UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF DULUTH, Plaintiff, v. NATIONAL INDIAN GAMING COMMISSION, and TRACIE L. STEVENS, in her official capacity as Chairwoman of the National Indian Gaming Commission. Defendant.	Case No. 1:13-cv-00246 CKK

REPLY IN SUPPORT
OF THE UNITED STATES' MOTION TO DISMISS

Defendants, the National Indian Gaming Commission ("NIGC"), and Tracie L. Stevens, in her official capacity as Chairwoman ("Chair") of the National Indian Gaming Commission, (collectively, "Defendants" or "United States"), submit this Reply in support of their Motion to Dismiss. For the reasons described in the Memorandum in Support of the United States' Motion to Dismiss and clarified below, the United States respectfully requests that the Court dismiss Plaintiff City of Duluth's Complaint (Docket No. 1) ("Complaint") for lack of jurisdiction.

Plaintiff has not alleged facts sufficient to establish that the agency action they challenge caused the injury it complains of; thus, Plaintiff lacks standing, and the Court lacks jurisdiction over the Complaint. In the alternative, the Court lacks jurisdiction over the Complaint because the injury asserted by Plaintiff does not fall within the zone of interests of the relevant statute pertaining to these claims. Thus, Plaintiff lacks prudential standing and these claims must be dismissed.

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ARGUMENT

A. Correction of Plaintiff's Mischaracterizations and Misstatements

1. Plaintiff's Alleged Injury is Not Fairly Traceable to Defendant's Action

In its Motion to Dismiss, Defendants argued that the particularized injury alleged by the Plaintiff was not fairly traceable Defendants' action because of the intervening actions of a third party. See Doc. No. 8 [hereinafter Motion], at 11-12. Specifically, the Chairwoman issued a Notice of Violation ("NOV") to the Fond du Lac Band of Lake Superior Chippewa ("Band"). The NOV ordered the Band to "cease performance under the 1994 Agreements of those provisions identified in this NOV as violating IGRA." Doc. No. 8-1, at 18. The Band then faced several options, including for example:

(1) Ceasing gaming entirely;

(2) Renegotiating the contracts with the City to conform with IGRA; or

(3) Continuing to operate the casino in a way that cured the IGRA violations.

Because the NOV gave the Band a range of options, some of which would not have caused a legal injury to Plaintiff, the City's alleged injury is not directly traceable to the Defendants.

In its Response, Plaintiff argued: "But for the NOV, the Band would have been unable to avoid its contractual obligations imposed under the 1994 Consent Decree." Doc. No. 9 [hereinafter Response], at 6. This is incorrect. The 1994 Sublease and Assignment of Gaming Rights Agreement states:

> The Band shall have the unilateral right, at its sole discretion, at any time, to cease gaming activities at the Sublease space and shall be liable for all debts and operating costs incurred or assumed by the Band pursuant to this Sublease up to the time of terminating such activities, but shall incur no additional liability solely as a result of exercising its option to terminate all gaming activities at the Sublease space.

Doc. No. 8-2, at 19 (emphasis added). With or without a NOV, the Band had the unilateral right to cease operation of the casino. Whenever the Band chose to exercise this option, the City would have been deprived of the benefits and payments under the 1994 Agreements and the 1994 Consent Decree. In addition, Plaintiff's statement ignores the fact that the Band had already ceased payments to the City before the NOV was issued and assumes that the City would have prevailed in the litigation pending in Minnesota.

Plaintiff also accuses Defendants of misstating the substance of the 1994 Agreements: "Defendants argument that the Band had the right to cease operating under the terms of the agreements also misstates the agreements." Response at 14. However, Plaintiff contradicts itself within the same paragraph, confirming that the United States' interpretation is correct. Plaintiff states "the Band may have had the right to discontinue operations . . . ." *Id.*

In sum, the City could have been deprived of the benefit of its bargain without any action on the part of the NIGC or the Chairwoman. And on the flip side, the actions of the NIGC and the Chairwoman did not mandate that the City suffer legal injury.

