12-1460

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DANIEL T. WARREN,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, individually, and as trustee of the goods, credits and chattels of the federally recognized Indian nations and tribes situated in the State of New York, LYNN SCARLETT, in her official capacity as Acting Secretary of the United States Department of the Interior, JAMES CASON, in his official capacity as the Acting Assistant Secretary of the Interior for Indian Affairs, UNITED STATES DEPARTMENT OF THE INTERIOR, PHILIP N. HOGEN, in his capacity as Chairman of the National Indian Gaming Commission, NATIONAL INDIAN GAMING COMMISSION, GEORGE E. PATAKI, as Governor of the State of New York, CHERYL RITCKO-BULEY, as Chairwoman, of the New York State Racing and Wagering Board, DIRK KEMPTHORNE, in his official capacity as Secretary of the United States Department of the Interior,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
Civ. No. 06-226 (Hon. William M. Skretny)

ANSWERING BRIEF OF THE FEDERAL APPELLEES

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STATEMENT OF THE CASE

In 2002, pursuant to the Indian Gaming Regulatory Act ("IGRA"), the Seneca Nation of New York and the State of New York executed a Tribal-State Gaming Compact, which, among other things, authorized the Nation to operate a gaming facility at an unidentified location within the City of Buffalo. A.106-30. Shortly thereafter, the National Indian Gaming Commission ("NIGC") approved the Seneca Nation's non-site-specific ordinance that authorized the tribe to operate Class III gaming facilities that include slot machines and table games. A.138.

In 2005, the Department of the Interior placed approximately nine acres of land in downtown Buffalo ("Buffalo Parcel"), into restricted fee status for the benefit of the Seneca Nation for economic development purposes pursuant to the Seneca Nation Land Claims Settlement Act, 25 U.S.C. §§ 1774 *et seq*. A.169. Two years later, the Seneca Nation "opened its Seneca Buffalo Creek Casino on the Buffalo Parcel in a temporary, 5,000-square-foot facility housing 124 slot machines." *See Citizens Against Casino Gambling in Erie County v. Hogen*, 2008 WL 2746566, 17 (W.D. N.Y. 2008). In August 2012, the Seneca Nation began construction on a new purportedly $131 million facility.

Plaintiff-Appellant Daniel Warren wants to stop the Seneca Nation from developing and operating a lawful gaming facility in Buffalo. A.180. In pursuit of his goal, Warren filed this lawsuit in 2006 challenging the decisions and actions of various federal and New York State officials, which he alleges authorized the Seneca Nation to develop and operate a gaming facility. A.159-81. Among other assertions, he asserts that Congress violated the Tenth Amendment when it enacted IGRA (A.170); that the former Secretary of the Interior violated IGRA in 2002 when she, through her inaction, allowed the Tribal-State Gaming Compact to take effect (A.170-71); and that the Chairman of the NIGC violated IGRA when he approved the Seneca Nation's 2002 Class III Gaming Ordinance (A.16-21).

Acting on the federal and state defendants' motions to dismiss, the district court dismissed the lawsuit. SPA.1-34. The court rejected Warren's argument that IGRA violates the Tenth Amendment, SPA.11-15, and concluded that Warren had failed to allege his standing to challenge the decisions or inactions that allowed the Seneca Nation to operate a gaming facility, SPA.15-18. The court also dismissed the claims against the state defendants, SPA.18-25, and concluded that

sovereign immunity precluded Warren's attempt to add the Seneca Nation's officers and instrumentalities as defendants. SPA.25-33.

STATEMENT OF THE FACTS

I. STATUTORY BACKGROUND

A. The Seneca Nation Land Claims Settlement Act

In 1990, Congress passed the Seneca Nation Land Claims Settlement Act ("Settlement Act") in settlement of the Seneca Nation's claims to lands in the City of Salamanca, New York. The funds appropriated under the Act are to be used by the Nation to acquire property to increase its land base. *See* S. Rep. No. 101-511, at 24 (1990); H. Rep. No. 101-832, at 21 (1990). The Settlement Act provides that the Nation may acquire land located either "within its aboriginal area in the State [of New York] or situated within or near proximity to former reservation land" with funds appropriated by the Act. 25 U.S.C. § 1774f(c). The title of land acquired pursuant to the Settlement Act is held in "restricted fee status" and is subject to specific federally-imposed restrictions on its use and/or disposition, which prevent transfer of the land without congressional approval. *Id.* Congress mandated that these newly acquired lands would assume restricted fee Indian lands status unless the Secretary of the Interior explicitly determines otherwise

within 30 days of the close of the state and local government comment period. *Id.* § 1774f(c).

