

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

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DANIEL T. WARREN,

Plaintiff,

- v -

06-CV-00226-JTE

UNITED STATES OF AMERICA, et al.,

Defendants.

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS THE AMENDED COMPLAINT**

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, Defendants, the United States of America, Dirk Kempthorne, in his official capacity as Secretary ("Secretary"), United States Department of the Interior, James E. Cason, in his official capacity as Associate Deputy Secretary, the United States Department of the Interior ("Interior"), Philip N. Hogen, in his official capacity as Chairman ("Chairman"), National Indian Gaming Commission ("NIGC"), and the NIGC (collectively, "United States"), by undersigned counsel, submit this Memorandum in Support of their Motion to Dismiss the Amended Complaint. For the reasons described below, the United States respectfully requests that the Court dismiss the Amended Complaint.

**INTRODUCTION**

The United States filed an initial Motion to Dismiss on July 24, 2006. Mr. Warren amended his complaint on August 16, 2006. The Amended Complaint also fails to state a claim over which this Court has jurisdiction. As Plaintiff's Amended Complaint indicates, his ultimate goal is to bar the Seneca Nation of Indians ("Nation") from developing and operating a lawful

gaming facility in Erie County, New York, as a means of economic development. In pursuit of this goal, Plaintiff challenges decisions and actions of various federal and New York State officials authorizing the Nation to develop and operate a gaming facility. He challenges under the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 et seq., the Secretary’s inaction in 2002 that allowed the Seneca-New York State Gaming Compact to take effect as a matter of law. Similarly, he challenges the Chairman’s decision to approve the Nation’s Class III gaming ordinance under the APA. He also brings a Tenth Amendment claim, arguing that Congress exceeded its authority under the Indian Commerce Clause in enacting the Indian Gaming Regulatory Act (“IGRA”). Plaintiff lacks standing to bring these claims and therefore this Court lacks jurisdiction.

## **I. STATUTORY BACKGROUND**

### **A. The Seneca Nation Land Claims Settlement Act**

In 1990, Congress passed the Settlement Act in settlement of the Nation’s claims to lands in the City of Salamanca.<sup>1/</sup> 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). This statute 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

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<sup>1/</sup>The Settlement Act resolved the disputes over non-Indian occupation of Nation lands by providing the Nation - a federally recognized tribe - with compensation for use of its land and for the economic impact of prior lease arrangements within the City of Salamanca, New York. See 25 U.S.C. § 1774f(c).

specific federally-imposed restrictions on its use and/or disposition, which prevent transfer of the land without congressional approval. See 25 U.S.C. § 177. When land assumes restricted fee status, the United States in effect acquires a real property interest in the land. Congress mandated that these newly acquired lands would assume restricted fee status unless the Secretary precluded such a federal restriction within a short time frame.<sup>2/</sup> Specifically, the Settlement Act provides:

Land within its aboriginal area in the State or situated within or near proximity to former reservation land may be acquired by the Seneca Nation with funds appropriated pursuant to this subchapter. State and local governments shall have a period of 30 days after notification by the Secretary or the Seneca Nation of acquisition of, or intent to acquire such lands to comment on the impact of the removal of such lands from real property tax rolls of State political subdivisions. Unless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of section 2116 of the Revised Statutes [25 U.S.C. 177, the Indian Non-Intercourse Act], such lands shall be subject to the provisions of that Act and *shall* be held in restricted fee status by the Seneca Nation.

25 U.S.C. § 1774f(c) (emphasis added). This provision sets forth the criteria that govern the acquisition and placement of land into restricted fee for the benefit of the Nation. Only three conditions must be met for the land to be eligible for restricted fee status:

- 1) it must be within the aboriginal territory of the Seneca Nation or situated within or near proximity to former reservation land;
- 2) it must be purchased with funds appropriated under the Settlement Act; and
- 3) the State and local governments must be given notice of the acquisition or of the Nation's intent to acquire the land, and 30 days within which "to comment on the impact of the removal of such lands from real property tax rolls of State political

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<sup>2/</sup>The title of restricted fee land is held by the Indian tribe with specific federally-imposed restrictions on its use and/or disposition. See 25 U.S.C. § 177. In the original thirteen States, Indian lands are typically held in restricted fee, not trust. See City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197 (2005).

subdivisions.”

