UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NEIGHBORS OF CASINO SAN PABLO, an unincorporated association; ANDRES SOTO; ANNE RUFFINO; ADRIENNE HARRIS; TANIA PULIDO;

and

JULIA I. AREAS
13352 San Pablo Ave., #2
San Pablo, CA 94806,

Plaintiffs,

v.

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

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

GEORGE SKIBINE (originally named erroneously as George Skabine) in his official capacity as Acting Chairperson of the National Indian Gaming Commission;

and,

NATIONAL INDIAN GAMING COMMISSION;

Defendants.

Case No. 1:09-cv-02384 RJL

Hon. Richard J. Leon

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action under the Administrative Procedure Act ("APA") (5 U.S.C. § 701 et seq.), the Declaratory Judgment Act (28 U.S.C. § 2201) and various provisions of the U.S. Constitution seeking, *inter alia*, review of final agency action and/or to compel compliance with an agency mandatory duty in connection with the approval on December 19, 2003 by Defendant National Indian Gaming Commission ("NIGC") of a gambling ordinance (the "2003 Ordinance") enacted by the Lytton Band of Pomo Indians (the "Lyttons") and the approval by NIGC on May 22, 2008 of a subsequent gaming ordinance (the "2008 Ordinance") enacted by the Lyttons. A true and correct copy of the

2003 Ordinance and the NIGC's approval thereof is attached hereto as Exhibit A and incorporated by reference herein. A true and correct copy of the 2008 Ordinance and the NIGC's approval thereof is attached hereto as Exhibit B and incorporated by reference herein. Both the 2003 Ordinance and the 2008 Ordinance pertain to the Lytton's San Pablo Casino (the "Casino"), a gambling establishment operated by the Lyttons.

2. The Casino is located on an approximately 9.5 acre parcel (the "Property") in the City of San Pablo, in the State of California, in a densely populated portion of Contra Costa County, near Interstate 80. From and after California's admission into the Union in 1850 until October 9, 2003, the Property was at all times subject to the jurisdiction of the State of California. During those years, people bought and rented homes, invested in businesses, and as taxpayers, funded government improvements to infrastructure in the area of the Property all with the justifiable expectations that, absent cession by the State of California of its jurisdiction over the Property pursuant to the procedure provided by law, the Property would remain governed by California law, including California land use and gambling laws. On October 9, 2003, the then-owner of the Property, Sonoma Entertainment Investors, L.P., a California limited partnership, which was a privately held, non-Indian owned operator of a state licensed card room operating on the Property, transferred title to the Property to the Secretary (the "Secretary") of the Department of the Interior ("DOI") in trust for the Lyttons and pursuant to Section 819 of the Omnibus Indian Advancement Act of 2000 (the "Technical Amendment"), the Secretary accepted title to the Property in trust, , for the benefit of the Lyttons." A true and correct copy of the Technical Amendment is attached hereto as Exhibit C and incorporated by reference herein.

3. The Technical Amendment did not purport to divest the State of California of any jurisdiction over the Property. At no time before, on or since October 9, 2003, has the State of California ceded its jurisdiction over the Property to the United States or to the Lyttons.

4. On July 13, 2004, the Assistant Secretary of the DOI for Indian Affairs proclaimed (the "Proclamation") the Property to be "an addition to and part of the reservation of the Lytton Rancheria of California under sections 5 and 7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. § 467)" and that the Property had been "part of the reservation of the Lytton Rancheria of California before October 17, 1988." Neither the Secretary nor NIGC has ever made any determination that the Lytton have sovereign jurisdiction over the Property.

5. This action is brought seeking, *inter alia*, a judicial determination that:

   A. the NIGC acted arbitrarily and capriciously and otherwise not in accordance with law when it approved the 2003 and 2008 Ordinances without first complying with its mandatory duty to determine whether the Property on which the Casino sits is Indian land under the jurisdiction of the Lyttons within the meaning of applicable federal law and, therefore, that the approvals must be set aside;

   B. if NIGC and/or the Secretary made or were found to have made a determination that the Property is Indian land under the jurisdiction of the Lyttons, the approvals of the 2003 and 2008 Ordinances were arbitrary and capricious and in excess of Defendants' statutory and Constitutional authority because the Property is not Indian land under the jurisdiction of the Lyttons as a matter of law and at all times

has been subject only to State and local law and, therefore, the approvals must be set aside;

C. if the Proclamation had the effect of altering the sovereignty over the Property, then the Proclamation was arbitrary, capricious, an abuse of discretion and otherwise in excess of DOI's statutory and Constitutional authority because, as a matter of law, the Property is not Indian land under the jurisdiction of the Lyttons and at all times has been subject only to State and local law, rather than federal and Indian law, and therefore the Proclamation must be set aside; and,

D. without regard to whether the Property is Indian land under the jurisdiction of the Lyttons, the continued operation of certain slot machines at the Casino is in violation of applicable law.

JURISDICTION AND VENUE

6. This action arises under the laws and the Constitution of the United States, the Technical Amendment, the Indian Gaming Regulatory Act (25 U.S.C. § 1701 et seq.) ("IGRA"), the APA, the Declaratory Judgment Act (28 U.S.C. § 2201 et seq.) and the jurisdictional statutes set forth below.

7. The Court has original subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1346, 2201 and 2202 and 5 U.S.C. §§ 701 and 702.

8. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b)(2) and (e)(2).

PARTIES

9. Plaintiff Neighbors of Casino San Pablo ("CSP Neighbors") is an unincorporated association comprised of residents, property owners and others who live, work and/or own businesses near the Property, or who frequent the area around the Property and who

seek to preserve their interests and rights currently protected under California law. CSP Neighbors believes that the Property remains under the plenary jurisdiction of the State of California and, therefore, subject to California and local land use and gambling laws. These laws protect the neighborhood, those who live, work, shop, and own property and businesses within it. Defendants' claim to sovereignty over the Property and the continuing use of the Property in ways not permitted by California law threaten those interests. The members of CSP Neighbors have invested financially and emotionally in the area, and the Lyttons' assertion of sovereignty as a result of the actions by Defendants disrupts the justifiable expectations of CSP Neighbors and its members.

10. Plaintiff Andres Soto resides approximately eight blocks from the Casino in the City of Richmond, a community contiguous to the City of San Pablo. He is a member of CSP Neighbors. Mr. Soto has suffered, and will continue to suffer, injury as a result of the operation of the Casino by the Lyttons. In particular, his neighborhood environment has been negatively effected by the operation of the Casino since the Lyttons assumed control. For example, traffic has worsened substantially since the Casino has been operated by the Lyttons and any expansion of the Casino would result in even more congested traffic. Traffic exiting and entering Interstate 80 has increased dramatically, with attendant congestion along the streets bordering the Casino; expansion of the Casino will only cause that problem to become worse. Since the Lyttons have assumed control of the Casino, and particularly since the introduction of slot machines described more fully below, Mr. Soto and his neighbors have noticed an increase in property crimes in and around the area. In addition, streetwalking prostitutes were non-existent on the streets in and around the Casino before the introduction of slot machines at Casino San

Pablo, but have now become common. Mr. Soto is informed and believes, and on that basis alleges, that even some Craigslist Adult Services ads have mentioned prostitution services near the Casino. Increased crime and prostitution in the area has led to increased police activity and presence in and around the Casino. The Casino has recently obtained additional parking land nearby the Casino that has displaced a number of businesses that previously provided various services to the neighborhood including, for example, a medical clinic. In addition, the nature of the businesses in and around the Casino has changed to serve the needs of non-residents visiting the Casino and thereby displacing businesses that served residents in the neighborhood.