B. The Indian Gaming Regulatory Act

Congress enacted IGRA, 25 U.S.C. §§ 2701-2721, in 1988 in the wake of the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In *Cabazon*, the Court held that under Public Law 280 (18 U.S.C. § 1162, 28 U.S.C. § 1360) a tribe could operate games of chance free from state regulation, where those games were not generally prohibited by the state where the tribe was located. 480 U.S. at 207-10, 221-22. Because federal law at that time did not provide "clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. § 2701(3), *Cabazon* left Indian gaming without federal or state regulatory involvement. Thereafter, Congress enacted IGRA to, *inter alia*, provide a regulatory structure for Indian gaming, promote tribal economic development, self-sufficiency and self-government, and protect Indian tribes from corrupting influences such as organized crime. 25 U.S.C. § 2702; *see also Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney for the W. Dist. of Mich.*, 369 F.3d 960, 971 (6th Cir. 2004).

IGRA applies only to Indian tribes that are recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians (*i.e.*,"federally-recognized tribes") and that possess powers of self-government. 25 U.S.C. § 2703(5). IGRA governs gaming only on "Indian lands." *Id.* §§ 2702(3), 2710. IGRA defines "Indian lands" as "all lands within the limits of any Indian reservation" and "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." *Id.* § 2703(4).

In general, IGRA prohibits gaming activities on land acquired into trust or restricted status 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

Id. § 2719(b)(1) (emphasis added).

1. Class III Gaming

IGRA divides gaming into three classes, each subject to differing levels of state, tribal and federal regulation. Class III gaming is any form of gaming that is not Class I or Class II and includes casino-style games. *Id.* § 2703(8). Slot machines are Class III games, as are casino games (such as baccarat, blackjack, roulette, and craps), sports betting, parimutuel wagering and lotteries. 25 C.F.R. § 502.4. A tribe may engage in Class III gaming only if (1) it has a governing ordinance approved by the NIGC; (2) the state "permits such gaming for any purpose by any person, organization, or entity;" and (3) the tribe and the state enter into a compact approved by the Secretary of the Interior to govern the conduct of such gaming. 25 U.S.C. § 2710(d).

2. Class III Compacts

A tribe desiring to conduct a Class III gaming operation may initiate the compacting process by requesting the state to enter into negotiations. 25 U.S.C. § 2710(d)(3)(A). Thereafter, the state is to "negotiate with the Indian tribe in good faith to enter into such a compact." *Id.* If a state and tribe reach agreement on a compact, it is

submitted to the Secretary. If the Secretary neither approves nor disapproves the compact within 45 days, it "shall be considered to have been approved by the Secretary, but only to the extent [it] is consistent" with IGRA. *Id.* § 2710(d)(8)(C). IGRA allows the Secretary to disapprove a compact only if it violates IGRA, other provisions of federal law, or the United States' trust obligations to Indians. *Id.* § 2710(d)(8)(B). A gaming compact, if explicitly approved by the Secretary or considered to have been approved by Secretarial inaction, takes effect when notice is published in the *Federal Register*. *Id.* § 2710(d)(3)(B).

3. Gaming Ordinances

A tribe desiring to conduct Class III gaming must also adopt, enact, and submit to the Chair of the NIGC for his or her approval a gaming ordinance. *Id.* §§ 2710(d)(1)(A)-(2)(A). Unless the Chair determines that the ordinance does not satisfy IGRA or the NIGC regulations, the Chair "shall approve such ordinance." *Id.* §§ 2710(d)(2)(B); 2710(e). If the ordinance is not acted upon by the Chair within a 90-day period, it "shall be considered to have been approved by the Chair[]" to the extent it is consistent with IGRA. *Id.* § 2710(e). An

ordinance, if approved or deemed approved, takes effect when notice is published in the *Federal Register*. *Id.* § 2710(d)(2)(B)(ii).

II. FACTUAL BACKGROUND

A. The Tribal-State Compact

On August 18, 2002, pursuant to IGRA, the Seneca Nation and the State executed a Tribal-State Gaming Compact for the conduct of Class III gaming. A.234. Subsections 11(b)(4) and (c) integrate terms of the Settlement Act into the Compact by providing that Settlement Act funds be used to acquire parcels in the Cities of Niagara Falls and Buffalo for the purpose of gaming. A.238. Thereafter, the Nation forwarded the fully executed and validly entered compact to the Secretary for approval. Under IGRA, the Secretary had 45 days from the submission of the Compact to act affirmatively. 25 U.S.C. §2710(d)(8)(C). Absent Secretarial approval or disapproval within the statutory time frame, IGRA provides that such compacts take effect by operation of law. *Id.* Rather than act on the Compact, the former Secretary exercised her discretion to take no action, which resulted in the Compact being considered to have been approved to the extent it is consistent with IGRA. A.234-41. As required by IGRA, on December 9,

2002, Interior published notice of the Compact in the *Federal Register*. *See* 67 Fed. Reg. 72,968 (Dec. 9, 2002).

