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.	NOTICE OF MOTION FOR ORDER TO ENFORCE AND/OR FOR CONTEMPT, AND FOR ATTORNEYS' FEES
PHILIP N. HOGEN, et al.,	
Defendants.	

PLEASE TAKE NOTICE that, upon the annexed Affidavit of Cornelius D. Murray, Esq., sworn to on October 21, 2008, and the exhibits annexed thereto, the Memorandum of Law submitted herewith, and upon this Court's prior Decision and Order dated July 8, 2008 (Dkt No. 61), and the Judgment entered pursuant thereto (Dkt No. 62), and prior Decision and Order dated August 26, 2008 (Dkt No. 76), and all the proceedings had herein, the Plaintiffs will move this Court at a time to be decided by this Court, for an Order (i) granting the Plaintiffs' motion to enforce, by directing that the Defendants Philip N. Hogen (as Chairman of the National Indian Gaming Commission) and the National Indian Gaming Commission ("NIGC") take the actions necessary to terminate immediately, and in any event within five (5) business days, all Class III gambling operated by the Seneca Nation of Indians at the 9-1/2 acre site in downtown Buffalo known in this litigation as the "Buffalo Parcel"; and/or (ii) holding the Defendant NIGC and Chairman Hogen in contempt of court for failure to adhere to the August 26 Decision directing them "to comply forthwith with Congress's mandate as set forth in 25 U.S.C. § 2713(a)(3), and with NIGC regulations" and "to take such action as is consistent with the Court's July 8, 2008 Decision, the IGRA's mandates and intent, and NIGC regulations"; and (iii) awarding Plaintiffs

their attorneys fees and costs; and (iv) for such other relief as to this Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that responding papers, if any, must be served in accordance with the schedule fixed by the Court.

Dated: Albany, New York
October 21, 2008

Respectfully submitted,

O'CONNELL & ARONOWITZ, P.C.

s/ Cornelius D. Murray
Cornelius D. Murray, Esq.
54 State Street
Albany, New York 12207
(518) 462- 5601
Cornelius D. Murray, Esq.
nmurray@oalaw.com
Jane Bello Burke, Esq.
jburke@oalaw.com

JACKSON & JACKSON
70 West Chippewa Street, Suite 603
Buffalo, New York 14202
(716) 362-0237
Michael Lee Jackson, Esq.
Rachel E. Jackson, Esq.

RICHARD LIPPES AND ASSOCIATES
1109 Delaware
Buffalo, New York 14209
(716) 884-4800
Richard J. Lippes, Esq.

THE KNOER GROUP, PLLC
424 Main Street, Suite 1707
Buffalo, New York 14202
(716) 332-0032
Robert E. Knoer, Esq.

RICHARD G. BERGER, Esq.
403 Main Street, Suite 520
Buffalo, New York 14203
(716) 852-8188
Richard G. Berger, Esq.

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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

Plaintiffs,

-against- 07-CV-00451-WMS

PHILLIP N. HOGEN, et al.,

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO ENFORCE AND/OR FOR CONTEMPT OF COURT AND FOR ATTORNEYS' FEES

STATE OF NEW YORK)
)ss.:
COUNTY OF ALBANY)

CORNELIUS D. MURRAY, being duly sworn, deposes and says that:

1. I am an attorney at law duly admitted to practice before this Court and am a member of the law firm of O'Connell and Aronowitz, attorneys for Plaintiffs herein, and as such I am fully familiar with the facts hereinafter set forth.

2. This Affidavit is respectfully submitted in support of Plaintiffs' application for an Order:

a) directing that the Defendants Philip N. Hogen (as Chairman of the National Indian Gaming Commission) and the National Indian Gaming Commission ("NIGC") take the actions necessary to terminate immediately, and in any event within five (5) business days, any further "Class III Gaming," as defined by the Indian Gaming Regulatory Act ("IGRA"), that is being and

heretofore has been conducted by the Seneca Nation of Indians ("Senecas" and/or "SNI") at the location within the City of Buffalo known in this litigation as the "Buffalo Parcel"; and/or

b) holding the said Defendants Hogen and the NIGC in contempt of court for their deliberate failure to comply with this Court's Decision and Order dated August 26, 2008 (Dkt. No. 76), which, *inter alia*, directed said Defendants "to comply ***forthwith*** with Congress' mandate as set forth in 25 U.S.C. § 2713(a)(3) and with NIGC regulations" (emphasis supplied) and further directed Defendant Hogen "to take such action as is consistent with this Court's July 8, 2008 Decision, the IGRA's mandates and intent, and NIGC regulations," and

c) directing Defendants to pay to Plaintiffs all reasonable attorneys' fees and expenses Plaintiffs have incurred in connection with the relief sought herein.

3. Despite this Court's August 26, 2008 Order that the NIGC and its Chairman "comply forthwith" with Congress' mandate in 25 U.S.C. § 2713(a)(3) and NIGC regulations, eight weeks later the illegal gambling operation conducted by the Senecas at the Buffalo Parcel continues unabated. As will be clear from what follows, the Defendants Hogen and NIGC have not acted in good faith, and while giving superficial lip service to this Court's August 26, 2008 Order, they have, in fact, not taken any effective enforcement action whatsoever, making a mockery of the law and this Court's prior orders, imparting a novel interpretation to the word "forthwith."

4. In addition to their own foot-dragging, Defendants have also allowed the Senecas to engage in dilatory tactics. Plaintiffs have become totally frustrated by the

continuation of an illegal gambling operation, despite what they thought was their hard-earned, clear and unequivocal victory that they obtained in three different prior decisions of this Court rendered in January 2007, July 2008, and August 2008 and, therefore, they now ask this Court, once and for all, to put an end to this gamesmanship.

5. While this Court is undoubtedly familiar with what has transpired heretofore in this litigation, a brief overview of the most salient facts is appropriate to establish the groundwork and to set the stage for Plaintiff's current application.

6. In January 2007, this Court vacated an Ordinance that had been adopted by the Senecas and approved by Defendant Hogen that would otherwise have authorized the Senecas to engage in Class III gambling at the Buffalo Parcel site. *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 491 F.Supp.2d 295 (W.D.N.Y. 2007) ("*CACGEC I*"). At that time, the Court vacated that approval as "arbitrary and capricious" because there was no basis upon which to conclude that such approval was "the result of reasoned decision-making." *Id.* at 326.

7. In *CACGEC I*, this Court further directed that the matter be remanded to Chairman Hogen and the NIGC "to determine whether the Buffalo Parcel is 'Indian lands' as defined in the IGRA, to consider, if necessary, the applicability of § 20 of the IGRA ... to the Buffalo Parcel, and to provide an explanation for the bases for the determinations." *Id.* at 327.

8. On July 2, 2007, Defendant Hogen approved an amended Ordinance that had been enacted by the Senecas on June 9, 2007 that was virtually identical to the previous ordinance that had been vacated by this Court in *CACGEC I*.

9. In approving that ordinance by letter dated July 2, 2007 (Dkt No. 27-2), Chairman Hogen stated that he had relied on a prior letter dated November 12, 2002 from then-Secretary of the Interior Gale Norton, that lands within the City of Buffalo acquired by the Senecas with proceeds from the Seneca Nation Settlement Act, 25 U.S.C. § 1774, *et seq.*, would qualify as "Indian lands" within the meaning of IGRA. Chairman Hogen further opined that the Buffalo Parcel was acquired "as part of the settlement of the land claim" and was therefore not subject to IGRA's § 20 prohibitions against gambling on land acquired after October 17, 1988, the effective date of IGRA (*id.*).

10. Shortly thereafter, the Senecas commenced a Class III gambling operation at a temporary facility erected on the site and announced ambitious plans for a multi-million dollar hotel and casino complex to be built on the site (Dkt No. 34-4).

11. Plaintiffs immediately challenged the Chairman's approval of the amended ordinance by initiating this action on July 12, 2007 (Dkt No. 1) and subsequently moved for summary judgment.

12. On July 8, 2008, this Court granted Plaintiffs' Motion for Summary Judgment insofar as the Court found that the Buffalo Parcel was not gambling-eligible because, although it was "Indian lands," it was not acquired as a result of the settlement of the land claim, and therefore, was subject to the prohibitions against gambling on Indian lands acquired after October 17, 1988 as set forth in § 20 of the IGRA. *See* 25 U.S.C. § 2719. Accordingly, "because gambling cannot lawfully occur on the Buffalo Parcel under the settlement of the land claim exception, the Court vacated the NIGC's approval of the SNI's Class III gaming ordinance ..." (Dkt No. 61 at 121).

13. It is significant that throughout the litigation, and indeed long prior to the litigation's commencement, the Defendants had consistently taken the position that the prohibitions embodied in § 20 of the IGRA against gambling on land acquired after October 17, 1988, applied both to land acquired in trust by the Secretary of the Interior and to "restricted fee" land. There is no dispute that the Buffalo Parcel constituted "restricted fee" land.

14. On the day after this Court's Decision, the Senecas held a press conference in which they characterized this Court's decision as "procedural" and said that it did not prevent further operations at the Buffalo Parcel site. Indeed, the Senecas intended to conduct "business as usual" (Dkt No. 63-3).

15. After Deponent, as attorney for the Plaintiffs, was informed by the Defendants that they were still "weighing their options" and had no immediate plans to halt gambling by the Senecas at the Buffalo Parcel site (Dkt No. 63-1), Plaintiffs moved on July 14, 2008 for an Order enforcing this Court's Judgment.

16. Two days later, the Senecas adopted yet another ordinance (Dkt. No. 65-2), the third such ordinance purporting to authorize gambling at the very same Buffalo Parcel site, and submitted said Ordinance to the NIGC for approval by letter dated July 16, 2008 (Dkt No. 65-2).

17. Six days later, on July 22, 2008, Defendants Hogen, the NIGC, Secretary of Interior Kempthorne and the U.S. Department of the Interior moved to remand this case to the NIGC based upon two so-called "new developments":

a) the adoption and submission of the aforementioned proposed third ordinance by the Senecas; and

b) new regulations, promulgated by the Secretary of the Interior in the May 20, 2008 issue of the Federal Register, to be effective on August 25, 2008, which contained a new interpretation of § 20 of the IGRA. That interpretation was that the prohibitions contained in § 20 prohibiting gambling on land acquired after October 17, 1988 did not apply to "restricted fee" land (Dkt No. 65).

18. The Senecas filed an *amicus* brief in support of the Defendants' motion to remand and in opposition to Plaintiff's Motion to Enforce this Court's July 8, 2008 judgment (Dkt No. 66). In their Brief, the Senecas argued that the Defendants' revised interpretation of the IGRA - that § 20 did not apply to restricted fee land - was correct and that this Court lacked the authority to order the cessation of gambling operations at the Buffalo Parcel site.

19. On August 26, 2008, this Court issued its Decision and Order denying the Defendants' Motion to Remand, noting their "particularly egregious" approach in invoking for the first time new regulations that had been published in the Federal Register well before the Court issued its July 8, 2008 Decision (Dkt No. 76 at 15). In that same Decision, the Court granted the Plaintiffs' motion to enforce its prior judgment and directed the Defendant Chairman to comply "forthwith" with Congress' mandate as set forth in 25 U.S.C. § 2713(a)(3) and its own regulations. This Court further ordered the Chairman to take such action as is consistent with the Court's July 8, 2008 decision, the IGRA's mandates, and intent, and NIGC regulations (Dkt No. 76 at 21).