11. Plaintiff Anne Ruffino is a resident of Contra Costa County. Her home is two blocks outside the city limits of the City of San Pablo, approximately 1.4 miles by car and about 1 mile directly from the Casino. She is a member of CSP Neighbors. Ms. Ruffino has lived near the Property for more than 30 years and has suffered, and will continue to suffer, injury as a result of the operation of the Casino by the Lyttons. In particular, since the Lyttons assumed control over the Property and the operation of the Casino, traffic in and around the Property, as well as traffic entering and exiting Interstate 80, which prior to 2003 was relatively light, has become extremely congested. Existing streets and intersections cannot adequately handle the load such that gridlock has become common. Not only does the significantly increased traffic diminish the overall quality of Ms. Ruffino's life, the exhaust fumes from the additional traffic, particularly while cars are idling at intersections, adds substantially to air pollution in the area, with its attendant health risks to members of the community. In addition, the increased traffic loads around the freeway interchange and on the City's streets potentially create a hazard. In

the event of an emergency, residents would find it difficult to easily exit the area. Ms. Ruffino's use and enjoyment of her property has been impaired because of the Casino, including specifically by the recent installation of a large outdoor electronic sign at the site which adds to light pollution in the area and is unnecessarily intrusive and unsightly. Ms. Ruffino is informed and believes, and on that basis alleges, that the foregoing impacts, individually and in combination, have resulted and will continue to result in a diminution in the value of her real property to a greater extent than the impact on others in and around the Casino who may be shielded from its unsightly character. Any further increase in the intensity of use of the site or in size of the building itself will only worsen these already noxious impacts. Ms. Ruffino is informed and believes, and on that basis alleges, that if State and local land use law were applied to the Property, the negative impacts from operation of the Casino would be lessened or eliminated altogether.

12. Plaintiff Adrienne Harris is a resident of the City of Richmond, directly across Wildcat Creek from the City of San Pablo. She is a member of CSP Neighbors. She has lived there for 22 years, can see the Casino from her front porch and has suffered, and will continue to suffer, injury as a result of the operation of the Casino by the Lyttons. In particular, the border between Richmond and the City of San Pablo runs through the middle of Wildcat Creek. Plaintiffs are informed and believe, and on that basis allege, that the Casino and its allies have expressed a desire to cover the creek for the purpose of building a parking facility over it. If those efforts are successful, Ms. Harris's property will be effectively adjacent to the Casino property. A parking structure for the Casino adjacent to Ms. Harris's property would substantially diminish the value of her home and

would substantially interfere with her use and enjoyment of her property. Plaintiffs are informed and believe, and on that basis allege, that the mere threat of expansion of the Casino and a parking structure has had and will continue to have deleterious effects on the value of Ms. Harris's property. Ms. Harris has been negatively impacted in other ways by the expansion and operation of the Casino. For example, the street on which Ms. Harris lives is immediately south of the Casino and, as a result, traffic in and around her home has increased substantially since the Lyttons assumed control over the Casino. The increased traffic has directly and negatively impacted her once quiet street and has substantially diminished her use and quiet enjoyment of her home. Traffic exiting and entering Interstate 80 because of the Casino has increased significantly and the streets are far more congested than previously. Property values on her street are lower than in nearby areas as a result of its proximity to the Casino. In addition, construction activity related to the Casino has significantly affected Wildcat Creek and plaintiffs are informed and believe, and on that basis allege, that the native bird population in and around the Creek has been noticeably reduced as a result of such construction activity, resulting in a less pleasant environment for Ms. Harris and her neighbors. Finally, Ms. Harris has observed that street prostitution in and around the Casino has become common since the Lyttons assumed control of the Casino. She has observed prostitutes regularly strolling around the Casino in an area where previously there was no obvious, active prostitution activity. As a result, police activity in and around her neighborhood has increased and the character of the neighborhood has changed for the worse. All of the foregoing effects have had, and will continue to have, a negative effect on property values in the area,

including the value of Ms. Harris's property and have had a deleterious effect on her use and enjoyment of her home and the neighborhood.

13. Plaintiff Tania Pulido grew up and still lives in the City of San Pablo near the Casino. She is a member of CSP Neighbors. She has suffered, and will continue to suffer, injury as a result of the operation of the Casino by the Lyttons. In particular, she has been affected by an increase in crime in the neighborhood since the Lyttons assumed control over the Casino. Her family had a tradition of eating at a local restaurant located across the street from the Casino but is now fearful of visiting that restaurant because of the clientele that has been, and continues to be, attracted to the Casino since the Lyttons assumed control thereof. As a result, the negative and adverse changes in the nature of the community have interfered, and continue to interfere, with her use and quiet enjoyment of her home and City.

14. Plaintiff Julia I. Areas owns a home on the property across the street from the Property in the City of San Pablo and has lived there since in or around November 2004. She is a member of CSP Neighbors. She has suffered, and will continue to suffer, injury as a result of the operation of the Casino by the Lyttons. The operation of the Casino has led to a noticeable increase in noise, traffic and crime in the area around the Property which has had a demonstrable and continuing negative impact upon Ms. Areas's quality of life. Ongoing and noxious noise from patrons of the Casino at all hours of the day and night and from police sirens are virtually an everyday occurrence. As a result of the increase in crime in the area, the neighborhood feels less safe and secure. Traffic is substantially heavier on the streets around the Property as a result of the operation of the Casino and

traffic entering and exiting Interstate 80 has increased dramatically, resulting in significant delays, street crowding and air pollution.

15. Defendant Ken L. Salazar ("Salazar") is the Secretary of the DOI and is ultimately responsible for administering the affairs of and relations with Indian tribes recognized by the federal government. He is sued herein in his official capacity.

16. Defendant Larry Echo Hawk ("Echo Hawk") is the current Assistant Secretary—Indian Affairs within the DOI and has oversight and responsibility for administering the affairs of and relations with Indian tribes recognized by the federal government. He is sued herein in his official capacity.

17. Defendant George Skibine (originally erroneously named herein as George Skabine) is the Acting Chairperson of NIGC and is sued herein in his official capacity.

18. Defendant NIGC is the federal agency, operating within the DOI, which was established to oversee, monitor and regulate gambling on Indian lands under tribal jurisdiction. NIGC is required to approve tribal gaming ordinances and gaming on Indian land where a tribe has jurisdiction may not occur without such approval.

CONSTITUTIONAL BACKGROUND

19. A state has complete jurisdiction over the land within its exterior boundaries. The Federal government can obtain sovereignty over land within state borders in only three ways: (i) by reserving jurisdiction over the affected property upon admission of the state into the Union; (ii) pursuant to the Enclaves Clause of the United States Constitution whereby a state consents to exclusive federal jurisdiction when the Federal government purchases property for certain specified uses; and, (iii) by state cession of jurisdiction, exclusive or partial, to the Federal government. Typically, Indians have exercised

sovereignty pursuant to the first of these three methods. The Indian tribe occupied certain land when the state was admitted into the Union and continuously held such land as a politically distinct people thereafter. If the Federal government obtains *title* to land within a state's borders through purchase or otherwise, and does not proceed through the process to obtain *sovereignty*, the Federal government holds title like an ordinary landowner, and state law continues to govern the site.

20. As the Attorney General of the State of California cautioned in 1991, in connection with *Scotts Valley Band of Pomo Indians, et al. v. United States of America*, No. C-86-3660 VRW (N.D. Cal.) ("*Scotts Valley*"), a case that addressed federal recognition of the Lyttons and the status of the Lytton Rancheria, "[I]f it is the intent of . . . the Department of Interior, to obtain by purchase, condemnation or derivative title from or on behalf of any Indian or Indian descendant, any lands which have been patented out of the public domain, or otherwise have historically been subject to State jurisdiction, regulation and sovereignty, the State respectfully asserts that the consent of the State Legislature will have to be obtained prior to the placement of such lands in trust. . . . The State does not doubt that the United States can acquire lands without the consent of the State . . . . However, in doing so, the federal government merely holds land as a proprietor . . . . United States jurisdiction then would be concurrent with that of the State . . . . Jurisdiction in the United States would only become exclusive if the State concedes that jurisdiction."

