UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

FRANK'S LANDING INDIAN COMMUNITY,
a federally recognized self-governing dependent Indian community,

Plaintiff,

v.

NATIONAL INDIAN GAMING COMMISSION,

and

Case No.:

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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UNITED STATES DEPARTMENT OF THE INTERIOR,

and

JONODEV CHAUDHURI, in his official capacity as Chairman of the National Indian Gaming Commission,

and

KEVIN K. WASHBURN, in his official capacity as Assistant Secretary of the Interior – Indian Affairs, United States Department of the Interior,

and

SALLY JEWELL, in her official capacity as the Secretary of the Interior.

Defendants.

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Plaintiff Frank's Landing Indian Community (the "Community"), is a federally-recognized self-governing dependent Indian community, and brings this action against Defendants the National Indian Gaming Commission ("NIGC" or "Commission"), the United States Department of the Interior (DOI" or "Interior"), NIGC Chairman Jonodev Chaudhuri, Assistant Secretary of the Interior Kevin Washburn, and Secretary of the Interior Sally Jewell and states:

INTRODUCTION

The Community is located along the Nisqually River near Olympia, Washington, where it has existed as a self-governing Indian community since time immemorial. The Community's right to self-government has been recognized by the United States Congress[1] and vindicated in this Court.[2] The Secretary of the Interior, through the Bureau of Indian Affairs (the "BIA"), has provided special programs and services to the Community and its members for decades because of their status as Indians.

In 2014, the Community's governing body adopted an ordinance establishing regulations for the conduct of Class II gaming on its Indian lands ("Gaming Ordinance"). It submitted that Gaming Ordinance to the NIGC for approval pursuant to the Indian Gaming Regulatory Act of 1988 25 U.S.C. 2701 et. seq. ("IGRA"). Relying on an opinion from Defendant Kevin Washburn that was based upon a completely different statute, the NIGC, through its Chairman, Jonodev Chaudhuri, refused to approve the Community's Gaming Ordinance. The Defendants asserted that the Community does not qualify as an "Indian tribe" under IGRA because it was not eligible to appear on the annual list of federally recognized

[1] Pub. L. No. 103-435, § 8, 108 Stat. 4566, 4569-70 (1994).

[2] *Nisqually Indian Tribe v. Christine Gregoire, et al*., No. 09-35725 (9th Cir. Oct. 4, 2010).

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Indian tribes published by the BIA, notwithstanding the fact that Congress had established different criteria to determine an Indian tribe's eligibility to regulate gaming under IGRA.

The Community is once again seeking to vindicate its rights and powers as a federally recognized self-governing Indian community.

NATURE OF THE CASE

1. The Community is seeking a declaration that the Community qualifies as an "Indian tribe" under IGRA, pursuant to Congress's express recognition of the Community's status in P.L. 103-435, 108 Stat. 4566 (November 2, 1994) (the "1994 Frank's Landing Recognition Act").
2. The Community is seeking relief from the Defendants' March 6, 2015 decision to reject the Community's request for approval of its tribal gaming ordinance under IGRA, and Defendant Kevin Washburn's October 28, 2015 refusal to reconsider his March 6, 2015 opinion.

PARTIES

3. Plaintiff Community, is a federally-recognized self-governing dependent Indian community, which exercises numerous rights and governmental powers recognized by the United States, and receives services provided by the United States Secretary of the Interior due to its status as an Indian community. The Community is located along the Nisqually River near Olympia, Washington.
4. Defendant NIGC is an independent federal regulatory agency within the Department of the Interior charged with, among other things, the responsibility to review and approve tribal ordinances that regulate the conduct of gaming on Indian lands. 25 U.S.C. § 2710.

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5. Defendant United States Department of the Interior is the federal agency statutorily charged with the administration of the federal government's trust responsibility, generally. 25 U.S.C. §§ 2 and 9.

6. Defendant Jonodev Chaudhuri is sued in his official capacity as the Chairman of the NIGC. The Chairman is the chief executive officer of the NIGC with numerous powers and responsibilities under IGRA, including the responsibility to approve lawful tribal ordinances that regulate the conduct of gaming on Indian lands.

7. Defendant Kevin K. Washburn is sued in his official capacity as the United States Assistant Secretary of the Interior, and has the responsibility to act on behalf of the Secretary of the Interior to deliver services to Indian tribes throughout the United States.

