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. 09-CV-0291**
Plaintiffs,	)	**Hon. William M. Skretny, U.S.D.J.**
v.	)	
HOGEN, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE DEFENDANTS' MOTION FOR PARTIAL DISMISSAL

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INTRODUCTION

In two decisions in two prior cases, this Court invalidated determinations of the National Indian Gaming Commission (the "NIGC") approving two different ordinances for the Seneca Nation of Indians ("SNI") to operate a Class III casino on the so-called "Buffalo Parcel."[1] This Court, in its July 8, 2008 decision in *CACGEC II*, held that the Indian Gaming Regulatory Act ("IGRA") prohibits gambling on land, such as the Buffalo Parcel, acquired after 1988, and that the "settlement of a land claim" exception to the after-acquired land prohibition does not apply. *CACGEC II*, 2008 U.S. Dist. LEXIS 52395, at *****209-10. Consequently, this Court held, the Buffalo Parcel is ineligible for Class III gambling. *Id.* Despite those rulings, the Defendants have adopted yet another ordinance necessitating still another round of litigation.

By July 17, 2008, just nine days after *CACGEC II*, the SNI had drafted and submitted the third iteration of a Class III ordinance to the NIGC (the "Third Ordinance") that was not materially different from the ones this Court had already rejected. Under IGRA, the Chairman of the NIGC, Philip N. Hogen, had 90 days to approve or disapprove the ordinance or it would be deemed approved. *See* 25 U.S.C. § 2710(e). In the meantime, and despite the fact that IGRA requires an Indian tribe to have an approved gaming ordinance to conduct a Class III gambling operation, *see* 25 U.S.C. § 2710(b)(1), (d)(1)(A), the SNI continued its gambling operation on the Buffalo Parcel without one in plain sight of the NIGC. On August 26, 2008, the Court directed the NIGC and its Chairman to enforce IGRA "forthwith" in a manner "consistent with the Court's July 8, 2008 Decision." 2008 U.S. Dist. LEXIS 67743, at *****14-15. The NIGC's sole response was to issue a tepid Notice of Violation, which the SNI contested. Shortly thereafter,

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[1] *See Citizens Against Casino Gambling v. Hogen*, 2008 U.S. Dist. LEXIS 52395 (W.D.N.Y. 2008) ("*CACGEC II*"); *Citizens Against Casino Gambling v. Hogen*, 471 F. Supp. 2d 295 (W.D.N.Y. 2007) ("*CACGEC I*").

Hogen moved his own agency for a stay of any enforcement proceedings, which the hearing officer granted. All the while, the gambling continued on the Buffalo Parcel.

On October 14, 2008, the eve of the deadline for NIGC action, the SNI inexplicably withdrew the Third Ordinance. Eight days later, on October 22, 2008, the SNI resubmitted an identical Class III ordinance (the "Resubmitted Third Ordinance") to the NIGC for approval. This restarted the 90-day clock for the NIGC Chairman to act on the ordinance. The end of this period coincided with Inauguration Day, Tuesday, January 20, 2009, the last day in office for outgoing Administration officials.

On January 20, 2009, in the waning minutes of the prior Administration, Hogen approved the SNI's Resubmitted Third Ordinance. (Dkt No. 1, ¶ 92.) To rationalize this action, which flies squarely in the face of the July 8, 2008 decision in *CACGEC II*, Defendants rely on an extraordinary last-second memorandum authored by the soon-to-be-departing Solicitor of the Department of the Interior (the "DOI"), David Bernhardt, on Sunday, January 18, 2009, two days before the Inauguration. (Dkt No. 1, ¶ 90.) On his way out the door, Bernhardt opined that the DOI's prior interpretation that the prohibition against gambling on after-acquired land applied equally to trust and restricted fee land was "incorrect."[2] This interpretation reversed the long-standing interpretation of the DOI, extending as far back as then-Secretary Gale Norton's November 12, 2002 letter explaining her "non-decision decision" that had allowed the Tribal-State Compact between the SNI and the State of New York to go into effect by operation of law. It also contradicted this Court's definitive decision in *CACGEC II*, not to mention Defendants' position throughout this litigation up to that point.

[2] "Applicability of 25 U.S.C. § 2719 to Restricted Fee Lands," M-37023 (Solicitor's Opinion Jan. 18, 2009), http://www.doi.gov/solicitor/opinions/M-37023.pdf.

Hogen bolstered Bernhardt's memorandum with new DOI regulations, published in the Federal Register on May 20, 2008 and effective August 25, 2008, 73 Fed. Reg. 29354, which Defendants failed to bring to the Court's attention until after the July 8, 2008 decision in *CACGEC II*. The Preamble to the regulations, which outlines the procedures by which DOI would act on land-into-trust applications under the Indian Reorganization Act, 25 U.S.C. § 465, intimates for the very first time that IGRA's prohibition against gambling on after-acquired land does not apply to land held in restricted fee. The Preamble states, "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)." 73 Fed. Reg. 29355-56. Citing both Bernhardt's memorandum and the Preamble to the land-into-trust regulations, Hogen concluded that the § 20 prohibition did not apply to the Buffalo Parcel, which was restricted fee land. This purported to nullify this Court's July 8, 2008 decision in *CACGEC II* and make the property eligible for Class III gambling yet again.

