UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTH COUNTY COMMUNITY ALLIANCE, INC., Plaintiff, v. DIRK KEMPTHORNE, Secretary of the United States Department of the Interior; DEPARTMENT OF THE INTERIOR; THE NATIONAL INDIAN GAMING COMMISSION; and PHILIP HOGEN, Chairman of the National Indian Gaming Commission, Defendants.	CASE NO. C07-1098-JCC ORDER

This matter comes before the Court on Defendants' Motion to Dismiss (Dkt. No. 7), Plaintiff's Response (Dkt. No. 9), and Defendants' Reply (Dkt. No. 14). Having considered the parties' briefing and supporting documentation, and finding oral argument unnecessary, the Court hereby finds and rules as follows.

I. BACKGROUND

Plaintiff is a non-profit organization, organized under the laws of the State of Washington, which is dedicated to environmental issues in Whatcom County, Washington. (Compl. ¶ 2 (Dkt. No. 1).) Plaintiff's members include property owners in the area affected by a casino project currently under

development by the Nooksack Indian Tribe, as well as members of the tribe itself. *Id*. at ¶¶ 3–4. Defendants are federal government officials and agencies with an interlocking set of responsibilities related to the regulation of Indian gaming. *Id*. at ¶¶ 5–8. The Nooksack Tribe is a federally recognized Indian tribe located in the State of Washington. *See* 72 Fed. Reg. 13,648 (March 22, 2007).

In 1993, the Nooksack submitted a tribal gaming ordinance to the National Indian Gaming Commission ("NIGC") for approval pursuant to the Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. § 2710. Shortly thereafter, the NIGC issued a list of tribes with approved class III gaming ordinances in the Federal Register that included the Nooksack Tribe. 58 Fed. Reg. 65406 (Dec. 14, 1993). In subsequent years, the NIGC has issued such notice in an identical format, with an updated listing of the tribes with approved class III gaming ordinances. *See, e.g.*, 67 Fed. Reg. 54823 (Aug. 26, 2002). The Nooksack's approved tribal gaming ordinance did not specify any particular site or facility where gaming was to take place; rather, it provided that the Nooksack Gaming Commission "shall issue a separate license to each place, facility, or location on Indian lands where Class II gaming is conducted under this ordinance." *See* Nooksack Tribal Code 56.04.030. The Nooksack Tribe is currently developing a gaming facility in Whatcom County called the Northwood Casino. The project is not located within the Nooksack reservation, but rather on a site approximately twenty miles away, on land held in trust for the Nooksack Tribe. (Pl.'s Resp. 6 (Dkt. No. 9)); (Dept. of Interior Letter (Dkt. No. 7-4).) Defendants assert that current plans limit this facility to Class II gaming. (Defs.' Mot. 3 (Dkt. No. 7).)

Plaintiff filed the present lawsuit on July 13, 2007, alleging violations of IGRA, the National Environmental Policy Act[1] ("NEPA"), and the Administrative Procedures Act ("APA"). These claims all concern alleged defects in the process by which the NIGC approved the Nooksack Tribe's tribal gaming ordinance, as well as an alleged neglect of ongoing procedural obligations (Compl. ¶¶ 21–45 (Dkt. No.

[1]In the Complaint, Plaintiff bases its second cause of action on the "National Environmental Protection Act." The Court assumes this refers to the National Environmental Policy Act.

1).) Plaintiff seeks declaratory and injunctive relief, or in the alternative, a writ of mandamus halting the development of the casino until the alleged procedural deficiencies can be cured. (Prayer for Relief ¶¶ 1–7 (Dkt. No. 1).) The matter now before the Court is Defendants' motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

II. DISCUSSION

A. Legal Standards

Federal Rule of Civil Procedure 12(b)(1) provides a defense for "lack of jurisdiction over the subject matter" of a claim. An assertion that a court lacks subject matter jurisdiction is a challenge to its "statutory and constitutional power to adjudicate the case, and it may not be waived." 2 MOORE'S FEDERAL PRACTICE, § 12.30[1] (Matthew Bender 3d ed.) ("MOORE'S"); *see also* FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"). "The district court must determine questions of subject matter jurisdiction first, before determining the merits of the case." 2 MOORE'S, § 12.30[1].