20. There is no question that the IGRA mandates that gambling on lands acquired after October 17, 1988 "shall not be conducted" absent certain exceptions and exclusions not applicable hereto. *See* 25 U.S.C. § 2719. In its July 8, 2008 Decision and

Judgment, this Court found that the only exception invoked by the Defendants - *i.e.*, the settlement of a land claim exception, did not apply and, therefore, gambling could not "lawfully occur" on the Buffalo Parcel. Dkt No. 61 at 171.

21. In addition, there is no question that Congress gave the power to the NIGC to enforce the law as this Court found in its August 26, 2008 Decision and Order (Dkt No. 76 at 4).

22. Further, there is no question that under the NIGC's own regulations, the conduct of Class III gambling on Indian land without an ordinance constitutes a "substantial violation" of the IGRA. 25 C.F.R. § 573.6(a)(3). Moreover, the Chairman is empowered to order temporary closure of a gambling facility until the enforcement process called for under 25 C.F.R. Part 573 is completed.

23. This raises the question as to what enforcement efforts the Defendants have engaged in following this Court's Order dated August 26, 2008 wherein it also summarized the enforcement procedures. Dkt No. 76 at 4-5.

24. On September 3, 2008 Defendant Hogen served the Senecas with a Notice of Violation ("NOV") in accordance with 25 C.F.R. § 573.3. Dkt No. 77-2. The NOV did not contain any immediate sanction and stated that the Senecas could correct the "ongoing violation" by closing the gambling facility at the Buffalo Parcel within 5 days. Dkt No. 77-2 at 6. The timing for correction was based on a determination by the Acting Director of the Enforcement Division of the NIGC, John Peterson, as set forth in an Affidavit dated September 2, 2008, a copy of which is annexed hereto as Exhibit "A". I received this affidavit last week from Defendants' counsel Mary Pat Fleming, as part of the administrative record for the issuance of the NOV. According to that affidavit, "in

these circumstances, five (5) days is a reasonable amount of time for the Nation to effectuate the closure of its Buffalo, New York gaming facility" by providing notice to employees, vendors, and state regulators and performing the necessary audits and procedures to close out the machines.

25. The NOV stated that the potential sanctions for the violation could include temporary closure and/or a fine of up to $25,000 / day. Dkt No. 77-2 at 6. It also stated that the Senecas had up to 15 days to submit written information in response to the violation and that the Chairman could grant an extension for good cause. *Id.*

26. Finally, the NOV advised the Senecas of their right to appeal from the Notice of Violation.

27. Under the statutory and regulatory enforcement scheme, permanent closure can only be ordered by the NIGC following an order of temporary closure by the Chairman. It should be noted, however, that the Chairman issued no order of temporary closure despite the fact that the NIGC's own regulations permit such closure when an Indian tribe fails to correct a violation within the time prescribed in the NOV or conducts gambling without a valid ordinance, both of which are described as "substantial violations." 25 C.F.R. § 573.6(a)(1)(i) and 573.6(a)(3).

28. In the very same NOV, the Commission also stated that the Chairman might modify the measures required to correct if either (1) the Senecas' third ordinance submitted on July 16, 2008 were to be approved; or (2) this Court's July 8, 2008 Decision and Order were reversed or stayed by the District Court or reversed by the United States Second Circuit Court of Appeals.

29. On the very same day that the Notice of Violation was issued, the Senecas sent a letter, a copy of which is annexed hereto as Exhibit "B", appealing the Notice of Violation and stating that the Court's decision was wrong "as a matter of law and policy" and that the Senecas had "lawfully obtained all required government approvals for its Class III gaming ordinance."

30. The Senecas' September 3, 2008 letter (Exhibit "B") also stated that the U.S. Government is still actively considering an appeal of [this Court's July 8 and August 26 decisions] and that the Senecas had submitted a new gaming ordinance on July 16, 2008 so that the "NIGC could consider the applicability of new and intervening Department of the Interior regulations concluding that lands like those at issue here are exempt from [the IGRA's] § 20 prohibition on gaming."

31. Thereafter, by letter dated September 15, 2008, the Senecas submitted an 11-page "Supplemental Statement" to the Commission in response to the aforementioned NOV. A copy of that Supplemental Statement is annexed hereto as Exhibit "C".

32. In that "Supplemental Statement," the Senecas requested that "the Presiding Official delay any hearing in this enforcement matter until a reasonable time after October 15, 2008, because that was the date by which the Commission was required by law to act on the Senecas' third proposed Ordinance that had been submitted on July 16, 2008.

33. It should be noted that Section 11(e) of the IGRA provides that the Chairman of the NIGC must act to approve or disapprove a tribal gaming ordinance within 90 days of its submission; otherwise, it becomes effective by operation of law, but only to the extent that it is consistent with IGRA. *See* 25 U.S.C. § 2710(e).

34. The Senecas also contended in their Supplemental Statement that the Chairman might approve the third Ordinance based upon the Department of Interior's new interpretation of the IGRA that the prohibitions in § 20 did not apply to "restricted fee" land. Exhibit "C" at 2.

35. In an undated letter, the NIGC staff attorney, Michael Hoenig, granted the extension of time requested by the SNI to respond to the NOV by 30 days, and delayed for an indefinite period of time the assessment of any civil fine for the continued illegal operation of the Buffalo Parcel casino. A copy of the letter is annexed hereto as Exhibit "D".

36. When the 90 days within which the Chairman was required to act on the Senecas' third ordinance elapsed on October 15, 2008, Deponent called U.S. Attorney Mary Pat Fleming to inquire as to the status of the Chairman's actions with respect to the ordinance and the status of the Commission's enforcement action that had been ordered by this Court.

37. Ms. Fleming informed me that the Senecas had withdrawn the submission of the Ordinance the previous day, October 14, 2008, a fact which she subsequently confirmed in an e-mail to me, a copy of which is attached hereto as Exhibit "E". When I asked her for a copy of the Senecas' written withdrawal, she said that I needed to file a Freedom of Information Act request. A copy of the FOIA request, sent on October 17, 2008, is annexed hereto as Exhibit "F".

38. In that same conversation, Ms. Fleming also advised that Defendant Hogen, however, had moved before the "Presiding Official" of the enforcement proceedings for a stay of those enforcement proceedings against the Senecas.

39. Ms. Fleming thereafter electronically forwarded to me a copy of the Chairman's motion for a stay, a copy of which is annexed hereto as Exhibit "G".

40. That motion was filed on October 10, 2008. The sole basis for the stay was that the Commission had until October 27, 2008 to appeal from this Court's July 8, 2008 and August 26, 2008 Decisions, and if an appeal was filed, the enforcement proceedings should be stayed "pending a decision on appeal" by the U.S. Second Circuit Court of Appeals.

41. In other words, the Chairman of the NIGC asked for a stay before the Presiding Official of an administrative hearing being held before the very same Commission of which he is the Chairman and that said stay remain in effect until the U.S. Second Circuit Court of Appeals renders its decision on an appeal that has yet to be filed.

42. It should be noted that the Commission has already had eight weeks to decide whether or not it will appeal the determination.

43. This is a blatant and transparent attempt to circumvent this Court's clear and unequivocal mandate that the Chairman of the NIGC and the NIGC "comply forthwith" with Congress' mandate, NIGC regulations, the IGRA's mandates and intent, all as set forth in this Court's August 26, 2008 Decision and Order. Dkt No. 76 at 21.

44. It is more than a little arrogant for the Commission to attempt by itself to delay an enforcement proceeding which this Court ordered be conducted forthwith. The notion that an administrative hearing officer within a federal agency could effectively stay the order of a federal district court judge is an affront to the Court. Only the Court, or the Second Circuit if an appeal were filed, could grant such a stay. Fed. R. App. Proc. 8(a).

45. It is painfully obvious that the NIGC and the Senecas are attempting to string the Plaintiffs and this Court along, resorting to every possible procedural device and artifice to continue the illegal gambling operation at the Buffalo Parcel site.

46. The Senecas have characterized this Court's Decision as "procedural" and vowed to continue "business as usual" as set forth in their press release. Dkt No. 62-3. They submitted what they knew was a flawed third Ordinance to the Chairman and used that as an excuse to delay the Commission's enforcement proceedings for as long as possible. Then, at the proverbial eleventh hour, they withdrew the ordinance. That, however, was in conjunction with the Chairman of the NIGC's coming to their rescue by requesting on October 14, 2008 that his own Commission stay enforcement proceedings until the Second Circuit renders its decision on the appeal from this Court's Decision, even though the Commission has yet not decided whether to appeal.

47. To summarize, the Senecas and the NIGC have flouted this Court's Decision and Order. Despite this Court's ruling over three months ago that gambling could not be lawfully conducted at the Buffalo Parcel site under the settlement of a land claim exception, and despite this Court's second order eight weeks ago to commence enforcement "forthwith," the Senecas have continued to openly conduct that illegal operation without a valid ordinance and the NIGC has failed to take any effective steps to stop them. The absence of a valid ordinance constitutes a "substantial violation" of the IGRA under the NIGC's own regulations. Moreover, the Senecas have withdrawn their proposed new ordinance so there is nothing further for the Chairman or the Commission to approve that would legalize the gambling.

48. It should also be noted that the Secretary of the Interior has not made the two-part determination required under 25 U.S.C. § 2719(b)(1)(A) and the Governor of New York therefore has not concurred in a determination which has not been made. *See* this Court's August 26, 2008 Decision, Dkt No. 76 at 6, n.1.

49. The Commission has issued a toothless Notice of Violation without imposing any sanctions and then, in an effort to bypass this Court and frustrate its Order, the Chairman has asked his own agency to stay enforcement proceedings without seeking permission from this Court or the Second Circuit to stay said Order. This charade has gone on far too long.

50. Plaintiffs are entitled to the relief they seek and, accordingly, they beseech this Court to put an end to this mockery and order:

a) The Chairman of the NIGC and the NIGC to stop the illegal gambling immediately with the direction that in the absence of a Secretarial two-part determination under 25 U.S.C. § 2719(b)(1)(A), allowing gambling to continue would be illegal and in contempt of this Court;

b) The Chairman and the NIGC to immediately proceed to conclusion with the enforcement procedures set forth in 25 U.S.C. 2713 and 25 C.F.R. Part 573 without further delay, and this Court should establish specific deadlines for accomplishing same;

c) Hold the Chairman of the NIGC in contempt of court for their deliberate failure to comply "forthwith" with this Court's August 26, 2008 Decision and Order;

d) Grant Plaintiffs reasonable attorneys' fees and costs they have incurred or will incur in conjunction with this application; and

e) Grant such other, further and different relief which to this Court seems just and appropriate under the circumstances, as may be necessary to enforce its prior decisions, including, if necessary, calling upon the U.S. Marshal to enforce the law and this Court's Order if the Chairman and the NIGC do not.

Cornelius D. Murray

Sworn to before me this
21st day of October 2008.

Notary Public, State of New York

KATHLEEN A CARROLL
Notary Public, State of New York
No. 01CA6155054
Qualified in Saratoga County
Commission Expires Oct. 23, 2010

EXHIBIT A

DECLARATION OF JOHN PETERSON, DIRECTOR, REGION IV

I, John Peterson, declare under penalty of perjury, that the following is true and correct.

