HON. BENJAMIN H. SETTLE

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; UNITED STATES DEPARTMENT OF THE INTERIOR; JONODEV CHAUDHURI, in his official capacity as Chairman of the National Indian Gaming Commission; LAWRENCE S. ROBERTS[1], in his official capacity as acting 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.

Case No.: 3:15-cv-05828-BHS

MOTION TO DISMISS THE NATIONAL INDIAN GAMING COMMISSION AND JONODEV CHAUDHURI FOR LACK OF JURISDICTION

NOTE ON MOTION CALENDAR:
June 3, 2016

[1] Lawrence S. Roberts is now the Acting Assistant Secretary – Indian Affairs, and is hereby substituted for Kevin K. Washburn under Rule 25(d) of the Federal Rule of Civil Procedure.

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I. INTRODUCTION

Plaintiff Frank's Landing Indian Community brings suit against the National Indian Gaming Commission ("NIGC") and its Chairman, as well as the United States Department of the Interior, the Secretary of the Interior, and the Assistant Secretary – Indian Affairs for Interior, challenging the decision that Plaintiff is not an "Indian tribe" as that term is defined by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701–2721. The NIGC, following the IGRA and its implementing regulations, referred the question of whether Plaintiff is an "Indian tribe" allowed to conduct gaming under the IGRA to the Assistant Secretary. The Assistant Secretary concluded that Plaintiff, which is not a federally recognized tribe, is not an "Indian tribe" under the IGRA. The Chairman, in a March 6, 2015, letter, conveyed that decision to Plaintiff. Plaintiff challenges the Chairman's March 6, 2015, letter as a violation of the IGRA and the Administrative Procedure Act ("APA").

Plaintiff's challenge to the Chairman's letter here must be dismissed for lack of subject matter jurisdiction and for failure to state a claim under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The IGRA and the regulations promulgated by NIGC require that NIGC defer to Interior's determination of whether a group is an "Indian tribe" for IGRA purposes. NIGC therefore has no basis to question or override the Assistant Secretary's determination that Plaintiff does not qualify as an "Indian tribe." The agency cannot be held accountable for actions it has no discretion not to take.

The Chairman's letter also does not constitute final agency action under IGRA. IGRA explicitly provides that certain agency actions are "final agency action" for purposes of review in United States district courts. The letter is not among those actions reviewable and this Court therefore lacks jurisdiction. In addition, the APA also does not provide for review in situations where other statutes preclude judicial review. Because IGRA precludes review of the Chairman's letter, the APA does not apply to allow review.

In addition, Plaintiff lacks standing to challenge the Chairman's letter, as its alleged injury is due to Interior's determination as a matter of law that only federally recognized tribes are "Indian tribes" under IGRA, and therefore is not traceable to NIGC. Similarly, because

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NIGC does not have authority to recognize the Plaintiff as an "Indian tribe" under IGRA, Plaintiff's injury is not redressable by NIGC.

Finally, this Court lacks jurisdiction over Plaintiff's third claim that the NIGC arbitrarily denied it its right to an administrative appeal. Plaintiff has also failed to state a claim for relief. Plaintiff did not file an administrative appeal here, and thus NIGC could not have denied such a claim. In addition, the regulations provide that only "disapprovals" of gaming ordinances can be appealed. Here, NIGC did not have the authority to either approve or disapprove the ordinance, as it was not a "tribal ordinance" within the meaning of IGRA. As such, Plaintiff did not have a legal right to file an administrative appeal because NIGC did not disapprove the gaming ordinance.

As explained further below, Defendants respectfully request that this Court dismiss the NIGC from this litigation.

II. BACKGROUND

A. Legal Background

1. The Indian Gaming Regulatory Act

"Congress passed the Indian Gaming Regulatory Act in 1988 in order to provide a statutory basis for the operation and regulation of gaming by Indian tribes." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 48 (1996) (citing 25 U.S.C. § 2702). The IGRA established the NIGC within Interior of the Interior to oversee and regulate tribal gaming under IGRA, *see* 25 U.S.C. §§ 2702(3), 2706(b), and to take enforcement actions for violations of the statute. *Id.* § 2713. The Commission is made up of a Chairman and two Commissioners, each of whom serves on a full-time basis for a three-year term.

