No. 08-35954

In the
United States Court of Appeals
for the
Ninth Circuit

CITY OF VANCOUVER,

Plaintiff/Appellant.

v.

PHILIP HOGEN

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
Cause No. 3:08-cv-05192-BHS
Honorable Benjamin H. Settle

BRIEF OF APPELLANT CITY OF VANCOUVER

CITY ATTORNEY'S OFFICE
VANCOUVER, WASHINGTON

BRENT D. BOGER, WSBA No. 22359
210 East 13th Street, 2nd Floor
P.O. Box 1995
Vancouver, WA 98668-1995
Tel: (360) 487-8500
Fax: (360) 487-8501
brent.boger@ci.vancouver.wa.us

ATTORNEY FOR APPELLANT CITY OF VANCOUVER

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STATEMENT OF JURISDICTION

A. Agency and District Court Jurisdiction.

(i) The District Court had subject matter jurisdiction over this matter under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706 because this action seeks review of administrative decisions made by the Defendants, namely, decisions made pursuant to the Indian Gaming Regulatory Act ("IGRA") and National Indian Gaming Commission ("NIGC") regulations.

(ii) The NIGC has authority to approve tribal gaming ordinances at 25 USC § 2710. Under 25 USC § 2714 decisions made by the NIGC pursuant to § 2710 constitute final agency action reviewable under the APA.

B. Appellate Court Jurisdiction.

This court has jurisdiction as an appeal by right under 28 USC § 1291 as it is from a final decision dismissing the case.

C. This appeal was from a decision of an officer and agency of the United States. Under FRAP 4(B) the notice of appeal may be filed by any party within 60 days after entry of the court's order. The court's order was entered on September 24, 2008, and the notice of appeal was filed on November 17, 2008.

D. This appeal is from a final order that disposed of the Appellant's claims because the order held that Appellant lacked standing.

STATEMENT OF ISSUE

Does Appellant, the City of Vancouver, Washington have Article III standing to sue the National Indian Gaming Commission for its approval of a gaming ordinance for a gaming facility near the City's northern boundary?

STATEMENT OF THE CASE

The National Indian Gaming Commission ("NIGC") approved a Cowlitz Indian Tribe ("Tribe") gaming ordinance applicable to a specific site approximately ten miles north of the City of Vancouver in Clark County, Washington. The approval of the ordinance is a final action under 25 USC § 2710 and in conjunction with other approvals will eventually make casino gaming possible on site.

The City of Vancouver (Appellant) filed suit in the United States District Court, Western District of Washington, challenging the ordinance approval because the NIGC is not authorized to approve a gaming ordinance on non-Tribal lands under 25 USC § 2710(b)(1). The Cowlitz Tribe did not own the land to which the ordinance applies during the proceedings below.

Appellant filed a Motion for Summary Judgment and the United States on behalf of the NIGC filed a 12(b)(1) and 12(b)(6) motion to dismiss. The District Court never reached the merits of the Appellant's claim that the NIGC exceeded its authority by approving gaming on non-Indian lands. It granted the 12(b)(1) motion based on lack of subject matter jurisdiction because, in the Court's opinion, other approvals were needed before gaming would actually occur and Appellant could demonstrate no injury.

This appeal followed.

SUMMARY OF ARGUMENT

The City has met the test for Article III standing to challenge the NIGC approval of the Cowlitz gaming ordinance. Federal standing jurisprudence requires the City to show that (1) it has suffered an injury in fact that is concrete, particularized, actual and imminent, (2) traceable to the challenged action, and (3) will likely be redressed by a favorable decision.

The City has been injured because the NIGC action increases the prospect that an Indian Casino will be located near its northern boundary which will have numerous impacts such as traffic, housing and crime. These injuries are traceable to the NIGC approval because it is a determination that could be used to avoid procedural review of these impacts. If the City is successful in this action, the Secretary will not be able to rely on the NIGC restored lands determination to avoid application of the City's procedural protections.

By throwing out the City's case based on standing, the District Court avoided ruling on the substance of the City's claim: that the NIGC did not have jurisdiction to approve a tribal gaming ordinance on non-Indian lands and violated IGRA procedures by doing so. The gaming ordinance is intertwined with and based on an opinion letter that the lands the gaming ordinance purportedly applies to are restored Indian lands. That opinion letter formed the basis of the NIGC's determination that the gaming is or would be on Indian lands.

The City has met the procedural standing test by showing (1) that the NIGC violated a procedural rule that the lands on which gaming is approved must be Indian

lands before ordinance approval, (2) this rule protects the City's concrete interest which is its interest in the IGRA requirement that there be no detrimental effect on the surrounding community, and (3) the NIGC gaming ordinance approval and restored lands determination raises a reasonable probability of approval of gaming even if there is a serious detrimental effect on the surrounding community, including the City of Vancouver.

Numerous cases demonstrate that the harm alleged is not required to be certain before standing is established. Among those cases is a U.S. Supreme Court case that held a plaintiff could challenge a biological opinion letter of the U.S. Fish and Wildlife Service because of the impact it could have on the Bureau of Reclamation—even though the bureau could disregard it. In another case, the D.C. Circuit allowed the challenge of a letter of no detrimental impact on Yellowstone National Park because of the impact it would have on a state agency—even though the state agency could still approve the proposal. The D.C. Circuit also found standing, if a successful judicial action would eliminate a governmental determination that could be used against the plaintiff.

The City meets the remaining standing tests that the NIGC action is traceable to the City's harm because gaming would not be possible without the ordinance and that a favorable resolution would require the NIGC to withdraw ordinance approval and not act until after the Secretary acts.

The City has also established prudential standing because its injury falls within its zone of interest. The NIGC decision could operate to deprive it of its consultation rights and a required finding that the proposed Indian gaming has no detrimental effect on it.

