IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

STATE OF NEBRASKA, ex rel. JON BRUNING, Attorney General of the State of Nebraska, Plaintiffs,	)	Case No. 1:08-cv-00006-CRW-TJS
v.	)	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**
UNITED STATES DEPARTMENT OF THE INTERIOR, et al. Defendants.	)	

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INTRODUCTION

Pursuant to Rules 12(b)(1), (b)(6), and 56 of the Federal Rules of Civil Procedure, Defendants, the United States Department of the Interior ("Interior"), Dirk Kempthorne in his official capacity as Secretary of the United States Department of the Interior, the National Indian Gaming Commission ("NIGC" or "Commission"), Philip N. Hogen, in his official capacity as Chairman of the NIGC, Cloyce V. Choney,[1] in his official capacity as Vice Commissioner of the NIGC, and Norman H. DesRosiers, in his official capacity as Commissioner of 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 or in the Alternative for Summary Judgment. For the reasons set forth below, the United States respectfully requests that the Court dismiss the Complaint, or in the alternative, grant the United States' Motion for Summary Judgment.

The State of Nebraska ("Plaintiff" or "Nebraska") seeks review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, of a Final Decision and Order ("Final Decision"), issued on December 31, 2007, by the NIGC approving the Ponca Tribe of Nebraska's ("Ponca" or "Tribe") site-specific class II gaming ordinance amendment ("Site-Specific Ordinance") pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721. Compl. ¶ 24. In its Final Decision, the NIGC concludes that the Ponca may lawfully conduct gaming under IGRA on the parcel of land in Carter Lake, Iowa ("Carter Lake Parcel"), taken in trust by the Department of the Interior in 2003, because the land fits within IGRA's "restored lands" exception. 25 U.S.C. § 2719(b)(1)(B)(iii) ("the restoration of lands for an Indian tribe that is

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[1] Commissioner Cloyce V. Choney retired on December 31, 2007. His position remains vacant.

restored to Federal recognition").[2] AR000001.

Plaintiff lacks standing to challenge the Final Decision and fails to state a claim upon which relief can be granted. The administrative record also supports the NIGC's Final Decision and indicates that there are no genuine issues of material fact. Therefore, the United States is entitled to judgment as a matter of law.

I. STATUTORY BACKGROUND

A. IGRA

In 1988, Congress enacted IGRA, 25 U.S.C. §§ 2701-2721, to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; to provide a statutory basis for the regulation of gaming by Indian tribes adequate to shield tribes from organized crime and other corrupting influences; to ensure that Indian tribes are the primary beneficiaries of their gaming operations; and to assure that gaming is conducted fairly and honestly by both the operators and players. See id. § 2702. IGRA applies only to federally recognized tribes, id. § 2703(5), which may conduct gaming only on "Indian lands" within their jurisdiction. Id. § 2710(b)(1) (Class II); id. § 2710(d)(3) (Class III). The term "Indian lands" is defined to mean:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) all 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.

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[2] IGRA contains a general prohibition against gaming on lands acquired into trust after October 17, 1988, unless the lands fit within one of the exceptions, referred to as the Section 20 exceptions, to this general prohibition. 25 U.S.C. § 2719.

Id. § 2703(4).[3] The Carter Lake Parcel is currently held in trust by the United States and there is no dispute that it meets the definition of Indian lands.

In general, IGRA prohibits gaming activities on land acquired into trust status by the United States on behalf of a tribe after October 17, 1988. Id. § 2719(a). There are several exceptions to this general prohibition, including when:

> (A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or
>
> (B) lands are taken into trust as part of –
>
> (i) a settlement of a land claim,
>
> (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or
>
> (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

Id. § 2719(b)(1). The relevant exception in this case is the "restoration of lands" exception. Id. § 2719(b)(1)(B)(iii).

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[3]Through an implementing regulation, the NIGC has clarified the definition of "Indian lands" to mean:

> (a) Land within the limits of an Indian reservation; or
> (b) Land over which an Indian tribe exercises governmental power and that is either –
> (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12.

Class II Gaming

Class II gaming includes bingo and certain "non-banking" card games. Id. § 2703(7). Class II gaming can occur if: (A) the state in which the tribe is located allows "such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and" (B) the Indian tribe adopts an ordinance or resolution for gaming and the Chairman approves it. Id. § 2710(b)(1). Class II gaming on Indian lands is within the jurisdiction of the Indian tribes, but is regulated by the NIGC. Id. §§ 2710, 2711, 2712, 2713. [4]

Tribal ordinances or resolutions governing the conduct or regulation of Class II gaming on Indian lands are reviewed and approved by the Chairman under 25 U.S.C. § 2710(b)(2). Amendments to a tribe's gaming ordinance are submitted for approval by the Chairman in accordance with 25 C.F.R. § 522.3. A tribe may appeal a disapproval of a gaming ordinance, resolution, or amendment within 30 days after the Chairman serves notice of his determination of disapproval. 25 C.F.R. Part 524.

B. The Ponca Restoration Act

The government-to-government relationship between the United States and the Ponca was terminated by the Act of September 5, 1962, Pub. L. No. 87-629, 25 U.S.C. §§ 971-980 ("Termination Act"), and was restored by the Ponca Restoration Act of October 31, 1990, Pub. L.

[4] Under IGRA, gaming is divided into three classes. Tribes have exclusive authority over "Class I" social and traditional games with prizes of minimal value. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class III gaming, which includes more traditional "casino" games, including slot machines, roulette, poker, blackjack, etc., can occur lawfully only pursuant to a tribal-state "compact." Id. §§ 2703(8), 2710(d). Regulatory and enforcement oversight of Class III gaming activities is also provided under IGRA by NIGC. Id. §§ 2706(b), 2710(b). Class III gaming is not at issue in the instant case.

