UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NEIGHBORS OF CASINO SAN PABLO, an unincorporated association;
2420 Lowell Avenue
Richmond, CA 94804;

ANDRES SOTO
2420 Lowell Avenue
Richmond, CA 94804;

ANNE RUFFINO
2420 Lowell Avenue
Richmond, CA 94804;

ADRIENNE HARRIS
3314 Tulare Avenue
Richmond, CA 94804;

TANIA PULIDO
2548 MacArthur Avenue
San Pablo, CA 94806;

and

BARBARA BUSHEE
9 Charlotte Court
El Sobrante, CA 94803

***Plaintiffs*,**

v.

KEN L. SALAZAR, in his official capacity as Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
Washington DC 20240;

LARRY ECHO HAWK, in his official capacity as Assistant Secretary of the Interior – Indian Affairs
Department of the Interior
1849 C Street, N.W.
Washington DC 20240;

Case No. 1:09-cv-02384-RJL
Judge Richard J. Leon

GEORGE SKIBINE, in his official capacity as Acting Chairperson of the National Indian Gaming Commission
1441 L. Street NW
Suite 9100
Washington DC 20005;

and,

NATIONAL INDIAN GAMING COMMISSION
1441 L. Street NW
Suite 9100
Washington DC 20005,

***Defendants*.**

UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendants, Kenneth L. Salazar, in his official capacity as Secretary of the United States Department of the Interior, Larry EchoHawk, in his official capacity as Assistant Secretary of the Interior – Indian Affairs, George Skibine, in his official capacity as the Acting Chairman of the National Indian Gaming Commission ("NIGC"), and the NIGC (collectively, the "United States"), by undersigned counsel, hereby respectfully submit this Statement of Points and Authorities in support of their Motion to Dismiss. For the reasons described below, Plaintiffs lack standing to bring this suit, this Court lacks subject matter jurisdiction over Plaintiffs' claims and Plaintiffs fail to state claims upon which relief can be granted. The United States therefore respectfully requests that the Court dismiss Neighbors' First Amended Complaint.

Introduction

The Lytton Band of Pomo Indians of the Lytton Rancheria ("Lytton" or "Tribe") is a federally recognized tribe that lawfully operates a gaming facility in the City of San Pablo, California. This lawsuit is the second challenging various actions of Federal officials that allowed the Lytton to establish a gaming facility in the City.[1/] In the first lawsuit, local card rooms and charities brought an action to enjoin the Secretary of the Interior ("Secretary") from taking the land into trust. Artichoke Joe's Cal. Grand Casino v. Norton, 278 F. Supp. 2d 1174 (E.D. Ca. 2003) (Artichoke Joe's II). Plaintiffs unsuccessfully sought an injunction preventing the Secretary from taking the San Pablo land into trust and their Tenth Amendment and Enclave Clause claims were dismissed for lack of standing. Id. at 1181, 1187-88.

Neighbors[2/] now seeks to re-litigate the Secretary's authority to take the land into trust and also challenges the NIGC's approval of tribal gaming ordinances in an attempt to stop Lytton from lawfully operating a class II gaming facility in San Pablo. In their first and second claims, Neighbors alleges that the NIGC failed and refused to comply with a mandatory duty under

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[1/] Artichoke Joe's also filed a separate lawsuit seeking a declaration that any tribal-state compact between the Governor of California and the Lytton Rancheria violated the Indian Gaming Regulatory Act, the Johnson Act, the Supremacy Clause, and the Fourteenth Amendment, and Artichoke Joe's sought an injunction to prevent the Governor from entering into such a compact. Artichoke Joe's v. Norton, 216 F. Supp.2d 1084, 1099 (E.D. Ca. 2002) (Artichoke Joe's I). Because California and Lytton had not yet entered into a Tribal-State Compact, that claim was dismissed on constitutional standing grounds and the parties did not appeal the dismissal of that claim. Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712, n.9 (9th Cir. 2003).

[2/] 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." Am. Compl. ¶ 9. The First Amended Complaint also names various individuals that reside in the City of Richmond, California, Contra Costa County, and in the City of San Pablo. They are referred to collectively as "Neighbors" or "Plaintiffs".

IGRA to make an Indian lands determination. Neighbors' third claim alleges that to the extent the NIGC made or is deemed to have made an Indian lands determination, that determination was arbitrary and capricious. Neighbors' fourth claim cites only the Declaratory Judgement Act, 28 U.S.C. § 2201, in seeking a declaration and its fifth claim contends that the Secretary's proclamation taking the land into trust was arbitrary and capricious. Finally, Neighbors' sixth, seventh and eighth claims all allege that the games being offered by Lytton are class III games, or illegal under state law, and therefore unlawful. Because Plaintiffs lack standing, fail to state claims against the NIGC regarding the approval of the Lytton gaming ordinances, and fail to state a claim against the Secretary for placing the land into trust, Neighbors' First Amended Complaint should be dismissed.

I. FACTUAL AND STATUTORY BACKGROUND

A. The Lytton Rancheria

Lytton is a federally recognized Indian tribe, see Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40218-02, 40220 (Aug. 11, 2009), that was previously terminated by the federal government under Pub. L. 85-671, 72 Stat. 619 (1958). This termination was challenged and in 1991, Lytton was reinstated according to the terms of a stipulation entered into between the Tribe, the United States, and the County of Sonoma where the Tribe's lands historically were located. Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria v. United States, No. C-86-3660 (N.D. Cal. Mar. 22, 1991) (Stipulation for Entry of Judgment), Am. Compl. ¶¶ 20, 55; Notice of Reinstatement to Former Status for the Guidiville Band of Pomo Indians, the Scotts Valley Band of Pomo Indians

and Lytton Indian Community of California, 57 Fed. Reg. 5214-01 (Feb. 12, 1992)).[3/] The stipulation included provisions which permitted the Secretary to take land into trust for the then landless Tribe in the Alexander Valley in Sonoma County. Stipulation ¶ 5; Artichoke Joe's I, 216 F. Supp. 2d at 1096-97. The stipulation also ensured that Lytton could not conduct gaming in Alexander Valley/Sonoma County, except in conformity with the County's general plan and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2729 ("IGRA"). Artichoke Joe's II, 278 F. Supp. 2d at 1177; Stipulation ¶ 5. Since the entry of the stipulation, Lytton has been listed as a recognized tribe in the Federal Register every time such notices have been issued.