See id. Lands acquired by the Nation with Settlement Act funds become “restricted fee” Indian lands, unless the Secretary specifically 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**

IGRA was enacted “as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.” 25 U.S.C. § 2702; see also Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the W. Dist. of Mich., 369 F.3d 960, 971 (6th Cir. 2004). IGRA applies only to federally recognized tribes and governs gaming on “Indian lands,” which are defined 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 an Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.” 25 U.S.C. § 2703(4)-(5).

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.<sup>3/</sup> 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). Class III gaming is regulated by the tribe, the state, and the federal government. Artichoke Joe’s California Grand Casino v. Norton, 353 F.3d 712, 721-22 (9th Cir. 2003).

### **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,

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<sup>3/</sup>Class I gaming consists of social games with prizes of minimal value and traditional Indian games that are part of tribal ceremonies or celebrations. 25 U.S.C. § 2703(6). Indian tribes are given exclusive authority to regulate these activities. Id. § 2710(a)(1). Class II gaming consists of two basic categories: (1) bingo and variants thereof, and (2) card games that are explicitly authorized by state law or are not explicitly prohibited by state law and are played in the state. Tribes may conduct Class II gaming in any state that “permits such gaming for any purpose by any person, organization, or entity,” so long as the particular gaming activity is not otherwise specifically prohibited on Indian lands by federal law. Id. § 2710(b)(1)(A). Class II gaming is subject to tribal regulation, id. § 2710(a)(2), and to federal oversight by the NIGC. Id. §§ 2710(b) & (c).

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). The Secretary may specifically 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 approved or deemed approved by Secretarial inaction, takes effect when notice is published in the *Federal Register* pursuant to Section 2710(d)(3)(B).

### **3. Gaming Ordinances**

Pursuant to Sections 2710(d)(1)(A)-(2)(A), a Tribe desiring to conduct Class III gaming must also adopt, enact, and submit to the Chairman of the NIGC for his approval a gaming ordinance. Unless the Chairman determines that the ordinance does not meet the content and submission requirements, or that the ordinance was not adopted in compliance with the governing documents of the Indian tribe, or that the governing body of the tribe was unduly influenced in its adoption of the ordinance, the Chairman “shall approve such ordinance.” 25 U.S.C. §§ 2710(d)(2)(B); 2710(e). If the ordinance is not acted upon by the Chairman within a 90-day period, it “shall be considered to have been approved by the Chairman” 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* pursuant to Section 2710(d)(2)(B)(ii).

## **II. FACTUAL BACKGROUND**

### **A. The Tribal-State Compact**

On August 18, 2002, pursuant to IGRA, the Nation and the State executed a Tribal-State

Gaming Compact for the conduct of Class III gaming.<sup>4/</sup> (Amended Complaint Exhibit C, para. 1).<sup>5/</sup> 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. (Amended Complaint Exhibit C at 5, para. 4). Thereafter, the Nation forwarded the fully executed and validly entered compact to the Secretary for approval. Under IGRA, the Secretary had forty-five days from the submission of the Compact to act affirmatively. Absent Secretarial approval or disapproval within the statutory time frame, IGRA provides that such compacts take effect by operation of law. 25 U.S.C. § 2710(d)(8)(C). Rather than act on the Compact, former Secretary Gale A. Norton exercised her discretion to take no action, which resulted in the Compact being deemed approved to the extent it is consistent with IGRA. In identical letters dated November 12, 2002, sent to the Nation President and to the Governor of New York, the former Secretary explained the policy reasons behind her decision to neither approve or disapprove the Compact. (Amended Complaint Exhibit C). As required by IGRA, on December 9, 2002, the Secretary published notice of the approved status of the Compact in the *Federal Register*. 67 Fed. Reg. 72968 (Dec. 9, 2002).