The Compact entered into by the Seneca Nation and the State authorizes the Nation to conduct Class III gaming at three sites: an identified area within the City of Niagara Falls, or an alternative location within the County of Niagara; an unidentified area within the County of Erie or the City of Buffalo; and on a Seneca Nation reservation site. A.120 § 11(a). Under the Compact's terms, the Nation agreed to purchase these sites with the Settlement Act funds, reserving five million dollars for housing adjacent to the sites. A.121 § 11(b)(4).

B. The Gaming Ordinance

In the same month that the Seneca Nation executed the Compact, it adopted and enacted a Class III gaming ordinance. A.139-58. On August 29, 2002, the Seneca Nation submitted the "Seneca Nation of Indians Class III Gaming Ordinance of 2002" to the Chair of the NIGC for review and approval pursuant to Sections 2710(d)(1)(A)-(2)(A) of IGRA. A.138. Following the NIGC's initial review of the Ordinance and informal discussions with attorneys for the Seneca Nation, the Seneca Nation amended the Ordinance and submitted the "Seneca Nation of

Indians Class III Gaming Ordinance of 2002, as Amended" to the NIGC on November 25, 2002. *Id.* The Chair approved it the next day. *Id.* The Ordinance did not specify a specific site on which gaming would occur, but rather applied universally to all Nation lands on which Class III gaming is conducted by the Nation. A.139-58. As required by IGRA, on December 16, 2003, the NIGC published notice of the Ordinance in the *Federal Register*. *See* 68 Fed. Reg. 70,048 (Dec. 16, 2003).

C. The Buffalo Parcel

In November 2005, pursuant to the Settlement Act and the Compact, the Nation submitted documentation to the Bureau of Indian Affairs, Office of Indian Gaming Management, indicating its compliance with the requirements of the Settlement Act for the Parcel to go into restricted fee status. The Nation notified the State and local governments of the acquisition of the Parcel on October 3, 2005. A.168 ¶ 48. The State and local governments had thirty days to comment on the acquisition. 25 U.S.C. § 1774f(c). Once the comment period expired, the Parcel assumed restricted fee status on December 2, 2005. A.169 ¶ 52.

III. PROCEDURAL BACKGROUND

On April 6, 2006, Warren filed this suit against the United States of America, the U.S. Department of the Interior, individual federal

defendants, George E. Pataki, as Governor of New York, and Cheryl Ritchko-Buley, as Chair of the New York State Racing and Wagering Board. In an amended complaint filed on August 16, 2006, he asserted four causes of action against the federal and state defendants. A.159.

In his First cause of action, brought pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, Warren alleges IGRA violates the Tenth Amendment because, Warren asserts, IGRA compels state officers and the state legislature to enter into tribal-state gaming compacts that are prohibited by state law. A.170.

In his Second cause of action, brought pursuant to the APA, Warren alleges that the Secretary violated IGRA in allegedly approving the Tribal-State Compact between New York and the Seneca Nation. A.170-71. Warren asserts that the Compact permits games, including slot machines, which allegedly are not otherwise permitted by state law allegedly in violation of 25 U.S.C. § 2710(d)(1)(B).[1] *Id.* ¶¶ 59, 60.

In his Third cause of action, brought on an *Ex Parte Young* theory, Warren alleges that a New York statute authorizing the Governor to

[1] It is unclear whether Warren asserts his second cause against the United States, New York, or both. The government and district court assumed below that Warren asserted the claim against New York. Warren now asserts that the claim is made against the United States.

enter into the gaming compact with the Seneca Nation is void because it allegedly violates the New York Constitution. A.171-74 ¶¶ 61-83 (citing Part B of Chapter 383 of the Laws of 2001). On that basis, Warren alleges that "the state officials who authorized and entered into this tribal-state compact acted in excess of their authority and the compact is not in effect as required by 25 U.S.C. § 2710(d)(1)(C)." *Id.*¶ 83.

In his Fourth cause of action, brought pursuant to the APA, Warren alleges that NIGC's approval of the Seneca Nation's 2002 Gaming Ordinance is unlawful because the Tribal-State Compact between the Seneca Nation and New York violates IGRA. A.174-79.

Following the filing of Warren's lawsuit, the district court in response to a different lawsuit filed by a citizens' group vacated the 2002 Gaming Ordinance as well as a subsequent 2007 Gaming Ordinance. *See Citizens Against Casino Gambling in Erie County v. Hogen*, 704 F. Supp. 2d 269, 272 (W.D. N.Y. 2010) ("*CACGEC*") (describing case's history).[2] After Interior promulgated new regulations

[2] This Court has stayed the appeals in *CACGEC*, while the district court considers a lawsuit regarding the 2009 Ordinance. *See* 2d Cir. Nos. 08-5257, 11-5171.

in response to the court's rulings, the Seneca Nation adopted another gaming ordinance, which the Chair approved on January 20, 2009. *Id.*[3]

Due in part to these events, in March 2009, Warren moved for leave to file a second amended complaint, and to amend and supplement that proposed second amended complaint. A.325-64; SPA.2-4. Among other changes, the proposed amended complaint included references to the other court proceedings and gaming ordinances. A.343-44. The proposed amended complaint also attempted to add as defendants the Seneca Gaming Corporation and its President and Chief Executive Officer, and the President of the Seneca Nation. A.335-37.

