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

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

Plaintiffs

07-CV-0451
Hon. William M. Skretny

v.

PHILLIP N. HOGEN, *et al.*

Defendants.

AMICUS SENECA NATION OF INDIANS' BRIEF IN OPPOSITION TO PLAINTIFFS' SECOND MOTION TO ENFORCE

Introduction

With barely any citation to legal authority to support their argument, Plaintiffs have moved this Court for an order "directing [the federal] Defendants to terminate, within five (5) business days, all class III gambling" in the Nation's Buffalo Creek Territory. Docket No. 78-4 at 2. They have done so despite this Court's August 2008 ruling, on Plaintiffs' first Motion to Enforce, that "Plaintiffs' request that the Court give effect to its July 8, 2008 Decision by directing the Chairman to take a *specific* enforcement action is not in accord with the IGRA's remedial scheme." Docket No. 76 at 5 (emphasis added). That ruling was consistent with the bedrock principle of administrative law that the courts may not intrude on the discretion traditionally enjoyed by administrative agencies with respect to their enforcement decisions, a discretion that is grounded in the constitutional prerogatives of the executive branch. *Massachusetts v. EPA*, 127 S.Ct. 1438, 1459 (2007); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *New York Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 331 (2d Cir. 2003).

Only where Congress has clearly "indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion," *Heckler*, 470 U.S. at 834, may a court act to determine an agency's enforcement conduct. This Court found in its August 2008 decision that, under the circumstances of this case, the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. ("IGRA"), mandated that the NIGC issue a Notice of Violation to the Nation with respect to its Buffalo Creek facility. However, it refused Plaintiffs' request to go further and to direct the NIGC to take the very same enforcement action (issuance of a closure order) that Plaintiffs again ask the Court to decree here. Plaintiffs have provided no legal or factual basis for this Court to depart from its earlier decision.

Given the dearth of law in support of their present request, Plaintiffs' principal tact is to seek to inflame this Court by arguing that the NIGC and the Seneca Nation have demonstrated "a contemptuous disregard for the [Court's] authority" in the wake of its August 2008 decision. Docket No. 78-4 at 2. After directing the NIGC to serve the Nation with a Notice of Violation, this Court then "directed [the NIGC] to take such action as is consistent with the Court's July 8, 2008 decision, the IGRA's mandates and intent, and NIGC regulations." Docket No. 76 at 9. Plaintiffs assert, based largely on the unsupported speculation of counsel, that neither the NIGC nor the Nation has taken any meaningful action in response to the Court's decision, but that they are instead "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." Docket No. 78-2 (Murray Aff.) at ¶ 45.

These are reckless and unfounded assertions. They have no place in an affidavit of counsel, and they should not be rewarded through the issuance of the relief that Plaintiffs seek. The Nation has made its decisions regarding its Buffalo Creek facility in good faith, and those

decisions have been fully consistent with the NIGC's regulations and IGRA's detailed remedial scheme. The Nation submits this brief *amicus curiae* in an effort to make very clear what actions it has taken, and what the intention has been behind those actions, since the issuance of this Court's July and August 2008 decisions.

The Seneca Nation has Acted in Good Faith, and with a Desire for the Expeditious Resolution of this Matter, Since the Issuance of this Court's July and August 2008 Decisions.

In contrast to Plaintiffs' claims, the Seneca Nation has acted with one overriding goal since the issuance of this Court's July and August 2008 decisions: securing from the federal government, in as expeditious a manner as possible, an updated and, if possible, a unified interpretation of the scope of section 2719 of IGRA, with the idea that this Court could then determine whether such an interpretation (if indeed it differs from the one previously considered by this Court) is legally permissible. This Court contemplated that the Nation was engaged in precisely this course of action in its August 2008 decision. Docket No. 76 at 18-19. The Nation has no desire for delay in achieving its goal; such delay, in fact, runs directly counter to the Nation's interests.

