ORAL ARGUMENT – DECEMBER 08, 2011

Case No. 11-5136

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEIGHBORS OF CASINO SAN PABLO, an unincorporated association; ANDRES SOTO; ANNE RUFFINO; ADRIENNE HARRIS; TANIA PULIDO; and JULIA I. AREAS,

Plaintiffs/Appellants,

v.

KEN L. SALAZAR, in his official capacity as Secretary of the Interior; LARRY ECHO HAWK, in his official capacity as Assistant Secretary of the Interior—Indian Affairs; TRACIE STEVENS, in her official capacity as Acting Chairperson of the National Indian Gaming Commission; and, NATIONAL INDIAN GAMING COMMISSION;

Defendants/Appellees,

LYTTON RANCHERIA OF CALIFORNIA,

Intervenor-Appellee.

Appeal from U.S. District Court for the District of Columbia,
Case No. CV 09-02384-RJL

APPELLANTS' OPENING BRIEF

FUTTERMAN DUPREE DODD CROLEY MAIER LLP
MARTIN H. DODD
(CA Bar No.104363; D.C. Circuit Bar No. 53494)
180 Sansome Street, 17th Floor
San Francisco, CA 94104
Telephone: (415) 399-3840
Attorneys for Plaintiffs/Appellants
Neighbors of Casino San Pablo; Andres Soto; Anne Ruffino; Adrienne Harris; Tania Pulido; and Julia I. Areas

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Parties

1. The parties who appeared in the District Court are the following:

Plaintiffs:

NEIGHBORS OF CASINO SAN PABLO, an unincorporated association;

ANDRES SOTO;

ANNE RUFFINO;

ADRIENNE HARRIS;

TANIA PULIDO; and

JULIA I. AREAS.

Defendants:

KEN L. SALAZAR, in his official capacity as Secretary of the Interior;

LARRY ECHO HAWK, in his official capacity as Assistant Secretary of the Interior—Indian Affairs;

TRACY STEVENS, in her official capacity as Chairperson of the National Indian Gaming Commission;

and,

NATIONAL INDIAN GAMING COMMISSION.

Intervenor-defendant:

LYTTON RANCHERIA OF CALIFORNIA.

2. The parties to the appeal before this Court are the following:

Appellants:

NEIGHBORS OF CASINO SAN PABLO, an unincorporated association;

ANDRES SOTO;

ANNE RUFFINO;

ADRIENNE HARRIS;

TANIA PULIDO; and

JULIA I. AREAS.

Respondents/Appellees:

KEN L. SALAZAR, in his official capacity as Secretary of the Interior;

LARRY ECHO HAWK, in his official capacity as Assistant Secretary of the Interior—Indian Affairs;

TRACIE STEVENS, in her official capacity as Chairperson of the National Indian Gaming Commission;
and,

NATIONAL INDIAN GAMING COMMISSION.

Intervenor-Appellee:

LYTTON RANCHERIA OF CALIFORNIA.

3. Corporate Disclosure Statement Pursuant to FRAP 26.1 and Circuit Rule 26.1:

Plaintiff/appellant NEIGHBORS OF CASINO SAN PABLO is an unincorporated association whose members have no ownership interest and no member of which has issued shares or debt securities to the public.

Rulings Under Review

The appeal has been taken from the Memorandum Opinion and Order, dated March 30, 2011, by Hon. Richard J. Leon, District Judge, dismissing plaintiffs/appellants' First Amended Complaint. The Memorandum Opinion and Order are listed as Documents 45 and 46, respectively, on the District Court docket

sheet and may be found at pages 228-247of Appellants' Appendix, filed herewith. The decision of the District Court is reported as *Neighbors of Casino San Pablo, et al. v. Ken Salazar, et al.*, 2011 U.S. Dist. LEXIS 33639 (D.D.C., March 30, 2011).

Related Cases

There are no related cases currently pending in any court.

Dated: September 22, 2011

Respectfully submitted,

FUTTERMAN DUPREE DODD CROLEY MAIER LLP

By /s/ Martin H. Dodd
Martin H. Dodd
Attorneys for Plaintiffs/Appellants
Neighbors of Casino San Pablo, Andres Soto, Anne Ruffino, Adrienne Harris, Tania Pulido and Julia Areas

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

*Authorities upon which we chiefly rely are marked with asterisks.

*Authorities upon which we chiefly rely are marked with asterisks.

*Authorities upon which we chiefly rely are marked with asterisks.

*Authorities upon which we chiefly rely are marked with asterisks.

*Authorities upon which we chiefly rely are marked with asterisks.

Statutes Regulations and Rules

Federal Statutes

*Authorities upon which we chiefly rely are marked with asterisks.

*Authorities upon which we chiefly rely are marked with asterisks.

Other Authorities

Constitutional Provisions

*Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

Abbreviation	Definition
AA	Appellants' Appendix
APA	Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*
DJA	Declaratory Judgment Act, 28 U.S.C. § 2201
FAC	First Amended Complaint
IGRA	Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*
IRA	Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*
NIGC	National Indian Gaming Commission
SPMC	San Pablo Municipal Code
QTA	Quiet Title Act, 28 U.S.C. § 2409a

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The First and Second Claims for Relief of the FAC are brought pursuant to the APA and challenge NIGC's approvals of two tribal gaming ordinances. IGRA provides that ordinance approvals are final agency action subject to judicial review. 25 U.S.C. §§ 2710, 2714. The Third and Fifth Claims for Relief challenge other final agency action under 5 U.S.C. § 706(2). The Third, Fourth and Fifth Claims also allege non-statutory claims challenging federal agency action and/or the application of a federal statute which "venture[d] beyond the bounds of Congress's enumerated powers." *Laroque v. Holder*, 2011 U.S. App. LEXIS 13907, *39 (D.C. Cir., July 8, 2011).

The District Court entered its final order dismissing the FAC on March 30, 2011. Notice of appeal was filed on May 27, 2011. AA 228-248. This Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291.

INTRODUCTION

Plaintiffs and appellants Neighbors of Casino San Pablo, Andres Soto, Adrienne Harris, Tania Pulido, Anne Ruffino and Julia Areas (collectively, "Neighbors") have brought this action against the Secretary of the Interior ("Secretary"), the Assistant Secretary for Indian Affairs, NIGC and the Chairperson of NIGC (collectively, "Federal Defendants") to challenge the operation of an Indian casino ("Casino") which was foisted upon Neighbors' existing community without the analysis and review required by IGRA – an analysis and review which, had it been conducted, would have precluded Indian gaming at the site.

The Casino land is in San Pablo, California, a city located within the core of the densely populated San Francisco Bay Area, and has been subject to state jurisdiction since California was admitted to the Union. In October 2003, pursuant to Section 819 of the Omnibus Indian Advancement Act of 2000, Pub. L. 106-568, 114 Stat. 2868 ("Section 819"), the federal government accepted title to the Casino site in trust for the Lytton Band of Pomo Indians (the "Lyttons"), a small, newly-formed group with no connection to any land in or even near San Pablo.

In December 2003, the Lyttons sought NIGC approval of an ordinance which pertained to the gaming they intended to conduct and which specifically identified the Casino's location. NIGC approved the ordinance, but failed to find

that the site was "Indian lands within the jurisdiction" of the Lyttons as required by IGRA. In 2008, the Lyttons submitted, and NIGC approved, a further gaming ordinance. Once again, NIGC failed to determine that the site was properly under the Lyttons' jurisdiction.

The principal issue before the Court is whether the mere transfer of *title* to the Casino site in trust for the Lyttons also transferred jurisdiction, *i.e.*, *sovereignty*, over the land to the tribe, even though none of the permissible methods for the transfer of state sovereignty occurred. Neighbors contend that, under long-settled law, the transfer of title alone could not create an island of Indian sovereignty in the midst of an otherwise non-Indian community. But the Federal Defendants' actions, including the ordinance approvals, effectively authorized the Lyttons to assert jurisdiction over the land to the exclusion of state law, including laws governing gambling and land use.

Operation of the Casino has visited a number of ills on Neighbors and their community: traffic, noise, light pollution, street prostitution and other crime have all increased. Neighbors, who are otherwise permitted by state and local law to participate in land use decisions and to challenge illegal gambling establishments, are now precluded from exercising those rights with respect to the Casino site.

The District Court rejected Neighbors' claims in their entirety. Because the District Court's reasoning does not withstand analysis, this Court must reverse.

ISSUES ON APPEAL

1. Did the District Court err in dismissing Neighbors' First and Second Claims for Relief on the grounds that IGRA did not require NIGC, before approving gaming ordinances in 2003 and 2008, to find that the Casino site is "Indian land within the jurisdiction" of the Lyttons, even though information provided to NIGC specifically identified the site?

2. Did the District Court err in holding that Neighbors lacked standing under the Tenth Amendment and the Enclaves Clause to bring the Third, Fourth, and Fifth Claims for Relief, even though Neighbors reside near the Casino, gaming at the site has adversely affected their quality of life and impaired their rights under state law, and Neighbors are asserting their own interests, not those of the state?

3. Did the District Court err in holding that Neighbors could not satisfy the redressability prong for Article III standing with respect to the Fifth Claim, even though the relief sought is an order setting aside a 2004 proclamation that the Casino site is a reservation, to the extent the proclamation sought to confer sovereignty over the site on the Lyttons?

4. Did the District Court err in holding that the Third, Fourth and Fifth Claims fail to state causes of action?

5. Did the District Court err when it dismissed the Third Claim based on a factual finding unsupported by the record?

6. Did the District Court err when it dismissed the Fourth Claim under the DJA on the ground that Neighbors had failed to allege an independent basis for subject matter jurisdiction?

7. Did the District Court misconstrue the Fifth Claim as a challenge to the land-to-trust acquisition and the proclamation that the site is part of the Lyttons' reservation?

ALLEGATIONS OF THE FIRST AMENDED COMPLAINT

Neighbors are a group of residents and homeowners who live near the Casino, which is located in San Pablo, California and operated by the Lyttons. AA 017-023. The Casino – which consists of a building and parking lot – sits on 9.5 acres in a commercial district of a densely populated urban community within the San Francisco Bay Area. AA 015, 037. The area around the Casino is more than 99% non-Indian. AA 041. From 1850 until October 2003, the land had been in private, non-Indian hands and subject to state and local jurisdiction. AA 016, 037.[1]

When California became a state in 1850, it did not take jurisdiction subject to any treaties with, or reservations occupied by, Indians. AA 028-029. In the early twentieth century, the federal government established a number of "rancherias" for California Indians. These were small tracts of land located in farming communities, which were divided into lots and assigned to individual

[1] From sometime prior to 2003, the site was a state licensed card room offering "non-banked" card games. AA 015, 037.

families. The rancherias remained subject to California's jurisdiction and were not segregated communities under the sovereignty of the Indians who lived on them. AA 029-031.