21. The federal government could not gain sovereignty over the Property unless the State of California ceded jurisdiction thereof to the Federal government. The State of California did not cede such jurisdiction nor has it ever expressed any intent to cede such

jurisdiction. As a result, at all times material hereto, State and local law, including applicable law governing land use and gambling, have remained applicable to the Property, notwithstanding the acquisition of title to the property pursuant to the Technical Amendment and the approval by NIGC of the Ordinance.

STATUTORY BACKGROUND

The Indian Gaming Regulatory Act of 1988

22. In 1987, the US Supreme Court held in *California v. Cabazon Band of Mission Indians,*480 U.S. 202 (1987), that states could not regulate Indian gaming on Indian lands under Indian jurisdiction. In response, and to fill the regulatory vacuum created by that decision, Congress passed the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*

23. IGRA subdivides gaming activities into three classes of games and provides for distinct regulatory models for each class. 25 U.S.C. § 2703. Class I encompasses social games played for prizes of minimal value and games involved in traditional Indian tribal ceremonies or celebrations. Class I games are within the exclusive jurisdiction of the tribe. 25 U.S.C. § 2710(a)(l).

24. Class II games include bingo, lotto and non-banking card games that are either explicitly authorized or not expressly prohibited by state law. 25 U.S.C. § 2703(7)(A). Class II gaming expressly excludes "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B)(ii). Class II games are under the shared control of the tribe and the NIGC.

25. Class III games broadly include "all other forms of gambling," and thus include the mainstays of Nevada style casinos such as slot machines and banked card games. 25 U.S.C. § 2703(8). Class II and Class III games are allowed only if they may otherwise be

conducted in the state. 25 U.S.C. § 2710(b), (d). Class III games were under the shared control of the tribe and the state.

26. In order to conduct Class II gaming, the tribe must adopt an ordinance that is approved by the NIGC. 25 U.S.C. §§ 2705, 2710(b), (c). Before approving an ordinance, the NIGC must determine that the gaming will be operated on Indian lands within the tribe's jurisdiction. *Id.* In addition, the Chairman must determine that the Indian tribe will have sole proprietary interest over the gaming activity. 25 U.S.C. 2710(b)(2)(A).

27. Class III gaming may be conducted on Indian land subject to the negotiation of a Tribal-State compact, which governs the manner in which such games are conducted on Indian land. Accordingly, states, instead of the Federal government, were given a large regulatory role in the governance of class III games. 25 U.S.C. § 2710(d). The compact must be entered into by the State and the Tribe and approved by the Secretary. *Id.*

28. When a tribe which is operating without a compact submits an ordinance to NIGC for review, before approving the ordinance, NIGC must ensure that none of the gaming then occurring violates the Ordinance or IGRA. Specifically, NIGC must ensure that the games being offered all constitute Class I or Class II games.

29. IGRA applies exclusively to "Indian lands," as defined in the statute. 25 U.S.C. §§ 2701, 2703(4), 2710. "Indian lands" is defined as:

    a) all lands within the limits of any Indian reservation; and

    b) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which the Indian tribe exercises governmental power.

25 U.S.C. § 2703.

In addition, section 11 of IGRA, governing Tribal Gaming Ordinances, allows class II and class III gaming on "Indian lands," only if "the Indian tribe [has] jurisdiction over such lands." 25 U.S.C. § 2710(b), (d). Accordingly, prior to permitting a tribe to operate under a tribal gaming ordinance, the NIGC necessarily has a duty to determine that the property on which the tribe intends to conduct gaming is "Indian lands" over which the tribe has jurisdiction.

30. Section 20 of IGRA further limits the application of IGRA's gaming provisions to lands acquired by tribes before October 17, 1988. 25 U.S.C. § 2719(a). Exceptions to the Section 20 prohibition are enumerated in the statute and include lands taken in trust as part of an initial reservation and lands restored to an Indian tribe that is restored to Federal recognition. *See generally* 25 U.S.C. § 2719(b).

31. IGRA also requires that a tribal ordinance or resolution for class II gaming may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements, among other things, are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. 25 USC 2710(b)(4).

32. The Technical Amendment, which was enacted in 2000, was enacted for the Lyttons' benefit in part to circumvent. Section 20 of IGRA.

INDIAN TRIBES IN CALIFORNIA, THE RANCHERIA SYSTEM AND THE RECENT APPEARANCE OF THE LYTTONS

33. Unlike the practice of the English on the East Coast, when the Spanish colonized the West Coast and California, they did not make treaties with the existing inhabitants.

Whereas the English adopted a system of segregation between its colonists and the Indians, the Spanish and the Catholic Church established the Mission system which had as its purpose the integration and absorption of the Indians into a new Spanish society. By law, mission lands and property were to pass to resident Native Americans after a period of time, when the natives would become Spanish citizens. The result was much higher rates of integration and inter-marriage between the Spanish and natives. It also meant lack of recognition of Indian sovereignty. When Mexico gained independence from Spain in 1821, California became a Mexican territory. Mexico assumed full sovereignty over the territory, as none of the land within the state was subject to any treaties with the Indian inhabitants, and during its reign from 1821 to 1848, Mexico did not enter into any treaties with California Indian tribes.

34. When Mexico ceded the territory of California to the United States in 1848, under the Treaty of Guadalupe Hidalgo, it ceded full sovereignty, not subject to any treaties with Indians.

35. Between 1848 and September 9, 1850, the Federal government did not enter into any treaties with any California Indian tribes.

36. On September 9, 1850, Congress passed the California Admissions Act which admitted California into the Union. Thirty-First Congress, Sess. I, ch. 50, 9 Stats. 452. Unlike the terms of many other state admission acts, the California Admissions Act contained no exemption recognizing Indian rights over any lands within the borders of the state, and the State did not take jurisdiction subject to any pre-existing Indian treaty rights.

37. In 1851, after the State of California had been admitted into the Union, President Fillmore appointed three Indian agents to negotiate treaties with Indian tribes in

California. Between March 19, 1851 and January 7, 1852, these agents negotiated 18 treaties with various tribal representatives in California. The Lyttons did not exist at the time as a group, and thus, none of the treaties were with the Lyttons. The tribe with a treaty that lived closest to the future site of the Lytton Rancheria was at Clear Lake (about 25 miles north), and the second closest lived on the Russian River near Hopland in Mendocino County (about 35 miles north). In June 1852, the treaties were submitted to the Senate for ratification, but in August 1852, after considerable debate, Congress refused to ratify them. The failure to ratify the treaties constituted Congress' political judgment to refuse to recognize the sovereignty of any tribe over any California lands.

38. In 1871, Congress added a rider to the Indian Appropriations Act ending United States recognition of additional Native American tribes or independent nations, and prohibiting additional treaties. The rider read:

> That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty....

Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. §71 (1982)). Of the hundreds of treaties between the United States and its domestic Indian tribes, none pertain to California lands, making California unique even among the former Spanish lands.