The Compact entered into by the 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

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<sup>4/</sup>Plaintiff also challenges the validity of the Compact under New York State law. As the state defendants note in the memorandum of law submitted in support of the State's motion to dismiss the amended complaint, the New York Court of Appeals has held that the Compact does not offend New York law. See Memorandum of Defendants Pataki and Ritchko-Buley in Support of Motion to Dismiss at Points II and IV.

<sup>5/</sup>The United States' Exhibits A through C ("U.S. Exhibit") referenced herein as are attached as an Appendix filed contemporaneously with the United States' motion to dismiss.

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.<sup>6/</sup> Under the terms of the Compact, the Nation agreed to purchase these sites with the funds provided by the Settlement Act, reserving five million dollars for housing adjacent to the sites. Compact, at Section 11(b)(4); MOU at U.S. Exhibit A.<sup>7/</sup>

## **B. The Gaming Ordinance**

In the same month that the Nation executed the Compact, it adopted and enacted a Class III gaming ordinance. On August 29, 2002, the Nation submitted the "Seneca Nation of Indians Class III Gaming Ordinance of 2002" to the Chairman of the NIGC for review and approval pursuant to Sections 2710(d)(1)(A)-(2)(A) of IGRA. Following the NIGC's initial review of the Ordinance and informal discussions with attorneys for the Nation, the 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; the Chairman subsequently approved it on November 26, 2002. Letter Approving Ordinance at U.S. Exhibit B. The Ordinance applies to all Nation lands on which Class III gaming is conducted by the Nation.<sup>8/</sup> The Ordinance does not apply to a specific site. As required by IGRA, on December 16, 2003, the Chairman published

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<sup>6/</sup>The terms of the MOU and the Compact specifically limit the use of Settlement Act funds and the location of Nation gaming facilities to parcels in Erie County and Niagara County. Compact, Section 11(a) at U.S. Exhibit A.

<sup>7/</sup>The Compact also requires that the Nation pay the State a percentage of the gaming revenue in exchange for several benefits including a grant of Class III gaming exclusivity in a 10,500 square-mile area in Western New York and certain start-up benefits provided by the State. Compact, Section 12 at U.S. Exhibit A.

<sup>8/</sup>The Ordinance provides that Nation lands shall have the meaning found in IGRA, 25 U.S.C. § 2703(4). Ordinance § 4-1(u) at U.S. Exhibit C; see also 25 C.F.R. § 502.12.

notice of the approved status of the Ordinance in the *Federal Register*. 68 Fed. Reg. 70048 (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. (Amended Complaint ¶ 48). The State and local governments had thirty days to comment on the acquisition. As indicated in the Nation's submission, the Parcels were acquired by the Nation in order to operate Class III gaming and related facilities pursuant to the Compact and IGRA. Once the comment period expired, the Parcel assumed restricted fee status on December 2, 2005. (Amended Complaint ¶ 52).

**III. STANDARD FOR DISMISSAL**

Federal Rule of Civil Procedure 12(b)(1) provides that a defendant may move for dismissal based upon "lack of jurisdiction over the subject matter" when the district court lacks the statutory or constitutional authority to adjudicate a case. See Fed. R. Civ. P. 12(b)(1). In resolving a such a motion, a court is not confined to allegations in the complaint because "[o]n a motion under [Rule] 12(b)(1) challenging the district court's subject matter jurisdiction, the court may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits." Antares Aircraft, L.P. v. Fed. Republic of Nigeria, 948 F.2d 90, 96 (2d Cir. 1991) (citations omitted), vacated, 505 U.S. 1215 (1992). The plaintiff has the burden of proving, by a preponderance of the evidence, subject matter jurisdiction. See Makarova v.

United States, 201 F.3d 110, 113 (2d Cir. 2000), citing Malik v. Meissner, 82 F.3d 560, 562 (2d Cir. 1996).