Because gaming is inconsistent with the Sonoma County general plan, Lytton could not game in Alexander Valley, where the original Rancheria was located. Artichoke Joe's II, 278 F. Supp. 2d at 1177.

B. The Omnibus Indian Advancement Act of 2000.

Property in the City of San Pablo, California ("San Pablo Property") was eventually identified as a suitable gaming property.[4/] Artichoke Joe's II, 278 F. Supp. 2d at 1177. The property consists of approximately 9.5 acres of land. Am. Compl. ¶ 59. Pursuant to the Omnibus Indian Advancement Act of 2000 ("Omnibus Act"), Pub. L. 106-568, 114 Stat. 2868, Congress directed the Secretary to take the San Pablo Property in Contra Costa County, California, into trust for in the benefit of the Lytton for the purposes of tribal government gaming

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[3/]The Stipulation, which is incorporated by reference in the First Amended Complaint, is attached hereto as Exhibit A. Anderson v. Reilly, -- F. Supp. 2d --, 2010 WL 768739, *1 (D.D.C. 2010) (in deciding a motion to dismiss, a court may consider documents incorporated by reference in the complaint).

[4/] A private entity was already operating a card room on the property. Artichoke Joe's II, 278 F. Supp. 2d at 1177.

under IGRA. Section 819 of the Omnibus Act provides:

> 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.

Pub. L. 106-568, § 819, 114 Stat. 2868 (2000). On October 9, 2003, the Secretary accepted title to the San Pablo Property into trust and on July 13, 2004, the Assistant Secretary for Indian Affairs declared the Property to be a part of the Lytton reservation. Proclaiming Certain Lands as Reservation for the Lytton Rancheria of California, 69 Fed. Reg. 42066-01 (July 13, 2004). The last sentence of Section 819 exempts the San Pablo Property from Section 20 of IGRA, which generally prohibits gaming on lands acquired after October 17, 1988 (the date of IGRA's enactment), unless the property meets one of the exceptions contained in Section 20, 25 U.S.C. § 2719.

In 2001, Congress revised the terms governing the conduct of gaming on the San Pablo Property when it enacted Section 128 of Pub. L. 107-63, which states that, "[t]he Lytton Rancheria of California shall not conduct class III gaming as defined in Pub. L. 100-497 [IGRA] on land taken into trust for the Tribe pursuant to Pub. L. 106-568 except in compliance with all required compact provisions of Sec. 2710(d) of Pub. L. 100-497 or any relevant Class III gaming procedures." Pub. L. 107-63, Section 128 (2001), 115 Stat. 442 (Nov. 5, 2001).

C. The Indian Gaming Regulatory Act.

Congress enacted IGRA, in large part, "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government" and "to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702(1)-(2); see also Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852, 865 (D.C. Cir. 2005).

By permitting tribes to establish and regulate gaming on their lands, IGRA recognizes and accounts for tribes' sovereignty over their own lands. "Indian tribal territory has always held a separate status under federal law. Tribes exercise substantial governing powers within their territory, they have important economic and property rights, and a number of federal laws also govern other relationships, all to the exclusion of state law." Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 735 (quoting Felix Cohen, Handbook of Federal Indian Law 27 (2d ed. 1982)); see also United States v. Wheeler, 435 U.S. 313, 322-23 (1978) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975))). "IGRA is an example of 'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." Artichoke Joe's, 353 F.3d at 715.

IGRA classifies gaming into three classes. Class I gaming is defined as social games for minimal value prizes or traditional forms of Indian gaming engaged in as part of tribal ceremonies or celebrations. 25 U.S.C. § 2703(6). Class I gaming is within the exclusive jurisdiction of the Indian tribes and is not subject to regulation under IGRA. Id. § 2710(a)(1).

Class II gaming includes bingo and similar games, and card games (excluding "banking card games" such as blackjack). Id. § 2703(7). Class III gaming includes all forms of gaming that are not Class I or Class II gaming (such as banked card games and slot machines). Id. § 2703(8). Class II and Class III gaming are subject to regulation under IGRA. Id. § 2710(a)(2)-(b) & (d). A tribe that wishes to conduct class III gaming must first enter a compact with the state in which the class III gaming is to occur, and the compact must be approved by the Secretary. Id. § 2710(d)(3), (8).

A tribe that wishes to conduct gaming activities under IGRA must adopt a tribal gaming ordinance and the NIGC must approve it. Id. § 2710(b)(2), (d)(1)(A). IGRA requires the Chairman of the NIGC to approve a Class II or Class III gaming ordinance if it satisfies a number of conditions relating to ownership and control of the gaming, use of gaming revenues, and audits. Id. § 2710(b)(2). Additionally, any Indian tribe that wishes to contract with an outside manager for the management of a gaming facility must first obtain the NIGC's approval of the management contract. Id. § 2711.

A tribe may conduct gaming under IGRA only on "Indian lands." See id. §§ 2710(b)(1) (Class II) & 2710(d)(3) (Class III); Facility License Standards, 73 Fed. Reg. 6,019, 6,022 (Feb. 1, 2008) ("IGRA requires that all gaming take place on 'Indian lands.'"). IGRA defines "Indian lands" 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 an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4); see also 25 C.F.R. § 502.12.

IGRA authorizes the NIGC to promulgate regulations and to monitor Indian gaming activities in order to achieve the purposes of the statute. 25 U.S.C. § 2706(b)(1), (10). The Act also authorizes the NIGC Chairman to bring enforcement actions and collect civil fines for violations of the statute, the NIGC regulations, or approved tribal gaming ordinances. Id. § 2713. The NIGC Chairman has the authority to close temporarily Indian gaming, with the NIGC having the authority to halt gaming permanently if it finds a substantial violation. Id. § 2713(b).

