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

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY, et al.,	)	**Civil Action No. 07-CV-0451**
Plaintiffs,	)	**Hon. William M. Skretny, U.S.D.J.**
v.	)	
HOGEN, et al.,	)	
Defendants.	)	

MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The central issue in this case is whether the Defendants, Chairman Philip N. Hogen (the "Chairman") of the National Indian Gaming Commission (the "NIGC") and Secretary Dirk. E. Kempthorne (the "Secretary") of the Department of the Interior (the "Department"), and their agencies, acted legally and in accordance with the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. ("IGRA"), in approving a tribal gaming ordinance under IGRA § 11(d)(1)(A)(i), thereby allowing the Seneca Nation of Indians ("SNI") to operate a gambling casino on 9± acres in Buffalo (the "Buffalo Parcels"). Plaintiffs assume without conceding for purposes of this litigation that the SNI purchased the Buffalo Parcels with proceeds from the Seneca Nation Settlement Act of 1990, 25 U.S.C. §§ 1774-1774h (the "SNSA"). Plaintiffs contend that Congress, in enacting the SNSA, never intended to establish a sovereign Indian enclave in the heart of downtown Buffalo for the conduct of casino gambling that otherwise would be illegal under the New York Constitution and laws. See N.Y. Const., Art. I, § 9; N.Y. Penal Law § 225.00, et seq.

Defendants now move to dismiss Plaintiffs' Complaint on the grounds of sovereign immunity under the Quiet Title Act, 28 U.S.C. 2409a (the "QTA"), for lack of standing and for failure to state a claim or, alternatively, for summary judgment. For the reasons set forth below,[1] Defendants' motion must be denied.

First, the QTA does not apply. As this Court recognized in the prior action between the parties, Citizens Against Casino Gambling in Erie County v. Kempthorne ("CACGEC I"), Plaintiffs do not contest that the SNI purchased the Buffalo Parcels, and Plaintiffs assume without conceding for purposes of this litigation that the SNI holds title to the land in "restricted

[1] Simultaneously herewith, Plaintiffs are moving for summary judgment on the merits of their claims. Plaintiffs respectfully refer this Court to Plaintiffs' Memorandum of Law in Support of their Motion for Summary Judgment, dated October 9, 2007, which Plaintiffs incorporate herein by reference to the extent relevant to the Defendants' dismissal motion.

fee" under the SNSA. For the same reasons that this Court found dispositive in CACGEC I, the QTA is inapplicable, and this Court has jurisdiction. See CACGEC I, 471 F. Supp. 2d 295, 320 (W.D.N.Y. 2007); 2007 U.S. Dist. LEXIS 29561 at *21-24 (W.D.N.Y. Apr. 20, 2007).

Moreover, as discussed below, Plaintiffs possess the requisite "personal stake" in the outcome of this controversy, and they are within the "zone of interest" of the statutes at issue. The interests Plaintiffs seek to protect are precisely the kinds of interests that courts routinely find to establish standing. Further, Plaintiffs have stated valid claims against Defendants under the Administrative Procedure Act, 5 U.S.C. § 701, et seq. The Buffalo Parcels are not sovereign SNI land, and thus are not "Indian lands" eligible for gambling under IGRA. Moreover, the Buffalo Parcels were not "taken into trust as part of a settlement of a land claim." Thus, they are not excepted from IGRA's "after-acquired lands" prohibition on gambling. For these reasons, and as set forth in Plaintiffs' Memorandum in Support of their Summary Judgment Motion, it is Plaintiffs, not Defendants, who are entitled to judgment on the merits. Accordingly, Defendants' motion to dismiss or for summary judgment should be denied in its entirety.

STATEMENT OF FACTS

The Court's familiarity with the facts and the relevant statutory and regulatory framework is respectfully assumed, given the close relationship between this action and CACGEC I, decided earlier this year. The relevant facts are set forth in the Complaint; the accompanying affidavits; the Administrative Record; and this Court's prior opinions in CACGEC I.[2]

THE APPLICABLE STANDARD OF REVIEW

On a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), the court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated

[2] On September 10, 2007, Defendants filed the Administrative Record relating to the NIGC's approval of the Ordinance (Docket No. 27). The Administrative Records relating to the Secretary's and the Chairman's prior determinations and approvals were filed in CACGEC I (see CACGEC I, Docket No. 17, 25-27) and are thus matters of public record.

by reference in the pleadings and matters of which judicial notice may be taken." Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir. 1993). The Court must afford plaintiffs' complaint a liberal construction, assume the complaint's factual allegations to be true, and draw every possible inference, determining whether any cognizable claim for relief has been alleged. See, e.g., Chambers v. Time Warner, 282 F.3d 147, 153 (2d Cir. 2002); see Yoder v. Orthomolecular Nutrition Inst., 751 F.2d 555, 558 (2d Cir. 1985) (complaint read with "great generosity"). The court may not dismiss unless the plaintiffs' factual allegations are insufficient "to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, --- U.S. ---, 127 S.Ct. 1955, 1974 (2007). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Id., --- U.S. ---, 127 S.Ct. at 1969.

Summary judgment of a claim or defense will be granted when the moving party demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 331 (1986). The district court is "not to resolve issues of fact but only to determine whether there is a genuine triable issue as to a material fact." Howley v. Town of Stratford, 217 F.3d 141, 150-51 (2d Cir. 2000); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

For a case under the APA, the standard of review is set forth in APA § 706. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413 (1971); Schicke v. Romney, 474 F.2d 309, 314 (2d Cir. 1973). Under § 706, the reviewing court is authorized to "hold unlawful and set aside agency action, findings, and conclusions" that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see Citizens to Preserve Overton Park, 401 U.S. at 413-14; Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1573-75 (10th Cir. 1994); Schicke, 474 F.2d at 315; CACGEC I, 471 F. Supp. 2d at 320. Although this standard is sometimes referred to as a "deferential" one, see, e.g., Utahns for

Better Transp. v. United States Dep't of Transp., 305 F.3d 1152, 1164 (10th Cir. 2002), modified, 319 F.3d 1207 (10th Cir. 2003), such deference is "not unfettered nor always due," see Cherokee Nation of Oklahoma v. Norton, 389 F.3d 1074, 1078 (10th Cir. 2004). In particular, no deference is due where, as here, the agency's interpretation is plainly erroneous or inconsistent with the law. See, e.g., South Dakota v. U.S. Dep't of Interior, 423 F.3d 790, 799 (8th Cir. 2005).

