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

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY, et al.,

Plaintiffs,

- v - 07-CV-0451-WMS

HOGEN, et al.,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The United States hereby opposes Plaintiffs' Motion for Summary Judgment ("Motion for Summary Judgment"). As an initial matter, the United States asserts that Plaintiffs lack standing and there is no applicable waiver of sovereign immunity. Therefore, this Court lacks jurisdiction over Plaintiffs' claims. Those arguments are set forth in the United States Motion to Dismiss or in the Alternative for Summary Judgment. However, for the reasons set forth below, Plaintiffs have also failed to show that they are entitled to summary judgment. Therefore, Plaintiffs' motion should be denied.

INTRODUCTION

As Plaintiffs' Complaint indicates, their goal is to bar the Seneca Nation of Indians ("Seneca Nation") from developing and operating a lawful gaming facility in Buffalo, New York, as a means of economic development. To this end, they challenge the Chairman's decision to approve the Nation's class III gaming ordinance under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and the Indian lands opinion issued by the Chairman as part of that

approval.

Underlying Plaintiffs' allegations is the United States' placement of approximately ±9 acres of land in the City of Buffalo, Erie County, New York ("Buffalo Parcel") into restricted fee status for the benefit of the Nation for economic development purposes pursuant to the Seneca Nation Land Claims Settlement Act ("Settlement Act"), 25 U.S.C. §§ 1774-1774h.

I. STATUTORY BACKGROUND

The relevant statutory background is set forth in the United States' Motion to Dismiss or in the Alternative for Summary Judgment ("U.S. Motion to Dismiss"). U.S. Mot. to Dismiss at 2-6.

In response to Plaintiffs' discussion regarding the statutory framework, however, the United States notes that "Congress' central purpose in enacting the Indian Gaming Regulatory Act ("IGRA") was to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." Chickasaw Nation v. United States, 534 U.S. 84, 99 (2001) (citations and internal quotation marks omitted); 25 U.S.C. § 2702. Contrary to Plaintiffs' assertion, it was not "to address concerns regarding unregulated widespread Indian gambling". Mot. for Summ. J. at 20. This statement is simply false – the Indian Gaming Regulatory Act ("IGRA"), §§ 2701-2721, was not enacted for that purpose and there is no evidence that widespread unregulated Indian gaming was being conducted prior to IGRA.

II. FACTUAL BACKGROUND

The Complaint in this case was filed on July 12, 2007. In response, the United States filed a Motion to Dismiss or in the Alternative for Summary Judgment on September 20, 2007.

Plaintiffs filed their response in opposition to the United States' motion and a cross-motion for summary judgment on October 10, 2007.

The relevant facts are set forth in the United States' Statement of Material Facts Not in Dispute, submitted pursuant to the Federal Rules of Civil Procedure, Local Rule 56.1. Review of the National Indian Gaming Commission ("NIGC") action at issue is based on the administrative record, which is incorporated in support of the United States' motion.

Plaintiffs also filed a "Statement of Undisputed Facts" ("SUF"), in support of their motion for summary judgment. The United States does not agree with Plaintiffs' SUF and the characterizations and/or unstated inferences incorporated in some of Plaintiffs' listed facts. The United States provides its view of the legal significance, if any, of various facts set forth in Plaintiffs' SUF in the body of this memorandum.

This case centers on one administrative action – the Chairman's approval of a Gaming Ordinance. The administrative record supporting the Chairman's decision was filed in this case on September 20, 2007. The NIGC's Administrative Record supports the Chairman's decision to approve the Class III Gaming Ordinance of the Seneca Nation.

III. STANDARD OF REVIEW

The applicable standards of review are set forth in the United States Motion to Dismiss. U.S. Mot. to Dismiss at 7-12. However, the United States finds it necessary to respond to the Plaintiffs' misstatements regarding the applicable standards of review in their motion for summary judgment.

A. Standard of Review under APA

Under the APA and relevant case law, determinations of the Chairman of the National

Indian Gaming Commission are entitled to the deference normally accorded agencies, and "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984); see also Lyng v. Payne, 476 U.S. 926, 939 (1986) (agency's construction of its own regulations is entitled to substantial deference); EPA v. Nat'l Crushed Stone Ass'n, 449 U.S. 64, 83 (1980).[1/] The courts are to grant an agency's interpretation of its own regulations and of statutes it administers considerable leeway. See Auer v. Robbins, 519 U.S. 452, 461 (1997) (agency's interpretation of own regulations are controlling unless "plainly erroneous or inconsistent with the regulation.") (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

Furthermore, "if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). These well-established limitations on judicial review of agency decisionmaking are grounded in the separation of powers doctrine and the recognition that Congress has conferred certain discretionary decisionmaking powers to federal agencies equipped with special expertise. Cronin v. U.S. Dep't of Agric., 919 F.2d 439, 444 (7th Cir. 1990).

The APA also provides the standard of review for Plaintiffs' statutory claims. The APA is the sole mechanism for challenging federal agency action, unless a party challenges agency

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

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

Relying on Miami Tribe of Okla. v. United States, 927 F. Supp. 1419 (D. Kan. 1996), Plaintiffs argue that this Court should apply a *de novo* standard of review regarding the Chairman's Indian lands opinion. Mot. for Summ. J. at 11-12. Plaintiffs reliance on Miami is misplaced. In Miami, the Chairman relied on a Department of the Interior Indian lands opinion. The courts application of a *de novo* standard was based in part on that decision and on the fact that the Chairman's "conclusion that plaintiff does not have jurisdiction . . . does not depend on an interpretation of a statute committed to the NIGC." Miami, 927 F. Supp. at 1422. In this case, the Chairman did not rely on Interior's Indian lands determination in approving the Ordinance. He issued a separate Indian lands opinion, wherein he relies on the Secretary's interpretation of the Settlement Act, a statute which the Secretary administers. Instead of interpreting a statute not committed to the NIGC, the Chairman properly deferred to the Secretary's interpretation of a statute committed to Interior.

