UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

YSLETA DEL SUR PUEBLO, **Plaintiff,** **v.** **NATIONAL INDIAN GAMING COMMISSION,** **Defendant.**	**CIVIL ACTION NO. 3:10-cv-00315-HLH**

DEFENDANT'S MOTION TO DISMISS AND
MEMORANDUM IN SUPPORT

COMES NOW Defendant National Indian Gaming Commission ("NIGC" or the "Commission"), pursuant to Fed. R. Civ. Pro. 12(b)(1) and 12(b)(6), respectfully to move the Court to dismiss the complaint, and to provide this memorandum in support of the motion.

Introduction

On May 12, 2010, the Ysleta del Sur Pueblo, a federally recognized Indian tribe ("Tribe" or "Plaintiff") filed suit in the District Court for the District of Columbia against the NIGC seeking declaratory and injunctive relief. Specifically, Plaintiff seeks a declaration that the NIGC violated the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, and the Restoration Act, 25 U.S.C. § 1300g et seq., when, by letter dated February 20, 2010, the NIGC's former Acting General Counsel opined that the NIGC lacks jurisdiction over Plaintiff's gaming activities, and therefore is not authorized to offer the Plaintiff's gaming commission technical

assistance and training for its gaming activities. By Order and Memorandum Opinion dated August 17, 2010 Judge Huvelle of the District of Columbia District Court ordered the case transferred to This Court under 28 U.S.C. § 1404(a). By agreement of the parties NIGC has until September 13, 2010 to file its Answer or otherwise respond to the Complaint.

For two independent reasons, Plaintiff's suit must be dismissed. First, because the judicial review provision of the Indian Gaming Regulatory Act, 25 U.S.C. § 2714, makes only certain specific decisons reviewable under the Administrative Procedure Act, 5 U.S.C. § 704,[1] an opinion letter by its General Counsel is not reviewable. Congress enumerated the specific NIGC final agency actions that are subject to judicial review, and the action complained of here is not among them. Because Plaintiff has not alleged such a reviewable decision by the Commission, there is no jurisidiction. And even if Congress had not expressly limited APA review to certain types of NIGC decisions not alleged here, General Counsel opinion letters do not constitute final agency actions reviewable under the APA.

Second, Plaintiff cannot state a claim for relief because its claims are barred by issue preclusion under the Fifth Circuit's decision in *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1335 (5th Cir. 1994), which held that the Restoration Act, and not IGRA, applies to gaming activities conducted on Plaintiff's lands. Therefore, Plaintiff is collaterally estopped from now arguing that IGRA is applicable to the regulation of its gaming activities.

1. Section 704 provides: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."

Statement of Facts

1. Statutory Background.

In 1987, Congress passed the Restoration Act under which the Federal Government assumed trust responsibilities with respect to Plaintiff. 25 U.S.C. § 1300g. The Restoration Act, however, also addressed the issue of gaming by Plaintiff on its lands in El Paso, Texas. The Restoration Act specifically provided that Texas law would govern any gaming activities that are conducted on Plaintiff's reservation and lands. Specifically, Section 107 of the Restoration Act provides that:

> (a) All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.
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> * * *
>
> (c) Notwithstanding section 1300g-4(f) of this title, the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) of this section that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

25 U.S.C. § 1300g-6. Tribal Resolution No. T.C.-02-86, referenced in subsection (a), specifically requested that the Restoration Act "provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal land." See, generally, *Ysleta del Sur Pueblo v. Texas*, 36 F.3d at 1328 quoting Tribal Resolution No. T.C.-02-86. The effect of Section 107 of the Restoration Act was to prohibit gaming activities on Plaintiff's lands to the extent that the laws of Texas

prohibit such gaming activities, and to federalize Texas's gaming laws as applied to Plaintiff. Id. at 1327-1329.