1. On July 16, 2008, well before this court's August 2008 decision, the Nation submitted amendments to its Class III Gaming Ordinance to the Chairman of the NIGC. The principal purpose of the submission, as the President of the Nation expressly indicated in his accompanying letter to the Chairman, was to allow the NIGC to consider whether it concurred in the provision of the notice-and-comment regulations that had recently been promulgated by the Department of the Interior in which the Department concluded that Section 2719's prohibition on after-acquired gaming extends only to lands held by the United States in trust for Indian nations, and not to lands held by those nations themselves in restricted fee status. *See* Affidavit of

Maurice A. John, Sr. ("John Aff.") at ¶ 7; John Aff., Ex. A, at 2 (Letter of President John to NIGC Chairman Hogen).

This question was and is, of course, of great interest to the Nation and of central relevance to this litigation. While the Nation has consistently argued that, pursuant to the plain language of section 2719, only trust lands are subject to the prohibition on after-acquired gaming, the United States had taken the contrary position in its filings with this Court. In its July 2008 decision, this Court ruled that the United States' position was "a permissible construction of the statute." Docket No. 61 at 103. It never stated, however, that the United States' position was the legally mandated interpretation of section 2719, and instead observed that "the ordinary and common meaning of the terms employed in section [2719]" was consistent with the Nation's own views. *Id*. at 100. The United States had not informed the Court of the Interior Department's new position prior to the Court's July 2008 ruling. Docket No. 76 at 14-19. It seemed only sensible to the Nation that the NIGC should have to decide whether it concurred in the Interior Department's position, and that this Court should then have an opportunity to evaluate the resulting position of the United States on this critical issue.

Contrary to the unsupported assertions of Plaintiffs' counsel, then, the Nation did not submit "what [it] knew was a flawed third Ordinance to the Chairman . . . as an excuse to delay the Commission's enforcement proceedings for as long as possible." Docket No. 78-2 (Murray Aff.) at ¶ 46. The Nation submitted its ordinance amendments well before any enforcement proceedings had begun, and it did so because it viewed the Interior Department regulations as a vindication of the position the Nation has taken consistently in this litigation, and because it thought that the Court and the Nation were entitled to a determination by the NIGC as to whether it concurred in that position. The Nation's clear understanding at the time, moreover, was that,

as provided for by IGRA, *see* 25 U.S.C. § 2710(e), the NIGC would have to render a determination on its amendments within 90 days, or by October 15, 2008. John Aff., at ¶¶ 7, 10. In submitting the amendments, then, the Nation hardly thought that it was "attempting to string the Plaintiffs and this Court along" by resorting to measures that would allow it to continue gaming in its Buffalo Creek Territory for an indeterminate amount of time. Docket No. 78-2 (Murray Aff.) at ¶ 45. *See* John Aff., at ¶ 8.

2. On September 3, 2008, and in compliance with this Court's August 2008 decision, the NIGC issued a Notice of Violation ("NOV") to the Nation. The NOV contained a detailed recitation of the circumstances leading to its issuance, and of the statutory and regulatory provisions relevant to those circumstances. John Aff., Ex. B. In addition, the NOV confirmed the Nation's understanding that "[t]he Chairman [of the NIGC] must take action on the Nation's 2008 site-specific ordinance by October 15, 2008, or else the ordinance will become approved by operation of law. In reviewing that ordinance, the Chairman will have the opportunity in light of the Department of the Interior's new regulation to review his prior decision that the Section 2719 prohibition applies to after-acquired restricted fee as well as trust lands." John Aff., Ex. B at 5 (circumstance Q).

3. The NIGC's regulations expressly provide that the recipient of a NOV may challenge that NOV in an appeal to the Commission. 25 C.F.R § 577.1. While the regulations state that a notice of appeal must be filed within 30 days of service of a NOV, 25 C.F.R. § 577.3, in an effort to expedite the vindication of its position, the Nation promptly exercised its regulatory rights and appealed its NOV on the day of its receipt. John Aff., at ¶ 10; Ex. C. In its notice of appeal, the Nation again stated that it had submitted ordinance amendments to the NIGC in order that the agency "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 [sic], 2008." John Aff., Ex. C at 1.

