No. 08-35954

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF VANCOUVER, A WASHINGTON MUNICIPAL CORPORATION,
Plaintiff-Appellant,

v.

GEORGE SKIBINE,* Acting Chairman, National Indian Gaming Commission; NATIONAL INDIAN GAMING COMMISSION,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

FEDERAL DEFENDANTS-APPELLEES' ANSWERING BRIEF

IGNACIA S. MORENO
Assistant Attorney General

KATHERINE J. BARTON
STEVEN E. MISKINIS
GINA L. ALLERY
Attorneys, U.S. Dep't of Justice
Env't & Natural Resources Div.
P.O. Box 44378 (L'Enfant Station)
Washington, DC 20026-4378
(202) 305-0261
gina.allery@usdoj.gov

*Substituted pursuant to Fed. R. App. P. 43(c)(2).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES:

CONSTITUTIONAL PROVISIONS

STATUTES:

RULES AND REGULATIONS:

STATEMENT OF JURISDICTION

Plaintiff-Appellant the City of Vancouver ("the City"), filed this action on March 28, 2008 in the United States District Court for the Western District of Washington (Hon. Benjamin H. Settle) against the National Indian Gaming Commission and the Chairman of the National Indian Gaming Commission (collectively, "NIGC"). The City invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. As set forth herein, the district court properly concluded that the City failed to establish it had standing; thus the district court lacked jurisdiction over the City's claims.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The City timely filed a notice of appeal on November 17, 2008, within 60 days of the district court's order and judgment entered on September 24, 2008. Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the City's challenge to the NIGC's approval of an amendment to a site-specific gaming ordinance for the Cowlitz Indian Tribe ("Cowlitz" or "Tribe") presents an Article III case or controversy.

2. Whether the City has prudential standing to challenge the NIGC's approval of an amendment to a site-specific gaming ordinance for the Cowlitz.

STATEMENT OF THE CASE

This case involves a challenge to an NIGC decision approving an amendment to the Cowlitz Tribe's site-specific gaming ordinance. ER000065-66. NIGC approved the original ordinance on November 23, 2005. Under that ordinance, the Tribe proposed to game on certain lands that the Tribe had asked the Department of the Interior to take into trust, but with respect to which Interior has made no decision. NIGC approved the site-specific ordinance, but stated that the Tribe could not game on the site until Interior accepted the land into trust and the Tribe exercised governmental authority over the site. ER000186-87. The City did not seek judicial review of the ordinance's approval. On January 8, 2008, the NIGC approved an amendment to the previously approved gaming ordinance pertaining to the Environment and Public Health and Safety section ("EPHS Amendment") of the ordinance. ER000111.

The City filed suit pursuant to the APA, challenging the NIGC's approval of the January 8, 2008 EPHS Amendment. The relevant complaint for purposes of this appeal is the City's "First Amended Complaint for Declaratory and Injunctive Relief." ER000056. In the sole claim stated by that complaint, the City alleged that the NIGC's decision approving the EPHS Amendment violated the IGRA, 25 U.S.C. § 2710(b), because it failed to determine whether the location where gaming would occur was "Indian lands" as defined under IGRA, 25 U.S.C. § 2703(4). ER000065-66. The City asserted two claims for relief: (1) declaratory relief that the NIGC's approval of the EPHS Amendment is invalid; and (2) injunctive relief prohibiting the NIGC from proceeding with any further consideration of the Ordinance or any other gaming ordinance that may be adopted by the Cowlitz until the Tribe (a) obtains jurisdiction over the site on which gaming is proposed; (b) acquires fee title to the tract on which gaming is proposed; and (c) exercises governmental power over the Parcel on which gaming is proposed. ER000066-67. The City premises standing to maintain this suit on environmental and societal harms. ER000063-64; Am. Compl.

¶¶ 41-43. The district court dismissed the City's complaint for lack of standing. The City appealed.

STATEMENT OF FACTS

A. STATUTORY BACKGROUND

In 1988, Congress enacted IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and "to provide a statutory basis for the regulation of gaming by Indian tribes adequate to shield tribes from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. § 2702; *see also, e.g., TOMAC v. Norton*, 433 F.3d 852, 865 (D.C. Cir. 2006). IGRA applies only to federally-recognized tribes, 25 U.S.C. § 2703(5), which may conduct gaming pursuant to IGRA only on "Indian lands" within their jurisdiction. *Id.* § 2710(b)(1) (class II); *Id.* § 2710(d)(3) (class III).

Under IGRA, gaming is divided into three classes. Tribes have exclusive authority over class I social and traditional games with prizes

of minimal value. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II gaming – the type of gaming the Cowlitz propose to conduct – includes bingo and certain "non-banking" card games, *id.* § 2703(7), and can occur if the state allows such gaming for other groups. *Id.* §§ 2703, 2710(b). The tribes and the NIGC share regulatory duties over class II gaming. *Id.* § 2710(b). Class III gaming, which includes more traditional "casino" games, including slot machines, roulette, poker, blackjack, etc., can occur lawfully only pursuant to a tribal-state compact. *Id.* §§ 2703(8), 2710(d). The NIGC provides regulatory and enforcement oversight of gaming activities under IGRA. *Id.* §§ 2706(b), 2710(d).

Any tribe that wishes to conduct gaming activities under IGRA must adopt a tribal gaming ordinance that includes certain specified requirements, and the NIGC Chairman must approve such tribal gaming ordinance before the tribe may lawfully conduct gaming. *Id.* § 2710(b)(2), and (d)(1)(A). For a class II gaming ordinance, the Chairman's approval is mandatory as long as the ordinance meets the requirements of Section 2710(b)(2)(A)-(F), and the ordinance does not

conflict with IGRA, the NIGC's regulations, or any other federal law.[1] *Id.* § 2710(b)(2). Additionally, any Indian tribe that wishes to contract with an outside manager for the management of a gaming facility must first obtain the NIGC Chairman's approval of the management contract, which approval may not be granted unless the contract contains certain provisions and adheres to certain limitations. *Id.* § 2711.