In reaching this determination, Hogen disingenuously seized on a single sentence, taken out of context in the July 8, 2008 decision, characterizing the NIGC's view of the after-acquired land prohibition as applying to both restricted fee and trust land as a "permissible construction of the statute." *CACGEC II*, 2008 U.S. Dist. LEXIS 52395, at *****178. Hogen himself had earlier said that this was the only "sensible" reading of the statute. *Id.* at *171-72. On January 20, 2009, however, he decided that **"a"** permissible construction of the statute was not the **"only"** permissible construction. A more intellectually honest reading would have had to acknowledge this Court's statement, in the immediately preceding sentence, that to hold that the after-acquired

land prohibition did not apply to restricted fee land "would be at odds" with the "clear purpose" of the provision. *Id.* at *177.[3]

Using Solicitor Bernhardt's January 18, 2009 last-second switch-in-time as the needed "cover," Chairman Hogen approved the Resubmitted Third Ordinance, which allowed the SNI to continue operating its Class III casino at the Buffalo Parcel site despite this Court's earlier decision. On January 30, 2009, the Court denied Plaintiffs' motion to hold Defendants in contempt of court for failure to enforce the Court's earlier ruling with regard to the Second Ordinance. The Court explained that the new Third Ordinance enjoyed "presumptive" validity in the absence of yet another round of litigation challenging its legality. This brings us to the present case, which Plaintiffs initiated by filing their Complaint (Dkt No. 1) on March 31, 2009, slightly more than two months after the NIGC approved the Resubmitted Third Ordinance.

In this case, Plaintiffs challenge the NIGC's approval of the Resubmitted Third Ordinance under the Administrative Procedure Act ("APA"). Plaintiffs contend in their first claim for relief that the Seneca Nation Settlement Act ("SNSA") is unconstitutional, not on its face but rather as the Defendants have interpreted and applied it, to convert the Buffalo Parcel into so-called "Indian land" based upon the DOI's designation of the property as "restricted fee" land some 15 years after the enactment of that law. (Dkt No. 1, ¶ 98.) In enacting SNSA in 1990, Plaintiffs contend, Congress never envisioned or intended that by a mere bureaucratic stroke of the pen more than a decade later -- or worse, a non-decision decision -- land in the middle of downtown Buffalo that for over two centuries was under the control of the State of New York would instantaneously be removed from its sovereign jurisdiction. If Congress had really meant

[3] Importantly, the courts have consistently held that "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear Congressional intent." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-448 (1987). *Meriden Trust & Safe Deposit Co. v. Federal Dep. Ins. Corp.*, 63 F.3d 449, 452 (2d Cir. 1995).

to do that, it would have violated the Tenth Amendment to the U.S. Constitution, which prohibits Congress from exercising powers which are not delegated to it and which are reserved to the States and/or the people. *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009) ("grave constitutional concerns" would be raised if Congress could cast a cloud on the sovereignty of a state by purporting to unilaterally remove land from its jurisdiction more than three decades after its admission to statehood).

Plaintiffs have been directly injured by such action because they enjoy rights guaranteed to them under Article I, § 9 of the New York State Constitution, which places the prohibitions against commercialized gambling in the Bill of Rights itself. This is especially significant because normally a Bill of Rights within a constitution imposes limits on governmental action to protect individual liberties. Article I, § 9, on the other hand, affirmatively directs the Legislature to pass laws to prevent commercialized gambling. *See also* N.Y. Penal Law Article 225; N.Y. Gen. Mun. Law § 185 (mandate of Article I, § 9 of the Constitution should be carried out by rigid regulation "to prevent commercialized gambling"). The purpose of New York's constitutional prohibition against gambling was to "protect[]the family man of meager resources from his own imprudence at the gaming tables." *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9, 15 (1964). If the Constitution of the State of New York no longer applies because of the loss of New York State sovereignty over the Buffalo Parcel, Plaintiffs would lose the protection its Constitution affords them to live in a state free from commercialized gambling.

Defendants have now moved to partially dismiss Plaintiffs' Complaint, contending that their first claim should be dismissed on a variety of grounds, including statute of limitations, lack of standing, failure to state a claim, claim and issue preclusion, sovereign immunity of the U.S., and the Quiet Title Act. For the reasons discussed below, none of these arguments have merit. Accordingly, Defendants' motion to dismiss should be denied.

ARGUMENT

POINT I

DEFENDANTS' MOTION TO DISMISS THE TENTH AMENDMENT CLAIM SHOULD BE DENIED

A. The First Claim is Timely

Plaintiffs' challenge to the constitutionality of SNSA is not a facial constitutional challenge, but rather is an "as applied" challenge to the Defendants' interpretation and application of the statute. *See* Dkt No 1 ¶ 98. Under 28 U.S.C. § 2401, the statute of limitations for asserting a civil claim against the U.S. is "six years after the right of action first accrues." This applies to actions under the APA. *Wong v. Doar*, 2009 U.S. App. LEXIS 13311, at *43-44 n.5 (2d Cir. 2009); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991). The six-year statute begins to run "after the right of action first accrues." 28 U.S.C. § 2401. For a substantive challenge to agency action, the cause of action accrues, and the statute begins to run, "at the time of the adverse agency action on a particular claim." *Wong*, 2009 U.S. App. LEXIS 13311, at *43-44 n.5. Further, a decision contesting the substance of an agency decision as exceeding constitutional or statutory authority may be brought no later than six years "following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger." *Wind River*, 946 F.2d at 715.