Even though the District Court did not consider the substance of the City's claims, it did rely on a United States argument that there was no requirement that "a gaming ordinance apply only to currently existing lands" to defeat the violation of a procedural require element of Article III standing. This was erroneous under the clear application of the statute and case authority cited to the Court.

Finally, this is a dismissal of claims at the pleading stage and the City's allegation of harm is sufficient.

STATEMENT OF FACTS

This case concerns National Indian Gaming Commission's ("NIGC")[1] approval of the Cowlitz gaming ordinance on lands the Cowlitz did not own and on lands not held in trust by the Secretary of the Interior ("Secretary"). Under the Indian Gaming Regulatory Act ("IGRA"), the NIGC did not have jurisdiction to approve a gaming ordinance on non-Indian owned lands. NIGC attempted to avoid its jurisdictional problem by making its approval contingent upon the Cowlitz acquiring ownership through the fee-to-trust process under the jurisdiction of the Secretary.

The Cowlitz Indian Tribe ("Tribe") proposed to establish a casino on a ±151.87 acre property located in Clark County, Washington.[2] Title to the proposed Cowlitz casino site was privately held by Salishan-Mohegan, LLC, a Washington limited liability company formed by the Tribe's development partner, the Mohegan Tribe, and tribal member David Barnett.[3] The Cowlitz Tribe currently does not exercise jurisdiction or

[1] The NIGC is established at 25 U.S.C. § 2704.
[2] Administrative Record ("AR") at 001645.
[3] AR 003677-79 (Clark County Title); AR at 001446 (stating David Barnett is the "power behind the Cowlitz tribe").

governmental authority over any portion of the proposed Cowlitz casino site.[4]

The Tribe filed a Fee-to-Trust application pursuant to 25 U.S.C. § 465, and a reservation designation under 25 U.S.C. § 467, with the Bureau of Indian Affairs ("BIA"), requesting that the United States take the proposed casino site into trust for the benefit of the Tribe and designate it as a reservation.[5] The applications identified the Tribe's intent to use the property for gaming purposes.[6] The applications also noted that "[t]itle to the Cowlitz Parcel…is either held or controlled by Salishan-Mohegan, LLC, the Tribe's development partner…" and further stated that the Tribe's acquisition of title to the proposed site from Salishan-Mohegan, LLC was contingent upon the United States accepting the property into trust.[7] The United States has not issued a final decision with respect to the Cowlitz Tribe's Amended Fee-to-Trust application.[8]

On August 22, 2005, the Cowlitz Tribe adopted Tribal Council Ordinance No. 05-2 ("Gaming Ordinance No. 05-2") for the purpose of governing "Class II gaming operations on the Tribe's Indian Lands."[9] In Gaming Ordinance No. 05-2, the Tribe defined the Tribe's Indian land as "including but not limited to" the parcel owned by Salishan-Mohegan, but conceded that the parcel would not be deemed the Tribe's Indian Lands "until such time as the United States has acquired trust title to it and the Tribe exercises governmental power over it."[10] The Tribe submitted Gaming Ordinance 05-2 to the NIGC for approval on August 29, 2005.[11]

On November 22, 2005, the NIGC's office of General Counsel issued an advisory

[4] AR 001622-001623; AR 005617; and AR 005618-005619.
[5] First Declaration of Steven G. Jones, Exhibit 3; AR 001643.
[6] First Declaration of Steven G. Jones, Exhibit 3; AR 001643.
[7] First Declaration of Steven G. Jones, Exhibit 3 at 6.
[8] AR at 001643; AR at 005348; and AR at 001682-83.
[9] AR 005315.
[10] First Declaration of Steven G. Jones, Exhibit 3 at 6.
[11] AR 005248.

opinion that the proposed casino site would constitute the Tribe's "restored lands."[12] The NIGC's Restored Lands Opinion was issued at the behest of the Tribe.[13] The NIGC's General Counsel determined that such an opinion was necessary in order to allow the NIGC to make a decision to approve or disapprove of the Tribe's proposed Gaming Ordinance within 90 days, even though this was the only time the NIGC had ever made a restored lands determination with respect to property that was not either owned by the tribe or held in trust for the benefit of a the tribe making such an application.[14]

On November 23, 2005, NIGC Chairman Hogen issued a letter approving Gaming Ordinance No. 05-2.[15] In that letter, NIGC Chairman Hogen stated that the Tribe's Gaming Ordinance followed the NIGC's model ordinance, except for the ordinance's definition of the "Tribe's Indian Lands."[16] As a result, Chairman Hogen expressly made approval of the Tribe's Gaming Ordinance No. 05-2 contingent upon the Department of Interior taking the land into trust and the Tribe's exercising control over the site.[17]

Gaming Ordinance No. 05-2 has been amended by Ordinances 07-02 and 07-03 and NIGC Chairman Hogen approved the Amended Gaming Ordinance. In the approval, Chairman Hogen stated that nothing in the ordinance conflicts with IGRA, NIGC regulations or federal law.[18]

On October 17, 2007, the Tribe submitted the Amended Gaming Ordinance to the

[12] AR 001643-001659.
[13] AR 005408-005445; and AR 005336-005338.
[14] Second Declaration in Support of City Motion for Summary Judgment of Steven Jones at 2. AR at 00748 (referring to Ms. Coleman's testimony to the Senate Indian Affairs Committee).
[15] AR 001622.
[16] AR 001622.
[17] AR 001622-001623.
[18] AR 000779-000786 and AR 000773.