In 1927, the government purchased 50 acres in rural Sonoma County from private landowners and named it Lytton Rancheria. AA 031. For a while, members of two families – who had roots in tribes from elsewhere – resided on the Rancheria. These two families had "no tribal organization." S. Rep. No. 1874, 85th Congress, 2d Sess., p. 28; AA 032, 035. In 1958, the federal government enacted legislation which resulted in the distribution of the entire Lytton Rancheria to those two families. They sold the land soon thereafter. AA 033.

In 1986, descendants of these two families joined a lawsuit against the federal government seeking "restoration" of eligibility to receive federal benefits. In 1991, pursuant to the stipulation settling the case, the government listed the Lyttons as a tribe entitled to receive federal benefits.[2] The Lyttons agreed to refrain from gaming in Sonoma County unless permitted to do so by the county government. AA 034-036.

In 1999, prior to the acquisition of any land, the Lyttons enacted, and NIGC approved, a gaming ordinance ("1999 Ordinance") which provided that they would

[2] Although the District Court stated that the Lyttons were "reinstated" (AA 230), they were restored only to the status they previously occupied (AA 081, ¶ 4) which, as alleged in the FAC, was a group that had neither organized nor was recognized as a tribe. AA 032.

have the "sole proprietary interest in and responsibility for the conduct of" any gaming. See Lytton Gaming Code, §§ 1.07 (July 8, 1999); AA 036.[3]

In 2000, Section 819 was added as a "Technical Amendment" to the Omnibus Indian Advancement Act of 2000. Section 819 provides:

> Notwithstanding any other provision of law, the Secretary of the Interior shall accept for the benefit of the Lytton Rancheria of California the land described in that certain grant deed dated and recorded on October 16, 2000, in the official records of the County of Contra Costa, California, Deed Instrument Number 2000-229754. The Secretary shall declare that such land is held in trust by the United States for the benefit of the Rancheria and that such land is part of the reservation of such Rancheria under sections 5 and 7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. § 467). Such land shall be deemed to have been held in trust and part of the reservation of the Rancheria prior to October 17, 1988.

AA 036-037, 074.

Pursuant to Section 819, on October 9, 2003, the Secretary accepted title to the Casino land – located some 60 miles and three counties away from the former Lytton Rancheria – in trust for the Lyttons. AA 015, 038. The state did not then, or at any time thereafter, cede its jurisdiction over the site. AA 016. In December 2003, the Lyttons submitted to NIGC for approval an "Ordinance Of The Lytton Rancheria of California, Temporarily Licensing A Class II Gaming Operation Owned and Operated by SF Casino Management, LP, a California Limited Partnership" ("2003 Ordinance"), together with tribal Resolution 121303-1

[3]The 1999 Ordinance can be located at http://nigc.gov/Reading_Room/Gaming_Ordinances.aspx. Judicial notice is requested. Fed. R. Evid. 201(d). Relevant sections are set out in the Appendix.

("Resolution") revoking the license effective November 24, 2003, the date on which the Lyttons assumed "full ownership and operational control of the Casino San Pablo." AA 058-059.[4] The Resolution identified the Casino both by name and by its location in San Pablo. AA 038, 058-059. On December 19, 2003, NIGC approved the 2003 Ordinance "for gaming only on Indian lands, as defined in the IGRA, over which the Rancheria possesses jurisdiction and exercises governmental power," but did so without determining that the Casino site was Indian land within the Lyttons' jurisdiction. AA 039, 060.

Thereafter, the Lyttons conducted Class II gaming, as defined in IGRA, at the Casino. AA 103, ¶ 9.[5] On July 13, 2004, the Assistant Secretary proclaimed the Casino to be "an addition to and part of the reservation of the Lytton Rancheria of California . . ." ("Proclamation"). AA 016.

---

[4]Technically, the Lyttons *re*submitted the Ordinance because they had previously, and inadvertently, rescinded it before it could be approved by NIGC. AA 232, n. 6; AA 058.

[5] IGRA divides Indian gaming into three classes. Class I are traditional Indian games regulated only by tribes themselves. 25 U.S.C. § 2710(a)(1). Class II includes non-banking card games, bingo and games similar to bingo, and is regulated jointly by tribes and NIGC. *Id*., § 2703(7)(A), (B); *Colorado River Indian Tribes v. National Indian Gaming Comm'n*, 466 F.3d 134, 135 (D.C. Cir. 2006). Class III includes most forms of casino gambling (*e.g*., slot machines, roulette and blackjack), and is permitted only if the tribe and the state have entered into a compact authorizing such gaming. 25 U.S.C. §§ 2703(8), 2710(d)(2)(C). The Lyttons have no compact with the state authorizing Class III gaming. AA 039-040.

In 2005, the Lyttons introduced gaming machines to the Casino which they contended were "bingo" games, but which Neighbors allege are slot machines made illegal by California law. AA 040.

On January 30, 2008, the Lyttons submitted, and on May 22, 2008, NIGC approved, a new gaming ordinance (the "2008 Ordinance"). AA 063-072. As before, NIGC approved the ordinance for "gaming only on Indian lands, as defined in IGRA, over which the Nation has jurisdiction," but did not determine that the Casino was Indian land within the Lyttons' jurisdiction. AA 062.

Operation of the Casino has interfered with Neighbors' use and enjoyment of their homes and community. Traffic has increased substantially and clogs the streets; noise from the Casino interferes with Neighbors' quiet enjoyment of their homes; light pollution from the Casino's electronic billboards disturbs them at night; and crime, including streetwalking prostitutes, has increased. In addition, the Lyttons' purported exercise of sovereignty over the site has had the effect of stripping Neighbors of their rights, otherwise guaranteed by state and local law, to participate in land use decisions regarding the Casino land and to challenge illegal gambling. AA 017-023, 041-045.

PROCEEDINGS BELOW

Neighbors filed the FAC on March 15, 2010. AA 014. The Federal Defendants moved to dismiss the FAC on May 24, 2010. AA 075. The Lyttons

and the City of San Pablo moved to intervene on May 21, 2010 and June 11, 2010, respectively. AA 095, 120. The District Court denied the City's motion to intervene and granted the Lyttons' motion to intervene in part. AA 010, 215. The Lyttons filed a motion to dismiss on February 11, 2011. AA 216. On March 30, 2011, the District Court granted the Federal Defendants' motion and dismissed the action in its entirety. AA 228-245. The District Court thereafter denied the Lyttons' motion to dismiss as moot. AA 012-013. Neighbors timely filed their notice of appeal on May 27, 2011. AA 248.

SUMMARY OF ARGUMENT

The order dismissing Neighbors' First through Fifth Claims should be reversed. The First and Second Claims allege that, before approving the 2003 and 2008 Ordinances, NIGC was required by IGRA, but failed, to make a determination that the Casino site was gaming eligible, *i.e.,* Indian lands within the Lyttons' jurisdiction. *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295, 326 (W.D.N.Y. 2007) ("*CACGEC I*"). The District Court concluded that IGRA imposed no such obligation on NIGC because the Lyttons' submitted for approval only non-site specific ordinances. Contrary to the District Court's conclusion, the 2003 Ordinance was site-specific. Therefore, applicable law and NIGC's own policy required NIGC to determine that the site was Indian lands within the Lyttons' jurisdiction before approving the Ordinance.

In addition, the District Court's conclusion that the 2003 Ordinance imposed no duty on NIGC because it was merely a "resolution" which did not seek "new gaming authority" is contrary to the record and to applicable provisions of IGRA. With respect to the Second Claim, NIGC knew in 2008 that the Lyttons were gaming at the site and therefore should have been required to make a gaming eligibility determination before approving the 2008 Ordinance.

The District Court also erred in concluding that the Casino site became eligible for gaming as a matter of law when title to the land was taken in trust. For trust land to be gaming eligible under IGRA, a tribe must exercise governmental power over it, and to exercise government power, the tribe must have jurisdiction over the land. Tribal jurisdiction is an essential prerequisite to gaming eligibility which NIGC itself acknowledged in this case. Section 819 authorized that the land be taken into trust, but did not purport to confer jurisdiction over the land.

In their Third, Fourth and Fifth Claims for Relief, Neighbors allege that, under well-settled principles, the federal government or an Indian tribe may obtain jurisdiction over land within a state's borders in only three ways – none of which applied here: (1) by reservation when a state is admitted to the union; (2) pursuant to the Enclaves Clause of the Constitution (Art. 1, § 8 cl. 17); or (3) by state cession. Neighbors seek a declaratory judgment that (a) if NIGC actually made, or is deemed to have made, a determination that the Lyttons have jurisdiction over the

Casino site, neither Section 819 nor the act of taking the land into trust authorized such a determination (Third Claim); (b) the Lyttons have no jurisdiction over the Casino site (Fourth Claim); and (c) if the Proclamation that the Casino is part of the Lyttons' "reservation" purported to transfer jurisdiction to the Lyttons, it exceeded the Secretary's lawful authority (Fifth Claim).

The District Court erred when it dismissed the Third, Fourth and Fifth Claims for lack of prudential standing on the grounds that Neighbors were asserting the rights of the State of California under the Tenth Amendment and/or the Enclaves Clause and also dismissed the Fifth Claim for lack of redressability. Intervening and controlling authority demonstrates that Neighbors have standing because they are seeking to protect their own, not merely the state's, interests. See *Bond v. United States*, __U.S.__, 131 S. Ct. 2355 (2011); *Laroque v. Holder*, 2011 U.S. App. LEXIS 13907 (D.C. Cir., July 8, 2011). Furthermore, the relief requested in the Fifth Claim will redress the injury alleged in that claim.

The District Court also erred in dismissing the Third, Fourth and Fifth Claims for failure to state a claim upon which relief can be granted. The Third and Fifth Claims properly challenge final agency action under 5 U.S.C. § 706(2) to the extent such action was intended to confer jurisdiction on the Lyttons. In addition, the Third, Fourth and Fifth Claims allege the type of "nonstatutory" claims which have been authorized by the Supreme Court and this Court. See *Free Enterprise*

Fund v. Public Co. Acc'ting Oversight Bd., 561 U.S.__, 130 S. Ct. 3138, 3151 n. 2 (2010); *Laroque,* 2011 U.S. LEXIS 13907 at *39; *Trudeau v. FTC*, 456 F.3d 178, 186-187 (D.C. Cir. 2006).

The Third Claim is pleaded in the alternative to the First and Second Claims. In dismissing it, the District Court erred by making a factual finding, unsupported by the record, that NIGC had not made a gaming eligibility determination with respect to the Casino site. The District Court had subject matter jurisdiction of the Fourth Claim under the DJA, pursuant to 28 U.S.C. § 1331, because that claim (1) states a nonstatutory claim challenging Section 819 and/or the Federal Defendants' actions to the extent they purported to confer jurisdiction on the Lyttons; (2) challenges the Lyttons' sovereignty over the site; and (3) seeks relief which would be available if any of the first three claims survive. Finally, the District Court misunderstood that, in the Fifth Claim, Neighbors challenge the Federal Defendants' actions to the extent they conferred jurisdiction over the Casino, not whether the land should have been taken into trust or proclaimed to be a reservation.