The Rancheria System

39. The rancheria system was unique to California and was adopted in rejection of the reservation system. Under the reservation system, Indians were segregated unto large tracts of land far away from non-Indian settlements and lived as separate and distinct communities. These reservation lands were often unproductive, and the Indians on them

often ended up in poverty and dependence. In 1905, pursuant to an Act of Congress (33 Stats. 1058), the Secretary of DOI appointed a special agent, C.E. Kelsey, to investigate the existing condition of the California Indians and to report to Congress some plan to improve them. Kelsey found small groups of Indians scattered around the state and their condition to be destitute. He recommended creation of the rancheria system to benefit individual Indians. Kelsey expressly disclaimed any desire to establish reservations: "Your special agent is inclined to object strongly to anything in the nature of reservations for these people. The day has gone by in California when it is wise to herd the Indians away from civilization...." The rancherias were to be small tracts of land in the midst of farm communities where parcels of a few acres could be assigned to individual families. The parcels would not be large enough alone to support the residents, but rather the Indian residents would work in the community. Thus, the Rancherias were akin to government-owned work camps. Since most state lands were already settled, Kelsey noted that Congress would need to purchase settled lands. In 1906, Congress authorized the first monies for the program, and did so again in 1908, 1914, 1915, yearly between 1916 and 1929, and in 1937. Kelsey administered the purchase of such lands and the assignment to Indian residents from 1906 through 1913.

40. Nothing in Kelsey's original report or his subsequent purchase or administration of the land indicates any attempt by the federal government to oust the State of California from jurisdiction over lands purchased for rancherias, either in whole or in part, or to assert any claim by the Federal government that state law no longer applied to sites purchased. In fact, documents from that time indicate that neither the rancherias nor the unaffiliated

Indians assigned land on the rancherias were considered under the supervision of the Office of Indian Affairs.

41. In 1912, soon after the rancheria system was established, the Office of Indian Affairs in Washington, D.C. took the position that plots of land that had been purchased by the federal government from private parties and which had been under the jurisdiction of the State of California remained under the jurisdiction of the State. The Assistant Commissioner stated that, "Inasmuch as the lands occupied by these Indians were purchased from private parties while the same were under the jurisdiction of the State of California, said jurisdiction would continue until such a time as the State ceded its police jurisdiction."

Lytton Rancheria

42. In 1927, the Federal government purchased a 50-acre tract of land outside Healdsburg in the rural Alexander Valley of Sonoma County, California, to be used as a home for "landless" Indians. The tract was referred to as the "Lytton Rancheria," named for its location by Lytton Station. "Lytton" is a British, not an Indian name. The tract had been privately owned and had been under state jurisdiction and governed by state law since the state was formed. The federal government did not request California to cede, and the state did not cede, its sovereignty over the land. Thus, the federal government acquired *title* to the land, not *sovereignty* over it.

43. Title to the Lytton Rancheria was not taken in trust. Rather, the government held fee title to the site. Purchase documents indicated the land was intended for the use of Indians from the Dry Creek Area. No Indians received either title to or governmental sovereignty over this land.

44. From 1927 to 1937, no one lived on the Lytton Rancheria. During this period the Salvation Army grew corn on the Rancheria. In 1937, first Bert Steele, who was one-quarter Indian, then later John Myers, Steele's brother-in-law, moved onto the Rancheria with the revocable permission of the Bureau of Indian Affairs office in Sacramento. Steele and Myers were allowed to reside on two demarcated and separate portions of the Rancheria. The remaining portions were unused and unoccupied. The BIA retained both legal and equitable ownership, and granted Steele and Myers revocable licenses.

45. According to records of the Office of Indian Affairs, the Steele and Myers families were of Indian, Non-Indian, and mixed tribal origins. They were descended from three tribes: the Pit River Indians (Shasta County), Nomalaki Indians (from Tehama County in Northeastern California), and the Stewart's Point Band of Pomo Indians, located on the California coast. None of these tribes was from the Alexander Valley. Each of these tribes is presently recognized and has a reservation.

46. During their residence on the Lytton Rancheria, the Steele and Myers families never organized as a tribe, and were not self-governing. Rather, they lived under the laws of the State of California. They never exercised any common authority on the Lytton Rancheria, never had any communal or collective property or interests, never exercised any rights of self-government, and had no authority to determine their own parcel boundaries, or to determine whether any other persons could live on or use the Rancheria.

47. On several occasions during the 1950s, the Steele and Myers families petitioned to have the Rancheria land distributed to them in fee so they could become owners. Congress considered terminating the Rancheria system, and in 1958, passed the California Rancheria Act of August 18, 1958, P.L. 85-671, 72 Stat. 619, directing BIA to terminate

the Rancheria system and to distribute the lands to Indian residents or their successors. In addition, the Act terminated the status of distributees as Indians, disqualifying them from further government benefits exclusively available to Indians. A Senate Report on the bill describes each Rancheria separately, and under the Lytton Rancheria, states that the residents had not organized as a tribe.

48. In May 1959, a distribution plan was approved for the Lytton Rancheria pursuant to the Rancheria. The plan listed eight parcels, seven for the Steele family and one for the Myers family.

> Lot 1 (the Steele tract) was divided in 7 parcels for Mary Steele (widow of Bert Steele), and her children, Daniel Steele, Romeo Steele, Sarah Gonzales, Rosaline Madera Zunino, Eleanor Lopez and Doris Miller. According to records of the Office of Indian Affairs, the last four were married to non-Indians, and of all these persons, only one, Daniel Steele, possibly lived on the Rancheria. Mary Steele, Sarah Gonzales, Eleanor Lopez, Rosaline Zunino and Doris Miller lived in Santa Rosa. Romeo Steele lived in Oregon.
>
> Lot 2 (the Myers tract) was to be shared by Dolores Myers (widow of John Myers) and her son, James Myers.

49. Pursuant to the distribution plan, the land was distributed in 1961. Plaintiffs are informed and believe, and on that basis allege, that the distributees of the land sold the parcels, and none of them continued to live on the land that had comprised the Rancheria. Plaintiffs are further informed and believe, and on that basis allege that, until very recently, neither the Steele family, the Myers family, nor both of them together, exercised any authority as a "tribe" or otherwise took any action to indicate that they rightfully claimed or possessed historical status as a cohesive Indian community with historical tribal status.

"Restoration" of the Lyttons' Tribal Recognition

50. Plaintiffs are informed and believe, and on that basis allege, that on or about September 22, 1986, certain descendants of the Steele family requested approval from the

DOI to organize a tribal government; however, on June 18, 1987, the DOI denied their request.

51. In or about June 27, 1986, descendants of residents of rancherias other than the Lytton Rancheria filed the *Scotts Valley* action against the Secretary and other defendants seeking a declaratory judgment that their rancherias had been illegally terminated and should be restored. The complaint was subsequently amended to add other rancherias and plaintiffs. The plaintiffs in *Scotts Valley* asked to be recognized as Indian tribes, qualified to receive federal benefits available to Indian tribes. The allegations made by the various rancherias were similar: namely, that the defendants had promised, in conjunction with the distribution of the rancherias to individual residents, to make certain water and irrigation improvements, and that because those improvements had not been made, recognition of the tribal organizations should be restored.

52. On or about August 25, 1987, a Second Amended Complaint was filed in the *Scotts Valley* action which for the first time included claims about the Lytton Rancheria. The Second Amended Complaint listed as named plaintiffs Carol J. Steele and a self-styled "Lytton Indian Community." The Second Amended Complaint does not contain any allegations identifying either Carol Steele or the "Lytton Indian Community," except the allegation that it was an Indian "band" recognized by the United States Government from 1927 until August 1, 1961. Plaintiffs are informed and believe, and on that basis allege, that at no time between 1927 and 1961 had the federal government recognized any "band" of Indians identified as the "Lytton Indian Community."

53. The sole allegation in the *Scotts Valley* case regarding the government's breach of duty for the Lytton Rancheria was that six of the eight parcels created for distribution did not

have adequate water systems. Plaintiffs are informed and believe, and on that basis allege, that the six persons who received such parcels did not live on the Rancheria in 1961 and there were no houses on their parcels.