When the issue is one of statutory interpretation, the Court should review the interpretation under a de novo standard. See Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712, 719 (9th Cir. 2003); see also Grande Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Attorney for W. Dist of Mich., 369 F.3d 960, 966 n.3 (6th Cir. 2004); Pueblo of Santa Anna v. Kelly, 104 F.3d 1546, 1557 (10th Cir. 1997) (IGRA presents federal question suitable for determination by federal court). Under this standard, the court interprets the statute by ascertaining the intent of Congress and by giving effect to its legislative will. Artichoke Joe's, 353 F.3d at 720. When the words of a statute are unambiguous, judicial inquiry is complete. But where the language is not dispositive, "we look to the congressional intent revealed in the history and purposes of the statutory scheme." Id. (citations and internal quotations omitted); see also Plaintiffs' Summary Judgment Mem. at 9-18.

ARGUMENT

POINT I

THE QUIET TITLE ACT IS INAPPLICABLE BECAUSE PLAINTIFFS ARE NOT CHALLENGING TITLE

Defendants' argue, as they did in CACGEC I, that this Court lacks subject matter jurisdiction on the ground of sovereign immunity under the QTA. This Court has already twice considered and twice rejected this same argument.[3] So too here, for the reasons that were

[3] In CACGEC I, 471 F. Supp. 2d at 320, this Court held that title to the Buffalo Parcels "is not in danger of divestiture as a consequence of this lawsuit and, therefore, the QTA is not applicable."

dispositive in CACGEC I, the Court should reject Defendants' motion to dismiss for lack of subject matter jurisdiction.

The QTA, by its terms, applies when: (1) there is an action "to adjudicate a disputed title to real property;" and (2) the property involved is one "in which the United States claims an interest." When both conditions are met, the QTA waives the United States' sovereign immunity from suit unless the property is "trust or restricted Indian lands," in which case the United States retains its immunity. 28 U.S.C. § 2409a(a). As this Court recognized in CACGEC I, the focus of the QTA analysis is on the nature of the relief requested, not the parties' characterization of the claim. CACGEC I, 471 F. Supp. 2d at 318 (citing United States v. Mottaz, 476 U.S. 834, 843 (1986)). Here, as in the prior action, Plaintiffs' APA claim challenges the approval of the ordinance and the Defendants' determination that the Buffalo Parcels are "Indian lands" otherwise qualified for the "settlement of a land claim" exception to IGRA's after-acquired lands prohibition on gambling. As in CACGEC I, "there is no challenge to the title of the Buffalo parcels, express or implied." Id. at 318. Thus, the QTA does not apply.

In pressing the issue of sovereign immunity, Defendants continue to ignore the critical distinction between an action challenging title to trust or restricted lands and an action challenging the governmental status of such lands. As the court in Kansas v. United States, 249 F.3d 1213 (10th Cir. 2001), explained:

> [A]djudicating the question of whether a tract of land constitutes "Indian lands" for Indian gaming purposes is "conceptually quite distinct" from adjudicating title to that land. One inquiry has little to do with the other as land status and land title "'are not congruent concepts' in Indian law." A determination that a tract of land does or does not qualify as "Indian lands" within the meaning of IGRA in no way affects title to the land. Such a determination "would merely clarify sovereignty over the land in question."

Subsequently, upon motion for reconsideration, this Court again concluded that "because the Parcel's title is not in danger of divestiture as a result of this lawsuit, the QTA is not applicable." 2007 U.S. Dist. LEXIS 29561 at *22 (W.D.N.Y. Apr. 20, 2007).

249 F.3d at 1225; see also Shivwits Band of Paiute Indians v. Utah, 185 F. Supp. 2d 1245, 1253 (D. Utah 2002), aff'd, 428 F.3d 966 (10th Cir. 2005) (challenge to determination of land's status as "Indian country" without first complying with NEPA did not challenge title and QTA did not bar it); see Neighbors for Rational Dev't, Inc. v. Norton, 379 F.3d 956, 965 (10th Cir. 2004).

Defendants acknowledge that this action does not directly challenge title to the Buffalo Parcels. Instead, they assert that the QTA "strictly precludes judicial review of the Indian country status of Indian lands, even if Plaintiff is not seeking to quiet title," Defs' MOL at 16, because "the United States has an interest in the land that would be affected by the relief sought," id. at 18. In CACGEC I, this Court previously addressed and rejected this same argument in ruling on Defendants' motion for reconsideration. There, this Court stated:

> As is clear from the plain language of the statute, for the QTA to apply to an action: "(1) the United States must claim an interest [other than a security interest or water rights] in the property at issue, and (2) there must be a disputed title to real property. If either condition is absent, the [QTA] in terms does not apply . . . ."
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> . . . Quite simply, before the Government can invoke the QTA's "trust or restricted Indian lands" exception as a shield to suit, there first must exist a dispute that otherwise triggers the QTA's waiver of sovereign immunity. No such dispute exists here.

