IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a federally-Recognized Indian tribe, MORRIS REID, DORA JONES, DIXIE JACKSON, and HAROLD HAMMOND, SR.,

Plaintiffs,

v.

Case 1:13-cv-411-RWR

TRACIE STEVENS, Chairwoman,
National Indian Gaming Commission,
1441 L Street NW, Suite 9100
Washington, DC 20005;

JO-ANN SHYLOSKI, Associate General Counsel,
National Indian Gaming Commission,
1441 L Street NW, Suite 9100
Washington, DC 20005;

MARIA GETOFF, Senior Counsel,
National Indian Gaming Commission,
1441 L Street NW, Suite 9100
Washington, DC 20005; and

UNITED STATES NATIONAL INDIAN GAMING COMMISSION,
1441 L Street NW, Suite 9100
Washington, DC 20005;

Defendants.

DEFENDANTS' MOTION TO DISMISS
AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendants hereby respectfully move the Court for an order dismissing Plaintiffs' Complaint for want of jurisdiction, on the grounds stated in the memorandum of points and authorities that follows.

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INTRODUCTION

The Picayune Rancheria of the Chukchansi Indians (the "Tribe") owns and operates the Chukchansi Gold Resort & Casino (the "Casino"), located at 711 Lucky Lane, Coarsegold, CA, 93614. Complaint (ECF 1) at 1.[1] Plaintiffs Morris Reid, Dora Jones, Dixie Jackson, and Harold Hammond, Sr. ("Plaintiffs"), purporting to represent the Tribe, filed this suit against the National Indian Gaming Commission ("NIGC" or the "Commission"), NIGC Chairwoman Tracie Stevens, NIGC Associate General Counsel Jo-Ann Shyloski, and NIGC Senior Attorney Maria Getoff (collectively, "Defendants.") Plaintiffs seek an order holding unlawful and setting aside alleged Commission action regarding a proposed gaming ordinance amendment submitted by Plaintiffs, an order compelling the NIGC to make a decision regarding Plaintiffs' proposed gaming ordinance amendment, and an order holding unlawful and setting aside the Commission's alleged recognition of a governing body of the Tribe for purposes of reviewing the proposed gaming ordinance amendment. ECF No. 1 at 13-14.

Three facts undermine Plaintiffs' Complaint and require dismissal of Plaintiffs' claims. First, Plaintiffs do not represent the Tribe. On December 1, 2012, the Tribe held its annual election, at which Plaintiffs were voted off the Council. These election results were forwarded to the Bureau of Indian Affairs ("BIA"), and by letter dated January 8, 2013 BIA determined that the election appeared to have been proper and that the newly-elected council therefore spoke for

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[1] Unless otherwise indicated, and solely for purposes of the instant motion, Defendants accept as true the allegations in Plaintiffs' complaint. Of central importance to this motion, however, and for reasons explained below, Defendants reject the allegation (ECF No. 1 at 2) that "Plaintiffs Morris Reid, Dora Jones, Dixie Jackson, and Harold Hammond, Sr. comprise the voting majority of the Tribe's seven-member governing body, its Tribal Council." *See also id*. at ¶¶ 14-17. For the same reasons, our inclusion of the Tribe in the caption of this matter should not be construed as an admission that the Tribe is properly before the Court. *See *Timbisha Shoshone Tribe v. Kennedy*, 687 F.Supp.2d 1171 (E.D. Cal. 2009) ("*Timbisha Shoshone I*")

the Tribe. Because Plaintiffs do not represent the Tribe, they lack standing to press the claims they now assert and those claims must be dismissed under the controlling precedent in *_Timbisha Shoshone Tribe v. Salazar_*, 678 F.3d 935 (D.C. Cir. 2012) ("_Timbisha Shoshone II_").

Second, the current and duly-elected Tribal Council has formally withdrawn the ordinance submission originally proffered by Plaintiffs on behalf of the Tribe. NIGC has therefore not taken – and, indeed, is powerless to take – any reviewable action with respect to the ordinance submission that forms the crux of Plaintiffs' complaint, which must be dismissed for that reason as well. Also, because the submission that Plaintiffs seek to promote has been lawfully withdrawn, Plaintiffs' claims regarding that submission are moot.

Finally, this Court lacks jurisdiction over Plaintiffs' claim regarding Defendants' alleged "recognition" of the Tribe's current governing body, because only Congress and the BIA have authority to acknowledge Tribal governments, and both this Court and the Commission have no choice but to accept the authority of a Tribal governing body acknowledged by BIA. Because the federal courts lack jurisdiction to adjudicate matters of tribal self-governance, and because Congress has impliedly precluded judicial review of the Commission action at issue, Plaintiffs' Count III must be dismissed as well.