4. The NIGC's regulations further provide that, within 10 days of the filing of a notice of appeal, the appellant shall submit a "supplemental statement" in support of its appeal to the agency. The Nation did so on September 15, 2008. In that detailed statement, the Nation specifically requested:

> 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 1[6], 2008. 25 C.F.R. § 523.4. 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 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.

John Aff., Ex. D at 1-2.

This supplemental statement again makes clear that, far from attempting to "string the Plaintiffs and this Court along" for an indeterminate period of time, Docket No. 78-2 (Murray Aff.) at ¶ 45, the Nation was simply taking the common sense position with the NIGC that the agency should defer enforcement proceedings until it had clarified its position on the scope of section 2719, a clarification which at that point was due within 30 days. The Nation's request that the hearing be held after October 15, 2008 was expressly authorized under the NIGC's regulations. 25 C.F.R. § 577.4.

5. On September 18, 2008, the Nation similarly requested that it be allowed to defer, for 30 days, the submission of information relative to the amount of the fine, if any, that the Chairman might consider imposing pursuant to the NOV, again due to the pendency of the ordinance amendment decision. John Aff., Ex. E. This request was likewise authorized under the NIGC's regulations. *See* 25 C.F.R. § 575.5.

6. The NIGC's regulations expressly provide that non-parties to a NOV proceeding may move to intervene in the proceeding. *See* 25 C.F.R. at §577.12. At no point in time have the Plaintiffs sought to intervene in the NOV proceedings, and at no point in time did they object to the Nation's procedural requests regarding the timing of the NOV hearing or of the Nation's submissions.

7. On September 19, 2008, the NIGC granted the Nation's request to extend the deadline for the submission of information related to any potential fine for 30 days. On September 30, 2008, the NIGC indicated, in requesting the designation of a Presiding Official to hear the NOV appeal, that it concurred in the Nation's position that the hearing be deferred until after October 15, 2008.

8. As of October 8, 2008, the Nation's full expectation was that the NIGC would render a decision on its ordinance amendments by October 15, 2008. John Aff., at ¶ 11. On that date, however, the NIGC requested that the Nation withdraw its ordinance amendments from consideration, at least temporarily. The NIGC explained that it was engaged in active, time-consuming discussions with other elements of the federal government regarding the decision to appeal from this Court's July and August 2008 rulings. That decision had to be made by October 24, 2008, and the NIGC requested that the Nation withdraw the amendments, and then re-submit them if it so desired, in order to provide the agency with more time to complete its review of the

amendments once the federal government's appellate decision had been finalized. John Aff., at ¶ 11. The NIGC explained that it had followed this procedure in numerous other instances where gaming ordinances or amendments were pending before it, and that this procedure was not proscribed by NIGC regulation. John Aff., at ¶ 12. The Nation was reluctant to withdraw the amendments, *id.*, but on October 14, 2008 it did so in order to accommodate the request of one of its principal regulators.

9. On October 10, 2008 (four days before the Nation withdrew its ordinance amendments), the NIGC moved the Presiding Official assigned to hear the Nation's NOV appeal for a stay of the proceedings "pending a decision on appeal" in *CACGEC II*. The Nation was hardly in a position to object to this request, and so consented to it. It is this stay request, which was granted by the Presiding Official on October 28, 2008, that Plaintiffs seize upon as evidencing that the Nation seeks to continue gaming indefinitely on its Buffalo Creek Territory even in the face of this Court's July and August 2008 decisions.