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits dismissal for "failure to state a claim upon which relief can be granted." In deciding a Rule 12(b)(6) motion, the Court must accept as true all well-pleaded allegations of fact in the complaint and construe them in the light most favorable to Plaintiff. *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001). Dismissal is warranted only if it "appear[s] to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved." *Plaine v. McCabe*, 797 F.2d 713, 723 (9th Cir. 1986). However, "[c]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *In re Verifone Sec. Litig.*, 11 F.3d 865, 868 (9th Cir. 1993).

B. Statute of Limitations

Defendants assert that the only agency action for the purposes of Plaintiff's claims is the NIGC's approval of the Nooksack's gaming ordinance, and that such a challenge is statutorily time-barred.

(Defs.' Mot. 9–10 (Dkt. No. 7).) The parties agree on the applicable statutory limit, which states in relevant part that "[e]xcept as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). This is consistent with precedent in this Circuit, which has found that § 2401(a) "should apply to actions brought under the APA which challenge a regulation on the basis of procedural irregularity." *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991) (citing *Sierra Club v. Penfold*, 857 F.2d 1307 (9th Cir. 1988) (applying § 2401(a) to bar the Sierra Club's APA challenge to regulations whose adoption purportedly did not comply with the procedural requirements of NEPA)).

The crux of the disagreement is when Plaintiff's cause of action first accrued. Defendants assert that the limitations period began to accrue when approval of the Nooksack's gaming ordinance was first published in the Federal Register in 1993. (Defs.' Mot. 10 (Dkt. No. 7).) Plaintiff, on the other hand, maintains that the limitations period for its cause of action began to accrue "upon announcement of the Northwood Crossing project," when it "had reason to know" of the individual injury serving as the basis of the action. (Pl.'s Resp. 9 (Dkt. No. 9).) In the alternative, Plaintiff argues that the limitations period began to accrue when the NIGC published notice of its approval of the Nooksack gaming ordinance in the Federal Register in 2002. *Id*.

As a threshold matter, Plaintiff's argument that the 2002 publication in the Federal Register should serve as the point of accrual is entirely without merit. In both its form and professed intention, the 2002 publication is identical to the 1993 notice in the Federal Register cited by Defendants. *See* 58 Fed. Reg. 65406 (Dec. 14, 1993); 67 Fed. Reg. 54823 (Aug. 26, 2002). The only difference between the two documents, both issued by the NIGC, is that the latter reflects a longer, updated list of the tribes with approved gaming ordinances authorizing class III gaming. For present purposes, the critical factor is that both documents listed the Nooksack Tribe. Accordingly, there is no basis for designating the 2002 notice,

rather than the 1993 notice, as the point of accrual. Plaintiff argues that rather than serving as the "consolidated and comprehensive" listing that Defendants describe, the 2002 notice entitled its readers to believe it was "an approval of and action upon the Nooksack ordinance as of that date." (Pl.'s Resp. 10 (Dkt. No. 9).) Plaintiff supports this conclusion with language in IGRA providing that publication in the Federal Register shall occur "[u]pon the approval" of an ordinance or resolution. *Id*. (quoting 25 U.S.C. § 2710(d)(2)(B)(ii)). Nothing in this language, however, precludes the NIGC from publishing its recent approvals in periodic, consolidated listings. Furthermore, courts have found under similar circumstances that the reissue of information does not reset the relevant statute of limitations. *See*, *e.g.*, *Impro Prods., Inc. v. Block*, 722 F.2d 845, 850 n.9 (D.C. Cir. 1983). The confusion Plaintiff describes could only occur if one had neglected to read earlier notices in the Federal Register, an excuse that is antithetical to the principle of constructive notice. In sum, approval of the Nooksack gaming ordinance was first published in the Federal Register in 1993 and subsequent notices issued by the NIGC could do nothing to revise this operative date.

Having decided that the 2002 publication in the Federal Register was not the point of accrual, the question becomes whether, under the circumstances of this case, the 1993 publication triggered the limitations period or whether an event other than publication in the Federal Register should mark the point at which Plaintiff's rights were perfected. Ordinarily, "[p]ublication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance." *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667–68 (9th Cir. 1989). However, certain characteristics of the statutory scheme of IGRA cast doubt on how this baseline rule is to apply. Pursuant to IGRA's notice requirement, the NIGC issued the 1993 publication in the Federal Register to announce that the Commissioner had approved the Nooksack's gaming ordinance authorizing class III gaming. This publication did not specify the nature or location of any specific project. It was not until over a decade later, when a concrete project at the Northwood Casino site finally materialized, that

Plaintiff most probably realized its interest in the matter. This raises the question of whether publication in the Federal Register, under IGRA's scheme of shared authority between the NIGC and Indian tribes, was sufficient to provide even constructive notice of Plaintiff's claims.