I. LEGAL FRAMEWORK

A. The Indian Gaming Regulatory Act

The Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721 ("IGRA") was established for three purposes: (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self sufficiency, and strong tribal governments; (2) to provide a statutory basis for the regulation of gaming by an Indian Tribe adequate to shield it from organized crime; and (3) to establish standards for regulation. 25

U.S.C. § 2702; *see City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003). IGRA separates gaming into three classes and creates distinct regulatory schemes for each. "Class I" gaming (social games played for token prizes or traditional, ceremonial gaming) is regulated solely by tribes. 25 U.S.C. §§ 2703(6), 2710(a)(1). "Class II" gaming, which includes bingo and other games commonly played with bingo, is regulated by a tribe and the NIGC. 25 U.S.C. §§ 2703(7)(A), 2710(a)(2). "Class III" gaming -- defined as all gaming not Class I or Class II -- is regulated in accordance with a tribal-state compact between a tribe and the state in which the tribe is located. 25 U.S.C. §§ 2703(8), 2710(d). Class III gaming may only be played pursuant to a compact negotiated between a tribe and its home state. 25 U.S.C. § 2710(d)(1)(C).

Before a tribe can lawfully conduct Class II or III gaming, it must adopt an ordinance or resolution for gaming which must be approved by the NIGC Chair. 25 U.S.C. §§ 2710(b)(1)(B); 2710(d)(1)(A)(iii). The Chair is required to approve a tribal gaming ordinance if it complies with IGRA and NIGC regulations. 25 U.S.C. §§ 2710(b)(2), 2710(d)(1)(A)(ii).

Only a limited number of NIGC decisions are reviewable in court. Section 2714 of the IGRA provides that "[d]ecisions made by the Commission pursuant to sections 2710, 2711, 2712, and 2713 shall be final agency decisions for purposes of appeal to the appropriate Federal district court . . . "). 25 U.S.C. § 2714. The final agency decisions referenced in Section 2714 are: decisions to approve or disapprove tribal gaming ordinances (§§2710, 2712), decisions to approve or disapprove management contracts (§§2711, 2712), and imposition of civil penalties (§2713).

B. NIGC Regulations

NIGC regulations, 25 C.F.R. Part 522, details the process for the Chair's review of tribal gaming ordinances or amendments. 25 C.F.R. Part 582 governs appeals of the Chair's

disapproval of tribal gaming ordinances or amendments. Certain documents must accompany a proposed ordinance or amendment, and the proposed ordinance or amendment itself must contain specified information before the Chair may approve it. *See* 25 C.F.R. § 522.2 (submission requirements), 25 C.F.R. § 522.3 (amendments) and 25 C.F.R. §§ 522.4 and 522.6 (approval requirements for Class II and Class III ordinances). One fundamental submission requirement, important here, is that the ordinance or amendment be "certified as authentic by an authorized tribal official . . . ." 25 C.F.R. § 522.2(a). Once these submission requirements are met, the Chair will engage in a substantive review of the ordinance or amendment to ensure it satisfies the other regulatory requirements. The Chair must disapprove the ordinance if it does not, if the Chair determines either that the "tribal governing body did not adopt the ordinance or resolution in compliance with the governing documents of [the] tribe", 25 C.F.R. § 522.7(a)(1), or that the "tribal governing body was significantly and unduly influenced in the adoption of the ordinance or resolution . . .". 25 C.F.R. § 522.7(a)(2). The Chair must approve or disapprove the ordinance or amendment within 90 days of its submission. 25 C.F.R. §§ 522.4. If the Chair fails to approve or disapprove an ordinance within the 90-day deadline, it is considered approved but only to the extent that it is consistent with IGRA and NIGC regulations. 25 U.S.C. §2710(e); 25 C.F.R. § 522.9.

The Chair's disapproval of a tribal gaming ordinance or amendment may be appealed to the full NIGC Commission. 25 C.F.R. Part 582.

II. STATEMENT OF FACTS

As Plaintiffs' complaint attests (ECF No. 1 at 8-11), it appears that bitter rivalry has plagued the Tribe for many years. That rivalry is in part the foundation for the instant litigation. The embroiled parties are often referred to as the "Reid Faction," led by Plaintiff Morris Reid,

and the "Lewis Faction," led by Reggie Lewis. *Id*., *passim*. Plaintiffs' contention that BIA has improperly recognized the Lewis Faction as representing the Tribe for purposes of government-to-government relations with the United States is the subject of two pending appeals filed by Plaintiffs with the BIA's Interior Board of Indian Appeals ("IBIA"). *Id*. at 13.