D. The Lytton Gaming Ordinances.

On July 8, 1999, Lytton adopted a tribal gaming ordinance and Tribal Gaming Code for the conduct of gaming on the Tribe's reservation. The NIGC subsequently approved the ordinance on July 13, 1999.[5/] The 1999 gaming ordinance provided for the conduct of gaming on reservation lands, defined as, "any lands, title to which is either held in trust by the United States for the benefit of the Lytton Band of Pomo Indians, or held by the Lytton Band of Pomo Indians subject to restriction against alienation by the United States and over which the Lytton Band of Pomo Indians exercise governmental authority whether or not the lands have been formally declared to be a reservation." 1999 Ord. at 6. As such the ordinance was not site-specific, but general in its application to lands that qualified under it.

As discussed above, on October 9, 2003, the Secretary took the San Pablo Property into

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[5/]Copies of the gaming ordinances and the NIGC approvals are publicly available on the NIGC website at http://nigc.gov/ReadingRoom/GamingOrdinances/tabid/909/Default.aspx#L. The 2003 and 2008 ordinances are also attached to the First Amended Complaint as Exhibits, Am. Compl. Ex. A, Ex. B , and the 1999 ordinance is incorporated by reference, Am. Compl. ¶ 56. Therefore, the Court may consider the ordinances without converting the motion to dismiss to a motion for summary judgment. Randolph v. ING Life Ins. & Annuity Co., 486 F. Supp. 2d 1, 5 (D.D.C. 2007) ("The court is limited to considering facts alleged in the complaint, any documents attached to or incorporated in the complaint, matters of which the court may take judicial notice, and matters of public record.").

trust for the Tribe as mandated by Congress in Section 819. As of that date, the land immediately qualified as Indian lands eligible for gaming by the Tribe. Because the Tribe's 1999 gaming ordinance was approved by the NIGC, and the land at issue had been taken into trust, the Tribe could begin class II gaming on the land. However, Lytton was not prepared to take over the gaming facility on the San Pablo Property that was owned and operated by SF Casino Management, L.P., which was licensed to conduct card games in accordance with California state law. Instead, the Tribe licensed the card club pursuant to Section 2710(b)(4)(B) of IGRA so that it could continue its operations under state law until such time as the Tribe was prepared to take over the facility. Section 2710(b)(4)(B) authorizes tribes to license non-tribal entities to conduct gaming on their lands in accordance with state law. 25 U.S.C. § 2710(b)(4)(B). The temporary license was issued for the period between the land being taken into trust (October 9, 2003) and the Tribe assuming full ownership and operational control over Casino San Pablo (November 24, 2003).

On December 13, 2003, Lytton adopted an ordinance amendment which provided for the revocation of the temporary license granted to SF Casino Management, L.P. to conduct a class II gaming operation on property in the City of San Pablo, California. Resolution of the Lytton Rancheria of California Revoking Temporary Class II Gaming Operation License of SF Casino Management, L.P., a California Limited Partnership, Etc., Resolution No. 121303-1 (December 13, 2003), Am. Compl. Ex. A.[6/] However, the original 1999 Ordinance remained in effect for

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[6/]As the resolution discusses, Lytton originally rescinded their gaming ordinance, instead of just amending it to revoke the temporary license, which required the Tribe to resubmit the December 13, 2003 Resolution to the NIGC to clarify that the amendment was only intended to revoke the temporary license, not to rescind the 1999 gaming ordinance.

regulation of gaming on all Lytton reservation lands. It was only amended as to a particular provision regarding licensing of SF Casino Management, L.P. during the limited time period before Lytton took over operations.

On January 30, 2008, Lytton enacted an amended gaming ordinance, which the NIGC approved on May 22, 2008. The 2008 resolution and ordinance repealed and replaced the 1999 Ordinance and Tribal Gaming Code and all other prior gaming ordinances. 2008 Ordinance ¶ XIII, Am. Compl. Ex. B. The 2008 Ordinance provides for class II and class III gaming, but it is not site-specific and it does not identify specific types of class II games.

II. STANDARD OF REVIEW

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the Court may dismiss a complaint for lack of subject matter jurisdiction. If a plaintiff lacks standing to bring a claim, that is a defect in the court's subject matter jurisdiction over the claim. See Haase v. Sessions, 835 F.2d 902, 906 (D.C. Cir. 1987) (citing Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986)). "Although the District Court may in appropriate cases dispose of a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) on the complaint standing alone, where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Coal. for Underground Expansion v. Mineta, 333 F.3d 193, 198 (D.C. Cir. 2003) (internal quotation marks and citation omitted).

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits the Court to dismiss a complaint when it fails "to state a claim upon which relief can be granted." "[T]he accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears that the

plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Generally, under this standard, the Court accepts the allegations within the complaint as true and resolves ambiguities in favor of the pleader. See Harbury v. Deutch, 244 F.3d 956, 958 (D.C. Cir. 2001); Tripp v. Dep't of Defense, 193 F. Supp. 2d 229, 234 (D.D.C. 2002).

However, there are several exceptions to the general rule of construction. "The Court is not required to draw argumentative inferences in favor of the Plaintiffs." Yamaha Motor Corp. v. United States, 779 F. Supp. 610, 611 (D.D.C. 1991). Facts that are internally inconsistent within the pleadings need not be accepted as true. See Gibbs v. Buck, 307 U.S. 66, 72 (1938). The Court also need not accept facts that run counter to facts of which the Court can take judicial notice. Fletcher v. Jones, 105 F.2d 58, 61 (D.C. Cir. 1939). Further, the Court "need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast in the form of factual allegations." Guam Indus. Services, Inc. v. Rumsfeld, 405 F. Supp. 2d 16, 19 (D.D.C. 2005) (citing Warren v. Dist. of Columbia, 353 F.3d 36, 39 (D.C. Cir. 2004); Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002)); see also Kowal v. MCI Comms. Corp.,16 F.3d 1271, 1276 (D.C. Cir. 1994).