The Miami case is also easily distinguishable because it involved an interpretation of twelve legal documents to determine whether the tribe had jurisdiction over the parcel at issue, including: treaties, U.S. Attorney General Opinions, House of Representatives and Senate

Committee Reports, congressional acts, and an Indian Claims Commission Case ("ICC").[2/] Except for the ICC case, all of these treaties, acts, reports and opinions date from the 19th century. Therefore, the Miami case included significant issues of historical interpretation, as well as statutory interpretation. In contrast, this case involves the interpretation of ***one*** congressional act as the basis for jurisdiction– the Settlement Act, passed in 1990.

Plaintiffs next argue that the Chairman's decision is not owed deference because it is arbitrary, capricious, and manifestly contrary to the statute. Mot. for Summ. J. at 12-13. Plaintiffs' argument is based on this Court's decision that the Secretary's letter was an intermediate opinion letter that lacks the force of law and on Plaintiffs' argument that the Chairman's decision conflicts with proposed rules for the settlement of a land claim exception. Plaintiffs' argument is disingenuous because they are simultaneously arguing both that the Secretary's letter lacks the force of law and is not owed deference, and that the proposed regulations (which do not have the force of law) should be relied upon because it represents "the Department's current position." Mot. for Summ. J. at 13. Plaintiffs' argument fails for the following reasons. This case is a review of the Chairman's Ordinance approval and Indian lands opinion, not the Secretary's actions, and the proposed regulations do not represent the Department's current position. The Department's current position is represented by the ***codified*** regulations.

[2/]Included in this list are the following: Treaty with the Miami, 7 Stat. 569 (November 6, 1828); Attorney General Opinion, 17 Op. Att'y Gen. 410 (1882); H.R. Ex. Doc. No. 23, 49th Cong., 1st Sess. (1886); Attorney General Opinion, 12 Op. Att'y Gen. 236 (1867); Treaty with the Miami, 10 Stat. 1093 (June 5, 1854), Act of June 12, 1858, 11 Stat. 329; Misc. Doc. No. 131, 53rd Cong., 3d Sess. (1895); H.R. Rep. No. 3852, 51st Cong. 2d Sess. (1891); Treaty of Feb. 23, 1867; and Act of March 3, 1873, 17 Stat. 631; Act of May 15, 1882, 22 Stat. 63.

B. The Indian Canons of Construction

In reviewing an agency interpretation of a statute governing Indian tribes, courts must consider canons of construction relevant to Indian law. Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior, 228 F.3d 82, 92-93 (2d Cir. 2000); City of Roseville v. Norton, 348 F.3d 1020, 1032 (D.C. Cir. 2003).

Plaintiffs argue that the Indian canons of statutory construction do not apply to this case because IGRA and the Settlement Act are neither ambiguous nor enacted solely for the benefit of Indians. Mot. for Summ. J. at 16-19. The United States agrees that the Indian canons of construction do not apply unless the court finds the statutory language to be ambiguous. However, to the extent that the court finds either the Settlement Act or IGRA to be ambiguous, any ambiguity must be construed in favor of the Seneca Nation, as both were enacted for the benefit of the Nation. See Connecticut ex rel. Blumenthal, 228 F.3d at 92-93; City of Roseville, 348 F.3d at 1032 ("AIRA [Auburn Indian Restoration Act] focuses on ensuring the same [economic viability] for the Auburn Tribe. In this context, the Indian canon requires the court to resolve any doubt in favor of the tribe.").

In arguing that the Indian canons do not apply to the Settlement Act, Plaintiffs are urging this Court to reject Second Circuit case law. In Connecticut ex rel. Blumenthal, 228 F.3d at 92-93, the Second Circuit held that the Indian canons of construction applied to a similar settlement act, the Connecticut Indian Land Claims Settlement Act. Id. at 92 ("[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.") (quoting Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985)); County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992). Disregarding

this precedent, Plaintiffs argue that when a statute is enacted for the dual purpose of benefitting and limiting tribes, the canons do not apply. There is simply no support for this proposition.

Additionally, the courts that have interpreted Section 20 of IGRA have also routinely held that the Indian canons apply. IGRA was enacted for the benefit of Indian tribes and numerous courts have applied the Indian canons of construction to IGRA. City of Roseville, 348 F.3d at 1032 ("IGRA is designed to promote the economic viability of Indian Tribes, and AIRA [Auburn Indian Restoration Act] focuses on ensuring the same for the Auburn Tribe. In this context, the Indian canon requires the court to resolve any doubt in favor of the tribe."); United Keetoowah Band of Cherokee Indians v. Oklahoma ex. Rel. Moss, 927 F.2d 1170, 1179 (10th Cir. 1991); MichGO v. Norton, 477 F. Supp. 2d 1, 8 (D.D.C. 2007) (reaffirming that the Indian canons of construction apply to an interpretation of Section 20 "initial reservation" exception); Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, 116 F. Supp. 2d 155, 158-59 (D.D.C. 2000); accord Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney for W. Dist. of Mich., 198 F. Supp. 2d 920, at 934 (canons of construction require the application of a "plausible construction" of Section 20 of IGRA that is more favorable to the tribe).[3/]

IV. ARGUMENT

A. The Buffalo Parcel is Indian Land

As discussed in the U.S. Motion to Dismiss and in the United States' reply in support of

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[3/]In footnote 10, Plaintiffs cite Chickasaw Nation v. United States, 534 U.S. 84 (2001), in support of their proposition that the Indian canons of construction do not apply. In Chickasaw, the Supreme Court relied on the unambiguous language of the statute and did not apply the Indian canons to a tax provision of IGRA. That provision is not at issue in this case.

the motion to dismiss, the Chairman's determination that the Buffalo Parcel is Indian lands within the meaning of IGRA is not arbitrary, capricious or manifestly contrary to the statute, and is owed deference by this Court. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); U.S. Mot. to Dismiss 18-25; U.S. Reply in Support of Mot. to Dismiss at 10-16. The United States relies on the arguments made in those briefs and will not repeat those arguments here, but will respond to the argument set forth in Plaintiffs' Motion for Summary Judgment.

1. Restricted fee land is "Indian country"

Plaintiffs allege that restricted fee lands are not "Indian country." Mot. for Summ. J. at 29-33. The term "Indian Country" is currently defined at 18 U.S.C. § 1151. In relevant part, the statute provides that the term "Indian country" means:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . ,
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, 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. Although Congress enacted Section 1151 as a guide to federal criminal jurisdiction, the Supreme Court has applied this definition to questions of federal civil jurisdiction and tribal jurisdiction. Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 (1987); DeCoteau v. Dist. County Court for Tenth Judicial Dist., 420 U.S. 425, 427 n.2 (1975).