1. I am employed by the National Indian Gaming Commission (NIGC or Commission) as the Region Director for Region IV. I have been employed in this capacity since May of 1999. I am now serving as the Acting Director of the Enforcement Division of the NIGC.

2. I have been asked to assess what is a reasonable amount of time to allow for the closure of the Seneca Nation of New York's (Nation) gaming facility in Buffalo, New York.

3. Until the recent decision and order in *Citizens Against Casino Gambling v. Hogen*, 2008 U.S. Dist. LEXIS 52395 (W.D.N.Y. 2008) and *CACGEC* v. *Hogen*, No. 07-CV-0451S, p. 20 (W.D.N.Y. August 26, 2008) (Decision and Order), the Nation and the NIGC proceeded according to the belief that the Buffalo, New York facility was being operated in accordance with IGRA.

4. According to Region IV Director Cindy Altimus's most recent site visit, the facility operates approximately 280 slot machines. *See* August 29, 2008 Declaration of Cindy Altimus, Director, Region VI.

5. The Nation employs approximately 50 people at its Buffalo facility. *See, Now open: Seneca Buffalo Creek Casino*, Buffalo Business First, Newspaper, July 3, 2007. While it could immediately discontinue gaming and close the facility, that is not consistent with the Nation's need to assist its employees in making the transition to other employment or, in the worst case, unemployment. The Tribe may need to notify its employees of closure and follow any internal procedures the facility or tribe may have implemented for dismissing or temporarily laying off employees.

6. The Tribe may need to notify machine vendors that gaming machines will be out of use during the closure and doing so in accordance with contracts between the tribe and each vendor.

7. The Nation may need to notify state regulators of the closure pursuant to a tribal/state compact;

8. The Nation may need to perform the necessary audits and procedures to close out the machines.

9. I believe that in these circumstances, five (5) days is a reasonable amount of time for the Nation to effectuate the closure of its Buffalo, New York gaming facility.

Executed this 3 day of September, 2008.

John Peterson
Acting Enforcement Director

EXHIBIT B

The Seneca Nation of Indians

PRESIDENT'S OFFICE

P.O. Box 231
Salamanca, New York 14779
Phone: (716) 945-1790
Fax: (716) 945-1565

12837 Rt. 438
Irving, New York 14081
Phone: (716) 532-4900
Fax: (716) 532-6272

PRESIDENT ..... Maurice A. John, Sr - P.O. Box 70, Salamanca, NY 14779
CLERK ..... Jacqueline Bowen - P.O. Box 283, Salamanca, NY 14779
TREASURER ..... Kevin W. Seneca - P.O. Box 193, Irving, NY 14081

September 3, 2008

Chairman Phil Hogen
National Indian Gaming Commission
1441 L Street, NW
Suite 9100
Washington, DC 20006

Dear Chairman Hogen,

I have been authorized by the Seneca Nation Council to appeal Notice of Violation 08-20 pursuant to 25 C.F.R. § 577.3, and this letter constitutes the Nation's notice of appeal and request for a hearing in that matter. It is the Nation's view that it has lawfully obtained all required government approvals for its Class III Gaming Ordinance and that the decision and orders in *Citizens Against Casino Gambling in Erie County v. Hogen*, dated July 8 and August 26, 2008, on which the Notice of Violation is based, are wrong as a matter of law and policy.

As you know, the U.S. Government is still actively considering an appeal of both orders in that case. Moreover, the Nation submitted a new gaming ordinance to the National Indian Gaming Commission on July 16, 2008, so that the NIGC could consider the applicability of new and intervening Department of Interior regulations concluding that lands like those at issue here are exempt from Section 20's prohibition on gaming. A decision on that ordinance is due no later than October 14, 2008.

If the U.S. Government were to appeal and be upheld on the merits, or if the Commission were to approve the new gaming ordinance, the premise on which the Notice of Violation is based would be obviated and the Nation would be proved correct in its interpretation of the applicable law in this case.

Respectfully submitted,

Maurice A. John, Sr., President
SENECA NATION OF INDIANS

EXHIBIT C

NATIONAL INDIAN GAMING COMMISSION

IN THE MATTER OF:

NOTICE OF VIOLATION TO THE SENECA NATION OF INDIANS, NOV-08-20

SENECA NATION OF INDIANS' SUPPLEMENTAL STATEMENT

Introduction

On September 3, 2008, the Chairman of the National Indian Gaming Commission ("NIGC") issued a Notice of Violation ("NOV") to the Seneca Nation of Indians (the "Nation"). The NOV states that, as a consequence of the July 8, 2008 decision issued by Judge Skretny in *Citizens Against Casino Gambling in Erie County v. Hogen*, No. 07-CV-0451S, 2008 U.S. Dist. LEXIS 52395 (W.D.N.Y. 2008) ("*CACGEC II*"), the Nation is currently considered to be in violation of the Indian Gaming Regulatory Act ("IGRA") and its implementing regulations by (i) conducting gaming activities in the Buffalo Creek Territory Casino without an approved gaming ordinance authorizing gaming on the site, and (ii) conducting gaming activities on a site that is ineligible for gaming under 25 U.S.C. § 2719 (referred to hereafter as either "section 2719" or "section 20"). The NOV expressly notes that the *CACGEC II* litigation is on-going, that the July 8, 2008 Decision and Order is appealable, and that the Chairman may determine that the situation has changed at the conclusion of the litigation or if the Nation's 2008 site-specific ordinance is approved.

On the day after the NOV was issued, the Nation submitted a Notice of Appeal to the NIGC and requested a hearing on the matter.

In this Supplemental Statement, submitted pursuant to 25 C.F.R. § 577.3, the Nation specifically requests that the Presiding Official defer any hearing in this matter until a reasonable time after October 15, 2008. That is the date by which the Chairman is statutorily required to take action on the Nation's gaming ordinance amendments, which were submitted on July 17, 2008. 25 C.F.R. § 523.4.[1] The Chairman's decision on the ordinance amendments will potentially be of controlling relevance to this proceeding. If the Chairman concludes, in keeping with notice-and-comment regulations recently issued by the Department of the Interior, *see* 25 C.F.R. § 292.1-292.6 (but contrary to the position taken by the federal defendants in the *CACGEC* I and II litigation and accepted by Judge Skretny as a permissible, though not mandatory, construction of the statute) that section 20's prohibition on after-acquired gaming pertains only to trust, and not to restricted fee, lands, then the legal basis for the issuance of the

[1] If the Chairman does not act upon the ordinance amendments within the statutory timeframe, the ordinance amendments become approved by operation of law. 25 C.F.R. § 523.4(c).

NOV will have evaporated entirely. Proceeding with a hearing while a decision from the Chairman of such potential importance is pending would not serve any valuable purpose.

The Nation challenges the NOV on the merits. The Nation further requests the opportunity to file an additional brief on the merits if warranted by subsequent developments in the ordinance approval process or in the CACGEC litigation.

Statement of Facts

In January 2006, various plaintiffs brought suit in the United States District Court for the Western District of New York against the U.S. Department of the Interior, this Commission, and individual governmental defendants, challenging gaming in the Buffalo Creek Territory (the "Territory"). *See Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295 (W.D.N.Y. Jan. 12, 2007)(No. 06-CV-0001S)("*CACGEC I*"), *amended on reconsideration by* 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007). In relevant part, plaintiffs alleged that gaming in the Territory was not lawful because the Territory did not fall under IGRA's definition of "Indian lands" and because gaming in the Territory is proscribed by Section 20 of the statute. On January 12, 2007, Judge Skretny denied defendants' motion to dismiss the suit and vacated the Chairman's approval of the Seneca Nation Gaming Ordinance as to the Buffalo Creek Territory. Judge Skretny remanded the matter to the NIGC so that the Chairman could determine whether the Buffalo Creek Territory qualifies as "Indian lands" under IGRA and, if so, whether Section 20 or any of its exceptions apply to the Territory.

The Nation then submitted to the Chairman amendments to its ordinance that specified the precise location of the Buffalo Creek Territory—something that the original ordinance, which was submitted before the acquisition of the parcel, had not done. The site-specific amendments were approved on July 2, 2007, by letter opinion in which the Chairman concluded that the Buffalo Creek Territory constituted "Indian lands" as defined by IGRA and that the Territory met the "settlement of a land claim" exception to Section 20's general prohibition against gaming on trust lands acquired after the passage of IGRA.

In a new action filed in the Western District of New York, the *CACGEC I* plaintiffs (along with additional plaintiffs) then challenged this second approval on the same grounds that they had advanced in their first suit. The parties filed dispositive motions, and on July 8, 2008, Judge Skretny issued an opinion vacating this Commission's July 2, 2007 approval of the gaming ordinance amendments. *See generally CACGEC II*. The court held, in agreement with the NIGC and the Department, that the Nation properly enjoys jurisdiction over the Buffalo Creek Territory, and that the Territory hence satisfies IGRA's requirement that Indian nations may conduct gaming only on "Indian lands." However, Judge Skretny also held that Section 20's prohibition against gaming on lands taken into trust after the Act's effective date applies to the Territory even though it is comprised of restricted fee rather than trust lands. In so holding, the court concluded that the Chairman's position (articulated in both the ordinance approval and in the litigation) that Section 20 of IGRA applied to restricted fee land was "a permissible construction" of IGRA. He further held that the Section 20 "settlement of a land claim" exception does not apply, declaring the NIGC's conclusion on the latter issue to be "arbitrary, capricious, and not in accordance with the law." *CACGEC II* at *63.

After the dispositive motions in *CACGEC II* were briefed for the Court, but before the issuance of the decision, the Department published final agency regulations construing and implementing Section 20 of IGRA. *See* 25 C.F.R. §§ 292.1-292.26 (73 Fed. Reg. 29354). The regulations define the "newly acquired lands" to which Section 20's general prohibition applies to encompass only "land that has been taken, or will be taken, in trust for the benefit of an Indian tribe." *Id.* at § 292.1 (73 Fed. Reg. at 29376). As it discussed in the preamble to the Final Rule, the Department considers "[t]he omission of restricted fee lands from [the Section 20 prohibition to be] purposeful, because Congress referred to restricted fee lands elsewhere in IGRA." 73 Fed. Reg. 29354, 29355-56. More specifically, under the new Rule, the Department defines "newly acquired lands" as encompassing only "land that has been taken, or will be taken, *in trust* for the benefit of an Indian tribe." 25 C.F.R. 292.1 (73 Fed. Reg. 29354, 29376) (emphasis added). The Department explains that its omission of restricted fee lands from this definition was no accident. The Preamble to the Final Rule states:

> One comment regarded the applicability of section 2719 of IGRA to restricted fee lands[.]
>
> Response: . . . [S]ection 2719(a) refers only 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 sections 2719(a)(2)(A)(ii) and 2703(4)(B).
>
> . . . .
>
> Newly acquired lands:
>
> Several comments inquired as to the applicability of section 2719 to restricted fee lands[.]
>
> Response: In response to these inquiries, a definition of "newly acquired lands" was added to the regulations. It encompasses lands the Secretary takes in trust for the benefit of an Indian tribe after October 17, 1988. It does not encompass lands acquired by a tribe in restricted fee after October 17, 1988, as discussed above[.]