Under IGRA, "[a]n Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if — the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman." 25 U.S.C. § 2710(b)(1). IGRA defines "Indian tribe" as:

> any Indian tribe, band, nation, or other organized group or community of Indians which --

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> 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.A. § 2703(5). The regulations similarly defer to the Secretary of the Interior for determinations of whether groups qualify as "Indian tribes" under IGRA. *See* 25 C.F.R. § 502.13.

2. The Federally Recognized Indian Tribe List Act (the "List Act")

In 1994, Congress enacted the List Act, Pub. L. No. 103-454 (1994) (codified at 25 U.S.C. § 479a-1), which provides that "[t]he Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1. The List Act defines "Indian tribe" as "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. Through the List Act, Congress affirmed the authority of the Secretary to treat tribes as federally recognized, required the Secretary to maintain an updated list of such tribes, and reserved to itself the exclusive authority to de-list or terminate a tribe. Pub. L. No. 103-454, § 103(4).

The list published in the Federal Register is ordinarily dispositive evidence of whether a tribe is federally recognized. *See Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997) (noting that inclusion of group of Indians on list ordinarily suffices to establish that group is sovereign power and thus entitled to immunity from suit); *see also LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993) (finding that for purposes of 25 U.S.C. § 1321, the term "Indian" includes only those persons who are members of a tribe that has been formally acknowledged by the Bureau of Indian Affairs). Plaintiff does not appear on the list of federally recognized tribes, as it is explicitly not federally recognized. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5,019 (Jan. 29, 2016); Pub. L. No. 103-435, § 8, 107 Stat. 4566, 4569 (1994) ("Nothing in this section may be construed to constitute the recognition by the United States that the Frank's Landing

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Indian Community is a federally recognized Indian tribe."). Plaintiff admits that it is not a federally recognized tribe. Compl. for Declaratory & Inj. Relief ("Compl.") ¶ 24, ECF No. 1.

B. Factual Background[2]

1. Recognition of Plaintiff as a Self-Governing Indian Community.

Frank's Landing Indian Community is a federally-recognized self-governing dependent Indian community located along the Nisqually River near Olympia, Washington. Compl. ¶ 3. In 1987, Congress recognized Plaintiff's members "as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" and "as eligible to contract, and to receive grants, under the Indian Self-Determination and Education Assistance Act for such services." Pub. L. No. 100-153, § 10, 101 Stat. 886, 889 (1987). In 1994, Congress amended the law to state that Plaintiff is recognized "as a self-governing dependent Indian community that is not subject to the jurisdiction of any federally recognized tribe." Pub. L. No. 103-435, § 8, 107 Stat. 4566, 4569 (1994). This amendment stated that "[n]othing in this section may be construed to constitute the recognition by the United States that the Frank's Landing Indian Community is a federally recognized Indian tribe." *Id.* The section also noted that "notwithstanding any other provision of law," Plaintiff "shall not engage in any class III gaming activity" under IGRA.[3] *Id.*

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[2] The facts are drawn from Plaintiff's Complaint and the Chairman's March 6, 2015, letter to Yeka Mills, Chairwoman, Frank's Landing Indian Community, attached as Exhibit A. It is appropriate for the Court to rely upon this document in deciding this Motion to Dismiss because the document's authenticity is not contested and Plaintiff's Complaint necessarily relies on it. *See Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013) (noting that in 12(b)(6) motion, court was "permitted to consider documents that were not physically attached to the complaint where the documents' authenticity is not contested, and the plaintiff's complaint necessarily relies on them"); Compl. ¶¶ 31–32, 50, 56. Further, on a Rule 12(b)(1) motion, the Court can consider the evidence presented and resolve factual issues if necessary to determine the jurisdictional issues. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1141 n.5 (9th Cir. 2003) (holding that in ruling on a 12(b)(1) jurisdictional motion, court may look beyond complaint and consider extrinsic evidence); *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (holding that court "may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary").

[3] Class I gaming under IGRA includes social games of minimal value or traditional forms of Indian gaming. 25 U.S.C. § 2703(6); *Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1141 (D.