In accordance with this definition, if the lands at issue constitute an Indian reservation, a tribe clearly has jurisdiction based on 18 U.S.C. § 1151(a). When the lands at issue are outside

the limits of an Indian reservation, but held in trust or restricted fee – as the Buffalo Parcel is – the Supreme Court looks to whether the lands constitute a dependent Indian community or an "informal reservation." Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993). As the Supreme Court observed in Venetie, these terms "refer[] to a limited category of Indian lands 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." Venetie, 522 U.S. at 527.[4/] Therefore, restricted fee lands outside a reservation are considered Indian country if the lands have been set aside by the federal government and are under federal superintendence.

In support of their argument that restricted fee land is not Indian country, Plaintiffs once again rely on Buzzard v. Okla. Tax Comm'n, 992 F.2d 1073 (10th Cir. 1993). In Buzzard, the tribe purchased the land at issue with its own money and the restriction on alienation was imposed by a tribal charter, rather than by a congressional act. Accordingly, the tribe purchased the land in fee simple, in the same manner as any other property owner, with no federal government involvement or approval. Buzzard, 992 F.2d at 1075-77. Therefore, the issue was whether the tribe's charter, permitting them to purchase land in fee simple, but prohibiting disposal of the land without Secretarial approval, created Indian country. The Buzzard court held that the tribe's ***unilateral*** acts did not create Indian country.

[4/] See also Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 511 (1991) (Indian lands held in trust by the United States for the Tribe were "validly set apart for the use of the Indians as such, under the superintendence of the Government," and therefore were Indian country); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 452-453 & n.2 (1995) (treating tribal trust lands as Indian country); Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123-125 (1993); United States v. McGowan, 302 U.S. 535, 539 (1938).

In sharp contrast, the Buffalo Parcel was placed in restricted fee by Secretary pursuant to the Settlement Act. The Settlement Act imposes the following requirements on the Seneca Nation before land can be set aside as restricted fee Indian lands: the use of Settlement Act funds provided by Congress, notification of the local governments of its intent to have the lands set aside and removed from the tax rolls, and the ***congressional imposition*** of a restriction against alienation unless the Secretary determines otherwise. See 25 U.S.C. § 1774f(c). These are all requirements that any other property owner would not be subject to when purchasing land. In contrast with the tribes's actions in Buzzard, the Seneca Nation did not unilaterally create Indian country.

Although Plaintiffs recognize that Indian country status arises only through specific affirmative action by the federal government, they argue that no such action has occurred in this case. Mot. for Summ. J. at 36-40. This argument is completely at odds with the text and purpose of Settlement Act. The Parcel went into restricted fee status pursuant to the Settlement Act. It became "Indian country" within the meaning of Section 1151, because it was set aside by the federal government for use by the Nation pursuant to the terms of the Settlement Act, and it is now under federal superintendence. Such lands are under tribal and federal jurisdiction – and conversely, exempt from state and local taxation, local zoning and regulatory requirements, and state criminal and civil jurisdiction – unless Congress has provided to the contrary. Congress did not limit the Nation's authority over Settlement Act lands. Plaintiffs may disagree with the method that Congress chose to create Indian country in this instance, namely through Secretarial inaction, but the Indian Commerce Clause provides Congress with the authority to enact legislation on behalf of the tribes, such as the Settlement Act. U.S. Const. Art. I, § 2, cl. 3.

In arguing that restricted fee lands are not Indian country, Plaintiffs also ignore the Venetie Court's discussion of United States v. Sandoval, and the impact that it has on the dependent Indian community inquiry. As the Venetie Court notes:

> [In United States v. Sandoval] we rejected the contention that federal power could not extend to the Pueblo lands because, unlike Indians living on reservations, the Pueblos owned their lands in ***fee simple***. *Id.,* at 48, 34 S.Ct., at 6-7. We indicated that the Pueblos' title was not fee simple title in the commonly understood sense of the term. Congress had recognized the Pueblos' title to their ancestral lands by statute, and Executive orders had reserved additional public lands "for the [Pueblos'] use and occupancy." *Id.,* at 39, 34 S.Ct., at 3. In addition, Congress had enacted legislation with respect to the lands "in the exercise of the Government's guardianship over th[e] [Indian] tribes and their affairs," *id.,* at 48, 34 S.Ct., at 6, ***including federal restrictions on the lands' alienation.***[FN4] Congress therefore could exercise jurisdiction over the Pueblo lands, under its general power over "all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State." *Id.,* at 46, 34 S.Ct., at 5.
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> ***FN4. One such law was Rev.Stat. § 2116, 25 U.S.C. § 177***, which rendered invalid any conveyance of Indian land not made by treaty or convention entered into pursuant to the Constitution, and which we later held applicable to the Pueblos. See *United States v. Candelaria,* 271 U.S. 432, 441-442, 46 S.Ct. 561, 562-563, 70 L.Ed. 1023 (1926).

Venetie, 522 U.S. at 528 (1998) (emphasis added).[5] In Sandoval, the Supreme Court found that the federal restriction on alienation contained in 25 U.S.C. § 177, indicated that the land was under federal superintendence. This is the same restraint on alienation that the Settlement Act imposes on all lands acquired pursuant to the Act. See 25 U.S.C. § 1774f(c). Contrary to Plaintiffs' statements, a restriction on alienation is not only relevant, but it is also determinative of whether the land is Indian country in many instances.

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[5] Indeed, the entire text of 18 U.S.C. § 1151(b) "is taken virtually verbatim from *Sandoval*," and later quoted by the Supreme Court in United States v. McGowan. Venetie, 522 U.S. at 530.

2. The Settlement Act provides only one method for the Seneca Nation to acquire land

Plaintiffs also argue that the land acquisition provision of the Settlement Act actually consists of two distinct parts, a "Restricted Fee Provision" and a "Reservation Provision," and that only the "Reservation Provision" allows for the establishment of "Indian country." Mot. for Summ. J. at 33-36. Plaintiffs' interpretation ignores the plain language of the statute.