On March 13, 2012, the district court granted the defendants' motions to dismiss the amended complaint. The court determined that IGRA does not violate the Tenth Amendment and thus that Warren lacks an injury-in-fact for Article III standing purposes. SPA 12-15. The court also determined that Warren's allegations of injury were "vague" and "too attenuated to suggest a personal, individualized injury." SPA 17. The court thus concluded that Warren had failed to "sufficiently

[3] *See also* http://www.nigc.gov/Reading_Room/Gaming_Ordinances.aspx#S. The NIGC's website maintains a database of all approved ordinances.

allege an injury in fact for purposes of IGRA standing." SPA 18. The court thus dismissed the claims against the federal defendants. The court also dismissed the claims against the state defendants, concluding that Warren had alleged only violations of state law against the state defendants and thus that the state's sovereign immunity, as preserved in the Eleventh Amendment, precluded his claims. SPA 18-25.

In granting the motions to dismiss, the district court considered all arguments in the context of both the existing and proposed claims for relief. SPA 5. The court concluded that the proposed complaint "rest[ed] on the same erroneous reading of IGRA" as the existing complaint and that accepting it would be "futile" because the pleading did "not cure the deficiencies" the court had identified in the existing complaint. SPA 15, 18, 24-25. The court further concluded that tribal sovereign immunity precluded Warren from attempting to add as defendants in his proposed second amended complaint the Seneca Gaming Corporation and individual Seneca Nation officers. SPA 25-33.

SUMMARY OF THE ARGUMENT

Warren's lawsuit suffers from a host of jurisdictional and substantive problems and the district court properly dismissed it.

First, Warren lacks Article III standing to maintain his action because he alleges no "concrete and particularized" injury stemming from the challenged agency actions. Warren asserts only generalized concerns with possible future increases in crime and traffic, and the commandeering of state officers that are not particular to him, but are shared equally by the public-at-large. It is well-settled that these types of generalized concerns do not create a justiciable "case or controversy" for purposes of Article III. Moreover, even if Warren has properly pled individualized as opposed to mere generalized injuries, those alleged injuries were not caused by the federal defendants and are unlikely to be redressed by a favorable decision from this Court.

Second, even assuming Warren has standing, the district court properly dismissed Warren's Tenth Amendment challenge to IGRA. Contrary to Warren's allegations, IGRA does not improperly commandeer state officers or compel States to enter into compacts.

Third, even assuming Warren has standing, the district court properly dismissed the claim challenging the Secretary's inaction that allowed the Tribal-State Compact to become effective. Warren's challenge is based on the incorrect assumption that the Secretary

through her inaction approved provisions of the Tribal-State Compact that he alleges to violate IGRA. Rather, because the Secretary took no action to approve the Compact, IGRA provides that the Compact is effective only to the extent that it is consistent with IGRA. Because the Secretary did not approve any provision of the Compact that violates IGRA, Warren's challenge to Secretarial inaction fails as a legal matter.

Fourth, even assuming Warren has standing, the district court properly dismissed Warren's challenge to the Chair's approval of the Seneca Nation's 2002 Gaming Ordinance. The 2002 Ordinance is no longer operable and thus any challenge to it is moot. Even if Warren's proposed amended complaint could be read to challenge the current ordinance, his proposed amendment is futile because he bases his challenge on the incorrect notion that the Chair has a duty to review the Compact before approving a gaming ordinance.

Finally, even assuming Warren has standing, the district court also correctly concluded that it would be futile to add the Seneca Nation's officers and instrumentalities as defendants to this APA lawsuit because Warren lacks a cognizable cause of action against the Nation. And, in any event, even if Warren has a cognizable legal claim

against the Seneca Nation's officers and instrumentalities, those officers and instrumentalities are immune from suit.

ARGUMENT

I. WARREN LACKS STANDING.

The district court granted the federal defendants' motion to dismiss because Warren lacked standing. SPA 8-18. This Court reviews *de novo* the district court's decision to dismiss for lack of a standing. *See Carver v. City of N.Y.*, 621 F.3d 221, 225 (2d Cir. 2010). A party invoking federal jurisdiction has the burden of demonstrating its standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

To establish his standing to sue, Warren must demonstrate for each claim or type of relief sought that he has "suffered an injury-in-fact -- an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical"; [2] that there was a "causal connection between the injury and the conduct complained of"; and [3] that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Carver*, 621 F.3d at 225 (quoting *Lujan*, 504 U.S. at 560 (citations and internal quotation marks omitted)). These requirements together constitute the "irreducible constitutional

minimum" of standing, which is an "essential and unchanging part" of Article III's case-or-controversy requirement and a key factor in dividing the power of government between the courts and the two political branches. *See Vt. Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000).