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2. Submission of Gaming Ordinance to NIGC

On December 9, 2014, Plaintiff submitted a purported Class II gaming ordinance to NIGC for the Chairman's review and approval along with a resolution from Plaintiff's governing body, enacting the ordinance. Compl. ¶ 26. The NIGC referred the matter to Interior's Office of the Solicitor, requesting an opinion on whether Frank's Landing is a tribe within the meaning of IGRA, who referred the matter to the Assistant Secretary – Indian Affairs, Kevin Washburn. *Id.* ¶ 27. On March 6, 2015, the Assistant Secretary – Indian Affairs issued a memorandum to the NIGC Chairman conveying Interior's conclusion that Frank's Landing is not an Indian tribe within the meaning of IGRA because it is not a federally-recognized Indian tribe. *Id.* ¶ 30. This memorandum attached another memorandum prepared by the Office of the Solicitor of the Department of the Interior, explaining its legal conclusion that only federally-recognized tribes are entitled to engage in gaming under IGRA.

The same day, NIGC Chairman Jonodev Chaudhuri issued a letter to Plaintiff's Chairperson, indicating that, based on the Assistant Secretary's determination that Frank's Landing is not a tribe under IGRA, Plaintiff's submission was not a "tribal ordinance" under IGRA. The Chairman thus indicated that he could not accept Plaintiff's gaming ordinance because it was beyond the scope of his review. *Id.* ¶ 31; Ex. A at 1, 4. The letter also noted that the Chairman "did not approve or disapprove this ordinance, because it does not qualify as a tribal ordinance submission for purposes of IGRA," but even if it were a disapproval, "Plaintiff would not possess any appeal rights under NIGC regulations, 25 C.F.R. Part 582, since the Community is not an 'Indian tribe' under IGRA and, therefore, would lack standing to appeal." Ex. A at 4 n.23; Compl. ¶ 32.

Or. 2005). Class II gaming includes bingo and similar games, including pull-tabs and lotto, if played in the same location as bingo, but does not include "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B)(ii). Class III gaming includes all forms of gaming not covered by Class I or Class II gaming, such as slot machines, casino games, and sports betting. 25 U.S.C. § 2703(8); *Dewberry*, 406 F. Supp. 2d at 1141.

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On September 18, 2015, Plaintiff submitted requests for reconsideration to the Assistant Secretary – Indian Affairs and the NIGC Chairman. On October 28, 2015, the Office of the Assistant Secretary issued an email to Plaintiff's legal counsel indicating that the Assistant Secretary would not reconsider the issue. Compl. ¶ 36. The NIGC Chairman did not respond to the request for reconsideration. Compl. ¶ 39.

3. Plaintiff's Complaint

Plaintiff brought this Complaint on November 13, 2015, seeking declaratory and injunctive relief against the Federal Defendants. Compl., Prayer for Relief. Plaintiff's Complaint raises three claims asserting that: (1) Plaintiff qualifies as an "Indian tribe' under IGRA, 25 U.S.C. § 2703(5); (2) Defendants acted arbitrarily, capriciously, and not in accordance with the law by relying on the list of federally recognized tribes to determine that Plaintiff is not an Indian tribe under IGRA; and (3) the NIGC defendants acted arbitrarily, capriciously, and not in accordance with the law by denying Plaintiff's right to an administrative appeal. Compl. ¶¶ 40–59. Plaintiff seeks a declaration that (1) it is an "Indian tribe" under IGRA, (2) Defendants acted arbitrarily, capriciously, and not in accordance with law by issuing their March 6, 2015, decisions and refusing to consider Plaintiff's request for reconsideration, and (3) the NIGC Defendants acted arbitrarily, capriciously, and not in accordance with law by denying Plaintiff the right to an administrative appeal. Plaintiff also seeks to have the Court invalidate the Chairman's letter and Interior's memoranda and enjoin Interior and the NIGC from taking any action in reliance on those documents.

III. LEGAL STANDARD

A. Rule 12(b)(1) Lack of Subject Matter Jurisdiction

Federal court jurisdiction is limited, and "[a] federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) (citing *California ex rel. Younger v. Andrus*, 608 F.2d 1247, 1249 (9th Cir. 1979) (per curiam)). Once challenged, the burden of establishing a federal court's subject matter jurisdiction rests on the party asserting jurisdiction. *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377 (1994).