With regard to geographical limitations on the conduct of Indian gaming, IGRA allows Indian tribes to conduct gaming activities only on "Indian lands." *See id.* § 2710(a)(2), (b)(1), (d)(1). The term "Indian lands" is defined to mean:

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

---

[1] Requirements of Section 2710(b)(2) pertain to matters such as the tribe's allowable uses of gaming revenues and requirements pertaining to contracts, audits, casino construction and operation, and oversight of management officials and key employees.

Id. § 2703(4). Through an implementing regulation, the NIGC has clarified the definition of "Indian lands" to mean:

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

25 C.F.R. § 502.12.[2]

In general, IGRA prohibits gaming activities on land acquired into trust by the United States on behalf of a tribe after October 17, 1988. 25 U.S.C. § 2719(a)(1). This provision of IGRA, 25 U.S.C. § 2719, is commonly referred to as Section 20. The City does not allege a violation of Section 20 in its amended complaint, but the NIGC addresses it here because, as discussed *infra* pp. 35-38, the City rests its argument on appeal on a violation of Section 20. There are several exceptions to this

[2] IGRA authorizes the NIGC to promulgate regulations and to monitor Indian gaming activities in order to achieve the purpose of the statute, *id.* § 2706(b)(1), (10), and authorizes the Chairman to bring enforcement actions and collect civil fines for violations of the statute, the NIGC regulations, or approved tribal gaming ordinances. *Id.* § 2713.

general prohibition. The one addressed by the City is the "restored lands" exception, which permits gaming on land acquired after 1988 when:

> (B) lands are taken into trust as part of -
>
> * * *
>
> (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

25 U.S.C. § 2719(b)(1)(B)(iii). If the land does not qualify for gaming under an exception, the land will still be eligible for gaming if the Secretary of the Interior determines that the gaming would be in the tribe's and its members' best interest and would not be detrimental to the surrounding community, and the governor of the relevant State concurs. 25 U.S.C. § 2719(b)(1)(A) (commonly called the "two-part determination").

B. FACTUAL BACKGROUND

On March 12, 2004, the Cowlitz submitted an application to the Department of the Interior ("Interior") requesting that approximately 151.87 acres of land in Clark County, Washington (the "Parcels") be taken into federal trust. Interior has yet to make a final decision regarding the Cowlitz trust application.

On August 29, 2005, the Tribe submitted a request to the NIGC Chairman for approval of a site-specific class II tribal gaming ordinance.[3] On November 23, 2005, the Chairman approved the Tribe's Ordinance. In doing so, he adopted the "Indian lands" legal analysis and conclusion of a November 22, 2005 NIGC opinion memorandum written by Penny Coleman, the Acting General Counsel of the NIGC. ER000186; ER000188. The opinion memorandum addressed the question of whether such lands would qualify as "Indian lands" within the meaning of IGRA, *if the lands were acquired in trust*. The memorandum stated that if the land is taken into trust by the Department of the Interior and the Cowlitz exercises governmental power over the site, it will fit within the definition of Indian lands under IGRA. *See* 25 U.S.C. § 2703(4); ER000186-87; ER00190.

[3] While not necessary, Section 2(O) of the Cowlitz gaming Ordinance included a site-specific legal land description identifying the Parcels where the gaming would take place. ER000189; ER000265. Nothing in IGRA or the NIGC regulations requires a tribe to submit a site-specific gaming ordinance, but if a tribe does submit one, the Chairman determines whether the site qualifies as Indian lands that are eligible for gaming under IGRA.

However, "for lands taken into trust after October 17, 1988, it is necessary to review the prohibition and its exceptions to determine whether a tribe can conduct gaming on such lands." ER000190. Here, the legal memorandum opined that the Property qualifies under the exception for "restored lands," under which gaming is permitted on lands taken into trust in conjunction with "the restoration of lands for an Indian tribe that is restored to Federal recognition." *See* 25 U.S.C. § 2719(b)(1)(B)(iii); ER000204. The NIGC adopted the opinion in its final determination to approve the Ordinance. ER000186. Recognizing, however, that the land had not been taken into trust, the NIGC decision states, "this approval does not authorize the Tribe to conduct gaming on the subject site. In order to conduct gaming on the subject site, the Department of the Interior must first accept the land into trust, and the Tribe must first exercise government authority over the site." ER000187.

In October 2007, the Tribe submitted a request to amend the Environment, Public Health, and Safety ("EPHS") provision of its Ordinance. The EPHS amendment "includes provisions for law enforcement; fire protection and emergency response; public health;

traffic and transportation; sewer and water; compliance with County ordinances such as building/plumbing codes, fire codes, landscaping codes, and street standards; contributions to problem gambling programs; and the establishment of an education and arts fund." ER000111. The EPHS amendment also includes an irrevocable waiver of the Tribe's sovereign immunity and the Tribe consents to being sued by Clark County in state court to enforce the requirements therein. *Id.* The Chairman approved the EPHS amendment on January 8, 2008. Because the amendment revised only one section of the Ordinance, the NIGC Chairman did not revise, withdraw or reevaluate the Indian lands section of the Ordinance, the opinions expressed in the November 22, 2005 NIGC opinion memorandum, or the November 23, 2005 decision's reliance on that memorandum.