No. 101-484, 25 U.S.C. §§ 983-983h ("Restoration Act"). Section 983b(a) of the Restoration Act restores all of the Tribe's rights and privileges which were abrogated or diminished by the Tribe's termination. Section 983a restores Federal recognition and provides that "[a]ll Federal laws of general application to Indians and Indian tribes (including the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. § 461 et seq.), popularly known as the Indian Reorganization Act [IRA]) shall apply with respect to the Tribe and to the members." 25 U.S.C. § 938a.

Subsection 983b(c) of the Restoration Act relates to the development of a land base for the Ponca and directs the Secretary of the Interior to accept in trust not more than 1,500 acres of real property located in Knox or Boyd Counties, Nebraska, pursuant to the Act and directs that any additional acreage be acquired pursuant to the IRA. However, Subsection 983b(e) provides that "[r]eservation status shall not be granted any land acquired by or for the Tribe."[5/] Because the Restoration Act prevents the Ponca from having any land acquired be declared a reservation, the Act designates a service area for the Tribe and its members, which includes "members of the Tribe residing in Sarpy, Burt, Platte, Stanton, Holt, Hall, Wayne, Knox, Boyd, Madison, Douglas, or Lancaster Counties of Nebraska, Woodbury or Pottawattomie [sic] Counties of Iowa, or Charles Mix County of South Dakota . . . ." 25 U.S.C. § 983c.

II. <u>ACQUISITION OF THE CARTER LAKE PARCEL</u>

On September 24, 1999, the Ponca purchased in fee approximately 4.8 acres of land in Carter Lake, Iowa, located in Pottawattamie County, Iowa. AR000324. Thereafter, by a tribal

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[5/]This provision was apparently inserted at the request of the members of the Nebraska congressional delegation who believed that it was anachronistic to create new reservations in the modern era. 136 Cong. Rec. H9279-80 (statement of Representative Bereuter); AR000298-99.

resolution dated January 10, 2000, the Ponca requested that the Bureau of Indian Affairs ("BIA") place the land into trust. AR000922. The resolution stated that the parcel would be used to provide services for tribal members, primarily health services under Indian Health Service and Bureau of Indian Affairs programs contracted under the Indian Self-Determination Act, 25 U.S.C. § 450 et seq. AR000923. The trust acquisition was not mandated by the Restoration Act because the parcel is not located in Knox or Boyd County, Nebraska. Therefore, the BIA considered the request under Interior's discretionary authority to acquire land into trust for tribes pursuant to the IRA, 25 U.S.C. § 465, and its implementing regulations, 25 C.F.R. Part 151. AR000892, AR000895, AR000897, AR000918.

Pursuant to its land acquisition regulations, on February 23, 2000, the BIA notified the State of Iowa ("Iowa"), Pottawattamie County, Iowa, and the City of Carter Lake that it was considering the Tribe's trust acquisition request and solicited comments from each entity. AR000892, AR000895, AR000897. Iowa and Pottawattamie County did not submit comments; however, the City of Carter Lake did negotiate a cooperative agreement with the Ponca regarding civil and criminal jurisdiction over the parcel. AR000707, AR000734, AR000814. On September 15, 2000, the Regional Director of the BIA granted the Ponca's request to have the Carter Lake Parcel taken into trust. AR000729-733. Iowa and Pottawattamie County timely appealed the Regional Director's decision to the Interior Board of Indian Appeals ("IBIA"). AR000693, AR000795; Iowa and Bd. of Supervisors of Pottawattamie County, Iowa v. Great Plains Reg'l Dir., BIA, 38 IBIA 42 (Aug. 7, 2002). One of the issues that Iowa and Pottawattamie County raised before the IBIA was their belief that the Ponca intended to operate a gaming establishment on the parcel, rather than a health care facility. Id. at 52. In accordance

with prior IBIA case law, the Board held "that mere speculation that a tribe might, at some future time, attempt to use trust land for gaming purposes does not require BIA to consider gaming as a use of the property in deciding whether to acquire the property in trust." Id. at 52-53. The IBIA affirmed the Regional Director's decision. Id. at 55.

Subsequent to the IBIA's decision, Iowa contacted the Ponca's attorney regarding the possibility of Iowa filing a lawsuit in federal district court to challenge the trust acquisition unless the Ponca agreed that the Carter Lake Parcel did not constitute restored lands under 25 U.S.C. § 2719(b)(1)(B)(iii) and could only be used for gaming if the Ponca obtained a "two-part determination" under 25 U.S.C. § 2719(b)(1)(A). On November 26, 2002, the Ponca's attorney sent an email to the BIA requesting that BIA publish a notice of intent to take the Carter Lake Parcel into trust as soon as possible. AR000632. In that email, the Ponca's attorney requested that the notice include the following language:

> The trust acquisition of the Carter Lake lands has been made for non-gaming related purposes, as requested by the Ponca Tribe and discussed in the September 15, 2000 decision under the Regional Director's analysis of 25 C.F.R. 151.10(c). As an acquisition occurring after October 17, 1988, any gaming or gaming-related activities on the Carter Lake lands are subject to the Two-Part Determination under 25 U.S.C. Sec. 2719. In making its request to have the Carter Lake lands taken into trust, the Ponca Tribe has acknowledged that the lands are not eligible for the exceptions under 25 U.S.C. Sec 2719(b)(1)(B). There may be no gaming or gaming-related activities on the lands unless and until approval under the October 2001 Checklist for Gaming Acquisitions, Gaming-Related Acquisitions [sic] and Two-Part Determinations Under Section 20 of the Indian Gaming Regulatory Act has been obtained.