In this action, Plaintiffs challenge the NIGC's January 20, 2009 decision to approve the Resubmitted Third Ordinance for the Buffalo Parcel. Under IGRA, an Indian tribe may engage in Class III gambling only on "Indian land" as IGRA defines that term. *See* 25 U.S.C. § 2703(4). On July 2, 2007, Chairman Hogen opined, in approving the SNI's Second Ordinance, that IGRA permits gambling only on "Indian lands," which the NIGC's regulations define to include restricted fee land if, in addition, the tribe also exercises governmental power over the land. *See*

Letter dated July 2, 2007 approving SNI Class III Gaming Ordinance (the "2007 Approval Letter").[4] On January 20, 2009, when Chairman Hogen approved the Third Resubmitted Ordinance, he stated that "once the Secretary of the U.S. Department of the Interior allowed the Buffalo Parcel to pass into restricted fee pursuant to the SNSA, the land became Indian country within the meaning of 18 U.S.C. § 1151." *See* Letter dated January 20, 2009 approving SNI Class III Gaming Ordinance (the "2009 Approval Letter").[5] Hogen dispensed with the second prong of the test, *i.e.*, whether the Tribe also exercised governmental power over the land. In issuing this interpretation, the NIGC Chairman interpreted SNSA, for the first time, in a way that raised a constitutional issue under the Tenth Amendment. He opined that the mere designation of land as "restricted fee" by the Secretary of the DOI was sufficient to make the land "Indian land" and deprive the State of jurisdiction over it. Such unilateral action by the U.S. Government depriving a state of jurisdiction over its land implicates the Tenth Amendment. *Hawaii,* 129 S. Ct. at 1445. This is the challenged interpretation at issue in this action.

Defendants argue that SNSA's 180-day statute of limitations, applicable to an "action to contest the constitutionally or validity under law of this subchapter," *see* 25 U.S.C. § 1774g, bars this action. It does not, because Congress intended the 180-day period to apply only to constitutional claims challenging SNSA as originally enacted, not as applied. *See Narragansett Indian Tribe v. NIGC*, 158 F.3d 1335, 1338 (D.C. Cir. 1998). In *Narragansett*, the D.C. Circuit held that similar language in the Rhode Island Settlement Act applies only to constitutional claims challenging the original purpose of the statute. In that case, the tribe challenged an

[4] Available at www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/senecanationny/senecanation070207df.pdf. The Court may take judicial notice of the content of a website in the public domain. *See Francarl Realty Corp. v. Town of E. Hampton*, 2009 U.S. Dist. LEXIS 49684, at *4 n.3 (E.D.N.Y. June 12, 2009).

[5] Available at Available at www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances /senecanationny/SenecaOrdinanceApproval12009.pdf.

amendment to the Rhode Island Act which expressly excluded the tribe's lands from the definition of "Indian lands" under IGRA. Section 1711 of the statute required "any action to contest the constitutionality of this subchapter" to be filed within 180 days of September 30, 1978. *Id.* at 1338 (quoting 25 U.S.C. § 1711). The D.C. Circuit held that this did not apply to the challenged amendment, even though it was part of "this subchapter." The court noted that the Rhode Island Act was intended to remove clouds on title resulting from Indian land claims in Rhode Island and to resolve the tribe's claims to lands in the adjacent town. *Id.* at 1339. Another Indian settlement act, the Alaska Native Claims Settlement Act, contains similar language, along with the explanatory phrase that the "purpose of this limitation on suits" is to insure that the rights at issue "will vest with certainty and finality." *Id.* The Rhode Island Act used "the same jurisdictional language," the court noted, and it had "essentially the same purpose." *Id.* By analogy to the Alaska Act, it concluded, Congress intended the 180-day limitations period to apply only to challenges that would threaten the original statutory purpose. *Id.*

This action does not challenge the SNSA, or its purpose, or the manner in which Congress sought to achieve that purpose. Congress intended SNSA, among other things, to compensate the SNI for past unfair below-market leases and to permit non-Indian lessees to extend their existing leases in the City of Salamanca and nearby villages. 25 U.S.C. § 1774(b). In exchange for relinquishing potential legal claims for lease payments, the SNI received, among other things, a payment in the amount of $30 million from the U.S. *Id.* § 1774f(c). The purpose of the 180-day limitations period was to achieve certainty and finality with respect to the non-Indian leases held by the SNI. As in *Narragansett*, this action "neither revives old land claims nor unsettles land titles," 158 F.3d at 1339, and it does not challenge the constitutionality of the original enactment on its face. Instead, it challenges the NIGC's application of SNSA to the Resubmitted Third Ordinance. Thus, as in *Narragansett*, the 180-day period does not apply.

If Defendants were correct, Plaintiffs could never mount a challenge to the constitutionality of the statute as applied to the Buffalo Parcel. The SNI did not identify the Buffalo Parcel until 2005, some 15 years after Congress passed the SNSA, and the NIGC Chairman did not approve the Resubmitted Third Ordinance until January 20, 2009, nearly five years later. This was long after the 180-day period in the statute expired. In 1990, the individual Plaintiffs, whose standing is predicated on their proximity to the Buffalo Parcel (*see CACGEC II*, 2008 U.S. Dist. LEXIS 52395, at *64-65, could not possibly have foreseen that in 2005, the SNI would purchase that specific tract of land and use it for gambling purposes much less that in 2009 the NIGC would view the SNSA, by its terms, as creating "Indian lands."

Defendants' argument presents a legal conundrum: How can a statute of limitations run before a claim has even accrued? The answer is it cannot; Congress cannot insulate its actions from constitutional scrutiny by enacting a statute of limitations that expires before the cause of action accrues. To do so would raise profound separation of powers issues. *See generally Marbury v. Madison*, 5 U.S. (Cranch 1) 137 (1803). A cause of action does not accrue, and the limitations period begin to run, until the claim is ripe for adjudication. *See Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 200 (1997). Moreover, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). Thus, Plaintiffs' cause of action did not accrue until January 20, 2009, when Chairman Hogen interpreted SNSA to create "Indian lands" in approving the Resubmitted Third Ordinance. For these reasons, Plaintiffs have properly and timely raised their constitutional challenge.

B. Plaintiffs Have Standing to Assert their Tenth Amendment Claim

To allege an injury in fact sufficient for constitutional standing, a plaintiff must first have a legally protected interest that is thwarted by the Defendants' actions. *CACGEC II*, 2008 U.S. Dist. LEXIS 52395, at *60. Here, as in *CACGEC II*, Plaintiffs have made the requisite showing.