On March 27, 2012 the Tribe's Council (on which the "Reid Faction" sat), initiated the first of several attempts to amend the Tribe's gaming ordinance. *Id*. at 14. The stated purpose of the amendments was to halt the Lewis Faction's alleged misuse of Casino resources. *Id*. In June, 2012 the March submission was withdrawn (*id*. at 15), and a new, modified amendment was submitted to the Commission on July 31, 2012. *Id*. In October, 2012 (before the expiration of the 90-day period for action by the Chair), the Tribe's Council was notified of a defect in the July 31 submission, *id*. at 16, and on October 22, 2012, the Tribe again submitted a new, allegedly corrected, amendment. *Id*. It is this October 22, 2012 submission that underlies Plaintiffs' claims. As Plaintiffs note, "[t]he 90-day deadline for action on the October 22 submission was January 21, 201[3]. See 25 U.S.C. § 2712(b)." *Id*. at 17.[2]

On December 1, 2012, the Tribe conducted its annual Council elections. On January 8, 2013, attorney Richard Verri, representing the newly elected Tribal Council, emailed the BIA with the results of that election, which he asserted showed that Nancy Ayala was the newly

[2] The date referenced in Paragraph 40 of the complaint is January 21, 201**2**. We believe that date to be in error as it would place the deadline for action on the October 22, 2012 submission some ten months prior to its submission. Therefore, we believe 2013 was the year intended.

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elected Chairwoman and Reggie Lewis the newly elected Vice Chairman. Exhibit A-1.[3] The same day BIA Superintendant Troy Burdick prepared a letter that acknowledged receipt of the election results and stated that "it appears that the indicated officials were duly elected for purposes of acting on pending federal actions before the [BIA]." Exhibit A-2.

The "pending federal actions" BIA Superintendant Burdick refers to in Exhibit A-2 involved the Tribe's submission of a "Revenue Allocation Plan." Section 290.18 of 25 C.F.R. requires that the BIA Superintendent ensure that revenue allocation plans are adopted in accordance with applicable tribal law. 25 C.F.R. §290.18. The existence of pending federal actions is significant. Consistent with strong federal policies against unwarranted meddling in internal tribal affairs, the IBIA has held that BIA has no authority to opine on the validity of tribal elections, or on the legitimacy of tribal office-holders, unless the federal government is obligated to take a specific action that cannot be taken without BIA's making a determination as to the identity of duly authorized tribal officers with whom the United States will treat in its government-to-government relations. *Coyote Valley of Pomo Indians v. Acting Pacific Regional Director,* 54 IBIA 320, 320-321 (April 18, 2012) (Exhibit A-3).

On January 10, 2013, NIGC received the Tribe's Resolution No. 2013-05, which called for the withdrawal of the gaming ordinance amendment(s) submitted by the Council.[4]

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[3] Exhibit A is the Sworn Declaration of Shakira Ferguson, Legal Administrative Specialist, National Indian Gaming Commission. Attachments 1-7 to Exhibit A, which Mr. Ferguson's Declaration authenticates, will be referred to herein as "Exhibit A-1" through "Exhibit A-7."

[4] Tribal Resolution 2013-05 formally rescinded Resolutions 2012-19 and 2012-20, by which the Tribe's former Council had approved the July 31, 2012 and October 22, 2012 gaming ordinance amendment submissions.

With the prior Council's October, 2012 gaming ordinance amendment being before the NIGC, but also being in receipt of the newly-elected Council's withdrawal of that amendment, the Commission, through NIGC Acting General Counsel Jo-Ann Shyloski, wrote to BIA Superintendant Burdick as follows:

> Superintendent Burdick:
>
> Thank you for your time in working with the NIGC on this matter.
>
> As discussed previously, NIGC Chairwoman Stevens has a gaming ordinance pending before her that requires her action by Wednesday, January 16. For that purpose, please advise whether the BIA[']s taking action in regard to the [Tribe's] revenue allocation plan constitutes recognition of the new tribal government of the Picayune Rancheria. Thank you again for all your assistance,
>
> Jo-Ann Shyloski
> Acting General Counsel

Exhibit A-5. BIA Superintendant Burdick responded to Ms. Shyloski's inquiry in the affirmative, specifically stating that "Resolution 2013-05 appears to have [been] adopted in accordance with [the Tribe's] recent election held on December 1, 2012, and acknowledge[d by BIA] on January 8, 2013." *Id.*

Based on this information from the BIA, on January 17, 2013, NIGC advised Plaintiffs' counsel that the NIGC had received from the Tribe's Council a resolution withdrawing resolution numbers 2012-19 and 2012-12 and that therefore the NIGC was closing the matter. Exhibit A-6.