C. THE CITY'S LAWSUIT

Plaintiff-Appellant then filed its lawsuit in district court challenging the Chairman's 2008 approval of the Tribe's EPHS amendment. ER000065-66; Am. Compl. ¶¶ 53-60. The City did not challenge the November 22, 2005 opinion memorandum or the November 23, 2005 approval of the Ordinance. Rather, the City –

without citing any factual support for its assertion – alleged that the Tribe withdrew its prior gaming ordinance. ER000063; Am. Compl. ¶ 35. The City thus claimed that the NIGC should have re-examined the Indian lands status of the Parcels when approving the EPHS amendment to the Tribe's Ordinance amendment in January 2008.

To establish its standing to sue, the City asserts that if the Cowlitz Tribe is allowed to proceed with development of its proposed casino, the City will be injured by the societal impacts associated with gambling, including increased crime, bankruptcy, divorce, domestic violence, and mental and physical health issues. ER000063; Am. Compl. ¶ 41. The City alleges that "[c]onstruction and operation of the Tribe's proposed casino and resort complex will also draw 4000 construction workers and 3000 operational workers into the City and Clark County, placing an additional strain on the already stressed low to moderate housing stocks that are located within the City." ER000064; Am. Compl. ¶ 42. Finally, the City alleges that "[o]peration of the Tribe's proposed casino and resort complex will increase traffic congestion and vehicle emissions in the City, generating more than 17,000 new vehicle trips through the City on weekdays, and more than

19,000 new vehicle trips on weekends. In addition . . . significant additional stress will be placed on traffic corridors and intersections around the proposed site, multiplying the impacts of the additional traffic." ER000064; Am. Compl. ¶ 43.

Based on those alleged injuries, the City asserts two claims for relief. The City first seeks a judgment against the NIGC invalidating the approval of EPHS amendment to the Ordinance "because the NIGC is without jurisdiction to consider the Tribe's Amended Gaming Ordinance." ER000066. The second claim for relief asks for injunctive relief prohibiting the NIGC "from proceeding with any further consideration of the Tribe's Amended Gaming Ordinances or any other gaming ordinance that may be subsequently adopted by the Tribe." ER000067. The City requests that the declaratory judgment and injunctive relief be in effect until such time as the Cowlitz obtains jurisdiction, acquires fee title, and exercises governmental power over the Parcels on which gaming is proposed. ER000066-67. The City did not challenge the substance of the NIGC's Indian lands opinion or the restored lands determination made. Instead, the City's complaint challenges, "[t]he Defendants' *failure to make* a preliminary threshold

"Indian lands" determination," which the City alleges makes the approval of the EPHS amendment to the Ordinance arbitrary and capricious, an abuse of discretion and otherwise not in accordance with the law. ER000066 (emphasis added); Am. Compl. ¶ 59.

D. THE DISTRICT COURT'S DECISION

The NIGC moved to dismiss the City's complaint pursuant to Fed. R. Civ. P. 12(b)(1) & (6), arguing that the City lacks standing and failed to state a claim upon which relief could be granted. The court granted the motion, addressing only whether the City has standing to sue. The court recognized that the City's alleged injury in fact, that "*if* the site is taken into trust, gaming on the site *will inevitably* follow, making it *likely*, that the City's interests will be harmed," was neither actual nor imminent. ER000005-6 (emphasis in original); Opinion at 5-6.

The City also argued that its claim alleges a procedural violation and it is entitled to the relaxed standards of procedural standing. ER000006. The City claimed that the alleged procedural violation was "the [Commission's] decision to approve the Tribe's Amended Gaming Ordinance for class II gaming on lands . . . despite the fact that the proposed casino site does not constitute 'Indian lands' for purposed of

[the Gaming Act]." ER000006. However, the district court concluded that the City failed to show what part of 25 U.S.C. § 2710 requires the Commission to decide the Indian lands question prior to approving an ordinance. The court concluded: "In other words, Plaintiff has not shown that 25 U.S.C. § 2710(b) imposes a procedural requirement on Defendants" and "[t]herefore, Plaintiff has failed to show a sufficient injury in fact to satisfy Article III standing." ER000006-7.

The district court further concluded that even if the City had alleged a procedural injury, the City still lacked standing because injuries would not be adequately redressed by a favorable decision. ER000007. The court explained that the approval of the Ordinance is currently inoperative because the Cowlitz Tribe does not own the Parcels of land on which gaming is proposed. *Id.* Therefore, the City failed to show that a favorable decision would have any effect on the status quo. *Id.* The district court also found that the City failed to show how the court's imposition of a procedural timing requirement would alleviate its injuries because whether the approval is issued "today, tomorrow, or on some unknown future date, Plaintiff will still face their alleged injuries." *Id.* The court therefore found that even

under the relaxed procedural standing standards, the City failed to meet its burden on the third prong of the test for Article III standing. *Id.*

The court thus dismissed the City's amended complaint.

STANDARD OF REVIEW

This Court reviews a district court's dismissal for lack of standing de novo. *Fleck and Assocs., Inc. v. Phoenix*, 471 F.3d 1100, 1103 (9th Cir. 2006). While a complaint is generally construed in favor of a plaintiff, that principle applies to factual assertions that have not been challenged and does not extend to a plaintiff's legal assertions. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986). A complaint's factual allegations must state a plausible claim for relief; a mere possibility of relief is insufficient. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009).