2. Facts Underlying the Complaint.

The facts giving rise to Plaintiff's complaint are simple. In the Fall of 2009, an attorney for Plaintiff contacted an NIGC regional office to request that the regional office provide technical training and assistance to Plaintiff's gaming commission for gaming activities being conducted at Plaintiff's Speaking Rock Entertainment Center ("the Center") located in El Paso, Texas.[2] That request was verbally denied. By letter dated October 14, 2009, an attorney for Plaintiff wrote to the NIGC's former Acting General Counsel requesting reconsideration of the regional office's denial of technical assistance. Complaint For Declaratory and Injunctive Relief, ("Complaint") ¶ 16 & Ex. B. By letter dated February 23, 2010, Penny J. Coleman, the NIGC Acting General Counsel, in response to Plaintiff's attorney, opined that under the controlling decision in *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1335 (5th Cir. 1994), Plaintiff is "not under NIGC jurisdiction, and NIGC funds are not available to provide training to the Tribe." Id. ¶17 & Ex. C. Plaintiff now seeks a declaration that the NIGC violated IGRA and the Restoration Act by failing to exercise jurisdiction over Plaintiff's gaming activities, and Plaintiff further seeks an injunction to compel the NIGC to exercise jurisdiction over Plaintiff's gaming activities and to provide it with technical assistance and training.

Argument

NIGC brings this motion in accordance with Fed. R. Civ. P. 12(b)(1) seeking dismissal of Plaintiffs' claims against Federal Defendants for lack of subject matter jurisdiction. Jurisdiction is a threshold issue that should be addressed before considering the merits. *Steel Co. v. Citizens*

2 Under 25 U.S.C. § 2706(d)(2), the Commission is authorized to offer training and technical assistance to tribes who are conducting gaming pursuant to the provisions of the IGRA.

for a Better Env't, 523 U.S. 83, 94-96 (1998); *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1105 (D.N.M. 2006) (citation omitted). Furthermore, "[s]ince federal courts are courts of limited jurisdiction, there is a presumption against [their] jurisdiction, and the party invoking federal jurisdiction bears the burden of proof." *Penteco Corp. Ltd. P'ship – 1985A v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991) (citing *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)).

NIGC also brings this motion in accordance with Fed. R. Civ. P. 12 (b)(6) which authorizes a court to dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41 (1957)). "[I]f as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,' a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one." *Neitzke*, 490 U.S. at 327 (quoting *Hishon*, 467 U.S. at 73). In assessing a motion pursuant to Rule 12(b)(6), the Court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *See, e.g., Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007) ("a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . .[f]actual allegations must be enough to raise a right to relief above the speculative level") (citations omitted).

I. THERE IS NO WAIVER OF SOVEREIGN IMMUNITY THAT AUTHORIZES REVIEW OF A GENERAL COUNSEL'S OPINION.

A. Plaintiff Fails to Properly Allege Any Jurisdictional Basis for Maintaining its Action Against the National Indian Gaming Commission.

The Plaintiff fails to allege a proper jurisdictional basis for instituting suit against NIGC. It is elementary that the United States, as a sovereign, is immune from suit save as it consents to be sued. *United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 1351 (1980). The terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. Id.; *United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 768 (1941). Therefore, a court has no subject matter jurisdiction over the United States unless a specific statute waives its sovereign immunity. *Lehman v. Nakshian*, 453 U.S. 156, 160, 101 S. Ct. 2698, 2701 (1981). Such waiver must be "unequivocally expressed." *Mitchell*, 445 U.S. at 538, 100 S. Ct. at 1351; *United States v. King*, 395 U.S. 1, 4, 89 S. Ct. 1501 (1969). The United States has not waived its sovereign immunity in this matter.

In the jurisdictional portion of the Complaint, Plaintiff cites the Declaratory Judgment Act. However that Act, 28 U.S.C. §§ 2201, 2202, does not waive sovereign immunity. *Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d 1376, 1382 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989) (finding the Declaratory Judgment Act merely creates a remedy in cases otherwise within the court's jurisdiction, but does not constitute an independent basis for jurisdiction); *Cotter Corp. v. Seaborg*, 370 F.2d 686, 691-92 (10th Cir.1966) (affirming dismissal of action seeking declaratory judgment and injunction for failure of plaintiff to cite waiver of sovereign immunity with respect to federal defendants); *Jarret v. Resor*,. 426 F.2d 213, 216 (9th Cir. 1970) (the Declaratory Judgment Act does not waive the federal government's sovereign immunity). To defeat a motion to dismiss, the Tribe must demonstrate that the

government has waived sovereign immunity for this claim. See *United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 953 (1976).