The Court concludes that the circumstances of this case do not justify a departure from the general rule. First, Plaintiff's theory is that the NIGC did not make a required determination, which is a procedural claim that should have been apparent at the time the NIGC approved the Nooksack's gaming ordinance. Second, while it would have required familiarity with the statutory scheme of IGRA in order to contemporaneously appreciate the *consequences* of the 1993 gaming ordinance approval, all necessary information for identifying the land potentially affected by the decision was part of the public domain at the time the ordinance was approved. With an approved gaming ordinance authorizing class III gaming under IGRA, the Nooksack Tribe needed to do nothing more, with respect to the NIGC, in order to conduct class II gaming on its own "Indian lands." Therefore, any piece of property falling within the definition of "Indian lands" was a potential site for a project such as the Northwood Casino.[2] In this respect, this case is distinguishable from one in which "defendant has concealed its acts with the result that plaintiff was unaware of their existence or . . . [plaintiff's] injury was 'inherently unknowable' at the accrual date." *Japanese War Notes Claimants Assoc. of the Philippines, Inc. v. United States*, 373 F.2d 356, 359 (Cl. Ct. 1967) (quoting *Urie v. Thompson*, 337 U.S. 163, 169 (1949)). While it may be little consolation to Plaintiff that all the information necessary to identify its particularized claim was available in the public record, the theory of constructive notice that assumes familiarity with prevailing law is no different in kind from that which assumes familiarity with the content of the Federal Register.

[2]Defendants state that the Nooksack Tribe plans to restrict the Northwood Casino to class II gaming (Defs.' Mot. 3 (Dkt. No. 7)), while Plaintiff speculates that the tribe may really be laying the groundwork for a class III casino. (Pl.'s Resp. 5 (Dkt. No. 9).) The Court does not have enough information to resolve this dispute, which is not material to the issues raised by Defendants' motion.

Furthermore, this result comports with a line of case law in this Circuit that specifically addresses the issue of agency action and accrual of statutory limitations periods. In *Shiny Rock Mining Corp. v. United States*, a 1964 public land order withdrew from appropriation, under the United States mining laws, a section of land within the Williamette National Forest. 906 F.2d 1362, 1363 (9th Cir. 1990). The plaintiff applied for a mineral patent more than fifteen years later, only to be denied on the basis of the order. Plaintiff filed suit "arguing that there were errors and violations of statutes and regulations in the formulation and publication" of the public land order. *Id*. After concluding that the six–year statute of limitations of § 2401(a) applied to the case, the Ninth Circuit found that the statutory period began to accrue upon publication of the public land order in the Federal Register, and therefore the plaintiff's claim was time-barred. *Id*. at 1366. In so doing, the court affirmed the adequacy of the Federal Register as a means of constructive notice, and dispensed with the plaintiff's arguments that it did not have standing and had not suffered an injury during the limitations period. The court explicitly "decline[d] to accept the suggestion that standing to sue is a prerequisite to the running of the limitations period," and characterized the injury, for the purposes of triggering accrual, as "that incurred by all persons when, in 1964 and 1965, the amount of land available for mining claims was decreased." *Id*. at 1365–66.

In *Wind River Mining Corp. v. United States*, the Ninth Circuit saw reason to depart from the result in *Shiny Rock*, while drawing a key distinction. 946 F.2d 710 (9th Cir. 1991). *Wind River* concerned a 1979 Bureau of Land Management decision to establish 138 Wilderness Study Areas ("WSA") on federal land pursuant to the Federal Land Policy and Management Act of 1976 ("FLPMA"). *Id*. at 711. The plaintiff staked certain mining claims within the affected areas but was barred from pursuing ore-extraction activities, and therefore brought suit claiming that the land in question was improperly classified as a WSA. After identifying § 2401(a) as the operative statute of limitations, the Ninth Circuit found that the plaintiff's claim was not time-barred, even though it was filed more than six years after the Bureau's land designation. The court held that "a substantive challenge to an agency

decision alleging lack of agency authority may be brought within six years of the agency's *application of that decision to the specific challenger*." *Id*. at 716 (emphasis added). The court harmonized its holding with *Shiny Rock* by drawing a distinction between procedural and substantive challenges: "If a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years *of the decision*." *Id*. a 715 (emphasis added). The rationale for this distinction was predicated on a delicate balance "between the government's interest in finality and a challenger's interest in contesting an agency's alleged overreaching." *Id*. Whereas "[t]he government should not be permitted to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs," "[t]he government's interest in finality outweighs a late-comer's desire to protest the agency's action as a matter of policy or procedure." *Id*.