SUMMARY OF ARGUMENT

The district court correctly held that the City lacks standing to sue. First, the City challenges only approval of the EPHS amendment to the Cowlitz Ordinance, not the Ordinance itself. The relief sought by the City – invalidation of approval of the EPHS amendment – would leave standing the NIGC's 2005 approval of the Ordinance, and thus

would not redress the injuries that the City alleges it would suffer if gaming occurs on the Parcels. Second, assuming that the City's challenge encompasses a challenge to the NIGC's original Ordinance approval as well, the City's challenge does not constitute an Article III case or controversy. The approval of the site-specific Ordinance expressly states that gaming cannot occur unless and until Interior takes the land into trust and the Tribe exercises jurisdiction over it. The district court correctly concluded that the City's alleged injury -- that *if* the land is taken into trust, the City will *likely* be injured by gaming occurring on land ten miles from the City's limits – was not actual or imminent. Unless and until the land is taken into trust, the City can suffer no harm that satisfies the constitutional requirements for judicial review. Third, as the district court correctly held, the City's requested relief – that the NIGC be barred from approving an ordinance until the Tribe exercises jurisdiction over the Parcels – would alter only the timing of the Ordinance's approval, not the substantive decision, and would not alleviate the City's alleged injuries.

The City – recognizing the hypothetical nature of its alleged injury – claims that it is immaterial that its injury is speculative because it

has suffered a procedural injury. But IGRA section 2710(b)(2) contains no requirement that NIGC wait until land is taken into trust before it approves a site-specific gaming ordinance; it contains no requirement for procedures such as comment or consultation; and it confers no right to such procedures on the City itself. Furthermore, a claim of procedural injury loosens only the requirements of redressability and cannot cure the hypothetical and speculative nature of the City's alleged injury.

On appeal, the City does not reject the district court's analysis but rather makes an entirely new argument. On appeal, the City claims to be injured not by the NIGC's 2008 approval of the EPHS amendment but by the NIGC's 2005 approval of the Tribe's Ordinance – even though the City's complaint alleges that that Ordinance was subsequently withdrawn. The City also asserts that its injury results not from the absence of an "Indian lands" determination under 25 U.S.C. § 2710(b), but from the NIGC's Section 20 "restored lands" determination in its 2005 approval of the Ordinance – even though the City's complaint is devoid of any allegation pertaining to Section 20. The City cannot base its injury on allegations not contained in the

complaint, and it has waived its challenge to the district court's rejection of standing under the allegations that *are* contained in the complaint. For all these reasons, the City fails to establish that it has constitutional standing to sue.

In addition to Article III standing, the City cannot establish that it meets the requirements of prudential standing because there is no legally protected interest given to local governments in IGRA's ordinance approval process. *See* 25 U.S.C. § 2710(b)(1). Therefore, the City does not fall within the zone of interests of that statutory provision.

ARGUMENT

I. The City lacks Article III standing.

The district court correctly dismissed the complaint for lack of an Article III case or controversy. The court correctly held that the City failed to show a sufficient injury in fact or that the City's injuries would be favorably redressed by a favorable decision because the land may never be taken into trust. Therefore, the City cannot satisfy the requirements for Article III standing.

A. The district court correctly held that the City lacks Article III standing to challenge the NIGC's compliance with IGRA § 2710(b).

The jurisdiction of federal courts is limited to "cases" and "controversies." U.S. Const., art. III, § 2. No case or controversy exists where a plaintiff lacks standing to make the claims asserted. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, at a minimum a plaintiff must show: an "injury in fact" – an invasion of a legally protected interest which is concrete and particularized and actual or imminent (not conjectural or hypothetical); a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the action of the defendant and not the result of some action of a third party; and that it is likely the injury will be redressed by a favorable decision. *Id.* at 560-61. These elements are "not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Id.*

Additionally, the Supreme Court has emphasized that, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily 'substantially more difficult' to establish." *Id.* at 562. (quoting *Allen v. Wright*, 468

U.S. 737, 758 (1984)). Those principles require affirmance of the district court's judgment here.

1. The City lacks standing to challenge the EPHS amendment, which does not authorize gaming.

The City fails to allege an injury that is more than speculative. The City challenges the NIGC's approval of the EPHS amendment to the Ordinance based on its alleged failure to issue an "Indian lands" opinion in conjunction with that approval, contending that the NIGC's decision will cause it environmental and societal harms. ER000066; Am. Compl. ¶ 60.

First, as a threshold matter, the City cannot establish standing to challenge the approval of the January 2008 approval of the EPHS amendment because that is not the approval that authorized gaming, which is what the City asserts will cause it injury. The City alleges that the Tribe withdrew the Ordinance approved in 2005 and resubmitted an entire amended gaming ordinance that was the subject of the NIGC's January 2008 decision. ER000063; Am. Compl. ¶ 35. But the City cites no support for that allegation, which is flatly contradicted by the administrative record that was before the district court. See

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-1950 (2009) (courts "are not bound to accept as true a legal conclusion couched as a factual allegation") (internal quotation marks omitted).

The NIGC's January 8, 2008 decision expressly states that it, "constitutes approval of Ordinance No. 07-03, adopted October 6, 2007," which it describes as "an amendment that revises Section 22 of the Tribe's previously approved gaming ordinance." ER000111. The Tribe's Ordinance No. 07-03 is a one-page document that sets forth only the amendment to Section 22. ER000165. Because the amendment does not authorize gaming, the injuries from gaming alleged by the City are not fairly traceable to its approval. Similarly, the City's alleged injuries from gaming are not redressable by invalidation of the amendment, because such invalidation would leave the original ordinance approval in place. While a gaming ordinance requires an EPHS provision, the EPHS amendment to the Cowlitz Ordinance is a supplemental amendment that merely adds to and does not modify the Ordinance's pre-existing and previously approved provisions. The elimination of the EPHS amendment, therefore, would not affect the ability of the Cowlitz to game on the Parcels.

On this basis alone, this Court should affirm the district court's dismissal of the City's claims for lack of standing.

