIGC could, as has occurred here, allow a casino to be built and operated without ever making the required threshold determination to the potential detriment of not only affected neighbors like many members of the Alliance, but also the tribes themselves.

Federal Defendants and the district court attempt to escape these cases and provisions by arguing (1) the Alliance's challenge to the NIGC's approval of the Nooksack gaming ordinance is barred by the statute of limitations, and (2) the NIGC's failure to make an Indian lands determination in response to the Northwood Crossing project is not agency action subject to judicial review. Neither of these arguments withstands scrutiny.

C. The statute of limitations does not bar the Alliance's challenge to the NIGC's approval of the Nooksack gaming ordinance.

Both Federal Defendants and the district court have asserted that the Alliance's challenge to the NIGC's 1993 approval of the Nooksack's gaming ordinance, and the NIGC's concomitant failure to determine the

Northwood Crossing site's Indian lands status, is barred by the applicable, six-year statute of limitations. *See* 28 U.S.C. § 2401(a); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991) (section 2401(a) applies to actions under the APA). However, the Alliance's claim against the ordinance approval did not accrue until announcement of the casino in 2006, both because the challenge is substantive in nature and because the Alliance lacked standing to bring any challenge against the ordinance until that time.

1. *The statute of limitations did not begin running on the Alliance's challenge until 2006 because the challenge is an as-applied, substantive challenge.*

"Under federal law a cause of action accrues when the plaintiff is aware of the wrong and can successfully bring a cause of action." *Acri v. International Ass'n of Machinists*, 781 F.2d 1393, 1396 (9th Cir. 1986). Generally, publication in the Federal Register regarding the relevant agency action is deemed to make everyone "aware of the wrong" for purposes of accrual. *See Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990).

This rule does not apply, however, where the plaintiff's claim is substantive in nature rather than procedural. *Wind River*, 946 F.2d at 714-16. Specifically, where "a challenger contests the substance of an agency

decision as exceeding constitutional or statutory authority, the challenger 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." *Id.* at 715. This is because challenges such as the Alliance's, "by their nature, will often require a more 'interested' person than generally will be found in the public at large." *Id.*

Thus, in *Wind River*, plaintiff mining company sued to challenge the government's refusal to invalidate the creation of a wilderness study area that prevented the company from developing certain mining claims. 946 F.2d at 711-12. The basis of the company's challenge was that the designated area was not "roadless" as required in the Federal Land Policy and Management Act. Despite the fact that the company filed suit more than six years after creation of the wilderness study area, this Court allowed the company's suit to go forward, reasoning that the claim was substantive in nature inasmuch as it alleged that the government exceeded its statutory authority in creating the challenged wilderness study area. *Id.* at 715-16.

Similarly, in *Utu Utu Gwaitu Paiute Tribe v. Dep't of Interior*, 766 F. Supp. 842, 844-47 (E.D. Cal. 1991), plaintiff Indian tribe sued the Department of the Interior to challenge the validity of a department rule that governed applications for fee awards under the Equal Access to Justice Act.

766 F. Supp. at 843-45. The tribe alleged that the rule was inconsistent both with EAJA's terms and relevant case law. *Id.* As in *Wind River*, the court found that the tribe's challenge was an as-applied, substantive challenge. The court cogently reasoned that unlike a procedural irregularity, which is predicated upon a deficiency in the manner or process of making an agency decision, a substantive wrong is often not apparent until it is applied to the complaining party. *Id.* at 846. Thus, the Utu Utu Tribe was not and could not be injured by the challenged rule before the rule was applied to its fee application. Thus, the tribe could not "successfully bring a cause of action" until that time. *Id.* (citing *Acri*, 781 F.2d at 1396). The court accordingly allowed the tribe's challenge to go forward.