ARGUMENT

A. Standard of Review.

This Court reviews *de novo* the District Court's rulings dismissing Neighbors' claims for failure to state a claim upon which relief can be granted and

for lack of standing. *Laroque*, 2011 U.S. App. LEXIS 13907 at *16-*17; *Amador County v. Salazar*, 640 F.3d 373, 377-378 (D.C. Cir. 2011). This Court "'must accept as true all material allegations of the complaint,' drawing all reasonable inferences from those allegations in plaintiffs' favor and 'presum[ing] that general allegations embrace those specific facts that are necessary to support the claim.'" *Laroque*, 2011 U.S. App. LEXIS 13907 at *17 (internal citations omitted). In assessing Neighbors' standing, this Court "must assume [they] will prevail on the merits of their constitutional claims." *Id*.; *Amador County*, 640 F.3d at 378.

B. The District Court Committed Reversible Error When It Dismissed The First And Second Claims For Relief.

Gaming under IGRA may be conducted only on Indian lands within a tribe's jurisdiction. "Indian lands" is defined as:

> (A) all lands within the limit 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.

25 U.S.C. § 2703(4).

The necessity for tribal jurisdiction over Indian land is repeatedly emphasized in Section 2710 of IGRA. See 25 U.S.C. §§ 2710(b)(1) ("An Indian tribe may engage in, or license and regulate, class II gaming on *Indian lands within such tribe's jurisdiction* . . ."); 2710(b)(2) ("The Chairman shall approve any tribal

ordinance or resolution concerning . . . class II gaming on the *Indian lands within the tribe's jurisdiction* . . "); 2710(b)(4)(A) (". . . class II gaming activity conducted on *Indian lands within the jurisdiction of the Indian tribe* . . ."); 2710(d)(1)(A)(i) (". . . [ordinance] adopted by the governing body of the Indian *tribe having jurisdiction over such [Indian] lands* . . ."); 2710(d)(1)(3)(A) ("Any Indian *tribe having jurisdiction over the Indian lands* upon which a class III gaming activity is being conducted. . .") (emphasis added). The "consistent and overarching requirement common to each class of gaming [under IGRA] is that it be sited on Indian land within the tribe's jurisdiction." *CACGEC I,* 471 F. Supp. 2d at 304. See also *State of Kansas v. United States*, 249 F.3d 1213, 1218 (10th Cir. 2001).

IGRA imposes still another requirement pertinent to this case. A tribe must submit to NIGC for approval an ordinance or resolution pertaining to gaming it intends to conduct. 25 U.S.C. § 2710(b)(1)(B), (2).

Neighbors allege that together these statutory mandates required NIGC, before approving the Lyttons' 2003 and 2008 Ordinances, to find that the Casino site is Indian land within the jurisdiction of the Lyttons. Because NIGC failed to do so, the approvals should be set aside. AA 045-048; *CACGEC I*, 471 F. Supp. 2d at 326.

The District Court held that NIGC had no such duty for two reasons. First, the court concluded that the 2003 and 2008 Ordinances were not "site-specific," and that "the plain language of the IGRA did not require NIGC to perform an independent 'Indian lands' determination in conjunction with the Lyttons' submission of non-site-specific gaming ordinances." AA 236. Second, the District Court held that the Casino site became gaming eligible as soon as title to the land was taken in trust. *Id*. The court was wrong on both counts and must be reversed.

1. Before Approving The 2003 And 2008 Ordinances, NIGC Had A Duty To Determine That The Casino Site Was Within The Lyttons' Jurisdiction.

a. NIGC must make a gaming eligibility determination if it is presented with a site-specific ordinance for approval.

It is undisputed that, at least when presented with a site-specific ordinance, NIGC must determine that the identified land is eligible for gaming before approving the ordinance. The case law so provides, NIGC so admits and the District Court agreed. AA 236 & n. 10.

In *CACGEC I* – a decision the District Court did not mention – the tribe intended to conduct gaming on land to be purchased in Buffalo, New York. The tribe submitted a gaming ordinance to NIGC for approval. NIGC approved the ordinance for gaming on Indian lands generally, but failed to determine that land in Buffalo was gaming eligible within the meaning of IGRA. Plaintiffs contended

that IGRA required NIGC to make such a determination before approving the ordinance or permitting gaming on the land. The *CACGEC I* court agreed:

> Whether proposed gaming will be conducted on Indian lands is a critical, threshold jurisdictional determination of the NIGC. Prior to approving an ordinance, the NIGC Chairman must confirm that the situs of proposed gaming is Indian lands. If gaming is proposed to occur on non-Indian lands, the Chairman is without jurisdiction to approve the ordinance. . . . [T]he NIGC is the gatekeeper for gaming on Indian lands and, when acting on a tribal gaming ordinance, it has a duty to make a threshold jurisdictional determination. If, by the Chairman's action or inaction, a tribe establishes a gaming operation on non-Indian lands, it follows that the NIGC has no jurisdiction thereafter to fine or close that unlawful operation.

471 F. Supp. 2d at 323-324.

Because NIGC failed to "make an Indian lands determination regarding the to-be-purchased sites identified in the Compact before acting on the Ordinance . . . the Ordinance approval with respect to the Buffalo Parcel was arbitrary and capricious." *Id*. at 326. The court remanded the matter to NIGC to make the necessary determination. *Id*. at 327.

In *North County Community Alliance, Inc. v. Salazar,* 573 F.3d 738 (9th Cir. 2006) – which the District Court found to be "persuasive authority" – the Nooksack Tribe sought in 2006 to construct and operate a Class II gaming facility on land approximately 33 miles from their historic reservation. The tribe relied upon a non-site specific ordinance which had been approved in the 1990s before the tribe had any land and which authorized gaming on Indian lands generally. Plaintiffs argued that NIGC was required to make an Indian lands determination

prior to approving the original non-site specific ordinance and before licensing the new facility. The majority held that nothing in IGRA required "a tribe [to] submit a site-specific ordinance as a condition of approval by the NIGC" (*id*. at 747) or required NIGC to make an Indian lands determination before approving a non-site specific ordinance. *Id*.[6]

The majority emphasized, however, two points with particular relevance for this case. First, the court contrasted the facts before it with *CACGEC I*, where the Buffalo parcel had been generally identified. "In the Nooksack Ordinance, no potential gaming sites are identified, either specifically or generally." *Id*. at 746. See *Arizona v. Tohono O'odham Nation*, 2011 U.S. Dist. LEXIS 64041, *11 n. 2 (D. Ariz., June 15, 2011) (before approving amended gaming ordinance, NIGC required to make gaming eligibility determination for specifically identified parcel).

Second, NIGC itself represented that "*when a site-specific ordinance is presented for approval it has an obligation to make an Indian lands determination for the specifically identified site or sites*. In that circumstance, it makes sense for the NIGC to make an Indian lands determination for the site or sites identified." *North County*, 573 F.3d at 746 (emphasis added). Likewise, in this case, NIGC admitted that it must make a determination if a "'site-specific ordinance or

[6] The majority acknowledged that its reading of the statute could lead to "the possibility that an Indian casino might be built on non-Indian land." *Id*. at 748.

management contract . . . indicates the proposed location of the gaming.'" AA 236, n. 10.

The principles articulated in the foregoing authority require reversal of the order dismissing the First and Second Claims.

b. NIGC was required to make a gaming eligibility determination before approving the site-specific 2003 Ordinance.

(1) The 2003 Ordinance was site-specific.

The District Court concluded that the 2003 Ordinance was not site-specific and thus imposed no duty on NIGC to determine if the Casino site was eligible for gaming. The court's conclusion cannot be squared with the record.

At the outset, the District Court had no basis to conclude that the 2003 Ordinance was non-site specific. The Lyttons did not attach a copy of the Ordinance to the Resolution, but Neighbors alleged that the 2003 Ordinance was site-specific. AA 038, ¶ 66; AA 045, ¶ 83; AA 058-060. Unless other information in the record contradicted that allegation as a matter of law, the District Court was bound to accept it as true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *Laroque,* 2011 U.S. App. LEXIS 13907 at *17.

And, far from contradicting Neighbors' allegations, the record demonstrates that the Lyttons identified the "potential gaming site[]." *North County*, 573 F.3d at

746. The Resolution specifically identified the Casino location no less than three times:

> WHEREAS: The Lytton Rancheria of California . . . now owns and operates the Casino San Pablo . . . in San Pablo, California, and offers Class II gaming there pursuant to federal and tribal law. . . .
>
> WHEREAS: . . . .[T]he Tribe issued . . . a Class II Gaming license . . . for the limited purpose of providing a means to continue the operation of the Casino San Pablo as a card room . . . .
>
> WHEREAS: The Tribe on November 24, 2003 assumed full ownership and operational control of the Casino San Pablo . . . .

AA 058.

The Federal Defendants have never claimed that the Resolution did not identify the site or that NIGC was unaware that the Lyttons were conducting gaming there when it considered the 2003 Ordinance. As discussed above, NIGC admits that it must make gaming eligibility determinations for "management contract[s] that indicate[] the proposed location of the gaming." AA 236, n. 10; *North County*, 573 F.3d at 746. Neither the District Court nor the Federal Defendants explained why the 2003 Ordinance, which licensed a third party to operate a facility at a specific location, should be treated any differently than a management contract which identifies a proposed gaming location. There is no meaningful distinction. Accordingly, the District Court should have required NIGC to follow its own policy of conducting a gaming eligibility determination when presented with a site-specific ordinance.

(2) The District Court's ruling that NIGC was not required to make a gaming eligibility determination is based on a misreading of the Resolution.

Rather than hold NIGC to its policy regarding site-specific ordinances, the District Court concluded NIGC was freed from any obligation because the 2003 Ordinance was not an ordinance at all, but "actually a resolution . . . to revoke SF Casino Management's temporary, class II gaming and management license, which had been granted pursuant to 25 U.S.C. § 2710(b)(4)(A)," and which did not seek "new gaming authority for the San Pablo property." AA 237, 238. The court's conclusions are contradicted by the Resolution itself, by NIGC's response thereto and by applicable law.