2. Even assuming the City challenges the NIGC's approval of the Tribe's site-specific gaming ordinance, the City still fails to allege an Article III case or controversy because gaming may not occur unless and until Interior takes the Parcels into trust.

The district court accepted the City's allegation that it was challenging approval not of just an amendment to the Tribe's gaming ordinance but of the entire Ordinance. The City challenged NIGC's approval of the purported amended Ordinance based on NIGC's alleged failure to issue an "Indian lands" opinion in conjunction with that approval, contending that the NIGC's decision will cause it environmental and societal harms. ER000066, Am. Compl. ¶ 60. As the district court recognized, these allegations are based on speculation that Interior will decide to acquire the lands at issue in trust for the Tribe. Interior, however, has yet to reach a decision regarding the Cowlitz's trust application and it could well decide to deny the application. That decision must consider an environmental evaluation set forth in an appropriate National Environmental Policy Act ("NEPA")

document as well as additional factors under the land-into-trust regulations. 25 C.F.R. § 151.10-11.

As the City itself recognizes, if the land is not taken into trust, no lawful gaming may take place on the land pursuant to IGRA. Thus, the City's allegations that gaming will occur are based on a prediction that is speculative at this time. Indeed, the City alleges that "*[i]n the event* that the Tribe's fee-to-trust application *is accepted* by Interior and the Tribe *is allowed* to proceed with development of its proposed casino and resort complex, the City *will be* negatively impacted by actions associated with that development." ER000063; Am. Compl. at ¶ 40 (emphasis added). As the district court correctly held, all of the City's alleged injuries are speculative and therefore, the City fails the first prong of the standing test.[4] *See, e.g., City of Los Angeles v. Lyons,* 461

[4] For this same reason, the City's claim is not ripe for review. "For a suit to be ripe within the meaning of Article III, it must present concrete legal issues, presented in actual cases, not abstractions." *Colwell v. Dep't of Health and Human Serv.*, 558 F.3d 1112, 1123 (9th Cir. 2009) (internal quotation marks and citations omitted). As courts have commonly noted, "[t]he constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000); *Colwell*, 558 F.3d at 1123 (same). Because there is

U.S. 95, 105-06 (1983); *Schmier v. U.S. Court of Appeals for the Ninth Circuit,* 279 F.3d 817, 821 (9th Cir. 2002) ("[H]ypothetical, speculative or other possible future injuries do not count in the standings calculus.") (quotation omitted).

Similarly, the City's predicted injury is not traceable to the NIGC's approval of the purported amended Ordinance. The City's complaint does not challenge the substance of the EPHS amendment or any other aspect of the purported amended ordinance; it only contends that the NIGC improperly approved the amendment without making an Indian lands determination, which the City contends it cannot do unless and until Interior takes the Parcels into trust. But 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 injuries alleged by the City

---

insufficient injury to meet the standing requirement, the City's claim fails the constitutional ripeness component. Furthermore, assuming the City was challenging the NIGC's 2005 approval of the original Ordinance (which it was not), that ordinance does not authorize gaming until the Indian land requirements are met. Such a challenge would not be ripe for adjudication because it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998).

will never occur. Despite this fact, the City argues that "but for" NIGC's approval of the EPHS amendment to the Ordinance, a casino could never be built. Appellant's Br. at 18. Outside of the context of procedural standing, discussed *infra.* pp. 29-34, simply asserting that but for an agency action a future harm could never occur is not sufficient. Instead, the Court must determine "whether the alleged injury can be traced to the defendant's challenged conduct, rather than to that of some other actor not before the court." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1152 (9th Cir. 2000); *see also Dep't of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004) ("a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA"). "[T]he causal connection put forward for standing purposes cannot be too speculative, or rely on conjecture about the behavior of other parties . . . ." *Ecological Rights Found.*, 230 F.3d at 1152. That is precisely the situation here where the potential future injury facing the City – an operating casino – will only come to be depending on the behavior of other actors, specifically, the Department of the Interior, which must decide whether to accept into trust the land on which the Tribe wishes

to game. Accordingly, the City cannot reasonably articulate how its highly conjectural and contingent injury might be traced to the NIGC's approval of the Ordinance and cannot meet its burden with respect to the second prong of the standing test.

For similar reasons, the City cannot meet the redressability prong of the standing test. A plaintiff must show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan.*, 504 U.S. at 561 (citation omitted). Because it is not yet certain if the land at issue will be taken into trust and a gaming facility constructed and operated thereon, it is not possible to determine if this lawsuit will address the City's alleged injury. The City's allegations fail to take into account the fact that additional review must occur before Interior reaches a decision regarding the Parcels. Indeed, the City's alleged speculative injuries may never be put at issue because the City's concerns may be resolved through the NEPA process. The EIS will serve to provide "discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1.

Interior may also choose an alternative that avoids the alleged potential injuries that the City speculates will occur. As a result, the City's alleged harm cannot be redressed by challenging the NIGC's approval of the purported amended Ordinance. *McConnell v. FEC*, 540 U.S. 93, 226 (2003)(Plaintiff must demonstrate a "'substantial likelihood' that the requested relief will remedy the alleged injury in fact.") (quoting *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000)), *overruled on other grounds by Citizens United v. FEC,* 130 S.Ct. 876 (2010). [5]

[5] Holding that the City lacks standing to challenge the purported amended Ordinance's approval will not deprive the City of any opportunity to challenge the Indian lands determination (or lack thereof) of which it complains. The City will have the opportunity to challenge Interior's decision if it decides to take the land into trust for purposes of gaming. If Interior makes such a determination, it will issue a notice pursuant to 25 C.F.R. § 151.12(b). The notice will state that a final determination has been made and that the Secretary will acquire title to the land no sooner than 30 days after the notice is published. *Id.* Therefore, the City will have 30 days in which to file a lawsuit challenging the land into trust action, the NEPA documents prepared in conjunction with that action, and any decision by Interior that, under IGRA, the land is eligible for gaming.

