UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID PATCHAK **2721 6th Street** **Shelbyville, MI 49344,** **Plaintiff,** **v.** **DIRK KEMPTHORNE, in his official capacity as Secretary of the U.S. Department of the Interior, and CARL J. ARTMAN, in his official capacity as Assistant Secretary of the U.S. Department of the Interior, Bureau of Indian Affairs,** **Defendants.** **MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,** **Intervenor-Defendant.**	**Case No. 1:08-cv-1331-RJL** Judge Richard J. Leon

UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, Defendants, Dirk Kempthorne, in his official capacity as Secretary of the United States Department of the Interior, and George Skibine, in his official capacity as the Acting Deputy Assistant Secretary for Policy and Economic Development,[1/] United States Department of the Interior (collectively, the "United

[1/] George Skibine, who has assumed the duties of the Assistant Secretary, is automatically substituted for his predecessor in office pursuant to Federal Rule of Civil Procedure 25(d). This Stipulation is entered into on behalf of the Department of the Interior and the individually named defendants acting in their official capacities.

States"), by undersigned counsel, hereby respectfully submit this Statement of Points and Authorities in support of their Motion to Dismiss. For the reasons described below, Plaintiff lacks standing to bring this suit. The United States therefore respectfully requests that the Court dismiss the Complaint.

Introduction

On August 8, 2001, Intervenor-Defendant, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Gun Lake Band" or "Tribe"), submitted its application to the United States to acquire two parcels of land in Allegan County, Michigan, into trust on its behalf under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465. When the Secretary determined that the United States would take the land into trust in 2005, opponents of this decision filed suit against the Secretary in this Court. Mich. Gambling Opposition ("MichGO") v. Norton, No. 05-1181 (D.D.C. filed June 13, 2005).[2/] Plaintiff, undoubtedly aware of the litigation[3/], never intervened and did not file his own lawsuit. The challenges to the Secretary's decision were extensively briefed and rejected, both by this Court and then by the Court of Appeals for the D.C. Circuit. MichGO v. Norton, 477 F. Supp. 2d 1 (D.D.C. 2007), aff'd, MichGO v. Kempthorne, 525 F.3d 23 (D.C. Cir. 2008). Instead, Plaintiff waited more than three years, only coming

[2/]MichGO argued that the IRA was an unconstitutional delegation of legislative power, and asserted several statutory claims under the Administrative Procedure Act ("APA"), the National Environmental Policy Act ("NEPA") and the Indian Gaming Regulatory Act ("IGRA"). Both the Tribe and the United States filed motions to dismiss or for summary judgment. This Court granted their motions and dismissed MichGO's complaint on February 23, 2007. MichGO v. Norton, 477 F. Supp. 2d 1, 3-4 (D.D.C. 2007).

[3/]Plaintiff David Patchak submitted several comment letters regarding the Gun Lake land-into-trust determination and proposed casino. AR010944, AR011100 (to President George W. Bush); AR011132, AR011529 (to Secretary Gale Norton); AR011324 (to the Bureau of Indian Affairs Midwest Regional Office).

forward with this lawsuit after the ruling of the Court of Appeals and its denial of rehearing *en banc*.[4/]

Regardless, because the interests Plaintiff alleges are outside the zone of interests protected by the IRA, and, indeed, directly conflict with the interests protected by the IRA, Plaintiff lacks prudential standing to assert his claim. For this reason, the Complaint should be dismissed.

I. Background

A. The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians

The Gun Lake Band descends from a Band of Pottawatomi Indians led by Chief Match-E-Be-Nash-She-Wish, which resided near present-day Kalamazoo, Michigan. Under the terms of the Treaty of Chicago of 1821, signed by Chief Match-E-Be-Nash-E-Wish, the Gun Lake Band secured a three square mile tract of land at Kalamazoo, Michigan. 7 Stat. 218 (Aug. 29, 1821); see 62 Fed. Reg. 38113 (July 16, 1997); MichGO v. Kempthorne, 525 F.3d at 26. However, this parcel was ceded by the Pottawatomi in the Treaty of 1827, 7 Stat. 305 (Sept. 19, 1827), in return for enlargement of the Nottawaseppi Reserve. Pursuant to the 1833 Treaty of Chicago, 7 Stat. 431 (Sept. 26, 1833), and the Ottawa Treaty of 1836, 7 Stat. 513 (Sept. 20, 1836), to which the