10. On October 21, 2008, the Nation re-submitted its ordinance amendments to the NIGC. John Aff., Ex. G. It did so because, as it had indicated to the agency ever since receiving its request for a withdrawal on October 8, the Nation desires that the NIGC pass on the validity of its ordinance amendments and, in the course of doing so, that it make it clear to the Nation and to this Court whether or not it concurs in the Interior Department's interpretation of section 2719. John Aff., at ¶ 13. Responsible action by the federal government requires that the relevant actors within the government come to a determination as to whether the government still maintains its original litigation position regarding the scope of section 2719, or whether the Interior regulations have led to a change in that position. In the Nation's view, a decision by the NIGC on the Nation's amendments is an integral part of that process. *Id.*

When the Nation withdrew its amendments on October 14, 2008, the Nation fully expected that the NIGC would still have to make such a determination. John Aff., at ¶¶ 13-15. The Nation had every intention of re-submitting its amendments shortly thereafter, which it in fact did on October 21, 2008. John Aff., at ¶ 13. Furthermore, it is not the Nation's expectation that further withdrawals of its ordinance amendments would be warranted. Thus, it is the Nation's position that the NIGC should, pursuant to IGRA's requirements, render a decision on the Nation's ordinance amendments no later than January of 2009. *Id*. at ¶ 15.

It is a Reasonable Exercise of the NIGC's Enforcement Discretion for the Agency Not to Close the Buffalo Creek Facility While the Nation's Ordinance Amendments Are Pending Before It.

Under the circumstances discussed above, it is entirely reasonable and within the NIGC's discretion for the agency not to issue a closure order with respect to the Nation's Buffalo Creek facility. A decision by the NIGC on the Nation's ordinance amendments is due within approximately 75 days of this filing. If the NIGC were to approve the amendments, then the Nation would once again be operating the facility pursuant to an approved ordinance (which Plaintiffs would presumably challenge once again in court). If, on the other hand, the NIGC were to disapprove the amendments, the Nation would likely have to bring suit against the NIGC under the APA. Under either scenario, Plaintiffs' emphasis on the NIGC's request for an administrative stay pending appeal, and on the granting of that stay, misses the point entirely. Either the approval or disapproval of the Nation's ordinance amendments would effectively moot the appeals in *CACGEC II*. The Nation will either be gaming pursuant to a newly approved set of amendments, or it will be bringing its own lawsuit challenging the disapproval of those amendments.

Allowing the Buffalo Creek facility to stay open while the amendment decision is pending is a classic exercise of sound enforcement discretion, which takes into account the United States' legal position on the question as well as the irremediable damage that hasty enforcement action would cause. If the NIGC were to issue a closure order, or if the Nation were to unilaterally close the facility, forty full-time employees of the Nation's gaming corporation, all of whom have jobs with good salaries and benefits, would be displaced at a time of significant economic weakness in the region. Affidavit of E. Brian Hansberry ("Hansberry Aff.") at ¶ 6. And that would only be the tip of the iceberg. As the President and Chief Executive Officer of the Seneca Gaming Corporation explains, "a closure of the Seneca Buffalo Creek Casino would have a grave, immediate and irreparable impact on the SGC, its employees, [the] Seneca people and the citizens of the State of New York":

> A closure order would significantly impair the SGC's credit rating in the financial markets. As a result, the SGC may have difficulty in maintaining the strength of investor interest in its current financing, and in obtaining new financing, not simply for the Seneca Buffalo Creek Casino & Hotel, but for its other operations. This would include planned construction and development projects at the other sites. In other words, even a temporary closure order would pose a significant threat to all three of the SGC's gaming operations in Western New York. Together, those three operations employ more than 4,000 individuals, [and] generate $500 million in revenues for the Seneca Nation for the fiscal year 2007, along with $109.6 million in exclusivity fees for the State of New York in calendar year 2007, and local share revenue [totaling $27.3 million].

Hansberry Aff., at ¶¶ 5, 7.

The effects of a closure order would extend not only to the Nation and its members, but to the residents and the economy of western New York more generally. *See, e.g.*, Affidavit of Chris Collins, County Executive for Erie County, at ¶¶ 4, 9 ("I am very concerned about the potentially devastating effects that a closure of the Seneca Buffalo Creek Casino would have on the already troubled Erie County economy . . . At a time when Erie County is desperately

looking for alternative (non-tax) sources of revenue, committed local employers, and any opportunity for economic growth that will put people to work and relieve some of the tax burden, it is deeply disturbing to learn that one of the area's most promising economic stimulants could be closed."); Affidavit of Byron W. Brown, Mayor of the City of Buffalo, at ¶¶ 4 – 10 (detailing extensive benefits to City from Nation's gaming activities); Affirmation of Robert Williams, New York State Bureau of Gaming Operations, at ¶¶ 8-11 (noting that the temporary Buffalo Creek facility has thus far generated $5.2 million in revenue sharing obligations to the State in 2008, 25% of which will go to the local municipalities, and that overall the Nation is expected to remit $100 million for its three operations to the State in 2008, which will in turn result in sizeable payments to local governments).