#### IV. ARGUMENT

##### Plaintiff Lacks Standing to Bring His Claims

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

As to the Constitutional requirements for standing, the Supreme Court in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), reiterated that a plaintiff seeking to invoke a federal court's jurisdiction must establish (1) that it has suffered an "injury in fact" – an "invasion of a legally protected interest which is (a) concrete and particularized,<sup>9</sup> and (b) 'actual or imminent, not 'conjectural' or 'hypothetical,'" id. (citations omitted); (2) that its injury is fairly 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). These three elements constitute the "irreducible minimum" required by Article

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<sup>9</sup> "Particularized" means that the injury must affect the plaintiff in a personal and individual way. Defenders of Wildlife, 504 U.S. at 561 n.1.

III. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 472 (1982).

Plaintiff must establish both constitutional and prudential standing. Sullivan v. Syracuse Hous. Auth., 962 F.2d 1101, 1106 (2d Cir. 1992). Under prudential considerations, a plaintiff may not rest his claim on the legal rights of a third-party; the courts should generally refrain from adjudicating “abstract questions of wide public significance” which are “generalized grievances”; and plaintiff’s injury that supplies constitutional standing must be “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” Id. at 1106. 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). When a plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily substantially more difficult to establish. Defenders of the Wildlife, 504 U.S. at 562.

While the zone of interests test seeks, on the one hand, to enable a broad class of people to challenge administrative action, it also ensures, on the other hand, that the class of challengers is not overly broad and thereby limits “the potential for disruption inherent in allowing every party adversely affected by agency action to seek judicial review.” Clarke v. Sec. Indus. Ass’n, 479 U.S. 388, 397 (1987). The zone of interests test requires a court to ask first what interests “‘arguably [are] to be protected’ by the statutory [or constitutional] provision at issue,” and then to determine “whether the plaintiff’s interests affected by the agency action in question are among them.” Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co., 522 U.S. 479, 492 (1998) (internal quotations omitted). Where a constitutional provision is at issue, the zone of

interests is determined by resort to the intent of the Framers of the Constitution. See DKT Memorial Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 286 (D.C. Cir. 1989).

**A. Plaintiff Lacks Standing to bring a Tenth Amendment Claim**

Plaintiff's first cause of action alleges that Congress exceeded its authority under the Indian Commerce Clause as limited by the Tenth Amendment of the U.S. Constitution. (Amended Complaint ¶ 57). First, Plaintiff has a high burden with respect to his constitutional claims as federal statutes are accorded a presumption of constitutionality. See, e.g., Walters v. Nat'l Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (invoking the "presumption of constitutionality which attaches to every Act of Congress"); see also Kyle Rys. v. Pac. Admin. Servs., 990 F.2d 513, 518 (9th Cir. 1993) (due process challenge entailed difficult burden since legislative Acts "come to the Court with a presumption of constitutionality"). When Congress legislates in the special area of Indian affairs the presumption of constitutionality is even stronger. As explained by the Supreme Court in Morton v. Mancari, 417 U.S. 535, 551-52 (1974):

The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation.

Here, Plaintiff cannot establish that he has standing to challenge IGRA's constitutionality and cannot meet this heavy burden in showing that the IGRA is unconstitutional.

Plaintiff lacks standing to allege a violation of the Tenth Amendment on behalf of the State. See, e.g., Tenn. Elec. Power Co. v. TVA, 306 U.S. 118, 144 (1939) (private parties "have

no standing . . . to raise any question under the” Tenth Amendment). The Tenth Amendment reserves to States all powers not granted to the federal government by the Constitution. See U.S. CONST. Amend. X. “If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.” New York v. United States, 505 U.S. 144, 156 (1992).