Furthermore, as the district court recognized, the relief the City seeks will not redress its injury. The City does not allege that the approval of the purported amended ordinance is erroneous in any respect other than its timing. The City's complaint merely requests that the NIGC be barred from approving the Tribe's gaming Ordinance until the Tribe exercises jurisdiction over the Parcels. As the district court noted, the City "fail[s] to explain how . . .[the] imposition of a procedural timing requirement will alleviate the substantive nature of its alleged injuries." ER000007; Opinion at 7. As the court recognized, "whether Defendants issue their approval today, tomorrow, or on some unknown future date, Plaintiff will still face their alleged injuries." *Id.* The City thus has failed to establish it satisfies the redressability prong of standing.

3. The City has no basis on which to allege a procedural injury.

In its response to the NIGC's motion to dismiss in the district court, the City asserted that it was immaterial that its injury was speculative because it contended it had suffered a procedural injury.

Dkt. No. 29 at 9-10. The district court correctly rejected this argument. ER000006-8.

"In the case of a plaintiff seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs, the plaintiff can establish standing without meeting all the normal standards for redressability and immediacy." *Hall v. Norton*, 266 F.3d 969, 975 (9th Cir. 2001) (internal quotations omitted). In order to claim standing based on a procedural injury, the City must demonstrate that IGRA provides it a procedural right. *See Tyler v. Cuomo*, 236 F.3d 1124, 1135 n.10 (9th Cir. 2000); *see also Douglas County v. Babbitt*, 48 F.3d 1495, 1500-01 (9th Cir. 1995). The City must first show a violation of the procedural rule and that the procedural rule was designed to protect its interests. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969-70 (9th Cir. 2003).

The class II gaming ordinance approval requirements of IGRA give no procedural rights to anyone, let alone the City. *See* 25 U.S.C. § 2710(b). First, as the district court correctly held, there is no requirement that the NIGC determine that a gaming ordinance only apply to currently existing Indian lands prior to deciding whether to

approve a submitted ordinance. ER000006. The plain language of the statute requires no such thing and, in any event, reading such a requirement into the statute makes no sense given that most proposed ordinances are not site-specific.[6] *See N. County Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 747 (9th Cir. 2009) (NIGC may approve, without making an Indian lands determination, a non-site-specific gaming ordinance) *petition for cert. filed*.

Second, the requirements of 25 U.S.C. § 2710(b)(2) are substantive, not procedural. Procedural standing considerations apply with respect to procedures an agency is required to follow in reaching a substantive decision, not to the decision itself. A procedural requirement typically involves a process that must be followed that "does not mandate particular substantive results." *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 523 (9th Cir. 1994); *see also*

[6] Of course, if an ordinance is site-specific, the NIGC must ensure that a gaming ordinance "concern[s] . . . gaming on the Indian lands within the tribe's jurisdiction," 25 U.S.C. § 2710(b)(2), as it did in approving the Cowlitz Ordinance, by determining that the Ordinance will only apply to gaming that occurs on lands that are taken into trust and that the Tribe exercises governmental power over. ER000186-87.

Citizens for Better Forestry, 341 F.3d at 968 (distinguishing between challenge to substance of agency rule and challenge to "procedural violations of NEPA and the ESA in its promulgation"). Procedural standing theory has been applied, for example, to the National Environmental Policy Act, which requires procedures in connection with agency actions that afford the public with a right to comment and participate, *Citizens for Better Forestry*, 341 F.3d at 970), and the Endangered Species Act, which provides for "procedural consultation and biological-assessment requirements" in connection with agency actions, *id.* at 971. Section 2710(b)(2) does not have any comparable provision; nothing in it creates procedural rights of public participation, comment, or consultation.

Third, even if Section 2710(b)(2) contains a procedural requirement, it does not confer a procedural right on the City. *See Tyler*, 236 F.3d at 1135 n.10. For example, in *Tyler*, the Ninth Circuit held that a binding Memorandum of Agreement containing a provision requiring consultation among parties not including plaintiffs "does not even provide a basis for procedural standing because it in no way accords [plaintiffs] any procedural right to protect [their] concrete

interest." 236 F.3d at 1136 (internal quotations omitted) (first bracket inserted; second bracket in original). Similarly here, neither Section 2710(b) nor its implementing regulations provide any right to consult or comment to anybody, let alone the City.[7] Accordingly, no procedural right has been granted the City in 25 U.S.C. § 2710, and the City cannot assert procedural standing.

Put differently, in connection with IGRA's class II gaming ordinance provisions, no procedural "rules protect [the City's] concrete interests." *Citizens for Better Forestry*, 341 F.3d at 969. While the NIGC must review class II gaming ordinances to ensure that they mandate that any gaming facility will be built and operated "in a manner which adequately protects the environment and the public health and safety," 25 U.S.C. § 2710(b)(2)(E), nothing provides for

[7] Nevertheless, the City and others submitted comments to the NIGC regarding the EPHS amendment to the Ordinance. As the Chairman of the NIGC explained in his approval decision, "the Indian Gaming Regulatory Act ("IGRA") and the NIGC's regulations contain no provisions for public comment regarding tribal gaming ordinances . . . ." ER000112. Nevertheless, the submitted comments were considered in the approval decision. *Id.*

public participation in the review of what is an internal governance document of a sovereign Indian tribe.