III. ARGUMENT

First, Plaintiffs fail to state a claim upon which relief can be granted because the NIGC was not required to issue an Indian lands determination or to rule on the classification of specific games when approving the Lytton gaming ordinances. Second, this Court lacks subject matter jurisdiction over Plaintiffs' fourth claim seeking a declaratory judgment, and Plaintiffs lack standing to assert their Constitutional claims because it is the State of California that must assert

those claims. Plaintiffs also fail to state a claim against the Secretary for the Congressionally mandated acquisition of land into trust on behalf of the Lytton and the subsequent proclamation that the land is part of the Lytton reservation. Finally, NIGC's enforcement decisions are discretionary and not subject to judicial review.

A. The San Pablo Property is Indian land under IGRA since it was taken into trust and nothing in IGRA requires the NIGC to issue an Indian lands determination when approving a gaming ordinance.

1. The San Pablo Property automatically became Indian lands pursuant to IGRA when it was taken into trust.

In their first and second claims, Neighbors alleges that the 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 and 2008 Lytton ordinances. Am. Compl. ¶¶ 85, 91. Neighbors' argument should be rejected because once the land went into trust on October 9, 2003, it automatically became "Indian lands" pursuant to IGRA. IGRA provides that, "any lands title to which is . . .held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe" and "over which an Indian tribe exercises governmental power," 25 U.S.C. § 2703(4); 25 C.F.R. § 502.12, is "Indian lands." Section 819 required the Secretary to take the land into trust and make it part of the Tribe's reservation. This satisfied IGRA's Indian lands requirement as soon as the land was taken into trust.

Section 819 also directly states that Congress intended the land to be eligible for gaming, "[s]uch land shall be deemed to have been held in trust and part of the reservation of the Rancheria prior to October 17, 1988." Pub. L. 106-568, § 819, 114 Stat. 2868 (2000). The reference to October 17, 1988, is from Section 20 of IGRA, which prohibits gaming on all lands

acquired after that date. 25 U.S.C. § 2719(a). By exempting the San Pablo Property from that prohibition, Congress clearly intended the land to be eligible for gaming. As a result, it was unnecessary for the NIGC to issue an Indian lands determination. Accordingly, no further action by the NIGC was necessary and the Court should dismiss Neighbors' first and second claims.

2. Nothing in IGRA requires the NIGC to issue an Indian lands determination when approving a gaming ordinance.

Furthermore, IGRA imposes no obligation on the NIGC to perform an independent, formal Indian lands determination when a tribe submits a gaming ordinance. Under APA section 706(1), a claim that a final agency action has been "unlawfully withheld" or "unreasonably delayed," such as Neighbors' claim here, "can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." Kaufman v. Mukasey, 524 F.3d 1334, 1338 (D.C. Cir. 2008), quoting Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 64 (2004) (emphasis in original). The term "failure to act," in this context, means a failure to take a required "agency action" – that is, a failure to take one of the agency actions (or its equivalent) defined in 5. U.S.C. § 551(13) that is legally required. S. Utah Wilderness Alliance, 542 U.S. 55, 62-63 ("The important point is that a 'failure to act' is properly understood to be limited, as are the other items in § 551(13), to a discrete action. . . . [T]he only agency action that can be compelled under the APA is action legally required.").

Even if the San Pablo Property did not automatically become Indian lands by operation of Section 819, IGRA simply does not require the NIGC to perform an independent, formal Indian lands determination when a tribe submits a non-site-specific gaming ordinance. While the 2003 ordinance amendment identifies the San Pablo Property for purposes a temporary license

provision amendment to the 1999 ordinance, it did not change the Indian lands definition of the 1999 ordinance. Thus, the provision in the 1999 ordinance defining "Indian lands" remained the same and no Indian lands determination was necessary.

Finally, while IGRA limits a tribe's right to conduct gaming to "Indian lands," 25 U.S.C. § 2710(b)(1) & (d)(3), it does not mandate that the NIGC resolve the Indian lands issue in the context of ordinance approval or any other proceeding. As the Ninth Circuit concluded in a similar case, North County Community Alliance, Inc. v. Salazar, the "NIGC was not required in 1993, when it approved the Nooksacks' [the tribe's] non-site-specific Ordinance, to make an Indian lands determination for the parcel on which the Casino is located[,]" and there was "nothing in the text of IGRA, or in any implementing regulation in effect in 2006, that required the NIGC to make an Indian lands determination when a tribe licensed or began construction of a class II gaming facility already authorized by a non-site-specific ordinance." 573 F.3d 738, 747 (9th Cir. 2009).[7/] Indeed, the IGRA provisions relied upon by plaintiffs in the North County case and Neighbors in the instant case do not require the NIGC to make any determinations. Because IGRA does not direct the NIGC to perform an independent, formal Indian lands determination, it has not failed to perform "a clear statutory duty."

Of course, IGRA does impose several other "clear statutory duties" on the NIGC and the Secretary. The NIGC must review and approve tribal gaming ordinances. 25 U.S.C. § 2710. The NIGC must review and approve management contracts between tribes and outside managers,

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[7/]The non-site-specific 1999 Ordinance authorized gaming on lands that qualified as "Indian lands" under IGRA. As a result, Lytton did not need to submit a site-specific ordinance for the San Pablo Property as it was property that the Secretary had taken into trust, in compliance with a statutory mandate to do so.

25 U.S.C. § 2711, and Interior must review and approve tribal-state compacts for Class III gaming. 25 U.S.C. § 2710(d). In satisfying these duties, if a tribe submits a site-specific gaming ordinance or management contract[8/] that indicates the proposed location of the gaming, only then may the NIGC make a determination about whether the gaming will be on Indian lands. However, that sort of formal Indian lands determination is ancillary to NIGC's performance of one of its mandated statutory duties. Undertaking such an ancillary analysis in those instances does not create a mandatory obligation on the NIGC to make an Indian lands determination.[9/]

Because the NIGC does not have a statutory or regulatory duty to perform the action that the Neighbors seeks to compel, the Court should dismiss Neighbors' first and second claims.

B. Neighbors' third claim should be dismissed because the NIGC did not issue an Indian lands determination and the claim is barred by the Quiet Title Act.