This provision outlines only one mechanism for ***all*** land acquisition pursuant to the Settlement Act and there are only three requirements that the Nation must meet to acquire land pursuant to this section: 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 subdivisions." 25 U.S.C. § 1774f(c).

Plaintiffs are correct in their assertion that the Settlement Act makes a key distinction between the status of the land acquired, but are incorrect in asserting that the key distinction is between restricted fee and reservation land. Mot. for Summ. J. at 35-36. The distinction is between reservation versus non-reservation land. Plaintiffs argue that the last sentence of this provision, which states that, "[b]ased on the proximity of the land acquired to the Seneca Nation's reservations, land acquired may become part of and expand the boundaries of the Allegany Reservation, the Cattaraugus Reservation, or the Oil Spring Reservation in accordance

with the procedures established by the Secretary for this purpose[,]"[6] is the only process by which the land can be set aside as Indian country pursuant to the Settlement Act. The last sentence of this provision provides that if the land acquired through the aforementioned procedures is in close proximity to the Nation's reservations, the Nation may request that the Secretary declare the acquired land to be a part of and expand the existing reservation boundaries. However, this last sentence is inapplicable to an analysis of the status of the Buffalo Parcel as the Parcel is not in close proximity to the Nation's Allegany, Cattaraugus, or Oil Springs Reservations and therefore, cannot become part of or expand the reservations boundaries. Furthermore, the United States does not contend that the Buffalo Parcel constitutes a reservation and as discussed *infra*, ***the definition of "Indian country" is not limited to***

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[6]In footnote 23 of their Motion for Summary Judgment, Plaintiffs refer to the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461-494a, and its regulations. Plaintiffs mischaracterize the IRA process. The Secretary takes land into trust pursuant to the land acquisition section of the IRA, 25 U.S.C. § 465. Land taken into trust constitutes Indian country, but ***does not*** automatically become a reservation. The IRA has a separate provision, 25 U.S.C. § 467, for lands taken into trust to be declared a reservation. Similarly, the Settlement Act has both a provision for acquiring land and a provision for declaring those lands to be part of a reservation.

Furthermore, the Secretary and the Chairman did not address the IRA regulations because they were not required to do so and those regulations are inapplicable to the Settlement Act. If Congress intended the IRA and its regulations to apply, it would express that intent in the Settlement Act as it has in other Settlement Acts. See e.g., Washington Indian (Puyallup) Land Claims Settlement, 25 U.S.C. § 1773c ("the Secretary shall exercise the authority provided him in section 465 of this title, and shall apply the standards set forth in part 151 of title 25, Code of Federal Regulations[.]"); Mohegan Nation (Connecticut) Land Claims Settlement, 25 U.S.C. § 1775c(a) ("Subject to the environmental requirements that apply to land acquisitions covered under part 151 of title 25, Code of Federal Regulations . . . the Secretary shall take such action as may be necessary to facilitate the conveyance to the United States of title to lands."); Cherokee, Choctaw, and Chickasaw Nations Claims Settlement, 25 U.S.C. § 1779d(b)(1)(A) ("The Secretary may accept such lands into trust for the beneficiary Indian Nation pursuant to the authority provided in section 465 of this title and in accordance with the Secretary's trust land acquisition regulations at part 151 . . . .").

reservations. See Okla. Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 511 (1991) ("the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' ") (quoting United States v. John, 437 U.S. 634, at 648-49 (1978)).

It is not the distinction between "restricted fee" and "reservation land" that the statute preserves, it is the distinction between "reservation" and "non-reservation" land and regardless of that distinction, the land acquired would fit within the definition of Indian country. See 18 U.S.C. § 1151. In fact, the Seneca Nation's current reservation land is held in restricted fee. Plaintiffs' argument confuses two distinct Indian law concepts – land is either held in restricted fee or trust, but both restricted fee and trust lands can be either reservation or non-reservation lands. There is no requirement that lands be designated as reservation lands for lands to be Indian country.

Finally, this interpretation of the statute does not render the "Reservation Process" superfluous. Plaintiffs' argument rests on the false premise that only land acquired pursuant to the "Reservation Process" can become Indian country and therefore, if all lands acquired pursuant to the "Restricted Fee Process" can become Indian country, then the "Reservation Process" is superfluous. Mot. for Summ. J. at 35. As the United States has explained numerous times, Plaintiffs' premise is incorrect because the Supreme Court and congress have repeatedly provided that ***land does not have to be a reservation to be considered Indian country***. See 18 U.S.C. § 1151; Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 511 (1991) (Indian lands held in trust by the United States for the Tribe were "validly set

apart for the use of the Indians as such, under the superintendence of the Government," and therefore were Indian country, although not formally designated a reservation).[7] Again, it is not the distinction between "restricted fee" and "reservation land" that the statute preserves, it is the distinction between "reservation" and "non-reservation" land. This is the same distinction that the IRA, the primary statute whereby the Secretary acquires land into trust, preserves. Compare 25 U.S.C. § 465 (land acquisition), with 25 U.S.C. § 467 (reservation proclamation).

3. The Buffalo Parcel was validly set aside

Plaintiffs' final argument regarding the status of the Buffalo Parcel as Indian country is that the Parcel does not fall within the "dependent Indian communities" prong of the definition. Mot. for Summ. J. at 36-42. Plaintiffs begin by stating the Supreme Court's interpretation of "dependent Indian communities" as discussed in Venetie, 522 U.S. at 520-21. However, Plaintiffs again ignore Venetie's discussion of United States v. Sandoval and the impact of that decision. See discussion supra pp. 10-11.

Plaintiffs next argue that Congress simply could not have intended to allow land acquired through the Settlement Act "Restricted Fee Process" to be set aside by the federal government and under its superintendence because that could result in large portions of land in Western New

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[7] See also United States v. Roberts, 185 F.3d 1125, 1131 (10th Cir. 1999) ("Applying these Supreme Court cases, we believe official "reservation" status is not dispositive and lands owned by the federal government in trust for Indian tribes are Indian Country pursuant to18 U.S.C. 1151."); Langley v. Ryder, 778 F.2d 1092, 1095 (5th Cir. 1985) ("Regardless, however, whether the lands are merely held in trust for the Indians or whether the lands have officially been proclaimed a reservation, the lands are clearly Indian country and the district court's conclusion was correct."); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 666 (9th Cir.1975) ("We are confident that when Congress in 1934 authorized the Secretary to purchase and hold title to lands for the purpose of providing lands for Indians, it understood and intended such lands to be held in the legal manner and condition in which trust lands were held under the applicable court decisions free of state regulation.").