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a court should dismiss claims over which it lacks subject matter jurisdiction. An assertion that a court lacks subject matter jurisdiction is a threshold issue to be addressed prior to considering the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92–102 (1998). When a defendant brings a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), "the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen*, 511 U.S. at 377 (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936)).

In considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the court "may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary." *Thornhill Publ'g Co.*, 594 F.2d at 733; *Warren*, 328 F.3d at 1141 n.5 (holding that on a 12(b)(1) jurisdictional motion, court may look beyond complaint and consider extrinsic evidence). If it is necessary to resolve factual disputes, the court does not presume that the allegations of the complaint are true; the plaintiff bears the burden of establishing subject matter jurisdiction through affidavits or other appropriate evidence. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

B. Rule 12(b)(6) Failure to State a Claim

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When considering a Rule 12(b)(6) motion, the Court "must 'accept all factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party.'" *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000) (quoting *Tworivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999)). The Court can also "consider facts contained in documents attached to the complaint." *Id.*

IV. ARGUMENT

This Court should dismiss NIGC from this case for lack of subject matter jurisdiction. NIGC does not have discretion to determine which groups constitute an "Indian tribe" under IGRA, and therefore must rely on the Secretary's determination. In addition, the Chairman's

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letter does not constitute "final agency action" that can be reviewed under IGRA. Nor does the APA provide a means for review because IGRA precludes judicial review here. Plaintiff also lacks standing to challenge the Chairman's letter because Plaintiff's alleged injury is neither traceable to NIGC nor redressable by the NIGC. And Plaintiff has not stated a claim over which this Court has jurisdiction for its claim that NIGC denied Plaintiff's right to an administrative appeal, as Plaintiff neither filed such an appeal nor was entitled to one.

A. NIGC Does Not Have Discretion to Determine Who is an Indian Tribe Under IGRA.

Plaintiff asks this Court to determine that it is an "Indian tribe" under IGRA and to hold that NIGC and Interior acted arbitrarily, capriciously, and not in compliance with law in relying on the list of federally recognized Indian tribes to determine that Plaintiff is not an "Indian tribe" under IGRA. Under IGRA, the NIGC must defer to the Secretary's determination of whether a group is an Indian tribe. NIGC does not have discretion to make its own determination and for that reason, Plaintiff's claims should be dismissed as against NIGC.

IGRA defines "Indian tribe" as:

> 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)(a) (emphasis added). This congressional directive places the onus on the Secretary to determine which tribes are "Indian tribes" for IGRA purposes. The regulations similarly provide that:

> Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians *that the Secretary recognizes* as –
>
> (a) Eligible for the special programs and services provided by the United States to Indians because of their status as Indians; and
>
> (b) Having powers of self-government.

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25 C.F.R. § 502.13 (emphasis added). There is no procedure or mechanism for the NIGC to disagree with or challenge the Secretary's determination on recognition in either the IGRA or the regulations. The NIGC simply has no jurisdiction over that issue, and therefore must rely on the Secretary's determination of tribal status.

The Chairman's letter noted that NIGC precedent "mandates that I defer to the Secretary and Bureau of Indian Affairs (BIA) on tribal recognition questions," citing several Commission decisions beginning in 1994 in which the NIGC Commission determined that the Chairman properly deferred questions of tribal recognition to Interior. *See* Ex. A at 3 n.14. The NIGC also defers to Interior's decisions on tribal recognition in other contexts in recognition of Interior's expertise and primary jurisdiction. For example, the NIGC defers to Interior in determining which tribal faction should be recognized as the tribal government. *See Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 944 (8th Cir. 2010) (noting that NIGC deferred issue of "which faction should be recognized as the tribal government" to BIA); *Citizens Against Casino Gambling in Erie Cty. v. Kempthorne*, 471 F. Supp. 2d 295, 322 (W.D.N.Y. 2007) (noting that the Secretary is delegated some duties under IGRA).