The Resolution did more than simply revoke the gaming license. It sought to accomplish three goals: first, to revoke a *prior* resolution which had rescinded the Ordinance, granting the temporary license to a non-Indian management company, before NIGC had approved it; second, to notify NIGC that the Lyttons were *resubmitting* the Ordinance for approval effective as of October 9, 2003; and third, to revoke the license conferred by the 2003 Ordinance retroactive to November 24, 2003, the date when the Lyttons assumed control of operations at the site. The Resolution reads in pertinent part as follows:

> WHEREAS: By its "ORDINANCE OF THE LYTTON RANCHERIA OF CALIFORNIA TEMPORARILY LICENSING A CLASS II GAMING OPERATION OWNED AND OPERATED BY SF CASINO MANAGEMENT, L.P., A CALIFORNIA LIMITED PARTNERSHIP," (the

> "*Ordinance*") the Tribe issued . . . a Class II Gaming license to SF Casino Management L.P. . . . pursuant to Section 2710(b)(4)(A) of [IGRA] . . . for the limited purpose of providing a means to continue the operation of the Casino San Pablo. . . .
>
> WHEREAS: the Tribe on November 24, 2003 assumed full ownership and operational control of the Casino San Pablo. . . .
>
> WHEREAS Resolution 112503-1 requires certain technical corrections because *the Tribe now understands that by rescinding the Ordinance, instead of merely revoking the license, the Tribe inadvertently prevented the National Indian Gaming Commission from reviewing the Ordinance for its approval*,"
>
> IT IS THEREFORE RESOLVED that Resolution 112503-1 is revoked and rescinded . . . nunc pro tunc; and,
>
> . . . that effective November 24, 2003, the license . . . was terminated, and after that date has been of no force or effect; and
>
> . . . that the "*ORDINANCE* OF THE LYTTON RANCHERIA OF CALIFORNIA TEMPORARILY LICENSING A CLASS II GAMING OPERATION OWNED AND OPERATED BY SF CASINO MANAGEMENT, L.P., A CALIFORNIA LIMITED PARTNERSHIP," *shall be resubmitted forthwith to the NIGC for approval* . . . and . . . this resubmission shall be deemed to begin anew the NIGC's 90-day approval period, provided that the NIGC is requested to issue its approval effective as of October 9, 2003.

AA 058, 059 (emphasis added).

The record is muddied because the Lyttons did not attach the Ordinance to the Resolution (presumably because it had already been submitted). But the Resolution makes it clear that the Ordinance was being resubmitted for retroactive approval. And, if there was ever any doubt that the Lyttons intended to submit the Ordinance for approval, NIGC's approval letter puts it to rest. It stated: "This

letter responds to your request . . . to review and approve *the ordinance . . . which provided a temporary license* to SF Casino Management, L.P. . . . [T]he *ordinance* is approved for gaming only on Indian lands, as defined in the IGRA, over which the Rancheria possesses jurisdiction . . . ." AA 060 (emphasis added). The District Court's construction of the Resolution as merely revoking the license as of November 24, 2003 is just incorrect.

Furthermore, IGRA does not treat resolutions pertaining to gaming as having less status than ordinances. The provision in IGRA requiring that ordinances be submitted to NIGC for approval also requires that "resolutions" pertaining to the licensing and regulating of gaming be submitted for approval. See 25 U.S.C. § 2710(b)(1)(B) ("An Indian tribe may engage in, or *license* and regulate, class II *gaming on Indian lands within such tribe's jurisdiction*, if--. . . (B) the governing body of the Indian tribe adopts an *ordinance or resolution* which is approved by the Chairman"); see also 25 C.F.R. § 522.1 (requirements for submission of "any gaming ordinance or resolution"). IGRA draws no distinction between the approvals required for resolutions and for ordinances; the District Court's effort to create such a distinction should be rejected.

Finally, contrary to the District Court's apparent assumption, IGRA nowhere provides that an ordinance or resolution must seek "new gaming authority" before approval is required. IGRA requires instead that all ordinances or resolutions

pertaining to gaming be submitted for approval. See 25 U.S.C. § 2710(b)(1)(B).

In any event, the Ordinance sought authority which required NIGC approval. Consistent with the requirements of 25 U.S.C. § 2710(b)(2)(A), the 1999 Ordinance provided that only the Lyttons would have a "proprietary interest in and responsibility for the conduct of" any gaming they offered. Lytton Gaming Code, §§ 1.07; see also 25 C.F.R. § 522.4(b). Section 2710(b)(4)(A) of IGRA, which is referenced in the Resolution, provides for an exception to this requirement. It permits the licensing of gaming facilities to non-Indians if the gaming is "at least as restrictive as those established by State law" and the licensee is a person or entity which would be "eligible to receive a State license to conduct the same activity." Because the 1999 Ordinance did not contain these provisions[7], NIGC approval of the 2003 Ordinance was required. Not surprisingly, therefore, the Resolution itself acknowledged that NIGC had to approve the Ordinance. AA 058 (fifth WHEREAS clause).

* * *

Viewed from every angle, the District Court's ruling that NIGC had no duty to make a gaming eligibility determination before approving the 2003 Ordinance was erroneous and the order dismissing the First Claim must be reversed.

[7] See generally Lytton Gaming Code (July 8, 1999) (http://nigc.gov/Reading_Room/Gaming_Ordinances.aspx).

c. NIGC's knowledge of the Casino site required it to determine that the site was gaming eligible Indian lands before approving the 2008 Ordinance.

In the Second Claim, Neighbors allege that, because the Lyttons had identified the Casino site in 2003, NIGC knew they were offering gaming there when they submitted the 2008 Ordinance for approval. As a result, NIGC was required to, but did not, make a gaming eligibility determination before approving that ordinance. AA 046-047.[8] The District Court dismissed this claim, concluding that NIGC was not obligated to make such a determination because the 2008 Ordinance was not site-specific. AA 238. The District Court is once again incorrect.

The court below held that NIGC's knowledge of the Casino site was simply irrelevant: "[K]nowledge of gaming activities and the Indian lands on which they occur does not create an additional legal duty (such as an Indian lands determination) not imposed by statute." *Id*. This cannot be correct. Even NIGC admits that its knowledge is relevant to whether it must make a gaming eligibility determination. Before the Ninth Circuit in *North County* and before the District Court, NIGC acknowledged that it must make a gaming eligibility determination

[8]NIGC *had* to know the Lyttons were conducting gaming at that site. NIGC has a statutory duty to monitor class II gaming "on a continuing basis." 25 U.S.C. § 2706(b)(1). Because the Casino had been operating for more than four years when the Lyttons submitted the 2008 Ordinance for approval, NIGC could not have fulfilled its monitoring obligation without knowing the Casino's location.

when presented with a site-specific gaming ordinance or management contract. See pp. 18-19, *supra*.

Since NIGC knew of the site, it surely was not freed of its obligation merely because the 2008 Ordinance did not itself identify the Casino site. If that were the case, a tribe could submit a non-site specific ordinance, safe in the knowledge that NIGC, despite its awareness of a gaming location, would never inquire into the land's status. That would permit the tribe to conduct gaming on land not within its jurisdiction and, *NIGC would have neither a duty nor any jurisdiction to stop the unlawful gaming. CACGEC I,* 471 F. Supp. 2d. at 324. Troubled by just such a possibility, the concurring and dissenting judge in *North County* stated:

> If an Indian Tribe, after having received approval on a non-site-specific ordinance, bought land in downtown Seattle . . . the NIGC would have no duty to stop the tribe from erecting a casino, even if the land clearly did not fall within the statutory definition of Indian lands. . . .
>
> How could the NIGC, the agency tasked with regulating and protecting gaming on Indian lands effectuate [congressional] intent without determining whether proposed gaming was on Indian lands and thus within its jurisdiction? The NIGC, like all federal agencies, does not have authority that expands beyond what Congress has delegated to it. The NIGC, therefore, cannot allow construction of a new gaming facility before it determines that it has jurisdiction over that specific site. Stated simply, the NIGC has no statutory authority to empower a regime under which tribes could build casinos at any location, whether or not on Indian lands.

573 F.3d at 749, 751 (Gould, J., concurring and dissenting) (citations omitted).

NIGC has "exclusive regulatory authority for Indian gaming on Indian lands." *CACGEC I*, 471 F. Supp. 2d at 321-322; *Tohono O'odham Nation*, 2011

U.S. Dist. LEXIS 64041 at *21. In prescribing that gaming may occur only on Indian lands within a tribe's jurisdiction and entrusting regulation of such gaming to NIGC, Congress cannot have intended that NIGC would authorize gaming without so much as even considering whether an identified site is gaming eligible. The District Court's order dismissing Neighbors' Second Claim should be reversed.

2. The District Court erred in concluding that the site was gaming eligible as a matter of law.

The District Court held that NIGC had no duty to find that the Casino site was eligible for gaming because the site became eligible as soon as the government accepted title to the property in trust. In a brief footnote, the District Court dispensed with the legal issue upon which this case rests, stating:

> Plaintiffs' insistence that "the federal government could not, solely by acquiring title to the land, authorize the Lyttons to exercise sovereignty over it" is a red herring. . . . The threshold issue is not whether the San Pablo property is sovereign [sic], but rather whether it is Indian lands on which gaming is authorized under the IGRA. Unfortunately for plaintiffs: it is!

AA 233-234, n. 7. The court then expanded on its reasoning:

> The plain language of the IGRA requires Indian gaming to take place on "Indian lands," 25 U.S.C. § 2710(b), and defines "Indian lands" as "any lands title to which is . . . held in trust by the United States for the benefit of any India[n] tribe." *Id.* § 2703(4). The action Congress directed in the 2000 Omnibus Act easily meets these requirements: Section 819 not only directed the Secretary to take the land into trust for the Lyttons' benefit (thus immediately qualifying that property as "Indian lands"); it also *explicitly* exempted the Lyttons' property from the statutory prohibition on Indian

> gaming on lands acquired after October 17, 1988. The IGRA requires no further NIGC determination regarding the Lyttons' lands.

AA 236 (emphasis in original).

The District Court's opinion reflects a fundamental misunderstanding of IGRA – a misunderstanding which led the court to an erroneous conclusion about the effect of Section 819. Put simply, the District Court ignored IGRA's requirement that a tribe have jurisdiction over land before gaming there is permissible.

The District Court failed to acknowledge anywhere in its decision the repeated statutory references to tribal jurisdiction contained in 25 U.S.C. § 2710, discussed above. See pp. 14-15, *supra*. That omission is serious enough. Equally troubling is the court's failure to quote that part of the definition of "Indian lands" most essential to the issues in this case. The District Court quoted only the first part of the definition in 25 U.S.C. § 2703(4)(B) relevant to this case. The complete definition reads:

> any lands title to which is either held in trust by the United States for the benefit of any Indian tribe . . . and *over which an Indian tribe exercises governmental power.*

Id. (emphasis added); see also 25 C.F.R. § 502.12 (defining Indian lands).

The District Court simply missed that implicit in the requirement that a tribe exercise governmental power over trust land before it will be considered "Indian lands" is that the tribe has jurisdiction over the land: "'a necessary prelude to the

exercise of governmental power is the existence of jurisdiction.'" *State of Kansas,* 249 F.3d at 1219. Indeed, NIGC understands that jurisdiction is a critical element of gaming eligibility. See *Miami Tribe v. United States*, 927 F. Supp. 1419, 1422 (D. Kan. 1996) (NIGC considers that "only those lands within an Indian tribe's jurisdiction can qualify as 'Indian lands'"). Thus, NIGC approved the 2003 Ordinance "for gaming only on Indian lands . . . over which the Rancheria possesses jurisdiction and exercises governmental power," and the 2008 Ordinance for gaming "only on Indian lands . . . over which the Nation has jurisdiction." AA 060, 062.