In response to follow-up correspondence from Plaintiffs' counsel, on February 12, 2013, Maria Getoff, NIGC Senior Counsel, advised that the withdrawal of the gaming ordinance amendment did not result in the Commission's disapproval of same. Ms. Getoff explained that

when an ordinance amendment is withdrawn, there is no longer a submission to act upon, and that thus no agency action can occur. Exhibit A-7.

Plaintiffs filed their complaint on March 29, 2013, and effected service on June 8. The complaint asserts three claims. First, it challenges the Commission's handling of the gaming ordinance amendment submitted on October 22, 2012, alleging that the Commission violated NIGC regulations either by rejecting that amendment, or by failing to take action before expiration of the ninety-day deadline. ECF No. 1 at 20-21. Second, the complaint alleges that the same acts (either rejecting, or failing timely to act upon, the October 2012 amendment) were arbitrary and capricious, in violation of the Administrative Procedure Act ("APA"). *Id*. at 21-22. Third, Plaintiffs assert that the Commission "recognized" the Lewis faction as the governing body of the Tribe, and that doing so was arbitrary and capricious in violation of the APA. *Id*. at 22-23.

III. ARGUMENT

A. Standard of Review

A motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) may present either a facial or factual attack on jurisdiction. *Macharia v. U.S.*, 334 F.3d 61, 64, 67 (D.C. Cir. 2003); *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A facial attack asserts that the complaint on its face fails to allege sufficient grounds to establish subject matter jurisdiction. *Macharia*., 334 F.3d at 67 *citing Gould Elecs., Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000). In a factual attack, the defendant challenges the court's jurisdiction based on evidence outside the pleadings, and the court may review and rely upon any evidence in assessing jurisdiction. *See id*.; *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003); *Herbert v. Nat'l Acad.*

of Scis., 974 F.2d 192, 198 (D.C. Cir. 1992); *In re Swine Flu Immunization Products Liability Litigation*, 880 F.2d 1439, 1442-43 (D.C. Cir. 1989) *citing Exchange National Bank v. Touche Ross & Co*., 544 F.2d 1126, 1131 (2d Cir.1976). The burden of establishing subject matter jurisdiction always rests with the plaintiff. *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008); *Walker v. Jones*, 733 F.2d 923, 934-35 (D.C. Cir. 1984) (MacKinnon, Senior Circuit Judge, dissenting in part and concurring in part) ("[W]hen the movant denies or controverts the plaintiff's factual allegations going to subject matter jurisdiction, the burden is on the opposing party to assert jurisdiction, and the recitals in the complaint are no longer controlling") *citing KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278, (1936); 5 C. Wright & Miller, *Federal Practice & Procedure* § 1350 at 555, § 1363 at 653-54 (1969).[5]

Consideration of materials outside the pleadings, on a Rule 12(b)(1) motion, does not convert the motion to one for summary judgment under Rule 12(d). *Rann v. Chao*, 346 F.3d 192, 194 (D.C. Cir. 2003); *Alliance For Environmental Renewal, Inc. v. Pyramid Crossgates Co*., 436 F.3d 82, 88 (2nd Cir. 2006) ("The presentation of affidavits on a motion under Rule 12(b)(1), however, does not convert the motion into a motion for summary judgment under Rule

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[5] See 5B Wright & Miller, *Federal Practice & Procedure* § 1350 at 159-98 (2004) (citations and footnotes omitted):

> When the movant's purpose is to challenge the substance of the jurisdictional allegations, he may use affidavits and other additional matter to support the motion. . . . [There are] a wide array of cases from the four corners of the federal judicial system involving the district court's broad discretion to consider relevant and competent evidence on a motion to dismiss for lack of subject matter jurisdiction to resolve factual issues. . . . . [O]nce a factual attack is made on the federal court's subject matter jurisdiction, the district judge is not obliged to accept the plaintiff's allegations as true and may examine the evidence to the contrary and reach his or her own conclusion on the matter.

56. *See Kamen v. AT & T Co.*, 791 F.2d 1006, 1010-11 (2nd Cir. 1986)")); *Douglas v. Norton*, 167 Fed. Appx. 698, 704 (10th Cir. 2006).