This deference makes sense in light of the fact that Congress has granted Interior general responsibility over matters pertaining to Indian tribes and specifically delegated to Interior the authority to decide which Indian groups merit federal recognition as Indian tribes. *See, e.g.*, 43 U.S.C. § 1457 (charging the Secretary of the Interior with the supervision of public business related to Indians); 25 U.S.C. § 2 (granting management of all Indian affairs to the Commissioner of Indian Affairs under the supervision of the Secretary of the Interior and regulations prescribed by the President); 25 U.S.C. § 9 (authorizing the President to prescribe regulations to carry out statutory responsibilities relating to Indian affairs); *see also Miami Nation of Indians of Ind., Inc. v. Dep't of Interior*, 255 F.3d 342, 345 (7th Cir. 2001) (noting that Congress has delegated to the Executive power to acknowledge tribes); *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137–38 (D.C. Cir. 1987) ("Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and

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relations," including "procedures for federal recognition of Indian tribes."). Courts have recognized that Interior has primary jurisdiction and expertise in determining which tribes are entitled to recognition. *See Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60 (2d Cir. 1994) ("The Department of the Interior's creation of a structured administrative process to acknowledge 'nonrecognized' Indian tribes using uniform criteria, and its experience and expertise in applying these standards, has now made deference to the primary jurisdiction of the agency appropriate."); *Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1031 (E.D. Cal. 2012) (noting that deference to Interior for tribal recognition decisions is the "preferred course of action . . . under the doctrine of primary jurisdiction"); *United States v. 43.47 Acres of Land*, 45 F. Supp. 2d 187, 192–93 (noting Interior's primary jurisdiction and specialized knowledge in acknowledgment decisions).

"[A]n agency cannot be held accountable for the effects of actions it has no discretion not to take." *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1144 (11th Cir. 2008) (citing *Public Citizen v. Dep't of Transp.*, 541 U.S. 752, 766 (2004)); *see also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 647 (2007) (citing *Public Citizen* for the "basic principle" that "an agency cannot be considered the legal 'cause' of an action that it has no statutory discretion *not* to take"). Because the NIGC has no discretion as to whether a group is an Indian tribe for the purposes of the IGRA but must rely on the Secretary's determination, the claims against the NIGC should be dismissed.

B. The Court Lacks Subject Matter Jurisdiction Because There is no Reviewable Final Agency Action under § 2714.

The claims against the NIGC also should be dismissed because the Court lacks subject matter jurisdiction to hear them. The challenged action — the NIGC's "determination" that Plaintiff is not an Indian tribe and that the submission of the gaming ordinance was not a "tribal ordinance" within the meaning of IGRA — is not among those made reviewable by Congress under § 2714 of the IGRA. *See* 25 U.S.C. § 2714.

Section 2714 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

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appropriate Federal district court." 25 U.S.C. § 2714. Thus, the only final agency actions permitted to be reviewed in court are decisions on tribal gaming ordinances, decisions on management contracts, and the imposition of civil penalties and closure orders. 25 U.S.C. §§ 2410–2713; *Cheyenne-Arapaho Gaming Comm'n v. Nat'l Indian Gaming Comm'n*, 214 F. Supp. 2d 1155, 1170–71 (N.D. Okla. 2002) ("Thus, the final agency actions enumerated by the IGRA are decisions on tribal gaming ordinances, management contracts, and review of existing ordinances, contract and civil penalties."). Those decisions, moreover, must be made by the full NIGC Commission. *Id.* § 2714 (making certain decisions "by the Commission" final agency action); *Cheyenne-Arapaho Gaming Comm'n*, 214 F. Supp. 2d at 1171–72 (noting that "Chairman issued orders must be reviewed by the full Commission upon appeal before it is considered a final agency action").

