No. 08-35954

In the
United States Court of Appeals
for the
Ninth Circuit

CITY OF VANCOUVER,

Plaintiff/Appellant.

v.

GEORGE SKIBINE, Acting Chairman, National Indian Gaming Commission, NATIONAL INDIAN GAMING COMISSION

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

REPLY BRIEF OF APPELLANT CITY OF VANCOUVER

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A. INTRODUCTION

In this case, the City is challenging Cowlitz Tribal Ordinance 07-03. Contrary to the National Indian Gaming Commission's argument in its Answering Brief, the City is not challenging the November, 2005 NIGC acting General Counsel opinion that the lands the ordinance applies to are restored lands. ("Restored Lands Opinion".)[1]

The Restored Lands Opinion, however, is relevant to the Ordinance 07-03 challenge because the Opinion serves as both the erroneous rationale for the NIGC to approve the Ordinance on non-Indian lands and because its application in another tribal gaming regulatory process is what causes the City harm. The Opinion's application in the Secretary of Interior's gaming trust approval process threatens harm because it could be applied to deny the City its rights under the two-part determination required under Indian Gaming Regulatory Act (IGRA) Section 20.[2]

In addition, the NIGC's Answering Brief suggests that the City may have its concerns resolved under the National Environmental Policy (NEPA).[3] Ordinance 07-03 actually harms the City's rights under NEPA because the Ordinance was written to short circuit the NEPA process by

[1] AR 001643-001659.
[2] 25 USC § 2719(b)(1).
[3] Answering Brief, page 27.

replacing mitigation contained in the Final Environmental Impact Statement (FEIS) based on an invalidated Memorandum of Understanding (MOU) between the Cowlitz Tribe and Clark County, Washington.[4] Ordinance 07-03 could deprive the City of its ability to participate in the preparation of supplemental EIS under NEPA.

B. NIGC APPROVAL OF ORDINANCE 07-03 HARMS THE CITY BECAUSE OF ITS POTENTIAL IMPACT ON THE SECRETARY'S LAND-TO-TRUST PROCESS FOR INDIAN GAMING

The NIGC argues that the Opinion is not properly before the court because it has no connection to the City-challenged Ordinance 07-03 the Commission approved[5] and because the City made no allegations in its complaint regarding the Opinion.[6] These arguments are without merit because the Restored Lands Opinion is the sole (and erroneous) basis of NIGC-claimed jurisdiction to approve the Ordinance 07-03 on non-Indian lands. NIGC has jurisdiction only on Indian lands and there is no basis to suggest the site-specific Ordinance 07-03 applies to Indian lands other than

[4] See argument under heading C.
[5] Answering Brief, page 22.
[6] Answering Brief, pages 35-37.

that Opinion.[7] Moreover, under federal notice-pleading rules, the allegations in the City's complaint are a sufficient basis to present the Restored Lands Opinion to the Court to show harm to establish standing.[8]

1. Invalidation of the Ordinance Will Eliminate or Greatly Reduce the Likelihood the Secretary of Interior Will Use the Restored Lands Opinion to Deprive the City and Public of Consultation Rights under 25 USC § 2719(b).

The basis of this suit is the NIGC acted illegally when it acted to approve Ordinance 07-03, which was specifically applicable to land the Cowlitz Tribe did not own or had not been taken into trust.[9] In the proceedings below, the City pointed to case law and the plain language of the statute to establish that the NIGC acted without jurisdiction in approving the ordinance because the lands were not Indian lands.[10] The District Court never reached the merits of that challenge because it accepted the NIGC's argument that NIGC approval of Ordinance 07-03 did not harm the City. The Restored Lands Opinion demonstrates how the City could be harmed.

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[7] The City is aware of no other basis claimed in this litigation to establish jurisdiction for the NIGC to approve ordinances applicable to the proposed casino site.
[8] Federal Rules of Civil Procedure, Rule 8(a).
[9] City First Amended Complaint, ER 000065-000066.
[10] See e.g., City's Motion for Summary Judgment, pages 3-5.