Finally, even if the City could allege a procedural injury, it still could not establish standing. While a procedural right accorded by Congress can loosen the strictures of the *redressability* prong of the standing inquiry (by obviating, for example, the need to show that a right to comment would be successful in influencing an agency's decision on a project that would affect the party's concrete interests), "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). The City relies on its alleged procedural injury in an attempt to avoid the fact that its injury is speculative and dependent on an action of another agency that may never occur. That it may not do.

4. The City does not dispute the district court's reasoning.

On appeal, the City does not challenge the district court's analysis that 25 U.S.C. § 2710(b) does not impose a procedural requirement on the NIGC. Rather, as set forth below, the City argues that it has been

denied the procedural safeguards set forth in Section 20, 25 U.S.C. § 2719(b)(1)(A). Thus, the City has waived the argument that the district court erred in holding that it failed to establish standing to challenge the NIGC's January 8, 2008 decision based on the alleged violation of Section 2710(b)(2), 25 U.S.C. § 2710(b)(2). *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259-1260 (9th Cir. 1996) (issues not raised and argued in opening brief are waived).

For the foregoing reasons, the district court's decision that the City lacks Article III standing and Section 2710(b) imposes no procedural requirement on the NIGC should be affirmed.

B. The City cannot base its standing on IGRA § 2719.

In its opening brief on appeal, the City abandons its argument before the district court that it would be harmed as a result of the NIGC's alleged failure to make an "Indian lands" determination, under 25 U.S.C. § 2710(b), in its January 8, 2008 decision approving the EPHS amendment. Instead, it makes an entirely new argument, basing its standing on allegations regarding the NIGC's restored lands determination under 25 U.S.C. § 2719(b)(1)(A) (IGRA Section 20), in its November 23, 2005 decision approving the Cowlitz Ordinance.

Appellant's Br. at 3, 13-16, 18-23. The City now contends that the NIGC's Section 20 restored lands determination made prior to the land being taken into trust denies the City the procedural safeguards set forth in the so called "two-part determination" in IGRA, 25 U.S.C. § 2719(b)(1)(A) .[8]

The City's new argument is not properly before this Court. The City does not allege a violation of 25 U.S.C. § 2719(b)(1)(A) , in its amended complaint, so whether 25 U.S.C. § 2719(b)(1)(A) affords procedural rights is entirely irrelevant here. Indeed, the City doesn't even mention 25 U.S.C. § 2719(b)(1)(A), in the section of its amended complaint discussing the administrative decisions under review and the

[8] In briefing the NIGC's motion to dismiss in the district court, the City made a similar argument, relying on *Citizens Against Casino Gambling in Erie County v. Hogen* ("*CACGEC II*"), 2008 WL 2746566 (W.D.N.Y. July 8, 2008), Dkt. 29 at 13-15, but on appeal, the City has abandoned its reliance on *CACGEC II* for procedural standing. In that case, the court required demonstration of a "legally protected interest that involves a procedural right," and found such a right in 25 U.S.C. § 2719(b)(1)(A) . *CACGEC II* at *18. If the City were trying to preserve its procedural right to a two-part determination under IGRA, it should have sued the Department of the Interior, not the NIGC, as the *CACGEC* plaintiffs did, because IGRA directs the Secretary to conduct the two-part determination. 25 U.S.C. § 2719(b)(1)(A).

City's standing, or anywhere else. ER000058-59. [9] Instead, the City challenges the NIGC's failure to make an Indian lands determination when approving the EPHS amendment. ER000066; Am. Compl. ¶ 59. If a violation of a procedural right has not even been alleged, then it cannot support standing. *See Citizens for Better Forestry*, 341 F.3d at 969 (procedural standing requires a showing that procedural rules designed to protect plaintiff's interests were violated).

The City's suit challenges the NIGC's compliance with 25 U.S.C. § 2710(b)(2), and any procedural right that gives this Court jurisdiction to hear this case must derive from that provision of IGRA. That provision, as discussed previously, has no language mandating consultations or any other form of public participation in the consideration of class II gaming ordinances.

In sum, the City's argument that it is injured by the Section 2719 restored lands determination embodied in the NIGC's November 23,

---

[9] Notably, in its request for relief, the City does not request that the NIGC's restored lands determination made pursuant to Section 2719(b)(1)(B)(iii), be vacated, nor does the City request that the Defendants be forced to conduct a two-part determination pursuant to Section 2719(b)(1)(A) .

2005 decision fails because it is based on a different action and different purported statutory violation than the action and violation alleged in the complaint. Regardless, as set forth above, the City's allegations of injury are speculative rather than actual or imminent, as the Secretary of the Interior has yet to decide to take the land into trust for the Tribe, and therefore the City cannot establish Article III standing based on these allegations.

II. The City cannot establish prudential standing.

In addition to constitutional limitations on federal court jurisdiction, standing doctrine also involves "prudential limitations on its exercise." *Fleck and Assocs., Inc. v. Phoenix*, 471 F.3d 1100, 1103 (9th Cir. 2006) (internal quotations omitted). For example, a plaintiff must establish that the injury complained of falls within the "zone of interests" protected by the statutory provision or constitutional guarantee whose violation forms the basis of the suit. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Bennett v. Spear*, 520 U.S. 154, at 162, 175-76 (1997). Also, a plaintiff generally must assert his or her own rights, and only in limited circumstances (not met here) is a plaintiff permitted to assert the rights of others. *See Kowalski v.*

Tesmer, 543 U.S. 125, 129 (2004). Those principles too require affirmance of the district court's judgment.

