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
PHILIP N. HOGEN, et al.,	)	
Defendants.	)	

DEFENDANTS' MOTION FOR REMAND

Defendants, Philip N. Hogen, in his official capacity as Chairman of the National Indian Gaming Commission ("Chairman"), the National Indian Gaming Commission ("NIGC"), Dirk Kempthorne, in his official capacity as Secretary of the Interior ("Secretary"), the United States Department of the Interior ("Interior"), and Interior (collectively, "Defendants"), by undersigned counsel, hereby move the Court to alter or amend its Judgment to remand the Chairman's approval of the Seneca Nation of Indian's class III gaming ordinance ("Ordinance") and the Indian land opinion issued by the Chairman as part of that approval, which is at issue in the above-captioned case.

On July 8, 2008, this Court issued its Decision and Order (Dkt. No. 61) in the above-captioned case, vacating the Ordinance on the grounds that the parcel of land held in restricted fee for the benefit of the Seneca Nation of Indians is not eligible for gaming under the Indian Gaming Regulatory Act's ("IGRA"), 25 U.S.C. §§ 2701-2721, "settlement of a land claim" exception for lands acquired after October 17, 1988, id. § 2719(b)(1)(B)(i). Although the Court

vacated the Ordinance, it did not remand the case to the Defendants.

The purpose of this Motion is two-fold: (1) to inform the Court of recent events that could impact this case, and (2) to respectfully request a remand of the Court's July 8, 2008 Decision pursuant to Federal Rule of Civil Procedure 59(e), to allow Defendants to review the determination that the Buffalo Parcel does not fit within IGRA's Section 20 "settlement of a land claim" exception to the prohibition against gaming on land acquired after October 17, 1988. Therefore, Defendants respectfully request that the Court alter or amend its Judgment to remand the Ordinance to the agencies.

I. New Developments

Defendants would like to inform the Court of two new developments relating to the request for a remand.

A. The Seneca Nation Submitted a New Ordinance to NIGC

On July 16, 2008, the Seneca Nation of Indians submitted a new class III gaming ordinance to the NIGC for review. See attached Exhibit. Pursuant to IGRA, the Chairman must approve the ordinance if it meets the requirements of IGRA. 25 U.S.C. § 2710(e). Action must be taken on the ordinance, "by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman . . . . Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman," to the extent it is consistent with the statute. Id. Therefore, the Chairman will have until Tuesday, October 14, 2008, to approve the new ordinance before it takes effect as a matter of law.

The Seneca Nation submitted its new ordinance in light of regulations promulgated by

Interior on May 20, 2008. These regulations ("Regulations") implement Section 20 of IGRA, which prohibits gaming on trust lands acquired after October 17, 1988. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29354 (May 20, 2008). Although the Regulations were scheduled to go into effect on June 19, 2008, the preamble to the rule contained an incorrect effective date. Gaming on Trust Lands Acquired After October 17, 1988; Correction, 73 Fed. Reg. 35579-80 (June 24, 2008). The Regulations will go into effect August 25, 2008. Id. By the date that the Chairman must act on the new ordinance, Interior's Regulations will be in effect and the Chairman will need to determine how to apply the Regulations.

B. The Department of the Interior Published Regulations Implementing Section 20 of IGRA

The Regulations, codified in 25 C.F.R. Part 292, articulate the standards that the Bureau of Indian Affairs will follow in interpreting various exceptions to the gaming prohibitions contained in Section 2719 of IGRA. 25 U.S.C. § 2719. In particular, the Regulations address two issues that were before this Court: (1) whether Section 20 applies to restricted fee lands, although the term "restricted fee" is omitted from that section, and (2) what criteria are necessary for meeting the "settlement of a land claim" exception. 73 Fed. Reg. at 29355, 29376-77.

1. Application of Section 20 to Restricted Fee Indian Lands

Interior initially interpreted Section 20 as applying to restricted fee Indian lands. Citizens Against Casino Gambling in Erie County v. Hogen, No. 07-0451, slip op. at 99 (W.D.N.Y. July 8, 2008) (Dkt. No. 61). Interior reconsidered this interpretation in the context of notice and comment rulemaking and concluded that, "section 2719(a) only refers to lands acquired in trust

after October 17, 1988. The omission of restricted fee from section 2719(a) is considered purposeful, because Congress referred to restricted fee lands elsewhere in IGRA, including at section 2719(a)(2)(A)(ii) and 2703(4)(B)." 73 Fed. Reg. at 29355. This decision and the preamble discussion of why Interior now takes that position are discussed in the review of public comments received as part of the notice-and-comment rulemaking process. Id.

2. Settlement of a Land Claim Exception

The Regulations also discuss the criteria for meeting the requirements of the "settlement of a land claim" exception. 25 U.S.C. § 2719(b)(1)(B)(i). First, the Regulations define the term "land claim" as:

> [A]ny claim by a tribe concerning the impairment of title or other real property interest or loss of possession that:
> (1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;
> (2) Is in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and
> (3) Either accrued on or before October 17, 1988, or involves lands held in trust or restricted fee for a tribe prior to October 17, 1988.

73 Fed. Reg. at 29376 (25 C.F.R. § 292.2). The Regulations then allow gaming to be conducted under this exception if the land is acquired, "under a settlement of a land claim that resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, in legislation enacted by Congress[.]" 73 Fed. Reg. at 29376-77 (25 C.F.R. § 292.5).