The harm to the City is the potential application of the Restored Lands Opinion under IGRA.[11] IGRA prohibits Indian gaming on lands acquired after October 17, 1988, unless one of the two following relevant exceptions applies: (1) the Secretary, among other things, consults with state and local officials and determines that the gaming would not be detrimental to the surrounding community,[12] or (2) the lands are taken into trust as the restoration of Indian lands for an Indian tribe restored to federal recognition.[13] Since The Restored Lands Opinion directly relates to issues highly relevant to the restored lands exception under Section 20, it has a great potential to deprive the City of its consultation rights under the first part of the two-part determination.[14]

If a court were to conclude that the Restored Lands Opinion does not convert the lands into Indian lands and therefore cannot form the basis of NIGC jurisdiction in approving Ordinance 07-03, such a conclusion would

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[11] 25 USC § 2719.
[12] 25 USC § 2719(b)(1)(A).
[13] 25 USC § 2719(b)(1)(B). Other exceptions not directly at issue here allow gaming without consultation apply if the gaming is on lands taken into trust as an initial reservation or as a land claim settlement.
[14] The importance of Section 20 consultation is demonstrated by the fact that as of early 2008, only four Indian gaming proposals have been approved after going through such consultation in the 20 years IGRA has been in effect. Murphy, *Betting the Rancheria: Environmental Protections as Bargaining Chips under the Indian Gaming Regulatory Act*, 36 B.C. Ent'l Law Rev. 171 at192, note 171 and accompanying text (2009).

make Secretary of the Interior reliance on the Opinion unlikely and would tend to preserve the City's rights under Section 20. These rights are very important to the City.

Here we have an ordinance based on the Restored Lands Opinion approved by a commission in the Secretary's Department.[15] If the Secretary defers to the NIGC, approval of Indian gaming on the site is much more likely. If the Secretary does not defer to the NIGC because the ordinance was invalidated, the Secretary can only approve gaming after finding no detrimental impact on the surrounding community. Without Ordinance 07-03, the Secretary will have to independently evaluate the restored lands status of the Tribe.

In response to the harm to the City's interests caused by NIGC approval of the ordinance flowing from the Restored Lands Opinion, NIGC's answering brief argues: (a) the City never pled the Restored Lands Opinion in its complaint,[16] (b) the City should have challenged the ordinance that initially allowed gaming (Ordinance 05-02), not 07-03,[17] and (c) the harm may never happen if the Secretary does not take the land into trust.[18]

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[15] 25 USC § 2704(a).
[16] Answering Brief page 23.
[17] Answering Brief pages 21-23.
[18] Answering Brief pages 23-27.

Noticeably missing from the Answering Brief is an argument that the City will not be harmed if the Secretary applies the Restored Lands Opinion in his approval process under 25 USC § 2719(b)(1)(A).[19]

a. The City's Allegations in its First Amended Complaint Are Sufficient.

The NIGC suggests that since the City did not plead a violation of 25 USC § 2719(b), it cannot argue a violation on appeal.[20] This suggestion shows a fundamental misunderstanding of the City's argument because the City is not arguing a violation of 25 USC § 2719(b) because no action has been taken under that statute. What the City is arguing is that NIGC approval of Ordinance 07-03 and the Restored Lands Opinion it is based on

[19] Also missing from the NIGC argument is a discussion of the recent *Carcieri v. Salazar*___ U.S. ___, 129 S.Ct. 1058 (2009) Supreme Court case decided after the District Court decision in the instant case. *Carcieri* held that the Secretary cannot take land into trust land for any tribe that was not recognized in 1934 when the Indian Reorganization Act was adopted. The Restored Lands Opinion concluded the Cowlitz lost their recognition before 1934 in order to reach the conclusion that it was a tribe restored to federal recognition. (AR 001647-001650). Absent an amendment to the Indian Reorganization Act, the Secretary will have to disregard the Restored Lands Opinion to conclude the Tribe was recognized in 1934 to take the land into trust. Curiously, the NIGC does not rely on *Carcieri* to argue the unlikelihood of the land being taken into trust.

[20] Answering Brief pages 35-38.

will make the taking of the land into trust for gaming purposes more likely under the restored lands provision of Section 2719.