NIGC.[19] On January 8, 2008, NIGC Chairman Hogen approved the Tribe's Amended Gaming Ordinance.[20] In Chairman Hogen's January 8, 2008, letter approving the Tribe's Amended Gaming Ordinance, he approved the "tribal gaming ordinances and ordinance amendments if the submissions do not conflict with IGRA, the NIGC's regulations, or other federal law."[21] Chairman Hogen further stated that "nothing in the amendment conflicts with IGRA, the NIGC regulations, or other federal law…." [22]

The City of Vancouver is the nearest large City to the proposed casino. It commented to the NIGC and the Secretary that the proposed Casino would cause negative impacts and strain the services it provides to its citizens including impacts on its streets and increased crime.[23] The City made clear to the NIGC its concern that if the NIGC concluded that the proposed Cowlitz site were restored lands, such conclusion would jeopardize the availability of procedural protections the City has under IGRA to protect against negative impacts on the surrounding community.[24]

The City filed suit in United States District Court for the Western District of Washington on March 28, 2008. Pursuant to a court-approved briefing schedule, the City and NIGC filed cross-motions for summary judgment and to dismiss. Without reaching the NIGC jurisdictional issues, the District Court dismissed the City's case pursuant to a United States motion brought under 12(b)(1) based on standing.

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[19] AR at 000761-000763; AR at 000770-000772; AR at 000764-000768; and AR at 000774-000778.
[20] AR at 000001-000002; and AR at 000004-000005.
[21] AR at 000002.
[22] AR at 000002.
[23] AR 000701-000717; AR at 000723-000725; AR at 000726-000730; AR at 001454-001458; AR at 001671-001673; AR at 001667-001670.
[24] AR at 001668-1670.

ARGUMENT

I. INTRODUCTION

The District Court order dismissing the NIGC's approval of a gaming ordinance applicable to non-Indian lands was based on Article III standing. The arguments submitted by the United States and relied on by the Court boil down to: because gaming on the site requires an additional approval of the Secretary of Interior which may never occur, the City cannot demonstrate an injury. Certainly the City is concerned about the impacts of gaming, but its more immediate concern in the present case is being deprived of critical procedural protections that may either prevent gaming altogether or enable the City to negotiate essential mitigation.

As shown below, the opinion and the argument are erroneous as a matter of law and the City has demonstrated Article III standing.

II. STANDARD OF REVIEW FOR APPEALS OF ARTICLE III STANDING IS DE NOVO

This appeal is mostly about Article III standing in a motion to dismiss brought under 12(b)(1).[25] Because standing presents an issue of law, the Ninth Circuit reviews de novo a district court's ruling on the issue.[26]

In considering a motion to dismiss for lack of standing brought under Fed. R. Civ. Pro. 12(b)(1), a court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."[27]

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[25] The NIGC filed the motion to dismiss the City's claims pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

[26] *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1111 (9th Cir. 1999). *Also see Colorado Farm Bureau v. United States Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000)

[27] *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421-422 (1969)).

A lower court's standing determination is immediately reviewable when the standing issue is inextricably intertwined with an otherwise appealable order, or the determination of standing is essential to the resolution of the appealable order.[28] As a practical matter, a determination that a party lacks standing to pursue a claim effectively puts the party out of court and is typically part of a final judgment disposing of the matter, as is the case here.[29] The District Court's determination that the City lacked standing put it out of court and is therefore immediately reviewable.

III. THE CITY HAS MET THE TEST FOR ARTICLE III STANDING

1. General Test

In the case now before the Court, Appellant respectfully suggests the Court examine the substance of the NIGC action. The Commission has approved a gaming ordinance with an accompanying restored lands opinion that could be used to avoid a consideration of the impact on the surrounding community as further discussed below. While the United States is correct that the decision alone will not allow gambling, it cannot seriously argue that the approval and the restored lands opinion, if allowed to stand, will facilitate and make more likely the location of the casino near Appellant's city limits, causing the City injury.

2. Procedural Test

The test of Article III standing is whether a plaintiff has: "suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant;

[28] Moore's *Federal Practice*, § 101.35
[29] *Id.*

and (3) it is likely, as opposed to merely speculative, the injury will be redressed by a favorable decision."[30] In such cases as this, where a procedural injury is claimed, the plaintiff must show that the "challenged act performed with improper procedures will cause a distinct risk to plaintiff's particularized interests," but the "normal standards for redressibility and immediacy" are relaxed. *See TOMAC v. Norton*[31], and *Lujan v. Defenders of Wildlife*[32] (where protected interest involves a procedural right, plaintiff need not meet normal standards for redressibility and immediacy). What this means is that, "for instance, 'one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.'"[33]

IV. THE CITY HAS SHOWN A PROCEDURAL INJURY-IN-FACT

Because the City's claim is directed to an alleged procedural violation, the City may establish a cognizable injury-in-fact by alleging "that (1) the [agency] violated certain procedural rules; (2) these rules protect [the City's] concrete interests; and (3) it is reasonably probable that the challenged action will threaten [the City's] concrete interests."[34] There is no minimum quantitative quota of harm required to show injury.

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[30] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs (TOC), Inc.*, 528 U.S 167, 180-81 (2001) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).
[31] *TOMAC v. Norton*, 193 F. Supp.2d 182, 187 (2002).
[32] 504 U.S. 555, at 573 (1992).
[33] TOMAC, 193 F. Supp.2d at 187 (*quoting Lujan*, 504 U.S. at 572 n.7).
[34] *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) (*quoting Citizens for Better Forestry v. U.S. Dep't of Agric*., 341 F.3d 961, 969-70 (9th Cir. 2003)); *TOMAC v. Norton*, 193 F. Supp.2d 182, 187 (D.D.C. 2002) (*citing Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 664 (D.D.C. 1996) (*en banc*) (*aff'd in relevant part*, 433 F.3d 852 (D.C. Cir. 2006)) (in a case "alleging procedural violations, the requisite showing of injury requires a demonstration that the challenged act performed with improper procedures

Rather, the focus must be on the qualitative nature of injury, regardless of how small it may be.[35]

To establish procedural standing, a plaintiff must demonstrate that it is accorded a procedural right to protect its interests and it has concrete interests that are threatened.[36] The City satisfied the first requirement because IGRA accords appropriate state and local governments a procedural right to protect their interest when off-reservation gaming proposals are involved.[37] The City's officials are just such appropriate local officials under federal regulations[38] because the City is located within a 25-mile radius of the proposed gaming establishment and would be directly impacted by approval of a gaming establishment within approximately 10 miles of city limits.[39]

In the present case, there is no question that Appellant has pled adequate injury to demonstrate standing.