In the email, the Ponca's attorney noted that the language "was negotiated with Ass't Attorney General Jean Davis of the State of Iowa and County Attorney Richard Crowl of Pottawattamie County, Iowa." AR000632.

On December 3, 2002, the BIA published a Notice of Intent to Take Land in Trust in the Council Bluffs Daily Nonpareil newspaper.[6] AR00947-50. The original notice did not include the above-mentioned language requested by the Tribe. On December 6, 2002, at the request of the Ponca's attorney, Michael Mason, a Corrected Notice of Intent to Take Land in trust ("Amended Notice") was published in the Council Bluffs Daily Nonpareil newspaper. AR000626, AR001056. That Amended Notice contained the additional language regarding IGRA. Following the Amended Notice, Iowa decided not to litigate its case in federal district court. AR000595-96, AR000628. However, there is no formal written agreement between the Tribe and the State of Iowa regarding the land's gaming eligibility, the trust deed does not contain a restriction against gaming on the land, AR001155, there is no evidence that the Amended Notice was authorized by the Ponca Tribal Council, and there is no legal analysis by Interior regarding the applicability of the restored lands exception at the time of the trust acquisition.

Interior's administrative record for the trust acquisition does not discuss IGRA's restored lands exception and there is no discussion regarding whether the Carter Lake Parcel would satisfy that exception. The only mention of the restored lands exception in the administrative record is the correspondence between Iowa and the Ponca's attorney. The BIA included the language in the Amended Notice at the request of those two parties, not as a result of any determination or analysis by the BIA or the Secretary.

The Ponca built and began operating a health care facility on the site in 2000.

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[6] Interior publishes a notice of intent to take land into trust to provide the opportunity for interested parties to seek judicial relief. See 25 C.F.R. § 151.6.

AR000230. The Tribe erected a small modular building and paved a parking lot on the site at a cost of $161,000. The building was used to house a staff of four to provide health and social services. AR000230, AR00285, AR000378. For budget reasons, however, the Tribe discontinued providing health care services at the site. AR000230. The Ponca continue to maintain an office on the site. Id. Nearly eight years after the Ponca acquired the Carter Lake Parcel in fee, and four years after it was taken into trust, the Tribe submitted the Site-Specific Ordinance to NIGC for approval.

III. THE FINAL DECISION

On July 23, 2007, the Ponca petitioned for NIGC approval of the Site-Specific Ordinance. AR000276. The Site-Specific Ordinance makes one change to the Ponca's existing gaming ordinance approved by the NIGC in 2002: it defines "Indian lands" to include the parcel of trust land in Carter Lake, Iowa. AR000221. On October 22, 2007, the Chairman of the NIGC sent a letter to the Ponca in response to their request. AR000219. In that letter, the Chairman disapproved the Site-Specific Ordinance on the grounds that even "though the Ponca Tribe of Nebraska is itself a restored tribe, the Carter Lake land is not restored land." Id.

Thereafter, the Ponca appealed the Chairman's decision to the full Commission. AR000206. On December 31, 2007, the full Commission (including the Chairman) reversed the Chairman's prior determination and approved the Site-Specific Ordinance. In Re: Gaming Ordinance of The Ponca Tribe of Nebraska, Final Decision and Order of the NIGC (Dec. 31, 2007); AR000001-18.[7] The Commission found that: (a) the Chairman's disapproval improperly

[7] Pursuant to the NIGC's regulations, 25 C.F.R. Part 524, a tribe may appeal a disapproval of a gaming ordinance by the Chairman to the full Commission within 30 days of the Chairman's determination. 25 C.F.R. § 524.1. An entity other than a tribe may request to participate in an

relied on the Tribe's intended use of the land; (b) the Chairman's disapproval improperly relied on events that occurred after Interior's final agency decision was made; and (c) the factual circumstances of the acquisition weigh in favor of restoration. AR000002. This Final Decision is the only federal action Plaintiff challenges.

IV. FACTUAL BACKGROUND

The relevant facts are set forth in the United States' Statement of Material Facts Not In Dispute, submitted pursuant to Federal Rule of Civil Procedure 56 and LR 56.a.3. Review of the NIGC action at issue is based on the administrative record, which is incorporated in support of the United States' motion.

V. STANDARDS

A. Standard for Dismissal under Rules 12(b)(1) and 12(b)(6)

Federal Rule of Civil Procedure 12(b)(1) provides that a defendant may move for dismissal based upon a "lack of subject-matter jurisdiction" when the district court lacks the statutory or constitutional authority to adjudicate a case. See Fed. R. Civ. P. 12(b)(1). To prevail on a motion to dismiss pursuant to Rule 12(b)(1), a moving party "must successfully challenge Plaintiffs' Complaint 'on its face or the factual truthfulness of its averments.'" Thompson v. Deloitte & Touche LLP, 503 F. Supp. 2d 1118, 1121 (S.D. Iowa 2007) (quoting Titus v. Sullivan, 4 F.3d 590, 593 (8th Cir. 1993)). Facial challenges are limited to analyzing the face of the complaint. Id. at 1121 (citing Biscanin v. Merrill Lynch & Co., Inc., 407 F.3d 905, 907 (8th Cir. 2005)). Under a facial challenge, factual allegations concerning jurisdiction are presumed to

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appeal of a disapproval by filing a written submission; the Commission then determines whether to allow participation by the entity. 25 C.F.R. § 524.2. Iowa did participate in the appeal to the full Commission. AR000001.

be true and a moving party's motion can be "successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction." Titus, 4 F.3d at 593. Factual challenges invoke facts other than those pled in the complaint. Osborn v. United States, 918 F.2d 724, 729 n.6 (8th Cir. 1990). A court confronted with a factual challenge must weigh the evidence without presuming the truthfulness of the plaintiff's complaint. Id. at 730. Therefore, "the Court may look outside the pleadings to determine whether jurisdiction exists, and the nonmoving party loses the benefit of favorable inferences from its factual statements." Dolls, Inc. v. City of Coralville, 425 F. Supp. 2d 958, 970 (S.D. Iowa 2006).