The complaint did not plead 25 USC § 2719(b) because it was not necessary to plead that statute to show a violation of 25 USC § 2710. The only necessary allegation for a violation of that statute is that the NIGC approved a gaming facility specifically applicable to non-Indian land. Section 2719(b) only became an issue in this action when the NIGC raised a lack of standing defense. The City argued in its Opening Brief that it has standing because the potential application of the Restored Lands Opinion in the process set forth at 25 USC § 2719(b) will harm it. Under federal notice pleading practice, the City's allegation of harm is sufficient to give the NIGC fair notice of its claim without pleading the exact legal mechanism of harm. Federal pleading rules do not require the City to anticipate the NIGC's standing argument and plead the precise manner how the ordinance will cause the City harm.

b. The Restored Lands Opinion is Necessary for the Approval of the 2007 Ordinance.

As the City argued in the proceedings before the District Court and in its Opening Brief, the NIGC was without jurisdiction to approve Ordinance

07-03.[21] This was also true of Ordinance 05-02 because both are dependent on the Restored Lands Opinion as the only argued reason the NIGC had jurisdiction to approve these ordinances.[22] The Restored Lands Opinion is not a basis to give the NIGC jurisdiction over non-Indian lands in any site-specific ordinance.

25 USC § 2710, the statute under which the NIGC approved 07-03, authorizes Indian gaming only on Indian lands within the tribe's jurisdiction. IGRA elsewhere 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 an individual.[23] Both Ordinances 07-03 and 05-02 were approved even though they applied to a non-Indian lands specific site. The NIGC approved both Ordinances based on the Restored Lands Opinion.

The interplay between the NIGC ordinance approval process contained in 25 USC § 2710 and the Secretary's land-to-trust process for Indian gaming under 25 USC § 2719 is at the heart of this case. The two statutes when read together contemplate that the NIGC only act on a site-specific ordinance after the land has been taken into trust. The Cowlitz tribe, however, applied for NIGC site-specific ordinance approval before the land

[21] Answering Brief pages 26-27;
[22] City Motion for Summary Judgment, pages 9-11.
[23] 25 USC § 2307(4).

was in trust. This presented the Commission with a situation it never had to face before.[24] The NIGC acknowledges that site-specific ordinances are unusual.[25] That is an understatement when it comes to site-specific ordinances applicable to lands not yet taken into trust.

Testimony of the NIGC acting General Counsel to the Senate Indian Affairs Committee indicates that 05-02 was the first site-specific ordinance ever approved before land was taken into trust.[26] When faced with this unique situation, the NIGC got it wrong. Rather than deny the proposed ordinances because it applied to non-Indian land, the NIGC operated under the assumption it was required to approve them and strained to establish jurisdiction through the dubious vehicle of the Restored Lands Opinion. It repeated this error when it approved 07-03, which applied to the same non-Indian land. The only difference between the two ordinances concerning Indian lands was that 05-02 expressly relied on the Restored Lands Opinion while 07-03 did not specify any basis for application to non-Indian land. This is counterintuitive because 05-02 was a standard gaming ordinance that

[24] See testimony of Penny Coleman, acting General Counsel for the NIGC to the Senate Indian Affairs Committee ("[T]he Cowlitz ordinance decision is the only time we have been in a situation where it was a trust acquisition that had not happened and we had a site-specific ordinance."). ER 000442.
[25] Answering Brief, page 9, footnote 3.
[26] See Note 24, *supra*.

considered few site-specific impacts, while 07-03 related largely to environmental and other site-specific matters.

By approving these site-specific ordinances based on the Restored Lands Opinion, the NIGC disrupted the statutory scheme between its jurisdiction and the Secretary's fee-to-trust process under 25 USC § 2719: first land is taken into trust for gaming purposes, then the NIGC approves a site-specific ordinance.[27] NIGC should have rejected both 05-02 and 07-03 because they specific non-Indian lands.