1. The NIGC did not issue an Indian lands determination.

Neighbors' third claim alleges that, "to the extent that, upon approvals of the 2003 and 2008 Ordinances, the NIGC made or is deemed to have made a determination that the Property is

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[8/]Management contracts are always site-specific because they involve the NIGC Chairman's review of the management of a particular gaming facility or facilities.

[9/]IGRA grants the NIGC the authority to take enforcement actions if gaming is conducted in a manner that violates IGRA, the NIGC regulations, or an approved tribal gaming ordinance. 25 U.S.C. § 2713. In addition, IGRA directs the NIGC to refer information indicating a violation of other laws to the appropriate law enforcement officials. 25 U.S.C. § 2716(b). Therefore, if a tribe opens a gaming operation on a site that qualifies as Indian lands under IGRA, but is ineligible for gaming under 25 U.S.C. § 2719, then the tribe is in violation of IGRA and the NIGC could exercise its enforcement powers. That enforcement authority, however, is subject to the NIGC's enforcement discretion. See Heckler v. Chaney, 470 U.S. 821, 831 (1985) (The "decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."); Sierra Club v. Whitman, 268 F.3d 898, 903 (9th Cir. 2001) (an agency's decision to not take an enforcement action is "typically committed to the agency's absolute discretion").

Indian land under the jurisdiction of the Lyttons within the meaning of 25 U.S.C. § 2710, ... Plaintiffs contend that NIGC's determination was arbitrary, capricious, an abuse of discretion and otherwise in excess of its statutory and Constitutional authority[.]" Am. Compl. ¶ 94.[10/] As discussed above, the NIGC did not issue an Indian lands determination and was not required to do so when approving the temporary license ordinance amendment in 2003 or in approving the 2008 non-site-specific ordinance. Therefore, Neighbors' third claim should be dismissed.[11/]

2. The Quiet Title Act Bars Plaintiffs' Indian lands Claim.

Neighbors third claim is also barred by the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a. The QTA applies to any action challenging the status of Indian lands and, therefore, the United States has not waived its sovereign immunity. Neighbors seek a declaration that, "the Property is not Indian land under the jurisdiction of the Lyttons[.]" Am. Compl. ¶ 98, Prayer for Relief ¶ 3(a). This claim is barred by the QTA because the United States set aside the San Pablo Property as trust Indian lands for the benefit of the Lytton. The QTA expressly applies to trust Indian land and preserves the United States' immunity to such a challenge. 28 U.S.C. § 2409a(a) (QTA waiver "does not apply to trust or restricted Indian lands").

Even if Plaintiffs are not directly challenging the United States' actual title to the property, the relief they seek would limit the use of the San Pablo Property if granted. A declaration that the parcel is not Indian land would impose a limitation on the Lytton's use of the

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[10/]In paragraph 94(a) of their Amended Complaint, Neighbors asserts that the Secretary could not take the land into trust pursuant to the IRA for Lytton's benefit. However, the land was not taken into trust pursuant to the Secretary's discretionary authority under the IRA, it was taken into trust pursuant to Congress' mandate in Section 819 of the Omnibus Act.

[11/]As discussed infra., section III.D., Neighbors also lacks standing to assert the Constitutional claims mentioned in its third claim for relief.

land. Their effort to strip the San Pablo Property of its status is also strictly precluded by the QTA. United States v. Mottaz, 476 U.S. 834, 843 (1986) ("When the United States claims an interest in real property based on that property's ***status*** as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity.") (emphasis added). As the Tenth Circuit stated in Shivwits Band of Paiute Indians v. Utah, "[i]t is well settled law [that] . . . a reviewing court 'must focus on the relief . . . request[ed],' rather than on the party's characterization of the claim." 428 F.3d 966, 974-75 (10th Cir. 2005), cert. denied, 549 U.S. 809 (2006) (quoting Neighbors for Rational Dev. v. Norton, 379 F.3d 956, 961 (10th Cir. 2004)). The fact that Neighbors does not seek to quiet title for their benefit is irrelevant. United States v. Mottaz, 476 U.S. 834, 843 (1986). If the remedy sought by a plaintiff would alter the ***status*** of the land as trust Indian land by placing restrictions on how it can be used by its owner, sovereign immunity precludes the case from going forward. Id. at 843.

Neighbors claims that the San Pablo Property does not constitute Indian lands under IGRA. Whether they couch that challenge in terms of IGRA or the APA is irrelevant because it is the effect of the challenge or the remedy sought that is the ultimate issue.[12/] If Neighbors prevail, the land will lose its trust Indian land status, any benefit that may accrue to the Tribe will be lost, and the United States will be effectively stripped of its trust title in the land because it will not be able to regulate use of the land in the manner clearly endorsed by Congress in the Omnibus Act. Therefore, the third claim necessarily challenges the status of the land and the interests of the United States and it is barred by the QTA because the United States has not

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[12/]Courts have repeatedly emphasized that plaintiffs cannot avoid the QTA's impact by characterizing their claim as falling under the APA. Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 286 n.22 (1983).

waived its sovereign immunity for this suit.

C. The Declaratory Judgment Act does not constitute an independent grant of jurisdiction.

Neighbors' fourth claim cites only the Declaratory Judgement Act ("DJA"), 28 U.S.C. § 2201, in seeking "a declaration from the court that the Property remains subject to the plenary jurisdiction of the State of California." Am. Compl. ¶ 103. However, the DJA does not constitute an independent grant of jurisdiction. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950); C & E Services, Inc. of Washington v. District of Columbia Water and Sewer Auth., 310 F.3d 197, 201 (D.C. Cir. 2002). "Rather, the statute merely creates a remedy in cases otherwise within the Court's jurisdiction." Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan v. Ashcroft, 360 F. Supp. 2d 64, 66 n.3 (D.D.C. 2004), citing C & E Services, Inc., 310 F.3d at 201. Neighbors' fourth claim fails to specify any cause of action through which the Court may exercise subject matter jurisdiction and grant declaratory relief. Simply seeking a declaration that the Property remains subject to California jurisdiction, without citing what law the United States violated or what agency action they are seeking to have overturned, does not provide the Court with jurisdiction. As a result, Neighbors' fourth claim should be dismissed because this Court lacks subject matter jurisdiction over the claim.