2. Defendants Do Not Concede That They Exceeded Statutory Authority

Plaintiff misreads the Motion to Dismiss, alleging that Defendants "concede [they] exceeded their statutory authority." Response at 17. In their Motion, Defendants explained the nature of the Chair's actions in both 1994 and 2011. The Chair of the NIGC has the authority to approve management contracts. 25 U.S.C. §§ 2705(a)(4). The converse is that the Chair does not have the authority to approve contracts that are not management contracts. The 1994 Agreements are not management contracts. They are a unique set of agreements not

contemplated by IGRA.[1] Thus, the Chair did not have authority to formally approve or disapprove those contracts. Any pronouncements made by the Chair in 1994 were necessarily advisory.[2]

Today, the Chairwoman does not have the authority to approve the 1994 Agreements. However, the Chairwoman does have the authority to initiate enforcement action against tribes for any violation of IGRA. 25 U.S.C. §§ 2713(a). The Chairwoman issued the Notice of Violation to the Band because the Band was operating its casino in violation of IGRA. In explaining the basis for the violation, the Chairwoman concluded that the 1994 Agreements violate IGRA, and consequently the Band's operation of the casino under those agreements was a violation. This is an important distinction that is squarely consistent with the statutory language.

3. Defendants Did Not Argue That Plaintiff Must Be Regulated by IGRA to Satisfy the Prudential Standing Test

In its Motion, Defendants described the three-part, disjunctive approach to determining whether Plaintiff has prudential standing. Prudential standing examines whether the Plaintiff is:

(1) Regulated by the relevant statute; OR

(2) An intended beneficiary of the relevant statute; OR

(3) A suitable challenger to the relevant administrative action.

[1] Defendants do not generally characterize the 1994 Agreements as a lease, as Plaintiff asserts in its Response. See Response at 17. A lease is part of the agreements. Compl. ¶ 22(a). Defendants assert that the 1994 Agreements are a unique set of agreements not contemplated by IGRA.

[2] Plaintiff falsely asserts in its Response that the NIGC and its Chairman were active participants in the negotiation and creation of the 1994 Agreements. Response at 10. The Complaint uses phrases such as "Under the auspices of the Chairman of the NIGC," ¶ 19, and "With the NIGC's assistance," ¶ 20 without offering any concrete examples of how the NIGC actually participated. There is no evidence that NIGC offered guidance to the parties, only that they offered a conclusion.

See Motion at 13 (citing Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918, 922 (D.C. Circ. 1989). Defendants argued that Plaintiff does not qualify under any of the three categories.

Plaintiff is confused by this articulation of the test, apparently believing it to be conjunctive. Plaintiff's first heading in its prudential standing discussion reads: "Prudential standing does not require that the City demonstrate that it is a regulated entity . . . ." Response at 16. Defendants agree. Being regulated provides an easy answer to the "zone of interests" question but is not the only way to achieve prudential standing. Later, Plaintiff attributes to Defendants the argument that "prudential standing exists only when the plaintiff is regulated by the statute." Response at 18. Defendants did not so argue. Again, it is useful to examine whether the plaintiff is regulated to determine if prudential standing exists, but it is not a dispositive inquiry. Defendants discussed and rejected Plaintiff's claim of prudential standing under each of the three prongs of the test to conclude that Plaintiff does not have prudential standing.

B. Plaintiff's Alleged Injury is Not Redressable By This Action

Plaintiff seeks an order "reversing NOV-11-02, setting aside all actions taken in its enforcement and ordering Defendants to take all necessary corrective action to reinstate the preexisting legal rights of the City." Response at 15 (quoting Compl., Prayer for Relief ¶ 3). In Count III of its Complaint, Plaintiff asserts that it is entitled to "a mandatory injunction requiring Defendants to reinstate its prior approval of the 1994 Contracts." Compl. ¶ 63. Plaintiff believes that such a remedy will redress its alleged injury because the City can then "return to the Minnesota district court and assert its own motion under Rule 60(b)(5)&(6) to reinstate the Consent Decree and the 1994 Agreements . . . ." *Id.* at 16. There are two flaws with this

argument. First, Plaintiff cannot receive the relief it requests. Second, Plaintiff's alleged injury can only be redressed by the third party actions of the Band.