73 Fed. Reg. 29354, 29355-56. The new regulations also address what is meant by the "settlement of a land claim" as that term is used in Section 20.

On July 17, 2008, the Nation submitted amendments of its gaming ordinance to the NIGC for approval. The NIGC is statutorily required to act on the amendments by October 15, 2008. 25 C.F.R. § 523.4. The Nation believes that the Department's new Rule marks an important change in the governing law, and that the NIGC should have the opportunity to consider in the first instance the gaming eligibility of the Buffalo Creek Territory in light of the Department's new regulations and, in particular, the conclusion that the Section 20 prohibition does not apply to restricted fee lands. Those amendments make it clear that the Nation's gaming in the Buffalo Creek Territory occurs only on Indian land as defined by the decision in *CACGEC II*, and that it occurs only on restricted fee lands that the Department has concluded are not subject to Section 20's limitations.

On July 14, 2008, the *CACGEC II* Plaintiffs filed a Motion to Enforce Judgment, seeking an order compelling the NIGC to close the Nation's temporary gaming facility in the Buffalo Creek Territory immediately. On July 22, 2008, the federal defendants filed a Motion for Remand pursuant to Fed. R. Civ. P. 59(e), requesting that the court amend its judgment and remand the case so that the NIGC could consider the impact of the new Rule on the gaming-eligibility of the Buffalo Creek Territory. The Nation also filed an amicus brief in opposition to Plaintiffs' Motion to Enforce Judgment and in support of the Defendants' Motion for Remand.

On August 26, 2008, Judge Skretny denied the Motion for Remand and granted in part Plaintiffs' Motion to Enforce Judgment. The court issued an order compelling the NIGC to issue a Notice of Violation for the continued operation of the Buffalo Creek facility. Slip Op. at 7-8, 21. However, the court denied CACGEC's request that it order the NIGC to close the Buffalo Creek operation, as such an order would trench impermissibly on the Commission's discretionary enforcement authority. "Congress did give the Chairman and the Commission discretion, within the IGRA's mandatory remedial framework, to determine what type of enforcement action is appropriate to the circumstances of a particular violation or substantial violation. *Thus, Plaintiffs' request that the Court give effect to its July 8, 2008 Decision by direction to the Chairman to take a specific enforcement action is not in accord with the IGRA's remedial scheme.*" Opinion at 5 (emphasis added). In response, the NIGC issued a Notice of Violation pursuant to 25 U.S.C. § 2713(a)(3) and its regulations on September 3, 2008 (NOV-08-20), explaining that, under the court's July 8, 2008 decision, the Nation is currently considered to be in violation of the IGRA by operating a Class III gaming operation without an approved gaming ordinance relative to the Buffalo Creek Territory.[2]

Argument

I. The Presiding Official should order the hearing to commence only after the 90-day period in which the Chairman is required to take action on the pending gaming ordinance amendments has concluded.

The Nation requests that the Presiding Official order the hearing in this matter to commence at a reasonable time after October 15, 2008, the date by which the Chairman is statutorily required either to take action on the Nation's recently submitted gaming ordinance amendments or to allow the ordinance go into effect by operation of law. Postponing the hearing would enable the Chairman to review the continuing need for the NOV in light of the agency's considered and developed views regarding whether Section 20 applies to restricted fee land – and thus to the Buffalo Creek Territory at issue in the NOV – given the Department's new Rule that Section 20 does not apply to such land. As set forth above, the Department has concluded as a matter of law and agency policy that restricted fee lands are *not* subject to the Section 20

[2] Paragraph 4(R) of the NOV states imprecisely that "at this point in time, the Nation has no approved Class III ordinance." The "Seneca Nation of Indians Class III Gaming Ordinance of 2002", as amended, remains in effect relative to the Nation's other gaming establishments as it has never been challenged and the *CACGEC I* and *II* decisions are limited to the Buffalo Creek Territory and the subsequent amendment to the pre-existing ordinance. *See* 25 C.F.R. § 523.4 (Review of an amendment).

prohibition – a new position that departs from the one that the federal defendants took in the *CACGEC* litigation that led to Judge Skretny's order that the NIGC issue the NOV. The Department has also developed a new, and potentially significant, definition of a "settlement of a land claim." As the Supreme Court has made clear, "a court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act." *NLRB. v. Food Store Employees Union*, 417 U.S. 1, 10 n.10 (1974). The same principle applies here, where a coordinate agency has ordained a change in law that bears directly on the NIGC's own actions. *See Nat'l Fuel Gas Supply Corp. v. FERC*, 899 F.2d 1244, 1249-50 (D.C. Cir. 1990) (remanding case to agency because "the legal background against which the [agency] rendered its interpretation has been . . . altered. Remand under these circumstances also comports with the general principle that an agency should be afforded the first word on how an intervening change in law affects an agency decision pending review").

A brief postponement here will ensure that any agency action on the NOV is fully informed by the completed and considered decision of the agency on the proper scope of section 20 in light of the new Department Rule and the Nation's arguments as to why the NIGC should adopt the conclusions embodied in that Rule as its own. By contrast, administrative review prior to that time could deprive the agency of the time it needs to consider those important questions of agency law, and could result in internally contradictory agency proceedings, and in inefficiencies in and the unnecessary waste of administrative and party resources.

When the NIGC reviewed the Nation's previous gaming ordinance amendments, the NIGC relied in part on the Department's informal 2002 construction of the scope of the Section 20 prohibition in arriving at its own interpretation that Section 20's prohibition includes restricted fee lands. *See* Docket No. 34-5 (July 2, 2007 Letter of NIGC to the Nation (citing Secretary's November 12, 2002 opinion letter)) at 4 n.2. It is certainly plausible that the NIGC might amend its position in light of the Department's present interpretation, particularly where that interpretation – unlike the Department's former position and that of the NIGC – is embodied in a formal rule promulgated after public notice and comment and fully adheres to the plain statutory text.[3]

If the NIGC were in fact to concur in the construction of the Section 20 prohibition embodied in the new Department Rule, the considered determination of both agencies would warrant *Chevron* deference from the Court. In its Decision and Order, the Court held that the NIGC's present interpretation of Section 20's scope is "a permissible construction of the statute." Docket No. 61 at 103. The Court never held, however, that NIGC's present interpretation is correct or that an interpretation that the Section 20 prohibition extends only to trust lands would not likewise be permissible. If such an interpretation is permissible, then the Court would be bound to defer to it, even if it thinks it is not the better reading of the statute. "[Where an agency] construction is reasonable, *Chevron* requires a federal court to accept the agency's

[3] In addition, the new Final Rule sets forth the circumstances under which gaming may occur on newly acquired lands under a settlement of a land claim. 25 C.F.R. § 292.5 (73 Fed. Reg. 29354-01, 29376-77). These changes may provide an alternative independent basis for a reconsidered decision by the agency.

construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Crocker v. Piedmont Aviation, Inc.*, 933 F.2d 1024, 1027-28 (D.C. Cir. 1991) (reversing district court's grant of summary judgment where interpretation of statute relied on by district court was "permissible [but] not the only" interpretation and contrary agency interpretation of statute issued *after* district court issued its decision was not inconsistent with the statutory language and therefore "entitled to deference"). And compelling circumstances exist here in favor of the reasonableness of the Department's position.

First, the plain language of IGRA's Section 20 unequivocally supports the Department's interpretation. Section 20 of IGRA prohibits gaming "on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988." 25 U.S.C. 2719. That straightforward statutory text does not include land held in restricted fee status and thus, by its plain language, does not unambiguously dictate Section 20's application to restricted fee lands.

Second, that natural reading is strengthened by the fact that, elsewhere in IGRA, Congress used the phrase "restricted fee" when it wished to refer to restricted fee lands. *See, e.g.*, 25 U.S.C. 2703(4)(B) (defining "Indian lands" to include "lands title to which is *either* held in trust by the United States for the benefit of an Indian tribe or individual *or* held by any Indian tribe or individual subject to restriction by the United States against alienation.") (emphasis added). The selective inclusion and exclusion of restricted fee land within IGRA, and indeed within Section 20 itself, *see* 25 U.S.C. 2719(a)(2)(A) (section 20 prohibition does not apply to Oklahoma lands belonging to a tribe that had no reservation when IGRA was passed if the lands are "contiguous to other land *held in trust or restricted status* by the United States for the Indian tribe) (emphasis added), must be respected. "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Lopez v. Gonzales*, 127 S. Ct. 625, 631 (2006) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Riverkeeper, Inc. v. United States Environmental Protection Agency*, 475 F.3d 83, 102, 125 (2d Cir. 2007) (a selective "omission is * * * significant.").

Third, because "in trust" is an established term of art in Indian legislation, federal agencies such as the NIGC and the Department must presume that Congress intended to carry forward that specialized meaning. *See, e.g., Wilkie v. Robbins*, 127 S. Ct. 2588, 2605 (2007) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken") (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *Neder v. United States*, 527 U.S. 1, 21 (1999) (where terms have "accumulated settled meaning," a "court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (internal quotation marks omitted); *Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974).[4]

[4] Additional reasons in support of the reasonableness of the Department's position are elaborated upon in the Nation's submission to the NIGC in support of its ordinance amendments, which is incorporated herein by reference.

Given these established canons of statutory construction and the plain language of Section 20, the recent regulations cement the view that Section 20 has no application to the restricted fee lands at issue here and thus that gaming remains appropriate on those lands. Because all of the other applicable requirements of the IGRA are met with respect to the Buffalo Creek Territory,[5] it is certainly plausible that the NIGC could approve the gaming ordinance amendments to permit gaming on the Buffalo Creek Territory on or before the statutory deadline of October 15, 2008. Processing the NOV before that decision has been made thus could disrupt the NIGC's important deliberations on a question of law with wide-ranging importance.

Significantly, there is nothing in the district court's recent orders that would preclude the NIGC from adopting the Department's interpretation of Section 20 in approving the Gaming Ordinance. A district court decision will only foreclose a contrary agency construction if the court's construction of the statute is "the *only permissible* reading of the statute." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984 (2005) (emphasis in original). In other words, "[b]efore a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction." *Id.* at 985. *See also id.* at 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the *unambiguous terms of a statute* and thus *leaves no room for agency discretion.*") (emphasis added). Accordingly, under *Brand X*, the district court's decision would only foreclose a contrary agency interpretation if its decision rested on the "unambiguous terms" of IGRA section 20, if the decision concluded that the statute "leaves no room for agency discretion," and if the decision held that its reading of Section 20 was "the only permissible reading of the statute."