Plaintiff, claiming that Congress exceeded its authority by the passage of IGRA, lacks standing to bring claims under the Tenth Amendment, which protects the rights of states. Plaintiff argues that IGRA violates the Tenth Amendment by impermissibly commanding state action. (Amended Complaint ¶ 57). The State of New York, however, has declined to challenge this decision and raise that argument itself. In fact, the State entered into a compact with the Nation regarding the operation of the gaming facility on the Buffalo Parcel. The Plaintiff cannot stand in the State’s shoes to argue that the State has been commandeered to do anything in violation of the Tenth Amendment. Therefore, he cannot satisfy the elements of third-party standing on behalf of the State. See City of Roseville v. Norton, 219 F. Supp. 2d 130, 148 (D.D.C. 2002) (“Rights under the Tenth Amendment are thus properly raised by the states and their officers, and by them alone. . . . the Court is not prepared to extend this exception to find that the plaintiff municipalities have standing to assert legal interests that lie with the State of California.”).<sup>10</sup> Here, assuming Plaintiff’s alleged injuries can be traced to a violation of the

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<sup>10</sup>Third-party standing is only available when three criteria are met: “The litigant must have suffered an ‘injury in fact,’ thus giving him or her a ‘sufficiently concrete interest’ in the outcome of the issue in dispute, the litigant must have a close relation to the third party, and there must

Tenth Amendment, he nevertheless cannot be viewed as falling within the zone of interest protected by that Amendment, which involves protecting a State's interests.

**B. Plaintiff also lacks standing to bring an IGRA claim**

Plaintiff's fourth cause of action alleges that both the Secretary of the Interior and the Chairman of the NIGC have violated various provisions of the IGRA. Plaintiff lacks standing to bring these claims and his alleged injuries are not traceable to any actions by the Secretary or the Chairman.

Plaintiff must satisfy the basic requirement of the APA for an IGRA claim, as IGRA does not offer a private right of action for individual plaintiffs.<sup>11/</sup> Thus, a private individual must find his right to sue on some other basis. In this case, Plaintiff seeks to enforce IGRA through the APA, 5 U.S.C. § 702. Plaintiff's IGRA claims must fail because he has not asserted an injury in fact that is traceable to the actions of the Secretary of the Interior or the Chairman of the NIGC.<sup>12/</sup>

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,

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exist some hindrance to the third party's ability to protect his or her own interests." Powers v. Ohio, 499 U.S. 400, 411 (1991) (citations omitted) (quoting Singleton v. Wulff, 428 U.S. 106 (1976)). There can be no dispute that Plaintiff cannot establish the third Powers element as the State of New York had the capability of challenging the United States' decisions if it chose to do so.

<sup>11/</sup>Plaintiff likewise lacks prudential standing, as he does not fall within the zone of interests that IGRA protects. The interests that IGRA seeks to protect are those of the Indian Tribes and the states, not a private plaintiff. See 25 U.S.C. § 2702.

<sup>12/</sup>In his Fourth Cause of Action (¶ 102) and his Prayer for Relief (¶ 17), Plaintiff references the fee-to-trust regulations. 25 C.F.R. § 151. The fee-to-trust regulations do not apply because the land is held in restricted fee. Plaintiff cites a *Federal Register* notice regarding amendment of § 151. (Amended Complaint ¶ 102). However, the agency withdrew that final rule in a subsequent *Federal Register* notice. 66 Fed. Reg. 56608 (Nov. 9, 2001).

and this action is not discretionary but is mandated by statute. 25 U.S.C. § 2710(d)(8)(D); 67 Fed. Reg. 72968 (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). Any provisions of the Tribal-State Compact that violate federal law are not in effect. Therefore, it is not possible for Plaintiff to have suffered an injury that is traceable to the Secretary's statutorily permissible inaction. Furthermore, neither the Secretary nor the Department of the Interior is a party to the Tribal-State Compact, so it is not possible to trace Plaintiff's alleged injuries to the United States.<sup>13/</sup>

Plaintiff also cannot prove a connection between his claimed injury and the Chairman's approval of the Nation's non-site specific, Class III Gaming Ordinance. The Chairman's