1. The City Showed Violation of Procedural Rules

The City's complaint alleged that the NIGC violated the procedures established under IGRA for approval of gaming ordinances and making an Indian lands determination that the NIGC found necessarily involved a restored lands finding.[40] IGRA

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will cause a distinct risk to plaintiff's particularized interests.").

[35] *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987).
[36] *Douglas County v. Babbitt* 44 F.3d 1495, 1500 (9th Cir 1995).
[37] 25 U.S.C 2719(b)(1)(A).
[38] See 25 C.F.R. 292.2 ("Surrounding community means local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment. A local government or nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment").
[39] Through traffic, crime, emergency services, pollution, etc. as alleged in the City's First Amended Complaint at Paragraph 65.
[40] See First Amended Complaint at Paragraphs 55-60.

requires that the NIGC exercise its jurisdiction only on Indian lands and no where does it allow contingent approvals of a gaming ordinance.[41]

The City's concrete procedural interest is in what is commonly known as the two-part determination test found at Section 20 of IGRA[42] applicable to Indian gaming on Indian lands acquired after October 17, 1988. This test generally prohibits gaming on newly acquired Indian land unless the Secretary of the Interior can find that there is no detrimental effect on surrounding communities after consultation with local officials.[43] However, if the newly acquired Indian lands are "restored lands" (as the NIGC has concluded they are), then the consultation and required no detrimental effect finding do not apply. The application of the two-part process is extremely significant for the City.

Congress included Section 20 for an important reason. Congress knew that tribes interested in gaming might attempt to locate casinos in areas where they can make the most money--which are not necessarily traditional tribal lands. Anticipating these possible attempts, Congress sought to provide state and local governments with a voice in such decisions through Section 20 consultation with local governments and required gubernatorial approval of a gaming proposal. Thus, Section 20 requires an important balancing of the Tribe's interest against the adverse effects on local communities. Such rights provide the only check on federal preemption of state and local government control over the most basic powers of state and local governments such as the power to regulate land use, protect the environment, and provide for education, transportation and other government services. *See Artichoke Joe's Cal Grand Casino v. Norton*[44] ("IGRA is an

[41] 25 U.S.C. 2710 (jurisdiction on "Indian lands").
[42] 25 U.S.C. 2719(a) and (b)(1).
[43] *Id.*
[44] 353 F.3d 712, 715 (9th Cir. 2003).

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.")

IGRA does not authorize the NIGC to determine whether the two-part determination process set forth in Section 20 is required by using a restored lands analysis. In fact, the Interior Department's Section 20 regulations clearly indicated that before land is placed in trust, it is the responsibility of the Department, and not the NIGC to make restored lands determinations. *See* 25 CFR 292.3(b) (requiring a request for an opinion regarding whether an exception to Section 20 prohibition applies to be submitted to the Office of Indian Gaming within the Department of Interior for any land not yet acquired in trust). [45]

By approving the ordinance before the lands were taken into trust, the NIGC violated IGRA procedures. As shown below, this violation, when read with another section of IGRA, creates a serious potential to harm the City.

2. The City's Concrete Interests Will be Affected.

The gaming ordinance, and the restored lands determination on which it relies, if allowed to stand, will prevent consideration of the effects of the proposed casino on the surrounding community, including the City. If the Interior Department relies on the NIGC's restored lands finding, the Secretary will not have to consult with appropriate local officials, including those that represent the City, will not determine whether the

[45] 25 U.S.C. § 2719(b)(1)(B)(iii).

proposed gaming will be detrimental to the surrounding community, and will not seek the concurrence of the Governor of the State of Washington for the casino.[46]

The District Court stated that "[d]efendants' approval of the Cowlitz gaming ordinance is currently inoperative because the Cowlitz tribe does not own the tract of land on which gaming is proposed."[47] The District Court did not explain its reasoning, but apparently was relying on a contention raised in the United States' brief that if the land is not taken into trust, the Cowlitz will be unable to establish a lawful gaming operation on the Parcels and the predicted injuries will never occur.[48] In other words, the Secretary of Interior will have to take a future action before an injury will actually occur. That argument fully ignores the procedural protections the City may otherwise have if the Department were to conduct an independent restored lands determination.

The fact that other determinations are necessary does not preclude a finding of procedural standing. In *Bennett v. Spear*[49], for example, the Supreme Court rejected the argument that the plaintiffs lacked standing because another agency retained ultimate decision-making authority. In that case, the plaintiffs met their standing burden of alleging that their injury--lack of irrigation water--would be redressed if a Fish and Wildlife Service biological opinion were set aside because the Bureau of Reclamation would be unlikely to impose minimum water restrictions in the absence of a biological opinion. The Supreme Court reversed the lower court because the biological opinion enhanced the risk of an unfavorable future ruling.

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[46] 25 U.S.C. § 2719(b)(1)(A).
[47] District Court Order at Page 5.
[48] United States Motion to Dismiss at Page 10.
[49] 520 U.S. 154 (1997).