The Tenth Amendment states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. In New York, the Bill of Rights of the New York State Constitution guarantees its citizens the right to be free from illegal gambling. Specifically, Article I, Section 9 of the New York Constitution states that "no lottery . . . or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature" shall be permitted. N.Y. Const. Art. I, § 9. Plaintiffs here seek to enforce this right, which New York guarantees to it citizens, and which would be secure, but for the U.S. Government's challenged actions in violation of the Tenth Amendment.[6] Thus, the Plaintiffs have standing under the Tenth Amendment.

As courts have recognized, the Tenth Amendment ultimately secures the rights of individuals. In *Gillespie v. City of Indianapolis*, 185 F.3d 693, 697 (7th Cir. 1998), for example, a police officer challenged a federal gun control law prohibiting individuals convicted of domestic violence offense from carrying firearms. Due to the law, the police officer lost his job. The Court found that plaintiff suffered an injury in the loss of his ability to carry a firearm, and consequent loss of his job, and that the injury was traceable to the alleged constitutional violation, in that the invalidation of the statute would nullify the disability and restore to him the right to carry a firearm. *Id.* at 703. Thus, the officer had standing to pursue the Tenth

[6] *See Intercontinental Hotels*, 15 N.Y.2d at 15.

Amendment claim. *Id.*; *see also Atlanta Gas Light Co. v. U.S. Dep't of Energy*, 666 F.2d 1359 (11th Cir. 1982) (private party has standing under the Tenth Amendment to challenge federal statute regulating the permissible uses of natural gas); *United States v. Rothacher*, 442 F. Supp. 2d 999 (D. Mont. 2006).

The Tenth Amendment, as originally drafted, did not contain the language "or to the people." Thomas B. McAffee, *Powers Reserved for the People and the State: A History of the Ninth and Tenth Amendments* 42-44 (1st ed. 2006). Each of the states offered its own version of the Tenth Amendment. The language as adopted takes the "New York" view that the "reservation of power should reflect that it is the people who grant and reserve powers to both the federal and state governments, and therefore that the reserved powers are reserved first to the people and second to the states." *Id.* at 43. How ironic it would be if this Court were to hold, as Defendants urge, that the citizens of New York State lack standing to enforce a constitutional provision so plainly intended for their protection.

The U.S. cites *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 144 (1939), *Brooklyn Legal Services Corp. v. Legal Services v. Corp.*, 462 F.3d 219, 234 (2d Cir. 2006), and *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 148 (D.D.C. 2002), for the proposition that private individuals lack standing to bring a Tenth Amendment claim. (Dkt No. 11-2 at 14.) These cases are distinguishable. In *Tennessee Electric Power*, the plaintiff power companies sought to challenge the constitutionality of the Tennessee Valley Authority. The Court held that they lacked standing as competitors. This was because they did not suffer a loss that was remediable, in that they did not have the right to be free from competition in the creation and sale of water power. 306 U.S. at 140. In *Brooklyn Legal*, a legal assistance program and private parties challenged the constitutionality of federal restrictions on legal assistance programs that receive federal funding. The plaintiffs lacked standing because they brought suit in their individual

capacities, but sought to argue that the restrictions interfered with the state's ability to fund programs that receive federal funds and perform functions on behalf of state judicial systems. 462 F.3d 235-36. Here, in contrast, Plaintiffs are not seeking to secure rights of the State, but rights that the State of New York, in its Bill of Rights, has guaranteed to its citizens to be free from illegal gambling, as residents of New York in the communities in which they live.

None of the Defendants' cases involved the fundamental right at issue here -- the right of citizens of a State to invoke the Tenth Amendment to vindicate the rights guaranteed to them under state constitutional guarantees, *see* N.Y. Const. art. I, § 9, and under federal law. *See CACGEC II*, 2008 U.S. Dist. LEXIS 52395, at *63-64. In this case, Plaintiffs complain that Defendants' interpretation of the SNSA, with the direct effect of permitting gambling on the Buffalo Parcel, has a "corrosive effect" upon the "immediate environment and economy, including, but not limited to, increases in crime, traffic, noise, and a decline in the moral and social fabric of the community." (Dkt No. 1, ¶ 2.) Unlike in Defendants' cases, Plaintiffs do not assert merely that the challenged actions impinge on the sovereignty of the states or its political subdivisions; instead, Plaintiffs assert a violation of their own legal rights, which the Defendants have violated through an impermissible expansion of the authority of Congress under the Indian Commerce Clause. This distinguishes Defendants' authorities and establishes standing.

Where, as here, the individual Plaintiffs champion their own rights, the basic practical and prudential concerns underlying the standing doctrine are satisfied, and the individuals have standing to pursue their Tenth Amendment claim in this case. This is consistent with the Court's recognition in *New York v. United States*, 505 U.S. 144 (1992), that:

> the Constitution does not protect the sovereignty of States for the benefit of States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, *the Constitution divides authority between federal and state governments for the protection of individuals.*

Id. at 181 (emphasis added). If this statement is to mean anything, private parties must have standing to assert their Tenth Amendment rights.

C. The Complaint States a Claim under the Tenth Amendment

Defendants next argue that, if Plaintiffs have standing to raise Tenth Amendment claims, they have failed to state a claim in this case. Defendants invoke Congress' plenary power under the Indian Commerce Clause to suggest that when it comes to the regulation of Indian affairs, the U.S. Government can do virtually whatever it wants, including divesting a state of jurisdiction over land over which it has exercised governmental jurisdiction for more than two centuries. To the contrary, the Supreme Court has made clear that there are limits on Congress' power, even under the Indian Commerce Clause. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996).