8. Defendant Sally Jewell is sued in her official capacity as the United States Secretary of the Interior, who is vested with broad authority to carry out the United States' fiduciary obligations toward Indian tribes, and with the authority to execute various laws relating to Indian tribes.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this matter under 28 U.S.C. § 1331, as it arises under federal law, including IGRA, 25 U.S.C. §§ 2701, et seq., the 1994 Frank's Landing Recognition Act, P.L. 103-435, 108 Stat. 4566, the Administrative Procedure Act, 5 U.S.C. §§ 701, et seq. (the "APA"), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391 in that a substantial part of the events or omissions giving rise to the claim have occurred in this District and all of the real property that is the subject of the action is located within this District.

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11. There is an actual and immediate dispute between the Community and the Defendants regarding the Community's status as an "Indian tribe" under IGRA.

GENERAL ALLEGATIONS

12. The Community has been an independent and self-governing Indian community since time immemorial. The Community's present-day members descend from Indians who signed the Medicine Creek Treaty of 1859, which set aside lands for the Community near the Nisqually River.

13. The Secretary of the Interior initially purchased land for the Community in 1919 adjacent to the Nisqually River, in exchange for lands needed for military use. The Community relocated to those lands, and began operating numerous businesses on the site for the benefit of tribal members.

14. In 1969, the Community began to sell cigarettes in addition to the fresh and smoked fish, Indian handcrafts, and other miscellaneous items sold at its Trade Center to pay legal costs incurred in the fishing rights struggles. The Community's legal position regarding native fishing rights was vindicated in the watershed 1974 decision handed down by Judge Boldt in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

15. The Community's members continue to exercise their treaty-reserved fishing rights to this day.

16. The Community established the Wa-He-Lute Indian School in 1974, which provides education to Community members and other Indian students. The Wa-He-Lute Indian School was built with proceeds from the Community's Trade Center, as well as federal funds from the United States Department of Agriculture and the BIA.

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17. In 1976, the Commissioner of Indian Affairs, within the Department of the Interior, issued a letter to the Community expressing his intent to acquire additional lands for the Community for flood relief.

18. In 1982, the Community entered into contracts with the Secretary of the Interior (the "Secretary") pursuant to Pub. L. No. 93-638, and later the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 450, et seq., for school funding.

19. In 1984, the Community again sought funding for the Wa-He-Lut Indian School. The Community's Council adopted a resolution on September 28, 1984 authorizing the Board of Directors of the Wa-He-Lut Indian School to execute contracts with the Department of the Interior, and other federal agencies, for funding. The BIA awarded federal funds to the Community based upon that resolution.

20. In 1987, in order to confirm the Community's pre-existing authority, Congress expressly recognized the Community "as eligible to contract, and to receive grants, under the Indian Self-Determination and Education Assistance Act[.]" Pub. L. No. 100-153, §10 (Nov. 5, 1987) (the "1987 Act").

21. Congress enacted IGRA in 1988, utilizing a particular definition of Indian tribe for the statute's purposes. For purposes of Indian gaming, Congress defined an "Indian tribe" to mean:

> … any Indian tribe, band, nation, or other organized group or community of Indians which –
>
> (A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and
>
> (B) is recognized as possessing powers of self-government. 25 U.S.C. § 2703(5)

22. Congress clarified and reaffirmed its recognition of the Community in Pub. L. No. 103-

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435, § 8 (Nov. 2, 1994) ("1994 Frank's Landing Act"), utilizing language mirroring the definition of "Indian tribe" contained in IGRA:

> (a) Subject to subsection (b), the Frank's Landing Indian Community in the State of Washington is hereby recognized;
>
> (1) ***as eligible for the special programs and services provided by the United States to Indians because of their status as Indians*** and is recognized as eligible to contract, and to receive grants, under the Indian Self-Determination and Education Assistance Act for such services, but the proviso in section 4(c) of such Act (25 U.S.C. 450b(c)) shall not apply with respect to grants awarded to, and contracts entered into with, such Community; and
>
> (2) ***as a self-governing dependent Indian community*** that is not subject to the jurisdiction of any federally recognized tribe.
>
> (3) Notwithstanding any other provision of law, the Frank's Landing Indian Community shall not engage in any class III gaming activity (as defined in section 3(8) of the Indian Gaming Regulatory Act of 1988 (25 U.S.C. 2703(8))).

23. That same year, Congress enacted the Federally Recognized Tribes List Act of 1994 (the "1994 Tribal List Act"), Public Law 103-454 (Nov. 2, 1994), which requires the BIA to publish a list of all federally-recognized Indian tribes on an annual basis. The 1994 Tribal List Act defines the term "Indian tribe" to mean, "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." 25 U.S.C. § 479a.