Finally, in *Artichoke Joe's California Grand Casino v. Norton*, 278 F. Supp. 2d 1174 (E.D. Cal. 2003), plaintiff card rooms and charities challenged the Secretary of Interior's decision to recognize the Lytton Indians as a tribe as part of a settlement agreement in a previous lawsuit. *Id.* at 1182-83. Plaintiffs' challenge to the recognition decision was part of a larger contest against the government's decision to take certain land in the San Francisco Bay Area into trust for the tribe for the purpose of gaming under IGRA. *Id.* at 1176. The court allowed plaintiffs to challenge the tribal recognition decision even though it occurred more than six years before the

commencement of the suit. The court reasoned in part that, similar to the present case, "when the Secretary made the decision to . . . grant Lytton federal recognition in 1991, plaintiffs could have had no idea that Lytton's tribal status would affect them" given that the Lytton's previous home land was miles away from the contested site. *Id.* at 1183.

Here, the district court dismissed the Alliance's challenge as procedural rather than substantive on the rationale that it is predicated on the NIGC's failure to make required determinations. *See* ER 16:8. This misunderstands the Alliance's challenge, IGRA's requirements, and *Wind River's* progeny. As noted above, the Alliance asserts that an Indian lands determination is a basic threshold requirement under IGRA. The NIGC is powerless to approve a gaming ordinance without affirmatively determining that any potential gaming facility site constitutes Indian lands. Such a failure to comply with a statutory duty gives rise to a substantive challenge under *Wind River* inasmuch as the NIGC's actions and inactions exceed its statutory authority. *See Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, No. 07-CV-358, 2007 WL 4117978 at *6 (D. Ore. Nov. 16, 2007). The NIGC's approval of a the Nooksacks' gaming ordinance without making this threshold determination grossly exceeds the NIGC's statutory authority and is subject to judicial review here.

2. *The statute of limitations did not begin running on the Alliance's challenge until 2006 because the Alliance lacked standing to bring its challenge until that time.*

The district court's order also rejected the notion that the Alliance's challenge to the Nooksack gaming ordinance did not accrue until the Alliance gained standing to make such a challenge, relying upon *Shiny Rock Mining Corp.*, 906 F.2d 1362. *See* ER 16:7. *Shiny Rock*, however, is in marked tension with the rule of *Acri*, 781 F.2d 1393, which has never been overruled. The district court's application of *Shiny Rock* to this case also conflicts with basic concepts of common sense, simple fairness, and federal law.

Acri holds that a claim does not accrue until a purported plaintiff "can successfully bring a cause of action." 781 F.2d at 1396. It is a fundamental precept of federal jurisprudence that a party who lacks standing to bring a claim may not file suit on that claim. Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It gauges "whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984).

Part of the "irreducible minimum" of standing is the requirement that plaintiff have suffered an "injury in fact" that is both "concrete and

particularized" as well as "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations omitted). A claim is "too speculative" where the alleged harm depends on the occurrence of "contingent future events that may not occur as anticipated, or indeed may not occur at all." *See Texas v. United States*, 523 U.S. 296, 300 (1998) (addressing ripeness). Moreover, an interest shared with the public at large is not sufficient. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). Absent satisfaction of the injury in fact requirement, a party has no claim in federal court. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475-76 (1982).

The *Artichoke Joe's* court drew on these principles in finding that the statute of limitations had not accrued against plaintiffs' challenge to the government's tribal recognition decision in that case. The court noted that even if the plaintiffs in that case "had known of the [decision to recognize the Lyttons] and had wanted to challenge it at the time, [they] would not have had standing to do so. The only group with an interest in challenging the Secretary's recognition decision w[ere] the . . . landowners" near the Lyttons' previous homeland. 278 F. Supp. 2d at 1183. Plaintiffs, on the

other hand, were located miles away from the Lyttons' homeland and thus the decision faced no prospect of injury from the decision.

Against this background it is plain that, prior to the announcement of the casino in 2006, the Alliance lacked standing to challenge the NIGC's approval of the Nooksack gaming ordinance – inasmuch as it was not imminently threatened with a concrete, particularized injury until that time – and that the statute of limitations accordingly should not bar its challenge now. Whether the Nooksacks would build a casino, or anything else, on the Northwood Crossing parcel was wholly "hypothetical" and "conjectural" before the announcement of the casino. Had the Alliance filed suit challenging the NIGC's approval of the Nooksack ordinance prior to 2006 on the grounds that the Nooksacks might, someday, try to build a casino on the Northwood Crossing parcel, it would have been run out of court. Accordingly, the Alliance could not "successfully bring a cause of action" under *Acri* until announcement of the casino in 2006 and the Alliance's claim could not possibly accrue until that time.