In this case, the situation is more egregious. The NIGC acted without jurisdiction, and its decision will not only influence the Department's ultimate choice, NIGC's action negates consultation duties that could preclude the proposed gaming. As in *Bennett*, if the restored lands opinion and gaming ordinance are allowed to stand, the City will lose a valuable procedural right to prevent a detrimental impact on the surrounding community prior to taking the land into trust for casino purposes. Inversely, if the gaming ordinance and restored lands determination is vacated after remand from this Court, then the Secretary will not be able to rely on the restored lands determination to avoid the required finding under IGRA of no detrimental effect on the surrounding community.

Other cases also support a finding of procedural injury related to intermediate agency actions and the effect of such actions on future discretionary agency action. For example, in *National Parks Conservation Ass'n v. Manson*, the D.C. Circuit allowed a challenge to a Department of Interior letter because of the role it would play in state proceedings.[50] The court held that petitioners who alleged injury by Montana's decision to issue a permit for a coal-fired plant near Yellowstone National Park had standing to challenge an Interior Department letter stating that the plant would not adversely affect the park. The court considered the effect of the letter on how the Montana Department of Environmental Quality would use its discretionary authority to conduct an independent evaluation.[51] Likewise, the court found that the District Court should have considered the effect the restored lands opinion and gaming ordinance could have on the Secretary's review of the casino's impact on surrounding communities and applicability of the two-part determination process.

[50] 414 F.3d 1(D.C. Cir. 2005).
[51] *Id.*, 414 F. 3d at 6-7.

The Supreme Court has also been skeptical about uncertainty of harm arguments to defeat standing made in other contexts. In an action seeking a declaration as to whether the Boulder Canyon Project imposed acreage limitations on lands that already had vested rights to Colorado River water, landowners who intervened were held to have standing, based on their assertions that if successful in the suit, they could purchase available excess farmland below market price for irrigated land.[52] The Supreme Court stated that despite the uncertainty of whether present landowners would sell to the parties, it would be unlikely that any of the owners of excess lands would sell land at below current market prices absent the applicability of the statute, and that excess lands would likely become available if the statute were applied.[53]

Similarly, in *Tyler v. Cuomo*[54], Plaintiff homeowners challenging a proposed low-income housing project successfully showed that their injury was redressable. The redress being sought was compliance with the terms of a memorandum of agreement, including consultations with the public if members of the public, believed that the agreement's terms were not being carried out. Changes could still be made as a result of consultations with the public, and the district court erred in prejudging the outcome of those consultations when it concluded that no meaningful changes could result.

The District Court engaged in its own speculation at the invitation of the United States by noting that the Secretary might not take the land into trust. As the administrative proceedings stand now, there is an Indian restored lands determination

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[52] *Bryant v. Yellen*, 447 U.S. 352, 366-368, 100 S. Ct. 2232, 65 L. Ed. 2d 184, (1980) (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 261-262, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)).

[53] *Bryant*, 447 U.S. at 367.

[54] 236 F.3d 1124, 1133-1134 (9th Cir. 2000).

issued by a federal official. Even though this was error, the determination could be afforded substantial weight even though the NIGC is without jurisdiction to make such a determination because the Cowlitz tribe does not own the land in trust and because Secretary of the Interior has the exclusive authority to make such a determination. The Appellant should not be dismissed from court based on the possibility that the Secretary might agree with the Appellant's position over that of a statutorily-established commission the Secretary oversees.

V. THE INJURY IS FAIRLY TRACEABLE TO THE CHALLENGED ACTION OF THE DEFENDANT.

The NIGC attempts to sidestep judicial review of its actions by arguing that, because it made its approval of the Tribe's gaming ordinances is contingent upon the United States taking the casino site into trust, the harms alleged by the City may never come to pass.[55] Thus, the argument follows that the City's harm is not traceable to the NIGC gaming ordinance approval.

This argument misses the mark, since it fails to acknowledge that, but for the NIGC's approval of the Tribe's Amended Gaming Ordinance and the restored lands determination when it lacked jurisdiction to even consider it, the City would face no threat, because no gaming could ever take place until the site had met the requirements for Indian lands established by IGRA. Moreover, the argument ignores the fact that the NIGC's decision impacts the actions the Department takes, and my influence the Department's decision on the underlying trust acquisition. Courts have repeatedly found

[55] *See e.g.*, U.S. Motion to Dismiss at 11 ("If Interior does not take the land into trust, the Cowlitz will be unable to establish a lawful gaming operation on the Parcels and the predicted injuries will never occur.").

that parties challenging allegedly improper actions had standing to do so, since the challenged action would authorize conduct that would otherwise be barred by law. In such cases (including those involving challenges to improperly-approved Indian casinos):

> [t]he necessary linkage [for standing] is easy to identify . . . [since the plaintiffs'] injuries due to operation of the casino are traceable to the Bureau's actions . . . [which are] a necessary prerequisite to both Class II and Class III gaming . . . . These factors not only establish that the individual [plaintiffs'] injuries would be "fairly traceable" to the defendant's actions, but they also help to satisfy the redressibility requirement – since a decision *not* to take the land in trust would prevent the Pokagon from building a casino on that site and from satisfying the requirements of IGRA for casino gambling.[56]

The Ninth Circuit noted a plaintiff may claim "procedural standing" when, for example, it seeks to enforce a procedural requirement the disregard of which could impair a concrete interest of the plaintiff.[57] That is exactly what has happened here. The statutory scheme Congress established sought to balance Indian gaming while protecting the impacts of such gaming on surrounding communities. By making a restored lands determination ahead of the Interior Department's land-to-trust decision, the NIGC has disregarded the procedural safeguards provided to protect the City's concrete interests.

The burden of proving redressability in cases involving procedural injuries is lessened.[58] In procedural injury cases, redressability is sufficiently established by showing "some possibility that the requested relief will prompt the injury-causing party to

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[56] *TOMAC*, 193 F. Supp.2d at 188 (internal citations omitted) (italics in original opinion).
[57] *Churchill . Babbitt*, 150 F. 3d 1072, 1078 (1998), *citing Lujan v. National Wildlife Federation* 497 U.S. 871 (1990).