The Chairman has 90 days in which to act on the new ordinance submitted to the NIGC for approval. During this time, Interior's Regulations will take effect. Consequently, the NIGC will need to determine how to apply the Regulations in its review of the new ordinance. As a

result, the parties could be before this Court once again.

II. Request For Remand Pursuant To Rule 59(e)

A. The Ordinance Should be Remanded

The Court, as recognized in footnote 65 of the opinion, resolved the question of whether the Buffalo Parcel meets the requirements of the "settlement of a land" claim exception in Section 2719 of IGRA on the basis of considerations not expressly raised in the parties' briefs. Citizens Against Casino Gambling in Erie County v. Hogen, No. 07-0451, slip op. at 117 n.65 (W.D.N.Y. July 8, 2008) (Dkt. No. 61). In support of this approach, the Court cites City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197, 214 n.8 (2005), as the basis for its decision to resolve the issues presented. However, City of Sherill involved a matter of federal common law, not review of a decision by a federal agency pursuant to the Administrative Procedure Act ("APA"). In an APA case, the proper course is to remand the decision to the agency. Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) ("[I]f 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*.") (emphasis added); Camp v. Pitts, 411 U.S. 138, 143 (1973); Sierra Club v. EPA, 167 F.3d 658 (D.C. Cir. 1999). Indeed, "'[t]he scope of review under the arbitrary and capricious standard is narrow,' and courts should not substitute their judgment for that of the agency." Karpova v. Snow, 497 F.3d 262, 267 (2d Cir. 2007) (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)) (internal quotations omitted). Therefore, if the Court could not decide the issue based on the administrative record before it, the proper course was to remand the decision to the agencies for

additional analysis or explanation.

The Supreme Court has held that "[g]enerally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." INS v. Orlando Ventura, 537 U.S. 12, 16 (2002); see also Gonzales v. Thomas, 547 U.S. 183, 187 (2006) ("We can find no special circumstance here that might have justified the Ninth Circuit's determination of the matter in the first instance . . . . [T]he Court of Appeals should have applied the ordinary remand rule.") (citations and internal quotations omitted); Keisler v. Hong Yin Gao, 128 S. Ct. 345 (2007) (granting certiorari, vacating the judgment, and remanding a Second Circuit decision on the same grounds as Thomas). These well-established limitations on judicial review of agency decision-making are grounded in the separation of powers doctrine and the recognition that Congress has conferred certain discretionary decision-making powers to federal agencies equipped with special expertise. Cronin v. U.S. Dep't of Agric., 919 F.2d 439, 444 (7th Cir. 1990).

For the foregoing reasons, Defendants respectfully request that the Court amend its decision to remand the Ordinance to the agencies.

B. Remand Could Also be Appropriate In Light of the Regulations

The Regulations could also provide an alternative basis for a remand. As the Supreme Court recognizes, a remand can occur as a result of a wide range of developments, including administrative reinterpretation of federal statutes. See Lawrence ex rel. Lawrence v. Chater, 516 U.S. 163, 165, 171 (1996) (finding new interpretation of the Social Security Act by the Social Security Administration required the Supreme Court to grant certiorari, vacate the judgment below, and remand the case); SKF USA, Inc. v. United States, 254 F.3d 1022, 1028 (Fed. Cir.

2001) (discussing remand for an agency to reconsider its decision because of intervening events, or remand to reconsider its previous position) (citing Lawrence); see also Dep't of Interior v. South Dakota, 519 U.S. 919, 921 (1996) (granting certiorari, vacating the judgment below, and remanding in light of Interior's changed position and new regulations).

Therefore, a remand may also be appropriate in light of Interior's Regulations. As discussed above, Interior has changed its interpretation of the applicability of Section 2719 of IGRA to restricted fee Indian lands in the Regulations. The new interpretation reverses the interpretation set forth in the Secretary's November 12, 2002, letter, relied upon by the Chairman in reviewing the Ordinance. In reviewing an agency's construction of a statute it administers, a court addresses two questions, as required by the Supreme Court's decision in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). First, a court must determine "whether Congress has directly spoken to the precise question at issue." Id. at 842. If, however, Congress has not spoken directly on the issue, a court addresses the second question, whether the agency responsible for filling a gap in the statute has rendered an interpretation that is "based on a permissible construction of the statute." Id. at 843. The fact that Section 2719's applicability to restricted fee Indian lands is subject to interpretation and reinterpretation demonstrates that it is ambiguous.

A remand of the Ordinance is consistent with all of these principles because it will allow the NIGC to review its decision and determine in the first instance whether to alter that decision. It would also provide Interior, the agency tasked with administering and interpreting the Seneca Nation Land Claims Settlement Act, with the opportunity to interpret the Settlement Act and allow the NIGC to review its prior approval of the Ordinance in light of Interior's new legal

interpretation of the settlement of a land claim exception in the Regulations. Finally, it may obviate the need for the NIGC to consider a new ordinance and thereby conserve the resources of the parties and the Court by eliminating the possibility that this Court would have to consider these issues again in a separate case.

III. Conclusion

For the foregoing reasons, Defendants respectfully request that the Court alter or amend its Decision and Order to remand the matter to Defendants for further review.

DATED: July 22, 2008

Respectfully submitted,
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