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[4/]On March 5, 2007, Judge Penn issued a Stay Pending Appeal that prevents the United States from taking the land into trust until the mandate issues in MichGO v. Kempthorne, No. 07-5092 (D.C. Cir. 2008). MichGO v. Norton, No. 05-1181, Dkt. No. 79. Pursuant to Federal Rule of Appellate Procedure 41(d)(2)(D), on August 15, 2008, the D.C. Circuit Court of Appeals issued an order staying the mandate in MichGO v. Kempthorne pending MichGO's petition for writ of certiorari. 2008 WL 4356930, at *1 (D.C. Cir. Aug. 15, 2008). As a result, the stay preventing the Department of the Interior from taking the land into trust remains in effect. Plaintiff is correct in stating that once the land is placed in trust, the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a(a), bars any suit challenging the land-in-trust acquisition. Compl. ¶ 12.

Band was not a signatory, all of the Tribe's land was eventually ceded to the United States, leaving the Tribe landless. MichGO v. Kempthorne, 525 F.3d at 26.

During the period from 1828 to 1838, the Gun Lake Band moved north of the Kalamazoo River and in 1839 placed itself under the protection of an Episcopalian Mission, funded under the Treaty of 1836, in Allegan County, Michigan. This Episcopalian Mission was known as the "Griswold Colony" or the "Bradley Colony/Settlement," located in Bradley, Michigan. 62 Fed. Reg. at 38113-14; MichGO v. Kempthorne, 525 F.3d at 26.

Despite the loss of the land, a majority of the Band's members remained in Allegan County, Michigan. However, the Band was ineligible to organize under the IRA because it had no commonly owned reservation land. The 1940 decision by the Commissioner of Indian Affairs, John Collier, not to extend federal services to the Indians of Michigan's lower peninsula ended the Band's government-to-government relationship with the federal government. See, e.g., S. Rep. No. 103-260 (May 16, 1994) (discussing John Collier's decision not to extend the IRA to Indian tribal governments in Michigan's lower peninsula).

On June 24, 1992, the Band began pursuing federal acknowledgment by submitting to the Branch of Acknowledgment and Research, Bureau of Indian Affairs ("BIA") a letter of intent requesting acknowledgment that it exists as an Indian tribe, in accordance with 25 C.F.R. Part 83. In accordance with 25 C.F.R. § 83.10(d), the Band's petition was placed on active consideration on December 24, 1996. On July 16, 1997, the Assistant Secretary published notice of his proposed finding to acknowledge that the Band exists as an Indian tribe within the meaning of federal law. 62 Fed. Reg. 38113. The Assistant Secretary published notice of the final determination to acknowledge the Band on October 23, 1998. 63 Fed. Reg. 56936 (Oct. 3,

1998); see In re Fed. Acknowledgment of Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Mich., 33 IBIA 291, 294 (May 21, 1999). The final determination became effective on August 23, 1999. MichGO v. Norton, 477 F. Supp. 2d at 4; MichGO v. Kempthorne, 525 F.3d at 26.

B. The Allegan County Parcels

The Gun Lake Band seeks to have the Bradley Property, consisting of the two Allegan County parcels, taken into trust by the United States. The Bradley Property is located in Wayland Township, Allegan County, Michigan. 70 Fed. Reg. 25596 (May 13, 2005). The Gun Lake Band has been centered around the town of Bradley in Allegan County since the founding of the Griswold Colony in 1838 and has long historical, geographical and cultural ties to the area in which the two parcels are located. 63 Fed. Reg. 56936.

C. The Previous Litigation

On June 13, 2005, a lawsuit was filed against the Secretary in this Court by Michigan Gambling Opposition ("MichGO"), an anti-gambling organization representing a variety of concerned citizens, including residents of surrounding communities. MichGO v. Norton, 477 F. Supp. 2d at 4. The Tribe intervened, and both the Tribe and the United States filed motions to dismiss or for summary judgment. This Court granted their motions and dismissed MichGO's complaint on February 23, 2007. Id. at 3.