"A 'frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand coverage of the statute to subsume other remedies.'" *State v. Nat'l Indian Gaming Comm'n*, No. 15-CV-4857-DDC-KGS, 2015 U.S. Dist. LEXIS 169352, at *24–*25 (D. Kan. Dec. 18, 2015) (quoting *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974)); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208 (1994) (holding that statutory provisions creating right to judicial review for one party do not create a corresponding right for another party that the statute did not mention). Because IGRA specifically states which actions shall be considered "final agency actions" reviewable in federal district court, courts have refused to review other actions taken by NIGC. *See, e.g., Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1049 (11th Cir. 1995) (holding that "in the face of these express rights of action" in § 2714, actions not covered by that section were not reviewable); *State*, 2015 U.S. Dist. LEXIS 169352, at *25 ("When it passed the IGRA, Congress defined which actions by the NIGC amounted to final agency actions subject to judicial review."); *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Ashcroft*, 360 F. Supp. 2d 64, 67 (D.D.C. 2004) ("An analysis of IGRA, the 'relevant statute' in this case, illustrates Congress' clear intent to limit judicial review to certain final agency actions taken under that statute."); *Cheyenne-Arapaho Gaming Comm'n*,

214 F. Supp. 2d at 1170–72 ("A proper analysis of the IGRA illustrates Congress's intent to provide only limited review under the Act."). *But see United Keetoowah Band v. Kuykendall*, No. CIV-04-340-WH, 2006 U.S. Dist. LEXIS 97268, *17 (E.D. Okla. Jan. 26, 2006) (finding that legal opinion issued by NIGC General Counsel opining that tribe did not hold any "Indian lands" under IGRA was final agency action because the NIGC treated the legal opinion as if it was the consummation of the agency's decision process and acted in accordance with it).

This case is distinguishable from *United Keetoowah Band* ("UKB"). There, the NIGC's General Counsel sent a letter to the plaintiff informing the plaintiff of the General Counsel's legal opinion that plaintiff's land was not "Indian land" under the IGRA and that IGRA did not apply to the plaintiff's gaming activities. NIGC then "refused submission of reports from Plaintiff, attempted to return to Plaintiff all the fees it previously submitted to the NIGC, and ceased all regulation of Plaintiff's gaming operation," and the state informed the plaintiff that it intended to pursue criminal sanctions for its gaming operations in violation of state law. The court found that NIGC treated its General Counsel's legal opinion as final agency action and the consummation of its decision-making process, and the plaintiffs suffered legal consequences. Thus, the court found the legal opinion was final agency action under the APA, even though it did not fall within the categories of final agency action in § 2714. In *UKB*, however, the legal opinion concerning whether the plaintiff's land constituted "Indian land" was not referred to the Secretary, but was made by NIGC's General Counsel and the NIGC chose to act in accordance with that legal opinion.

Here, in contrast, Interior made the decision about whether Plaintiff is an "Indian tribe" under IGRA. *See Cty. of Amador v. U.S. Dep't of Interior*, No. CIV. S-07-527 LKK/GGH, 2007 U.S. Dist. LEXIS 95715, *17 (E.D. Cal. Dec. 13, 2007) (noting that where Department of Interior "retain[ed] the final say-so on the relevant legal question," it was "not merely advice to the agency charged with making the relevant decision; it is the decision itself"). Thus, Plaintiff has a means to challenge the actual decision made by Interior, unlike in *UKB*, where Plaintiff would have lacked an opportunity for judicial review if the NIGC's actions taken in accordance with its General Counsel's legal opinion were not considered final agency action.

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This case is analogous to the Tenth Circuit's decision in *Oklahoma v. Hobia*, 775 F.3d 1204 (10th Cir. 2014), *cert denied*, 136 S. Ct. 33 (2015). The Tenth Circuit held that a letter from the NIGC Chairwoman concluding that a property was not Indian lands eligible for gaming pursuant to IGRA was not final agency action reviewable in district court. *Id.* at 1208, 1210. The court noted that while "[w]ithout question, the letter concluded that the Property was ineligible for gaming by the Tribe pursuant to IGRA," it "did not constitute 'final agency action' under IGRA," citing § 2714. *Id.* at 1210. Further, the court stated that "the letter itself anticipated the possibility of future agency action by advising the Tribe that if it commenced gaming on the Property," NIGC would exercise enforcement authority under 25 U.S.C. § 2713. *Id.* Here, too, the Chairman's letter notes that "[i]f the Community initiates gaming on its members' land I will consider any and all enforcement options," citing § 2713. Ex. A at 1 n.1. Thus, because the Chairman's letter does not fall within the categories of final agency action delineated in § 2714 and also contemplates further agency action, this Court should find that the Chairman's letter is not a final agency action for which IGRA provides review. The Court therefore lacks jurisdiction.