Plaintiff is not entitled to an injunction in this action. The Administrative Procedure Act directs that a court "shall hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law." 5 U.S.C. § 706(2)(A) (emphasis added). "[T]he Supreme Court and the D.C. Circuit have held that vacatur is the presumptive remedy for this type of violation." In Re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation, 818 F. Supp. 2d 214, 238 (D.D.C. 2011). See also Fed. Election Comm'n v. Akins, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case."); Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1084 (D.C. Cir. 2001) ("If an appellant has standing . . . and prevails on its APA claim, it is entitled to relief under that statute, which normally will be a vacatur of the agency's order."). Injunctive relief is only authorized under the APA for "agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), which is not present in this case. Plaintiff cites to no other provision of law which would entitle it to injunctive relief. Thus, if Plaintiff has standing and prevails, the appropriate remedy would be vacatur of the NOV or vacatur and remand.

At that time, the NIGC would be free to issue a subsequent NOV not inconsistent with the district court's opinion. It is entirely possible that such NOV would reach the same conclusion as the first NOV and carry a similar admonition to the Band to cease performance of certain parts of the 1994 Agreements. On the other hand, it is possible that the NIGC would not issue another NOV. Recognizing these possibilities, this Court has held that vacatur and remand is a "necessary first step on a path that could ultimately lead to relief fully redressing the injury."

See Am. Petroleum Tankers Parent, LLC v. United States, Civ. No. 12-1165, 2013 WL 1859311, at *5 (D.D.C. May 6, 2013) (quoting Tel. & Data Sys., Inc. v. Fed. Commc'n Comm'n, 19 F.3d 42, 47 (D.C. Cir. 1994)). Thus, in the typical case, vacatur and remand, coupled with the possibility of a favorable subsequent agency action, satisfies the redressability prong of the standing inquiry.

This is not the typical case. As discussed at length in the Motion and at Part A.1 here, the third party actions of the Band interrupt the causal chain. Even if the NIGC chose not to issue another NOV, the Band would still have the option to cease gaming entirely or to renegotiate the agreements. If the Band chose to cease gaming entirely, the fact that the NIGC changed position would have no effect on the City's rights under the Agreements. In other words, the possibility of a favorable subsequent agency action is not enough to show redressability in this case. The City must also rely on the independent third party actions of the Band to regain the benefits of the 1994 Agreements.

C. Plaintiff is Not an Intended Beneficiary of IGRA

Plaintiff argues that it is an intended beneficiary of IGRA under the following logic. See Response at 19-20. First, that tribes are to be the "primary" beneficiary of IGRA necessarily means that Congress intended others to benefit. 25 U.S.C. § 2702(2). Second, that local governments are among those Congress intended to benefit because Congress authorized tribes to spend gaming proceeds[3] "to help fund operations of local government agencies." 25 U.S.C. § 2710(b)(2)(B)(v). Third, that because the City is a local government, it is therefore intended to be benefitted. There are a number of flaws in Plaintiff's theory.

[3] IGRA does not authorize tribes to share gaming proceeds. Rather IGRA allows tribes to use net revenues to help fund local government operations. 25 U.S.C. § 2710(b)(2)(B).