More than four months after the case was briefed and argued in the Court of Appeals, MichGO moved to "supplement the issues" on appeal with the question on which the Supreme Court granted certiorari in Carcieri v. Kempthorne, 128 S. Ct. 1443 (Feb. 25, 2008) (whether Section 19 of the IRA limits definition of "Indian tribe" to those tribes federally-recognized in

1934).[5] The Court of Appeals denied that motion and affirmed this Court's ruling.[6] MichGO petitioned for rehearing *en banc*, which was denied on July 25, 2008.[7]

Plaintiff's sole allegation is the very same issue that MichGO sought to add to its allegations when it moved to supplement the issues on appeal. Both MichGO and the Plaintiff could have filed suit on the basis of this allegation at the beginning of the litigation. Instead, Plaintiff waited until August 1, 2008 – seven days after the Court of Appeals denied rehearing *en banc* in MichGO v. Kempthorne – to file his Complaint.[8]

II. The Indian Reorganization Act

In deciding to accept the Property into trust, the Secretary acted pursuant to the IRA.

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[5] Carcieri v. Norton, 290 F. Supp. 2d 167 (D.R.I. 2003), was filed on July 31, 2000, and decided on September 29, 2003. The District Court's decision was affirmed by the First Circuit. Carcieri v. Norton, 398 F.3d 22 (2005), reh'g *en banc*, 423 F.3d 45 (2005) (op. withdrawn), reh'g *en banc*, 497 F.3d 15 (2007) (aff'g 290 F. Supp. 2d 167). The Supreme Court granted Rhode Island's petition for certiorari on February 25, 2008. The claim that Section 19 of the IRA limits the definition of "Indian tribe" to those tribes federally-recognized in 1934 was also argued and dismissed in City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157, 160-61 (D.D.C. 1980).

[6] Order Denying Motion to Supplement, MichGO v. Kempthorne, Case No. 07-5092 (D.C. Cir. Mar. 19, 2008).

[7] On July 29, 2008, MichGO moved to stay the Court of Appeals' mandate pending a potential petition for certiorari. The Court of Appeals granted the motion (without opinion) on August 15, 2008, 2008 WL 4356930, at *1; the Tribe's application to vacate the stay was denied on September 3, 2008.

[8] Plaintiff incorrectly alleges that the Secretary's decision violated Sections 5 and 19 of the IRA, 25 U.S.C. §§ 465, 479. Compl. ¶ 1. Section 5 authorizes the Secretary to acquire land into trust for an "Indian tribe" or "individual Indian," for the purpose of "providing land for Indians." 25 U.S.C. § 465. Section 19 states that "[t]he term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood." 25 U.S.C. § 479.

Section 5 of the IRA provides in pertinent part that:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
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> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465.

The regulations implementing section 5 of the IRA are set forth in 25 C.F.R. Part 151. They provide that the Secretary may acquire land into trust "[w]hen the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. § 151.3(a)(3). Section 151.10 requires the Secretary to notify the state and local governments having regulatory jurisdiction over the land of the proposed trust acquisition so that they can provide written comments on the potential impacts on jurisdiction, taxes and assessments. Id. § 151.10. The provision also obligates the Secretary to consider factors such as: the need of the tribe for the land, the purposes for which the land will be used, the impact on the State and its political subdivisions resulting from the removal of the land from its tax rolls, jurisdictional problems and potential conflicts of land use, whether the BIA is equipped to discharge any additional responsibilities resulting from the trust status, and compliance with NEPA. See id. § 151.10(b)-(c), (e)-(h). Here, the Secretary made the required notifications and considered the appropriate factors. Accordingly, Plaintiff has not challenged

the Secretary's application of the regulations implementing Section 5 of the IRA.

Standard of Review

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the Court may dismiss a complaint for lack of subject matter jurisdiction. If a plaintiff lacks standing to bring a claim, that is a defect in the court's subject matter jurisdiction over the claim. See Haase v. Sessions, 835 F.2d 902, 906 (D.C. Cir. 1987) (citing Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986)). "Although the District Court may in appropriate cases dispose of a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) on the complaint standing alone, where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Coal. for Underground Expansion v. Mineta, 333 F.3d 193, 198 (D.C. Cir. 2003) (internal quotation marks and citation omitted).

III. Argument

Plaintiff lacks prudential standing to assert his claim. His argument is fundamentally at odds with the purpose of the IRA, which is to further *tribal* self-determination and economic self-sufficiency through restoration of the tribal land base and protection of tribal land from involuntary alienation through trust acquisition by the United States. Plaintiff's interests do not fall within the IRA's zone of interests.