Taken together, these cases emphasize the nature of a plaintiff's claims in deciding when the statute of limitations to challenge agency action begins to accrue. Recognizing that the line between procedure and substance can be an analytical thicket, it is apparent in this case that Plaintiff's claims are procedural. The Complaint repeatedly characterizes the problem as a failure to make required determinations, rather than a failure to reach the right result. (*See, e.g.*, Compl. ¶¶ 24, 26, 31, 40, 45 (Dkt. No. 1).) Furthermore, responding in part to Defendants' argument that Plaintiff seeks to usurp their enforcement prerogative, Plaintiff explicitly subordinates questions of substance: "Now, in the end, it may be that the Northwood Crossing site does in fact qualify as "Indian lands" – though the Alliance doubts this. Either way, it is Defendants' duty under IGRA to make this determination, and to make it sooner rather than later." (Pl.'s Resp. 6 (Dkt. No. 9).)

Therefore, to the extent that Plaintiff challenges Defendants' approval of the Nooksack's gaming ordinance based on § 2710(b)(1) ("Indian lands") and § 2710(b)(2)(E) ("environment . . . public health and safety"), the claims are time-barred under 28 U.S.C. § 2401(a), with the six–year limitation period

having begun to accrue upon publication in the Federal Register in December 1993. Accordingly, the Court lacks subject matter jurisdiction over these claims under Federal Rule of Civil Procedure 12(b)(1).

C. "Indian Lands" Under IGRA

While the statute of limitations precludes any challenge to the sole agency action taken with respect to this case, this by itself does not dispose of the matter. In addition to the claim that approval of the Nooksack gaming ordinance was flawed at its inception, Plaintiff also advances the theory that IGRA "require[s] Defendants to make an 'Indian lands' determination for each and every facility where tribal gaming is to occur." (Pl.'s Resp. 4 (Dkt. No. 9).) If this is true, then regardless of whether the gaming ordinance should have been approved in 1993, the NIGC still had an ongoing obligation to make a formal "Indian lands" determination with respect to the Northwood Casino site, once it became known.[3] However, in order for Plaintiff to pursue this theory of unlawful omission, there must first be a corresponding right to judicial review.

i. Judicial review under IGRA

Plaintiff argues that IGRA provides for judicial review of Defendants' failure to make an "Indian lands" determination "for each and every facility where tribal gaming is to occur." (Pl.'s Resp. 4 (Dkt. No. 9). The statute explicitly addresses the question of judicial review in § 2714, enumerating the circumstances under which NIGC decisions can be appealed in federal court:

> Decisions made by the Commission pursuant to sections 2710 (Tribal gaming ordinances), 2711 (Management contracts), 2712 (Review of existing ordinances and contracts), and 2713 (Civil penalties) of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5.

25 U.S.C. § 2714. By what it specifically includes, and therefore excludes, this provision plainly does not support a right to judicial review for an alleged failure to make a formal "Indian lands" determination

[3]Plaintiff must be asking for some kind of "formal" determination, since the NIGC's decision not to exercise its enforcement authority with respect to the Northwood Casino necessarily implies that it does not consider the tribe to be in violation of IGRA.

outside of the context of a gaming ordinance application. Even assuming that IGRA implicitly requires such a determination, it still does not follow that § 2714 implicitly offers the right to judicial review, and Plaintiff offers no support to the contrary.

ii. Judicial review under the APA

Plaintiff also alleges a right to seek judicial review under the APA, which states in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
>
> (1) compel agency action unlawfully withheld or unreasonably delayed;

5 U.S.C. § 706; (Compl. ¶ 45 (Dkt. No. 1).) This provision rests on the premise that the agency has a duty to act in the first place. *See San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 885–86 (9th Cir. 2002); *Friends of the Wild Swan, Inc. v. U.S. EPA*, 130 F.Supp.2d 1184, 1192 (D. Mont. 1999).