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<sup>13/</sup> Even if the Plaintiff could establish the court has jurisdiction over this suit, the Compact became effective as a matter of law and the Secretary's decision to take no action on the Compact was committed to the Secretary's discretion by law and thus not subject to review under the APA. The APA authorizes review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Final agency action is not reviewable if "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). If "the governing statute or regulations '[are] drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion[.]" there is no jurisdiction. Schneider v. Feinberg, 345 F.3d 135, 148 (2d Cir. 2003) (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)). "Therefore '§ 701(a)(2) requires careful examination of the statute on which the claim of agency illegality is based,' and requires dismissal when there is 'no law to apply.'" Lunney v. U.S., 319 F.3d 550, 558 (2d Cir. 2003) (citations omitted) (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess., at 26 (1945)); Webster v. Doe, 486 U.S. 592, 600 (1988)). IGRA authorizes the Secretary to approve gaming compacts, 25 U.S.C. § 2710(d)(8)(A) ("The Secretary is authorized to approve any Tribal-State compact . . .,") and provides that the Secretary "may disapprove a compact" only if it violates IGRA, another federal law, or the United States' trust obligations to Indians. Id. § 2710(d)(8)(B). However, the statute does not require the Secretary to approve or disapprove a compact. IGRA grants the Secretary discretion to take no action while providing no standard by which a court can measure his conduct in exercising that discretion. Thus, the statute does not "guide or limit" the Secretary's discretion to act and there is no law to apply. See Schneider, 345 F.3d 135, 148-49 (2d Cir. 2003).

approval of the Ordinance is not connected to the potential harm that may be caused to the environment or nearby historical sites by casino gaming on the part of the Seneca Nation. Plaintiff cannot show that the approval was for gaming on this specific 9-acre parcel of land, or on any specific parcel of land. The Ordinance is one of general applicability, *i.e.*, there is no identification or mention of a specific site upon which Class III gaming will be conducted.<sup>14/</sup> While there may exist a general allegation of injury, the Plaintiff cannot show a connection between the injury and the Chairman's approval of a non-site specific, Class III gaming ordinance.<sup>15/</sup> Therefore, the Chairman's approval of the gaming ordinance cannot have caused any injury that the Plaintiff alleges from the siting of the casino in the City of Buffalo.

Plaintiff's alleged injuries also would not be redressed by a favorable decision from this Court. A favorable decision would result in this matter being remanded to the respective agencies with the directive that the Secretary take action either to approve or disapprove the Tribal-State compact and that the Chairman disapprove the Gaming Ordinance. If this Court were to remand the Secretary's inaction to the Secretary, it could not order him either to approve or disapprove the Compact without directly contravening IGRA, which plainly gives him the authority to take no action at all. The same is true for the Chairman with respect to gaming ordinances. Under IGRA, the Chairman is not required to either approve or disapprove an Ordinance within the statutory 90-day time frame, and he can opt to take no action. If the

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<sup>14/</sup>The absence of specific gaming sites from gaming ordinances approved by the Chairman of the NIGC is standard, as IGRA does not require that a specific site be identified.

<sup>15/</sup>The Seneca Nation of Indians Class III Gaming Ordinance of 2002 as Amended, in its definitions section, provides that "Nation lands," for purposes of the Ordinance, shall have the meaning found in IGRA at 25 U.S.C. § 2703(4).

Chairman opts to take no action, then the ordinance will be deemed approved. As a result, if the Court were to remand to the Chairman, it could not order him to disapprove the Ordinance without contravening IGRA, unless the Ordinance violated one of the requirements set forth in IGRA. In this case, Plaintiff has not alleged that by approving the Ordinance, the Chairman violated either of the requirements set forth in Sections 2710(d)(1)-(2), or the NIGC regulations.

**CONCLUSION**

For the reasons stated above, the United States respectfully requests that Plaintiff's Amended Complaint be dismissed.

DATED: August 25, 2006

Respectfully submitted,

SUE ELLEN WOOLDRIDGE  
Assistant Attorney General

MARY E. FLEMING  
United States Attorney's Office  
Western District of New York

/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, D.C. 20026-4378  
(202) 305-0261  
gina.allery@usdoj.gov

OF COUNSEL:  
MARIA WISEMAN  
Department of the Interior  
Office of the Solicitor

KATHERINE ZEBELL  
Staff Attorney  
National Indian Gaming Commission