2007 U.S. Dist. LEXIS 29561 at *19, *22 (citations omitted).

Here, as in the prior action, Plaintiffs do not contest the ownership of the land, but the NIGC's determination that the land is gambling-eligible "Indian land" under IGRA. Title to the Buffalo Parcels is not in danger of divestiture. Thus, regardless of whether Plaintiffs prevail, the SNI will retain its restricted fee title to the Buffalo Parcels. Thus, as in the prior action, the QTA does not bar the claim and this Court has jurisdiction pursuant to the APA, 5 U.S.C. § 702. Thus, Defendants' motion to dismiss for lack of subject matter jurisdiction must be denied.

POINT II

PLAINTIFFS HAVE STANDING TO PURSUE THEIR CLAIMS

Defendants argue that the Complaint should be dismissed because Plaintiffs lack standing to challenge the approval of a Class III gambling ordinance. As discussed below, Plaintiffs possess the requisite "personal stake" in the outcome of this controversy and are within the "zone of interests" of the statutes at issue. Thus, Defendants' motion to dismiss on standing grounds must be denied.[4]

The doctrine of standing addresses whether a plaintiff has "such a personal stake in the outcome of [a] controversy as to assure that adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." Baker v. Carr, 369 U.S. 186, 204 (1962). The doctrine arises from the constitutional requirement that federal courts act only on "Cases" or "Controversies." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); see also U.S. Const. art. III, § 2. In addition, the "[s]tanding doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction." Allen v. Wright, 468 U.S. 737, 751 (1984).

To satisfy the constitutional component of standing, plaintiff must have suffered an "injury in fact," that is, an invasion of a legally protected interest. Lujan, 504 U.S. at 560. The injury must be "concrete and particularized," which means that it must be personal to the plaintiff, id. at 560 & n.1, although it also may be shared by many others, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687-88 (1973). In addition, the inquiry must be fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. Lujan, 504 U.S. at 560-61. In a case with multiple plaintiffs,

[4] Defendants do not challenge the premise that the NIGC's "Indian lands" determination is a "decision" by the NIGC pursuant to § 2710, and therefore, constitutes "final agency action" reviewable under 5 U.S.C. § 702. See CACGEC I, 471 F. Supp. 2d at 321.

only one plaintiff needs to have standing to permit review. See Rumsfeld v. Forum for Academic & Inst'l Rights, Inc., 547 U.S. 47, 52, n.2 (2006).

As the Supreme Court recognized in Lujan, procedural rights, such as those arising under the APA, are "special." Thus, for example:

> one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Lujan, 504 U.S. at 572 n.7. To establish procedural standing, the plaintiff must show that "the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." See id. at 573 n.8. In such a case, the plaintiff can establish standing "without meeting all the normal standards for redressability and immediacy." Id. at 573 n.7; see Nulankeyutmonen Nkihtaqmikon v. Impson, 2007 U.S. App. LEXIS 22053 at *12 (1st Cir. Sept. 14, 2007).

Here, Plaintiffs sue under the APA to enforce legal rights regulated under IGRA. In cases under the APA, there is a strong presumption in favor of judicial review. See Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967); see also Bowen v. Michigan Acad. of Family Physicians, 476 U.S. 667, 670 (1986). IGRA was enacted, at least in part, to limit the proliferation of off-reservation gambling casinos and the adverse consequences of gambling activities on the surrounding communities. 25 U.S.C. §2719(b)(1)(A); see TOMAC v. Norton, 193 F. Supp. 2d 182, 190 (D.D.C. 2002), aff'd in relevant part, 433 F.3d 852 (D.C. Cir. 2006). Thus, under IGRA, gambling may occur only on "Indian lands," as IGRA defines that term. 25 U.S.C. § 2703(4). In addition, there must be a valid (i.e., approved by the Secretary) gambling Compact and a valid (i.e., approved by the Chairman) ordinance. Plaintiffs contend that none of the exceptions under IGRA §20 properly applies here. Further, IGRA § 20 prohibits gambling on

lands acquired after October 17, 1988, unless certain specific criteria are met. See Compl at ¶¶ 32, 59-67. Thus, the Buffalo Parcels are not eligible for gambling, and the Defendants' determinations to the contrary are arbitrary, capricious and contrary to law.

As the Complaint alleges, Plaintiffs have the requisite personal stake in the outcome of this controversy to give rise to standing to sue. The individual Plaintiffs live and work near the Buffalo Parcels. See Compl. ¶¶ 13-20; Affidavit of John McKendry, sworn to on October 5, 2007.[5] They are concerned about the negative impact of a gambling casino, including the blight on the neighborhood, the lack of parking it will create, and the expected increase in crime, traffic, air pollution, noise and other adverse effects. These individuals allege that they will be injured in their quality of life and in their livelihoods by the challenged determinations. See Compl. ¶ 13-20. As residents and property owners, they have a concrete and particularized interest in the legality of the Defendants' actions in approving the Ordinance and permitting gambling to take place essentially in their own backyards.[6] These are precisely the kinds of interests that courts have found establish standing. See, e.g., Lujan, 504 U.S. at 572 n.7; Nulankeyutmonen Nkihtaqmikon, 2007 U.S. App. LEXIS 22053 at *12-*14 (sufficient interest where plaintiffs lived near proposed site and used land and surrounding waters for ceremonial and community purposes); TOMAC, 193 F. Supp. 2d at 187-88 (neighboring landowners and residents had standing to challenge decision to take land in trust for Indian tribe to build casino).

The organizational Plaintiffs also have standing to sue. An organization has standing to sue on behalf of its members if "(a) its members would otherwise have standing to sue in their

[5] On a motion to dismiss, it is sufficient to plead facts demonstrating the elements of standing. See Bennett v. Spear, 520 U.S. 154, 168 (1997). Here, Plaintiffs not only plead such facts, see Compl. ¶¶ 4-22, but also support their pleading with sworn affidavits demonstrating the elements of standing. Accordingly, they more than satisfy the required showing.