While Federal power under the Indian Commerce Clause is surely extensive, so too are the restraints on that power under the Tenth Amendment. The Supreme Court has repeatedly so instructed over the past two decades while making it clear that the Tenth Amendment has enjoyed a renaissance and is, in fact, alive and well. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 714-14 (1999) (U.S.'s broad power cannot strip a state of one of its essential attributes -- sovereign immunity in its own courts); *Printz v. United States*, 521 U.S. 898, 919-20 (1997) (U.S. cannot impose duties on State officials to carry out Federal program); *New York*, 505 U.S. at 161 (U.S. may not commandeer states to carry out Federal policy); *see also Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) ("Dual sovereignty is a defining feature of our Nation's Constitutional blueprint."). Even more recently, in *Hawaii*, 129 S.Ct. at 1445, the Supreme Court made it abundantly clear that state sovereignty would be seriously implicated were the U.S. Government's actions to be construed as unilaterally divesting the State of its land.

In this action, Plaintiffs contend that the NIGC illegally interpreted SNSA in such a way as to strip a state of its jurisdiction over its land, unilaterally, by empowering an unelected federal bureaucrat to simply designate a parcel of land as restricted fee, thereby instantaneously removing it from state jurisdiction and control. If Congress had done this directly, it would have raised profound constitutional issues under the Tenth Amendment. *Hawaii*, 129 S. Ct. at 1445. The Supreme Court has held that while Congress' power under the Indian Commerce Clause may be extensive, it is not so all-encompassing as to enable it to unilaterally strip a state of its sovereign immunity under the Eleventh Amendment. *Seminole*, 517 U.S. at 47 (1996). Even when Congress wants to appropriate land within a state for its own use under the so-called "Enclave Clause" of the U.S. Constitution, it has long been settled that it must first obtain the consent of that state's Legislature. U.S. Const. art. I, § 8, cl. 17; *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 537-398 (1885). Yet here, under the guise of the power vested in it under the Indian Commerce Clause, the U.S. Government is apparently claiming that under SNSA, Congress can empower the Secretary of State to do on behalf of an Indian tribe what Congress could not even do for itself. In view of these authorities, and the trend in Tenth Amendment jurisprudence that they reflect, the Complaint is more than sufficient to withstand a motion to dismiss under Rule 12(b)(6). *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); *Collins v. Goord*, 2009 U.S. Dist. LEXIS 53340, at *6 (W.D.N.Y. June 24, 2009).[7]

[7] In New York, there is an elaborate procedure for the State to consent to the cession of jurisdiction over its land to the U.S. Government. *See, e.g.*, New York State Law, Art. 3, § 20, *et seq.* We are aware of no law whereby New York consented to cede jurisdiction over the Buffalo Parcel to the SNI. Section 2 of Part B of Chapter 383 of the Laws of 2001, which enacted § 12(a) of the Executive Law, did not have that effect. That law merely gave the Governor the authority to enter into Tribal-State gambling compacts with the SNI pursuant to IGRA, which, of course, would presuppose the existence of Indian land. It did not, and could not, create Indian land.

POINT II

COLLATERAL ESTOPPEL AND RES JUDICATA DO NOT PRECLUDE THE PLAINTIFFS' CLAIMS

Contrary to the Defendants' suggestion, *CACGEC II* does not bar Plaintiffs from litigating the "Indian lands" issue in this case. Collateral estoppel bars parties from relitigating an issue that they previously litigated, but only if the prior determination finally and necessarily decided the issue. *Res judicata* prevents a party from relitigating an issue that was or could have been raised in a prior action, but only if the judgment involves the identical transaction. Neither doctrine applies here, and neither precludes the litigation of the "Indian lands" issue in this case.[8]

A. Collateral Estoppel Does Not Bar Plaintiffs' Indian Lands Claim

The Second Circuit applies a four-factor test to determine whether collateral estoppel, or issue preclusion, applies. Under this test:

> A party is collaterally estopped from raising an issue in a proceeding if: (1) the identical issue was raised in a previous proceeding; (2) the issue was "actually litigated and decided" in the previous proceeding; (3) the party had a "full and fair opportunity" to litigate the issue; and (4) the resolution of the issue was "necessary to support a valid and final judgment on the merits."

Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d 86, 91 (2d Cir. 1997). To apply, each of these four factors must exist. In addition, the court must satisfy itself that the application of the doctrine would be fair and appropriate under the circumstances. *Bear, Stearns & Co. v. 1109580 Ont., Inc.*, 409 F.3d 87, 91 (2d Cir. 2005). Here, none of the four factors exists, and the application of collateral estoppel to bar the adjudication of the significant Tenth Amendment issue Plaintiffs have raised would be completely inappropriate.

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[8] "[T]he party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment." *BBS Norwalk One, Inc. v. Raccolta, Inc.*, 117 F.3d 674, 677 (2d Cir. 1997). Defendants' did not make the requisite showing in their bare-bones legal argument on this issue. To the extent they seek to cure this defect in their reply, Plaintiffs respectfully request an opportunity to respond.

First and foremost, the "Indian lands" determination was not necessary to support the judgment in *CACGEC II*. In *CACGEC II*, Plaintiffs challenged the NIGC's July 2, 2007 approval letter as arbitrary and capricious. Specifically, Plaintiffs argued that the Buffalo Parcel is not "Indian lands" and that, even if it is, the land is not gambling-eligible because the U.S. did not take it "into trust as part of a settlement of a land claim." In the July 8, 2008 decision, the Court held that the Buffalo Parcel is not gambling-eligible under the settlement of a land claim exception, and it vacated the NIGC 2007 Approval Letter applying that exception. This was the essential holding in the case.