The NIGC apparently believes that once it concludes lands are Indian lands in one ordinance, the lands must be Indian lands for all subsequent ordinances. NIGC cites no authority for its once-and-for-all jurisdiction determination. The Administrative Procedures Act (APA) indicates the contrary. It allows judicial review of the Restored Lands Opinion in connection with a final agency action, such as the NIGC's ordinance approval.[28] Under the Act, "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."[29] The Restored Lands Opinion is just

[27] If the Ordinance is not site-specific, the NIGC could approve the ordinance ahead of the fee-to-trust decision since it is not applicable specifically to any lands, Indian or otherwise.
[28] 25 USC § 2714.
[29] 5 USC § 704.

such a preliminary, procedural, and intermediate agency action. The fact that the NIGC did not bother to mention the Opinion as a basis for jurisdiction does not immunize it from review under the APA.

c. The City Is Not Required to Show Harm with Certainty in Order to Demonstrate Standing.

The NIGC both before the District Court and again in its Answering Brief argued that the Secretary might not take the land into trust for gaming purposes and therefore the City's injuries may never theoretically occur. In response to this argument made before the District Court, the City in its Opening Brief cited cases that found standing even though a project still faced approvals in addition to the one being challenged. The NIGC made no attempt to distinguish those cases in its Answering Brief.

In *Bennett v. Spear*[30], the U.S. Fish and Wildlife Service (USFWS) issued a biological opinion that the long-term operation of the Klamath federal reclamation project will likely jeopardize the continued existence of two species of fish. While the Bureau of Reclamation could choose not to follow the biological opinion, past practice indicated it probably would. The Supreme Court held that this was sufficient to establish standing because if

[30] 520 U.S. 154 (1997).

the opinion were set aside, the Bureau would not impose the water level restrictions the plaintiffs were challenging.

The instant case presents a similar situation to the one in *Bennett*. As in *Bennett*, one Interior Department entity issued an opinion in connection with an approval that had a strong possibility of being relied upon by the agency with final authority. In *Bennett*, USFWS issued the opinion and the Bureau of Reclamation could rely on it to impose water level restrictions. In the case at bar, the NIGC issued the Restored Lands Opinion to approve Ordinance 05-02 and 07-03. There is a strong possibility the Secretary would rely on that opinion to take the Cowlitz land into trust for gaming if the 07-03 is allowed to stand. Judicial disapproval of NIGC's approval of 07-03 will make the Secretary's reliance on the Restored Lands Opinion in its Section 20 process less likely.

The NIGC did not distinguish the D.C. Circuit case of *National Parks Conservation Ass'n v. Manson*[31] where the court allowed a challenge to a Department of Interior letter that indicated a proposed power plant would not adversely affect visibility in Yellowstone National Park. The Montana Department of Environmental Quality (MDEQ) issued a permit after receiving this letter. The D.C. Circuit reversed the District Court's ruling

[31] 414 F. 3d 1 (D.C. Cir 2005).

that the plaintiffs lacked standing because of the impact the Interior's letter had on the state approval process. The D.C. Circuit reasoned that the question of standing turned on the link between Interior's letter and MDEQ's approval of the power plant. Though MDEQ had the ultimate approval authority, it could only exercise it in the face of the letter only after it had written an explanation.

Here, the connection between the NIGC's ordinance and the trust decision is closer. The NIGC is in the same department as the Interior Department. The NIGC made a determination to support its ordinance approval that has a direct bearing on Interior's land-to-trust decision. If Interior is inclined to disagree with the Restored Lands Opinion, it will likely be compelled to engage in a lengthy explanation of why. On the other hand, if a court sets aside the ordinance approval, it is much less likely to rely on the Opinion.

The NIGC also did not distinguish *Tozzi v. HHS*[32] where the D.C. Circuit agreed the plaintiff had standing based on listing dioxin as a known carcinogen. Plaintiff manufactured PVC medical products that released dioxin when incinerated. The court agreed the plaintiff had established standing because the listing would "represent a 'substantial factor' in the

[32] 271 F. 3d 301 (D.C. Cir 2001).

decisions of state and local agencies to regulate products containing dioxin or of healthcare companies to reduce or end purchases of PVC plastics."[33] Setting aside the listing would eliminate an authoritative determination that opponents of the use of PVC pipe could point to.

