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

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

DEFENDANT'S REVISED 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. This Motion is submitted to supercede and replace Defendant's Motion to Dismiss and Memorandum in Support, which was submitted for filing on September 13, 2010 together with Defendant's Motion to Exceed Page Limits. Defendant hereby withdraws the aforesaid September 13 motions and submits the instant motion in their stead.

The undersigned is authorized to represent that Plaintiff Ysleta del Sur Pueblo ("Plaintiff", or the "Tribe") stipulates to the timeliness of this motion.[1]

1. This revised motion is substantially similar to the motion filed on September 13, 2010, with the exception of minor edits and the withdrawal of Defendant's alternative ground, for the time being, that Plaintiff's claims are precluded by the decision in *Ysleta del Sur Pueblo v. Texas*, 36

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).

Plaintiff's suit must be dismissed. Because the judicial review provision of the Indian Gaming Regulatory Act, 25 U.S.C. § 2714, makes only certain specific decisions reviewable under the Administrative Procedure Act, 5 U.S.C. § 704, 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 jurisdiction. 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.

F.3d 1325, 1335 (5th Cir. 1994). Defendant does not waive its preclusion argument, and states that although an issue preclusion argument is appropriate for a motion to dismiss under 12(b), *Hargrove v. Barclays Capital Real Estate Inc*, 2010 WL 2836167, 1 (5th Cir. 2010) (12 (b)(6) dismissal affirmed), Defendant thinks that jurisdiction is a threshold issue that resolves this case. Defendant will assert its issue preclusion argument at a later date if it becomes necessary to do so. The revised and shortened motion also obviates the need for a motion to exceed page limits.

Statement of Facts

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 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 for a Better Env't*, 523 U.S. 83, 94-96 (1998). Furthermore, "[s]ince federal courts are courts of limited jurisdiction, there is a presumption against [their] jurisdiction, and the party invoking

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.

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) (citation omitted).

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) (citation omitted). "[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 v. King & Spalding*, 467 U.S. 69, 73 (1984).

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 define the courts' jurisdiction to entertain 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. 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 a 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 are 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 the 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); *Telecommunications Research and Action Ctr. v. Federal Communications Comm'n*, 750 F.2d 70, 78 (D.C. Cir.1984).

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). 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). "The 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, entitled "Judicial Review," provides that "[d]ecisions 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 specificity of Section 15 shows that Congress intended to permit only limited review. "[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 action challenged by the Tribe does not fall within one of the categories for which judicial review is permitted.

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. 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 and citation 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.

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 Letter Would 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.3 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).

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3. 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).

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. . . .. 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.

Conclusion

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

Dated: September 21, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21th 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