Although the Court held that the Buffalo Parcel was "Indian land," this was not "essential to the judgment" vacating the 2007 Approval Letter. The Court could have invalidated the 2007 Approval Letter without making a determination on the Indian land issue. Moreover, the Indian lands determination did not support the judgment vacating the 2007 Approval Letter. *See* Wright & Miller, § 4421 Issue Preclusion—Necessarily Decided. Thus, it was not "necessarily decided."

Knox County Education Association v. Knox County Board of Education, 158 F.3d 361 (6th Cir. 1998), illustrates this principle. In that case, plaintiffs challenged a school drug-testing policy, which called for suspicionless drug testing for persons holding "safety sensitive" positions in the school system. *Id.* at 363. The court invalidated the policy on constitutional grounds, and then went on to determine which positions were "safety-sensitive" under the policy. Having invalidated the policy, the court did not need to decide the positions to which it applied. The holding on that issue in the first case thus was not "necessarily decided," and plaintiffs were not barred from relitigating it in a subsequent lawsuit. *Id.* at 337.

Similarly, in *Nabisco, Inc. v. Amtech International, Inc.*, 2000 U.S. Dist. LEXIS 305 (S.D.N.Y. 2000), Nabisco brought a trademark infringement action in New York against an individual and a corporation for selling products in New York that infringed Nabisco's

trademark rights. Upon realizing that the corporation had been the subject of an earlier consent decree in New Jersey, Nabisco brought civil contempt proceedings there. After an evidentiary hearing, the court held that the individual and corporation had acted in a "deliberate and willful" manner, and it sanctioned the corporation, but not the individual, who was not a party to the consent judgment. *Id.* at *9-10. Following that decision, Nabisco argued in the New York action that the court should grant preclusive effect to the New Jersey court's findings. The court refused: although the New Jersey court had made factual findings about the individual's intent and whether he had actually confused customers, these findings were not "essential parts of the court's contempt judgment" against the corporation. *Id.* at *33. Therefore, collateral estoppel did not apply. *Id.*; *see also Interoceanica*, 107 F.3d at 91.

There is no question that the judgment in this case turns on the settlement of a land claim issue. This is clear from the discussion on pages 117-19 of the July 8 decision (*CACGEC II*, Dkt No. 61) explaining the Court's conclusion that the 2007 Approval Letter did not pass APA muster. "Because Chairman Hogen and the Secretary failed to consider factors relevant to the settlement of a land claim determination, and failed to provide any statutory interpretation or explanation in support of their conclusions," this Court held, "the determination is arbitrary and capricious." *Id.* at 118-19. This was the essential aspect of the Decision and it drove the determination that the NIGC Chairman's "July 2, 2007 administrative decision approving the [SNI's] Class III Gaming Ordinance is VACATED." *Id.* at 122. Although the Court also ruled on the "Indian lands" issue, that ruling was not essential to the judgment vacating the 2007 Approval Letter. For this reason, without more, collateral estoppel does not apply.

Although this reason alone is sufficient, collateral estoppel cannot apply because the parties have not had a "full and fair" opportunity to litigate the Indian lands issue. "A party cannot be considered to have had a full and fair opportunity to litigate an issue, and issue

preclusion cannot apply, if there is an inability to obtain appellate review or there has been no review, even though an appeal was taken." *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 897 (2d Cir. 1997). Here, Plaintiffs appealed the Indian lands portion of the July 8 decision, but the appeal is stayed awaiting decision here. Thus, there has been no opportunity for appellate review.

In the appellate forum, Defendants' counsel have taken the position, in discussions with Plaintiffs' counsel and the Second Circuit's staff, that Plaintiffs won in the court below and thus have no right to appeal the Indian lands portion of the July 8 decision. (*See* accompanying Affidavit of Cornelius D. Murray, dated July 15, 2009, at ¶ 4.) Simultaneously, they seek to bar Plaintiffs from raising this issue to challenge the 2009 Approval Letter. If the U.S. Government has its way, Plaintiffs would be precluded from either appealing the Indian land issue in *CACGEC II* or litigating it anew in *CACGEC III*. In such event, there would be no opportunity at all for appellate review of the issue. Under these circumstances, the lack of appellate review to date is a strong factor precluding the application of collateral estoppel.

Either of these factors, on its own, is sufficient to require the denial of Defendants' motion to dismiss on this ground, but Defendants' motion fails on the remaining two prongs of the test as well. Specifically, while the parties litigated the "Indian land" issue in *CACGEC II*, they did not litigate the "identical issue" that is the subject of the present challenge. As previously noted, *see supra* pp. 6-7, the NIGC's analysis in the 2007 Approval Letter was different from its analysis in the 2009 Approval Letter that Plaintiffs challenge here. It follows, then, that the prior proceeding, which addressed an earlier determination based on a different rationale, did not actually litigate and decide the questions at issue here.

As discussed above, in the NIGC's 2007 Approval Letter, Chairman Hogen reasoned that the Buffalo Parcel passed into restricted fee pursuant to SNSA, and that, while this met the first prong of IGRA's "Indian lands" definition, it was not, without more, sufficient to create Indian

land. In addition, the Chairman opined in 2002 that it would be necessary to establish the element of the exercise of jurisdiction.

In the 2009 Approval Letter, however, Chairman Hogen stated that the NIGC's "analyses regarding Indian lands generally and lands held in restricted status in particular" had, since the July 2, 2007 letter, "undergone significant review, rethinking, and revisions," requiring "modification" of the agency's "former understanding of restricted lands in the context of IGRA." *Id.* This "change of course" led the Chairman "to review this new ordinance and the agency's Indian lands analysis afresh." The 2009 Approval Letter states that "once the Secretary of the U.S. Department of the Interior allowed the Buffalo Parcel to pass into restricted fee pursuant to the SNSA, the land became Indian country within the meaning of 18 U.S.C. § 1151." It is this "modification" of the agency's "former understanding" that is at issue in this case.