A. The Legal Framework for Prudential Standing

Plaintiff seeks relief under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. That statute allows a party to seek review of an agency action where he is "adversely affected or aggrieved" by the action "within the meaning of a relevant statute," id., – but only if that party

has both constitutional standing and prudential standing to assert the claim. See Bennett v. Spear, 520 U.S. 154, 162 (1997); see also Nat'l Fed'n of Fed. Employees v. Cheney, 883 F.2d 1038, 1042 (D.C. Cir. 1989) (§ 702 "provides a statutory grant . . . to contest agency action," but a plaintiff must show constitutional standing as well as prudential standing, which is "a judicial limitation necessary to ensure that the proper party is asserting the claim against the agency.").

In order to demonstrate "constitutional standing," a plaintiff must show that "he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." Bennett, 520 U.S. at 162 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).[9/] Under the principles of prudential standing, "the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990); see also Bennett, 520 U.S. at 175-76 ("[T]he meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question . . . , but by reference to the particular provision of law upon which the plaintiff relies."). In order to demonstrate prudential standing, a plaintiff must not only establish constitutional standing, but must also "establish that [his] injury . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint," Bennett, 520 U.S. at 176 – and "if the plaintiff's interests are [instead] marginally related to or inconsistent with the purposes implicit in [that] statute," he will not have prudential standing to assert the claim. Clarke v. Sec. Indus.

[9/]The United States does not concede that Plaintiff has constitutional standing, but Plaintiff's lack of prudential standing requires that his Complaint be dismissed, regardless of whether Plaintiff meets the "constitutional minimum." Bennett, 520 U.S. at 162.

Ass'n, 479 U.S. 388, 399 (1987). The basic premise of this prudential test "is a presumption that Congress intends to deny standing to 'those plaintiffs whose suits are more likely to frustrate than to further statutory objectives.'" Thomas v. EPA, 885 F.2d 918, 922 (D.C. Cir. 1989) (quoting Clarke, 479 U.S. at 397 n.12).

The D.C. Circuit, in Hazardous Waste Treatment Council v. U.S. Environmental Protection Agency ("EPA"), 861 F.2d 277 (D.C. Cir. 1988), found that Clarke requires less than a showing of congressional intent to benefit a prospective plaintiff but more than a marginal relationship to the statutory purposes to establish standing. Id. at 283. There, a trade organization of hazardous waste treatment firms challenged EPA's Resource Conservation and Recovery Act ("RCRA") regulations governing the burning of used oil as fuel as not being sufficiently stringent. The court held that the organization lacked standing to assert a claim on behalf of its members that the alleged laxity of the regulations will diminish the market for the firms' high-technology treatment services. In determining if Clarke applies to this type of "incidental benefit", the court analyzed whether Congress intended to benefit the plaintiff. When congressional intent is clear, the court held that there is a presumption of standing that can be overcome by a finding that the plaintiff's suit would severely disrupt a complex administrative scheme. When such intent is not evident, there is a presumption that standing is lacking. This presumption can be overcome if there is some indication that the plaintiff is a "peculiarly suitable challenger." Id. at 283. The D.C. Circuit held the plaintiff's economic claim to be outside RCRA's zone of interests, finding no evidence that Congress intended to benefit the competitive position of high-tech recyclers. Id. at 284.

B. The Purpose of Section 5 of the IRA

In 1934, Congress enacted the IRA to encourage tribes "to revitalize their self-government," to take control of their "business and economic affairs," and to assure a solid territorial base by "put[ting] a halt to the loss of tribal lands through allotment." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151 (1973). This "sweeping" legislation, Morton v. Mancari, 417 U.S. 535, 542 (1974), manifested a sharp change of direction in federal policy toward the Indians. It replaced the assimilationist policy at the time of the General Allotment Act, which had been designed to "put an end to tribal organization" and to "dealings with Indians . . . as tribes." United States v. Celestine, 215 U.S. 278, 290 (1909).

The IRA thus repudiated the previous land policies of the General Allotment Act. The IRA prohibited any further allotment of reservation lands, 25 U.S.C. § 461; extended indefinitely the periods of trust or restrictions on alienation of Indian lands, 25 U.S.C. § 462; provided for the restoration of surplus unallotted lands to tribal ownership, 25 U.S.C. § 462(a); and prohibited any transfer of Indian lands (other than to the tribe or by inheritance) except exchanges authorized by the Secretary as "beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations," 25 U.S.C. § 464.