York State becoming Indian country. Notably, Plaintiffs do not cite to a single provision of the Settlement Act or its legislative history for this proposition. The plain language of the Settlement Act states that the Seneca Nation may acquire, "[l]and within its aboriginal area in the State or situated within or near proximity to former reservation land" ***with funds appropriated pursuant to the Settlement Act***. 25 U.S.C. § 1774f(c).[8/] Providing the Seneca Nation with the ability and the funds to acquire land within its aboriginal area (lands that were alienated from the Seneca Nation) to be set aside as restricted fee Indian lands is precisely what Congress intended.[9/]

Plaintiffs also compare the Settlement Act with other congressional settlement acts in an attempt to support their argument that an Indian tribe must receive a specific parcel of land or that the settlement funds must be earmarked for the purchase of specific lands in order to create Indian country. As the United States discusses in its Response to Plaintiffs' Opposition, there is absolutely no support for the proposition that a congressional act must identify a particular parcel of land and mandate its purchase for the land to be set aside by the federal government for use as

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[8/] The amount of funds and the scope of the Seneca Nation aboriginal lands limit the scope of potential Indian country created under the Act.

[9/] Plaintiffs make the statement that never before has such a sweeping mandate been given for the creation of Indian country. Plaintiffs ignore the IRA, which provides the Secretary with authority to take land into trust for tribes. These congressional acts have been challenged on non-delegation grounds. Notably, these acts have survived these challenges. See Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852, 866-67 (D.C. Cir. 2006) (upholding Secretary's broad authority under provision of Pokagon Restoration Act that states "The Secretary shall acquire real property for the Band. Any such real property shall be taken by the Secretary in the name of the United States in trust for the benefit of the Band and shall become part of the Band's reservation."); Carcieri v. Kempthorne, 497 F.3d 15, 41-43 (1st Cir. 2007) (rejecting argument that the IRA lacked "boundaries" and "intelligible principles").

Indian land.[10/] U.S. Reply to Opp. at 13-15. Indeed, the primary mechanism for Indian land acquisition is for the Secretary to set land aside, pursuant to the IRA, which provides:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year[].

25 U.S.C. § 465. Notably, the IRA does not require the Secretary to purchase specific parcels and it does not earmark funds for the purchase of identified lands. Instead, it provides the Secretary with the discretion and funds to set aside land as trust Indian land to the extent such an acquisition is consistent with the principles and limitations of the IRA. The Settlement Act serves a similar purpose – it provides the Secretary with the discretion to set aside lands within a specific area purchased with Settlement Act funds as restricted fee Indian lands for the benefit of the Seneca Nation. See also Auburn Indian Restoration Act, 25 U.S.C. §§ 1300l-2(a), 1300l-6 (provides the Secretary with broad authority to acquire land for the Auburn, but does not provide funding or identify specific parcels: "The Secretary may accept any real property located in Placer County, California, for the benefit of the Tribe . . . . The Secretary may accept any

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[10/]In the other case that is the basis for 18 U.S.C. § 1151(b), United States v. McGowan, the Supreme Court held that the "[Reno Indian] colony had been 'validly set apart for the use of the Indians'" and "noted that the Federal Government had created the colony by purchasing the land with 'funds appropriated by Congress'" Venetie, 522 U.S. at 529 (citing McGowan, 302 U.S. at 537 n.4). "The Reno Indian Colony is composed . . . of land owned by the United States and purchased out of funds appropriated by Congress in 1916 and in 1926." Id. at 537. The Act of 1916 does not identify a particular parcel of land for set aside and purchase. Id. at 537 nn.3, 4.

additional acreage in the Tribe's service area . . . ." and "'service area' means the counties of Placer, Nevada, Yuba, Sutter, El Dorado, and Sacramento, in the State of California.").

There is no language in any of the case law or statutes that supports Plaintiffs' contention that only reservation land is Indian country and that Congress must earmark funds for the purchase of a specific parcel(s) of land in order for that land to be set aside. In fact, the Venetie decision mentions no such requirements for land to be a dependent Indian community. Venetie simply states that the land must have been set aside by the federal government (this includes, but is not limited to, Congress) and under federal superintendence. Venetie, 522 U.S. at 527. It is also disingenuous for Plaintiffs to argue that "Congress has the exclusive authority to create Indian Country[,]" and that "land may be acquired for an Indian tribe by an Act of Congress," but then argue that the Settlement Act is not such an act. Contrary to Plaintiffs' understanding, the Seneca Nation does not need a congressional act to purchase land in fee on the open market from a willing seller. Therefore, if this was all the Settlement Act land acquisition provision did, it would be superfluous. The Settlement Act provides both the funds and the terms that the Seneca Nation must comply with if it desires to have that land set aside as restricted fee land. See 25 U.S.C. § 1774f(c).

The Seneca Nation used Settlement Act funds, provided by the United States and the State of New York, to purchase the land. 25 U.S.C. § 1774d. As part of that process, the Seneca Nation was required to notify the State and local governments of its intent, a requirement that the Nation would not be subject to if it were simply engaging in a private fee simple purchase. Id. at § 1774f(c). The Nation then submitted the documentation to the Department of the Interior, also a requirement that the Nation would not be subject to if it were merely a fee simple purchase. Id.

at § 1774f(c). It is precisely because the Seneca Nation desired the Buffalo Parcel to be set aside by the federal government and placed under Federal superintendence that the Nation followed the specific guidelines of the Settlement Act. As such, the Buffalo Parcel was validly set aside as restricted fee Indian land pursuant to a congressional act, the Seneca Nation Land Claims Settlement Act, and therefore falls within the dependent Indian communities prong of the Indian country definition. Accordingly, the Nation exercises governmental power within the meaning of IGRA over lands acquired pursuant to the Settlement Act. The Parcel, once removed from the jurisdiction of the State or local governments, is subject to the Nation's jurisdiction. Therefore, the second part of the "Indian lands" determination pursuant to IGRA Section 2703(4)(B), requiring authority to exercise governmental authority over the land, is satisfied.[11/]

For the foregoing reasons, this Court should deny Plaintiffs' Motion for Summary Judgment on their first cause of action against the United States.