54. There had never been a distinct Indian community called the Lytton Indian Community or Lytton Band of Pomo Indians. Instead, as alleged above, the Lytton Rancheria was simply a tract of land purchased in 1927 for unspecified homeless and landless Indians and on which, in or about 1937, the Bureau of Indian Affairs gave permission to two separate families to live. During the relatively short time they lived separately on the Rancheria (just over 20 years), these two families never formed any tribal association, never shared any property, and never had any distinct tribal existence sufficient to satisfy the legal standards for being judged a sovereign tribe. A report prepared by the United States in 1988 in connection with the *Scotts Valley* case stated with regard to the Lytton Rancheria: "… there is no indication that the occupants ever held meetings or otherwise conducted business as a tribal entity."

55. In March 1991, the United States, Lytton representatives and the County of Sonoma settled the *Scotts Valley* case pursuant to which the termination of the Rancheria would be recognized as illegal and the descendants of the former residents of the Lytton Rancheria would be entitled to the rights and benefits of individual Indians. To accommodate the objections of the County and citizens who intervened, the Stipulation provided that, in the future, land could be taken into trust in Sonoma County for the "Lytton Indian Community" (an undefined group) only according to designated procedures, and that no gaming would be conducted on any land obtained by the Lyttons in the Alexander Valley unless in conformity with the County's general plan, or

anywhere in Sonoma County, except in compliance with IGRA and DOI guidelines. The Stipulation also provided that "the Lytton Indian Community shall, consistent with Federal law, have the right to determine its own membership and otherwise to govern its internal and external affairs as a tribal entity ***consistent with its status prior to termination***," and that the Lytton Indian Community could organize as an association under the Indian Reorganization Act. The Stipulation did not satisfy any of three ways in which tribes can be recognized under law. See 25 U.S.C. 479a *notes.*

THE PROPERTY, THE CASINO AND THE CURRENT DISPUTE

56. On July 8, 1999, the Lyttons enacted a gaming ordinance although, at the time, the Lyttons did not have any Indian land under their jurisdiction or any approval to take any lands, including the Property, into trust. The only lands owned by the Lyttons were in Sonoma County, about 60 miles by road from the Property, and on the other side of San Pablo Bay. On July 13, 1999, NIGC approved the gaming ordinance, but failed to make any determination that the Lyttons had land to which the laws would apply. In fact, the Lyttons had no land on which they were permitted to conduct gaming operations.

57. On October 24, 2000, the Omnibus Indian Advancement Act (the "Omnibus Act") was introduced in the House of Representatives as H.R. 5528. The bill included a number of acts that were then pending in the legislative process. On October 26, 2000, H.R. 5528 was amended to include the Native American Laws Technical Corrections Act of 2000. One of these amendments was the Technical Amendment, which directed the Secretary of Interior to accept title to the Property in trust for the Lyttons. Section 819 read:

> SEC. 819. LAND TO BE TAKEN INTO TRUST.
>
> Notwithstanding any other provision of law, the Secretary of the Interior shall accept for the benefit of the Lytton Rancheria of

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

See Exhibit C hereto.

58. Within five minutes after the Technical Amendment was added to the Omnibus Act, the House of Representative passed the Omnibus Act. Following Senate approval, President Clinton signed the Act into law on December 27, 2000.

59. The Property consists of approximately 9.5 acres in the City of San Pablo, and includes a parking lot and the Casino. The Casino site is integrated into the fabric of the City of San Pablo and is not a separate area. It is a single parcel on the street, served by the same utilities, reliant on the same road system, and dependent on the same emergency services as adjacent parcels. There is nothing about the Property that separates it in any meaningful way from the city. The Property is used exclusively for commercial purposes, and is not used for residential purposes.

60. At the time of the Technical Amendment, the Property was privately held by Sonoma Entertainment Investors L.P., a California limited partnership, an organization that was neither comprised of nor affiliated with any Indian tribe. Plaintiffs are informed and believe, and on that basis allege, that the land had been privately held since the state of California was admitted to the Union, and had been governed by state law.

61. At the time of the Technical Amendment, the Casino was a cardroom licensed by the State of California to conduct non-banked card games and was otherwise governed by California's laws on land use and gambling.

62. The Technical Amendment concerns transfer of title, and makes no claim to displacement of state sovereignty with Indian sovereignty. Nothing in the Technical Amendment or any other provision of the Omnibus Act requested the State of California to cede, and the state did not cede, any of its sovereignty over the Property. Nothing in the Technical Amendment operated to grant to the Lyttons sovereignty over this newly acquired land.

63. On October 17, 2001, less than a year after passage of the Technical Amendment, Congress enacted P.L. 107-63, which the President signed on November 5, 2001. Section 128 of P.L. 107-63 (the "Reid Amendment") provides as follows:

> The Lytton Rancheria of California shall not conduct Class III gaming as defined in P.L. 100-497 [IGRA] on land taken into trust for the Tribe pursuant to P.L. 106-568 [the Technical Amendment] except in compliance with all required compact provisions of Sec. 2710(d) of P.L. 100-497 or any relevant Class III gaming procedures.

64. The Reid Amendment did not purport to grant sovereignty over the Casino site to the Lyttons or to divest the State of jurisdiction over the Property.

65. On October 9, 2003, the Secretary accepted title to the Property in trust from Sonoma Entertainment Investors, L.P., and on July 13, 2004, the Assistant Secretary—Indian Affairs issued the Proclamation, declaring that the land was a reservation for the Lytton Rancheria and that the land was held in trust and part of the reservation before October 17, 1988. 69 Fed. Reg., no. 133, p. 42066. Neither the Secretary nor the Lyttons have requested California to cede its jurisdiction over the Property, and the state has not ceded its jurisdiction over the Property.

66. On December 16, 2003, the Lytton submitted an application to the NIGC to approve the 2003 Ordinance. The 2003 Ordinance and application specifically identified the Casino and assumed that the 2003 Ordinance was applicable to the Casino. The 2003 Ordinance

served temporarily to license a class II gaming operation owned and operated by SF Casino Management, L.P. at Casino San Pablo as of October 9, 2003 and revoking the temporary Class II operating license of SF Casino Management, L.P. as of November 24, 2003.

67. On December 19, 2003, the NIGC approved the Ordinance. See Exhibit A hereto. The approval was final agency action by NIGC within the meaning of the APA.

68. In approving the 2003 Ordinance, the NIGC indicated that the Lyttons could conduct gaming only on "Indian lands" and that the approval was not "game specific."

69. Notwithstanding NIGC's approval of the 2003 Ordinance, plaintiffs are informed and believe and, on that basis allege, that NIGC failed to make any determination that the Property was Indian land under the jurisdiction of the Lyttons, despite its obligation under IGRA and its own procedures to make such a determination. Alternatively, if NIGC made such an Indian lands determination with respect to the Property, that determination was erroneous as a matter of law because the Property is not Indian land under the Lyttons' jurisdiction. Rather, the Property remains under State and local jurisdiction, and IGRA does not apply to it.

70. In or about August 2004, California Governor Arnold Schwarzenegger announced that he had negotiated a compact with the Lyttons which, if otherwise approved, would have allowed the Lyttons to conduct Class III gaming at the Casino, including the operation of up to 5,000 slot machines at the site. Following a public outcry over the proposed size and scope of the proposed expansion of the Casino, Governor Schwarzenegger announced that he had renegotiated a compact with the Lyttons that would allow them to operate "only" 2,500 slot machines at the Casino. Neither compact has been approved by

the California legislature and the Lyttons are not now, nor have they ever been, legally authorized to conduct Class III gaming at the Casino.

71. On August 1, 2005, the Lyttons installed approximately 500 electronic gaming machines at the Casino site. Since then, the Lyttons have installed approximately 600 additional electronic gaming machines. The machines have the look and feel of slot machines, and offer the same gaming experience. A player deposits money, pushes a button (or pulls a handle), and watches the wheels spin. Depending on the configuration of symbols shown when the wheels stop spinning, the player either wins or loses. The machine has blinking lights and make sounds to stimulate excitement. The gaming experience is solitary, player versus machine. It is also passive. It is not communal and active as in bingo games.