[6] Moreover, these individuals have a state constitutional right, as part of the Bill of Rights between the State of New York and its citizens, to legal protection from all lotteries and any kind of gambling, with the exceptions of State lotteries and pari-mutuel betting on horse races. N.Y. Const. art. I § 9.

own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). Here, a number of the organizations' members live and work near the Buffalo Parcels. See Affidavit of Joel Rose, sworn to on October 5, 2007; Affidavit of Gregory Lodinsky, sworn to on October 6, 2007. For reasons described above, these members, concerned about the negative environmental, health, social and other consequences of gambling and the impact that a gambling casino would have on the historic neighborhood in the City of Buffalo, otherwise would have standing to sue in their own right. See Nulankeyutmonen Nkihtaqmikon, 2007 U.S. App. LEXIS 22053 at *12-*14 (plaintiff had standing to pursue procedural challenge to federal lease approval); Citizens for Squirrel Point v. Squirrel Point Assocs, 2003 U.S. Dist. LEXIS 21728, *9-10 (D. Me. Dec. 4, 2003) (loss of recreational opportunities and property values of individual members satisfies associational standing requirement); see Preservation Coalition of Erie County v. Federal Transit Admin., 129 F. Supp. 2d 551 (W.D.N.Y. 2000).

Moreover, these organizations were formed and operate to protect members of the Buffalo community from the negative social impact of a casino (see Compl. ¶¶ 4-8; Affidavit of Rev. G. Stanford Bratton, sworn to on October 5, 2007); to avoid the adverse economic and environmental consequences that are caused by gambling in New York State and that will be further exacerbated by the construction and operation of a casino on the Buffalo Parcels (see Rose Affidavit); and to preserve significant historical, architectural and cultural assets in the vicinity of Buffalo, New York (see Compl. ¶¶ 9-10; Lodinsky Affidavit). These interests are germane to the purposes of the organizational Plaintiffs, and this lawsuit seeks to protect these interests. Finally, there is nothing about the claim asserted or the relief requested that requires the participation of individual members in this lawsuit. Other courts have held that citizen groups

have potential injuries that fall within the zone of interests protected by IGRA. TOMAC, 433 F.3d at 860; City of Roseville v. Norton, 219 F. Supp. 2d 130, 157-58, 165 (D.D.C. 2002), aff'd, 348 F.3d 1020 (D.C. Cir. 2003). So too here, the organizations have standing to sue on behalf of their members to challenge Defendants' determinations in violation of lawful procedures.

The County of Erie, as a subdivision of the State of New York, and the County Executive have standing to sue. The County seeks to protect its sovereign authority, its right to collect sales tax revenues and to enforce local health and safety laws and regulations, as well as to protect significant financial investments that have been made in close proximity to the Buffalo parcels. Compl. ¶¶ 21-22. On November 1, 2005, the County of Erie, through its Law Department, opposed the removal of the Buffalo Parcels from the tax rolls due to the potential "significant negative impact on County real property and sales tax revenues currently and within the foreseeable future." See Administrative Record filed in CACGEC I, Document No. 25, at 00169-70. This is a harm which affects the County in a concrete and particularized manner and which the County has standing to challenge. Thus, like the other Plaintiffs, the County has standing to challenge the legality of the Defendants' actions in approving the Ordinance. See Village of Bensenville v. Federal Aviation Admin., 376 F.3d 1114 (D.C. Cir. 2004) (municipalities which "bear the cost of their officers' and employees' use of O'Hare for business travel had standing to challenge imposition of facility fee on passengers enplaning at airport); Kansas v. United States, 249 F.3d 1213, 1223 (10th Cir. 2001) (state had standing to challenge NIGC determination that land constitutes "Indian lands" within meaning of IGRA); Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv., 75 F.3d 1429 (10th Cir. 1996) (County's claim of flood damage to its property falling within the proposed critical habitat designation constitutes an injury in fact sufficient to establish standing).

Likewise, the legislative Plaintiffs, who live in and around Buffalo, are concerned about the effects that a gambling casino will have on their neighborhoods and their constituents; about the State's divestiture of sovereignty over the Buffalo Parcels, and about the integrity of the laws of the United States. They sue here on their own behalf and as parens patriae on behalf of their constituents, see Support Ministries for Persons with AIDS, Inc. v. Waterford, 799 F. Supp. 272 (N.D.N.Y 1992), to ensure that the intent of the applicable laws is fully carried out.

Defendants miscite Lujan for the proposition that when an alleged injury "arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed" by the plaintiff to demonstrate standing. Defs' MOL at 15-16 (quoting Lujan, 504 U.S. at 562 (emphasis omitted)). This principle is inapplicable where, as here, the government's action has the effect of authorizing conduct that otherwise would have been illegal. See Animal Legal Defense Fund, Inc v. Glickman, 154 F.3d 426, 440 (D.C. Cir. 1998). In such a case, the causation requirement is usually met "when a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries, if that conduct would allegedly be illegal otherwise." Id. at 440. Similarly, to meet the redressability requirement in cases of procedural injury, all that is required is "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." Nulankeyutmonen Nkihtaqmikon v. Impson, 2007 U.S. App. LEXIS 22053 at *17-*18.

Here, Plaintiffs' injuries arising from the operation of the casino are traceable to the Defendants' actions. The negative social, economic and environmental consequences of gambling on the Buffalo Parcels will not come about unless Defendants permit the SNI to conduct gambling operations there. Defendants' actions, which this lawsuit challenges, have the effect of authorizing illegal gambling on non-Indian lands. If the authorization is removed, the conduct will become illegal and must cease. Thus, causation and redressability are satisfied.