Warren cannot establish the "irreducible constitutional minimum" of standing. His pleadings fail to establish that he has anything more than generalized concerns with the gaming facility. Moreover, even if he could establish that he will suffer an imminent, particularized injury, he cannot tie any injury to the federal defendants' actions, and he cannot demonstrate that any injury could be redressed by this Court.

A. Warren failed to properly allege that he would suffer a "concrete and particularized" injury-in-fact.

The district court concluded Warren lacked Article III standing because he had failed to sufficiently allege an injury-in-fact "particular to him," as opposed to a generalized grievance shared in substantially equal measure by all or a large class of citizens. SPA 16. The district court was correct. "[S]tanding to sue may not be predicated upon an interest of the kind . . . which is held in common by all members of the public." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S.

208, 220 (1974). A plaintiff like Warren who seeks 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." *Lujan*, 504 U.S. at 573-74. *Accord Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm along normally does not warrant exercise of jurisdiction").

1. Warren's generalized concerns with blight, crime, traffic, and other unspecified consequences do not establish that he personally will suffer harm

As one basis for his standing, Warren alleges that he will be subjected to blight, an increased risk of crime emanating from a casino, lack of parking and an increase in traffic, and other unspecified environmental, health, and social consequences. A.160 ¶ 7. Warren, however, "does not live, work, or own property in the *immediate vicinity* of the Buffalo site." SPA 16 (emphasis in original). Warren admits that he lives 6 miles from the Buffalo site, and works as far as 1.5 miles from the site.[4] *Id.* ¶¶ 5, 7. As the district court concluded, Warren's

[4] Warren complaint also references a Niagara Falls site (A.165-68), but, as with the Buffalo site, he alleges *no* particularized interest in, or injury stemming from, the Niagara Falls site (A.160-61).

allegations do not show that a gaming facility at the site will affect him "in a personal and individual way, as opposed to having a generalized impact on all members of the public." SPA 16 (citing *Lujan*, 504 U.S. at 560 n.1). Indeed, Warren concedes in his brief before this Court that his purported injury is no different than "all citizens and residents of Erie County." Br. at 17-18. Thus, as the district court concluded, his "allegations do not suffice to show a concrete and particularized interest, even at this more liberal pleading stage." *Id.*

In his proposed amended complaint, Warren adds the allegation that he travels within 1,000 feet of the Buffalo site. A.331 ¶ 9. This allegation, however, does not cure the deficiency in his pleadings. Warren is only one among presumably thousands who regularly travel the Niagara Thruway (I-190). That alone does not set him apart from the general public for standing purposes. Moreover, Warren's proposed amended complaint does not explain how travelling on a high-speed freeway within 1,000 feet of the facility increases his risk of becoming a casino-related crime victim, or how the facility will cause noticeable traffic issues on a large capacity freeway like I-190. See *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("Allegations of possible future

injury do not satisfy the requirements of Article III. A threatened injury must be 'certainly impending' to constitute injury in fact."). In the end, Warren simply failed to sufficiently plead his standing to sue.

2. Warren's generalized concern over the alleged commandeering of state officers does not establish that he personally will suffer harm

Warren further alleges (at 18) for purposes of his Tenth Amendment challenge that he will suffer injury "through the commandeering of his state officers to carry out federal policy." Again, Warren's allegation of injury fails because he identifies no concrete, particularized interest in the activities of his state officers.

In *Bond v. United States*, 131 S. Ct. 2,355 (2011), the Supreme Court held that a citizen could raise a Tenth Amendment challenge to a statute so long as there is a valid cause of action in which to raise the challenge and the citizen otherwise has standing to sue. *Id.* at 2,366-67. The Court emphasized that, in order to have Article III standing to sue, a citizen must demonstrate that s/he has an injury-in-fact that, among other things, is "concrete and particular[ized]": "It is not enough that a litigant suffers in some indefinite way in common with people generally." *Id.* at 2,366 (quotations omitted).

In *Bond*, the government did not dispute that Bond had Article III standing to pursue a Tenth Amendment challenge to the statute at issue because Bond faced a six-year prison sentence for violating the statute. *Id.* at 2,360, 2,366.[5] However, Warren, unlike Bond, is not the object of governmental action, let alone the object of a criminal prosecution. Since Warren is not the object of governmental action, he faces a difficult challenge in establishing his standing. *See Lujan*, 504 U.S. at 562 ("when the 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"). Warren does not rise to that challenge. Warren alleges no concrete, particularized interest that distinguishes his alleged injury stemming from the so-called commandeering of state officers from that of the public generally. Because Warren cannot predicate his standing "on the right, possessed by every citizen, to require that the Government be administered according to law," *Valley Forge Christian College v. Am. United for Separation of Church & State*, 454 U.S. 464, 482-83 (1982), his concern

[5] Although the government agreed that the Bond had Article III standing, the government argued that she lacked prudential standing because only state governments could assert Tenth Amendment claims. *See Bond*, 131 S. Ct. at 2,366. The Court disagreed. *Id*. at 2,366-67.

over the potential commandeering of state officers does not confer upon him Article III standing to maintain this action.