As an initial matter, Plaintiff does not explain how the provision it cites regarding local governments is relevant to the zone of interests in this case. The Supreme Court has made clear that the focus of the prudential standing inquiry is on the particular provision of law upon which the plaintiff relies, Bennett v. Spear, 520 U.S. 154, 175-76 (1997), rather than on a statute or statutory scheme generally. For example, in Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517 (1991), the plaintiff unions argued that they had prudential standing under a provision of the Postal Reorganization Act ("PRA"). Id. at 521. However, the union's claim on the merits was based on a provision of the Private Express Statutes ("PES"). Id. at 520. The Union did not have prudential standing because "[t]he only relationship between the PES, upon which the Unions rely for their claim on the merits, and the labor-management provisions of the PRA, upon which the Unions rely for standing, is that both were included in the general codification of postal statutes . . . ." Id. at 529. The Court stressed that the unions could not reach beyond the specific statutory provision that was the basis of the claim, emphasizing that "to accept this level of generality in defining the 'relevant statute' could deprive the zone-of-interests test of virtually all meaning." Id. at 529-30.

Here, the particular provision at issue on the merits is the sole proprietary interest and responsibility requirement, 25 U.S.C. § 2710(b)(2)(A). See Compl. ¶ 38. The provision upon which Plaintiff attempts to rely for standing in its Response is 25 U.S.C. § 2710(b)(2)(B). The former places strict limits on who will have the authority and responsibility for the gaming activity, while the latter simply lists how money from Indian gaming may be spent. Like the two provisions at issue in Air Courier, these are substantively distinct provisions with distinct purposes. The only relationship between them is that they are both listed as criteria for the approval of tribal ordinances. That list also requires that tribes provide annual audits to the

NIGC and that the construction and maintenance of the gaming facility be conducted in a manner that protects human health and the environment. 25 U.S.C. §§ 2710(b)(2)(C), 2710(b)(2)(E). The items in this list are not substantively related. A court cannot "accept [the] level of generality" proposed by Plaintiff. Air Courier, 498 U.S. at 529-30. If Plaintiff were to qualify as an intended beneficiary in this case, it would need to show how it is an intended beneficiary of the sole proprietary interest and responsibility requirement.[4]

Even if Plaintiff could look to IGRA as a whole, Plaintiff's theory still falls apart. First, Plaintiff places too much emphasis on the negative implications of Congress's choice of the word "primary." It is clear from the purposes section of IGRA that tribes are to be the primary beneficiary of the gaming activity, and that IGRA was enacted "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." 25 U.S.C. §§ 2702. Nothing in the purposes section indicates that states or other parties are to benefit from the gaming.[5] Plaintiff thus confuses being an intended beneficiary with being an incidental beneficiary. States and local governments incidentally benefit from the increased tourism and economic development that often follow the opening of a tribal casino. Parties like a napkin distributor may also be incidentally benefitted by the contracts they enter with a tribal casino. See Motion at 19. The existence of these incidental beneficiaries does not suggest that Congress intended such benefits.

[4] Or, to qualify as a suitable challenger, Plaintiff would need to show how its economic interest in the 1994 Agreements would further the interests sought to be protected by Congress when it mandated that the tribe retain the sole proprietary interest in the gaming activity and that the tribe be the "primary beneficiary" of the gaming enterprise. As explained in the Motion, the City is interested in being a joint proprietor and joint beneficiary. Motion at 18.

[5] To the extent the use of the word "primary" is ambiguous, statutes enacted for the benefit of Indian tribes, such as IGRA, are to be liberally construed in favor of Indians. See, e.g., City of Roseville v. Norton, 348 F.3d 1020, 1032 (D.C. Cir. 2003).

Second, that tribes may help fund the operations of local government agencies should not be construed to indicate that local governments are intended beneficiaries of the act. IGRA allows tribes to use revenues for local government operations because it would benefit tribes. Congress did not want there to be any confusion on this point. When engaging in compact negotiations with states, tribes may offer to offset potential local government costs of a proposed casino. Such payments recognize the loss of real property taxes when land is taken into trust and the potential strain on roads, water systems, police and fire services, etc., that a casino may invite. However, the mere authorization of such payments does not mean that local governments are entitled to an economic benefit from Indian gaming. Courts looking at similar interests have found that States do not have a general economic interest under IGRA. See Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger, 602 F.3d 1019, 1034-35 (9th Cir. 2010). Likewise, there is no indication that a municipality has a general economic interest in IGRA. [6]