Finally, Defendants argue that the Plaintiffs lack prudential standing because they are not within the "zone of interest" of the statutes governing the Chairman's approval of a Class III gambling ordinance. This argument, too, must fail. The requirement that the plaintiffs' interests fall within the zone of interest that the statutes at issue protect or regulate is "not meant to be especially demanding" and does not require that a particular plaintiff be the specific intended beneficiary of the act. See Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399-40 (1987). The test excludes only those plaintiffs whose interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit suit." Id. The focus is "not on those who Congress intended to benefit, but on those who in practice can be expected to police the interests that the statute protects." See TOMAC v. Norton, 193 F. Supp. 2d 182, 188 (D.D.C. 2003) (citation omitted), aff'd in relevant part, 433 F.3d 852 (D.C. Cir. 2006).

IGRA was designed to address concerns regarding unregulated, widespread Indian gambling and to establish federal standards for gaming on Indian lands. 25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. §§ 151.10(f), 151.11(a). It requires a determination that the proposed site constitutes "Indian lands" in order to be eligible for gambling under IGRA. CACGEC I, 471 F. Supp. 2d at 303. In general, it prohibits Indian gambling on off-reservation lands acquired in trust by the United States after October 17, 1988. See 25 U.S.C. § 2719(a). A tribe may be exempted from this prohibition if the lands are taken into trust as part of a "settlement of a land claim," 25 U.S.C. § 2719(b)(1)(B)(i), or if the Secretary, after local consultation, determines that a gaming establishment "would be in the best interest of the Indian tribe" and "would not be detrimental to the surrounding community," and the state Governor concurs, id., § 2719(b)(1)(A). See Citizens Exposing Truth About Casinos v. Kempthorne, 492 F.3d 460, 468 (D.C. Cir. 2007) ("CETAC") (citing 25 U.S.C. § 2719(b)(1)(A)).

Here, the Chairman opined that the Buffalo Parcels are gambling eligible "Indian lands" which were acquired as part of a "settlement of a land claim" to which the general prohibition against gambling on after-acquired lands does not apply. Plaintiffs allege that they have been harmed by the Defendants' erroneous determination that the Buffalo Parcels are eligible for gambling and their failure to follow the statutorily required procedures. These determinations have led, and if upheld will lead, to Indian gambling on the Buffalo Parcels. Plaintiffs seek to enforce their right to these procedural protections. This is sufficient to place the Plaintiffs within the "zone of interest" protected and regulated by the statutes at issue and to satisfy the requirements of prudential standing. See, e.g., CETAC, 492 F.3d at 464. For all of these reasons, Defendants' motion to dismiss on standing grounds must be denied.

POINT III

PLAINTIFFS HAVE STATED CLAIMS FOR RELIEF AND DEFENDANTS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW

Defendants argue that this Court should dismiss the Complaint for failure to state a claim or alternatively, grant summary judgment in their favor on the merits of Plaintiffs' claims. For the reasons described below, Defendants' motion must be denied.

Without a question, Plaintiffs state claims for relief. Plaintiffs allege that the Chairman's approval of the Ordinance is "final agency action" for purposes of APA review, see Compl. at ¶ 41. Included within the scope of this judicial review, Plaintiffs allege, are any intermediate determinations, including the Secretary's determinations that the Buffalo Parcels are "Indian lands" as defined in the IGRA and that the lands are otherwise gambling-eligible under IGRA (Compl. at ¶ 41). Plaintiffs contend that the Buffalo Parcels are not "Indian lands" (Compl. at ¶¶ 42-55); and that therefore the Chairman's approval of the Ordinance is arbitrary, capricious, an abuse of discretion and not in accordance with law (Compl. at ¶ 56). Plaintiffs further contend

that gambling on the Buffalo Parcels is prohibited under IGRA § 20 (Compl. at ¶¶ 57-70); and that, therefore, the Chairman's approval of the Ordinance is arbitrary, capricious, an abuse of discretion and not in accordance with law (Compl. at ¶ 71).

Under the APA, final agency action is reviewable, APA § 704, and IGRA provides for APA review, 25 U.S.C. § 2714. Accepting the truth of Plaintiffs' factual allegations and drawing all reasonable inferences in their favor, as the Court must do on a motion to dismiss, Plaintiffs clearly have amply stated a "claim to relief that is plausible on its face." Bell Atlantic, --- U.S. --, 127 S.Ct. at 1974 (2007). Accordingly, Defendants' motion to dismiss for failure to state a claim must be denied.

Further, Defendants are not entitled to judgment as a matter of law. As described below,[7] the SNSA does not effect a transfer of jurisdiction over lands held in restricted fee from the local and New York State governments to the SNI. Rather, the restricted fee title merely protects the lands from alienation without federal government approval and, as a corollary, renders the lands exempt from State and local property taxes. The Buffalo Parcels are not, by virtue of their restricted fee status, sovereign SNI land; they do not qualify as "Indian lands," and they are not eligible for gambling under IGRA. Moreover, the Buffalo Parcels were not "taken into trust as part of a settlement of a land claim," and are not otherwise excepted from IGRA's prohibition against gambling on after-acquired lands. In sum, the Chairman's determination was arbitrary, capricious, and contrary to law. Thus, Defendants' summary judgment motion must be denied.

A. The Chairman's Determination that the Buffalo Parcels are Gambling-Eligible "Indian lands" is Arbitrary, Capricious and Contrary to Law

In approving the Ordinance, the Chairman concluded that the Buffalo Parcels are "Indian country" because the SNI holds the land subject to the federal government's restrictions against

[7] Plaintiffs' Summary Judgment Memorandum, filed simultaneously herewith, contains a more in-depth discussion of the merits. Plaintiffs respectfully incorporate that discussion herein by reference and provide these points as a brief overview of the issues.

alienation and, by virtue of its own actions, it "exercises governmental authority" over the land. This conclusion is incorrect: among other things, an Indian tribe cannot acquire land and then exercise governmental authority over it by unilateral action. To create "Indian country," there must be an express act of the federal government. Here, the federal government took no action to confer upon the SNI jurisdiction over the Buffalo Parcels. Thus, the Buffalo Parcels are not "Indian country" and are not eligible for gambling activity.