Collateral estoppel does not apply when the essential facts of the earlier case differ from the present one, even if they involve the same legal issues. *Envtl. Def. v. EPA*, 369 F.3d 193, 202 (2d Cir. 2004). "When the facts essential to a judgment are distinct in the two cases, the issues in the second case cannot properly be said to be identical to those in the first, and collateral estoppel is inapplicable." *Id.* As applied here, *CACGEC II* addressed a different approval letter premised on a different analysis from the 2009 Approval Letter. Thus, the parties could not have, and in fact did not, litigate the "identical issue" in *CACGEC II*. It follows that the prior action did not resolve the questions at issue here.

There is an additional compelling reason why collateral estoppel does not apply: this is a matter of important public significance as to which the Supreme Court's jurisprudence has evolved and is continuing to evolve since the parties briefed the issue in *CACGEC II*. This evolution is reflected in the Supreme Court's March 31, 2009 decision in *Hawaii*, 129 S.Ct. 1436. There, the issue was whether Congress, in a Joint Resolution acknowledging and

apologizing for the role of the U.S. in the overthrow of the Kingdom of Hawaii in 1893, had stripped Hawaii of its authority to convey 1.2 million acres of its sovereign territory, unless it reached a political settlement with native Hawaiians about the status of the land. Rejecting this argument, a unanimous Court stated that it would "raise grave constitutional concerns," if the Apology Resolution had the effect of clouding "Hawaii's title to its sovereign lands more than three decades after the State's admission to the Union." *Id.* at 1445.

The Supreme Court's evolving jurisprudence is also reflected in *Carcieri v. Salazar*, 129 S.Ct. 1058 (2009). The Court held that the Secretary of the Interior cannot take land into trust for the benefit of the Narragansett Tribe of Rhode Island, because that tribe was not "under Federal jurisdiction" in 1934. *Id.* at 1068. Applying a rule of strict construction, the Court held that the phrase "now under Federal jurisdiction" in the Indian Reorganization Act refers only to those tribes that were under federal jurisdiction at the time of the statute's enactment. *Id.* The Court also held that a subsequent enactment, the Indian Land Consolidation Act, did not overcome this limitation, because it did not alter the IRA's definition of "Indian," which is "limited to members of tribes that were under federal jurisdiction in 1934." *Id.* at 1067-68.

In this case, the important public significance of the issues raised cautions against the application of collateral estoppel. In *Environmental Defense*, 369 F.3d at 202-03, the U.S. Government argued that collateral estoppel barred an environmental group from challenging the EPA's approval of New York's plan for meeting national air quality standards for ozone because it was on the losing side of a case challenging EPA's approval of another State's plan for meeting the ozone standards. Due in part to the significant public importance of the matters at issue, the Second Circuit disagreed: "The traditional concerns about relieving the parties of the costs of litigation and conserving judicial resources must be weighed against the interests of nonparties where this legal challenge implicates the public good." *Id.* at 203.

So too here, the creation of sovereign Indian land is a matter of profound public interest. The Supreme Court's holdings in *Hawaii* and *Carcieri* are significant because they reflect the Supreme Court's expectation that if Congress intends to deprive a State of sovereignty over that land, it must do so explicitly. The creation of a sovereign Indian land within a State is much too significant an act to be left to inaction, implication, and speculation about what Congress must have meant. *See also City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) (depriving a State of sovereignty and creating separate Indian sovereignty raises serious and confusing jurisdictional issues). Accordingly, the important public nature of the issues at stake provides an additional reason to reject the application of collateral estoppel in this action.

B. Res Judicata Does Not Bar Plaintiffs' Indian Land Claim

The doctrine of *res judicata* also does not apply. Under this doctrine, also known as "claim preclusion," once a final judgment has been entered on the merits, the judgment bars subsequent litigation by the same parties concerning "'the transaction, or series of connected transactions, out of which the [first] action arose.'" *Maharaj v. BankAmerica Corp.*, 128 F.3d 94, 97 (2d Cir. 1997) (quoting Restatement (Second) of Judgments § 24(1) (1982)). In this case, there is no claim preclusion because this action challenges events that took place after the events in *CACGEC II*. Thus, it does not arise out of the "same transaction" as that earlier case.

The Second Circuit has held time and again that "when the second action concerns a transaction occurring after the commencement of the prior litigation, claim preclusion generally does not come into play." *Id.*; *Interoceanica*, 107 F.3d at 91. In *Interoceanica*, for example, New York shipping pilots brought an action against a shipping company to enforce a New York statute requiring the use of New York-licensed pilots to navigate ships in parts of the Long Island Sound. *Id.* at 89. The shipping company defended the suit on statutory and constitutional grounds, but lost. *Id.* The shipping company appealed and, while the appeal was pending, it sued

the pilots association for a declaratory judgment that it was in compliance with the law. *Id.* Although the shipping company urged the same legal theories that the district court had rejected in the prior action, the Second Circuit held that *res judicata* did not bar the case. *Id.* at 91. This was because the second lawsuit concerned "distinct voyages" that took place "after those litigated" in the first action, and it thus did not arise out of the same "transaction." *Id.* at 91.