C. The APA Does Not Provide a Means to Review the Chairman's Letter.

Nor does the APA provide this Court with subject matter jurisdiction. The APA does not provide a waiver of sovereign immunity here, when review is precluded by the IGRA. Without a waiver of sovereign immunity, this Court lacks jurisdiction to hear Plaintiff's claims against NIGC.

"It is axiomatic that Congressional waiver of sovereign immunity is a prerequisite to any suit brought against the United States . . . ." *Roberts v. United States*, 498 F.2d 520, 525 (9th Cir. 1974). "A court may only exercise jurisdiction over the Government pursuant to 'a clear statement from the United States waiving sovereign immunity . . . together with a claim falling within the terms of the waiver.'" *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 498 (2006) (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003)). In accordance with Supreme Court precedent, this Circuit has held that if there is no waiver of sovereign immunity, the government is immune from suit, and the court has no subject matter jurisdiction to hear the

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case. *See Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006). Courts construe waivers of sovereign immunity strictly and in favor of the government. *Id.*

The APA, 5 U.S.C. §§ 701–706, is a limited waiver of sovereign immunity that provides for judicial review of federal agency actions for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The APA does not apply, however, "to the extent that . . . statutes preclude judicial review." 5 U.S.C. § 701(a)(1); *see Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984); *Lac Vieux Desert Band*, 360 F. Supp. 2d at 67. "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block*, 467 U.S. at 345.

As discussed *supra*, "[a]n analysis of IGRA, the 'relevant statute' in this case, illustrates Congress' clear intent to limit judicial review to certain final agency actions taken under that statute." *Lac Vieux Desert Band*, 360 F. Supp. 2d at 67. As other courts have found, IGRA has a detailed enforcement system, explicitly provides for review of certain Commission decisions, and has a legislative history that demonstrates an intent to limit review only to those listed decisions. *See id.* (citing Sen. Rep. 100–446 at 20, 1998 U.S.C.C.A.N. 1090 ("certain Commission decisions will be final agency provisions for the purposes of court review")); *Cheyenne-Arapaho Gaming Comm'n*, 214 F. Supp. 2d at 1171. Thus, because the "relevant statute," IGRA, precludes judicial review of agency actions other than those listed in §§ 2710–2714, the APA does not provide a general cause of action for challenges to other agency actions.

D. Plaintiff Lacks Standing to Challenge the Chairman's Letter.

Plaintiff also lacks standing to challenge the Chairman's letter here for several reasons. First, because Plaintiff is not an "Indian tribe" under IGRA, it does not possess any rights or privileges under that law. Any injury to Plaintiff is also not traceable to NIGC, given that NIGC was required to rely on the Secretary's determination that Plaintiff was not an "Indian tribe" under the IGRA. It is also not likely that Plaintiff's alleged injury could be redressed by a favorable decision against NIGC.

Standing is a jurisdictional requirement under Article III of the United States Constitution. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1036 (9th Cir. 2010). "The standing doctrine, like other Article III doctrines concerning justiciability, ensures that a plaintiff's claims arise in a 'concrete factual context' appropriate to judicial resolution." *Arakaki v. Lingle*, 423 F.3d 954, 965 (9th Cir. 2005) (citation omitted) (*vacated on other grounds*, *Lingle v. Arakaki*, 547 U.S. 1189 (2006)). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

Plaintiff's alleged injury is not traceable to NIGC because, as discussed above, Interior, not NIGC, decides whether Plaintiff is an "Indian tribe" under IGRA. Plaintiff's injury all stems from Interior's decision that only federally recognized tribes are "Indian tribes" under IGRA. For that reason, Plaintiff does not have standing to challenge IGRA's action here.