A challenge to the Plaintiffs' standing is appropriately brought under Rule 12(b)(1), *Kim v. United States*, 632 F.3d 713, 717 (D.C. Cir. 2011), as is a claim that an action is moot. *Sibley v. Alexander*, --- F.Supp.2d ---, 2013 WL 76286 at *2 (D.D.C. 2013) (*citing Comm. in Solidarity with the People of El Salvador v. Sessions*, 929 F.2d 742, 744 (D.C.Cir. 1991)); *Freedom Watch, Inc. v. Obama*, 859 F.Supp.2d 169, 172 (D.D.C. 2012) ("If a case is moot, it must be dismissed for lack of subject-matter jurisdiction under Rule 12(b)(1)") (*citing Sierra Club v. Jackson*, 648 F.3d 848, 852 (D.C. Cir. 2011).).

B. NIGC Had No Authority to Question BIA's Determination that the Tribal Resolution Withdrawing Plaintiffs' Ordinance Amendment Was Validly Enacted, and This Court Lacks Jurisdiction to Entertain Plaintiffs' Claims to the Contrary

Plaintiffs' Count III alleges that "[t]he Commission wrongfully recognized an entity which is not the legitimate tribal governing body for purposes of, inter alia, its actions concerning Plaintiffs' Gaming Ordinance Amendment submissions." ECF No. 1 at 22. The Lewis Faction, Plaintiffs allege, "is an illegitimate Tribal governing body . . .". *Id*. at 23. But neither the Commission, nor this Court, possesses the authority to interfere with or question the Tribe's December 1, 2012 elections.

It is a cornerstone of federal Indian jurisprudence that Congress possesses plenary power to regulate Tribal affairs and that, therefore, the courts should not interfere with tribal sovereignty or with matters of tribal self-governance. "Internal matters of a tribe are generally reserved for resolution by the tribe itself, through a policy of Indian self-determination and self-government as mandated by the Indian Civil Rights Act." *Timbisha Shoshone I*, 687 F.Supp.2d

at 1185, *citing* 25 U.S.C. §§ 1301-1341. Unless surrendered by a tribe, or abrogated by Congress, tribes possess an inherent and exclusive power over matters of internal tribal governance. *Id., citing Nero v. Cherokee Nation,* 892 F.2d 1457, 1463 (10th Cir.1989); *see also Milam v. U.S. Dep't of Int.*, 10 Indian L. Rep. 3013, 3015 (D.D.C. 1982) (ordinarily, disputes "involving intratribal controversies based on rights allegedly assured by tribal law are not properly the concerns of the federal courts."); *County of Charles Mix v. U.S. Dept. of Interior,* 674 F.3d 898, 903 (8th Cir. 2012) ("Jurisdiction to resolve internal tribal disputes, interpret tribal constitutions and laws, and issue tribal membership determinations lies with Indian tribes and not in the district courts") (*quoting In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir.2003)); *Wheeler v. Swimmer,* 835 F.2d 259, 261 (10th Cir. 1987) (affirming dismissal of suit brought by defeated tribal office-seekers on the grounds that "the Cherokee Nation possesses an inherent right to self-government without federal government intrusion . . . ".)

Because Congress has given the BIA responsibility for government-to-government relations with tribes, including issues of tribal recognition, the courts likewise defer to BIA's determination of tribal matters. Deference is given, for example, to BIA determinations of tribal authenticity. *Robinson v. Salazar,* 838 F.Supp.2d 1006, 1031 (E.D. Cal. 2012) ("Deference to the BIA determination is [the] preferred course of action. While courts may make the determination whether an unrecognized group is 'an Indian Tribe,' they are not required to so. Instead, under the doctrine of primary jurisdiction, courts may defer resolution of the issue to the BIA); *New Jersey Sand Hill Band of Lenape & Cherokee Indians v. Corzine,* 2010 WL 2674565 (D.N.J. 2010) (court dismissed claims under the Nonintercourse Act based on deference to the BIA for a "hotly disputed" tribal authenticity, and where plaintiff had not yet begun the federal

recognition process); *BGA, LLC v. Ulster County, N.Y.*, 2010 WL 3338958 (N.D.N.Y.2010) (given the complexity of the tribal inquiry and the potential for inconsistent and under-informed rulings, deference to the BIA is generally preferred); *U.S. v. 43.47 Acres of Land,* 45 F.Supp.2d 187 (D.Conn.1999) (determination of band's tribal status would be referred to BIA).

The Commission, no less than the courts, must defer to BIA determinations regarding tribal authority. "The NIGC defers to the Secretary of the Interior, acting through the BIA, in determining which faction should be recognized as the tribal government." *Attorney's Process And Invest. v. Sac & Fox Tribe*, 609 F.3d 927, 944 (8th Cir. 2010) (internal quotation marks omitted). For the Commission to do anything else would violate express congressional directives, *see* 25 U.S.C. § 2703(5)(A) (directing the Commission to recognize Indian tribes that are recognized by the Secretary of the Interior), and would be a formula for chaos: it is BIA that has the expertise and primary responsibility in such matters, and for other federal bodies to make their own tribal authority determinations would invite inconsistent determinations.