B. The Settlement of a Land Claim Exception in Section 20 Applies

As discussed in the U.S. Motion to Dismiss and in the United States' reply in support of the motion to dismiss, the Chairman's determination that the Buffalo Parcel fits within IGRA's Section 20 "settlement of a land claim" exception is not arbitrary, capricious or manifestly contrary to the statute, and is owed deference by this Court. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); U.S. Mot. to Dismiss 25-31; U.S. Reply in Supp. of Mot. to Dismiss at 16-20. Again, the United States relies on its earlier briefs and will not

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[11/]A detailed explanation of how the Seneca Nation exercises governmental power over the Buffalo Parcel and, thus, satisfies the second prong of the "Indian lands" analysis is set forth in the United States Reply in Support of its motion to dismiss and will not be repeated herein. See U.S. Reply in Support of Motion to Dismiss at 15-16.

repeat those arguments here, but will respond to the argument set forth in Plaintiffs' Motion for Summary Judgment.

1. The Chairman Properly Referred to the U.S. Code Title of the Settlement Act

Plaintiffs argue that in his approval the Chairman inappropriately referred to the title of the statute. Mot. for Summ. J. at 21. Any reference to the title of a statute by an administrative agency has no relevance to the construction of the terms therein unless a word or phrase is ambiguous, and here the language of the Settlement Act in the statutes at large is clear and unambiguous.[12/] Indeed, the purpose of the Act, as expressed by Congress, is to resolve "disputes concerning leases of tribal lands within the city of Salamanca," 25 U.S.C. § 1774(a)(1), and "to avoid potential legal liability on the part of the United States that could be a direct consequence of not reaching a ***settlement***." Id. § 1774(b)(8). These statements acknowledge the Seneca Nation's claims and the fact that Congress considered the Act to be a settlement. The Act also contains a section entitled "NEW LEASES AND EXSTINGUISHMENT OF ***CLAIMS***" wherein the Seneca Nation relinquishes "all ***claims*** against the United States, the State, the city the congressional villages, and all prior lessees[.]" 25 U.S.C. § 1774b(b). Obviously, Congress thought that the Seneca Nation had valid claims or it would not have enacted the Settlement Act

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[12/]The cases that Plaintiffs cite do not stand for the proposition that it is inappropriate to refer to a statute's title, but rather for the obvious proposition that when the text of the statute as codified is inconsistent with the statutes at large, the statutes at large prevail. However, Plaintiffs fail to explain how the Settlement Act is inconsistent with the title or how the title, as codified, significantly modifies the Act so that a resort to the statutes at large would be necessary. Indeed, the plain language of the Settlement Act and the legislative history support the fact that the Act is settling a land claim. See discussion infra Part IV.

or required the Nation to relinquish those claims.[13] Additionally, the Act contains a provision regarding "SETTLEMENT FUNDS". 25 U.S.C. § 1774d. All of these references to extinguishment and settlement of claims are in the statutes at large. Plaintiffs cannot find support for their argument that the Settlement Act did not settle a land claim in either the statutes at large or the statute as codified and the Chairman's reference to the title of the Settlement Act was neither inappropriate nor inconsistent with the purpose and language of the Act.[14]

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[13]In the legislative history of the Settlement Act, a number of statements support the fact that Congress intended to settle a land claim in passing the Act. See Statement of Mr. Horton, ("There are currently no less than five Indian land claims being pursued in the Empire State. Today we have a chance to settle one of these disputes in a peaceful, democratic manner. . . . Furthermore, I hope this legislation and the negotiations which produced it can serve as a model for the other outstanding land claims, two of which lie at least partially in my district."); Statement of Mr. Richardson ("Congress could decide not to act today and allow the courts to pursue the issue. Indian claims cases are costly, lengthy, and very often substantial damages are awarded to the claimant. . . . Congress could choose today to redress a serious wrong. To settle this claim. . . ."). 136 Cong. Rec. H9285, at 9289 (Oct. 10, 1990).

[14]Furthermore, in Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior, the Second Circuit, in discussing the use of chapter titles stated:

> The Connecticut plaintiffs insist that chapter titles must give way to the unambiguous meaning of the text. They argue that § (b)(7) is plain on its face and that reliance on the chapter title is therefore proscribed by canons of construction. *See Thistlethwaite v. Dowty Woodville Polymer, Ltd.,* 110 F.3d 861, 866 (2d Cir.1997) ("Headings and titles are not meant to take the place of the detailed provisions of the statutory text; nor are they necessarily designed to be a reference guide or a synopsis.") (internal quotation marks and alterations omitted). The short answer to the plaintiffs' argument is that our reliance is not on the title of § 1754, but rather on the structure of the statute. We do not need the chapter title to inform us that § 1754(b) generally governs the disposition of the settlement fund. The chapter title in this case provides a convenient referent for the subject of the statutory section but we do not rely on it to describe the subsection's content. Plaintiffs' criticism is therefore misplaced. Moreover, to the extent that the meaning of the phrase "acquired under this subsection" is ambiguous, resort to chapter titles, as well as to other tools of statutory interpretation, is appropriate. *See United States v. Roemer,* 514 F.2d 1377, 1380 (2d Cir.1975) (discussing *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.,* 331 U.S. 519, 528-29, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947)).