B. Warren lacks standing because he cannot show any injury that he will suffer is caused by the federal defendants' challenged actions.

In any event, even if Warren properly has alleged a particularized injury, he has failed to demonstrate that his injury is caused by the federal defendants. The Tribal-State Compact under which the Seneca Nation operates a gaming facility on the Buffalo site is between the Seneca Nation and New York. The United States is not a party to the Compact. The Secretary has taken no action, other than to publish notice in the *Federal Register* that the Tribal-State Compact was considered approved, to the extent it is consistent with IGRA, and this action is not discretionary but is mandated by statute. 25 U.S.C. § 2710(d)(8)(D); 67 Fed. Reg. 72,968 (Dec. 9, 2002). The Secretary's inaction resulted in the Tribal-State Compact becoming effective, but only to the extent that it is consistent with IGRA. 25 U.S.C. § 2710(d)(8)(C). Under IGRA's terms, any provision of the Tribal-State Compact that violates federal law is not in effect. *Id.* Thus, it is impossible for Warren to have suffered an injury that is traceable to the

Secretary's statutorily permissible inaction. The mere publication in the *Federal Register* will not cause or contribute to a potential increase traffic or crime, nor does that action commandeer any state officer.

Moreover, to the extent Warren maintains his challenge to the approval of the 2002 Class III Gaming Ordinance, he also cannot prove a connection between his potential injuries and the approval of that now-vacated and non-site specific document. Even if it were still in effect (which it is not), the NIGC Chair's approval of the 2002 Ordinance is not connected to the potential harm that Warren allegedly may suffer if gaming on the Buffalo Parcel continues. Warren cannot show that the approval was for gaming on the Buffalo Parcel, or on any specific parcel of land. The Ordinance was one of general applicability, *i.e.*, there was no identification or mention of a specific site upon which Class III gaming will be conducted. While there may exist a general allegation of injury, Warren cannot show a connection between the injury and the NIGC's approval of the now-vacated and non-site specific, Class III Gaming Ordinance. Therefore, the NIGC's approval of the gaming ordinance cannot have caused any injury that the Warren alleges from the siting of the gaming facility in Buffalo.

C. Warren lacks standing because he cannot show his lawsuit will redress his alleged injuries.

Finally, even if Warren establishes that he will suffer a cognizable injury caused by the federal defendants, he still cannot demonstrate a substantial "likelihood" that his alleged injuries would be redressed by a favorable decision from this Court. *See Lujan*, 504 U.S. at 561 (standing requires showing that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision").

To redress his alleged injuries, Warren asks this Court to enjoin the NIGC to take enforcement action against the Nation and shutter its Buffalo facility. A.180-81. This Court, however, cannot grant such relief. Just as this Court cannot order the United States to pursue criminal charges against a person or organization, *see United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"), it cannot order the NIGC to take enforcement action against the Seneca Nation. The Supreme Court "has recognized on several occasions over many years that an agency's 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. 821, 831 (1985). The presumption that enforcement discretion is not subject to judicial review can be rebutted only if 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. Congress has not limited NIGC's discretion.

Instead, IGRA vests the Chair with absolute enforcement discretion, stating that the Chair "shall have the power to order temporary closure of an Indian game for substantial violation of the provisions of [IGRA], of regulations prescribed by the Commission . . . , or of tribal regulations, ordinances, or resolutions approved under [IGRA]." 25 U.S.C. § 2713(b)(1). Nothing in that language directs or mandates that the Chair exercise that power or expresses intent to limit the Chair's discretion to decide when or whether to pursue enforcement actions. Because IGRA vests absolute enforcement discretion in the Chair, this Court cannot order the Chair to issue a closure order, *see Heckler*, 470 U.S. at 834-35, and it therefore cannot grant Warren the ultimate relief that he seeks.

Moreover, even if Warren sought less drastic relief than the shuttering of the gaming facility, Warren's alleged injuries as they

relate to the Tribal-State Compact are unlikely to be redressed by a judgment against these federal defendants. The Secretary has no duty to take any action on the challenged Tribal-State Compact. Thus, even if this Court were to agree with Warren that Tribal-State Compact was unlawful, it could not order the Secretary to explicitly disapprove the Compact without the Court contravening IGRA.