In assessing prudential standing, a court must consider "whether a particular plaintiff has been granted a right to sue by the statute under which he or she brings suit." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004). In order to establish standing pursuant to the APA , a plaintiff claiming – as the City does here – that it was aggrieved by an agency action must show that its injury falls within the "zone of interests" of that the statutory provision that the plaintiff claims was violated. *Lujan*, 497 U.S. at 882.[10]

The City fails to establish that it is within the zone of interests of IGRA's ordinance approval provision.[11] 25 U.S.C. § 2710(b)(1). The

---

[10] The City suggests that the zone of interests test drawn from Supreme Court jurisprudence has been relaxed by the Ninth Circuit and other courts addressing this question. Appellant's Br. at 24. It has not. *See DBSI/TRI IV Ltd. P'ship v. United States*, 465 F3d 1031, 1038 (9th Cir. 2006) (zone of interest test requires showing of legal wrong or injury that "falls within the zone of interests of the statutory provision the party claims was violated.") (internal quotations and brackets omitted).

[11] There is no legally protected interest given to local governments in IGRA's ordinance approval process. *See* 25 U.S.C. § 2710(b)(1).

City relies on *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001), to allege that it can meet the zone of interests test requirements.

In *Kansas*, the Tenth Circuit held that the State was within the zone of interests of IGRA because the court did not believe 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." 249 F.3d at 1223 ("Surely Congress did not intend to render the State powerless to protect its sovereign interests in this situation."). The *Kansas* court explained that an Indian lands determination implicated the sovereign rights of the State over the land. *Id.*

The City, in contrast, has no sovereign rights that would be implicated by an Indian lands determination. *See City of Lafayette, La. v. La. Power & Light Co.*, 435 U.S. 389, 412 (1978) ("Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them."). The land on which the Tribe hopes to game is not even located within the City's jurisdiction.

The City correctly points out that IGRA mandates consultation with the State and local officials, but that is only in the case of a two-part determination pursuant to Section 2719(b)(1)(A) . Under the terms of the statute, the Secretary either makes a two-part determination "or" the land qualifies under an exception. The NIGC determined that the land qualified under the restored lands exception and the City failed to challenge the merits of that decision in its amended complaint. The City also failed to include the Secretary, the official that is charged with the two-part determination, in its lawsuit. As a result, even if the City fit within the zone of interests of the two-part determination process of IGRA, it failed to plead that claim in its amended complaint and the City cannot rely on that provision for prudential standing.

For these reasons, the City also lacks prudential standing to raise its claims.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

KATHERINE J. BARTON
STEVEN E. MISKINIS

/s/
GINA L. ALLERY
Attorney
U.S. Dep't of Justice
Env't & Natural Resources Div.
P.O. Box 44378 (L'Enfant Station)
Washington, DC 20026-4378
(202) 305-0261
gina.allery@usdoj.gov

24 March 2010

STATEMENT OF RELATED CASES

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

/s/

GINA L. ALLERY
Attorney
U.S. Dep't of Justice
Env't & Natural Resources Div.
P.O. Box 44378 (L'Enfant Station)
Washington, DC 20026-4378
(202) 305-0261
gina.allery@usdoj.gov

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

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the Brief of Defendants-Appellees was prepared in Microsoft Office Word 2007, that it uses a proportionately spaced typeface of 14 points or more, and that it contains 8,149 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/

GINA L. ALLERY
Attorney
U.S. Dep't of Justice
Env't & Natural Resources Div.
P.O. Box 44378 (L'Enfant Station)
Washington, DC 20026-4378
(202) 305-0261
gina.allery@usdoj.gov

CERTIFICATE OF SERVICE

I certify that on Wednesday, March 24, 2010, I electronically filed the foregoing Response Brief of Federal Appellees 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:

Brent D. Boger
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

DATED: Wednesday, March 24, 2010

/s/
Gina L. Allery
U.S. Dep't of Justice
Env't & Natural Resources Div.
P.O. Box 44378 (L'Enfant Station)
Washington, DC 20026-4378
(202) 305-0261
gina.allery@usdoj.gov

STATUTORY ADDENDUM

Indian Game Regulatory Act (selected sections)

§ 2703. Definitions

For purposes of this chapter--

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

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

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

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

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

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

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

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

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

(6) The term "class I gaming" means social games solely for prizes of

minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

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

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

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

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

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that--

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

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

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

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

(i) any banking card games, including baccarat, chemin de fer, or

blackjack (21), or

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

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

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

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

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

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

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

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

§ 2710. Tribal gaming ordinances

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

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

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

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

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

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

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

A separate license issued by the Indian tribe shall be required for each

place, facility, or location on Indian lands at which class II gaming is conducted.

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

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

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

(i) to fund tribal government operations or programs;

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

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

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

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

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

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately

protects the environment and the public health and safety; and

(F) there is an adequate system which--

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

(ii) includes--

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

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

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

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

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

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

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) has otherwise complied with the provisions of this section may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it

determines from available information, and after a hearing if requested by the tribe, that the tribe has--

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

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

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

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

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

(i) accounting for all revenues from the activity;

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

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

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

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

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

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

(C) the Commission may not assess a fee on such activity pursuant to

section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

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

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

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

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

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

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

(iii) is approved by the Chairman,

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

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

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

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

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

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

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

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

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

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

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

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-

year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

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

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

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

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

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

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

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

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

(v) remedies for breach of contract;

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

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

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

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

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

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

(B) is in effect.

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

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

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

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

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

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

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

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

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

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming

activities, the court shall order the State and the Indian Tribe[12] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

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

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

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

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

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

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

---

[12] So in original. Probably should not be capitalized.

prescribe, in consultation with the Indian tribe, procedures--

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

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

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

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

(i) any provision of this chapter,

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

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

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

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review

and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

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

§ 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless--

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and--

(A) such lands are located in Oklahoma and--

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are

within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when--

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of--

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) of this section shall not apply to--

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 465 and 467 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected

Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Application of Title 26

(1) The provisions of Title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.