As the Chairman correctly recognized, IGRA permits gambling only on Indian lands. See 25 U.S.C. §§ 2701(5), 2702(3). IGRA 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) (emphasis added). There is no dispute that the Buffalo Parcels are not part of a reservation, and the United States does not hold title to the lands in trust for the benefit of the SNI. Instead, they are lands to which the SNI hold title "subject to restriction by the United States against alienation." Thus, to qualify as "Indian lands," the issue is whether the SNI "exercises governmental power" over the Buffalo Parcels.

Jurisdiction is coextensive with the inherent sovereign authority that Indian tribes possess over their members and territories within the limits of "Indian Country." Oklahoma Tax Comm. v. Citizen Band Potawatomi Tribe of Oklahoma, 498 U.S. 505, 509 (1991). The U.S. Congress, codifying Supreme Court precedent, defines the term "Indian Country" to mean:

> (a) all land within the limits of any Indian reservation . . .;
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, . . ., and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. The Buffalo Parcels do not fall within subsection (a), land within a reservation, or subsection (c), Indian allotments. Thus, the issue is whether the Buffalo Parcels are a "dependent Indian community." As described below, they are not.

In Alaska v. Native Village of Venetie, 522 U.S. 520 (1998), the Supreme Court defined "dependent Indian communities" as referring to "a limited category" of Indian holdings "that are neither reservations nor allotments, . . . and that satisfy two requirements -- first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." Id. at 527. Relying on U.S. v. McGowan, 302 U.S. 535 (1938), the Court in Venetie emphasized that a dependent Indian community, like an Indian reservation generally, is set aside for the use of the Indians "as such," and "it is the land in question, and not merely the Indian tribe inhabiting it that must be under the superintendence of the Federal Government." Id. at 529, 531 n.5 (emphasis in original).

Defendants argue that the Buffalo Parcels became "Indian country" within the meaning of Section 1151 because (1) the federal government set the land apart for use by the SNI pursuant to the SNSA, and (2) the land is under federal superintendence based on the federal government's ability to enforce the restriction on alienation. This argument is circular. It conflates the concepts of "set aside" and "federal superintendence" with the concept of "restricted fee status." The federal set-aside requirement in the definition of "dependent Indian communities" reflects the fact that "some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or recognize Indian country." Venetie, 522 U.S. at 531 n.6. It also "ensures that the land in question is occupied by an Indian Community." Id. at 521. The federal superintendence requirement "guarantees that [the Indian] community is sufficiently 'dependent' on the Federal Government and that the Government and the Indians

involved, rather than the States, are to exercise primary jurisdiction over the land in question." Id. (See generally Plaintiffs' Summary Judgment Mem. at 28-32.)

Nothing in the SNSA reflects Congress' intent to set aside the land to be acquired with SNSA funds for the use of the Indians as such, under the superintendence of the Government, or otherwise to create "dependent Indian communities." Nothing required the SNI to purchase land, or to purchase any particular land. Congress merely allowed that the SNI could acquire land as a protected economic asset, exempt from property taxes by virtue of a restraint on alienation. The statute authorized nothing more.[8]

Congress knew how to set aside land under federal superintendence when it intended to do so.[9] If it had meant to do so in the SNSA, it would have said so. In the SNSA, however, it used a very different term: "restricted fee status." 25 U.S.C. § 1774f. The effect of a restriction on alienation is that the tribe can transfer title only with federal approval, and the land itself is not subject to State or local property taxation. In contrast, the effect of "Indian Country," whether through the creation of "dependent Indian communities" or otherwise, is to divest the State of all inherent sovereignty over the lands in question (not just its authority to levy property taxes) and to subject them to the primary jurisdiction of the federal and Indian governments. See, e.g., Buzzard v. Oklahoma Tax Comm'n, 992 F.2d 1073, 1077 (10th Cir. 1993).

In approving the Ordinance, the Chairman concluded that the Buffalo Parcels qualify as "Indian land" because the SNI "exercises governmental power" over them. He based this

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[8] In contrast, the SNSA's "Reservation Provision" for acquiring land (see Plaintiffs' Summary Judgment Mem. at 32-35), offered a vehicle for the SNI to expand the area in which its community of people resides and thereby create new Indian country. The SNI did not employ this process with respect to the Buffalo Parcels.

[9] Where Congress does intend to "set aside" land for the use of an Indian tribe as such, it does so clearly and purposefully. For example, in the other Congressional Settlement Acts codified under Title 25 U.S.C., Chapter 19, the tribes either receive specific parcels of land or settlement funds specifically earmarked for the purchase of identified settlement lands. In each such case, Congress explicitly provides for the setting aside of the lands under federal superintendence.

conclusion on the SNI's unilateral actions with respect to the parcels, including fencing off the sites to restrict access; posting signs indicating the SNI's jurisdiction; enacting ordinances and resolutions purporting to apply the SNI's laws to the Parcel; and using the SNI's Marshal's Office to patrol and police the land. The defect, of course, is that "Indian Country," arises only through specific affirmative action by the federal government evidencing clear intent to confer governmental jurisdiction over land.[10] The SNI does not acquire the right to conduct gambling in the middle of a major New York metropolitan city merely because it says it does.

Here, Congress did not take affirmative action to designate the Buffalo Parcels as "Indian land," and the Executive did not use her delegated authority under 25 U.S.C. § 465, to acquire the land in trust for the benefit of the SNI. Thus, the Buffalo Parcels are not "Indian Country," and they are not eligible for gambling activity under IGRA. For all of these reasons, and those discussed more fully in Plaintiffs' Summary Judgment Memorandum, the Chairman's determination to approve the Ordinance was arbitrary, capricious, and contrary to law.