24. The Community has never petitioned the Secretary of the Interior for inclusion on the annual list of federally recognized Indian tribes, and is not seeking a determination that it is eligible for inclusion on that list through this lawsuit.

25. In 2007, the Community adopted its current constitution, which established the Community Council as the Community's governing body.

26. In 2014, the Community Council adopted a tribal gaming ordinance and submitted that

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ordinance to the NIGC for review pursuant to IGRA.

27. In 2015, the NIGC referred the matter to the Department of the Interior's Office of the Solicitor, which referred the matter to the Defendant Assistant Secretary Indian Affairs, Kevin K. Washburn.

28. The Community was not afforded an opportunity to provide materials to the Assistant Secretary, or otherwise brief the Assistant Secretary on its proposed gaming ordinance or its legal status under the 1994 Frank's Landing Recognition Act.

29. Neither the Department nor the Assistant Secretary consulted with the Community as provided for in Executive Order 13175 requiring consultation and coordination with Indian tribal governments, and of Secretary of the Interior Order 3317 setting forth the Department of the Interior Policy on Consultation with Indian Tribes.

30. On March 6, 2015, Defendant Washburn issued an opinion to the NIGC indicating that the Community was not an Indian tribe under IGRA, because it was not on the list of federally-recognized Indian tribes published by the Department of the Interior pursuant to the Federally Recognized Indian Tribes List Act of 1994.

31. That same day, on March 6, 2015, Defendant Chaudhuri issued a letter to the Community's Chairperson indicating that he would not approve the Community's gaming ordinance under IGRA because the Assistant Secretary did not recognize the Community as an Indian tribe pursuant to the 1994 Tribal List Act.

32. Defendant Chaudhuri further concluded that the Community was not entitled to an appeal of the Agency's actions because he did not approve or disapprove the Community's Ordinance, and because the Community is not an "Indian Tribe" as defined by IGRA.

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33. Under the IGRA and the regulations of the National Indian Gaming Commission (NIGC), the Chairman is directed to review ordinances with respect to the requirements of the IGRA and the implementing regulations and must render a decision no later than 90 days after a tribe submits an ordinance for approval under 25 C.F.R. § 522.

34. The Chairman may disapprove an ordinance if he or she determines that a tribe failed to comply with the requirements of 25 C.F.R. § 522 and shall notify a tribe of its right to appeal under 25 C.F.R. Part 582.

35. On September 18, 2015, the Community submitted requests to Defendants Washburn and Chaudhuri seeking reconsideration of their respective March 6, 2015 decisions.

36. On October 28, 2015, the Office of the Assistant Secretary issued an email to the Community's legal counsel indicating that the Assistant Secretary "considers this matter closed[.]"

37. The Community was not afforded an administrative appeal before the NIGC.

38. The Community was not afforded an opportunity to meet or confer with Defendant Washburn to provide a briefing on its request for reconsideration.

39. Neither Defendant Washburn nor Defendant Chaudhuri provided a substantive response to the Community's requests for reconsideration.

COUNT I

THE COMMUNITY QUALIFIES AS AN "INDIAN TRIBE" UNDER 25 U.S.C. § 2703(5).

40. The Community repeats and re-alleges the allegations set forth in paragraphs 1 through 39 in their entirety.

41. The Secretary has recognized the Community as a self-governing Indian community for nearly a century, dating back to its acquisition of land for the Community near the

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Nisqually River.

42. The Secretary has provided services to the Community because of its Indian status for nearly a century, including acquiring land for the Community and its school, and providing funding to the Community's school for Indian education.

43. In reaffirming the Community's status under federal law in the 1994 Frank's Landing Recognition Act, Congress utilized language that falls within Congress's definition of "Indian tribe" as utilized in IGRA 25 U.S.C. § 2703(5).

44. Congress contemplated that the Community could engage in Class II gaming when it expressly prohibited the Community from engaging in Class III gaming in the 1994 Frank's Landing Recognition Act, and rejected broader language that would have prohibited the Community from engaging in all forms of gaming under IGRA.

45. This Court has already recognized that the Community is a self-governing Indian community, and that Congress has enumerated the limitations on its authority in *Nisqually Indian Tribe v. Gregoire*, 649 F. Supp. 2d 1203 (W.D. Wash., 2009), including the specific narrow limitation on gaming.