D. Neighbors lacks standing to assert an Enclave Clause claim.

To the extent Neighbors' third, fourth and fifth claims can be construed[13/] to properly

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[13/]In all three claims, Neighbors makes oblique references to the State of California's sovereignty and jurisdiction over the land, but does not directly allege that the United States violated the Enclave Clause. Am. Compl. ¶¶ 96, 102, 106. As discussed supra, section III.B.2., the QTA applies to any action challenging the status of Indian lands and, therefore, the United States has not waived its sovereign immunity. Any claim that the Secretary's actions taking the land into trust were ultra vires or unconstitutional would also be barred by the QTA. The QTA expressly

allege that the United States violated the Enclave Clause of the United States Constitution, art. I, § 8, cl.17,[14/] based on the allegations set forth in paragraphs 19-21 of the First Amended Complaint, Neighbors lacks standing to assert the claims.

Standing involves both Constitutional limitations on a federal court's jurisdiction and prudential limitations on that exercise. See Warth v. Seldin, 422 U.S. 490, 498 (1975). Therefore, Neighbors must establish both constitutional and prudential standing. Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1232 (D.C. Cir. 1996). The injury that supplies constitutional standing must fall within the "zone of interests" protected by the provision at issue for purposes of prudential standing. Id. The party invoking federal jurisdiction bears the burden of establishing the elements of standing. FW/PBS Inc. v. Dallas, 493 U.S. 215, 231 (1990). When a plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily substantially more difficult to establish. Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992).

To establish prudential standing, a plaintiff generally must show that "the interest sought to be protected by complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970); see also Nat'l Petrochemical & Refiners Ass'n v. EPA, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (same). In Cement Kiln Recycling Coal. v. EPA,

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applies to trust Indian land and preserves the United States' immunity to such a challenge. 28 U.S.C. § 2409a(a) (QTA waiver "does not apply to trust or restricted Indian lands"). Therefore, Neighbors' Enclave Clause claims are also barred by the QTA.

[14/]The Enclave Clause requires the consent of a State before the federal government may establish an enclave within a State's territory that is exclusively subject to federal legislative authority.

255 F.3d 855 (D.C. Cir. 2001), the D.C. Circuit noted that the test operates to "deny standing to one claiming to be a suitable challenger when plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Id. at 871(internal quotations omitted). The zone of interests test requires a court to ask first what interests "arguably [are] to be protected by the statutory [or constitutional] provision at issue," and then determine "whether plaintiff's interests affected by the agency action in question are among them." Nat'l Credit Union Admin.v. First Nat'l Bank & Trust Co., 522 U.S. 479, 492 (1998) (internal quotations omitted). Where a constitutional provision is at issue, the zone of interests is determined by resort to the intent of the Framers of the Constitution. DKT Mem. Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 286 (D.C. Cir. 1989).

Assuming Neighbors' alleged injuries can be traced to a violation of the Enclave Clause, they nevertheless cannot be viewed as falling within the zone of interests to be protected by the Clause which exclusively involves protecting a State's territorial interests. The Enclave Clause was intended to promote federal interests while preventing a diminishment of state territory and jurisdiction without the consent of the applicable State. Here, the only party within the zone of interests protected by the Clause is the State of California. The State has not raised such a challenge. Neighbors cannot allege harm from violation of a provision intended to protect only States. Cement Kiln Recycling Coal. v. EPA, 255 F.3d at 870-71 ("Under this 'zone of interests' test, the essential inquiry is whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency disregard of the law.") (internal quotations and brackets omitted).

Furthermore, Neighbors has not demonstrated an ability to assert third-party standing on behalf of the State. Third-party standing is only available when three criteria are met: "[t]he litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute, the litigant must have a close relation to the third party, and there must exist some hindrance to the third party's ability to protect his or her own interest." Powers v. Ohio, 499 U.S. 400, 410-11 (1991) (quoting Singleton v. Wulff, 428 U.S. 106, 112, 113-114, 116 (1976)). There can be no dispute that Plaintiffs cannot establish the third Powers element as the State of California clearly had the capability of challenging the Secretary's decision to acquire the land in trust if it chose to do so. As the court in City of Roseville, 219 F. Supp. 2d 130, 146 (D.D.C. 2002), recognized:

> Here, the 'holder' of the constitutional rights, the State of California, is able to defend its interests under the Enclaves and Statehood Clauses and under the Equal Footing Doctrine, should it choose to do so. In *American Immigration Lawyers Association,* the D.C. Circuit noted that the Supreme Court has required that some impediment must exist to the third party's ability to assert her rights or interests, before third-party standing will be permitted. 199 F.3d at 1362 (citing *Powers,* 499 U.S. at 411, 111 S.Ct. 1364). Here, the State is in no way barred from bringing these claims. The State of California is not a party to this matter and, as such, the Court is not inclined to litigate the State's rights. Plaintiffs' claims present a clear example of when third party prudential concerns weigh against permitting plaintiffs to argue claims on behalf of a third party. Because the Court finds that the prudential standing principle limiting third party standing applies to plaintiffs' claims under the Enclaves Clause, Statehood Clause and Equal Footing doctrine, the Court need not reach the 'zone of interest' argument advanced by defendants and intervenors.

City of Roseville v. Norton, 219 F. Supp. 2d 130, 146 -147 (D.D.C. 2002).

Finally, to the extent that Neighbors claims can be construed as alleging a violation of the Tenth Amendment, they also lack standing to assert those claims. As the court in City of Roseville also acknowledged, "[t]his Court is bound to apply Circuit precedent. . . . Accordingly,

the Court finds that individual members of the plaintiff organization do not have standing to bring claims under the Tenth Amendment." City of Roseville v. Norton, 219 F. Supp. 2d 130, 148 (citing Lomont v. O'Neill, 285 F.3d 9 (D.C. Cir. 2002)).

For the very same reasons that plaintiffs in City of Roseville lacked standing, Neighbors lacks standing to assert all of their Constitutional claims and therefore, their third and fourth claims should be dismissed.