B. The Chairman's Determination is Unreasonable Because the Buffalo Parcels are not Excepted from the "After-Acquired Lands" Prohibition on Gambling

Even if the SNSA somehow paved the way for a sovereign "Indian island" in the middle of Buffalo, which it did not, this would not end the inquiry. This is because IGRA § 20, even as the Secretary interprets it, prohibits gambling on all "Indian lands" acquired after its effective date. Defendants argue that the land here qualifies for an exception, which allows the land to be gambling eligible if it was "taken into trust as part of a settlement of a land claim." It does not.

In approving the Ordinance, the Chairman, deferring to the Secretary's November 12, 2002 letter opinion, stated that the Buffalo Parcels meet this exception because: (i) the SNI

[10] One way for the federal government to take such action is by Act of Congress, for example by acquiring land for an Indian tribe by statute and designating its legal status as "Indian Country." Another way is for the Secretary of the Interior, under 25 U.S.C. § 465, to acquire land and to hold it in trust -- in the name of the United States -- for the purpose of providing land for Indians.

purchased the land with SNSA funds; (ii) the title of the act is the "Seneca Nation (New York) Land Claims Settlement," which he viewed as evincing a congressional intent to enact the settlement of a land claim; and (iii) the plain meaning of the term "land claim," citing Wyandotte Nation v. NIGC, 437 F. Supp. 2d 1193 (D. Kan. 2006), includes an assertion of the right to control and define the terms of leases and the use of the land. These conclusions are unsupportable.[11]

First, the United States never took the Buffalo Parcels into trust for the benefit of the SNI, and the SNSA did not acquire the parcels in settlement of a land claim. Indeed, the SNSA did not settle any claims, either for land or otherwise. To have a "land claim," there must first be a "claim." As this Court noted in CACGEC I, 471 F. Supp. 2d at 306, the SNI had no legal claims pending at the time of the SNSA's enactment. At that time, there was no question but that the SNI had title to the land, and there were no challenges either to title or possessory rights. The purpose of the SNSA was to facilitate the negotiation of new leases on SNI reservation lands. It did not itself settle a "land claim" or any other claim. Moreover, the SNI did not acquire the Buffalo Parcels "as part of" the settlement of a land claim. Notably, the SNSA did not require the purchase of land or earmark any funds that were required to be used for the purchase of land.

Moreover, if there were a claim, which there was not, it would not have been a "land claim." Defendants themselves have defined a "land claim" as "a claim for land by a tribe on the basis that the land was alienated without the express approval of Congress as required by 25 U.S.C. § 177 (the Indian Non-Intercourse Act)." See Internal Department of the Interior Memorandum, dated Nov. 18, 1998 (AR00110); see also Correspondence from SNI Counsel to Defendant Hogen, dated June 15, 2007 (AR00063). It is not disputed that Congress expressly approved the SNI leases not only once, but twice: first in 1875 (18 Stat. 330), again in 1890 (26

[11] As noted above, a de novo standard applies to issues of statutory interpretation. See Artichoke Joe's, 353 F.3d at 719.

Stat. 558). At the time of the SNSA, there was no dispute as to the SNI's title to or ownership of the land or as to the validity of the 99-year leases. The SNSA itself makes it clear that the only potential "claims" under the SNSA were "for payment of annual rents prior to February 20, 1991, with respect to all prior and existing leases." 25 U.S.C. § 1774b.[12] In light of these repeated, well settled statements, the Chairman's conclusion that the SNSA settled a "land claim" is arbitrary, capricious, and contrary to law.

Second, the Chairman's reliance on the U.S. Code Title of the SNSA was patently erroneous. The title of a statute has no relevance to the construction of its terms. As this Court (Siragusa, J.), recently reaffirmed, titles and section headings "are of use only when they shed light on some ambiguous word or phrase. "They are but tools available for resolution of a doubt. But they cannot undo or limit that which the text makes plain." Scope, Inc. v. Pataki, 386 F. Supp. 2d 184, 193 (W.D.N.Y. 2005) (quoting Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 529 (1947)). Here, the language of the SNSA is clear and unambiguous. Thus, the Chairman's resort to the purported title of the statute as bearing on its construction is improper as a matter of law.

Perhaps more significantly, the Chairman relied on the wrong title. The correct title, as codified in the United States Code, is the "Seneca Nation Settlement Act," not the "Seneca Nation (New York) Land Claims Settlement Act." This is the title of the Act as passed by both Houses of Congress and signed into law by the President. In concluding otherwise, the Chairman erroneously relied on language added to the chapter heading during the ministerial action of codifying and publishing the statute in the United States Code. It is the Statutes at Large, not the

[12] These claims would be either contract claims for the rents specified in the leases (see, e.g., New Haven Place v. Beaufort, 9 Misc.3d 1130A (Dist. Ct. Nassau Co., 2005)) or claims for "breach of trust" arising from the federal government's failure to require more favorable lease terms in the first place (see, e.g., United States v. Navajo Nation, 537 U.S. 488 (2003)). In either event, they would not be "land claims."

United States Code, which is the official source of the law. Royer's, Inc. v. United States, 265 F.2d 615 (3d Cir. 1959); Murrell v. W.U. Telegraph Co., 160 F.2d 787 (5th Cir. 1947); Richey v. Indiana Dep't of State Revenue, 634 N.E.2d 1375 (Ind. Tax Ct. 1994). If there is an inconsistency between the United States Code and the Statutes at Large, it is the Statutes at Large that control. United States v. Welden, 377 U.S. 95 (1964); Preston v. Heckler, 734 F.2d 1359 (9th Cir. 1984); Peart v. Motor Vessel Bering Explorer, 373 F. Supp. 927 (D.AK. 1974).