In its August 2008 decision, this Court identified language in IGRA that it read as mandating that the NIGC issue a Notice of Violation to the Nation. Docket No. 76 at 5 (citing 25 U.S.C. § 2713(a)(3)). It further stated, however, that "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." *Id.* Plaintiffs identify no language in IGRA or in the NIGC's regulations, and none exists, that would impeach this conclusion and require the NIGC to visit the drastic consequences on the Nation and on the economy of western New York that Plaintiffs' requested relief would engender. While IGRA provides that the NIGC Chairman "shall have authority to levy" fines, 25 U.S.C. § 2713(a)(1), and "shall have power to order temporary closure" of a gaming facility, 25 U.S.C. § 2713(b)(1), it does not divest him of all ability to exercise judgment in determining when or how to use such authority. The NIGC's regulations demonstrate a similar regard for the Chairman's traditional enforcement discretion. *See* 25 C.F.R. §573.6 ("the

Chairman may issue an order of temporary closure"); 25 C.F.R. § 575.4 ("[t]he Chairman may assess a civil fine").

The Court expressed great frustration in its August 2008 decision that the United States had not notified it of the Interior Department's new regulations concerning the scope of section 2719 prior to the Court's July 2008 decision. Docket No. 76 at 14-19. While the Nation understands, and shares in, that frustration, this Court should not allow any remaining frustration concerning the United States' actions – including any frustration that the NIGC has yet to rule on the Nation's ordinance amendments – to operate to the detriment of the Nation and of the western New York economy.

Indeed, a great irony now marks this litigation. In rejecting the Nation's suggestion in *CACGEC I* that the litigation should be dismissed on Rule 19 grounds, this Court held that the United States could adequately represent the Nation's interests. *CACGEC I*, 471 F. Supp. 295, 315-16 (W.D.N.Y. 2007). The Court did so notwithstanding the divergence between the Nation and the United States over the proper interpretation of section 2719's scope that existed even then. *Id.* at 316. The question of section 2719's scope has now become central to this litigation, and the fact that the United States has yet to inform the Court whether the NIGC shares the position of the Interior Department calls into question this Court's determination that the United States can adequately represent the Nation on this issue. If the Court is troubled by any such delay on the United States' part, the logical conclusion to draw from that delay is not that enforcement action should be mandated that would severely prejudice the Nation and its neighbors in western New York, but that this Court should revisit its Rule 19 determination. *See CACGEC I*, 471 F.Supp.2d 295, 312 ("the issue of indispensability is one that courts have an

independent duty to consider *sua sponte*, if there is reason to believe dismissal on such grounds may be warranted.").

DATED this 4th day of November, 2008.

Respectfully submitted,

HARTER SECREST & EMERY LLP

By: /s/ Carol E. Heckman
Carol E. Heckman
Twelve Fountain Plaza, Suite 400
Buffalo, NY 14202-2293
Ph: (716) 845-4220
Fax: (716) 853-1617
checkman@hselaw.com

KANJI & KATZEN, PLLC

By: /s/ Riyaz A. Kanji
Riyaz A. Kanji
Cory Albright
Laura Sagolla
101 North Main Street
Suite 555
Ann Arbor, Michigan 48104
Ph: (734) 769-5400
Fax: (734) 769-2701

Robert Odawi Porter
Senior Policy Advisor and Counsel
Christopher Karns
Deputy Counsel
Seneca Nation of Indians
Post Office Box 231, Seneca Nation
Salamanca, NY 14779
Ph: (716) 945-1790
Fax: (716) 945-6869
Counsel for the Seneca Nation of Indians