BIA's primary jurisdiction over tribal authority determinations is fatal to Plaintiffs' third cause of action, which seeks to challenge NIGC's "recognition" of the Lewis Faction as the Tribe's lawful governing council. *See Huffer v. Stuart*, 90 Fed.Appx. 471, 2003 WL 23105333 at *2 (7th Cir. 2003) ("The district court granted Stuart's motion to dismiss. It held that it lacked subject matter jurisdiction over Huffer's demand for tribal recognition because the Department of the Interior has authority over whether a group qualifies as a federally recognized tribe, see 25

C.F.R. § 83, and Huffer needed to direct his efforts for tribal recognition to that agency") (decision affirmed).[6]

This Court lacks jurisdiction over Plaintiffs' Count III for the additional reason that the challenged Commission action is not among those made reviewable by Congress. Section 15 of IGRA provides that "[d]ecisions by the Commission pursuant to Sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for the purposes of appeal to the appropriate Federal district court." 25 U.S.C. § 2714. The only final agency actions detailed in the IGRA are decisions on tribal gaming ordinances, decisions on management contracts, and the imposition of civil penalties and closure orders. 25 U.S.C. §§ 2710, 2712, 2713, 2714. Because of the specific listing by Congress of those decisions that may be deemed final agency actions subject to review under the APA, "the implied corollary is that the other agency actions are not final, and ergo, not reviewable." **Cheyenne-Arapaho Gaming Comm'n v. Nat'l Indian Gaming Comm'n*, 214 F. Supp. 2d 1155, 1171 (N.D. Okla. 2002). "The omission of a provision thereby shows Congressional intent to prohibit judicial review over any other agency actions as opposed to the few already granted express jurisdiction." **Lac Vieux Desert Band of Lake Superior Chippewa Indians of Mich. v. Ashcroft*, 360 F. Supp. 2d 64, 67 (D.D.C. 2004) (internal quotation marks and citations omitted). "[W]e adhere to '[a] frequently stated principle of statutory construction[:] when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.'" *Tamiami Partners,*

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[6] Plaintiff invokes the All Writs Act in support of Count III. ECF 1 at 23. While a court can use the All Writs Act to issue process in aid of its jurisdiction, it cannot use the Act to enlarge its jurisdiction. *See Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999); *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985); *Telecommunications Research and Action Ctr. v. Federal Communications Comm'n*, 750 F.2d 70, 78 (D.C. Cir. 1984) (the All Writs Act does not independently grant jurisdiction).

Ltd. v. Miccosukee Tribe of Indians of Fl., 63 F.3d 1030, 1049 (9th Cir. 1995) (*quoting Nat'l R.R. Passenger Corp. v. Nat'l Assoc. of R.R. Passengers*, 414 U.S. 453, 458 (1974) (second and third alteration in original)). In addition, the legislative history of IGRA is consistent with a congressional intent to limit judicial review to certain agency decisions. *See* S. Rep. 100-446 (1988) at 20 ("[Section 15] provides that certain Commission decisions will be final agency decisions for purposes of court review"); *see also Cheyenne-Arapaho Gaming Comm'n*, 214 F. Supp. 2d at 1171 (footnote omitted):

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

Plaintiffs' Count III must be dismissed for this reason as well.[7]

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[7] A suit against BIA challenging its decision to recognize particular office-holders, or opining on the validity of an election, might be another matter. *See Goodface v. Grassrope*, 708 F.2d 336, 339 (8th Cir.1983) (absent congressional preclusion of appeal, district court had jurisdiction to hear an APA challenge to BIA decision on the validity of a tribal election); *Runs After v. United States*, 766 F.2d 347, 351 (8th Cir. 1985) (same). But here, as several courts have held, the enumeration of reviewable "final agency actions" in 25 U.S.C. 2714 precludes APA review of NGIC actions not among those enumerated. And, given that Plaintiffs have two pending appeals before the IBIA (ECF No. 1 at 13), an APA suit against BIA would be precluded by failure to exhaust administrative remedies until those appeals are resolved. *Runs After*, 766 F.2d at 352; *Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708, 712-13 (2nd Cir. 1998).