Rule 12(b)(6) provides that a dismissal motion may be based upon a failure "to state a claim upon which relief can be granted." When considering such motions, "pleadings are construed in a light most favorable to the plaintiff and the facts alleged in the complaint are taken as true." Logan v. Ameristar Casino Council Bluffs, Inc., 185 F. Supp. 2d 1021, 1023 (S.D. Iowa 2002) (citing Hamm v. Groose, 15 F.3d 110, 112 (8th Cir. 1994); Ritz v. Wapello County Bd. of Supervisors, 595 N.W.2d 786, 789 (Iowa 1999)). A court may not dismiss an action unless "it is clear from the face of the complaint that plaintiff has no right to relief." Logan, 185 F. Supp. 2d at 1023 (citing Frey v. City of Herculaneum, 44 F.3d 667, 671 (8th Cir. 1995); Ritz, 595 N.W.2d at 789); see also Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (a motion to dismiss is appropriate when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). However, "[a]lthough the pleading standard is liberal, the plaintiff must allege facts – not mere legal conclusions – that, if true, would support the existence of the claimed torts." Moses.com Sec., Inc. v. Comprehensive Software Sys., Inc., 406 F.3d 1052, 1062 (8th Cir. 2005) (citing Schaller Tel. Co. v. Golden Sky Sys., Inc., 298 F.3d 736, 740

(8th Cir. 2002)). Therefore, the Court need not accept as valid Plaintiff's unsupported claims regarding fact or law.

B. Conversion of Motion for Dismissal to Motion for Summary Judgment

Rule 12(d) of the Federal Rules of Civil Procedure provides for the conversion of a motion to dismiss pursuant to Rule 12(b)(6) to a motion for summary judgment where "matters outside the pleadings are presented to and not excluded by the court" after there has been a "reasonable opportunity to present all the material that is pertinent to the motion" under Rule 56. Fed. R. Civ. P. 12(d). However, "Rule 12(b)(6) motions are not automatically converted into motions for summary judgment simply because one party submits additional matters in support of or [in] opposition to the motion." Missouri ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1107 (8th Cir. 1999), cert. denied, 527 U.S. 1039 (1999). For example, a district court does not convert a motion to dismiss into a motion for summary judgment when it makes clear that it is ruling only on the motion to dismiss. Skyberg v. United Food & Commercial Workers Int'l Union, 5 F.3d 297, 302 n.2 (8th Cir. 1993). Further, where a challenge to an agency decision presents only legal questions concerning, for example, "whether the agency adhered to the standards of decisionmaking required [by law]," the court may "consult the record to answer the legal question before the court" without converting a 12(b)(6) motion into one for summary judgment. Marshall County Health Care Auth. v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993); see also Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083 (D.C. Cir. 2001) ("As we have repeatedly recognized, however, when a party seeks review of agency action under the APA . . .[t]he 'entire case' on review is a question of law.").

C. The Standard for Summary Judgment

In the event the Court finds it necessary to convert the United States' motion to a summary judgment motion, Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56 is "an integral part of the Federal Rules as a whole" insofar as it allows for the dismissal of "factually insufficient claims" before trial, and thereby prevents the "unwarranted consumption of public and private resources" required by a trial of such meritless claims. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). The initial burden of production under Rule 56 rests with the moving party, who must make a prima facie showing that it is entitled to summary judgment. See id. at 323. The moving party may satisfy this burden by demonstrating to the court "that there is an absence of evidence to support the nonmoving party's case." Id. at 325. However, the moving party need not "negate the elements of the nonmoving party's case." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990). Rather, "the burden on the moving party may be discharged by 'showing' – that is pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. The burden then shifts to the nonmoving party to "designate specific facts showing that there is a genuine issue for trial." Id. at 324 (internal quotation marks omitted). "To survive a motion for summary judgment the resisting party must substantiate his allegations with probative evidence that would permit findings and judgment in his favor 'based on more than mere speculation, conjecture, or fantasy.'" Biggs v. John Deere Co., 431 F. Supp. 2d 952, 954 (S.D. Iowa 2005) (quoting Wilson v. Int'l Bus. Mach. Corp., 62 F.3d 237, 241 (8th Cir. 1995)); see also Sourcecorp BPS, Inc. v. Kenwood Records Mgmt., Inc.,

548 F. Supp. 2d 673, 677 (S.D. Iowa 2008).

D. Review of Agency Action Under the APA

Judicial review of administrative decisions is governed by the APA. 5 U.S.C. §§ 701-706. Under the APA, the court's review of agency decisions is limited. A court may only set aside an agency action if, based on the administrative record, the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2); Sierra Club v. EPA, 252 F.3d 943, 947 (8th Cir. 2001). This standard of review "gives agency decisions a high degree of deference." Sierra Club, 252 F.3d at 947 (citation omitted). Thus, "the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). If an agency's determination is supportable on any rational basis, a court must uphold it, rather than substituting its judgment for that of the agency. Friends of Richards-Gebaur Airport v. FAA, 251 F.3d 1178, 1184 (8th Cir. 2001). The reviewing court must consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Overton Park, 401 U.S. at 416; see also Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989). Especially when an agency is acting within its own sphere of expertise, the Court's review must be very deferential. Friends of Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115, 1128 (8th Cir. 1999).