The Tribe asserts federal question jurisdiction under 28 U.S.C. § 1331, but it is well established that statutes such as 28 U.S.C. § 1331 granting general jurisdiction do not waive sovereign immunity. *Fostvedt v. United States*, 978 F2d 1201, 1202-03 (10th Cir. 1992), cert. denied, 113 S. Ct. 1589 (1993). It is self-evident, moreover, that not all civil cases which present federal questions arc properly brought in district court pursuant to this provision. See *Guam v. Olsen*, 431 U.S. 195, 202 (1977). Section 1331 has never been construed as a waiver of United States' sovereign immunity from suit. *Kentucky v. Ruckelshaus*, 362 F. Supp. 360, 367-368 (W.D. Ky. 1973), aff'd, 497 F.2d 1172 (6th Cir. 1974). Nor has 28 U.S.C. § 1362. *Western Shoshone Business Council v. Babbitt,*1 F.3d 1052, 1058-59 (10th Cir. 1993) ("For the same reasons that plaintiffs cannot bring this action under § 1331, they also cannot assert jurisdiction under § 1362.")

Plaintiff also cites the All Writs Act, but that Act likewise does not constitute a waiver of sovereign immunity. While a court can use the All Writs Act to issue process in aid of its jurisdiction, it cannot use the Act to enlarge its jurisdiction. *See Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999); *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985); *Telecommunications Research and Action Ctr. v. Federal Communications Comm'n*, 750 F.2d 70, 78 (D.C.Cir.1984) (stating that the All Writs Act does not independently grant jurisdiction to a court).

A federal district court lacks subject matter jurisdiction if the plaintiff's action is not one described by a jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962). It is well established that federal courts have limited jurisdiction, and jurisdictional limitations imposed by

the Constitution or by Congress must be "neither disregarded nor evaded." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). It is equally axiomatic that "[t]he validity of an order of a federal court depends on the court's having jurisdiction . . . over the subject matter. . ." *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). Further, the burden of proving the existence of the requisite jurisdiction is on the party alleging jurisdiction. *Gibbs v. Buck*, 307 U.S. 66, 72 (1939). This the Tribe has failed to do.

B. The Court Lacks Jurisdiction Because 25 U.S.C. § 2714, the Judicial Review Provision of the Indian Gaming Regulatory Act, Does Not Make General Counsel Opinions Reviewable under the APA as Final NIGC Decisions.

1. Review of Commission decisions is limited by IGRA to final decisions of the Commission issued under 25 U.S.C. §§ 2710, 2711, 2712, and 2713.

Congress has expressly addressed the reviewability of NIGC decisions in the IGRA. Section 15 of the Act provides:

> **Judicial Review**
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> Decisions by the Commission pursuant to Sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for the purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5. 25 U.S.C. § 2714.

The section by section analysis of Section 15 shows thatCongress intended to permit only limited review in the manner prescribed by Congress. "[Section 15] Provides that only certain Commission decisions will be final agency provisions for purposes of court review." Senate Report 100-446 at 20, 1988 U.S.C.C.A.N. l090 (emphasis added). The categories for review which are permitted involve decisions on tribal gaming ordinances, 25 U.S.C. § 2710, management contracts, 25 U.S.C. § 2711, review of existing ordinances and contracts, 25 U.S.C.§ 2712, and enforcement actions and civil penalties, 25 U.S.C. § 2713. The enforcement action and

civil penalty section of IGRA provides comprehensive enforcement authority to impose monetary penalties and the closure of gaming facilities, and to prescribe regulations to carry out this purpose. 25 U.S.C. § 2713. The present action filed by the Tribe does not fall within one of the statutory categories that permit judicial review

2. Plaintiff fails to allege a waiver under 25 U.S.C. § 2714 because the General Counsel Opinion fits none of the categories under the provision.

Plaintiff did not and cannot assert a claim under the judicial review provision of the IGRA. Congress in this provision expressly limits judicial review of NIGC decisions to a few categories of final agency actions, none of which are involved here. See 25 U.S.C. § 2714. For the purpose of obtaining judicial review, a party may only challenge Commission decisions when they involve the approval or disapproval of tribal gaming ordinances and management contracts (25 U.S.C. §§ 2710-2712) , or when they involve enforcement actions (25 U.S.C. § 2713). Here, the General Counsel's opinion letter does not fall within one of these statutory categories set forth in IGRA.