The "overriding purpose" of the IRA, however, was broader and more prospective than remedying the negative affects of the General Allotment Act. Morton, 417 U.S. at 542. Congress sought to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." Id. Congress thus authorized Indian tribes to adopt their own constitutions and bylaws, 25 U.S.C. § 476, and to incorporate, 25 U.S.C. § 477. Congress also authorized or required the Secretary to take specified steps to improve the economic and social conditions of Indians, including: adopting regulations for

forestry and livestock grazing on Indian units, 25 U.S.C. § 466; assisting financially in the creation of Indian-chartered corporations, 25 U.S.C. § 469; making loans to Indian-chartered corporations out of a designated revolving fund "for the purpose of promoting the economic development" of tribes, 25 U.S.C. § 470; paying tuition and other expenses for Indian students at vocational schools, 25 U.S.C. § 471; and giving preference to Indians for employment in positions relating to Indian affairs, 25 U.S.C. § 472.

Of particular relevance here, Section 5 of the IRA authorizes the Secretary of the Interior "in his discretion, to acquire . . . any interest in lands . . . within or without existing reservations, . . . for the purpose of providing land for Indians." 25 U.S.C. § 465. The acquired lands "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian." Id.

Section 19 of the IRA provides an inclusive definition of those who are eligible for its benefits. That section provides that "Indian" "shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. The IRA also includes within its examples of "Indian" "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and "all other persons of one-half or more Indian blood." Id. Section 19 further provides that the term "tribe" shall be "construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." Id.

Pursuant to authority expressly delegated to the Secretary to prescribe regulations "carrying into effect the various provisions of any act relating to Indian affairs," 25 U.S.C. § 9; see 25 U.S.C. § 2; 5 U.S.C. § 301, the Secretary has issued regulations governing the implementation of his authority under Section 5 to take land into trust. 25 C.F.R. Part 151.

Those regulations define "individual Indian," *inter alia*, as "any person who is an enrolled member of a tribe." 25 C.F.R. § 151.2(c)(1). The regulations define "Tribe" as "any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs." Id. § 151.2(b).

C. Plaintiff Lacks Prudential Standing

In several instances, courts have held that private non-Indian plaintiffs lack standing to challenge the Secretary's decisions under the IRA and other federal statutes that are specifically intended for the benefit of Indians. In City of Sault St. Marie v. Andrus, 458 F. Supp. 465 (D.D.C. 1978), for example, this Court rejected a lawsuit brought by a municipality and non-Indian taxpayers that sought to prevent the Secretary from taking land into trust for the Sault Ste. Marie Tribe of Chippewa Indians. The court dismissed the challenge, noting that the plaintiff's interests were not within the zone of interests covered by the IRA. Id. at 468 ("As for the individual taxpayers, the court in Tacoma indicated that their interests were not within the zone regulated by the statute, and that therefore they should be dismissed. The individual plaintiffs in this case will suffer the same fate.") (citing City of Tacoma v. Andrus, 457 F. Supp. 342, 346 (D.D.C. 1978)).

Here, Plaintiff asserts no legitimate interests that fall within the zone of interests protected by the IRA. Plaintiff asserts:

> Among the negative effects of building and operating the anticipated casino in Mr. Patchak's community are: (a) an irreversible change in the rural character of the area; (b) loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site; (c) increased traffic; (d) increased light, noise, air, and storm water pollution; (e) increased crime; (f) diversion of

> police, fire, and emergency medical resources; (g) decreased property values; (h) increased property taxes; (I) diversion of community resources to the treatment of gambling addiction; (j) weakening of the family atmosphere of the community; and (k) other aesthetic, socioeconomic, and environmental problems associated with a gambling casino.

Compl. ¶ 9. These allegations are virtually identical to the environmental, non-IRA related claims already made by MichGO:

> These effects include, among others, (a) an irreversible change in the rural character of the area; (b) loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site; (c) increased traffic; (d) increased light, noise, air, and storm water pollution; (e) increased crime; (f) loss of tax revenue currently generated by the agricultural land that comprises the casino site; (g) diversion of police, fire, and emergency medical resources; (h) decreased property values; (I) the loss of business and recreational opportunities, such as retail stores and restaurants, that will be forced out by the casino; (j) loss of consumer spending at area businesses; (k) increased bankruptcies; (l) diversion of community resources to the treatment of gambling addiction; (m) weakening of the family atmosphere of the community; and (n) other aesthetic, socioeconomic, and environmental problems associated with a gambling casino.