The district court's orders in *CACGEC II* plainly do not meet this description. Throughout its July 2008 decision, the court spoke in terms that are consistent with preserving agency discretion under *Chevron* step two and that are irreconcilable with a ruling under *Chevron* step one. Nowhere does the district court hold that the federal defendants' litigation position that Section 20 applies to restricted fee lands is the "only permissible" reading of IGRA, let alone unambiguously compelled by the statutory text. In fact, the district court explains, "[w]ere the Court to start and end with the ordinary and common meaning of the terms employed in section 20, devoid of statutory and historical context, it might arrive at the reading advanced by the SNI" that Section 20 does not apply to restricted fee lands. July 8, 2008, Decision at 100. Under *Brand X*, an admission like that is wholly incompatible with a *Chevron* step one ruling that deprives the agency of discretion. The same is true of Judge Skretny's statement that he does not rely on "unambiguous" statutory text to support the NIGC position, but on "historical context," "historical discussion," and statutory "purpose," *id.* at 100, 101; this is clearly not the language of a *Chevron* step one decision. The district court's decision thus leaves the door open

[5] As explained above, the CACGEC plaintiffs grounded their attack on the Buffalo Creek casino on two theories: (1) that Section 20's prohibition against gaming on trust lands acquired after the passage of IGRA applied to the Buffalo Creek Territory and the Territory could not meet any of the exceptions to this prohibition; and (2) that the Buffalo Creek Territory was not "Indian lands." Judge Skretny has rejected the latter argument, holding (in agreement with the Secretary and NIGC) that the Nation properly enjoys jurisdiction over the Territory and that it hence satisfies IGRA's requirement that Indian nations conduct gaming only on "Indian lands."

for the NIGC to follow the Department's interpretation of Section 20 as embodied in its new Rule.

Furthermore, the court acknowledges that Congress was only concerned with "trust" land because "the IRA's trust provision was the only legally recognized manner in which new land could be acquired for Indians when the IGRA was enacted," *id.* at 101, and that "there was no statutory mechanism for the creation of restricted fee land in 1988," *id.* at 103. From that basis, the court reasons that Congress "intended" to cover all after-acquired land, and thus that "*the intention of the drafters, rather than the strict language, controls.*" *Id.* at 102. One can certainly debate whether judicially filling in explicit statutory gaps that Congress failed to anticipate is a proper mode of statutory construction. *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 217 (1993) (policy arguments about statute's intended operation were directed to the "wrong forum" because court is not at "liberty to add an exception"). But there is no sound basis for debating that such an acknowledged gap constitutes the very type of ambiguity that triggers agency discretion and forecloses any ruling as a matter of law under *Chevron* step one. *See Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2345-2346 (2007) ("We have previously pointed out that the 'power of an administrative agency to administer a congressionally created * * * program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' When an agency fills such a 'gap' reasonably, and in accordance with other applicable (*e.g.*, procedural) requirements, the courts accept the result as legally binding.") (citing, *inter alia*, *Chevron*). Quite the opposite, the district court concluded that, given the statutory "purpose," "Chairman Hogen's conclusion that Congress intended the section 20 prohibition to apply to *all* after-acquired land *is a permissible construction of the statute.*" July 8, 2008, Decision at 103 (latter emphasis added). That is indisputably *Chevron* step two language. *See Chevron*, 467 U.S. at 843 ("[I]f the statute is silent or ambiguous * * * the question * * * is whether the agency's answer is based on a permissible construction of the statute.").

Significantly, the district court's denial of the federal defendants' remand motion was partially predicated on the fact that the Nation had already filed gaming ordinance amendments with the NIGC "which the Chairman will have the opportunity to act upon if he so chooses." Slip op. at 19. Proper consideration of the recently submitted gaming ordinance amendments is thus wholly consistent with the district court's recent order.

Lastly, a short postponement of the hearing would not unduly prejudice the Chairman since his issuance of the NOV was in response to the Court's August 26, 2008, decision. All other aspects of the Chairman's enforcement regulatory discretion remain intact and would not be impacted by continuance of the hearing until a reasonable time after October 15, 2008.

II. The Presiding Official should allow the Nation to file an additional brief on the merits, if necessary, once the Chairman takes action on the pending gaming ordinance amendments or the United States takes action to appeal the decision in *CACGEC II*.

As discussed throughout this submission, the Chairman's consideration and expected decision on the pending gaming ordinance amendments has a direct bearing on the instant appeal. Moreover, the United States is currently assessing its position in the ongoing *CACGEC*

II litigation and must decide within 60 days of August 26, 2008, whether to appeal the decision and order in that case. In either case, there could exist a need to file an additional brief regarding the Nation's appeal of the NOV based upon these events.

In the interest of justice and providing the Nation a full and fair opportunity to present all of the legal and factual circumstances that have a bearing on the instant appeal, the Nation respectfully requests leave to file an additional brief in support of this appeal in the event that the Chairman issues a decision on the Nation's pending gaming ordinance amendments and/or the United States appeals the *CACGEC II* decision. Granting the Nation leave to file an additional brief will not prejudice the Chairman for the reasons stated above and will, in fact, promote the administrative judicial economy of this proceeding by ensuring all relevant legal arguments and factual circumstances are presented to the Presiding Official.

III. In any event, the NOV should be dissolved since the Chairman had no reasonable basis to conclude that a substantial violation of IGRA is occurring at the Nation's Buffalo facility notwithstanding the recent decision in *CACGEC II*.

As thoroughly demonstrated above, there has been a significant change in the law regarding the application of Section 20 to restricted fee land that has a direct bearing on the underlying controversy here. However, the Department's new Section 20 regulations, developed in conjunction with the NIGC, make plain that Section 20 does not apply to restricted fee land. Thus, the Nation does not even need to satisfy Section 20 since it has no application here.

But the court did not hold that was the only permissible construction of IGRA. In its post judgment motion to remand, and as set forth in the Nation's amicus curiae brief in support, the United States noted the change in law and asked the court to remand the case to the agency to explain why its new position is also a reasonable construction of the statute. The court denied the motion to remand on several grounds, including the fact that the United States acted "egregious[ly]" in failing to inform the court of the change in law after briefing of the case but before a decision was issued. The court also noted that the Nation had submitted another ordinance amendment that the Chairman can act upon, if he chooses, making remand of the July 2007 ordinance amendment unnecessary. The court did not conclude, however, in either the July 8 opinion or the August 26 opinion, that its ruling that Section 20 applied to restricted fee land was the only permissible construction of IGRA.

Accordingly, given the agencies' current view regarding the inapplicability of Section 20 to restricted fee lands, there was no reasonable basis for the Chairman to invoke his authority under 25 U.S.C. 2713 because the Chairman does not have "reason to believe that the tribal operator of an Indian game . . . is engaged in activities . . .that may result in the imposition of a fine under [IGRA]," 25 U.S.C. § 2713. Simply put, the Nation is gaming on restricted fee land that does not depend on any exception contained in Section 20. If there is no need to satisfy Section 20, then there is no basis for the Chairman to conclude that there is a violation of IGRA. And *CACGEC II* does not compel to the contrary because its ruling on the application of Section 20 to restricted fee land did not foreclose the federal agencies with expertise in this area of the

law from refining their position as they have now done. Therefore, the NOV should be dissolved.[6]

IV. Seneca Nation of Indians' Notice of Oral Testimony and Preliminary Witness List.

The Seneca Nation of Indians hereby gives notice that it intends to present oral testimony and anticipates calling some or all of the following witnesses at the hearing in this matter:

Maurice A. John, Sr., President, Seneca Nation of Indians

Kevin W. Seneca, Treasurer, Seneca Nation of Indians

Barry E. Snyder Sr., Chairman, Seneca Gaming Corporation

Brian Hansberry, President and Chief Executive Officer, Seneca Gaming Corporation

Each of the above-identified witnesses has information pertaining to the operations of the Seneca Nation or Seneca Gaming Corporation relative to the issues presented in the instant appeal.

Chris Collins, County Executive, Erie County, New York

Byron Brown, Mayor, City of Buffalo, New York

Each of the above-identified witnesses has information pertaining to the economic and other impacts the Seneca Buffalo Creek Casino has on Erie County and the City of Buffalo.

The Seneca Nation reserves the right to supplement or amend this preliminary witness list, to call any witness listed by the Chairman on his witness list as well as additional witnesses as necessary to rebut testimony or other evidence presented by the Chairman or any other hearing participant.

CONCLUSION

For the foregoing reasons, the Presiding Official should (i) set a hearing in this matter at a reasonable time after October 15, 2008, to enable the Chairman, pursuant to his statutory duties, to reconsider his position on the scope of section 20 in light of significant intervening legal developments and to ensure that any proceedings on the NOV are fully informed by that agency determination; and (ii) grant leave to the Nation to file an additional brief, if necessary, based on

---

[6] In requesting that the Presiding Official defer the hearing in this matter, and allow the Nation to file a subsequent brief on the merits of its NOV appeal should subsequent developments warrant such a filing, the Nation does not intend in any way to waive its substantive arguments that an NOV should not have issued in this matter. The Nation's gaming activities in the Buffalo Creek Territory are in full compliance with the requirements of IGRA, including section 20, as the Department's recent Rule makes clear. However, in the interest of presenting its arguments based on a full record, and in the interest of efficiency, the Nation did not think it appropriate to present its substantive arguments in full at this juncture. Should the Presiding Official disagree the Nation will file a substantive brief forthwith.

expected developments with regard to pending gaming ordinance amendments and the United States' decisions in the *CACGEC II* litigation.

Dated: September 15, 2008

Respectfully submitted,

JAMES T. MEGGESTO
Akin Gump Strauss Hauer & Feld LLP
Robert S. Strauss Building
1333 New Hampshire Avenue NW
Washington, DC 20036
202.887.4147 - direct dial
202.887.4288 - fax

Attorneys for Seneca Nation of Indians

EXHIBIT D

The Honorable Maurice A. John, Sr., President
Seneca Nation of Indians
P.O. Box 231
Salamanca, NY 14779
Fax: (716) 945-1565

Re: In the matter of Notice of Violation NOV-08-20

Dear President John:

This is in response to your letter of September 18, 2008, requesting an extension of time to submit information relative to the Notice of Violation NOV-08-20. In addition, you request that the National Indian Gaming Commission (NIGC) Chairman delay service of a proposed civil fine assessment. For the reasons described in your letter, the Chairman finds that there is good cause to grant the Nation an additional thirty (30) days to submit information about the violation, and agrees not to decide whether to issue the proposed fine assessment until he has had the opportunity to review the Nation's submission.

NIGC regulations permit a respondent to a notice of violation to submit written information about the violation to the NIGC Chairman within fifteen (15) days after service of the notice of violation, "or such longer period as the Chairman may grant for good cause." 25 C.F.R. § 575.5(a). If the Chairman chooses to issue a civil fine under 25 C.F.R. part 575, the Chairman must serve a copy of the proposed fine assessment on the respondent within thirty (30) days of issuing the notice of violation "when practicable." 25 C.F.R. § 575.5(b).

In light of the on-going appeal of NOV-08-20, the Nation's amended Class III gaming ordinance currently pending before the Chairman, and the potential outcome of the *CACGEC v. Hogen* litigation, the Chairman finds there is good cause to extend the Nation's submission deadline. For the same reasons, the Chairman also finds that it is not practicable to serve the proposed civil fine assessment within the thirty (30) days provided by NIGC regulations.

If you have any questions regarding this matter, please contact me at (202) 632-7003.

Sincerely,

Michael Hoenig
Staff Attorney

cc: Cindy Altimus, Region VI Director, NIGC
Donald R. Pongrace, Akin Gump Strauss Hauer & Feld LLP

EXHIBIT E

Cornelius D. Murray

From: Fleming, Mary Pat (USANYW) [Mary.Pat.Fleming@usdoj.gov]
Sent: Wednesday, October 15, 2008 1:15 PM
To: Cornelius D. Murray
Cc: Allery, Gina (ENRD)
Subject: FW: Motion to Stay.pdf
Attachments: Motion to Stay.pdf

Dear Neil,

Following up on our conversation a few minutes ago, attached is a copy of the motion for a stay filed by the Chairman of the NIGC. The motion for a stay has not been decided by the Presiding Official. We are looking into whether we can provide you with a copy of the administrative record and will get back to you with a response. As we discussed, the Seneca Nation withdrew its request for a third ordinance yesterday.