Section 2714 evinces Congress's intent to limit judicial review to specific final agency actions. "The omission of a provision thereby shows Congressional intent to prohibit judicial review over any other agency actions as opposed to the few already granted express jurisdiction." *Lac Vieux Desert Band of Lake Superior Chippewa Indians of Mich. v. Ashcroft*, 360 F. Supp. 2d 64, 67 (D.D.C. 2004) (internal quotation marks and citations omitted). "[W]e adhere to '[a] frequently stated principle of statutory construction[:] when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.'" *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fl.*, 63 F.3d 1030, 1049 (9th Cir. 1995) (quoting *Nat'l R.R. Passenger Corp. v. Nat'l Assoc. of R.R. Passengers*, 414 U.S. 453, 458 (1974) (second and third alteration in original)). In addition, the legislative history

of IGRA is consistent with a congressional intent to limit judicial review to certain agency decisions. See S. Rep. 100-446 (1988) at 20 ("[Section 15] provides that certain Commission decisions will be final agency decisions for purposes of court review.") See *Cheyenne-Arapaho Gaming Comm'n v. NIGC*, 214 F.Supp. 2d 1155, 1171 (N.D.Okla.2002) (footnote omitted):

> A proper analysis of the IGRA illustrates Congress's intent to provide only limited review under the Act. In considering the IGRA, the Senate stated that Section 15 of the Act provides "that certain Commission decisions will be final agency provisions for purposes of court review." Senate Report 100-446 at 20, 1998 U.S.C.C.A.N. 3071, 3090. Thus, it is clear that Congress intended that a final order be a prerequisite for judicial review since the only reference to judicial review mandate that there must be a decision by the Commission pursuant to only certain sections of the IGRA for it to be considered a final action. See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994) (holding that Congress shows its intent to preclude judicial review where it creates a scheme permitting judicial review only for certain actions).

In the instant case, in order for Plaintiff to be entitled to judicial review, Plaintiff would have had to seek agency action under one of the reviewable categories of the judicial review mechanism and exhausted its administrative remedies by following the procedures set forth in IGRA for obtaining a reviewable final agency decision. This did not occur here, and Plaintiff alleges no action that fits the express and clear categories of decisions that Congress made reviewable.

C. In Any Event, a General Counsel Opinion LetterWould Not Constitute Final Agency Action Reviewable under the APA.

Here, Plaintiff's entire complaint hinges on an opinion letter written by the NIGC's former Acting General Counsel—an opinion letter that has not been adopted by the NIGC Chairman or the NIGC Commission. Therefore, Plaintiff's claim fails for want of a reviewable final agency action.

Several courts have held that opinion letters, such as the one at issue in this case, do not constitute reviewable final agency actions. See *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 646

(6th Cir.2004) (informal opinion letters by NHTSA's chief counsel did not amount to reviewable final agency action); *Citizens Against Casino Gambling in Erie County v. Kempthome*, 471 F. Supp. 2d 295, 322 (W.D.N.Y. 2007) (finding that the Secretary of Interior's opinion letter regarding whether a particular parcel was "Indian lands" under IGRA was not a final agency action because it represented an intermediate step in a process that would eventually result in a final agency action); *Miami Tribe of Oklahoma v. United States*, 198 Fed. Appx. 686 (10th Cir.2006) (DOI opinion letter on tribe's sovereignty over land for purposes of IGRA was not final agency action). In a case factually parallel to the instant action, Judge Robinson of the Kansas District Court held that an informal opinion letter by the Commission's General Counsel did not constitute reviewable final agency action:

> In March 2004, the NIGC Office of General Counsel ('OGC') provided the Tribe with its written opinion that gaming is not legal on the Shriner Tract under IGRA. . . . The Tribe requested reconsideration of the opinion, and also filed suit against the NIGC in the United States District Court for the District of Columbia, challenging the opinion . . . . The NIGC moved to dismiss the action for lack of a final agency action, a prerequisite for this Court's jurisdiction, and on June 1, 2004, the Court granted the NIGC's motion to dismiss.