72. The Lyttons claim that the game played on the electronic machines is bingo and thus a Class II game under IGRA, despite the fact that there is no bingo caller, no prolonged call of numbers, no process of searching cards for numbers and marking numbers called on the cards, no determination by the player of a win, no call of “Bingo” and no collective gaming experience among other players.

73. Plaintiffs contend that the electronic machines in use at the Casino are slot machines under IGRA, and thus constitute class III games.

74. On or about November 19, 2005, California Attorney General Bill Lockyer sent a letter to then Assemblymember Loni Hancock, in reply to a legal inquiry, and offered the opinion that the machines the Lyttons were operating at the Casino site constituted slot machines under state law.

75. On or about March 20, 2008, the Lyttons submitted an amended gaming ordinance (the "2008 Ordinance") for approval by the NIGC to authorize Class II and Class III gaming.

76. On or about May 22, 2008, NIGC approved the 2008 Ordinance only for gaming on "Indian land." At the time of that it approved the 2008 Ordinance, NIGC knew or should have known that the Lyttons were then, and had been for several years, operating the Casino on the Property.

77. Notwithstanding NIGC's approval of the 2008 Ordinance, plaintiffs are informed and believe and, on that basis allege, that NIGC failed to make any determination that the Property was Indian land under the jurisdiction of the Lyttons, despite its obligation under IGRA and its own procedures to make such a determination. Alternatively, if NIGC made such an Indian land determination with respect to the Property, that determination was erroneous as a matter of law because the Property is not Indian land under the jurisdiction of the Lyttons. Rather, the lands remain under state jurisdiction, and IGRA does not apply to them.

ADDITIONAL ALLEGATIONS OF INJURY SUFFERED BY PLAINTIFFS AS A RESULT OF DEFENDANTS' ACTIONS

78. In addition to the injuries to the individual Plaintiffs described more fully in paragraphs 9-13 hereof, Plaintiffs individually and collectively have suffered injury to other interests as a result of the actions of Defendants described above. According to the 2000 census, over 99% of the population in the area surrounding the Property is non-Indian. American Indians comprise less than 0.5% of Contra Costa County's population and less than 0.5% of the population in West Contra County where the Property is located. U.S. Dept. Of Commerce, Census Bureau 2000 Census of Population and Housing, Summary

Population and Housing Characteristics: California: 2000 Table 3, p. 72 (November 2002), available at http://www.census.gov/prod/cen2000/phc-1-6.pdf.

79. Defendants' actions have unreasonably and unlawfully benefitted the Lyttons in derogation of longstanding principles governing cession of jurisdiction over State land and without regard to applicable Federal, state and local law, and the legitimate and settled expectations of the larger community, including specifically Plaintiffs.

a) California criminalizes the operation of slot machines and banked card games such as those now played at the Casino. As a result of the commencement and operation of these gambling activities at the Property under the purported application of Indian sovereignty to the site, Plaintiffs have suffered a decline in their quality of life as alleged more fully above. This includes, but is not limited to, the presence of undesirable elements in the neighborhood, an increase in criminal activities, such as drug sales and prostitution, increased traffic and traffic congestion, air, noise and light pollution, and the degradation of public spaces and roads. Plaintiffs are informed and believe, and on that basis allege, that they have also suffered, and will continue to suffer, depreciation in the value of their properties.

b) In addition, Defendants' actions have further impaired legitimate and settled interests of Plaintiffs which are provided by state laws. State gambling laws protect citizens, including Plaintiffs, from activities which often occur in neighborhoods in close proximity to casinos. State environmental laws and city and county land use controls protect citizens, including Plaintiffs, from use of neighboring lands in ways which harm the environment and decrease quality of

life. Specifically in this regard, the City of San Pablo has duly adopted a Zoning Map as part of its San Pablo Code of Ordinances and has designated the Property as C-1, Light Commercial District. Section 17.12.020 of the City Code provides that in such a district "uses with a potential detrimental impact are allowed only with a use permit." Before such a use permit may be awarded, public hearings must be held at which citizens, including Plaintiffs, may present their concerns about traffic, noise, light, impacts on the neighborhood, and other issues. The activities currently underway at the Casino could not, and would not, have been permitted under state and local substantive criminal and land use law and, at a minimum, would have been the subject of appropriate public hearings and public input.

c) As a result of Defendants' actions, Plaintiffs have suffered and will continue to suffer a gap in the protections otherwise afforded by zoning and land use laws and by substantive criminal laws. Elected local representatives control land use and are directly accountable for their decisions to local voters, including Plaintiffs. As a result of Defendants' actions, Plaintiffs have also lost the ability to exert influence at the state and local level to register their concern about the uses to which the Property are now being put. Federal and state law provide procedures for the cession of state jurisdiction over state property. Cession must occur through legislation passed by the state Legislature with the concurrence of the Governor of the state. State legislators are elected by local districts, and are answerable to the local citizenry. The Governor is elected by the state electorate. Citizens as well as elected officials of local government otherwise have the right

to provide input on any bill to cede jurisdiction over the Property for the benefit of an Indian group. Further, under state law any such legislation ceding jurisdiction would be subject to the electorate's power of referendum, essentially allowing a local citizen or a local group to lead an effort to subject the legislation to popular vote in an effort to cause the electorate to overturn such legislation. Defendants have not followed the required procedures to obtain a cession of state jurisdiction over the Property, but have attempted to create a de facto change in sovereignty, thereby depriving Plaintiffs of their rights as citizens under state law.

d) Because of the longstanding, distinctly non-Indian, character of the area and its inhabitants, the regulatory authority continually exercised over the Property by the State of California and its local subdivisions (Contra Costa County and the City of San Pablo), Plaintiffs have invested in the area with the justifiable expectations that the Property and its surrounding area would continue to be governed by the State of California unless and until the state ceded its jurisdiction through the procedures required to make such a cession. Those expectations have been unreasonably and unlawfully disrupted by the actions of Defendants.

80. The injury to Plaintiffs and their interests have been caused by Defendants' failure to limit the application of IGRA to Indian lands under the jurisdiction of the tribe and by Defendants' ongoing assertion of jurisdiction over Indian gaming occurring on the Property. Plaintiffs, as neighbors of the Property, are among those persons who Congress expected would police the interests protected by IGRA. Absent relief as prayed below, Plaintiffs will be without an effective remedy to assert and to protect their legitimate,

long-standing and settled interests as members of the community in and around the Property.

FIRST CLAIM FOR RELIEF

(Claim To Set Aside Agency Action and for Declaratory Relief Against All Defendants; 5 U.S.C. §§ 701-706, 28 U.S.C. § 2201)

81. The paragraphs set forth above are realleged and incorporated herein by reference.

82. NIGC's approval of the 2003 Ordinance was final agency action within the meaning of 5 U.S.C. § 704 and 5 U.S.C. § 706(1) authorizes the Court to compel agency action unlawfully withheld or unreasonably delayed.

83. IGRA permits gambling only on "Indian lands within the tribe's jurisdiction," and NIGC has a duty to determine whether a tribe's proposed gaming will occur on Indian lands before affirmatively approving an ordinance. When it approved the 2003 Ordinance NIGC was aware that the Lyttons were operating or intended to operate the Casino on the Property. NIGC notified the Lyttons that its approval applied only to gambling on "Indian lands." Accordingly, prior to approving the 2003 Ordinance, NIGC had a mandatory duty under IGRA to conduct an analysis and make a determination as to whether the Property, which was specifically identified in the 2003 Ordinance, was Indian land under the jurisdiction of the Lyttons.