C. Plaintiffs Lack Standing to Challenge the Commission's Handling of the Proposed Gaming Ordinance Amendment

1. Standard of Review

The "irreducible constitutional minimum of standing" contains the following three elements: (1) that the litigant has personally "suffered an 'injury in fact,' – an invasion of a legally-protected interest, which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'"; (2) that the litigant's injury is caused by or fairly traceable to the challenged act; and (3) that the litigant's injury is redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted). If one of these essential elements is lacking, then the case must be dismissed for lack of subject matter jurisdiction. *Id.* The party invoking federal jurisdiction bears the burden of establishing the elements of standing. *Id.* at 561.

2. Because They Do Not Represent the Tribe, Plaintiffs Lack Standing

In *Timbisha Shoshone II*, plaintiff tribe members challenged as unconstitutional a Congressional scheme calling for the allocation of tribal assets to members of the tribe. 678 F.3d at 936. As is true here, the tribe in *Timbisha Shoshone II* had been wracked by internal political divisions for several years. 678 F.3d at 937. At the time of filing suit, the plaintiffs in *Timbisha Shoshone II* had been members of the Tribal Council, but while the appeal was pending before the District of Columbia Court of Appeals a special election was held at which the plaintiffs were "soundly defeated." *Id*. BIA recognized the special election as valid under tribal law, a decision that the ousted faction challenged in a separate federal court suit. 678 F.3d at 937-38.

Based on the "bedrock principle of federal Indian law that every tribe is 'capable of managing its own affairs and governing itself,'"[8] and on the principle that the judiciary "owe[s] deference to the judgment of the Executive Branch as to who represents a tribe," 678 F.3d at 937 (citation omitted), the D.C. Circuit dismissed the appeal for lack of standing because plaintiffs were not the tribe's lawful representatives. 678 F.3d at 938. This holding in *Timbisha Shoshone II* requires dismissal of Plaintiffs' Counts I and II, which, like the claims at issue in *Timbisha Shoshone II*, are purportedly made on behalf of the Tribe.

Citing the Second Circuit's decision in *Shenandoah*, the court in *Timbisha Shoshone II* suggested an alternative analysis that leads to the same result. Because the BIA had made a determination that the plaintiff in *Shenandoah* no longer represented the tribe on whose behalf suit was purportedly brought, plaintiff's claims were moot. *Timbisha Shoshone II*, 678 F.3d at 938 ("The Second Circuit has noted that '[t]he [Government's] determination that [a certain member] does not represent . . . [a tribe] may well moot plaintiffs' claims.' We agree.") (*quoting Shenandoah*, 159 F.3d at 713) (alterations in original). *See also Timbisha Shoshone I*, 687 F.Supp.2d at 1187 n. 5.

Similarly, in *Historic Eastern Pequots v. Salazar*, --- F.Supp.2d ---, 2013 WL 1289571 (D.D.C.) (March 31, 2013) the plaintiffs, purporting to represent an Indian tribe for which the IBIA had denied official recognition, did not (or could not) furnish evidence that they in fact represented the legitimate governing council of either of the two tribal entities[9] affected by the

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[8] 678 F.3d at 937 (*quoting Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C.Cir. 2008)) (*quoting Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831)).

[9] The Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut. *See Historic Eastern Pequots*, 2013 WL 1289571 at *1.

IBIA's order. The court dismissed plaintiffs' claims on jurisdictional grounds, because plaintiffs had not met their burden of demonstrating standing.

> At this stage in the litigation, the record is far from clear as to whether the "Historic Eastern Pequots" is the same entity as any of the entities who were affected by the [IBIA's Final Decision]. . . . Ultimately, however, plaintiff bears the burden of establishing that it has standing to invoke the Court's subject matter jurisdiction, and plaintiff has failed to do so here. Accordingly, the Court finds that plaintiff has failed to meet its burden of pleading that it has standing, and the Court therefore lacks subject matter jurisdiction over this case.

Historic Eastern Pequots, 2013 WL 1289571 at *3, *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (footnote omitted); *see also Huffer v. Stuart*, 90 Fed.Appx. 471, 2003 WL 23105333 at *2 (7th Cir. 2003) ("If . . . Huffer represents only himself, he likely lacks standing to bring the suit to the extent that he is attempting to assert the rights of the Tribal Council.")[10]

Whatever rights and privileges are created by IGRA, those rights and privileges inure to tribes, not individual members of tribes. *See, e.g.*, 25 U.S.C. § 2702 (purpose of IGRA is to "provide a statutory basis for the operation of gaming by Indian tribes . . ."); 25 U.S.C. § 2710(b)(1) (allowing class II gaming by "[a]n Indian tribe . . .); 25 U.S.C. § 2710(d)(1)(A)(1) (allowing class III gaming on tribal land where, *inter alia*, a resolution approving same "is adopted by the governing body of the Indian tribe having jurisdiction over such lands . . .); 25 U.S.C. § 2711 (a)(1) (setting out requirements under which "an Indian tribe may enter into a management contract . . ."); 25 U.S.C. § 2719 (describing situations where land may be acquired