Mary Pat

From: Allery, Gina (ENRD)
Sent: Wednesday, October 15, 2008 1:08 PM
To: Fleming, Mary Pat (USANYW)
Subject: Motion to Stay.pdf

<<Motion to Stay.pdf>>

EXHIBIT F

O'CONNELL AND ARONOWITZ
ATTORNEYS AT LAW

54 STATE STREET, ALBANY, NEW YORK 12207-2501
(518) 462-5601 FAX: (518) 462-2670
www.oalaw.com info@oalaw.com

206 WEST BAY PLAZA, PLATTSBURGH, NEW YORK 12901
(518) 562-0600 FAX: (518) 562-0657

October 17, 2008

FOIA Officer
National Indian Gaming Commission
1441 L Street N.W.
Suite 9100
Washington, DC 20005

Re: Seneca Nation of Indians Gaming Ordinance Amendment Withdrawal

Dear Sir/Madame:

We write to request records pursuant to The Freedom of Information Act (FOIA), found at 5 U.S.C. § 552, and as implemented by the NIGC at 25 C.F.R. part 517. Specifically, we respectfully request the following records:

(1) All correspondence sent by the Seneca Nation of Indians withdrawing or relating to the withdrawal of their July 17, 2008 gaming ordinance amendments pending before the NIGC.

I agree to pay fees for the processing of this information up to the sum of $50. Please advise me via telephone at (518) 462-5601 if the photocopying and other fees will exceed this sum.

Very truly yours,

O'Connell and Aronowitz

By: Neil Murray
Cornelius D. Murray, Esq.

EXHIBIT G

BEFORE THE
NATIONAL INDIAN GAMING COMMISSION
PRESIDING OFFICIAL

IN THE MATTER OF SENECA NATION OF INDIANS OF NEW YORK Respondent	Hon. Bruce A. Johnson Docket No. NIGC 2008-1 Notice of Violation NOV-08-20

MOTION FOR STAY

The Chairman of the National Indian Gaming Commission ("NIGC Chairman") respectfully requests that the Presiding Official order a stay of proceedings in the above-referenced administrative appeal.

On September 13, 2008, the Chairman issued the above referenced notice of violation (NOV) against the Seneca Nation of Indians ("Nation") for gaming without an approved ordinance and gaming on lands that do not qualify as "Indian lands" under IGRA. 25 U.S.C. § 2703(4). The notice of violation was necessary as a result of decisions issued in the case *Citizens Against Casino Gambling v. Hogen*, 2008 U.S. Dist. LEXIS 52395 (W.D.N.Y. July 8, 2008) (*CACGEC I*) and 2008 U.S. Dist. LEXIS 67743 (W.D.N.Y. August 28, 2008) (*CACGEC II*). *See* Administrative Record Exhibits 8 & 9. On July 8, 2008, the district court ordered "that the National Indian Gaming Commission Chairman's July 2, 2007 administrative decision approving the Seneca Nation of Indians Class III Gaming Ordinance is vacated," *CACGEC I*, at 210-211, and on August 28, 2008, ordered the Chairman to serve the NOV at issue in this appeal. *CACGEC II*, at 36. The NIGC is working with the United States Department of Justice in regard to the

potential appeal of these decisions to the Second Circuit Court of Appeals. A notice of such appeal must be filed on or before October 27, 2008.

As the district court decisions are the bases for NOV-08-20, a successful appeal to the Second Circuit may render the NOV and, thus, this administrative appeal, unnecessary. Therefore, the NIGC Chairman respectfully requests that the Presiding Official order a stay of this proceeding pending a decision on appeal of *Citizens Against Casino Gambling v. Hogen*. Counsel for Respondent has reviewed this motion and represented that the Nation consents to this request.

As noted above, the United States must file a notice of appeal of *Citizens Against Casino Gambling v. Hogen* on or before October 27, 2008. The parties request that they be allowed to advise the Presiding Official of the status of such appeal via a status conference after October 27, 2008. If appeal is not sought by the United States, or the district court's decision to vacate the Chairman's July 2, 2007 approval is not overturned on appeal, then the requested stay should terminate and the appeal proceed by NIGC regulations.

Respectfully submitted on this 10th day of October, 2008

Michael L. Hoenig

Michael Hoenig, Staff Attorney

National Indian Gaming Commission
1441 L St. NW, Suite 9100
Washington, DC 20005
Phone: (202) 632-7003
Fax: (202) 632-7066

Certificate of Service

I hereby certify that on October 10, 2008, I served the foregoing Motion for Stay, via U.S. mail, on:

The Honorable Bruce A. Johnson
U.S. Department of the Interior
Office of Hearings and Appeals
801 N. Quincy Street, Suite 300
Arlington, VA 22203-1905

The Honorable Maurice A. John, Sr., President
Seneca Nation of Indians
P.O. Box 231
Salamanca, New York 14779

and

Donald R. Pongrace
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, DC 20036-1564

Frances W. Fragua
Legal Assistant

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

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR AN ORDER
TO ENFORCE AND/OR FOR CIVIL CONTEMPT AND ATTORNEYS' FEES

PRELIMINARY STATEMENT

It has been nearly eight weeks since this Court issued its August 26, 2008 Decision (Dkt No. 76) directing the Defendant National Indian Gaming Commission ("NIGC") and its Chairman, Defendant Philip N. Hogen, to enforce the Indian Gaming Regulatory Act (the "IGRA") with respect to the Seneca Nation of Indians (the "SNI") and its Buffalo casino (the "Buffalo Parcel"). Yet aside from issuing a Notice of Violation on September 3, 2008 (the "NOV") (Dkt No. 77-2), the Defendants have done very little if anything to enforce the IGRA, or to take action consistent with this Court's July 8, 2008 Decision (Dkt No. 61), as this Court specifically ordered them to do. All the while, the illegal Class III gambling on the SNI's Buffalo Parcel has continued.

Now, after nearly two months of delay and inaction, the NIGC Chairman has moved before the hearing officer presiding over the SNI's appeal of the NOV to stay the administrative proceeding for an indeterminate period, pending the outcome of a possible appeal of this Action

to the Second Circuit Court of Appeals. Essentially, the NIGC has asked the administrative law judge of the same agency the Chairman directs to stay the enforcement of this Court's July 8 and August 26 Decisions, an unprecedented move which displays a contemptuous disregard for the authority of the federal court.

From their actions, it is clear that the NIGC and its Chairman have no intention of enforcing the IGRA or this Court's July 8 Decision, notwithstanding the Court's unambiguous direction on August 26, 2008 (Dkt No. 76) to do so "forthwith." Accordingly, to give effect to this Court's prior Orders in this Action, Plaintiffs seek an order: (i) directing Defendants to terminate, within five (5) business days, all Class III gambling on the Buffalo Parcel and/or (ii) holding the NIGC and Chairman Hogen in contempt of court for failure to adhere to the August 26 Decision directing them "to comply forthwith" with the IGRA in a manner "consistent with the Court's July 8, 2008 Decision"; and (iii) awarding Plaintiffs their attorneys fees and costs incurred in compelling the Defendants' to comply with the requirements of the law.

THE FACTUAL DEVELOPMENTS GIVING RISE TO THIS MOTION

The history of this lawsuit is chronicled in the Court's Decisions and Orders dated July 8, 2008 and August 26, 2009 and summarized below to the extent pertinent to this motion.[1]

The Court's Decision in CACGEC I

In January 2006, the Plaintiffs filed an action to challenge the Defendants' administrative action in approving the SNI's Class III Tribal-State Gaming Compact with the State of New York (the "Compact") and its Class III Gaming Ordinance of 2002, as amended. On January 12, 2007, this Court vacated the approval of the 2002 Ordinance as it pertained to the Buffalo Parcel and remanded the case to the NIGC with instructions to determine whether the Buffalo Parcel is

[1] The relevant facts regarding recent events are set forth in the Affidavit of Cornelius D. Murray, Esq., sworn to on October 21, 2008, and the exhibits thereto, submitted herewith.

"Indian land" as defined in the IGRA and to consider, if necessary, the applicability of Section 20 of the IGRA, 25 U.S.C. § 2719, to the Buffalo Parcel and to explain the bases for these determination.

Following the remand, on June 9, 2007, the SNI enacted an amended Class III Gaming Ordinance (the "Ordinance"), modifying the definition of "Nation Lands" to include a site-specific legal description of the Buffalo Parcel. On July 2, 2007, the Defendant NIGC Chairman Hogan approved the 2007 Ordinance. In his letter explaining this determination (Dkt No. 27-2, AR 00008-13), Chairman opined that the Buffalo Parcel was "Indian land" under the IGRA and that the Section 20 prohibition did not apply because the land had been acquired as part of a "settlement of a land claim" under the Seneca Nation Settlement Act (the "SNSA"). In reaching these conclusions, he relied on an opinion of the Secretary of the Interior, issued November 12, 2002, that the lands described in the Compact with New York State would come within the IGRA's definition of "Indian land" if the SNI placed them in restricted fee and exercised governmental authority over them and that land taken into restricted fee in Buffalo pursuant to the SNSA would meet the "settlement of a land claim" exception to the Section 20 prohibition.

On July 3, 2007, the SNI opened its temporary" casino, a 5,000-square-foot structure with 124 slot machines, and soon thereafter it announced plans for a permanent casino, with 90,000 square feet of gaming space, 2,000 slot machines, 45 table games and a 22-story all-suite hotel.

The Court's Decision in CACGEC II

On July 12, 2007, ten days after the NIGC approved the Ordinance, Plaintiffs commenced this Action to challenge the Chairman's determination. In the Complaint (Dkt No. 1) and Amended Complaint (Dkt No. 49), Plaintiffs asserted that the NIGC Chairman's approval of

the 2007 Ordinance was arbitrary and capricious, an abuse of discretion and not in accordance with law because (i) the Buffalo Parcel is not "Indian land"; (ii) Section 20 of the IGRA prohibits gambling on land acquired after October 17, 1988, the effective date of the IGRA; and (iii) the "settlement of a land claim" exception does not apply.

On July 8, 2008, this Court issued its Decision, Order and Judgment in this Action. The Court agreed with the NIGC Chairman that the Buffalo Parcel is "Indian land." After conducting an exhaustive analysis, the Court held that the prohibition against gambling on after-acquired land applies to the Buffalo Parcel and that the site also did not fit into any of the statutory exceptions, including the settlement of a land claim exception, to the prohibition. Thus, the Court held, the land is not gambling eligible. Accordingly, the Court vacated the NIGC's approval of the 2007 Ordinance. As a result, following the July 8 Decision, there is currently no valid ordinance to permit gambling on the Buffalo Parcel.

The following day, July 9, 2008, the SNI held a press conference in which they characterized the July 8 Decision as "procedural," announced that nothing had changed, and said that it would be "business as usual" at the Buffalo casino. (Dkt No. 63-3, Ex. A.) The SNI said that it expected the United States to appeal the July 8 Decision to the Second Circuit and that, in the meantime, it would continue to keep the slot machines open at the temporary casino and to build the permanent casino on the Buffalo Parcel.