Here, Congress' title for the SNSA is an Act "To provide for the renegotiation of certain leases of the Seneca Nation, and for other purposes." P.L. 101-503, U.S. Stat. at Large, Vol. 104, Part 2, 104 Stat. 1292 (1990). There is no mention of "land claims" in the title that Congress gave to the Act. The short title, found in the text of the Act, Section 1 of P.L. 101-503, reads "[t]his Act may be cited as the Seneca Nation Settlement Act of 1990." There is no mention of "land claims" there either. The Chairman's reliance on the title of the Act as published in the United States Code is the exultation of form over substance and the extent of his stated analysis of the SNSA. To rely on the name of the statute -- and an incorrect one at that -- rather than its terms is plainly arbitrary, capricious, and contrary to law.

Third, the Chairman misconstrued the import of Wyandotte Nation v. NIGC, 437 F. Supp. 2d 1193 (2006). In Wyandotte, unlike here, the tribe had filed actions against the United States with the Indian Claims Commission "involving title determination of the Tribe's claims to land." Id. at 1198. The issue in Wyandotte, was whether the settlement of these actions, which sought money damages and not title to land itself, constituted the "settlement of a land claim." The court held that it did: "The plain meaning of 'land claim' does not limit such claim to one for the return of land, but rather, includes an assertion of an existing right to the land." Wyandotte, 437 F. Supp. 2d at 1208.

In this case, in contrast, there was no challenge to the SNI's title to or ownership of the leased lands and no dispute over possession of the lands subject to the leases. At the time of the SNSA, it was clear that if the leases were not successfully renegotiated, non-Natives would have been evicted from the SNI's lands. Thus, any potential "claims" by the SNI would not have been "land claims." Wyandotte does not address this issue. Thus, the Chairman's reliance on Wyandotte is misplaced, and his distortion of the holding should be rejected.[13]

Finally, the Chairman's determination is inconsistent with other policies and statements of the Department, including Proposed Regulations concerning Gaming on Trust Lands Acquired After October 17, 1988,[14] and the Memorandum of Agreement between the NIGC and the Department dated February 26, 2007. As discussed in Plaintiffs' Summary Judgment Memorandum, the Proposed Regulations establish criteria for gaming on after-acquired lands, and the Buffalo Parcels do not satisfy those criteria. The Memorandum of Agreement states the Chairman's position not to approve site specific ordinances "when they call for gaming on Indian lands that have not been acquired into trust." Given this position, the approval of the Buffalo Parcels, which were not acquired into trust, is inexplicable. The Chairman's failure to consider, much less reconcile, these existing policies and practices underscores the arbitrary and capricious nature of the "settlement of a land claim" determination.

As noted above, deference to an agency determination is neither unfettered nor always due. It is manifestly inappropriate where the agency's actions are arbitrary, capricious and contrary to law. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)). Here, the chairman's interpretation of the SNSA as a congressional grant of

[13] Moreover, for reasons discussed in Plaintiffs' Summary Judgment Memorandum (at 53-56), Wyandotte supports Plaintiffs' contention that any potential "claims" at issue in the SNSA were not "land claims" within the scope of IGRA's "settlement of a land claim" exception.

[14] The Draft Regulations were published in the Federal Register October 5, 2006, as corrected December 4, 2006, to be added as 25 C.F.R. Part 292. They are available at http://www.doi.gov.bia/gaming_management.html.

sovereign authority is at odds with the plain language of the statute, which itself merely provides for the SNI to hold the property purchased with SNSA funds in restricted fee, and with existing policies and practices of the agency. It is arbitrary, capricious, and contrary to the law.

C. The Department of the Interior and the Secretary are Proper Parties

Finally, the Department and the Secretary are proper parties to this action. Although Defendants assert that the "only agency action that is the subject of this lawsuit is the Chairman's approval of the Ordinance for the Buffalo Parcel," this statement misconstrues the import of the Secretary's actions and scope of the Plaintiffs' challenge in this action.[15]

As this Court recognized in CACGEC I, a prerequisite to the approval of a tribal ordinance is that there be a valid Tribal-State Compact governing gaming activities on Indian lands. 25 C.F.R. § 522.2(e); see CACGEC I, 471 F. Supp. 2d at 325. The Court further held in CACGEC I, the Secretary's "Indian lands" opinion was not a final agency action and that no final agency action had occurred with respect to that determination. As such, the Court held, the Secretary's opinion and related statutory interpretations were not yet reviewable under the APA, and the Court was without jurisdiction to review the IGRA claims against the Secretary.[16]

In considering whether the Buffalo Parcels meet IGRA's "Indian lands" definition and satisfy the "settlement of a land claim" exception, the Chairman deferred to the Secretary's interpretation, as expressed in the November 12, 2002 opinion letter. The Secretary's opinion letter represents an intermediate step in a process that eventually resulted in the final action that is the subject of this action. The Chairman's approval of the Ordinance is final agency action and

[15] As the Complaint alleges, the Secretary appoints the associate members of the NIGC and has the duty not only to review Class III gaming compacts and Tribal per capita revenue sharing plans but also to determine pursuant to Section 20 of IGRA that a gaming establishment on newly acquired lands would be in the best interests of the Indian tribe and its members and not detrimental to the surrounding community. The Secretary also retains the authority under IGRA to take land into trust for the benefit of Indian nations. See Compl. ¶ 26.

[16] Plaintiffs have appealed this determination to the U.S. Court of Appeals for the Second Circuit.

brings up for review all intermediate determinations including but not limited to the Secretary's November 12, 2002 opinion letter. See CACGEC I, 471 F. Supp. 2d 295 at 322. Thus, the Department of the Interior and the Secretary are necessary and proper parties to this action, and the Defendants' motion to dismiss these parties must be denied.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully submit that the Defendants' motion to dismiss or for summary judgment should be denied in all respects.

Dated: Albany, New York
October 9, 2007

Respectfully submitted,

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