If, to be considered Indian land, the tribe must exercise "governmental power" over it, and if the tribe must have jurisdiction before exercising governmental power, then by what authority do the Lyttons claim to have jurisdiction over the Casino site? Far from being a "red herring," as the court below stated, whether the Lyttons have jurisdiction is essential to whether gaming at the site is lawful under IGRA.

IGRA does not define jurisdiction or prescribe how it is conferred; that must be determined from other sources. *Miami Tribe*, 927 F. Supp. at 1422.[9] For present purposes, it is sufficient to state that Section 819 is not such a source. The statute makes no reference whatsoever to jurisdiction over the land and speaks,

[9]See Section C.1., *infra*.

inter alia, only of taking title to the land in trust. The statute's silence about jurisdiction is particularly telling because Congress is familiar with the concept of tribal jurisdiction over trust lands. In legislation concerning trust land for other tribes Congress has specifically addressed the existence of tribal jurisdiction. See, e.g., 25 U.S.C. § 1300j-7 (tribal jurisdiction over land held in trust for Pokagon Band). In fact, IGRA itself reveals that taking title to the site in trust did not suffice to confer jurisdiction. By providing that a tribe must exercise governmental power over trust land before it will be "Indian lands," Section 2703(4)(B) indicates by negative implication that trust land may exist over which a tribe lacks jurisdiction and, thus, does not exercise governmental power.

Congress emphasized the importance of tribal jurisdiction as a prerequisite to gaming eligibility by repeating the phrase "Indian lands within the tribe's jurisdiction" or its equivalent multiple times in IGRA, and by its reference to governmental power as a requirement for Indian lands status. 25 U.S.C. §§ 2703(4)(B), 2710(b)(1), (2), (4)(A), (d)(1)(A)(i), (d)(3)(A). Courts must "presume that a legislature says in a statute what it means and means in a statute what it says there" (*Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992)) and must "give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979). In concluding that the Casino site was eligible for gaming immediately upon the transfer of title to the land, the District Court

effectively – and improperly – read the tribal jurisdiction requirement out of the statute. That was error, requiring reversal of the order dismissing the First and Second Claims.

C. The District Court Erred In Dismissing The Third, Fourth And Fifth Claims For Relief.

The District Court dismissed the Third, Fourth and Fifth Claims for lack of standing and for failure to state claims upon which relief can be granted. In considering Neighbors' standing, this Court "must assume [Neighbors] will prevail on the merits of their constitutional claims." *Laroque,* 2011 U.S. App. LEXIS 13907 at *17. To assist the Court in understanding why Neighbors not only have standing but have stated viable claims, Neighbors begin with a discussion of the legal principles upon which the Third, Fourth and Fifth Claims are based.

1. Absent Either Aboriginal Rights To Which The State Was Always Subject Or State Cession Of Sovereignty, Neither The Federal Government Nor The Lyttons May Exercise Jurisdiction Over The Casino Site.

During the last decade, a number of cases have challenged the transfer of title to land in trust for Indian tribes on grounds that the transfer itself did or would violate the Enclaves Clause, the Admissions Clause or the Tenth Amendment. See, e.g., *Carcieri v. Norton*, 398 F.3d 22 (1st Cir. 2005); *Artichoke Joe's California Grand Casino v. Norton*, 278 F. Supp. 2d 1174 (E.D. Cal. 2003) ("*Artichoke Joe's II*"); *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 144

(D.D.C. 2002), *aff'd* 348 F.3d 1020 (D.C. Cir. 2003). The court below apparently assumed that Neighbors were making similar contentions. AA 242 & n. 21. In fact what Neighbors challenge here is the assumption that transfer of title also transferred jurisdiction, or sovereignty, from the state to the Lyttons. Neighbors contend that neither Section 819 nor the Federal Defendants' actions effected or could lawfully effect a change in sovereignty.

The Constitution establishes a system of dual sovereignty between the states and the federal government, and the federal government has only those limited powers conferred by the Constitution. All other powers are reserved to the people or the states. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). It follows that a state is presumed to have jurisdiction in the first instance over the land within its boundaries. *Van Brocklin v. Tennessee*, 117 U.S. 151, 167-168 (1886); *United States v. McBratney*, 104 U.S. 621, 624 (1881). The federal government can obtain jurisdiction over land within state borders in only three ways:

(i) by reserving jurisdiction over the affected property upon admission of the state into the Union (*Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 526-527 (1885));

(ii) pursuant to the Enclaves Clause of the United States Constitution, Art. I, § 8, cl. 17, whereby a state consents to exclusive federal jurisdiction

when the federal government purchases property for certain specified uses; *Humble Pipe Line Co. v. Waggonner,* 376 U.S. 369, 371 (1964)); and,

(iii) by state cession of jurisdiction, exclusive or partial, to the federal government. *Silas Mason Co. v. Tax Comm'n of Washington,* 302 U.S. 186, 207-208 (1937)*; James v. Dravo Contracting Co*, 302 U.S. 134, 142 (1937); *Fort Leavenworth R. Co.,* 114 U.S. at 531, 539; *United States v. Raffield*, 82 F.3d 611, 612 (4th Cir. 1996).

See also *Williams v. Arlington Hotel Co.*, 22 F.2d 669, 670 (8th Cir. 1927) (describing the three methods for transfer of state sovereignty); *Kalaka Nui, Inc. v. Actus Lend Lease*, 2009 U.S. Dist. LEXIS 38262, *11-12 (D. Hawaii, May 5, 2009) (same); *Kelly v. Lockheed Martin Servs. Group*, 25 F. Supp. 2d 1, 3 (D.P.R. 1998) (same and collecting cases); *Arizona v. Manypenny*, 445 F. Supp. 1123, 1125-1126 (D. Ariz. 1977), *appeal dismissed*, 608 F.2d 1197 (9th Cir. 1979), *rev'd on other grnds*, 451 U.S. 232 (1981) (state, rather than federal government, had jurisdiction over crime committed on either federal park or Indian reservation land because none of three methods for ceding state jurisdiction applied); Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, *Jurisdiction Over Federal Areas Within The States*, Part II, pp. 41-46 (1957) (http://www.constitution.org/juris/fjur/fedjurisreport.pdf ("*Federal*

Jurisdiction").) The element common to all three methods is that the state must consent to the reservation or transfer of sovereignty over land within its borders.

If, through purchase or otherwise, the federal government obtains *title* to land within a state but does not follow the procedures to obtain *sovereignty* or jurisdiction, the federal government holds title like an ordinary landowner, and state law continues to govern the site. *Fort Leavenworth,* 114 U.S. at 531. "The Federal Government cannot, by unilateral action on its part, acquire legislative jurisdiction over any area within the exterior boundaries of a State." *Federal Jurisdiction,* p. 46. As the Supreme Court has stated: "It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state." *Surplus Trading Co. v. Cook,* 281 U.S. 647, 650 (1930). Such land remains "subject to the legislative authority and control of the States equally with the property of private individuals." *Fort Leavenworth,* 114 U.S. at 531.

In *Silas Mason,* 302 U.S. 186, for example, the federal government acquired land from the State of Washington in connection with the construction of Cooley Dam. The government contended that Washington could not levy a gross receipts tax on contractors working on the property. The Supreme Court disagreed, stressing that "acquisition of title by the United States is not sufficient to effect that

exclusion [from state taxation]. It must appear that the State, by consent or cession, has transferred to the United States that residuum of jurisdiction which otherwise it would be free to exercise." *Id*. at 197.

These principles apply with equal force to land which has been set aside for Indians. Where, for example, Indian land holdings pre-existed, and then survived, the formation of state governments, such lands were never under state control and Indian sovereignty in those circumstances is often described as "aboriginal" (*Brendale v. Confederated Tribes*, 492 U.S. 408, 435 (1989)) or "historic[al]" (*New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983)) and tribes are referred to as possessing "inherent tribal sovereignty." *United States v. Wheeler*, 435 U.S. 313, 322 (1978). But cf. *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 202-203 (2005) ("acquisition of fee title" in former tribal lands did not revive tribe's "ancient sovereignty").[10]

Where such historical sovereignty is absent, state cession of jurisdiction is necessary before either the federal government or a tribe may exercise primary jurisdiction over the land. The Court in *Silas Mason* held that even that portion of the subject lands held in trust for Indians by the federal government was not exempt from state taxation. There, too, "exclusive legislative authority would be obtained by the United States only through cession by the State." *Id*. at 210. See

[10] The Lyttons have no aboriginal or inherent sovereignty over the Casino site.

also *Manypenny*, 445 F. Supp. at 1126; cf. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998) (where reservation diminished by Congressional action, lands ceded to state no longer Indian country and "State now has primary jurisdiction over them").[11]

A long line of cases, stretching well into the 19th century, has applied these principles when resolving disputes over whether the state, the federal government or a tribe had jurisdiction over the land at issue. Since Indian reservations are not generally considered federal enclaves (*Carcieri*, 398 F.3d at 34), the decisions in these cases typically consider whether the federal government reserved, or the state or tribe ceded, jurisdiction.

Some cases, for example, look to a state's admission act to ascertain whether the United States reserved jurisdiction over the land for Indians. See, e.g., *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (state had jurisdiction over land not reserved for Indians upon Alaska's admission); *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962) (state lacked jurisdiction over land reserved for Indians upon Alaska's admission); *United States v. Sutton*, 215 U.S. 291 (1909) (state liquor laws did not apply to Yakima Reservation; on admission state had disclaimed all "right and title" to reservation lands and agreed that such

[11] Even the acquisition by the federal government of partial, as distinct from exclusive, jurisdiction over state land requires the "State's consent or cession." *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976).

land was under exclusive jurisdiction of Congress until federal title extinguished); *United States v. Rickert*, 188 U.S. 432 (1903) (South Dakota's agreement upon entry into Union that it would not tax land held by Indians sufficient to preclude taxation of property held in trust by United States for, and occupied by, members of tribe); *Draper v. United States*, 164 U.S. 240 (1896) (Montana retained criminal jurisdiction over Indian reservation because terms of admission did not confer jurisdiction on federal government); *In re Kansas Indians (Blue Jacket v. Johnson County)*, 72 U.S. 737 (1866) (Kansas could not impose property taxes on lands held in names of individual Indians because federal government reserved the lands upon Kansas's admission); *Ex Parte Sloan*, 22 F. Cas. 324 (D. Nev. 1877) (no federal jurisdiction over murder on Indian reservation because U.S. did not reserve jurisdiction when Nevada admitted to statehood).