Wyandotte Nation v. NIGC, 437 F. Supp. 2d 1193, 1201 (D. Kan. 2006).

Similarly, in *Cheyenne-Arapaho Gaming Commission v. NIGC*, 214 F. Supp. 2d 1155 (N.D. Okla. 2002), the plaintiff sought review of an NIGC General Counsel's legal opinion regarding the classification of a particular game. The U.S. District Court for the Northern District of Oklahoma found that the General Counsel's legal opinion was not reviewable under the APA. The court determined that "[t]he advisory letter in this case does not initiate or threaten enforcement and serves simply compliance advice that the NIGC gives to tribes who seek to participate in Indian gaming." 214 F.Supp. 2d. at 1169. The court further noted that interpretive letters by agency counsel are not final agency action because they are not definitive statements of

policy and do not require specific action to be taken by the recipient. Id. at 1170, citing *Air California v. United States Dept. of Transp*., 654 F.2d 616, 619-20 (9th Cir. 1981).

Equally persuasive is the decision in *U.S. ex rel. The Saint Regis Mohawk Tribe v. President R.C.-St. Regis Management Co.* 451 F.3d 44 (2nd Cir. 2006). The issue in *Saint Regis Mohawk* was whether a particular construction contract required Commission approval in order to be effective. The court noted that the Commission's Acting General Counsel had taken the position, in a letter to the parties, "that the construction contract was not void for lack of approval because commission approval was not required." 451 F. 3d at 49. The court held that "the acting General Counsel's letter does not constitute a final agency decision subject to appeal." Id. The court explained:

> The Supreme Court utilizes a two part test to determine whether an agency action is final for purposes of the APA: 'First, the action must mark the consummation of the agency's decisionmaking process - it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.' In re: Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig., 340 F.3d 749, 756 (8th Cir. 2003) (quoting Bennett v. Spear, 520 U.S. 154, 177-78 (1997)). Neither part of the test is satisfied here. In addition, § 2714 specifies that a decision by the Commission may be appealed to federal district court pursuant to the APA. The opinion letter here, though offered by the Commission's acting general counsel, is merely advisory and does not constitute a final agency decision capable of being appealed. Cheyenne-Arapaho Gaming Comm'n v. NIGC, 214 F.Supp.2d 1155, 1167-68 (N.D.Okla.2002).

Id. at 49, n.4. Similarly, here, the former Acting General Counsel's opinion letter does not constitute a final agency action capable of being appealed.

II. ASSUMING *ARGUENDO* JURISDICTION EXISTED, PLAINTIFF IS BARRED BY ISSUE PRECLUSION FROM STATING A CLAIM THAT IGRA APPLIES TO ITS GAMING ACTIVITIES.

Plaintiff is barred from prevailing on a claim that the NIGC violated IGRA when the Acting General Counsel opined that the Tribe does not come under the authority of IGRA and

thus the NIGC has no authority to expend funds for the purpose of providing technical assistance to Plaintiff's gaming commission. The Fifth Circuit addressed that issue in its *Ysleta del Sur Pueblo* decision, which held that where Plaintiff's gaming activities at the Center are concerned, the Restoration Act (and through it Texas gaming laws), *and not* IGRA, governs. 36 F.3d at 1335.

"The objective of the doctrine of issue preclusion (also known as collateral estoppel) is judicial finality; it fulfills 'the purpose for which civil courts had been established, the conclusive resolution of disputes within their jurisdiction.'" *Yamaha Corp. of America v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) quoting *Kremer v. Chemical Constr. Corp*., 456 U.S. 461, 467 n.6 (1982). "The Supreme Court has defined issue preclusion to mean that 'once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.'" Id. quoting *Allen v. McCurry*. 449 U.S. 90, 94 (1980). "Furthermore, once an issue is raised and determined, it is the entire issue that is precluded, not just the particular arguments raised in support of it in the first case." Id. citing *Securities Indus. Ass'n v. Board of Governors*, 900 F.2d 360, 364 (D.C. Cir. 1990) (plaintiff may not raise new argument in second proceeding even though it was never made in first proceeding; so long as argument could have been made, it is precluded); Restatement (Second) of Judgments § 27 cmt. c at 253 (if previously litigated "issue was one of law, new arguments may not be presented to obtain a different determination of that issue").