Likewise, in *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1464 (2d Cir. 1996), which Defendants cite, *res judicata* did not preclude the SEC from bringing a second proceeding against a securities firm for fraud in the purchase and sale of securities, even though the SEC had settled an earlier proceeding relating to another group of stocks during a prior period. In rejecting the argument that *res judicata* barred the second suit, the Second Circuit explained, if the second suit involves "different transactions, and especially subsequent transactions," then "there generally is no claim preclusion." *Id.*

Here, *CACGEC II* challenged the NIGC's approval of the Second Ordinance and sought a declaration that the 2007 Approval Letter was arbitrary and capricious. This action, in contrast, challenges the NIGC's approval of the Resubmitted Third Ordinance, which came into existence after, and largely in response to, the July 8 decision in *CACGEC II*. In 2007, the NIGC had not yet issued the 2009 Approval Letter, and Plaintiffs could not possibly have sued upon it.

True, the facts in the two proceedings are similar. Yet they give rise to separate statutory wrongs -- just as a party who breaches a contract twice in the same way has committed two separate breaches, and thus can be sued in two separate cases. *See Prime Mgmt. Co. v. Steinegger*, 904 F.2d 811, 816 (2d Cir. 1990). "While a previous judgment may preclude litigation of claims that arose 'prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case.'" *Id.* (citations omitted). The Plaintiffs' claims relating to the NIGC's approval of

the Resubmitted Third Ordinance did not exist, and Plaintiffs could not possibly have sued upon them in the previous case. Thus, *res judicata* does not apply.

POINT III

PLAINTIFFS' CHALLENGE TO THE APPLICABILITY OF THE TRIBAL-STATE COMPACT TO THE BUFFALO PARCEL IS NOT BARRED BY THE STATUTE OF LIMITATIONS OR THE DEFENDANTS' SOVEREIGN IMMUNITY

In their Complaint, the Plaintiffs have alleged that former DOI Secretary Gale Norton's approval in November 2002 of the Tribal-State Compact between the State of New York and the SNI purporting to authorize the Tribe to engage in Class III gaming under IGRA does not apply to the Buffalo Parcel, which was not acquired by the SNI until nearly three years later in October 2005. (Dkt No. 1 ¶¶ 99-102.) This argument is not, contrary to Defendants' characterization, a challenge to the validity of the Compact which would be barred by the applicable six-year statute of limitations that would have elapsed in November 2008, six years after the Compact was approved and several months before the Complaint in the instant action was filed. Nor does Plaintiffs' challenge to Chairman Hogen's approval of the Resubmitted Third Ordinance in this APA action raise sovereign immunity issues, as Defendants contend.

Plaintiffs challenge the validity of the Resubmitted Third Ordinance, not the Compact, and, within the context of this APA action, are asserting that the Compact may not be cited to approve an ordinance for gambling on land that was not even under SNI control at the time the Compact came into existence. (*See* Dkt No. 99-104.) Thus, to the extent that Chairman Hogen made a determination that the land was gambling-eligible because of the Compact, he was in error. Plaintiffs could not have raised that issue until after the NIGC Chairman approved the Resubmitted Third Ordinance on January 20, 2009. When that occurred, Plaintiffs timely filed this action less than three months later, well within any applicable statute of limitations.

As for Plaintiffs' substantive argument, the Court has already held that the approval of a gaming ordinance must be accompanied by a determination in the first instance that the land is "gambling-eligible" as "Indian land." *CACGEC I*, 471 F. Supp. 2d at 323-24. It is clear, however, that in order for a Tribal-State Compact to be approved under IGRA, it must be with respect to gaming on "Indian land." 25 U.S.C. § 2710(d)(8)(A). In 2002, the Buffalo Parcel was not Indian land and, therefore, the Compact did not apply, and could not have applied, to the Buffalo Parcel. Since Chairman Hogen must have necessarily rendered a conclusion that the Compact did apply in approving the Resubmitted Third Ordinance, that decision is clearly reviewable within the context of this APA action. *CACGEC I*, 471 F. Supp. 2d at 323-24. Accordingly, Defendants' motion to dismiss on sovereign immunity and statute of limitations grounds should be denied.

POINT IV

THE QUIET TITLE ACT DOES NOT BAR THE INDIAN LANDS CLAIM

Defendants argue that the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, applies to any action challenging the status of Indian lands and that, therefore, the U.S. has not waived its sovereign immunity. This is the same argument that Defendants made and the Court rejected in *CACGEC I* and *CACGEC II*. Defendants acknowledge that the Court rejected the argument but raise it again to preserve it for appeal, relying on the same authorities they cited in *CACGEC I* and *II*. They have no more merit now than they did then.

The QTA operates as a limited waiver of sovereign immunity in cases where a party seeks "to adjudicate a disputed title to real property in which the United States claims an interest," 28 U.S.C. § 2409a(a), except where the dispute is over ownership of "trust or restricted Indian lands." *Id*; *see CACGEC I*, 2007 U.S. Dist. LEXIS 29561, at *77. Here, as in the prior cases, Plaintiffs do not dispute title to the Buffalo Parcel. Thus, this action would not affect title

to real property in which the U.S. claims an interest. Defendants' authorities do not support the proposition that the QTA bars the case from going forward if the requested relief "would limit the use" of the land at issue. *See United States v. Mottaz*, 476 U.S. 834, 843 (1986) (QTA did not apply because U.S. claimed interest in land for U.S. Forest Service, not Indian tribe); *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 961 (10th Cir. 2004) (U.S. held fee title to the land, so plaintiffs' challenge, if successful, could have divested the U.S. of title); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 974-75 (10th Cir. 2005) (QTA applied because plaintiffs alleged that trust acquisition violated federal law); *see also CACGEC II*, 2008 U.S. Dist. LEXIS 52395, at *81 (distinguishing cases). Here, as in the prior cases, Plaintiffs do not contest the ownership of the Buffalo Parcel, but the NIGC's determination that the land is gambling-eligible "Indian land" under IGRA. Thus, as in the prior actions, the QTA does not apply.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Defendants' motion for partial dismissal be denied.

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Respectfully submitted,
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s/ Cornelius D. Murray

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