Other cases hinge upon whether the state or the tribe had ceded jurisdiction following the state's admission. *DeCoteau v. District Court*, 420 U.S. 425 (1975) (by agreement tribe ceded its lands to federal government); *Clairmont v. United States*, 225 U.S. 551 (1912) (although upon admission Montana ceded jurisdiction over certain Indian lands, Indians retroceded jurisdiction over a portion of such land, thereby extinguishing tribal sovereignty); *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996) (tribe had not, in 1890 agreement, ceded lands allotted to tribal members); *United States v. Lewis*, 253 F. 469 (S.D. Cal. 1918) (federal

indictment for murder on Indian homestead held in trust dismissed because California never ceded jurisdiction over land). Compare *United States v. Long*, 324 F.3d 475 (7th Cir. 2003) (tribe's jurisdiction over crimes on reservation restored following state's retrocession of criminal jurisdiction) with *Latender v. Israel*, 584 F.2d 817 (7th Cir. 1978) (state had jurisdiction over murder on tribe's reservation *before* state's retrocession of such jurisdiction).

These principles are particularly relevant to this case. There were no lands reserved for Indians when California became a state. AA 028. Rancheria lands, as the Office of Indian Affairs wrote many years ago, "were purchased from private parties while the same were under the jurisdiction of the State of California, [and] said jurisdiction would continue until such time as the State ceded its police jurisdiction." AA 031, ¶ 41. Subsequent to admission, California formally ceded lands to the federal government for use by Indians apparently only once, in 1911. See Cal. Gov't Code § 111(g), citing Statutes 1911, Ch. 675.[12] It is, thus, undisputed that California never ceded its jurisdiction over the Casino site. AA 016, ¶ 3. Since there is no identifiable source from which the Lyttons' purported jurisdiction springs, it follows that state law – including state gambling and land

[12] State statutes cited in this brief have been reproduced in the Appendix. Judicial notice of such statutes is requested. Fed. R. Evid. 201(d).

use law – should continue to govern the Casino site. AA 024-025.[13]

Neighbors turn now to the District Court's specific rulings with respect to the Third, Fourth and Fifth Claims.

2. Appellants Have Standing To Bring The Third, Fourth And Fifth Claims.

In dismissing the Third, Fourth and Fifth Claims the District Court stated that those claims

> are largely based on the claim that California retains plenary jurisdiction over the Lyttons' San Pablo property. . . . By bringing these claims, plaintiffs seek to invoke California's alleged jurisdiction over the San Pablo property – not plaintiffs' own rights. To the extent that these allegations are construed properly as constitutional violations of the Enclaves Clause or the Tenth Amendment, plaintiffs lack standing under this Court's case law and their claims must be dismissed.

AA 242 (citations omitted).

The District Court is incorrect.

[13] The Federal Defendants suggested below that the Indian Commerce Clause (Art. I, § 8, cl. 3) could be the basis for a transfer of jurisdiction to the Lyttons. While the Indian Commerce Clause may confer on Congress "plenary power to legislate in the field of Indian affairs" (*Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)), Neighbors are unaware of any case which holds that the clause authorizes Congress to divest a state of sovereignty over land which had been within its jurisdiction since statehood and then to vest that jurisdiction in an Indian tribe.

a. Neighbors have Article III standing.

Although the court below appears to have dismissed these claims solely for lack of prudential standing (*id*., citing *City of Roseville*, 219 F. Supp. 2d at 144), Neighbors first discuss their Article III standing.

To establish Article III standing, Neighbors must show (1) an "injury in fact, *i.e*., "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical;" (2) a causal connection between the challenged conduct and the injury; and, (3) that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotation marks removed). Neighbors easily meet this test.

The Lyttons' wrongful exercise of sovereignty and resultant operation of the Casino have caused Neighbors concrete and particularized injury. Traffic, noise, pollution and crime around the Casino have all increased and interfered with Neighbors' quality of life. AA 017-023, 041-045.

Operation of the Casino has also interfered with Neighbors' settled expectations as members of their community. For more than 150 years, the land on which the Casino sits had been in private hands and subject to state and local law. The Casino – located dozens of miles from the Lyttons' *former* rancheria – is situated in a heavily populated urban area and shares public services with homes,

businesses, schools and other institutions, all of which long pre-existed the Lyttons' ownership of the site. AA 015, 037. The area is populated almost exclusively by non-Indians. The Lyttons do not reside, and never have resided, at the site. AA 041; *Artichoke Joe's II*, 278 F. Supp. 2d at 1179. "Settled expectations" among community members that arise from such circumstances may preclude even the revival of historical Indian sovereignty which has been lost by the passage of time and intervening events. *City of Sherrill,* 544 U.S. at 215, 219-220 (exercise of sovereignty by Indians "would adversely affect landowners neighboring the tribal patches"). Because the Lyttons have no historical claim to the Casino site, Neighbors' settled expectations must carry even more weight.

Neighbors have also lost rights afforded by state and local law, including the right to sue to abate nuisances, including illegal gambling (Cal. Civ. Code §§ 3479, 3493; Cal. Code Civ. Proc. § 731; Cal. Penal Code § 11225(a)) and to participate in public proceedings regarding land use at the site. See, e.g., SPMC § 9.04.110 (public hearings on gaming club licenses); *id*., § 17.64.040 (public hearings for use permits). AA 224, 226-227. Three named plaintiffs, Tania Pulido, Julia Areas and Adrienne Harris, live close enough to the Casino that they would otherwise be entitled to receive specific notice of any planned land use changes at the site. SPMC, § 17.64.040(D); AA 020-023. "Courts have 'long recognized' that legislatures 'may enact statutes creating legal rights, the invasion of which creates

standing, even though no injury would exist without the statute.'" *Laroque*, 2011 U.S. App. LEXIS 13907 at *20 quoting *Shays v. FEC*, 414 F.3d 76, 89 (D.C. Cir. 2005).

The foregoing facts are sufficient to demonstrate "injury in fact" for standing purposes. *Amador County*, 640 F.3d at 378; *Patchak v. Salazar*, 632 F.3d 702, 704 (D.C. Cir. 2011) (neighbor of proposed casino has Article III standing to challenge land to trust acquisition); *Butte County v. Hogen*, 609 F. Supp. 2d 20, 26-27 (D.D.C. 2009) (county has standing to challenge proposed casino because of environmental impacts); *Citizens Against Casino Gambling in Erie County v. Hogen*, 2008 U.S. Dist. LEXIS 52395, *64-65 (W.D.N.Y., July 8, 2008) (citizens have standing to challenge gaming ordinance approval).

Neighbors' injuries are "fairly traceable" to the Federal Defendants' conduct, thereby satisfying the causation prong for Article III standing. *Laroque*, 2011 U.S. App. LEXIS 13907 at *18, *28. The illegal gaming at the site is a function of the Lyttons' purported sovereignty over the Casino, which has been caused or permitted by Section 819 or the Federal Defendants' acts and omissions in connection with acquiring title to the land and approving the gaming ordinances. *Amador County*, 640 F.3d at 378.

Finally, Neighbors' injuries will be redressed by a judgment in this case. A decision that the Federal Defendants could not confer on the Lyttons sovereignty

over the land and/or that the Lyttons do not exercise sovereignty would render gaming at the Casino unlawful under IGRA and restore Neighbors' rights as citizens to exert influence over the site under state and local law. *Id.*; *Patchak*, 632 F.3d at 704.[14] Neighbors have Article III standing.

b. Neighbors have prudential standing.

The prudential standing requirement "ensure[s] 'that the most effective advocate of the rights at issue is present to champion them.'" *Laroque*, 2011 U.S. App. LEXIS 13907 at * 6, quoting *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978); see also *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The Third, Fourth and Fifth Claims all proceed from the premise that the Lyttons lack jurisdiction over the Casino site. The Third Claim alleges that neither the Secretary's acts of accepting the land in trust and proclaiming it to be a reservation "under section 5 and 7" of the IRA, as required by Section 819, nor Section 819 itself conferred on the Lyttons sovereignty over the Casino site. AA 048. The Fourth Claim seeks a determination that the Lyttons may not lawfully exercise such sovereignty. AA 050-051. The Fifth Claim challenges the Proclamation to the extent that it purported to confer sovereignty on the Lyttons. AA 051-052. Neighbors are "effective advocates" for these claims because they

[14] Redressability as it applies specifically to the Fifth Claim is discussed more fully in B.3., *infra*.

are asserting their own rights – even if the claims may implicate the Tenth Amendment or the Enclaves Clause.

(1) Neighbors have standing to the extent these claims implicate the Tenth Amendment.

In *Bond v. United States*, __U.S.__, 131 S. Ct. 2355 (2011), the Supreme Court held that a criminal defendant charged with attempting to poison her husband's paramour had standing to assert that the federal statute under which she was indicted "was beyond Congress' constitutional authority to enact." *Id.* at 2360. The Tenth Amendment was no bar to the defense because the federal system's allocation of power between the national government and the states is meant to protect not only "the integrity, dignity, and residual sovereignty of the [s]tates," but also "individual liberty." *Id.* at 2364.

> Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. [Citation omitted.] By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake. . . .
>
> An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.

Id.

Where, as here, an individual "is a party to an otherwise justiciable case or controversy, she is not forbidden to object that her injury results from disregard of the federal structure of our Government." *Id*. at 2366-2367. "The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State." *Id*. at 2363-2364.

Following *Bond,* this Court held that a candidate for local public office had prudential standing to sue to enjoin enforcement of the Voting Rights Act against his community on the grounds that the act exceeded Congress's constitutional authority. *Laroque*, 2011 U.S. App. LEXIS 13907 at *35-*38. Since the plaintiff otherwise had Article III standing, he could "pursue his 'direct interest' in the invalidation of a statute that he contends exceeds Congress's enumerated powers and thus endangers the liberty-protecting structure of our federal system." *Id*. at *37-*38.

Here, Neighbors have Article III standing and, therefore, should be permitted to pursue their "direct interest" in contending that disregard of the permissible methods by which the federal government may obtain jurisdiction over state land has saddled Neighbors and their community with an illegal gambling operation. Undoubtedly California could challenge the Lyttons' wrongful exercise of sovereignty, but that does not diminish the fact that the Casino has directly and

adversely affected Neighbors' use and enjoyment of their property and their rights as citizens. See *Bond*, 131 S. Ct. at 2363-2364. See also *Patchak*, 632 F.3d at 707; *Butte County,* 609 F. Supp. 2d at 26-27; *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1116-1117 (E.D. Cal. 2002) ("*Artichoke Joe's I")*; cf. *TOMAC v. Norton*, 193 F. Supp. 2d 182, 190 (D.D.C. 2002), *aff'd*, 433 F.3d 852, 860 (D.C. Cir. 2006) (residents adjacent to site of proposed Indian casino "are precisely the type of plaintiffs who could be expected to police" interests regulated by federal law requiring consideration of effects of casinos on surrounding communities).