[58] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (person living next to proposed site for federally licensed dam had standing to challenge agency's failure to prepare environmental impact statement)

reconsider the decision that allegedly harmed the litigant."[59] Thus, the plaintiffs in an environmental action asserting a procedural injury need not show that the ultimate outcome of following the proper procedure would necessarily be different.[60] A plaintiff seeking injunctive relief need only show that the requested injunction will preserve the environmental status quo pending federal review.[61]

The same applies here. The City need not show that the Department will necessarily determine that the two-part determination process applies or that the Department will acquire the land in trust. Rather the City need only show that invalidation of the gaming ordinance and the underlying restored lands analysis will preserve the status of the Department's review and require the Department to conduct the necessary restored lands analysis.

VI. IT IS NOT ONLY LIKELY, IT IS CERTAIN THAT THE CITY'S INJURIES WOULD BE REDRESSED BY A FAVORABLE DECISION.

The City sought a declaratory judgment that the NIGC's contingent approval of the Tribe's Amended Gaming Ordinance and related actions violate IGRA. The City also sought an order preventing the NIGC from acting upon any other ordinance adopted by the Tribe until the proposed casino site has been taken into trust and until the Tribe exercises governmental jurisdiction over the site, consistent with the mandate of IGRA.

Based on this requested relief, if the Court vacated NIGC ordinance approval,

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[59] *Massachusetts v. EPA*, 549 U.S. 497, 517-518, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007).

[60] Since the City is complaining of their environmental procedural protections under IGRA Section 20, this is at least in part an environmental action. See *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1094 (9th Cir. 1998) (plaintiffs challenging grant of grazing permit without state certification concerning water quality standards not required to prove that certification would be denied or would require change in grazing operation).

[61] *South Carolina Wildlife Federation v. Limehouse*, 549 F.3d 324, 330 (4th Cir. 2008) (plaintiffs had standing to seek injunction of bridge construction based on allegedly improper environmental impact statement).

gaming would not occur at the proposed casino site and the City will not suffer the injuries it has alleged. Accordingly, the City's requested relief will redress the injuries alleged by the City.

The City has a sufficiently compelling stake in the outcome of this case to give rise to standing to sue. The City's procedural injury flows from the NIGC's decision to approve the Tribe's Amended Gaming Ordinance for class II gaming on lands located in close proximity to the City, despite the fact that the proposed casino site does not constitute "Indian lands" for purposes of IGRA. As a result, the "relaxed standards" for standing articulated by the Supreme Court are applicable.

Here, the City is one of the municipalities that will be most affected by the Tribe's proposed casino project. As a direct result of the NIGC's approval of gaming on non-Indian lands, the City is certain to be denied consultation rights under Section 20 and is far more likely to be unnecessarily burdened with housing stress, traffic congestion and significantly increased vehicle emissions, as well as societal impacts that include increased crime, bankruptcy, divorce, and domestic violence. The City may also be burdened with the problems associated with increased mental and physical health issues associated with problem gambling. The City's claimed injuries are sufficiently particularized to present an alleged injury in fact.[62]

The Ninth Circuit has recognized these types of "proprietary interests" as giving rise to a city's procedural standing.[63] The City has actively participated in both the NIGC's ordinance review process and BIA's fee-to-trust process precisely to protect the City's interests directly threatened by the NIGC's decision on the Tribe's gaming

[62] *Roseville v. Norton*, 219 F. Supp. 2d 130 (D.D.C. 2002).
[63] *See City of Sausalito*, 386 F.3d at 1197 (noting that cognizable injuries to a municipality's proprietary interests "are as varied as the municipalities' responsibilities, powers, and assets.").

ordinances.[64] Because the NIGC has already approved gaming on the Tribe's proposed casino site, if the site is taken into trust, gaming on the site will follow, making harm more likely to the City's interests.

Even if the Secretary of Interior eventually determines that the land qualifies for a restored lands finding and makes a land-to-trust decision, if the gaming ordinance is set aside, approval of the gaming ordinance will be required again. It is possible that the NIGC may re-approve what was submitted but that is not necessarily the case. To establish standing, a plaintiff need not show the certainty of gain if successful; an enhanced probability of gain suffices.[65] See also *Kootenai Tribe of Idaho v. Veneman*[66] (redressability is established when a plaintiff shows that a revised environmental impact statement may redress the plaintiffs' alleged injuries).

Nor is it necessary that the requested relief would completely relieve the plaintiff's injury; it is enough that it would reduce the injury. "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury".[67]

In *Tozzi v. HHS*[68], a manufacturer of PVC medical products that release dioxin when incinerated had standing to challenge the Department's decision to upgrade dioxin from a substance "reasonably anticipated to be a carcinogen" to a "known carcinogen." Even though municipalities and healthcare providers would not necessarily reverse

[64] AR 001667-001673; AR 000701-730; AR 001454-1458.

[65] *Women's Equity Action League v. Cavazos*, 879 F.2d 880, 886 (D.C. Cir. 1989) (*citing Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280-281 n.14, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978)) .

[66],313 F.3d 1094, 1113 (9th Cir. 2002).

[67] *Larson v. Valente*, 456 U.S. 228, 243 n. 15, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982).

[68] 271 F.3d 301, 309-310 (D.C. Cir. 2001).

decisions to limit PVC use, a court's ruling to set aside the upgrade decision would remove, and activists could no longer point to, an authoritative determination by the federal government that dioxin is known to cause cancer in humans. Further, the plaintiff could show that a government report widely accepted as comprehensive does not list dioxin as a known carcinogen. State and local governments would be less likely to regulate dioxin and healthcare companies would be less likely to stop using PVC. Thus, reclassifying dioxin would redress some of the plaintiff's injuries.