Under the APA, the court reviews "the whole record or those parts of it cited by a party." 5 U.S.C. § 706; see also Camp v. Pitts, 411 U.S. 138, 142 (1973); Overton Park, 401 U.S. at 420. Thus, the Court's review is limited to the administrative record. Overton Park, 401 U.S. at 420; Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985); see also Newton County

Wildlife Ass'n v. Rogers, 141 F.3d 803, 807 (8th Cir. 1998) ("APA review of agency action is normally confined to the agency's administrative record."). Confining judicial review to the administrative record precludes the reviewing court from conducting a de novo trial and substituting its opinion for that of the agency. See United States v. Morgan, 313 U.S. 409, 422 (1941).

Under the APA and relevant case law, determinations of the NIGC are entitled to the deference normally accorded agencies, and "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984); see also Lyng v. Payne, 476 U.S. 926, 939 (1986) (agency's construction of its own regulations is entitled to substantial deference); EPA v. Nat'l Crushed Stone Ass'n, 449 U.S. 64, 83 (1980).[8] The courts are to grant an agency's interpretation of its own regulations and of statutes it administers considerable leeway. See Auer v. Robbins, 519 U.S. 452, 461 (1997) (agency's interpretation of own regulations are controlling unless "plainly erroneous or inconsistent with the regulation") (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

Furthermore, "if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Fla. Power & Light, 470 U.S. at 744. These well-established limitations on judicial review of agency decisionmaking are grounded in the separation of powers doctrine and the recognition that Congress has conferred certain

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[8] See also Red Lion Broad. Co. v. FCC, 395 U.S. 367, 381 (1969) ("[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.").

discretionary decisionmaking powers to federal agencies equipped with special expertise. Cronin v. U.S. Dep't of Agric., 919 F.2d 439, 444 (7th Cir. 1990).

The APA also provides the standard of review for Plaintiff's statutory claims. The APA is the sole mechanism for challenging the federal agency action, unless a party challenges the agency action as violating a federal law that confers a private right of action. Workplace Health & Safety Council v. Reich, 56 F.3d 1465, 1467 (D.C. Cir. 1995) ("Except where a statute provides otherwise or where 'agency action is committed to agency discretion by law,' judicial review of agency procedure is governed by the APA.") (citations omitted). IGRA does not confer a private right of action. See, e.g. Hein v. Capitan Grande Band of Diegueno Mission Indians, 201 F.3d 1256, 1260-61 (9th Cir. 2000).

E. The Indian Canons of Construction

The Supreme Court mandates that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Bryan v. Itasca County, 426 U.S. 373, 392 (1976) (citation omitted); Gaming Corp. Of Am. v. Dorsey & Whitney, 88 F.3d 536, 548 (8th Cir. 1996). In reviewing an agency interpretation of a statute governing Indian tribes, courts must consider the canons of construction relevant to Indian law. Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior, 228 F.3d 82, 92-93 (2d Cir. 2000); City of Roseville v. Norton, 348 F.3d 1020, 1032 (D.C. Cir. 2003). IGRA was enacted for the benefit of Indian tribes and numerous courts have applied the Indian canon of construction in construing IGRA. City of Roseville, 348 F.3d at 1032 ("IGRA is designed to promote the economic viability of Indian Tribes, and AIRA [Auburn Indian Restoration Act] focuses on ensuring the same for the Auburn Tribe. In this context, the Indian

canon requires the court to resolve any doubt in favor of the tribe."); United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Moss, 927 F.2d 1170, 1179 (10th Cir. 1991); Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, 116 F. Supp. 2d 155, 158-59 (D.D.C. 2000); accord Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney for the W. Dist. of Mich., 198 F. Supp. 2d 920, 934 (W.D. Mich. 2002) (canons of construction require the application of a "plausible construction" of Section 20 of IGRA that is more favorable to the tribe). Here, IGRA must be construed in favor of the Ponca Tribe.

Likewise, any ambiguity in the Ponca Restoration Act must be construed in favor of the Ponca, as the legislation was enacted for its benefit. See Connecticut ex rel. Blumenthal, 228 F.3d at 92-93; City of Roseville, 348 F.3d at 1032.

VI. ARGUMENT

A. Plaintiff Lacks Standing to Challenge the NIGC's Ordinance Approval

The question of standing involves both constitutional limitations on a federal court's jurisdiction and prudential limitations on the exercise of that jurisdiction. See Warth v. Seldin, 422 U.S. 490, 498 (1975). The constitutional basis for standing derives from Article III of the Constitution, which confines the jurisdiction of the federal courts to actual "cases" and "controversies." U.S. Const. art. III, § 2. This requirement serves to identify those disputes that are appropriately resolved through the judicial process. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

The Supreme Court in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), reiterated the constitutional requirements for standing: a plaintiff seeking to invoke a federal court's jurisdiction has the burden to establish (1) that it has suffered an "injury in fact" – an

"invasion of a legally-protected interest which is (a) concrete and particularized,[9] and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical,'" id. (citations omitted); (2) that its injury is traceable to the challenged action of the defendant and not the result of the "independent action of some third party not before the court," id. (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)); and (3) that it is "likely" as opposed to merely "speculative" that the plaintiff's injury will be "redressed by a favorable decision," id. at 561 (citing Simon, 426 U.S. at 38, 43, 96). These three elements constitute the "irreducible minimum" required by Article III of the Constitution for a federal court to have jurisdiction. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 472 (1982).