84. NIGC acknowledged and represented to the Ninth Circuit Court of Appeal in *North County Community Alliance, Inc. v. Kempthorne*, 573 F.2d 738, 746 (9th Cir. 2009) that it has such a mandatory duty. In its brief, NIGC stated:

> [I]f a tribe submits a site-specific gaming ordinance or management contract that indicates the proposed location of the gaming, then a determination must be made whether the location of the gaming is Indian lands.

85. A controversy currently exists between Plaintiffs and Defendants, in that Plaintiffs are informed and believe, and on that basis allege, that NIGC failed and refused to comply with its mandatory duty under IGRA to make an Indian land determination with respect to the Property prior to approval of the 2003 Ordinance and as a result, NIGC's approval of the 2003 Ordinance was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law. Plaintiffs are informed and believe, and on that basis allege, that NIGC contends that it was not required to comply with its mandatory duty to make an Indian lands determination with respect to the Property.

86. Accordingly, Plaintiff seeks a declaration that NIGC was required to make an Indian lands determination with respect to the Property prior to approving the 2003 Ordinance, that NIGC failed to make such a determination, that its approval of the 2003 Ordinance be set aside and that the matter be remanded to the NIGC to comply with such mandatory duty to make a determination whether the Property is Indian land under the jurisdiction of the Lyttons.

SECOND CLAIM FOR RELIEF

(Claim To Set Aside Agency Action and for Declaratory Relief Against All Defendants; 5 U.S.C. §§ 701-706, 28 U.S.C. § 2201)

87. The paragraphs set forth above are realleged and incorporated herein by reference.

88. NIGC's approval of the 2008 Ordinance was final agency action within the meaning of 5 U.S.C. § 704 and 5 U.S.C. § 706(1) authorizes the Court to compel agency action unlawfully withheld or unreasonably delayed.

89. IGRA permits gambling only on "Indian lands within the tribe's jurisdiction," and NIGC has a duty to determine whether a tribe's proposed gaming will occur on Indian lands before affirmatively approving an ordinance." When it approved the 2008 Ordinance

NIGC knew or should have known that the Lyttons were operating and intended to continue operating the Casino on the Property. NIGC notified the Lyttons that its approval applied only to gambling on "Indian lands." Accordingly, prior to approving the 2008 Ordinance, NIGC had a mandatory duty under IGRA to conduct an analysis and make a determination as to whether the Propertywas Indian land under the jurisdiction of the Lyttons.

90. NIGC acknowledged and represented to the Ninth Circuit Court of Appeal in *North County Community Alliance, Inc. v. Kempthorne*, 573 F.2d 738, 746 (9th Cir. 2009) that it has such a mandatory duty. In its brief, NIGC stated:

> [I]f a tribe submits a site-specific gaming ordinance or management contract that indicates the proposed location of the gaming, then a determination must be made whether the location of the gaming is Indian lands.

91. A controversy currently exists between Plaintiffs and Defendants, in that Plaintiffs are informed and believe, and on that basis allege, that NIGC failed and refused to comply with its mandatory duty under IGRA to make an Indian land determination with respect to the Property prior to approval of the 2008 Ordinance and as a result, NIGC's approval of the 2008 Ordinance was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law. Plaintiffs are informed and believe, and on that basis allege, that NIGC contends that it was not required to comply with its mandatory duty to make an Indian land determination with respect to the Property.

92. Accordingly, Plaintiff seeks a declaration that NIGC was required to make such an Indian land determination with respect to the Property prior to approving the 2008 Ordinance, that NIGC failed to make such a determination, that NIGC's approval of the 2008 Ordinance be set aside and that the matter be remanded to NIGC to comply with its

mandatory duty to make a determination whether the Property is Indian land under the jurisdiction of the Lyttons.

THIRD CLAIM FOR RELIEF

(Claim To Set Aside Agency Action and for Declaratory Relief Against All Defendants; 28 U.S.C. § 2201, 5 U.S.C. § 701-706)

93. The paragraphs set forth above are realleged and incorporated herein by reference.

94. Section 706(2) of the APA permits the Court to set aside final agency action that is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. If, and to the extent that, upon approvals of the 2003 and 2008 Ordinances, NIGC made or is deemed to have made a determination that the Property is Indian land under the jurisdiction of the Lyttons within the meaning of 25 U.S.C. § 2710, then an actual controversy exists between Plaintiffs and Defendants. Plaintiffs contend that NIGC's determination was arbitrary, capricious, an abuse of discretion and otherwise in excess of its statutory and Constitutional authority in that:

a) The Lyttons were not a "recognized Indian tribe under federal jurisdiction" within the meaning of the Indian Reorganization Act (25 U.S.C. § 567 et seq.) (the "IRA") and thus, notwithstanding the Technical Amendment, the Property could not legitimately be taken into trust pursuant to the IRA for their benefit; and/or

b) Neither the Technical Amendment, the Secretary's acts in taking the Property into Trust on October 9, 2003, NIGC's approvals of the 2003 and 2008 Ordinances nor the Constitution authorizes a change in sovereignty over the Property.

95. In 1850, the Federal Government transferred plenary jurisdiction over the Property to the State of California when it admitted the State into the Union. The Federal Government did not reserve jurisdiction over the Property for itself or for any Indian peoples. Nor has

the State of California at any time since its admission voluntarily ceded plenary jurisdiction over the Property to the Federal government. As a result, at all times since 1850, including the present, the Property has been governed by the State of California.

96. The Secretary's act on October 9, 2003, of accepting title to the Property in trust for the Lytton, effected only a transfer of title and not a transfer of sovereignty. The State of California retains its plenary jurisdiction over the Property, and the Property remains subject to limitations under California law on land use and gambling. Neither the Technical Amendment nor the Reid Amendment purported to effect a change in the governmental sovereignty over the Property. Further to the extent that the Technical Amendment or the Reid Amendment purported to effect a change in the governmental sovereignty over the Property without the consent of the State of California, such Congressional actions were beyond Congress' powers under the United States Constitution.

97. Plaintiffs are damaged by the approval of the 2003 and 2008 Ordinances and by the wrongful assertion of Federal and Indian sovereignty over the Property. The immediate effect of the wrongful assertion is to allow illegal gambling in their neighborhood. Illegal gambling brings undesirable people and activities into their neighborhood. It causes land use impacts such as traffic, noise, and an increase in drunk driving. It causes land use impacts at all hours of the day, and each day of the year. It has also led to increase in crime in the neighborhood. The long term effect of the wrongful assertion of jurisdiction is to effect permanent change in sovereignty, to exempt the Property from laws applicable to all other properties in the vicinity, and to create a patchwork of governmental jurisdiction, where there is one law for one property and another law for the neighbor.

This attempt to free certain lands from local zoning or other regulatory controls that protect all landowners in the area frustrates and disrupts, and will continue to frustrate and disrupt, the settled expectations of neighbors, residents, and business owners. Absent a determination of the sovereignty issue now, the Lyttons may be treated as having obtained sovereignty through doctrines of laches, acquiescence or impossibility, and thereby permitted to continue to exercise such sovereignty in a manner detrimental to the surrounding community.

98. For these reasons, Plaintiffs seek a declaration that, notwithstanding the acceptance by the Secretary of title to the Property in trust for the Lyttons and NIGC's approval of the 2003 and 2008 Ordinances, the Property is not Indian land under the jurisdiction of the Lyttons, the Property is and shall remain under the plenary jurisdiction of the State of California and that State and local limits on land use and gambling govern and will continue to govern the Property and further seek an order setting aside the approvals of the 2003 and 2008 Ordinances.