Plaintiff's injury also is not redressable with regard to NIGC because this Court cannot remedy Plaintiff's asserted injury. *See Cty. of Delaware v. Dep't of Transp.*, 554 F.3d 143, 149 (D.C. Cir. 2009) ("In order to determine redressability, [a] court must examine 'whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged.'" (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996)). As discussed above, IGRA and the regulations require NIGC to rely on the Secretary's determination of whether a group is an Indian tribe. Thus, Plaintiff's request that the Chairman's letter be invalidated would not remedy Plaintiff's asserted injury. Instead, Plaintiff must challenge Interior's underlying decision that only federally recognized tribes are "Indian tribes" under IGRA.

In addition, under the APA, even if this Court were to find a violation, the proper remedy would be remand to the agency for reconsideration. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (noting that in APA cases, "the proper course, except in rare circumstances,

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is to remand to the agency for additional investigation or explanation"); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976) (judicial review of agency action ordinarily requires remand to agency so that agency can exercise its discretion). Here, remand of the Chairman's letter would not remedy Plaintiff's injury because the NIGC still would not have authority to override the Secretary's determination whether a group is an "Indian tribe."

Nor would an administrative appeal before NIGC's full Commission redress Plaintiff's injury. The full Commission would not be able to determine that Plaintiff is a tribe under IGRA because that decision is left to the Secretary. In addition, even if the full Commission made a decision, it would not fall under one of the categories listed in § 2714 and thus would not be final agency action.

E. This Court Lacks Jurisdiction Over Plaintiff's Third Claim and Plaintiff Has Failed to State a Claim on its Third Claim.

Plaintiff has also failed to state a claim for relief on its third claim, for denial of Plaintiff's right to an administrative appeal. First, Plaintiff did not file a claim for administrative appeal, and thus does not have a claim for relief. *See* Compl. ¶¶ 35–39 (stating that Plaintiff was not afforded an administrative appeal but not stating that it filed an appeal). "The APA requires plaintiffs to exhaust their administrative remedies before bringing suit in federal court." *Buckingham v. Sec'y of the U.S. Dep't of Agric.*, 603 F.3d 1073, 1080 (9th Cir. 2010) (citing 5 U.S.C. § 704). Without having filed an administrative appeal, Plaintiff cannot viably allege that NIGC "denied" it an appeal.

Nor does Plaintiff have a right to appeal under the regulations. The regulations provide that "[o]nly the tribe whose gaming ordinance, resolution, or amendment thereto is disapproved by the Chair may appeal." 25 C.F.R. § 582.2. As the Chairman's letter to Plaintiff made clear, Plaintiff is not an "Indian tribe" under IGRA and thus the ordinance was not "a tribal ordinance submission" for IGRA purposes. Ex. A at 1, 4. The Chairman returned the proposed ordinance to Plaintiff without approving or disapproving it. *Id.* Because the Chairman did not disapprove the ordinance, the Chairman noted that Plaintiff is not entitled to appeal under the regulations.

Id. at 4 n.23. Because Plaintiff is not entitled to an administrative appeal as a matter of law, Plaintiff cannot state a claim that NIGC deprived Plaintiff of its administrative appeal rights.

Plaintiff also states that Chairman Chaudhuri's determination constitutes a "final agency action" reviewable under 25 U.S.C. § 2714, Compl. ¶ 57. As discussed above, this decision does not fall within the categories made reviewable by § 2714. There is, therefore, no agency action from which to administratively appeal.

V. CONCLUSION

In conclusion, this Court lacks subject matter jurisdiction over Plaintiff's claims against NIGC. The NIGC is required by IGRA and its regulations to defer to Interior as to whether a group is an "Indian tribe" under IGRA. The Chairman's letter is also not reviewable under IGRA or the APA, as it does not fall within the actions that IGRA deems final agency action. And Plaintiff lacks standing to challenge the Chairman's letter because Plaintiff's alleged injury is neither traceable to NIGC nor redressable by NIGC. Finally, this Court lacks jurisdiction over Plaintiff's third claim and Plaintiff has failed to state a claim for relief on its third claim because it neither filed an administrative appeal, nor had a legal right to do so. For the foregoing reasons, Defendants respectfully request that this Court dismiss Plaintiff's claims against NIGC.

Submitted this 12th day of May, 2016

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 12, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all Counsel of record.

DATED this 12th day of May, 2016.

s/ Devon Lehman McCune

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