The standards for applying issue preclusion are as follows. First, the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case. Second, the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case. See *McLaughlin v. Bradlee*, 803 F.2d 1197, 1201

(D.C. Cir. 1986); Restatement (Second) of Judgments § 27 (1982) ("when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties"). Third, preclusion in the second case must not work a basic unfairness to the party bound by the first determination. There is no requirement that the party invoking issue preclusion have been a party to the earlier action. *United States v. Mollier*, 853 F.2d 1169, 1175 n. 7 (5th Cir.1988) ("[T]he principle of non-mutual collateral estoppel is that if a litigant has fully and fairly litigated an issue and lost, then third parties unrelated to the original action can bar the litigant from re-litigating that same issue in a subsequent suit.")

These standards are satisfied here. One of the issues resolved by the Fifth Circuit involved the question whether Plaintiff's gaming activities are governed by IGRA. In April 1993, Plaintiff sued the State and its governor pursuant to IGRA for refusing to negotiate a compact with Plaintiff that would permit Plaintiff to engage in casino-type gambling on its reservation.[3] *Ysleta del Sur Pueblo v. State of Texas*, 852 F. Supp. 587, 589 (W.D. Tex. 1993). The district court granted Plaintiff summary judgment, finding that neither IGRA nor the Restoration Act barred Plaintiff from engaging in casino-style gaming. See id. at 597. The State appealed, *Ysleta del Sur Pueblo*, 36 F.3d at 1331-1332, and the Fifth Circuit reversed.

After analyzing IGRA, the Restoration Act, and their legislative histories, the Fifth Circuit stated that it was "left with the unmistakable conclusion that Congress - and the Tribe - intended for Texas' gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas." Id. at 1334. Most importantly for the instant case, the Fifth Circuit also

3. See 25 U.S.C. § 2710(d)(7)(A)(i) ("The United States district courts shall have jurisdiction over all 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").

held that IGRA is not applicable to Plaintiff's gaming activities. Id. ("Because the Restoration Act and IGRA establish such fundamentally different regimes, we now must decide which statute applies in this case."). The Tribe argued that IGRA governed because it had impliedly repealed the Restoration Act, but the Fifth Circuit disagreed, pointing out that "the Supreme Court has indicated that 'repeals by implication are not favored.'" Id. at 1335, quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). Because the Restoration Act was the more specific of the two statutes, and because the legislative history of the Restoration Act clearly evinced Congress's intent that Plaintiff's gaming activities be controlled by Texas law (acting as surrogate federal law), the Fifth Circuit "conclude[d] not only that the Restoration Act survives today but also that it - and not IGRA - would govern the determination of whether gaming activities proposed by the [Tribe] are allowed under Texas law, which functions as surrogate federal law." Id. The Fifth Circuit thus directed that Plaintiff's IGRA-based suit be dismissed.

While the instant action involves different provisions of IGRA than those Plaintiff invoked in the Fifth Circuit's *Ysleta del Sur Pueblo* appeal, that fact is of no consequence because the Fifth Circuit categorically determined that IGRA does not apply to Plaintiff's gaming activities. That issue was necessarily decided by the Fifth Circuit because Plaintiff, in that case and as it does here, sought to avail itself of benefits and rights provided by IGRA. Certainly the issue was "contested", and the Fifth Circuit resolved the issue.

In the instant action, Plaintiff seeks a declaration that the NIGC violated IGRA by failing to exercise jurisdiction over its gaming activities, and more specifically, by denying Plaintiff benefits (technical assistance) uniquely available to tribes gaming under the IGRA. Complaint

¶ 1. However, another court of competent jurisdiction has already decided that the Restoration Act (and Texas law acting as surrogate federal law), and not IGRA, applies to Plaintiff's gaming activities. *Ysleta del Sur Pueblo*, 36 F.3d at 1334.

Conclusion

For the reasons set forth above, Defendant requests that Plaintiff's suit be dismissed with prejudice.

Dated: September 13, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following: Randolph Barnhouse, Attorney for Plaintiff.

s/ *Peter Kryn Dykema*
Peter Kryn Dykema
Trial Attorney
United States Department of Justice