Like the dioxin listing in *Tozzi*, approval of 07-03 based on the Restored Lands Opinion established an authoritative determination that Indian gaming proponents will point to and the Secretary could rely on in determining to take the land into trust without Section 20 consultation.

The NIGC suggests that the City will still have an ability to challenge if the Interior takes the land into trust for purposes of gaming.[34] What the NIGC fails to note is that the scope of that challenge will be much more limited because taking the land into trust applying the restored lands exception of IGRA based on the Restored Lands Opinion will deprive the City of its consultation under Section 20.

If the NIGC stated its ordinance approval and accompanying Restored Lands Opinion should be afforded no weight its standing argument would be stronger. It does not make such a statement.

[33] *Id.*, at 309-310.
[34] Answering Brief, page 28, footnote 5.

C. THE 2007 ORDINANCE SHORT CIRCUITS THE NEPA PROCESS

NIGC makes the claim in its Answering Brief that "…the City's speculative injuries may never be put at issue because the City's concerns may be resolved through the NEPA process."[35] What the NIGC fails to mention is that Ordinance 07-03 was actually adopted to avoid the preparation of a supplemental EIS under NEPA.[36]

When the Cowlitz Tribe adopted its initial gaming ordinance, 05-02, it contained no significant provision concerning the environment and public health and safety. At the time of its adoption, the ordinance had no enforceable protection for the environment or for the public health and safety for the public or for any local government.[37]

Ordinance 05-02 was transformed by Ordinance 07-03 to add ostensible environmental and health and safety protection. Thus, the character of the Cowlitz gaming ordinance was substantially changed to address the heretofore barely mentioned environmental and public health and safety matters. After 07-03 was adopted, the Cowlitz gaming

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[35] Answering Brief, page 27.
[36] See letter from V. Heather Sibbison, Counsel for Cowlitz Tribe to George Skibine dated October 17, 2007. ER 000166-000167, AR 000774-000775.
[37] Other than the essentially unenforceable statement "[g]aming facilities shall be constructed, maintained and operated in a manner that adequately protects the environment and public health and safety." AR 005325.

ordinances involved more than merely Tribal financial matters and details of how gaming would actually be conducted on site. The ordinance involved environmental matters critically important to local governments.

Ordinance 07-03 approval came as result of litigation and the ultimate invalidation of the Memorandum of Understanding (MOU) between Clark County and the Tribe.[38] After the Cowlitz tribe applied for taking the land into trust, Clark County stated that if the property was used for commercial purposes, the development would pose significant challenges for local governments.[39] In response the County's concerns, the Tribe entered into negotiations with the County with the objective of developing an agreement under which the Tribe would agree to conform the development of the proposed casino to the County's development, health, and safety requirements and traffic regulations.[40]

The County and the Tribe entered into the MOU in an attempt to hold the Tribe accountable to certain state and local regulations.[41] The MOU outlined the process in which the County would provide services to the Tribe

[38] The facts surrounding the MOU and its approval are set forth in the Washington Court of Appeals case of *Alexanderson v. Bd. Commissioners*, 135 Wn. App. 541, 144 P. 3d 1219 (2006).
[39] 144 P. 3d at 1220.
[40] *Id.*
[41] *Id.*

if the BIA approved the Tribe's application.[42] Under the MOU**,** the County agreed to extend water supply through the existing Clark Public Utilities system to the subject land.[43] The County and the Tribe also agreed that the subject land and any structures or uses of the land would be developed in a manner consistent with the county codes that apply at the time of development.[44] Further, the Tribe agreed it would act in a manner consistent with certain applicable state laws and county ordinances.[45]

Local residents brought a challenge to the MOU to the Western Washington Growth Management Hearings Board.[46] The Hearings Board initially determined that it did not have subject matter jurisdiction over the MOU.[47] The Washington Court of Appeals reversed and remanded the Hearing's Board decision.[48] On remand, the Hearings Board invalidated the MOU and the County eventually rescinded it.[49]

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[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] Washington Growth Management Hearings Boards have authority to consider challenges to local government actions concerning compliance with Washington's Growth Management Act. Revised Code of Washington (RCW) 36.70.280.
[47] *Alexanderson v. Clark County*, 2004 GMHB LEXIS 54.
[48] 135 Wn. App. at 550.
[49] 2007 GMHB LEXIS 67; 2009 GMHB LEXIS 88 (County rescinded MOU).