After the July 8 Decision, the NIGC did not take steps to enforce the Court's ruling or to close the temporary casino. On July 10, 2008, the NIGC's attorney told Plaintiffs' counsel that the NIGC was "weighing its options" and had not made any decision whether to abide by this Court's order or to appeal it or to order closure or to take any other action. (Dkt No. 63-2.) On July 14, 2008, Plaintiffs moved for an order enforcing the July 8 Decision. (Dkt No. 63.)

On July 16, 2008, the SNI adopted and submitted to the NIGC yet another Class III gaming ordinance for gambling at the Buffalo Parcel site. (Dkt No. 70-5.) On July 22, 2008, Defendants filed a motion with this Court (Dkt No. 65) seeking remand to the NIGC based upon two events: (i) the SNI's adoption of its proposed amended ordinance;[2] and (ii) the Interior Department's new regulations,[3] published on May 20, 2008 in the Federal Register, 73 Fed. Reg. 29,354. In their motion papers, Defendants argued that the Court should remand to the NIGC to give it an opportunity to review its decision and to determine whether to alter that decision in light of the new regulations. The SNI submitted an amicus brief (Dkt No. 70), in support of the Government's motion for remand and in opposition to the Plaintiffs' motion to enforce. It argued that the NIGC should have the opportunity to review the amended ordinance in light of the Interior Department's new rule and that the Court lacks power to compel the NIGC to close the Buffalo Parcel, in that the decision is committed to the agency's discretion.

In the August 26 Decision (Dkt No. 76), this Court granted the Plaintiffs' motion to enforce in part and denied the Defendants' motion to remand. The Court found "particularly egregious" the Defendants' approach of first publishing a proposed rule in 2000, which lay dormant for several years, then amending it in 2006, but arguing against its applicability when the Plaintiffs sought to rely upon it in this litigation, and then amending the rule again while the summary judgment motions in this Action were pending, but without ever giving the slightest indication to the Court that the publication of a final rule was imminent. The Court directed the

[2] The amended ordinance added a new term, "Settlement Act Lands," which it defined as "the real property that is held by the Nation in restricted fee status and subject to restrictions by the United States against alienation pursuant to the Seneca Nation Land Claims Settlement Act." It also changed the definition of "Nation Lands" to include "Settlement Act Lands, such as the Buffalo Parcel, which is the real property in Erie County held by the Seneca Nation of Indians in restricted fee status and subject to restrictions by the United States against alienation pursuant to the Seneca Nation Land Claims Settlement Act." Compare SNI Ordinance, Document No. 27-9 at AR00152-53, with SNI Amended Ordinance, Document No. 70-4.

[3] The new regulations reinterpret IGRA's Section 20 prohibition as applying only to land acquired in trust after October 17, 2008, and not to restricted fee, and redefine the term "settlement of a land claim" as used in Section 20 of the IGRA.

NIGC and its Chairman to carry out their congressionally mandated enforcement duties under the IGRA. Specifically, the Court directed the NIGC and its Chairman "to comply forthwith with Congress's mandate as set forth in 25 U.S.C. § 2713(a)(3)," which requires the NIGC to provide a written notice of a violation that may result in a fine or closure of a gaming operation, and with NIGC regulations. "Upon issuance of the notice(s) of violation," the Court further directed, "the Chairman is directed to take such action as is consistent with the Court's July 8, 2008 Decision, the IGRA's mandates and intent, and NIGC regulations." (Dkt No. 76 at 8.)

The NIGC's Issuance and Subsequent Failure to Enforce the NOV

On September 3, 2008, the NIGC issued a Notice of Violation (Dkt No. 77-2) to the SNI. The NOV notifies the SNI that, under the Court's July 8 Decision, the tribe is operating the Buffalo casino in violation of the IGRA and NIGC regulations. To correct the violation, the NOV states, the SNI can close the Buffalo casino within five days.[4] The NOV also gives notice of the appeal rights under the NIGC's regulations, 25 C.F.R. Part 577.

The SNI did not close the gambling facility within five days. Instead, on September 3, 2008, the SNI filed a notice of appeal of the NOV and requested a hearing. (Dkt No. 77-2.) Two weeks later, on September 15, 2008, the SNI filed a Supplemental Statement requesting the deferral of any hearing on the administrative appeal until "a reasonable time after October 15, 2008." (Murray Aff. ¶ 33.) This was the date by which the NIGC Chairman was required to take action on the amended ordinance or it would pass into effect by operation of law. The SNI also requested leave to file an additional brief in support of its appeal in the event that the NIGC Chairman were to issue an opinion on the amended ordinance or the United States were to appeal

[4] The timing was based on the NIGC's determination, as set forth in an Affidavit of John Peterson, Acting Director of the Enforcement Division of the NIGC, dated September 3, 2008, that five days is a "reasonable amount of time" for the SNI to effectuate the closure of the Buffalo casino, after notifying employees, vendors, and state regulators and performing the necessary audits and procedures to close out the machines. (Murray Aff. ¶ 24, Ex. A.)

the July 8 Decision in this Action. As for the merits of the NOV, the SNI argued, as it had before this Court, that the Section 20 prohibition does not apply to the Buffalo Parcel and contended that the tribe does not have to satisfy it to run its gambling operation.

Under the NIGC's rules applicable to the assessment of civil fines, the SNI had 15 days from the NOV to submit written information about the violation to the NIGC Chairman. 25 C.F.R. § 575.5. On September 18, 2008, the SNI requested an extension of time, until some unspecified time after October 15, 2008, to submit that information and a corresponding delay in the assessment of any civil fine relative to the NOV. (Murray Aff. ¶ 32, Ex. C.) The SNI argued that the Chairman's decision on the amended ordinance would have a "direct bearing" on the NOV and could "eliminate the basis for it altogether"; that the United States is "currently assessing its appeal options" in the CACGEC II litigation; and that a particular course of action on either issue could affect the validity of the NOV. Id. In an undated letter, the NIGC, through its Staff Attorney, Michael Hoenig, granted the extension of time and delayed, for an indeterminate period, the assessment of any civil fine for the operation of the unlawful casino. At no time did the Chairman of the NIGC take any action to close the unlawful gambling operation, as he has the power and authority to do under the IGRA. (Murray Aff. ¶ 27.)

Most recently, on October 10, 2008, the Defendant NIGC Chairman moved before the Presiding Official of the NIGC, the agency he directs, for a stay of the SNI's administrative appeal of the NOV until after the conclusion of a possible appeal to the Second Circuit. The sole basis for the request was that the Defendants have until October 27, 2008 to appeal from this Court's July 8 and August 26 Decisions and that the reversal of the Court's July 8 Decision on the applicability of the Section 20 prohibition to the Buffalo Parcel could moot the NOV and render a hearing unnecessary. At the time of the motion, neither side had filed such an appeal

with the Second Circuit. Through this point an thereafter, the NIGC Chairman took no action whatsoever toward terminating the illegal gambling on the Buffalo Parcel, notwithstanding this Court's direction on August 26 to act "forthwith."

In a telephone conversation on October 15, 2008, Defendants' counsel informed Plaintiffs' counsel that the previous day, October 14, 2008, the SNI had withdrawn its proposed amended ordinance from consideration. (Murray Aff. ¶ 37, Ex. C.) Defendants' counsel said that Plaintiffs would have to file a Freedom of Information Act request to obtain a copy of the SNI's written withdrawal. Plaintiffs immediately filed that request. (Murray Aff. ¶ 37, Ex. F.)

ARGUMENT

THE NIGC AND ITS CHAIRMAN HAVE FAILED TO COMPLY WITH THE IGRA, THE NIGC'S REGULATIONS, AND THIS COURT'S JULY 8 AND AUGUST 26 DECISIONS

In the August 26 Decision, this Court directed the NIGC and its Chairman, in no uncertain terms, to comply "forthwith" with the congressional mandate in the IGRA, and to take such action as is consistent with the Court's July 8 Decision, the IGRA's mandates and intent, and NIGC regulations. There is no question that the IGRA requires that an Indian tribe must have an approved gaming ordinance before conducting Class III gaming. 25 U.S.C. § 2710(d)(1)(A)(iii). There is also no question that, by virtue of the July 8 Decision, the SNI does not have an approved Class III gaming ordinance for gambling on the Buffalo Parcel. Under NIGC's regulations, it is a substantial violation of the IGRA to conduct Class III gambling without a valid tribal ordinance in effect. 25 C.F.R. § 573.6(a)(3). To enforce the IGRA, the NIGC's regulations, and the July 8 Decision, the NIGC and its Chairman have little choice: they must bring the unlawful gambling on the Buffalo Parcel to an end, and they must do so "forthwith." This Court has so ordered, yet the Defendant NIGC and its Chairman have refused to act.

To date, the NIGC and its Chairman have failed to take reasonable action to comply with the Court's directive. As a direct result, the SNI continue to operate their unlawful gambling operation on the Buffalo Parcel. Accordingly, Plaintiffs seek the entry of such orders as may be necessary to require the Defendants to comply with this Court's prior Orders, including an order ending the unlawful gambling by a date certain, and/or holding the NIGC and its Chairman in civil contempt and imposing sanctions, including attorneys' fees and costs.

A. Plaintiffs are Entitled to an Order Requiring the Defendants To Terminate the Unlawful Gambling on the Buffalo Parcel

On September 3, 2008, the NIGC took the first step toward initiating the enforcement process by serving the NOV, notifying the SNI of the IGRA violations on the Buffalo Parcel. Almost immediately, however, it became clear that the Chairman had no intention of requiring the SNI to terminate the unlawful gambling.

The NOV stated that the SNI "has violated the IGRA by operating a Class III gaming operation without an approved gaming ordinance and by gaming on Indian Lands ineligible for gaming." (Dkt No. 77-2.) To correct the violation, the NOV said, the SNI could close the Buffalo gambling facility within five days. Although the NOV stated that the NIGC could order temporary closure, and the Chairman clearly has the power and authority to do so, 25 U.S.C. 2713(b)(1), 25 C.F.R. § 573.6, it declined to issue such an order or to impose any monetary penalty or sanction of any kind.

Not surprisingly, the SNI did not stop the gambling, but instead filed a notice of appeal, taking the position that the law did not apply to the Buffalo Parcel. Instead of closing the casino, as he had the power and authority to do, the NIGC Chairman dragged his feet and allowed the enforcement process to grind to a halt. In mid-September, the NIGC granted the SNI's request for a deferral of any hearing on the NOV, and a delay in the assessment of any civil fine, for an

indeterminate period of time. More recently, on October 10, the NIGC Chairman moved before the Presiding Official of the agency he directs to stay the enforcement proceeding pending the determination of an appeal, which had yet to be filed, to the Second Circuit Court of Appeals. In essence, the Chairman asked the federal agency he administers to stay an order of a federal district judge, an extraordinary step that it has no power to take. The Chairman's delay and inaction, and that of his agency, imparts a novel and heretofore unrecognized meaning to the term "forthwith."