The Lyttons' wrongful exercise of sovereignty has immediate, daily impact on Neighbors, all of whom live and work in the vicinity of the Casino. It is they who bear the brunt of the deleterious effects flowing from operation of the Casino – an operation which would be plainly illegal were the site subject to state and local law. Who better to vindicate these interests than Neighbors themselves? "[I]t would be very strange indeed to deny [Neighbors] standing in this case." *Patchak*, 632 F.3d at 707. They have a "direct interest in objecting" to the Lyttons' exercise of sovereignty because it has "upset the constitutional balance between the National Government and the States" and is "caus[ing] injury that is concrete, particular, and redressable." *Bond*, 131 S. Ct. at 2364. Even if the state has a protectable interest in whether the Lyttons have jurisdiction, so do Neighbors.

Patchak, 632 F.3d at 707. Neighbors have prudential standing to pursue the Third, Fourth and Fifth Claims for Relief, even if they implicate the Tenth Amendment.

(2) Neighbors have standing to the extent these claims implicate the Enclaves Clause.

As discussed below, Neighbors do not assert that the Enclaves Clause has been "violated." See p. 52, *infra*. But to the extent the Third, Fourth and Fifth Claims may implicate the state's interests under the Enclaves Clause, Neighbors have standing for much the same reason they have standing if their claims implicate the Tenth Amendment. Although *Bond* concerns prudential standing under the Tenth Amendment, there is no discernable basis to analyze standing under the Enclaves Clause any differently; the District Court treated the standing issue between the two interchangeably. The Enclaves Clause is but a specific expression of the dual sovereignty inherent in the Constitution which the Tenth Amendment articulates more generally. Thus, Neighbors should be permitted to "assert injury from governmental action taken in excess of the authority that federalism defines" (*Bond*, 131 S. Ct. at 2363), whether that authority arises under the Tenth Amendment or the Enclaves Clause. Neighbors have prudential standing to assert these claims.

3. The Relief Sought In The Fifth Claim Will Redress The Injuries Alleged.

The District Court also dismissed the Fifth Claim for lack of standing purportedly because a favorable decision will not redress the injuries alleged. AA 243-244. Once again, the District Court erred.

The Fifth Claim alleges that "[t]o the extent" the Proclamation that the Casino site is a reservation resulted in a change in sovereignty, the Proclamation should be set aside. AA 051. If the Proclamation had that effect, setting it aside would grant the relief Neighbors seek since gaming under IGRA cannot occur in the absence of tribal jurisdiction over the land. E.g., 25 U.S.C. §§ 2703(4)(B), 2710(b)(1); *State of Kansas,* 249 F.3d at 1219, 1223; cf. *Gila River Indian Community v. United States*, 2011 U.S. Dist. LEXIS 21520, *13 (D. Ariz., Mar. 3, 2011) ("[I]f the Court rules . . . that DOI should have made an IGRA determination as part of the Trust Decision, and if . . . DOI . . . concludes that Parcel 2 does not qualify for gaming under IGRA, then the Court's ruling would prevent the casino from being built and thereby redress Plaintiffs' injuries."). Accordingly, the District Court is simply wrong that "issuing a declaration that California retains plenary jurisdiction over the San Pablo property would not nullify the Lyttons' gaming eligibility." AA 243. If California retains plenary jurisdiction then, by

definition, the Lyttons lack jurisdiction and gaming at the site is unlawful under IGRA. *State of Kansas,* 249 F.3d at 1223. [15]

Surely the Lyttons would not continue to offer gaming in the face of a ruling that they lacked jurisdiction over the land. But, since the Lyttons are now party to this action and will be "'bound by any judgment or order of the [District] Court on any claim in this case'" (AA 215), they could be enjoined from offering gaming conducted in violation of the law. Similarly, the District Court could presumably require NIGC to take some kind of enforcement action. *Citizens Against Casino Gambling in Erie County v. Hogen*, 2008 U.S. Dist. LEXIS 67743,*9-*10, *13-*14 (W.D.N.Y., Aug. 26, 2008).

Granting the relief requested in the Fifth Claim would redress Neighbors' injuries, and they have standing to pursue the claim.

4. The Third, Fourth And Fifth Claims State Viable Causes Of Action.

The District Court also dismissed the Third, Fourth and Fifth Claims on a variety of other grounds. In each instance, the District Court must be reversed.

[15] The District Court also stated that, "Nor would such a declaration nullify the Secretary's duty to take lands into trust under Section 819." AA 243-244. Even if true, the court has missed the point. The land must be within the Lyttons' jurisdiction for gaming to be lawful; taking it into trust did not, standing alone, satisfy that requirement.

a. The District Court erred in holding that the Third, Fourth and Fifth Claims did not constitute causes of action.

The District Court held that if, as Neighbors contend, they are not asserting a claim under the Enclaves Clause then "Counts III, IV, and V . . . fail because they allege no cause of action." AA 242, n. 21. Not so.

All three claims are grounded in Neighbors' contention that neither Section 819 nor the Federal Defendants' actions could confer jurisdiction or sovereignty on the Lyttons and each claim seeks a declaration that the Lyttons do not have lawful jurisdiction over the Casino land. The Third Claim alleges:

> If . . . upon approvals of the 2003 and 2008 Ordinances, NIGC made or is deemed to have made a determination that the Property is Indian land under the jurisdiction of the Lyttons . . . then . . . NIGC's determination was . . . in excess of its statutory and Constitutional authority in that:
>
> a) The Lyttons were not a "recognized Indian tribe under federal jurisdiction" within the meaning of the [IRA] and thus, notwithstanding [Section 819], the Property could not legitimately be taken into trust pursuant to the IRA for their benefit; and/or
>
> b) Neither [Section 819], the Secretary's acts in taking the Property into Trust on October 9, 2003, NIGC's approvals of the 2003 and 2008 Ordinances nor the Constitution authorizes a change in sovereignty over the Property.

AA 048.

The Fourth Claim alleges:

> Plaintiffs assert that the Property is under the plenary jurisdiction of the State of California and that . . . state and local . . . laws apply to the Property, notwithstanding the transfer of title to the United States in 2003.

> . . . Defendants assert that . . . the United States obtained not only title . . . but plenary jurisdiction over the Property.
>
> Plaintiffs seek a declaration from the court that the Property remains subject to the plenary jurisdiction of the State of California.

AA 050-051.

> The Fifth Claim alleges:
>
> To the extent that the Proclamation was intended to divest the State of jurisdiction and sovereignty over the Property and to confer sovereignty on the Lyttons, the Proclamation exceeded the statutory and Constitutional authority of the Defendants.

AA 051.

To begin with, the Third and Fifth Claims are properly brought under the APA to challenge final agency action: *i.e.*, the ordinance approvals (Third Claim) and the Proclamation (Fifth Claim). See 25 U.S.C. § 2714 (ordinance approvals final agency action); *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (describing requirements for finality). Neighbors allege in these claims that, to the extent the Federal Defendants' actions conferred jurisdiction over the site, those actions exceeded their statutory and constitutional authority. 5 U.S.C. § 706(2).[16]

[16]The Third Claim also advances the alternate theory, based upon *Carcieri v. Salazar*, 555 U.S. 379, 129 S. Ct. 1058 (2009), that any "Indian lands" determination would have been fatally flawed at the outset. Section 819 directed the Secretary to accept title to the land in trust, but placed a condition on his actions: he was required to accept the land into trust and declare it to be a reservation "under sections 5 and 7" of the IRA. AA 074. The Secretary may accept land into trust under section 5 of the IRA *only* with respect to Indians under "federal jurisdiction" in 1934 when the IRA was enacted. 129 S. Ct. at 1060-1061.

Even absent the APA, all three claims allege viable nonstatutory claims. Neighbors do not contend in these claims that Section 819 and/or the Federal Defendants' actions "violated" the Enclaves Clause. They concede that the Enclaves Clause is not applicable here since a transfer under that provision requires state consent to exclusive federal jurisdiction over the land. *Humble Pipe*, 376 U.S. at 371. Neighbors contend, instead, that none of the permissible methods for transferring even partial jurisdiction from the state to the federal government – including the Enclaves Clause – were at work here. Absent these methods, any jurisdiction conferred on the Lyttons was effectively extra-constitutional and without basis in law. Thus, to the extent Section 819 and/or the Federal Defendants' actions purported to confer jurisdiction on the Lyttons, they were *ultra vires*. "[A] law 'beyond the power of Congress,' for any reason, is 'no law at all.'" *Bond*, 131 S. Ct. at 2368 (Ginsburg, J., concurring), quoting *Nigro v. United States,* 276 U.S. 332, 341 (1928). In circumstances such as this "courts may recognize nonstatutory causes of action for private parties to seek declaratory and injunctive relief against the enforcement of statutes that allegedly venture beyond the bounds

---

To comply with Section 819, the Secretary had to determine first that the IRA applied to the Lyttons. Only then he could carry out the statutory mandate to take the land into trust. *Churchill County v. United States*, 199 F. Supp. 2d 1031, 1034 (D. Nev. 2001) ("*once the requirements*" of the statute were met, "the Secretary was required to accept land into trust for the tribe"). The Secretary could not make that threshold determination because the Lyttons were not a recognized tribe in 1934 and did not meet the definition of "Indian" in the IRA. AA 031-034. Nothing in Section 819 altered these requirements under the IRA.

of Congress's enumerated powers." *Laroque*, 2011 U.S. App. LEXIS 13907 at *38-*39. See also *Trudeau*, 456 F.3d at 186.

In *Free Enterprise Fund v. Public Co. Acctng Oversight Bd.*, 130 S. Ct. 3138, the Supreme Court permitted the plaintiffs to pursue a nonstatutory claim to challenge certain provisions of the Sarbanes-Oxley Act on the grounds that they violated the Appointments Clause, emphasizing that "equitable relief 'has long been recognized as the proper means for preventing entities from acting unconstitutionally.'" *Id*. at 1351 n. 2 quoting *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

Similarly, in *Laroque*, plaintiffs contended that Section 5 of the Voting Rights Act exceeded Congress's powers and therefore could not be applied to their community. The lower court concluded that plaintiffs did not state a cause of action because their claim arose from a non-reviewable objection made by the Attorney General. 2011 U.S. App. LEXIS 13907 at *3-*4, *16, *40. This Court disagreed, finding that plaintiffs had stated a nonstatutory cause of action.

> [Plaintiffs'] injuries flow not from the Attorney General's objection, but rather from section 5's allegedly unconstitutional preemption of voting changes that have failed to receive preclearance . . . . "[N]either law nor logic requires [them] to challenge the Attorney General's failure to alleviate the statutorily imposed injury[] in order to challenge Congress' infliction of that injury in the first place."

Id. at *40-*41.

In each of these three claims Neighbors seek a declaratory judgment that, because no lawful method for the transfer of jurisdiction occurred here, the Lyttons cannot and do not exercise jurisdiction over the site. Either Section 819 exceeded Congress's constitutional authority by conferring jurisdiction or the Federal Defendants exceeded their authority if they purported to confer such jurisdiction. These allegations are surely sufficient to constitute "causes of action."

b. In dismissing the Third Claim, the District Court made an improper factual finding unsupported by the record.