46. Because the Community exercises powers of self-government and is eligible for services provided to Indians due to their status as Indians and because the Secretary has actually provided those services to the Community, and because Congress has expressly recognized and confirmed the Community's sovereign powers and authority, the Community qualifies as an "Indian tribe" under IGRA.

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COUNT II

DEFENDANTS ACTED ARBITRARILY, CAPRICIOUSLY, AND NOT IN ACCORDANCE WITH THE LAW BY RELYING ON THE LIST OF FEDERALLY RECOGNIZED INDIAN TRIBES TO DENY THE COMMUNITY'S STATUS AS A TRIBE UNDER IGRA

47. The Community repeats and re-alleges the allegations set forth in paragraphs 1 through 46 in their entirety.

48. The issue of whether the Community is an Indian Tribe recognized by the United States was congressionally answered in the 1994 Frank's Landing Act.

49. Defendant Kevin K. Washburn improperly relied upon the list of federally-recognized tribes to opine on the Community's status under IGRA. The criteria for eligibility on the list are separate and distinct from the criteria under IGRA, which predates the 1994 Tribal List Act.

50. Defendants Jonodev Chaudhuri and the NIGC improperly relied upon Defendant Washburn's erroneous opinion to conclude that the Community's submission of its Gaming Ordinance does not qualify as a "tribal ordinance" under IGRA or NIGC regulation.

51. Reliance on the criteria established by Congress in the 1994 Tribal List Act was wholly improper, as Congress clearly established the criteria for eligibility as an "Indian tribe" under IGRA. The Defendants' decision to do so was arbitrary, capricious, and not in accordance with the law.

52. The Defendants acted arbitrarily and capriciously by not thoroughly considering the Community's submissions, and by not affording the Community an opportunity to present its arguments in violation both of Executive Order 13175 requiring consultation and coordination with Indian Tribal Governments and of Secretary of the Interior Order

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3317 setting forth the Department of the Interior Policy on Consultation with Indian Tribes.

53. The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2).

COUNT III

DEFENDANTS NIGC AND CHAUDHURI ACTED ARBITRARILY, CAPRICIOUSLY, AND NOT IN ACCORDANCE WITH THE LAW BY DENYING THE COMMUNITY'S RIGHT TO AN ADMINISTRATIVE APPEAL

54. The Community repeats and re-alleges the allegations set forth in paragraphs 1 through 53 in their entirety.

55. Defendant Kevin K. Washburn improperly relied upon the list of federally recognized tribes to opine on the Community's status under IGRA. The criteria for eligibility on the list are separate and distinct from the criteria under IGRA, which predates the 1994 Tribal List Act.

56. Defendants Jonodev Chaudhuri and the NIGC improperly determined that the Community is not an Indian tribe and concluding that the Community's submission of its Gaming Ordinance does not qualify as a "tribal ordinance" within the meaning of IGRA or NIGC regulation.

57. Defendant Chaudhuri's determination constitutes a decision made pursuant to IGRA and, therefore, constitutes a "final agency action" reviewable under 25 U.S.C. § 2714, 25 C.F.R. Part 524 and 5 U.S.C. § 702 and resulting in a direct and immediate impact on the sovereign rights which the Community exercises over its Indian lands. See S. Rep.

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No. 100-446, at 8 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3078 ("All decisions of the [NIGC] are final agency decisions for purposes of appeal to Federal district court.").

58. Defendant Chaudhuri's acted arbitrarily, capriciously, and not in accordance with the law when he denied the Community its right to an administrative appeal pursuant to 25 U.S.C. § 2705 and 25 C.F.R. Part 582.

59. The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

The Community respectfully requests that this Court grant the Community the following relief:

1. Declare that the Community qualifies as an "Indian tribe" for purposes of IGRA, pursuant to 25 U.S.C. § 2703(5).
2. Declare that the Defendants acted arbitrarily, capriciously, and not in accordance with the law by issuing their respective March 6, 2015 decisions, and by refusing to reconsider the Community's September 18, 2015 requests for reconsideration.
3. Declare that Defendants Jonodev Chaudhuri and NIGC acted arbitrarily, capriciously, and not in accordance with law by denying the Community its right to an administrative appeal.
4. Invalidate the Defendants' March 6, 2015 decisions, and permanently enjoin the Defendants from taking any action in reliance upon those decisions.
5. Any other relief that the Court deems appropriate.

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Dated: November 13, 2015

Respectfully Submitted,

By: /s/*Scott Crowell*

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