Plaintiff's Complaint broadly states that the citizens of Nebraska are "substantially affected by NIGC's decision to allow Indian gaming on the Carter Lake Tract because of its unique geographical relationship with Nebraska, in that one cannot access the Carter Lake Tract from Iowa without first traveling through Nebraska." Compl. ¶ 4. Yet Plaintiff fails to identify any concrete, particularized, actual or imminent harm or injury in this statement or anywhere else in the Complaint. Plaintiff does not identify a specific harm or injury, so it is impossible to determine whether that harm or injury is fairly traceable to the restored lands determination or whether the injury could be redressed by a favorable decision.

While the United States appreciates the unique geographical location of Carter Lake, Iowa, it is still located within the State of Iowa and Nebraska has failed to allege any specific or particular harms that it would suffer from the building of the casino that are unique to the

[9] "Particularized" means that the injury must affect the plaintiff in a personal and individual way. Lujan, 504 U.S. at 561 n.1.

geographic location. Indeed, Nebraska's broad allegations could apply to any number of activities – Indian and non-Indian – occurring on the Carter Lake Parcel.[10] If Nebraska had standing in this case, it arguably would be able to obtain judicial review of any dispute involving a facility or structure that is reached by traveling through Nebraska. Allowing Nebraska to challenge activities that occur in Carter Lake – whether those activities are conducted or approved by the United States, Iowa, or the local government – simply because it is geographically surrounded by Nebraska, would essentially make the State boundary irrelevant.

Furthermore, there are numerous tribes – gaming and non-gaming – that are situated along state boundaries throughout the United States. The State of Nebraska has not alleged any injury or harm that would be any more particular than the general injury or harm that any state could allege from gaming being conducted by a tribe on the border of a neighboring state. See Lance v. Coffman, 127 S.Ct. 1194, 1196 (2007) (The Supreme Court has "– 'consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.'") (quoting Lujan, 504 U.S. at 573-74.).

In Lujan, Justice Scalia emphasized that when an alleged injury "arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more

[10]Even if the Carter Lake Parcel were not restored lands, the State of Iowa and the Ponca could still proceed through the two-part determination process under IGRA's Section 2719(b)(1)(A), and the Nebraska still would not be consulted in that process. Therefore, not only has Nebraska failed to allege any specific injury or harm from the conduct of gaming on the Parcel, the State also fails to allege any specific injury or harm particular to this case – which only involves the NIGC's determination that the Carter Lake Parcel is restored lands.

is needed" by the plaintiff to demonstrate standing. 504 U.S. at 562 (emphasis omitted). "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." Id. 561-62. The party invoking the federal jurisdiction bears the burden of establishing the elements of standing. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990). Here, Plaintiff is not the object of the government action that it is challenging and so it bears the difficult burden of establishing the elements of standing to challenge the NIGC's approval of the Site-Specific Ordinance. Plaintiff's one-sentence statement regarding standing is insufficient under this standard. For the foregoing reasons, Plaintiff's Complaint fails to establish standing under the Article III requirements.

In addition to the Article III requirements, a court is also bound by prudential limitations on its exercise of jurisdiction. Warth, 422 U.S. at 498 (standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise."). "[B]oth constitutional and prudential standing must be present, as both are necessary prerequisites to the exercise of jurisdiction." Iowa Cable and Telecomm. Assn. v. U.S. Dep't of Agric., 469 F. Supp. 2d 711, 718 (S.D. Iowa 2006) (citing Starr v. Mandanici, 152 F.3d 741, 750 (8th Cir. 1998)). "[P]rudential standing encompasses 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (citation omitted).

Plaintiff's allegations of harm are not specific to the statute at issue, IGRA, and therefore,

are too broad to be addressed in this case. In addition, Plaintiff is not within the zone of interests of IGRA's ordinance approval provision, and therefore lacks prudential standing. 25 U.S.C. § 2710(b)(2). Indeed, there is no legally protected interest given in-state local governments in IGRA's ordinance approval process, much less out-of-state governments. See id. § 2710(b)(2). The ordinance approval process provides a mechanism for a tribe to participate in the regulation of class II and class III gaming through internal tribal governmental procedures (similar to a zoning ordinance) and does not involve the weighing of a State's interest or role. The regulatory role of a State government under IGRA is addressed in the Tribal-State compact approval process, not the ordinance approval process. 25 U.S.C. § 2710(d). However, even under the Tribal-State compact process, Nebraska still would not have a role because the proposed gaming site is located in Iowa, not Nebraska. Accordingly, Plaintiff also lacks prudential standing.[11]

B. The NIGC's Final Decision is Reasonable and Should be Upheld

Plaintiff only challenges the NIGC's Final Decision that the Carter Lake Parcel constitutes land taken into trust as part of the "restoration of lands for an Indian tribe that is restored to recognition" within the meaning of Section 20 of IGRA. Compl. ¶ 24. There is no disagreement among the parties that the Carter Lake Parcel was acquired in trust after October 17, 1988, so one of IGRA's Section 20 exceptions must be met before gaming can be conducted. Additionally, Plaintiff does not allege that the Ponca are not a restored tribe and does not challenge the status of the Carter Lake Parcel as Indian lands, so there is no dispute on these

[11] Even assuming the Amended Notice is binding, see discussion infra Part VI.B.2, Nebraska fails to meet the standing requirements. As the Amended Notice indicates, the Ponca would still be able to pursue gaming under the two-part determination process, 25 U.S.C. § 2719(b)(1)(A), and Nebraska would not be consulted under that process. Only the Governor of the state in which the land is located is consulted. Id.

issues. Plaintiff's sole allegation is that the NIGC's Final Decision that the Carter Lake Parcel constitutes restored lands is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Compl. ¶ 24. However, the NIGC's determination is consistent with prior decisions of both the NIGC and Interior and with the existing case law on the subject. Therefore, Plaintiff has failed to meet its burden of establishing that NIGC's decision is arbitrary or capricious.