2. The Settlement Act Settles a Land Claim

Plaintiffs next argue that the Buffalo Parcel was not acquired in settlement of a land claim. Mot. for Summ. J. at 45-51. They begin by making the unsupported statement that in order for there to be a land claim, there must have been a legal claim pending. Therefore, although Plaintiffs admit that the Seneca Nation had title to the land, they argue that there was no challenge to their title or possessory rights to that land. In making this argument, Plaintiffs completely ignore the fact that the purpose of the Settlement Act, as specifically expressed by Congress, was to resolve "disputes concerning leases of tribal lands within the city of Salamanca," 25 U.S.C. § 1774(a)(1), and to avoid legal liability. Id. § 1774(b)(8). If Congress had not taken affirmative steps to settle these disputes, the Seneca Nation would have filed claims to eject the long-term lessees, who prevented the Nation from possessing its land. U.S. Mot. to Dismiss at 27. Plaintiffs want to restrict the Seneca Nation's rights simply because Congress had the foresight to act before, not after, they filed a lawsuit. However, that does not change the fact that the Seneca Nation had a claim to the land and an enforceable right to eject people from that land in the absence of the Settlement Act.

Plaintiffs next cite to an internal Interior memorandum regarding whether a court ordered settlement of an Indian land claim that results in the alienation of the land is considered the settlement of a land claim under IGRA. Plaintiffs argue that the United States defines a "land claim" in this memorandum 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

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Connecticut ex rel Blumenthal, 228 F.3d 82, 88-89 (2d Cir. 2000). Similarly, the Chairman's reference to the chapter title of the Settlement Act is appropriate in this case.

Non-Intercourse Act)." Mot. for Summ. J. at 46.[15/] Nowhere in the Secretary's letter or the Chairman's decision do they cite, much less rely upon, the memorandum, which was drafted by an Associate Solicitor. Without the Secretary or the Chairman adopting this position, it does not become the official position of the Department or the NIGC. Furthermore, the question that the memorandum addresses is court ordered settlements of land claims, not congressional settlements. Finally, Plaintiffs' argument ignores the text of the Non-Intercourse Act, which states, "No purchase, grant, ***lease***, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity . . . ." 25 U.S.C. § 177. Obviously, the Seneca Nation's claims regarding hold-over lessees remaining on their land falls within the ambit of the Non-Intercourse Act**.**

Plaintiffs also argue that the Chairman misconstrued the import of Wyandotte Nation v. NIGC, 437 F. Supp. 2d 1193 (D. Kan. 2006), stating that the court held that, "the plain meaning of 'land claim'. . . includes an assertion of an existing right to the land." Mot. for Summ. J. at 46 (citing Wyandotte, 437 F. Supp. 2d at 1208). Plaintiffs conveniently leave out the middle portion of this quote, which reads, "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. Plaintiffs then argue that the instant case is different because the Wyandotte filed a claim with the Indian Claims Commission and, "It was also 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.'"

[15/]Plaintiffs also cite to a letter from the Seneca Nation's counsel to the Chairman. Obviously, the legal opinion of the Seneca Nation's counsel is not the formal legal opinion of the agency.

Mot. for Summ. J. at 46-47. First, the Seneca Nation did file a claim with the Indian Claims Commission against the United States in 1952 regarding the lease fees. See 25 U.S.C. § 1774(a)(2)(E). Second, Plaintiffs fail to explain how the right to evict non-Natives from the land is not an assertion of an existing right to the land. If the Seneca Nation had no rights to the land, it could not evict non-Natives from it.

Plaintiffs next mistakenly argue that any legal claims that the Seneca Nation might assert would be contract claims for the rents specified in the leases or breach of trust claims arising from the federal government's failure to require more favorable lease terms. Mot. for Summ. J. at 47. This is incorrect. Without the Settlement Act, the leases would have expired and the Seneca Nation would have a claim for trespass and ejectment against the non-Indians living on their land. It would not be a contract claim as the leases would have expired (no contract was in effect at that point) and it would not be a breach of trust claim unless the Seneca Nation disagreed with the Settlement Act terms and sued over those terms ***after*** its passage.

Plaintiffs also reiterate their arguments regarding the proposed regulations. As the United States discussed in its Motion to Dismiss, the draft regulations are inapplicable because they have not been codified. U.S. Mot. to Dismiss at 29-30. As such, these proposed rules do not have the force of law and represent neither the Department's nor the NIGC's current interpretation of the Section 20 "settlement of a land claim" exception.

Finally, Plaintiffs compare the Settlement Act to other Settlement Acts under Chapter 19 of Title 25, in an attempt to argue that the Settlement Act did not involve a claim of title to or ownership of land. Mot. for Summ. J. at 49-51. Specifically, Plaintiffs argue that because the Settlement Act does not refer to claims for title or ownership interest, but rather to disputes

concerning leases, it is distinguishable from the other settlement acts. Mot. for Summ. J. at 51. Indeed, if the Seneca Nation does not have title or ownership to the lands that the Nation leases, then there is a larger problem with the Settlement Act because congress would be forcing land owners to lease land from someone that does not even own the land. Obviously, that is not the case. The Seneca Nation has title to the lands. Plaintiffs then refer to the fact that the Settlement Act does not reference "concerns over clouds on title." This is simply another attempt by Plaintiffs to add requirements to the "settlement of a land claim" exception. Nowhere in IGRA does it state that in order for land to fit within the "settlement of a land claim" exception, a settlement act must reference "concerns over clouds on title" or that it must conform to the language in all of the other settlement acts.

3. The Buffalo Parcel was acquired as part of the settlement of a land claim

Plaintiffs also disagree with the Chairman's determination that Congress intended Section 20 of IGRA to apply to both restricted fee and trust lands. Mot. for Summ. J. at 52. Section 20 prohibits gaming on trust lands acquired by the Secretary for the benefit of an Indian tribe after October 17, 1988, unless the land fits within one of several statutory exceptions. See 25 U.S.C. § 2719(b)(1). Under the terms of the Settlement Act, the Nation acquires land in restricted fee, rather than trust. The Chairman and the Secretary both concluded that Congress did not intend to limit the restriction to gaming on all after-acquired land and not solely to trust acquisitions. To conclude otherwise would arguably create unintended exceptions to the Section 20 prohibitions and undermine the regulatory regime prescribed by IGRA. AR at AR00012-13. If Plainiffs are correct, however, and Congress intended to limit the application of Section 20 to trust acquisitions only, any land acquired pursuant to the Settlement Act would be *completely exempt*

from the restrictions of Section 20 and the Nation, or any other Indian tribe for that matter, would be permitted to conduct gaming on Indian lands acquired in ***restricted fee*** after October 17, 1988. The Chairman's conclusion that Congress did not intend to create such a loophole in the application of Section 20 is entitled to deference.[16/]

Plaintiffs also reiterate their arguments regarding the Memorandum of Agreement ("MOA") between the NIGC and the Department of the Interior. As the United States discussed in its Motion to Dismiss, the Chairman's decision is consistent with the non-binding MOA. U.S. Mot. to Dismiss at 29-30.