D. An "Indian lands" determination is a required, final decision subject to judicial review under IGRA and the APA.

Just as the approval of the tribal gaming ordinance in *Erie County* and the state-tribe compact in *Apache Tribe* were subject to judicial review, so

too is the determination (or lack thereof) of a specific property's "Indian lands status."

In *Kansas v. United States*, 249 F.3d 1213, the Tenth Circuit reviewed an NIGC determination that certain non-reservations lands constituted "Indian lands" within the scope of IGRA. While this determination was made pursuant to the NIGC's review of a gaming management contract, the state of Kansas appears not to have challenged approval of the contract, but of the Indian lands determination itself. *See id.* at 1220, 1222. The court concluded that this determination constituted a final decision under IGRA and was thus subject to judicial review. *See id.* at 1222 (quoting S.Rep. No. 100-446, at 8 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3078 ("*All* decisions of the [NIGC] are final agency decisions for purposes of appeal to Federal district court."(emphasis added by court)).

Just as an Indian lands determination is subject to judicial review, so too is the failure to make such a determination when required. *See* 5 U.S.C. §§ 702, 706(1). As demonstrated above, the construction of the Northwood Crossing Casino has triggered such a responsibility here.

E. The required Indian lands determination is a major federal action under NEPA requiring environmental review.

It follows from the above that Federal Defendants are required to review the Northwood Crossing project under the National Environmental

Policy Act. NEPA requires review of all "major federal actions" that may significantly affect environmental quality. 42 U.S.C. § 4332(2)(C).

"Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18 (emphasis added). Actions include "new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies," 40 C.F.R. § 1508.18(a), and "[a]pproval of specific projects, such as construction or management activities located in a defined geographic area." 40 C.F.R. § 1508.18(b)(4). "Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities." *Id.* Finally, action also "include[s] the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action." 40 C.F.R. § 1508.18.

Neither Federal Defendants nor the district court dispute that the Northwood Crossing project will have a significant impact on environmental quality. Instead, they assert that the Alliance has not identified any federal action that activates NEPA's requirements. However, a determination of a potential gaming site's "Indian lands" status, and particularly the Northwood

site's status, easily qualifies as "action." As noted above, *supra* at 11, tribal documents indicate that the casino may include a gaming facility up to 107,000 square feet in size containing hundreds of electronic gaming devises and gaming tables, a parking lot for up to 1,050 vehicles, a 200-room hotel and spa, and an on-site wastewater treatment facility. *See* ER 12:2, 4-5. In addition, the facility is expected to generate thousands of extra vehicle trips along the narrow two-lane roads that serve the site every day. *See* ER 12:7.

This is plainly an enormous impact on the surrounding, rural environment. Moreover, the activity in question is "regulated" and "approved" by Federal Defendants under IGRA, and, as just discussed above, Federal Defendants have a duty to make an "Indians lands" determination with respect to the Northwood Crossing site.

VII. CONCLUSION

Despite the federal government's duty under IGRA to regulate tribal gaming, the Northwood Crossing project has been constructed and opened with little to no federal oversight. This violates the requirements of IGRA, NEPA, and the APA. Moreover, there are numerous, unresolved factual questions regarding the status of the Northwood Crossing parcel and the propriety of gaming thereon that should have been resolved by the district court but were not. Accordingly, the Alliance respectfully requests this

Court to reverse the district court's dismissal, and to remand for further proceedings that will allow for a full and fair hearing on the Alliance's claims.

Certificate of Compliance

In compliance with FRAP 32(a)(7)(B) and Circuit Rule 32-1, I certify that the foregoing opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 7798 words.

Statement of Related Cases

Homeowners know of no related cases pending in this Court.

RESPECTFULLY SUBMITTED this 14th day of April, 2008.

GROEN STEPHENS & KLINGE LLP

By: *Richard M. Stephens*
Richard M. Stephens, WSBA #21776
Attorneys for Plaintiff/Appellant