1. The NIGC Reasonably and Correctly Found that the Carter Lake Parcel is Restored Land

To meet the "restored lands" exception, a tribe must be an "Indian tribe that is restored to Federal recognition," and the acquisition of the land must be part of a "restoration of lands" for the tribe. 25 U.S.C. § 2719(b)(1)(B)(iii). The term "restoration of lands" is not defined in IGRA or the NIGC's regulations, and nothing in IGRA requires that the land be restored by Congressional action or as part of the same action that restored the Tribe. Therefore, lands may qualify as restored lands when acquired pursuant to the IRA, 25 U.S.C. § 465. Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Attorney for W. Dist. of Mich., 198 F. Supp. 2d 920, 935-36 (W.D. Mich. 2002) ("Grand Traverse II"), aff'd, 369 F.3d 960 (6th Cir. 2004); Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, 116 F. Supp. 2d 155, 161-64 (D.D.C. 2000); Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Attorney for W. Dist. of Mich., 46 F. Supp. 2d 689, 699-700 (W.D. Mich. 1999) ("Grand Traverse I"); AR000242-43.

Not every trust acquisition for a restored tribe meets the exception. Grand Traverse II, 198 F. Supp. 2d at 935. The necessary limiting conditions for lands to be "restored" are: (1) the

temporal proximity of the trust acquisition to the tribe's restoration; (2) the tribe's historical and modern nexus to the location; and (3) the factual circumstances of the trust acquisition. See, e.g., Coos, 116 F. Supp. 2d at 164; Grand Traverse II, 198 F. Supp. 2d at 935; AR000007, AR000243.

Applying these criteria to the Carter Lake Parcel, both the Chairman and the NIGC found that the Parcel meets both the temporal and location factors of the restored lands analysis. AR000008; AR000243-47. Regarding the location factor, the Carter Lake Parcel is located in Pottawattamie County, Iowa, which is part of the Tribe's statutorily established service area. See 25 U.S.C. § 983c; City of Roseville v. Norton, 348 F.3d 1020, 1026 (D.C. Cir. 2003) ("Even assuming the instant case is not at the center of the paradigm because the AIRA [restoration act] does not identify these particular 49 acres in Placer County, the term 'restoration' can nonetheless readily be construed to include lands acquired pursuant to the restoration statute (AIRA) from within the restored tribe's service area designated in the AIRA.").

The NIGC and the Chairman found that the Carter Lake Parcel fits within the temporal factor for "restored lands" because during the thirteen years between Congress' restoration of the Tribe and the acquisition of the Carter Lake Parcel, the Tribe did not acquire a significant land base separate and apart from Carter Lake.[12/] AR000017; AR000246; AR000301-02. In fact, the land the Tribe did acquire represents only a fraction of what it could acquire under its restoration act and its Congressionally mandated economic development plan. AR000246.

Therefore, the only factor of the Chairman's decision that was overturned by the NIGC is the Chairman's decision regarding the factual circumstances of the acquisition. The Chairman

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[12/]At the time the Ponca requested the trust acquisition of the Carter Lake Parcel, the Tribe had only two other parcels of land – an office building in Lincoln, Nebraska, and approximately 150 acres in Niobrara, Nebraska, used for a community building and bison grazing. AR000246.

gave significant weight to the Tribe's original expressions of intent as to its use of the land (for a health care facility). AR000017. However, as the NIGC Final Decision recognizes, a tribe's intended use of the land at the time it is taken into trust is not relevant to a restored lands finding. AR000011. Indeed, nothing in IGRA or the IRA precludes a tribe from changing its intended use of the land to take advantage of gaming opportunities if the land otherwise meets the relevant factors, as the Carter Lake Parcel does. Consistent with this, the courts and the NIGC have not taken the tribe's intent into consideration in other instances. See Coos, 116 F. Supp. 2d 155 (parcel qualified as restored lands under IGRA despite the fact that the tribe announced its intent to game 22 months after land taken into trust for other purpose); AR000011.[13/] Therefore, the NIGC's decision that the Ponca's expression of intended use is not relevant is reasonable.

2. The Restored Lands Language in the Amended Notice is Irrelevant

The Commission reviewed the BIA record for the trust acquisition and correctly and reasonably found that "there is no evidence that Interior reviewed, analyzed, or considered whether to approve or endorse whatever agreement that may have given rise to the notice before publishing it in the local newspaper." AR000016. An internal BIA e-mail referenced the language in the Amended Notice as a "compromise reached by the Ponca Tribe and the State of Iowa . . . [and that] the Solicitor's office had no problem including the appended paragraph."

[13/] See also Memorandum from NIGC Acting General Counsel to NIGC Chairman Deer, Re: Bear River Band of Rohnerville Rancheria at 2 (August 5, 2002) (land purchased through HUD grant and one year later the Bear River Band sought a restored lands opinion); Memorandum from John R. Hay, NIGC Staff Attorney, through Penny J. Coleman, NIGC Acting General Counsel to Philip N. Hogen, NIGC Chairman Re: Mooretown Rancheria Restored Lands at 9-10 (October 25, 2007) (land purchased with HUD money and two years later, the tribe announced its intent to game and sought restore lands opinion). Both opinions are available at: http://www.nigc.gov/ReadingRoom/IndianLandOpinions/tabid/120/Default.aspx

AR000016, AR000628. Therefore, the Commission found that Interior "simply accepted certain language to be appended to the . . . notice without independently determining whether it concurred with the substance . . . ." AR000016.