E. Section 819 mandated that the Secretary acquire the San Pablo Property in trust and declare it a reservation.

In its fifth claim, Neighbors contends that the Secretary's proclamation taking the land into trust was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. Am. Compl. ¶ 105. Section 819 clearly and unequivocally creates a mandatory trust acquisition duty and requires issuance of a reservation proclamation. Pub. L. 106-568, § 819, 114 Stat. 2868. Courts have found similar language in other Indian land acts to be mandatory. See Churchill County v. United States, 199 F. Supp. 2d 1031, 1033-34 (D. Nev. 2001) (Secretary not required to comply with Section 151.10 requirements because land acquisition was mandatory, not discretionary); Nevada v. United States, 221 F. Supp. 2d 1241, 1246-47 (D. Nev. 2002) (same); Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States, 78 F. Supp. 2d 699, 702-03 (W.D. Mich. 1999), rev'd on other grounds, 288 F.3d 910 (6th Cir. 2002) (use of "shall" in settlement act creates mandatory acquisitions to which Section 151.10 does not apply). As the Sault Ste. Marie court noted, when an acquisition is mandatory, "the acquisition is exempt from the procedures that otherwise must be followed before land can be taken into trust for individual Indians or tribes." Id.

In Churchill County, the Secretary had accepted land into trust on behalf of the Fallon Paiute-Shoshone Indian Tribes. 199 F. Supp. 2d at 1032-33. The Tribes had a Congressional settlement act, which stated:

> Title to all lands . . . acquired . . . within the counties of Churchill and Lyon in the state of Nevada shall be held in trust by the United States for the tribes as part of the Reservation, provided that no more than 2,415.3 acres of such acquired lands . . . shall be held in trust . . . .

Id. at 1033 (quoting Pub. L. No. 101-618, § 103(A)). The court found this language to be mandatory: "Shall is a mandatory term, indicating the lack of discretion on the part of the Secretary." Id. at 1033-34 (citing Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998); United States v. Monsanto, 491 U.S. 600, 607 (1989)).[15/] A plain reading of the settlement act, the court found, showed that "once the requirements of section 103(A) [the act] were met, the Secretary was required to accept the land into trust for the tribe, until the maximum allotment of 2,415.3 acres had been added to the reservation." Id. at 1034. Because the acquisition was mandatory, the court rejected the plaintiff's argument that the Secretary was required to follow the Part 151 procedures. Id.

Similarly, in Sault Ste. Marie, the court held the Secretary's trust acquisition of certain lands to be mandatory – and therefore exempt from 25 C.F.R. §§ 151.10 and 151.11 – when the land was acquired pursuant to a settlement act that provided that "[t]he Secretary shall also

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[15/]The Supreme Court has made clear that when a statute uses the word "shall," Congress has imposed a mandatory duty upon the subject of the command. See, e.g., Monsanto, 491 U.S. at 607 (by using "shall" in civil forfeiture statute, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied"); Pierce v. Underwood, 487 U.S. 552, 569-70 (1988) (Congress's use of "shall" in a housing subsidy constitutes "mandatory language"); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739 n.15 (1981) (same under Fair Labor Standards Act).

accept any real property located in those Counties for the benefit of the [Tribe] . . . if at the time of such acceptance, there are no adverse legal claims on such property including outstanding liens . . . ." 78 F. Supp. 2d at 702 n.5. The court found the plain language of the statute indicated the acceptance was mandatory. Id. at 702.

Likewise, Section 819 clearly mandates the Secretary to acquire land in trust for Lytton and to declare it a reservation. Therefore, even if Neighbors had standing to challenge the Secretary's placement of the land into trust, Neighbors' fifth claim fails to state a claim and should be dismissed.

F. The NIGC's approval of the 2008 ordinance did not violate IGRA.

Neighbors' sixth, seventh and eighth claims all allege that the games being offered by Lytton are class III games and therefore unlawful.[16/] Neighbors first alleges in claims six and seven that the NIGC had a duty to rule on the legality of classification of the games being offered by Lytton. Neighbors, in claim eight, also seeks a declaration that the games being offered are illegal class III games. Neighbors fails to state a claim upon which relief may be granted because the NIGC is not required to make a game classification decision in the context of a gaming

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[16/]Neighbors' sixth claim also alleges that the games being offered by Lytton are not permitted under California law. However, this claim misconstrues IGRA. Because the State of California allows bingo, Cal. Penal Code § 326.3 (2009), then a tribe in California may offer bingo, 25 U.S.C. § 2710(b), with the types of electronic aids authorized under IGRA regardless of the limits California may impose on bingo under state law. NIGC's implementing regulations provide that class II gaming may be played using "electronic, computer, or other technologic aids." 25 C.F.R. § 502.3. Such aids include pull tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo. 25 C.F.R. § 502.7(c); see also 67 Fed. Reg. 41171 (June 17, 2002) ("IGRA permits the play of bingo . . .in an electronic or electromechanical format, even a wholly electronic format, provided that multiple players are playing with and against each other.").

ordinance approval and any enforcement action that the NIGC may take for unlawful class III gaming is unreviewable.

1. The NIGC is not required to approve specific games as part of an ordinance approval.

The 2008 Ordinance properly approves Class II gaming, but does not approve or sanction any specific games. IGRA contains no language suggesting that NIGC must parse through the types of games a tribe might wish to operate before approving a tribal ordinance. 25 U.S.C. § 2710. To the contrary, IGRA states that "[t]he Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of Class II gaming . . ." if the tribal ordinance provides for how the net revenue is directed, requires annual outside audits, and references other specific actions. 25 U.S.C. § 2710(b)(2). There is no requirement in the statute or in the implementing regulations, 25 C.F.R. Part 522, that a tribal ordinance describe the specific types of machines or games that will be used. Principles of statutory interpretation, specifically, *inclusio unius est exclusio alterius*, (the inclusion of one thing suggests the exclusion of all others), see Raleigh & Gaston R.R. Co. v. Reid, 80 U.S. (13 Wall.) 269, 270 (1871), suggest that Congress, in setting forth the particular requirements for ordinances, did not intend to include a *sub silentio* requirement beyond those in the plain text; after all, if there were additional unwritten requirements it would undermine Congress' intent in using the term "shall." Neighbors' seventh claim would render 25 U.S.C. § 2710(b)(2) meaningless.