Finally, even if the Court concludes that local governments are intended beneficiaries of IGRA, the City is not suing in its capacity as a local government. The City is suing in its capacity as a party to a series of agreements not contemplated by IGRA. The City alleges that it suffered an economic injury; it does not allege any injury in its sovereign capacity. Compl. ¶ 60. Defendants' position on this point was discussed thoroughly in its Motion, and Plaintiff did not

[6] Plaintiff attempts to raise the specter of future harm to tribes if the Court denies standing in this case: "Only by having the ability to challenge NIGC actions that cause harm to these contractual relationships will local governments be willing to partner with tribes to achieve mutual economic advantage." Doc. No. 9, at 22. It seems clear that local governments are not regulated by IGRA, and Defendants argue here that neither are they intended beneficiaries of IGRA. Yet local governments may still have standing as suitable challengers to certain gaming decisions, as determined in specific cases such as Amador County v. Salazar, 640 F.3d 373, 379 (D.C. Cir. 2011). In Amador County, the court found that the plaintiff County had prudential standing because it was located near a proposed gaming facility and was suing the Secretary of the Interior to enforce the Secretary's obligations under IGRA. See id. ("we see no good reason to treat Amador County differently from any other neighbor of a planned gaming facility."); see also Motion at 15-16. In this case, Plaintiff is not suing as a member of the surrounding community, and is not affected in the same manner as the plaintiff in Amador County. Similarly, Plaintiff does not seek to "enforce the limitations IGRA imposes on the Secretary," id., but rather seeks to sue NIGC as a party to a contract in which it has an economic interest.

attempt to reject or deny this in its Response. The City can point to no provision of IGRA that was intended to protect a simple contractor.

D. Standing Doctrine Does Not Require At Least One Plaintiff

Plaintiff asks, who will sue if Plaintiff does not have prudential standing? Response at 21. That the answer may be "no one" is unremarkable. "The standing doctrine should not be manipulated to guarantee that there is a party to bring any action in court that some persons may think desirable to have adjudicated." Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 145 (D.C. Cir. 1977); see also United States v. Richardson, 418 U.S. 166, 179-80 (1974). And while the APA favors judicial review of agency action, it does not require that all agency action be reviewable, or that all agency action be actually reviewed. Indeed, application of the prudential standing doctrine will often mean that agency action goes unchallenged. The Band has prudential standing in this case. That the Band is allegedly unlikely to challenge the NOV is irrelevant. That no other plaintiff exists who is likely to sue to challenge the NOV is irrelevant. The only relevant inquiry is whether the City's alleged injury falls within the zone of interests sought to be protected by IGRA.

The United States emphasizes that this is a unique case. The City and the Band entered into a series of unique agreements not contemplated by IGRA. In the typical case, the NIGC takes enforcement action against a tribal operator and/or a management contractor. Either or both respondents are entitled to appeal that enforcement action to the full Commission, 25 C.F.R. § 585.2(a), and would have prudential standing to sue in federal district court upon exhaustion of their administrative remedies. Here, Plaintiff was not a respondent to the NOV, and could not have been a respondent under IGRA. See Motion at 14. Thus, Plaintiff did not have a right of appeal to the full Commission and does not have prudential standing to challenge the NOV. "[I]t

is not the mere existence of illegality or harm which confers standing; rather, it is the relationship between the harm and the particular complaining party that is the focus of the standing doctrine." Harrington v. Bush, 553 F.2d 190, 197 n.31 (D.C. Cir. 1977). Here, Plaintiff is neither a tribal operator nor a management contractor and therefore the proper relationship does not exist under IGRA.

CONCLUSION

For the reasons stated above and in its previously filed Motion, the United States respectfully requests that the Complaint be dismissed for lack of jurisdiction.

June 14, 2013

Respectfully submitted,

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