Plaintiff argues that IGRA implicitly imposes a duty on the NIGC to make ongoing "Indian lands" determinations as individual gaming projects develop. The statutory basis for the duty, according to this view, is IGRA's provision that "[a]n Indian tribe may engage in, or license and regulate, class II gaming *on Indian lands* within such tribe's jurisdiction," subject to certain conditions. 25 U.S.C. § 2710(b)(1) (emphasis added).[4] Furthermore, Plaintiff cites *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295 (W.D.N.Y. 2007) for the proposition that IGRA's statutory scheme contains this implicit requirement. (Pl.'s Resp. 7–8 (Dkt. No. 9).) Defendants argue that they "do not have a statutory duty to make pre-construction determinations in the first place." (Defs.' Mot. 12–14 (Dkt. No. 7).) Defendants also distinguish *Citizens Against Casino Gambling* as a timely challenge of a

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[4]The statute defines the term "Indian lands" as: "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4).

tribal gaming ordinance, and by the fact that the ordinance in that case was effectively "site-specific." (Defs.' Reply 3 (Dkt. No. 14).)

There can be no doubt that IGRA limits an Indian tribe's right to conduct class II gaming to "Indian lands," as this term is defined in the statute and implementing regulations. 25 U.S.C. § 2710(b)(1). Therefore, it cannot be the case that no mechanism exists for applying the definition of "Indian lands" to a particular enterprise. The question here is when and how this mechanism is to operate. Because any challenge to the NIGC's original approval of the Nooksack gaming ordinance is statutorily time-barred for the reasons set forth above in subsection B, the precise issue that remains is whether the NIGC must make a formal "Indian lands" determination for each class II gaming facility subsequently developed under a validly approved, non-site-specific gaming ordinance.

The Court concludes that neither the provisions of IGRA, the underlying logic of IGRA's statutory scheme, or the relevant case law, support Plaintiff's position that such a duty exists. The statute offers not even a hint as to when or how the NIGC is to make an "Indian lands" determination, even at the phase in which the NIGC reviews a tribal gaming ordinance. At that time, the statute provides certain conditions for the conduct of class II gaming by an Indian tribe, including the adoption of an ordinance or resolution by the tribal governing body, that is to be approved by the Commissioner. 25 U.S.C. § 2710(b)(1). This same provision also requires *a tribe* to issue a separate license for "each place, facility, or location on Indian lands at which class II gaming is conducted." *Id*. The statute then sets forth the criteria by which the Chairman must abide in granting approval of the tribal ordinance or resolution. *Id*. at (b)(2). Taken together, these provisions require the NIGC to ensure that a tribal gaming ordinance or resolution has certain institutional or systemic characteristics (i.e. limits on the use of net revenues, provision of outside audits), while leaving specific siting decisions to the tribe. There is no corresponding discussion of what the NIGC and a particular tribe must do as these siting decisions are made over time.

Furthermore, if it is some form of hearing that Plaintiff requests, such process is conspicuously

absent from IGRA, which states that the NIGC may hold such hearings "as the Commission deems appropriate," 25 U.S.C. § 2706(b)(8), and enumerates certain decisions for which hearings are required. *See, e.g.*, § 2710 (c)(2) (revocation of gaming licenses); § 2710 (c)(6) (removal of certificate of self-regulation); § 2711(f) (modification or voidance of a management contract). The presence of these express provisions tends to refute Plaintiff's theory that the NIGC has an implicit procedural duty to make formal "Indian lands" determinations with respect to new gaming establishments developed pursuant to a valid, non-site-specific gaming ordinance.

Plaintiff's reliance on *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295 (W.D.N.Y. 2007), is misplaced. That case involved a Tribal-State compact[5] that specifically authorized the tribe to establish gaming facilities at three separate sites, and identified how new land for gaming would be acquired. *Id*. at 307. Within three months after the Tribal-State compact was executed, the NIGC Chairman approved the tribe's class III gaming ordinance. *Id*. at 307, 309. Therefore, consideration of the gaming ordinance was made with particular sites having already been identified by the relevant Tribal-State compact. In rejecting the Government's argument that it was not required to make an "Indian lands" determination upon approving the gaming ordinance, the court found that IGRA implicitly required a determination, and therefore, "[p]rior to approving an ordinance, the NIGC Chairman must confirm that *the situs of proposed gaming is Indian lands*." *Id*. at 323–24.