Moreover, the restored lands language in the Amended Notice itself is non-binding. Accordingly, the timing of the Amended Notice in relation to the trust acquisition process is irrelevant and the restored lands analysis does not rely on it. Simply put, the circumstances surrounding the acquisition of the Carter Lake Parcel and the restored lands language in the Amended Notice are as follows:

- There was no Solicitor opinion regarding whether the Carter Lake Parcel was restored lands at the time the land was acquired.[14/]
- There is no affirmative decision by the appropriate Interior official (the Secretary or Assistant Secretary) formally reviewing, approving, or adopting the language in the Amended Notice.
- There is no formal, enforceable, memorialized agreement between the State of Iowa and the Ponca Tribe regarding the restored lands language in the Amended Notice.[15/]
- The Tribal Council did not know about and did not authorize the actions of their attorney regarding the Amended Notice. AR000947-950.
- There is no tribal ordinance whereby the Ponca agrees not to conduct gaming on the Parcel.
- There are no gaming restrictions incorporated into the deed for the Carter Lake Parcel.

[14/]See City of Roseville v. Norton, 219 F. Supp. 2d 130, 136-37 (D.D.C. 2002) (discussing Interior's process for gaming determinations and adoption of solicitor opinions). Even though Interior issued a formal restored lands legal opinion in City of Roseville, the Court did not find it to be legally binding. City of Roseville v. Norton, 219 F. Supp. 2d at 162 ("[T]he Court rejects the contention that a legal opinion of the Interior Department is due *Chevron* deference . . . .[t]he legal opinion is not a formal agency regulation and does not have the force of law.").

[15/]If such an agreement existed, it would have to be approved by Interior pursuant to 25 U.S.C. § 81. See also AR000261-63. Furthermore, Nebraska could not sue to enforce the terms of an agreement between the Ponca and Iowa. The administrative record indicates that the Ponca did enter into this type of agreement with the City of Lincoln, Nebraska, when the City appealed a decision to take land into trust to the IBIA. AR00562-67.

The administrative record reflects the fact that the only evidence regarding a restored lands analysis appears in an email request sent from the Ponca's attorney and subsequently incorporated into the Amended Notice. AR000628-29; AR000632.

Without the formal adoption of the statements in the Amended Notice by the United States and without a formal enforceable agreement between the Ponca and the State of Iowa, the United States is not bound by the statements made in the Amended Notice regarding the restored lands status of the Carter Lake Parcel.[16] Indeed, if the situation were reversed and the Ponca and the State of Iowa had unilaterally stated that the Carter Lake Parcel was restored lands, the United States would not be bound by that determination either because it would not be part of the agency's decision-making process. Without a formal legal opinion issued by the Solicitor's Office at Interior and the adoption of that opinion by the appropriate official, the statements in the Amended Notice do not bind the United States.

In summary, the NIGC and the Chairman agreed on two of the three factors in the restored lands analysis. The NIGC reasonably reversed the Chairman's opinion on the third factor. The NIGC determined based on prior case law that the factual circumstances surrounding the acquisition of the Carter Lake Parcel do not outweigh the other two factors. Therefore, the NIGC's Final Decision is not arbitrary, capricious, an abuse of discretion, or otherwise not in

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[16] As discussed supra in footnote 9, the Amended Notice also discussed the two-part determination process, 25 U.S.C. § 2719(b)(1)(A). However, the Amended Notice cannot bind the United States to make an affirmative determination under that process either. The Amended Notice also states that "[t]here may be no gaming or gaming-related activities on the land unless and until approval under the October 2001 Checklist for Gaming Acquisitions, Gaming-Related Acquisitions and Two-Part Determinations Under Section 20 of the Indian Gaming Regulatory Act has been obtained." AR000003. That checklist has been superceded and by this notice, Interior could not bind itself to an outdated guideline.

accordance with the law and Plaintiff has failed to establish a claim for which relief can be granted. Indeed, Plaintiff fails to set forth any concrete evidence or allegations in its Complaint that the United States has violated IGRA or any other law and the Complaint should be dismissed. Alternatively, the United States should be granted summary judgment because the NIGC's decision was not arbitrary or capricious.

C. The Department of the Interior and the Secretary should be dismissed from this lawsuit

The only agency action that is the subject of this lawsuit is the NIGC's Final Decision approving the Site-Specific Ordinance. The NIGC's Final Decision is supported by the administrative record filed by the NIGC. Interior and the Secretary have taken no action whatsoever regarding the gaming ordinance approval and there is no administrative record to be compiled by Interior. The APA only waives the sovereign immunity of the United States for "final agency action." 5 U.S.C. § 702. The Department is not subject to judicial review because no final agency action was taken by the Secretary of the Interior. Therefore, Interior and the Secretary should be dismissed from this lawsuit.

CONCLUSION

For the foregoing reasons, the United States requests that its motion be granted and Plaintiffs' complaint be dismissed or in the alternative, that the United States be granted summary judgment.

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Respectfully Submitted,

Ronald J. Tenpas
Assistant Attorney General

/s/

Gina L. Allery
Trial Attorney
United States Department of Justice
Environment and Natural Resources
Division
Indian Resources Section
P.O. Box 44378
L'Enfant Plaza Station
Washington, DC 20026-4378
(202) 305-0261
gina.allery@usdoj.gov

OF COUNSEL:

Maria Getoff
Senior Attorney
National Indian Gaming Commission

Jennifer Ward
Staff Attorney
National Indian Gaming Commission

Jonathan Damm
Solicitor's Office
Department of the Interior