Likewise, the gaming ordinance approval is based on a determination by the NIGC that the lands to which the ordinance applies are Indian lands because they are restored lands. A court's ruling to set aside the ordinance and restored lands opinion would remove, and casino advocates could no longer point to, an authoritative determination by the federal government that the lands are restored lands. Thus, setting aside NIGC's approval and the restored lands opinion would redress some of the City's injuries.

VII. THE CITY HAS ALSO ESTABLISHED PRUDENTIAL STANDING

The District Court did not rule on the United States claim that the City did not have prudential standing under Section 702 of the Administrative Procedures Act (APA).[69] The City, however, satisfies prudential standing as well.

Section 702 of the APA allows challenges to administrative action by plaintiffs "adversely affected or aggrieved by agency action within the meaning of the relevant statute."[70] While the Supreme Court has interpreted Section 702 as imposing a prudential standing requirement, such standing is established where the interest that a

[69] District Court Order at page 8.
[70] 5 U.S.C. § 702.

plaintiff seeks is to protect is "arguably within the zone of interests to be protected or regulated by the statute.[71]

The Ninth Circuit has made clear that to establish standing, the City "need only show that [its] interests fall within the 'general policy' of the underlying statute".[72] The "test [for prudential standing] is not meant to be especially demanding."[73] Rather, "a court should deny standing under the zone of interest test only if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.[74] Moreover, as stated by the D.C. District Court in *TOMAC v. Norton*[75], the "focus [for prudential standing] is 'not on those who Congress intended to benefit, but on those who in practice can be expected to police the interests that the statute protects.'"

In *Kansas v. United States*, the Tenth Circuit applied this zone of interest test in a case that is directly on point, since it arose from a challenge by the State of Kansas to the NIGC's failure to make an appropriate Indian lands determination with respect to a parcel of land on which the Miami Tribe of Oklahoma sought approval for Class II gaming.[76] In *Kansas*, the United States argued that the state lacked standing to sue under the APA because, "IGRA gives the State no stake in the NIGC's decision to issue the Miami Tribe a permit for Class II gaming [under 25 U.S.C. § 2710] on 'Indian lands' within the State."[77] The NIGC advanced this same argument in the proceedings below.[78]

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[71] *National Credit Union Admin. V. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998).
[72] *City of Sausalito*, 386 F. 3d 1186, 1200 (9th Cir 2004).
[73] *Clarke v. Secs. Indus. Ass'n* 479 U.S. 388, 399 (1987).
[74] 386 F. 3d at 1200.
[75] 193. F. Supp. 2d 182, 187 (D.D.C. 2002), *citing Florida Audubon Soc. v. Bentsen*, 94 F. 3d at 664.
[76] *Kansas v. United States*, 249 U.S. 3d 1213 (10th Cir 2001).
[77] *Id.*, 249 U.S. at 1222.
[78] See United States Motion to Dismiss at page 13.

The Tenth Circuit rejected this argument because it "*presupposes* the tract constitutes Indian lands under IGRA—a proposition very much in debate."[79] Because the resolution of the "Indian lands" question would directly affect whether Kansas would maintain governmental control or impose regulations with respect to the parcel, the Tenth Circuit concluded that the State's interest in the sovereign status of land fell within the zone of interests that Congress sought to regulate and protect:

> We are loathe to conclude that in enacting IGRA, Congress intended a State to have no say whatsoever in the largely dispositive question for Indian gaming purposes of whether a tract of land inside the State's borders constitutes "Indian lands," within the meaning of IGRA. *Cf. State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1108-09 (8th Cir. 1999) (recognizing the issue of whether a tribe's internet lottery occurs on "Indian lands" as critical to the application of IGRA, and remanding to the district court for a determination in the first instance). Such a construction of IGRA would set an unwarranted precedent by placing the sovereign status of land within the State of Kansas wholly in the hands of the Miami Tribe and the NIGC. Surely Congress did not intend to render the State powerless to protect its sovereign interests in this situation.[80]

Also see *City of Sausalito v. O'Neill*[81], where the court found that injuries alleged by the City fell within the general policies of the Marine Mammal Protection Act, the Public Lands Management Act, Migratory Bird Treaty Act, and other laws to support procedural standing.

Application of the Ninth Circuit's analysis in *City of Sausalito* and the Tenth Circuit's analysis in *Kansas* demonstrates that the City's claims fall within the "zone of interest" that Congress sought to protect under IGRA. Congress enacted IGRA in order to govern the operation of gaming by Indian tribes on Indian lands.[82] In doing so,

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[79] *Kansas*, 249 U.S. at 1222.
[80] *Id.*, 249 F. 3d at 1223.
[81] 386 F. 3d 1186, 1197 (9th Cir 2004).
[82] 25 U.S.C. §§ 2701-2721.

Congress expressly took the interests of local communities into account where, as here, gaming was proposed for off-reservation land.[83] IGRA also mandates the consideration of local governmental interests, land use, NEPA requirements, and provides for mitigation to local communities for the effects of casinos.[84] These mandated considerations are within the City's zone of interest and accordingly establish the City's prudential standing.

VIII. THE DISTRICT COURT'S DETERMINATION THAT IGRA DOES NOT REQUIRE THAT AN NIGC-APPROVED GAMING ORDINANCE APPLY ONLY TO CURRENTLY-EXISTING INDIAN LANDS IS ERRONEOUS.