The Third Claim is pleaded as an alternative to the First and Second Claims, alleging that "[i]f . . . upon approvals of the 2003 and 2008 Ordinances, NIGC made or is deemed to have made a determination that the Property is Indian land under the jurisdiction of the Lyttons," then that determination was unlawful. AA 048. After concluding that NIGC had no duty to make a gaming eligibility determination, the District Court dismissed the Third Claim because it "is premised on plaintiffs' *incorrect belief* that NIGC 'made or is deemed to have made a determination that the [San Pablo] [p]roperty is Indian land." AA 238 (emphasis added).

Plaintiffs may plead claims in the alternative, even if such claims are inconsistent with one another. FRCP 8(d)(2), (3); *Henry v. Daytop Village*, 42 F.3d 89, 95-96 (2d Cir. 1994); *Wright v. Herman*, 230 F.R.D. 1, 9-10 (D.D.C. 2005). And, on motion to dismiss, the district judge was required to accept as true

all material allegations of the complaint, even if he believed "that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atlantic*, 550 U.S. at 556. Accordingly, in addressing the Third Claim the District Court was required to assume that NIGC made or was deemed to have made a gaming eligibility determination with respect to the site.

The record is silent as to whether NIGC actually made such a determination. Discovery may reveal, as Neighbors suspect and have alleged in the First and Second Claims, that NIGC never made the determination. But nothing before the District Court expressly so indicated. Because the court below was not free to make a factual finding unsupported by the record, the order dismissing the Third Claim should be reversed.

c. The District Court had subject matter jurisdiction over the Fourth Claim.

The District Court dismissed the Fourth Claim for declaratory relief pursuant to the DJA, stating:

> "The DJA 'creates a remedy in cases otherwise within the Court's jurisdiction,' but 'does not constitute an independent basis for jurisdiction.'"

AA 241. The District Court correctly stated the law, but incorrectly applied it.

The Fourth Claim incorporated the allegations prior to it, including the charging allegations asserting federal question jurisdiction under 28 U.S.C. § 1331. AA 017, ¶ 7; AA 050, ¶ 99. For the reasons expressed in Section B.4.a., above,

Neighbors have alleged a nonstatutory claim, seeking a declaratory judgment that nothing authorized the Lyttons' exercise of jurisdiction over the Casino. In *Trudeau*, 456 F.3d 178, this Court concluded that 28 U.S.C. § 1331 provided a sufficient jurisdictional basis for the non-monetary constitutional and nonstatutory claims against the FTC in that case. *Id*. at 187. By parity of reasoning, 28 U.S.C. § 1331 should be a sufficient grant of subject matter jurisdiction for the relief sought in the Fourth Claim.

In addition, a challenge to Indian sovereignty, even in the absence of statute, necessarily raises a federal question for purposes of subject matter jurisdiction. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-853 (1985); see also *Nevada v. Hicks*, 196 F.3d 1020, 1024 (9th Cir. 1999), *rev'd on other grnds*, 533 U.S. 353 (2001) (district court had jurisdiction of declaratory relief action challenging jurisdiction of tribal court).

Finally, the Fourth Claim incorporates all the allegations which precede it. AA 050, ¶ 99. If any of the first three claims survive, the District Court may issue the declaratory judgment sought in the Fourth Claim. *Artichoke Joe's I*, 216 F. Supp. 2d at 1102 n. 25 (where plaintiff has otherwise stated "viable claims under federal law," plaintiffs are not precluded "from seeking a declaratory judgment").

d. The District Court misconstrued the Fifth Claim.

The District Court dismissed the Fifth Claim "because Section 819

mandated that the Secretary take into trust the San Pablo property and required that the Secretary issue a reservation proclamation." AA 243. The District Court has missed the point of this Claim.

What the Fifth Claim alleges is that the Secretary's actions could not imbue the Lyttons with sovereignty over the site and, if they purported to do so, they were not authorized by Section 819 or the Constitution and must be set aside. AA 051. As discussed in Section B.4.a., above, that is sufficient to state a claim.[17]

CONCLUSION

The order dismissing the First through Fifth Claims of the FAC should be reversed and the case should be remanded to the District Court.

Dated: September 22, 2011

Respectfully submitted,

FUTTERMAN DUPREE DODD CROLEY MAIER LLP

By /s/ Martin H. Dodd
Martin H. Dodd
Attorneys for Plaintiffs/Appellants N*eighbors of Casino San Pablo, Andres Soto, Anne Ruffino, Adrienne Harris, Tania Pulido and Julia Areas*

[17] The District Court declined to reach the Federal Defendants' argument that the QTA barred Neighbors' claims (AA 237, n. 14) – and properly so in light of this Court's decision in *Patchak,* 632 F.3d at 708 *et seq*., holding that the QTA does not bar claims like those asserted here. 249 F.3d at 1225. If, however, this Court is inclined to consider whether the QTA bars the Third, Fourth and Fifth Claims, then Neighbors request leave to brief the issue more fully.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Case No. 11-5136

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) (B) because this brief contains 13,937 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

September 22, 2011 /s/ Martin H. Dodd
Martin H. Dodd

APPENDIX OF PERTINENT STATUTES

FEDERAL STATUTES

Omnibus Indian Advancement Act of 2000, Pub. L. 106-568, 114 Stat. 2868

Section 819. Notwithstanding any other provision of law, the Secretary of the Interior shall accept for the benefit of the Lytton Rancheria of California the land described in that certain grant deed dated and recorded on October 16, 2000, in the official records of the County of Contra Costa, California, Deed Instrument Number 2000-229754. The Secretary shall declare that such land is held in trust by the United States for the benefit of the Rancheria and that such land is part of the reservation of such Rancheria under sections 5 and 7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. § 467). Such land shall be deemed to have been held in trust and part of the reservation of the Rancheria prior to October 17, 1988.

Administrative Procedures Act, 5 U.S.C. § 701 et seq.

§ 704. Actions reviewable

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. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq.

§ 2703. Definitions

. . .

(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.

§ 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 Act.

(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 Act.

(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;

. . .

(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 13 of the Act [25 USCS § 2712],

(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 18(a)(1) [25 USCS § 2717(a)(1)] 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 the date of enactment of this Act [enacted Oct. 17, 1988].

(iii) Within sixty days of the date of enactment of this Act [enacted Oct. 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.

. . .

(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), 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).

(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 12(e)(1)(D) [25 USCS § 2711(e)(1)(D)].

. . .

(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.

. . .

(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 Act.

§ 2714. Judicial review

Decisions made by the Commission pursuant to sections 11, 12, 13, and 14 [25 USCS §§ 2710-2713] shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code [5 USCS §§ 701 et seq.].

Declaratory Judgment Act, 28 U.S.C. § 2201

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986 [26 USCS § 7428], a proceeding under section 505 or 1146

of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930 [19 USCS § 1516a(f)(10)]), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act [21 USCS §§ 355 or 360b], or section 351 of the Public Health Service Act [42 USCS § 262].

Quiet Title Act, 28 U.S.C. § 2409a

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title [28 USCS §§ 1346, 1347, 1491, or 2410], sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954 [1986], as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

CALIFORNIA STATUTES

California Civil Code § 3479

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

California Civil Code § 3493

A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.

California Code of Civil Procedure § 731

An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as defined in Section 3479 of the Civil Code, and by the judgment in that action the nuisance may be enjoined or abated as well as damages recovered therefor. . . .

California Penal Code § 11225

(a) Every building or place used for the purpose of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

California Government Code § 111

The jurisdiction of the State over certain lands designated in the following statutes is subject to the cession of jurisdiction granted the United States by such statutes:

…

(g) Statutes of 1911, Chapter 675, concerning land in Riverside County. . . .

Statutes of 1911, Chapter 675 (29th Sess.)

SECTION 1. The State of California hereby grants and cedes to the United States of American, for the use of the Soboda Indians, all the right, title and interest of the State of California, in and to that certain tract of land situated in Riverside county, State of California, and described as Tract No. 8, Rancho San Jacinto Viejo in said Riverside county, . . .; and provided, further, that this state reserves the right to serve and execute in said lands, all civil process not incompatible with this section, and such criminal process as may lawfully issue under the authority of this state against any person or persons charged with crimes.

SEC. 2. Letters patent to the United States of America for the land above designated shall be issued in the manner prescribed by the constitution and laws.

SEC. 3. This act shall take effect and be in force from and after its passage.

California Penal Code §11225(a)

(a) Every building or place used for the purpose of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, are held or occur, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

Nothing in this subdivision shall be construed to apply the definition of a nuisance to a private residence where illegal gambling is conducted on an intermittent basis and without the purpose of producing profit for the owner or occupier of the premises.

LYTTON BAND OF POMO INDIANS TRIBAL GAMING CODE, July 8, 1999

Section 1.07 Ownership of Gaming.

The Tribe shall have the sole proprietary interest in and responsibility for the conduct of any Gaming Operation authorized by this Code. The Tribe shall receive, at a minimum, not less than sixty (60) percent of the Net Revenues from any Gaming Operation.

Section 1.08 Use of Gaming Revenue.

(a) Net Revenues from any form of Gaming authorized under this Code shall be used only for the following purposes: to fund Tribal government operations and programs; to provide for the general welfare of the Tribe and its members; to promote Tribal economic development; to make donations to charitable organizations; or to help fund operations of local government agencies.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM-ECF system on September 22, 2011.

I hereby certify that on September 22, 2011, I served the following counsel by email and by first class mail to the following addresses:

Mary Gabrielle Sprague Elizabeth A. Peterson United States Department of Justice Environment & Natural Resources Division, Appellate Section P.O. Box 23795, L'Enfant Plaza Station Washington, D.C. 20026-3795 *Attorneys for Defendants/Appellees*	Robert E. Kopp U.S. Department of Justice Civil Division, Appellate Staff Room #7519 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 *Attorneys for Defendants/Appellees*
Elizabeth A. Peterson United States Department of Justice Environment & Natural Resources Division, Appellate Section P.O. Box 23795, L'Enfant Plaza Station Washington, D.C. 20026-3795 *Attorneys for Defendants/Appellees*	Jerry C. Straus Hobbs, Straus, Dean & Walker LLP 2120 L Street, NW, Suite 700 Washington, D.C. 20037 *Attorneys for Intervenor/Appellee*
Joseph H. Webster Hobbs, Straus, Dean & Walker LLP 2120 L Street, NW, Suite 700 Washington, D.C. 20037 *Attorneys for Intervenor/Appellee*	

/s/ Martin H. Dodd

Martin H. Dodd (Cal. Bar No. 104363; D.C. Circuit Bar No. 53494)
Futterman Dupree Dodd Croley Maier LLP
180 Sansome Street, 17th Floor
San Francisco, CA 94104
Telephone: (415) 399-3840