MichGO Compl. ¶ 14, MichGO v. Norton, No. 05-1181 (D.D.C. filed June 13, 2005) (Dkt. No. 1). These alleged environmental impacts, asserted under NEPA, were insufficient to win the day for MichGO—the Secretary's determination that the impacts were insignificant was upheld by both this Court and the Court of Appeals, MichGO v. Norton, 477 F. Supp. 2d at 11-19, aff'd, MichGO v. Kempthorne, 525 F.3d 23—and they are certainly insufficient to demonstrate standing in a case proceeding exclusively under the IRA. Because Plaintiff's non-IRA related interests have already been rejected by this Court and the Court of Appeals, Plaintiff is in essence a private taxpayer making a challenge that strikes directly at the heart of the relationship between the Tribe and the government. Plaintiff lacks standing to assert such a claim.

Moreover, Plaintiff's allegations have nothing to do with the purposes for which Section

5 of the IRA was enacted, nor have private parties in the position of Plaintiff successfully demonstrated standing to assert generalized environmental concerns in a IRA-based challenge to a proposed trust acquisition. Unlike MichGO, Plaintiff does not additionally allege a violation of NEPA; and unlike the plaintiff in Citizens Exposing Truth about Casinos ("CETAC") v. Kempthorne, 492 F.3d 460 (D.C. Cir. 2007), he does not make a claim pursuant to IGRA. Instead, he attempts to assert generalized governmental and community concerns of an environmental nature with no showing of direct impact. While the court in CETAC found that the plaintiffs had standing to sue, there is no indication it would have so ruled had the complaint solely alleged a violation of the IRA. Counsel is aware of no court that has specifically held that private citizens have standing to make claims under the IRA alleging merely the kind of generalized, environmental harms asserted by Plaintiff.

The sweeping relief requested in this case would directly interfere with the IRA's core purposes of promoting Indian sovereignty and self-government, and restoring the tribal land base. For that reason alone, Plaintiff fails to meet the "zone of interests" test. Plaintiff's legal challenge threatens to interfere with the government-to-government relationship between the federal government and Indian tribes. While Plaintiff does not directly challenge the Tribe's status as a federally-recognized tribe, the consequences of allowing standing for a non-Indian private party in this case are perhaps even more stark.[10/] As one court noted in denying standing under another federal Indian statute, "to give legally enforceable rights to parties having interests

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[10/] The United States concurs in the Gun Lake Band's laches argument. Plaintiff's delay in pursuing this litigation, and the continued litigation of the Secretary's 2005 decision to acquire the land into trust, have significantly impacted the ability of this landless tribe to pursue economic opportunities for its members.

that compete with the tribes' would be to impose a duty on the Secretary that is inconsistent with the statute's purpose of protecting tribal interests and resources." Utah v. U.S. Dep't of Interior, 45 F. Supp. 2d 1279, 1283 (D. Utah 1999) (finding no prudential standing for non-Indian parties under the Indian Long-Term Leasing Act); see also South Dakota ex rel. Barnett v. U.S. Dep't of Interior, 317 F.3d 783, 785 (8th Cir. 2003) (Secretary has an obligation to represent the interests of the tribe in land acquisitions under the IRA).

Finally, applying the D.C. Circuit's analysis in Hazardous Waste Treatment Council, there is no indication that Congress, in the IRA, contemplated that private parties could make the type of broad statutory interpretation challenge to secretarial authority and to the tribal/governmental relationship that Plaintiff asserts. The relief he seeks is, in addition to its sweeping nature, akin to a generalized grievance – it has nothing to do with any legitimate interest he might have as a private citizen regarding a nearby proposed casino project. Granting Plaintiff the relief he requests would have impacts far beyond the proposed development of the Bradley Property, and would seriously limit the scope of the IRA and disrupt the administrative scheme that the Department of the Interior has long administered. Nor can it be said that the Plaintiff is, himself, a "peculiarly suitable challenger." See 861 F.2d at 283. If Plaintiff's vague and non-IRA related assertions of harm are sufficient to permit a challenge that seeks as relief a significant narrowing of the statute, then virtually any allegedly injured citizen would have standing to challenge any agency action. Such a construction would effectively do away with the APA's separate requirement that a challenge to agency action may be brought only by one within the statute's zone of interests.

For all of the above reasons, Plaintiff's Complaint should be dismissed for lack of

prudential standing.

IV. Conclusion

For the foregoing reasons, the Court should dismiss the Complaint.

Dated: October 6, 2008

Respectfully submitted,

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