The District Court ruled "there is no requirement that the [Commission] determine that a gaming ordinance only apply to currently existing lands prior to deciding whether to approve a submitted ordinance."[85] The argument and ruling are wrong applying the plain wording of the statute, which says, "[a]n Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction…."[86] (emphasis added). IGRA defines Indian lands as lands within the limits of any Indian reservation and land held in trust by the United States for the benefit of an Indian tribe or individual.[87] The lands the NIGC-approved gaming ordinance applies to are not within the limits of a reservation, nor on lands the Secretary holds them in trust. Accordingly,

[83] *See* § 2719(b)(1)(A) (permitting gaming on trust lands acquired by the Secretary after October 17, 1988 only when the interests of the neighboring communities have been considered unless certain exceptions apply).
[84] *See e.g.*, 25 U.S.C. § 2710(b)(2)(B)(v) (allowing the Chairman of the NIGC to approve class II gaming where net revenues will "help fund operations of local government agencies."
[85] See District Court Order at page 6.
[86] 25 USC § 2710(b).
[87] 25 USC § 2703(4).

they are not Indian land, and are beyond the jurisdiction of the MIGC under the plain terms of the statute.

Other than the above erroneous statement, the District Court did not reach the substance of the City's arguments concerning the lawfulness of the NIGC approving the ordinance and making an Indian lands determination prior the Secretary acting on the fee-to-trust application. That finding, as noted above, is not only contrary to the plain wording of the statute but also to a number of cases the City cited to the court.[88]

IX. THE ALLEGATIONS SHOW STANDING AT THE PLEADING STAGE

The Appellant's claim was dismissed under a 12(b)(1) motion conducted at the pleading stage. Courts have held mere allegations of injury resulting from the defendant's conduct may be sufficient to meet standing requirements, at least at the pleading stage.[89] At the pleading stage, the City's allegations should be sufficient to proceed in light of the facts that the gaming ordinance approval facilitates the establishment of the casino without review of its impacts on the surrounding community.

Significantly missing from the United States' briefing below and the District Court decision is any assertion or citation to facts that the NIGC's decision, including the restored Indian lands determination, should be afforded no weight and the Secretary is free to disregard such determination. If such an assertion was made, the United States

[88] *Kansas v. United States*, 249 F.3d 1213, 1228 (10th Cir. 2001); *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 2007 U.S. Dist. LEXIS 29561, (W.D.N.Y. April 20, 2007) (*Citizens II)*; *Citizens v. Kempthorne*, 471 F. Supp.2d 295, 308 (2007); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp.2d 1213 (D. Kan. 1998) (*Miami I*); and *State of Kansas ex rel. Graves v. United States*, 86 F. Supp.2d 1094 , 1099-1100 (D. Kan. 2000).

[89] *Whitmore v. Arkansas*, 495 U.S. 149, 155-156, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990); *see Warth v. Seldin*, 422 U.S. 490, 508, 518, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

standing argument would have been stronger. Indeed if that was the position of the United States, this appeal might not have been filed.

Moreover, the City expects that it could show that where the Secretary applies the Section 20 two-part determination, few Indian gaming operations are approved on post-1988 acquired lands.

The City's case should not be dismissed based on lack of standing at the pleading stage without the discovery of additional facts.

CONCLUSION

For the foregoing reasons, Appellant, the City of Vancouver requests a decision that the City has standing to challenge the approval of the National Indian Gaming Commission's approval of Cowlitz tribal gaming ordinance. Appellant further requests a remand to the United States District Court, Western District of Washington to consider the remainder of the City's arguments.

Respectfully submitted
TED H. GATHE
City Attorney
City of Vancouver, Washington

Brent D. Boger
Assistant City Attorney
City of Vancouver, Washington.
210 E. Thirteenth Street
P.O. Box 1995
Vancouver, Washington 98668
(360) 487-8500

CERTIFICATE OF COMPLIANCE

Pursuant to 9TH CIRC. R. APP. 32-1, the undersigned certifies that this brief contains 8,122 words based on the word processing program used to prepare the brief (Microsoft Word 2003), excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 12 point Times New Roman font.

DATED this 8th day of February, 2010.

. CITY ATTORNEY'S OFFICE
VANCOUVER, WASHINGTON

By: /s/ Brent D. Boger
Brent D. Boger, WSBA No. 22359
210 East 13th Street, 2nd Floor
P.O. Box 1995
Vancouver, WA 98668-1995
Tel: (360) 487-8500
Fax: (360) 487-8501
brent.boger@ci.vancouver.wa.us

Attorney for Appellant City of Vancouver

STATEMENT OF RELATED CASES

Pursuant to 9TH CIRC. R. APP. 28-2.6, the City of Vancouver states that it is not aware of any cases pending before this Court that are related to the one at bar.

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2010, I electronically filed the foregoing BRIEF OF APPELLANT CITY OF VANCOUVER with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will send notification of such filing to the following individual(s):

Steven Miskinis
Attorney for Defendants
Indian Resources Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 44378
Washington, D.C. 20026-4378
Phone: (202)305-0262
Fax: (202)305-0271
steven.miskinis@usdoj.gov

Gina Allery
Attorney for Defendants
Indian Resources Section
Natural Resources Division
Department of Justice
601 D. Street, NW
Washington, D.C. 20004
(202) 305-0466
gina.allery@usdoj.gov

Rebecca S. Cohen
Attorney for Defendants
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Phone: 206-553-7970
Fax: 206-553-4073
rebecca.cohen@usdoj.gov

I certify that the Excerpts of the Record were mailed to the Court and the parties as listed above on February 8, 2010.

DATED this 8th day of February, 2010.

CITY ATTORNEY'S OFFICE
VANCOUVER, WASHINGTON

By: /s/ Brent D. Boger
Brent D. Boger, WSBA No. 22359
210 East 13th Street, 2nd Floor
P.O. Box 1995
Vancouver, WA 98668-1995
Tel: (360) 487-8500
Fax: (360) 487-8501
brent.boger@ci.vancouver.wa.us