In other words, IGRA provides the Secretary with the unfettered discretion to take no action on the Compact. *See* 25 U.S.C. § 2710(d)(8)(C). If the Secretary takes no action, IGRA provides that the Compact is considered to have been approved by operation of law to the extent it is otherwise consistent with IGRA. *Id.* Warren's real complaint thus lies not with the Secretary, but with the provisions enacted by Congress in IGRA. Congress, however, is not subject to suit under the APA, *see* 5 U.S.C. § 551(1)(A), and Warren lacks any right to obtain relief against Congress. Thus, because the Secretary has the unfettered statutory discretion to take no action and, as a result of that inaction, IGRA provides that the Compact shall be considered to have been approved to the extent consistent with IGRA, it is too speculative that this lawsuit against these federal defendants will provide meaningful

redress to Warren. *See New York Coastal P'ship v. DOI*, 341 F.3d 112, 116 (2d Cir. 2003). In sum, Warren lacks standing because, among other reasons, he cannot prove that his APA lawsuit against these federal defendants is likely to result in any meaningful relief to him.

II. EVEN IF WARREN HAS STANDING, THE COURT PROPERLY DISMISSED THE TENTH AMENDMENT CHALLENGE TO IGRA.

Even if Warren has standing, the district court properly dismissed the Tenth Amendment challenge to IGRA because IGRA does not violate the Tenth Amendment. The Tenth Amendment provides that "powers not delegated to the United States by the Constitution . . . are reserved to the States[.]" U.S. Const. amend. X. The Tenth Amendment has been interpreted to prohibit the federal commandeering of state governments. *See Printz v. United States*, 521 U.S. 898, 933 (1997).

As mentioned, Warren argues that IGRA violates the Tenth Amendment "by compelling [state officials] to enter into agreements that are prohibited by state law and regulate gambling." A.170. However, as the district court correctly concluded, Warren's argument "is premised on an incorrect reading of IGRA's provisions." SPA 13. By its plain terms, IGRA requires only that state officials negotiate in good faith with a tribe that wishes to operate a gaming facility on Indian

lands located within that state, if they desire to participate in the regulation of gaming on federal Indian lands.[6] IGRA does not require that states ultimately enter into gaming compacts.

> Almost a decade ago, another district court opined that:
>
> > If IGRA attempted to force the State to regulate by compact all gaming activities on tribal lands it might indeed run afoul of the Tenth Amendment. But Congress clearly was cognizant of the Tenth Amendment when it acknowledged that a State need not forgo any State governmental rights to engage in or regulate class III gaming except whatever it may voluntarily cede to a tribe under a compact. IGRA's terms do not force the State to enter into a compact, it only demands good faith negotiation in order to meet state, as well as tribal and federal, interests.

Yavapai-Prescott Indian Tribe v. Arizona, 796 F. Supp. 1292, 1297 (D. Az. 1992) (citations omitted). The Supreme Court later noted that IGRA's intricate procedures relating to the negotiation of tribal-state compacts show an intent by Congress to limit significantly the duty imposed on states by 25 U.S.C. § 2710(d)(3). *See Seminole Tribe v. Florida*, 517 U.S. 44, 74-75 (1996). If, after following the defined procedures, a state declines to enter into a compact, that is the end of the matter as far as state participation is concerned. The Secretary of

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[6] Without IGRA or a similar clear delegation of authority by Congress, states generally lack the authority to regulate or limit activities by tribes on Indian lands. *See Cabazon*, 515 U.S. at 458.

the Interior then prescribes procedures governing the tribe's Class III gaming, which is conducted under tribal and federal regulation only. *See* 25 U.S.C. § 2710(d)(7)(B)(vii); *see also Yavapai-Prescott*, 796 F. Supp. at 1297. In sum, while IGRA strongly encourages state involvement, it neither compels states to enter into gaming compacts nor does it require states to participate in the regulation of gaming activities on Indian lands. Therefore, even assuming Warren has standing, his claim that IGRA violates the Tenth Amendment fails to state a claim, lacks merit, and was properly dismissed.

III. EVEN IF WARREN HAS STANDING, THE COURT PROPERLY DISMISSED THE CHALLENGE TO SECRETARIAL INACTION.

Even assuming that Warren could establish standing to maintain this suit, the district court properly dismissed his lawsuit against the Secretary as alleged in his Second cause of action. Warren's complaint alleges that the Secretary violated IGRA by approving a Compact that permits games which allegedly are not otherwise permitted by state law. A.170-71. That is incorrect. The Secretary's inaction resulted in the Tribal-State Compact being considered to have been approved, but only to the extent that it is consistent with IGRA. *See* 25 U.S.C. § 2710(d)(8)(C) ("If the Secretary does not approve or disapprove a

compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, *but only to the extent the compact is consistent with the provisions of this chapter*.") (emphasis added). Any provisions of the Tribal-State Compact that violate federal law were not approved by Secretary. Accordingly, Warren's allegation fails as a matter of law.