Ordinance 07-03 was intended to replace the MOU.[50] The MOU was heavily relied-upon in the Environmental Impact Statement prepared under the National Environmental Policy Act as mitigation of the casino's impacts.[51] If 07-03 is invalidated, the current final EIS and the project could not proceed until the City had an opportunity to comment on a supplemental EIS. A supplemental EIS would normally have been required since the MOU mitigation relied upon in the original EIS was no longer valid.

Thus, Ordinance 07-03, if allowed to stand, will deprive the City of a valuable procedural right under NEPA - the right to comment on a supplemental EIS as well as comment on the effectiveness of the mitigation in Ordinance 07-03. Invalidation will redress the City's harm by restoring its procedural right to participate in the supplemental EIS process.

The mitigation the FEIS contemplates is no longer valid and purportedly replaced by Ordinance 07-03, under which neither the City nor any member of the public has any rights. Clark County's rights under 07-03 may prove ephemeral as well. It is not clear that the current Tribal Council

[50] ER 000166-000167, AR 000774-000775.

[51] For example, the portions of the EIS concerning public services relied on the MOU and can be found on line at: http://www.cowlitzeis.com/documents/final_eis/files/document/sec3/Section_3p10_Public_Services-v7.pdf. See *Federal Register*, July 10, 2008, Vol. 73 No. 133 (extending the comment period for the Final EIS).

could bind a future one. A future Tribal Council could simply repeal the portions of the ordinance currently deemed irrevocable.

D. THE DISTRICT COURT DID NOT BASE ITS DECISION ON PRUDENTIAL STANDING AND THE CITY HAS PRUDENTIAL STANDING

As pointed out in the City's Opening Brief, the District Court did not rule on the NIGC claim that the City did not have prudential standing.[52] To establish prudential standing, the question boils down to whether NIGC's approval of Ordinance 07-03 under USC 25 § 2710 is within a zone of interests protected by the statute.[53] The NIGC argues the City does not have prudential standing because the statute does not protect the City's zone of interests.

The City is within the zone. The statute expressly allows approval only if the environment, public health and safety are protected.[54] Since the City has placed numerous comments[55] into the record on these interests, the statute's protections fall within the City's zone of interest.

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[52] Opening Brief, page 23, note 69 *citing* District Court Order at page 8.
[53] *See Kansas v. United States*, 249 F 3d. 1213 (10th Cir 2001).
[54] 25 USC § 2710(b)(2)(E).
[55] AR 000723-000730, AR 0001454-1458, AR 001667-1673.

In this case the City is farther into the zone than typically found in other NIGC ordinance approval actions. Ordinance 07-03 is site-specific and applicable to non-Indian lands. It is supported by a Restored Lands Opinion that the Secretary could use to impair the City's interest in the two-part determination of IGRA Section 20. The Ordinance is also intended to be substitute NEPA compliance which is clearly within the City's zone of interest as a cooperating agency.[56]

CONCLUSION

For the foregoing reasons, Appellant, the City of Vancouver, Washington, requests a decision determining that the City has standing under Article III of the United States Constitution and has prudential standing to challenge the National Indian Gaming Commission's approval of Cowlitz Tribal Ordinance 07-03. Appellant further requests a remand to the United States District Court, Western District of Washington to consider the remainder of the City's arguments.

[56] The NIGC admits the City's status as a cooperating agency under NEPA. See U.S. Motion to Dismiss at 4, footnote 6. ER 000373.

CERTIFICATE OF COMPLIANCE

Pursuant to 9TH CIRC. R. APP. 32-1, the undersigned certifies that this brief contains 4,253 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 7th day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2010, I electronically filed the foregoing REPLY 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):

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