Because the NIGC is not required to make gaming classification determinations as part of a gaming ordinance approval, Neighbors' sixth and seventh claims fail to state a claim and should be dismissed.

2. Gaming classification under IGRA is a matter for NIGC's enforcement discretion.

Neighbors' claims seek to coerce the NIGC to undertake an enforcement action against Lytton. The Supreme Court "has recognized on several occasions over many years that [the] decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. at 831. Contrary to this well-established principle of administrative law, Neighbors seek a declaration "that the electronic gaming machines in use at the Casino are slot machines and properly classified only as Class III games" and, for the same reason, they allege that the 2008 Ordinance authorizing Class II games must be set aside. Am. Compl. ¶¶ 109-123. These claims challenge the NIGC's "decisions to refuse enforcement" and are therefore not suitable for judicial review. Chaney, 470 U.S. at 831.

The presumption that enforcement discretion is not subject to judicial review is rebutted only where Congress "has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion . . . ." Id. at 834-35. In other words, there must be "law to apply." Id. With regards to IGRA, however, Congress did not circumscribe the NIGC's or Attorney General's discretion to decide whether to pursue civil or criminal enforcement actions, nor has Congress provided any standard by which a court could review the exercise of that discretion. Further, the relevant regulations classify each stage of the enforcement process as discretionary. See 25 C.F.R. § 573.

Neighbors' sixth and seventh claims assert that the NIGC's approval of the 2008 Ordinance is invalid because of what it characterizes as gaming that is either not permitted under

state law or not class II gaming. Plaintiffs' claims fail because the NIGC had no obligation, when approving the Ordinance, to determine the legality of specific gaming the Lytton might offer. Likewise, Neighbors' eighth claim asks this Court to determine whether the gaming at issue is properly classified class II or class III gaming. Congress vested the discretion to make these determinations solely with the NIGC, which has not made a determination. Absent such a determination by the NIGC, there is no final agency action or waiver of sovereign immunity and Neighbors' sixth, seventh, and eighth claims should be dismissed.

3. Neighbors' sixth, seventh, and eighth claims must be dismissed because they do not challenge a final agency action.

IGRA establishes "Congressional intent to preclude judicial review" of Neighbors' claims and that intent "is 'fairly discernible in the statutory scheme.'" Block v. Cmty. Nutrition Inst., 467 U.S. 340, 351 (1984) (quoting Ass'n of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 157 (1970)). Judicial review of the NIGC's decisions is limited to the NIGC's final decisions under 25 U.S.C. §§ 2710-13. 25 U.S.C. § 2714; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan v. Ashcroft, 360 F. Supp. 2d 64, 67-68 (D.D.C. 2004). Congress explicitly limited judicial review when it provided that "[d]ecisions by the Commission pursuant to sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for the purpose of appeal to the appropriate Federal district court . . . ." 25 U.S.C. § 2714. Judicial review under IGRA is limited to these sections. Lac Vieux, 360 F. Supp. 2d at 67-68; see also In re Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig., 340 F.3d 749, 756 (8th Cir. 2003), Cheyenne-Arapaho Gaming Comm'n v. NIGC, 214 F. Supp. 2d 1155, 1170-72 (N.D. Okla. 2002) ("omission of a provision thereby shows Congressional intent to prohibit judicial review

over any other agency actions as opposed to the few already granted express jurisdiction."). The present action filed by Plaintiffs does not fall within any of the statutory categories which authorize judicial review.

Although Neighbors' sixth and seventh claims nominally challenge the 2008 tribal ordinance, they do so on the basis that the ordinance allows unauthorized gaming. Am. Compl. ¶ 113 ("the 2008 Ordinance authorizes operation of electronic gaming machines even though California law does not permit" their operation); Am. Compl. ¶ 119 ("NIGC should not have approved the Ordinance knowing that they Lyttons were operating Class III machines . . . ."). Neighbors' eighth claim asks this Court to issue a declaration that "the electronic gaming machines in use at the Casino are slot machines and properly classified only as Class III games." Am. Compl. ¶ 123.[17/]

Neighbors would not have standing to challenge a final agency action finding that unlawful gaming was occurring on the Property. While judicial review is available in some cases for the NIGC decisions regarding tribal gaming ordinances, management contracts, existing ordinances and contracts, and civil penalties, it is not available for issues that are not proscribed by statute. Lac Vieux, 360 F. Supp. 2d at 67. The discretion to make that determination and the determinations Plaintiffs seek in claims six and seven rests solely with the NIGC. IGRA specifically provides that only after action by the full commission, following an administrative appeal, is a final agency action subject to review under the APA. 25 U.S.C. § 2713(c). The NIGC Chairman may issue a fine assessment or a closure order for "any violation of any

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[17/]As discussed supra, section III.C., the DJA does not constitute an independent grant of jurisdiction.

provision of [IGRA], any regulation prescribed by the Commission, or tribal regulations, ordinances, or resolutions approved under the Act." 25 U.S.C. 2713(a)(l). Under the Commission's regulations an order of closure, of all or part of a gaming operation is subject to informal expedited review upon request of the tribe within seven days of the Order, and the Chairman must conduct expedited review and decide whether to continue temporary closure, within two (2) working days of the receipt of the request 25 C.F.R. § 573.6(c). The tribe has thirty (30) days from the Order's issuance to appeal the closure. 25 C.F.R. § 573.6(c)(3). Plaintiffs are not a tribe and thus would not have standing to challenge the Chairman's determination.

Here, the NIGC has not entered any order or made any decision concerning the validity of specific games, including what Plaintiff classifies as slot machines. Therefore, under the express terms of IGRA, there has been no final agency action entered in this matter and this Court lacks jurisdiction under the APA or IGRA to grant the requested relief because it would require the Court to determine whether the gaming Neighbors complain about. Therefore, Neighbors' sixth, seventh and eighth claims should be dismissed.

IV. CONCLUSION

For the foregoing reasons, the Court should dismiss Neighbors' First Amended Complaint in its entirety.

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