4. The Wyandotte Case

Finally, misquoting Wyandotte, Plaintiffs argue that the Chairman's decision regarding the Seneca Nation is at odds with the Wyandotte case. Mot. for Summ. J. at 53-56; Wyandotte Nation v. National Indian Gaming Comm'n, 437 F. Supp. 2d 1193 (D. Kan. 2006). The Chairman correctly relied on Wyandotte and did not distort the holding.

First, the facts surrounding the Wyandotte's settlement are distinguishable from the present case. The Wyandotte Nation received the money that it spent on the land acquisition from an ICC judgment. Wyandotte, 437 F. Supp. 2d at 1198. The ICC handled large numbers of claims during its span, and substantial relief was granted to many tribes. Concerned that any tribe that received an ICC judgment would be able to acquire lands using ICC judgment funds

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[16/]In footnote 32 of their Motion for Summary Judgment, Plaintiffs argue that although Section 20's prohibition on gaming on after-acquired lands should apply to both trust and restricted fee lands, that does not mean that Section 20's exceptions should apply to both trust and restricted fee lands. Such an interpretation of the statute would require one to read "trust" to mean "trust and restricted fee" in one part of Section 20, but to mean only "trust" in another part of Section 20. Such an interpretation is nonsensical contrary to all rules of statutory construction.

and claim that those funds were part of settlement of a land claim, the NIGC argued that the Wyandotte Nation's land did not fall within the exception because the Wyandotte Nation did not have a congressional settlement act, but a monetary judgment fund. Id. However, Congress passed Public Law 98-602, which decreed how the Wyandotte judgment funds should be spent, dedicating $100,000 to land acquisition. Id. As the Wyandotte court noted, "[t]he NIGC's focus on the ICC money judgment might pass muster if the Tribe had merely purchased the Shriner Tract with money received from a claim brought before the ICC." Wyandotte, 437 F. Supp. 2d at 1210. The Wyandotte court then discussed the definitions of both "land" and "claim" and concluded that, "[t]he 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. The district court in Wyandotte found this plain meaning and the Department of Interior's decision regarding the Seneca Nation to be at odds with NIGC's decision regarding the Wyandotte Nation. As a result, the Wyandotte court concluded that the Wyandotte did not need to establish a claim for the return of land. Id. at 1212.

Plaintiffs argue that the Chairman has distorted Wyandotte to read the phrase, "includes an assertion of an existing right to the land" as including a right in any way related to land. Mot. for Summ. J. at 54. However, Plaintiffs again fail to explain how the Seneca Nation does not hold an existing property right to the lands that are being leased, since the Nation is the lessor of those lands.

Plaintiffs then argue that Wyandotte supports their proposition that because the Settlement Act did not mandate that the funds be used for the purchase of land, the Buffalo Parcel does not qualify under the "settlement of a land claim" exception. In making this

argument, Plaintiffs' cite to the Wyandotte court's statement that:

> The NIGC's focus on the ***ICC*** money judgment might pass muster if the Tribe had merely purchased the Shriner Tract with money received from a claim brought before the ***ICC***. That is not the case, however, because Congress mandated that $100,000 of the Tribe's ***ICC*** judgment funds be utilized to purchase land to be taken into trust for the benefit of the Tribe as a means of effectuating a judgment that resolved the Tribe's claims.

437 F. Supp. 2d at 1210 (emphasis added). However, Plaintiffs misunderstand the court's point. As discussed earlier, the ICC handled large numbers of claims during its span, and substantial monetary relief was granted to many tribes. Concerned that any tribe that received an ICC judgment would be able to acquire lands using ICC judgment funds and claim that those funds were part of settlement of a land claim, the NIGC argued that the Wyandotte Nation's land did not fall within the exception because the Wyandotte Nation did not have a congressional settlement act, but a monetary judgment fund. The court's statement simply indicates that if the tribe had purchased the land with money received from an ICC judgment – but not from a congressional act – it would not fit within the settlement of a land claim exception.

Regardless of the outcome in Wyandotte, the United States' position regarding the Seneca Nation Land Claims Settlement Act remains the same. See Wyandotte, 437 F. Supp. 2d at 1210-12. The fact that the land at issue in this case was purchased pursuant to the Settlement Act distinguishes their case from Wyandotte. Plaintiffs repeatedly emphasize the fact that the Seneca Nation did not *have* to purchase land according to the Settlement Act, but the fact is that the Settlement Act provides the Nation with the option to do so and requires the Secretary to set those lands aside as restricted fee Indian lands as long as the Nation complied with the terms of the Settlement Act. The money that the Wyandotte used was the result of an ICC judgment,

which Congress subsequently required the tribe to use to purchase real property, but there was no discussion in the appropriation of the payment being considered in settlement of a land claim.

For the foregoing reasons, the Chairman's determination that the Buffalo Parcel falls within IGRA's Section 20 exception for lands acquired pursuant to the settlement of a land claim is supported by the administrative record, the legislative history, and the plain language of both the Settlement Act and the IGRA. Under the APA and relevant case law, the Chairman's Section 20 determination is entitled to the deference normally afforded agencies. See Chevron, 467 U.S. 837. Therefore, this Court should deny Plaintiffs' Motion for Summary Judgment on their claims challenging the Chairman's determination that the Settlement Act constituted a settlement of a land claim for purposes of Section 20.

V. CONCLUSION

For the foregoing reasons, the United States respectfully requests that Plaintiffs' Motion for Summary Judgment be denied and the United States' Motion to Dismiss or in the Alternative for Summary Judgment be granted.

DATED: November 20, 2007 Respectfully submitted,

Ronald J. Tenpas
Acting 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:
Michael Hoenig
Staff Attorney
National Indian Gaming Commission

Andrew Caulum
Department of the Interior
Office of the Solicitor
1849 C Street
Washington, DC 20240