[10] The holding in *Timbisha Shoshone I* is analogous. There the individual plaintiffs were found to have failed to carry their burden of establishing standing where they had been disenrolled from the tribe they wished to sue. 687 F.Supp.2d at 1185. The standing problem was intractable, the court held, because the court could not address plaintiffs' contention that they had been unlawfully disenrolled from the tribe without impermissibly intruding on internal tribal governance. *Id*.

by the United States "in trust for the benefit of an Indian tribe . . ."). Because BIA has determined that Plaintiffs do not represent the Tribe, Plaintiffs are without standing to litigate Defendants' alleged noncompliance with IGRA and Commission regulations. Counts I and II of Plaintiffs' complaint must for this reason be dismissed.

D. Counts I and II Should Be Dismissed For the Additional Reasons That Plaintiffs Have Identified No Reviewable Action by Defendants, and Plaintiffs' Proposed Ordinance Amendment Is Moot

While not a jurisdictional bar, the APA limitation of judicial review to "final agency action," 5 U.S.C. § 704, is strictly enforced. An administrative action is final if it imposes an obligation, denies a right or fixes some legal relationship as a consummation of the administrative process. *Chicago and Southern Airlines, Inc. v. Waterman SS Corporation*, 33 U.S. 103, 112-113 (1948). Similarly, the action must mark consummation of the agency's decision-making process and must be one by which rights or obligations have been determined or from which legal consequences flow. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13 (D.C.Cir.2005). Because a final decision represents a complete resolution of the case and fixes parties' rights and obligations, a decision is not final if it is "tentative, provisional, or contingent, subject to recall, revision, or reconsideration." *Nat'l Treasury Employees Union v. FLRA*, 712 F.2d 669, 671 (D.C. Cir. 1983).

Here, having been careful to consult BIA's determination that the Tribal Resolution withdrawing Plaintiffs' gaming ordinance amendment had been validly adopted, the only "action" NIGC took was acknowledging the fact of withdrawal. Because that action "imposes [no] obligation, denies [no] right[, and] fixes [no] legal relationship" it is not final in any sense. *Chicago and Southern Airlines*, 33 U.S. at 112-113. Likewise, NIGC's action does not "mark

[the] consummation of the agency's decision-making process" – indeed, it does not reflect any decisionmaking at all. *Bennett*, 520 U.S. at 177-78. Nor is this an action "by which rights or obligations have been determined or from which legal consequences flow." *Id*. NIGC's "action" does not obligate anyone to do anything, or to refrain from doing anything. It does not affect any legal relationship in any way.

At the same time, the Tribe's withdrawal of Plaintiffs' gaming ordinance amendment renders any claims regarding that amendment moot. *See*, e.g., *Givaudan Corp. v. Reilly*, 1991 WL 126027 (D.D.C. 1991), *aff'd* 978 F.2d 744 (Table), 1991 WL 126027 (D.C. Cir. 1992) (challenge to EPA's handling of pesticide registration application dismissed as moot where application had been withdrawn); *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329-30 (1961) (challenge rendered moot where railroad whose application for tariffs was contested withdrew that application); *State of Ala. ex rel. Baxley v. Woody*, 473 F.2d 10, 14 (5th Cir. 1973) (challenge to permit allowing mineral prospecting in national forest moot where prospector ceased prospecting and withdrew application for permit to prospect). One of the animating principles of the mootness doctrine is the notion that the federal courts lack jurisdiction where they lack the ability to afford meaningful relief. *McBryde v. Comm. to Review Circuit Council Conduct*, 264 F.3d 52, 55 (D.C. Cir. 2001) ("If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot."); *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939, 952 (D.C. Cir. 2005) (same). Here, because Plaintiffs' gaming ordinance amendment is no longer before the Chair, the Chair cannot approve it or disapprove it, and there is accordingly no remedy available to the Court. For this Court, or for the Chair, to analyze the amendment's conformity with the IGRA and

NIGC regulations would be an entirely hypothetical exercise. Plaintiffs' Counts I and II must therefore be dismissed on mootness grounds as well.

CONCLUSION

Accordingly, Defendants respectfully request that the Court, pursuant to Fed. R. Civ. P. 12(b)(1), dismiss Plaintiffs' complaint in its entirety.

Respectfully submitted this 10th day of June, 2013.

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