FOURTH CLAIM FOR RELIEF

(Declaratory Relief Under 28 U.S.C. § 2201
Against All Defendants)

99. The paragraphs set forth above are realleged and incorporated herein by reference.

100. A controversy currently exists between Plaintiffs and Defendants regarding which governmental authority has sovereignty over the Property.

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

102. Defendants assert that the Property is no longer under the plenary jurisdiction of the State of California but is governed by Federal law and by the Lyttons. Defendants assert that in 2003, the United States obtained not only title to the Property but plenary jurisdiction over the Property.

103. Plaintiffs seek a declaration from the court that the Property remains subject to the plenary jurisdiction of the State of California.

FIFTH CLAIM FOR RELIEF

(Claim To Set Aside Agency Action and for Declaratory Relief against All Defendants; 5 U.S.C. § 701 et seq.; 28 U.S.C. § 2201)

104. The paragraphs set forth above are realleged and incorporated herein by reference.

105. The Proclamation taking the Property into trust was final agency action within in the meaning of 5 U.S.C. § 704 and Section 706(2) of the APA permits the Court to set aside final agency action that is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

106. To the extent that the Proclamation was intended to divest the State of jurisdiction and sovereignty over the Property and to confer sovereignty on the Lyttons, the Proclamation exceeded the statutory and Constitutional authority of the Defendants.

107. The Federal government transferred sovereignty to the State of California when it admitted the state to the Union. The Property has been governed by the State of California continually since then. The Federal government has not asked the State to cede any sovereignty over the Property to the Federal government for purposes of allowing the Lytton to exercise sovereignty, and the State has not ceded sovereignty over the Property for any purpose.

108. To the extent, if any, that the Proclamation effected any change in sovereign jurisdiction over the Property, Plaintiffs therefore seek a declaration that the State has and retains its sovereignty over the Property and an order setting aside the Proclamation.

SIXTH CLAIM FOR RELIEF

(Claim To Set Aside Agency Action Under APA and for Declaratory Relief Against NIGC; U.S.C. § 701 et seq; 28 U.S.C. § 2201)

109. The paragraphs set forth above are realleged and incorporated herein by reference.

110. NIGC's approval of the 2008 Ordinance was final agency action within the meaning of 5 U.S.C. § 704. Section 706(2) of the APA permits the Court to set aside final agency action that is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

111. IGRA allows class II gaming only if such gaming "is located within a state that permits such gaming for any purpose by any person, organization or entity...."

112. California does not permit the operation of electronic gaming machines by any person, organization or entity.

113. The 2008 Ordinance authorizes "[a]ll forms of Class II gaming as defined in IGRA." This would include not just games allowed in the state that are considered Class II under IGRA, but games considered Class II under IGRA that are not allowed in the state. Thus, assuming, without conceding, that some electronic gaming machines are properly classified as Class II machines, the 2008 Ordinance authorizes operation of electronic gaming machines even though California law does not permit the operation of electronic gaming machines by any person, organization or entity. Thus, the 2008 Ordinance violated the provisions of IGRA and should not have been approved.

114. Plaintiffs seek a declaration that NIGC's approval of the 2008 ordinance was arbitrary, capricious, and otherwise contrary to law and an order setting aside the approval of the 2008 ordinance.

SEVENTH CLAIM FOR RELIEF

(Claim To Set Aside Agency Action Under APA and for Declaratory Relief Against NIGC; 5 U.S.C. § 701 et Seq; 28 U.S.C. § 2201)

115. The paragraphs set forth above are realleged and incorporated herein by reference.

116. NIGC's approval of the 2008 Ordinance was final agency action within the meaning of 5 U.S.C. § 704 and Section 706(2) of the APA permits the Court to set aside final agency action that is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

117. Even if IGRA allows the Lytton to authorize all forms of Class II gaming, including those which California does not permit to any person, organization or entity, the electronic gaming machines in use at the Casino are not class II games. Rather, the electronic gaming machines are slot machines under IGRA.

118. At the time the 2008 Ordinance was submitted, NIGC knew or should have known that the Lyttons were operating electronic gaming machines, and that such machines are slot machines and properly classified as Class III games. NIGC should not have approved the Ordinance knowing that the Lyttons were operating Class III machines without a valid and approved Tribal-State compact.

119. Plaintiffs seek a declaration that the approval of the 2008 Ordinance was arbitrary, capricious and otherwise contrary to law and an order setting aside the 2008 Ordinance.

EIGHTH CLAIM FOR RELIEF

(Claim To Set Aside Agency Action Under APA and for Declaratory Relief Against NIGC; 5 U.S.C. § 701 et Seq; 28 U.S.C. § 2201)

120. The paragraphs set forth above are realleged and incorporated herein by reference.

121. A controversy exists between Plaintiffs and NIGC, in that Plaintiffs assert that the electronic gaming machines in use at the Casino are slot machines and properly classified as Class III games. NIGC treats the electronic gaming machines in use at the Casino as electronic aids to bingo and thus as Class II games.

122. Plaintiffs are injured by the operation of illegal gambling in their neighborhood. Illegal gambling brings undesirable people and activities into their neighborhood. It causes land use impacts such as traffic, noise, and an increase in drunk driving. It causes land use impacts at all hours of the day, and all days of the year. It has also led to increase in crime in the neighborhood.

123. Plaintiffs seek a declaration that the electronic gaming machines in use at the Casino are slot machines and properly classified only as Class III games.

PRAYER FOR RELIEF

1. On the First Claim For Relief:

   a) a declaration that NIGC was required to make an Indian lands determination with respect to the Property prior to approving the 2003 Ordinance and that NIGC failed to make such a determination;

   b) an order setting aside NIGC's approval of the 2003 Ordinance;

   c) an order remanding the matter to the NIGC to comply with such mandatory duty to make a determination whether the Property is Indian land under the jurisdiction of the Lyttons.

2. On the Second Claim for Relief:

   a) a declaration that NIGC was required to make an Indian lands determination with respect to the Property prior to approving the 2008 Ordinance and that NIGC failed to make such a determination;

   b) an order setting aside NIGC's approval of the 2008 Ordinance;

   c) an order remanding the matter to the NIGC to comply with such mandatory duty to make a determination whether the Property is Indian land under the jurisdiction of the Lyttons.

3. On the Third Claim for Relief:

   a) a declaration that, notwithstanding the acceptance by the Secretary of title to the Property in trust for the Lyttons and NIGC's approval of the 2003 and 2008 Ordinances, the Property is not Indian land under the jurisdiction of the Lytton, the Property is and shall remain under the plenary jurisdiction of the State of California and that State and local limits on land use and gambling govern and will continue to govern the Property;

   b) an order setting aside the approvals of the 2003 and 2008 Ordinances.

4. On the Fourth Claim for Relief:

   a) a declaration from the court that the Property remains subject to the plenary jurisdiction of the State of California.

5. On the Fifth Claim for Relief:

   a) to the extent, if any, that the Proclamation effected any change in sovereign jurisdiction over the Property, a declaration that the State has and retains its sovereignty over the Property;

b) an order setting aside the Proclamation.

6. On the Sixth Claim For Relief:

a) a declaration that NIGC's approval of the 2008 ordinance was arbitrary, capricious, and otherwise contrary to law;

b) an order setting aside the approval of the 2008 ordinance.

7. On the Seventh Claim for Relief:

a) a declaration that the approval of the 2008 Ordinance was arbitrary, capricious and otherwise contrary to law;

b) an order setting aside the 2008 Ordinance.

8. On the Eighth Claim for Relief:

a) a declaration that the electronic gaming machines in use at the Casino are slot machines and properly classified as Class III games.

9. On all Claims for Relief:

a) Costs of suit, including an award of attorneys fees pursuant to 28 U.S.C. § 2412 or as otherwise provided by law; and,

b) Such other relief as the Court may deem just and equitable.

Respectfully submitted,

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