As the Court previously held, the present case is appropriate for the invocation of the All Writs Act, 28 U.S.C. § 1651(a). See August 26 Decision at 8-9. Under the All Writs Act, a federal court has power "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." Pennsylvania Bur. of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 40 (1985). Since the July 8 Decision, the SNI has continued to operate its Class III gambling operation on the Buffalo Parcel, unabated and without an approved ordinance, in flagrant violation of the IGRA and the NIGC's regulations. The NIGC and its Chairman, without discretion to allow the unlawful gambling to continue, have done exactly that. Their inaction and delay frustrate the purpose of the Court's July 8 Decision, Order and Judgment and vitiate the intent of the August 26 Decision.

In issuing the NOV, the NIGC's Acting Director of the Enforcement Division determined that five days would be "a reasonable amount of time" for the SNI to close the gambling operation on the Buffalo Parcel. According to the NIGC's Enforcement Director, this would be a sufficient period to transition employees, notify vendors and state regulators and perform the necessary audits and processes to close out the machines. (Murray Aff. ¶ 24, Ex. A.) To

effectuate the prior Orders of this Court, Plaintiffs request that the Court enter an order directing the Defendants to terminate the Class III gambling on the Buffalo Parcel immediately and in any event within five (5) business days.

B. The NIGC and its Chairman should be held in Civil Contempt for their Failure to Comply with the August 26 Decision, the July 8, 2008 Decision, the IGRA, and the NIGC's Regulations

To hold a party in contempt of court, a plaintiff must prove by clear and convincing evidence that the defendant violated a clear and unambiguous order of the court. The violation need not be willful, but it must be demonstrated that the contemnor was not reasonably diligent in attempting to comply. See Drywall Tapers & Pointers of Greater N.Y., Local 1974 of I.B.P.A.T. AFL-CIO v. Local 530 of Operative Plasterers & Cement Masons Int'l Assoc., 889 F.2d 389, 395 (2d Cir. 1989). An order that is clear and unambiguous is one which permits the reader "to ascertain from the four corners of the order precisely what acts are forbidden." See id. (citation omitted). In this case, the NIGC and its Chairman flouted the law and refused to comply with not just one but two clear and unambiguous orders of this Court. Therefore, a finding of civil contempt is appropriate.

In the July 8 Decision, this Court held, clearly and unambiguously, that "gaming cannot lawfully occur on the Buffalo Parcel under the settlement of a land claim exception." July 8 Decision at 121. Consequently, the Court vacated the SNI's Class III Gaming Ordinance, which was based on that exception. On August 26, the Court ordered the NIGC and its Chairman to enforce the July 8 Decision. See Board of Trustees of Local 295 v. Hail Air Freight, Inc., 06-cv-528, 2008 U.S. Dist. LEXIS 31267, at *10 (S.D.N.Y. Apr. 15, 2008) (finding of contempt is generally appropriate only where court has first ordered compliance). Specifically, the Court directed the NIGC and its Chairman "to comply forthwith with Congress's mandate as set forth in 25 U.S.C. § 2713(a)(3)," which requires the NIGC to provide a written notice of a violation

that may result in a fine or closure of a gaming operation, and with NIGC regulations. "Upon issuance of the notice(s) of violation," the Court directed, "the Chairman is directed to take such action as is consistent with the Court's July 8, 2008 Decision, the IGRA's mandates and intent, and NIGC regulations." Although the Court did not specify the time frame within which the NIGC must take action, the plain meaning of the word "forthwith" is "immediately; without delay; directly." Webster's Revised Unabridged Dictionary (available at www.dictionary.reference.com/browse/forthwith (accessed Oct. 21, 2008)).

The Defendants have failed to act in a reasonably diligent fashion to comply with the Court's orders. Paying lip service to the Court's orders, the Chairman served the NOV on September 3, but declined to take any action to stop the gambling, notwithstanding his undisputed power to do so. After serving the NOV, the NIGC extended the tribe's time to submit information, extended its own time to serve a penalty assessment, and then the NIGC Chairman moved for a stay of the entire proceeding. If the NIGC wants to stay this Court's orders, the proper course of action would be to file the appeal and move for a stay pending appeal pursuant to Fed. R. App. P. 8(a). As of the date hereof, it has done neither. All the while, the NIGC and its Chairman have allowed the gambling to continue, unabated, even though they have the power to require it to stop. It is clerk from their actions that neither the NIGC nor its Chairman has any intention of enforcing the IGRA or this Court's July 8 Decision with respect to the Buffalo Parcel. The evidence establishing noncompliance is clear and convincing.

The Executive branch of government has no right to treat with impunity the valid orders of the federal Judiciary. Nelson v. Steiner, 279 F.2d 944, 948 (7th Cir. 1960) (quoting United States v. United Mine Workers of America, 330 U.S. 258, 293, 312 (1947)). In willfully circumventing this Court's lawful orders, the Defendant NIGC and its Chairman attempted to

take upon itself the power to countermand this Court in its interpretation of the law. In so doing, they subjected themselves to civil contempt. See United States v. O'Rourke, 943 F.2d 180, 189 (2d Cir. 1991) (a party's failure to act with reasonable diligence is a factor to be considered in determining motion for contempt). Plaintiffs request that this Court so find.

C. Plaintiffs Should Be Granted Their Attorneys Fees and Costs Incurred in Compelling the Defendants to Comply with the Prior Orders

A court sitting in equity has wide discretion in fashioning a remedy after a finding of civil contempt. Weitzman v. Stein, 98 F.3d 717, 719 (2d Cir. 1996) (citations omitted). An award of attorneys' fees is appropriate in cases where "bringing of the action should have been unnecessary and was compelled by . . . unreasonable, obdurate obstinacy." Class v. Norton, 505 F.2d 123, 127 (2d Cir. 1974) (citations omitted). Additionally, the court's discretion in this context permits, as a coercive measure, the imposition of a fine. See, e.g., American Rivers v. United States Army Corps of Engineers, 274 F. Supp. 2d 62, 69-70 (D.D.C. 2003) (holding that coercive fines are appropriate against the federal government when it fails to comply with an ambiguous court order). While willfulness may not necessarily be a prerequisite to an award of fees and costs, a finding of willfulness strongly supports the grant of them. Weitzman v. Stein, 98 F.3d 717, 719 (2d Cir. 1996) (citing Sizzler Family Steak Houses v. Western Sizzlin' Steak House, Inc., 793 F.2d 1529, 1535 (11th Cir. 1986)) (citations omitted).

In this case, there is strong evidence that the Defendants' failure to comply is willful. Although the NIGC Chairman has power to stop the unlawful gambling on the Buffalo Parcel, he has declined to exercise that power, thus necessitating this commencement of this Action. Following the July 8 Decision, the NIGC did nothing to terminate the unlawful gambling at the Buffalo Parcel. The NIGC's attorney said that the NIGC was "weighing its options" and had not made any decision whether to abide by this Court's order or to appeal it or to order closure or to

take any other action. It was the Defendants' wanton disregard of the Court's July 8 Decision that necessitated the July 22, 2008 motion to enforce (Dkt No. 65).

In response, the NIGC sought to remand this case to the itself for reconsideration in light of the SNI's proposed amended ordinance and the Interior Department's new regulations reinterpreting the IGRA's Section 20 prohibition as applying only to lands acquired in trust, not restricted fee, and redefining the "settlement of a land claim" exception. In denying the motion to remand, the Court termed "egregious" the Defendants' approach of publishing a rule in 2000, allowing it to lie dormant for years, amending it in 2006, but arguing against its applicability in this case, and then amending it again while the motions in this case were pending, but without giving the slightest indication to the Court that the publication of a final rule was imminent. The Court granted the motion to enforce and directed the NIGC and its Chairman to comply with the IGRA and the July 8 Decision "forthwith."

Although the NIGC initiated the enforcement on September 3 with the service of the NOV, the Chairman declined to take any action to stop the gambling. Instead, the NIGC extended the deadlines, declined to assess a fine or sanction, and then moved before the Presiding Official for a stay of the enforcement pending the outcome of a possible appeal to the Second Circuit of the Court's July 8 Decision. In the meantime, the SNI have continued to operate their unlawful gambling operation at the Buffalo Parcel.

Under the circumstances, it is difficult to view the NIGC's conduct and that of its Chairman as anything but willful. An award of attorneys' fees, while extraordinary, is warranted where, as here, where the action should have been unnecessary and the Defendants' unreasonable, obdurate obstinacy required the Plaintiffs to bring multiple motions to enforce compliance with the Court's orders. Plaintiffs request such an order in this case.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully submit that this Court should issue an order: (i) directing Defendants to terminate, within five (5) business days, all Class III gambling on the Buffalo Parcel; and/or (ii) holding the NIGC and Chairman Hogen in contempt of court for failure to adhere to the August 26 Decision directing them "to comply forthwith" with the IGRA in a manner "consistent with the Court's July 8, 2008 Decision"; and (iii) awarding Plaintiffs their attorneys fees and costs in compelling the Defendants to comply with the prior Orders of this Court.

Dated: Albany, New York
October 21, 2008

Respectfully submitted,

O'CONNELL & ARONOWITZ, P.C.

s/ Cornelius D. Murray
Cornelius D. Murray, Esq.
54 State Street
Albany, New York 12207
(518) 462- 5601
Cornelius D. Murray, Esq.
nmurray@oalaw.com
Jane Bello Burke, Esq.
jburke@oalaw.com

JACKSON & JACKSON
70 West Chippewa Street, Suite 603
Buffalo, New York 14202
(716) 362-0237
Michael Lee Jackson, Esq.
Rachel E. Jackson, Esq.

RICHARD LIPPES AND ASSOCIATES
1109 Delaware
Buffalo, New York 14209
(716) 884-4800
Richard J. Lippes, Esq.

THE KNOER GROUP, PLLC
424 Main Street, Suite 1707
Buffalo, New York 14202
(716) 332-0032
Robert E. Knoer, Esq.

RICHARD G. BERGER, Esq.
403 Main Street, Suite 520
Buffalo, New York 14203
(716) 852-8188
Richard G. Berger, Esq.

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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

Plaintiffs,

-against-

PHILLIP N. HOGEN, et al.,

Defendants.

Civil Action No. 07-CV-00451-S
Hon. William M. Skretny, U.S.D.J.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 21, 2008, I electronically filed the following documents:

1. Plaintiffs' Notice of Motion for an Order to Enforce and/or for Civil Contempt and Attorneys' Fees;

2. Affidavit of Cornelius D. Murray in Support of Motion to Enforce and/or for Contempt of Court and Attorneys' Fees, and Exhibits A-G thereto; and

3. Plaintiffs' Memorandum of Law in Support of their Motion for an Order to Enforce and/or for Civil Contempt and Attorneys' Fees;

with the Clerk of the District Court using its CM/ECF system, which electronically serves the following CM/ECF participants in this case:

1. Richard J. Lippes
2. Robert E. Knoer
3. Kristin Klein Wheaton
4. Michael L. Jackson
5. Rachel E. Jackson
6. Richard G. Berger
7. Thomas F. Kirkpatrick, Jr.

8. Gina Louise Allery
9. Mary Pat Fleming
10. Riyaz A. Kanji

I further certify that on October 21, 2008, I caused to be mailed a copy of the foregoing document by the United States Postal Service to the following non-CM/ECF participants:

Kendra E. Winkelstein
200 Depew Avenue
Buffalo NY 14214

s/Cornelius D. Murray
O'CONNELL AND ARONOWITZ, P.C.
54 State Street
Albany, New York 12207
nmurray@oalaw.com
(518) 462-5601