IV. EVEN IF WARREN HAS STANDING, THE COURT PROPERLY DISMISSED THE CHALLENGE TO NIGC'S APPROVAL

In his Fourth cause of action, Warren challenges the NIGC's approval of the Seneca Nation's Class III 2002 Gaming Ordinance. A.174-79. The 2002 Ordinance, however, is no longer operable. The 2002 Ordinance was superseded by the 2007 Ordinance, which, in turn, was superseded by the 2009 Ordinance. *See CACGEC*, 704 F. Supp. 2d at 272; *see also* 74 Fed. Reg. 29,711 (June 23, 2009) (list of approved gaming ordinances) (referring to http://www.nigc.gov for full text of each ordinance). Warren's challenge to the 2002 Ordinance thus is moot.

Even if Warren's proposed amended complaint could be read to challenge the NIGC's approval of the current ordinance, the proposed amendment was futile. Warren argues (5, 39) that the NIGC's approval

of the gaming ordinance is unlawful because the Compact is unlawful. Warren fundamentally misunderstands, however, that gaming ordinances and compacts are separate and distinct. While a compact and approved gaming ordinance, among other things, are necessary for Indian tribes lawfully to conduct Class III gaming, *see* 25 U.S.C. § 2710(d), the NIGC has no duty to ensure that a lawful compact exists before it approves a Class III gaming ordinance, *id.* § 2710(d)(2)(A)-(B).

Accordingly, because his challenge to the 2002 ordinance is moot and it would have been futile, in the manner he proposed, to allow him to amend his complaint to challenge the NIGC's approval of the current ordinance, the district court correctly dismissed Warren's lawsuit.

V. EVEN IF WARREN HAS STANDING, THE COURT PROPERLY DECLINED TO ADD THE SENECA NATION AS A DEFENDANT

Warren argues (at 39-56) that the district court erred in determining that sovereign immunity renders "futile" Warren's attempt to add the Seneca Nation's officers and instrumentalities as parties to this lawsuit. However, regardless of whether those officers and instrumentalities are immune from suit, the district court correctly denied Warren's attempt to add them as defendants because Warren's proposed amended complaint fails to state any cognizable claim against

them. Because the Seneca Nation and its officers and instrumentalities are not "authorit[ies] of the Government of the United States," 5 U.S.C. § 551(1), the APA does not provide a cause of action to sue the them. Nor are the Nation and its officers and instrumentalities necessary and indispensible parties to this APA lawsuit. *See Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1253-59 (10th Cir. 2001). IGRA similarly does not provide a cause of action against the tribe. *See Hartman v. Kickapoo Tribe Gaming Com'n*, 319 F.3d 1230, 1232 (10th Cir. 2003) ("nowhere does IGRA expressly authorize private individuals to sue directly under the statute for failure of a tribe . . . to comply with its provisions"). Warren identifies no cognizable legal claim against the Seneca Nation.

In any event, even in the event that Warren has a cognizable claim against the Seneca Nation's officers and instrumentalities, the sovereign Nation and its officers and instrumentalities are immune from suit for the reasons stated by the district court.[7] SPA 26-33.

[7] In addition to the reasons expressed by the district court, Warren's *Ex Parte Young* theory for suing individual Nation officers fails because he seeks declaratory and not injunctive relief against those officers (A.360-62). *See Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 87 (2d Cir. 2001) (noting that suits against officers must seek injunctive relief).

While the district court addressed and rejected most of Warren's arguments regarding the Seneca Nation's immunity, Warren makes one particular argument for the first time on appeal. Warren argues (at 39-45) the Seneca Nation has not been formally recognized as a federally recognized Indian tribe because it has not participated in the Part 83 regulatory process for recognizing Indian tribes. *See* 25 C.F.R. Pt. 83. The Part 83 process, however, "applies only to those American Indian groups . . . which are not currently acknowledged as Indian tribes." *Id.* § 83.3(a). As far back as 1784, the United States recognized and had established a formal government-to-government relationship with the Seneca Nation through a series of treaties. *See* Treaty of Fort Stanwix, 7 Stat. 15 (1784); Treaty of Fort Harmar, 7 Stat. 33 (1789); Treaty of Canadaigua, 7 Stat. 44 (1794); *see also* 44 Fed. Reg. 7,235, 7,236 (Jan. 31, 1979) (initial list of federally recognized Indian tribes). The Seneca Nation thus did not need to invoke the Part 83 process to achieve federal recognition because the United States already had formally recognized the Nation prior to the promulgation of the Part 83 regulations. *See* 43 Fed. Reg. 39,361 (Sept. 5, 1978) (preamble to Part 83). Warren's newly raised argument thus fails.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7072 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because I prepared it in a proportionally spaced typeface using the Microsoft Word 2007 word processing program in 14-point Century Schoolbook type.

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2012, I electronically filed the foregoing revised brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. Those participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

In addition, two copies of this document have been served this day by first class U.S. mail, postage prepaid, as follows:

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