There are at least a couple reasons why this case is distinguishable from the matter at hand. First, the plaintiffs there were challenging the final agency action of approving the tribe's gaming ordinance. For the reasons discussed above in subsection B, this avenue is closed to Plaintiff in this case, with the claim being brought well beyond the six–year statute of limitations. Furthermore, the implicit requirement to make an "Indian lands" determination found in that case was imposed in a context where specific sites

[5]As a prerequisite for conducting Class III gaming activities, IGRA requires that the tribe and relevant state enter into a Tribal-State compact. 25 U.S.C. § 2710(d)(1)(C).

had already been identified by the Tribal-State compact. Here, no such site was identified at the time the Nooksack Tribe sought approval of their gaming ordinance, and nothing in IGRA required them to go back to the NIGC before developing their class II facility. In *Citizens Against Casino Gambling*, the NIGC was simply faced with a different calculus at the time it approved the tribal gaming ordinance, and that court did not address whether there is any implicit obligation to initiate ongoing, formal "Indian lands" determinations as specific sites materialize.[6] Absent a statutory duty to make a formal "Indian lands" determination, Plaintiff has no right to judicial review under 5 U.S.C. § 706(1).

D. NEPA Claim

Plaintiff argues that a mandatory "Indian lands" determination also constitutes a "major federal action" triggering environmental review under NEPA. (Pl.'s Resp. 10 (Dkt. No. 9).) Therefore, Plaintiff's NEPA claim hinges on the theory that Defendants had an implicit obligation to make a formal "Indian lands" determination before construction on the Northwood Casino could commence. Since the Court has determined that no such formal, ongoing obligation exists, Plaintiff's NEPA claim fails on its own terms, as there is no "major federal action" that would require environmental review under that statute. 42 U.S.C. § 4332(2)(C).

E. Environmental Review Under IGRA

Plaintiff also argues that the NIGC had an ongoing obligation to make formal findings as to whether "the construction and maintenance of the gaming facility, and the operation of that gaming is

[6]While the immediate question here is when and how the NIGC must make "Indian lands" determinations, it is worth noting that the agency has not been evasive about its substantive position: "With all due respect to Plaintiff, the NIGC does not share this doubt [about whether the Northwood Casino site is on "Indian lands"]. NIGC staff has made appropriate inquires [sic] and has gathered appropriate documentation to inform the NIGC Chairman's enforcement discretion." (Defs.' Reply 4 (Dkt. No. 14).)

conducted in a manner which adequately protects the environment and the public health and safety." 25 U.S.C. § 2710(b)(2)(E). This claim fails for the same reason as the "Indian lands" theory in section C(ii). Plaintiff offers no support for the assertion that a formal determination has to be made on an ongoing, site-specific basis.

III. CONCLUSION

While it may be that Plaintiff raises legitimate policy concerns about the Northwood Casino project, the position Plaintiff advances in this lawsuit is either statutorily time-barred or without a proper legal home. Again, the question is not whether the NIGC must ensure compliance with IGRA, but rather how it must do so. IGRA delegates responsibility for Indian gaming to the NIGC, which exercises wide discretion in overseeing the interplay of federal, state, and tribal authorities in this area. Since there appears to be no requirement that tribal gaming ordinances be site-specific,[7] the statutory scheme is one that necessarily relies upon the NIGC's enforcement authority to ensure compliance with the Act. The NIGC's decision not to bring an enforcement action, displeasing as it might be to Plaintiff, is the mechanism the statute sets forth under these circumstances for establishing the lawfulness of the project. Plaintiff places great weight behind the notion that an "Indian lands" determination is necessary to "preserve Defendants' ability to assert any sort of jurisdiction over the Northwood facility in the future." (Pl.'s Resp. 7 (Dkt. No. 9).) However, Defendants have never denied making an "Indian lands" determination, and regardless of how they make that determination, they have no such ability to influence the sweep of their regulatory ambit. Rather than preserving NIGC jurisdiction, Plaintiff's position would work an end-run around the NIGC's enforcement prerogative with procedural hurdles not set forth in the statute. Simply put, while tribal gaming under IGRA must occur on "Indian lands" and the NIGC is the agency charged with ensuring this happens, there is no support in the statute or the relevant case law for

[7]In fact, Defendants specifically aver that site-specific gaming ordinances are "not common." (Defs.' Mot. 3 n.2 (Dkt. No. 7).)

the proposition that compliance must be enforced by the method of Plaintiff's choosing.

For the foregoing reasons, Defendants' Motion to Dismiss (Dkt. No. 7) is hereby GRANTED.

SO ORDERED on this 16th day of November, 2007.

John C. Coughenour
United States District Judge