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

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

Plaintiffs,

- v - 09-CV-0291-WMS

PHILIP N. HOGEN, et al.,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR PARTIAL DISMISSAL

Pursuant to Local Rule 7.1(f) and the Court's scheduling order, Dkt. No. 13, Defendants, (collectively, "United States"), hereby respectfully submit this Reply in Support of their Motion for Partial Dismissal.

ARGUMENT

Plaintiffs' First Claim asserts that approximately nine acres of land in the City of Buffalo, Erie County, New York ("the Parcel") held by the Nation in restricted fee is not Indian land. Specifically, they allege that the Seneca Nation Land Claims Settlement Act ("Settlement Act"), 25 U.S.C. §§ 1774-1774h, is unconstitutional, Compl. ¶¶ 95-98, 108; the Nation's Class III gaming compact with New York does not apply to the Parcel, Compl. ¶¶ 61-64, 99-102; and restricted fee land is neither Indian land under the Indian Gaming Regulatory Act, §§ 2701-2721 (" IGRA") nor Indian country pursuant to 18 U.S.C. § 1151, Compl. ¶¶ 103-109. On June 15, 2009, the United States filed a motion to dismiss Plaintiffs' First Claim. Plaintiffs filed their response on July 15, 2009. However, Plaintiffs' response fails to cure the deficiencies in their

complaint and Plaintiffs' First Claim should be dismissed.[1/]

I. Plaintiffs' Challenge to the Constitutionality of the Settlement Act Should be Dismissed

A. Plaintiffs' Challenge to the Constitutionality of the Settlement Act is a Facial, not an As-Applied Challenge

"Generally, a legislative Act may be challenged in two ways: (1) by establishing that it is wholly or facially, unconstitutional or (2) by demonstrating that it is unconstitutional as applied in a particular way or as applied to a particular person or group." Buffalo Teachers Federation v. Tobe, 446 F. Supp.2d 134, 141 (W.D.N.Y 2005). As this Court has recognized, a facial challenge to a legislative Act is the most difficult challenge because the challenger must establish that no set of circumstances exists under which the Act would be valid. Ward v. New York, 291 F. Supp.2d 188, 196-197 (W.D.N.Y. 2003), citing United States v. Salerno, 481 U.S. 739, 745 (1987); Cranley v. Nat'l Life Ins. Co., 318 F.3d 105, 110 (2d Cir. 2003).

In an apparent attempt to avoid the heavy burden of proof associated with a facial constitutional challenge, Plaintiffs now characterize their challenge as an "as-applied" one. Pls. Resp. 6. Plaintiffs new characterization of its claim does not square with their Complaint and their request that this Court declare the Settlement Act to be unconstitutional to the extent that it

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[1/]For the sake of brevity and page limitations, the United States relies on its Memorandum of Points and Authorities In Support of the United States' Motion for Partial Dismissal regarding the Tribal-State Compact statute of limitations and the Quiet Title Act arguments. However, in response to Plaintiffs' assertion that a Tribal-State Compact can only apply to lands that are already Indian lands at the time of the approval, Pls. Resp. 24, nothing in IGRA requires the parties to a Tribal-State Compact to identify the exact parcels where the facilities will be operated. The State of New York and the Seneca Nation chose to identify the Buffalo Parcel as a future gaming site as part of their bargain. The parties could have chosen not to identify the Buffalo Parcel, then acquire the parcel in the future and still have the Tribal-State Compact apply to it.

allows new sovereign Indian lands to be created in the State of New York. Compl. 35; ¶ 98. That kind of relief would be appropriate only if the statutory provision was unconstitutional on its face. The practical effect of the declaratory judgment Plaintiffs seek would be nullification of every land acquisition under Section 1774f of the Settlement Act, not just the Buffalo Parcel, and nullification of the settlement Congress passed.

Even if Plaintiffs' challenge to the constitutionality of the Settlement Act is an "as-applied" challenge, it would still suffer from jurisdictional defects. Plaintiffs completely fail to state why the application of Section 1771f(c) of the Settlement Act to the acquisition and subsequent setting aside of the Buffalo Parcel would render the Act unconstitutional. Instead, Plaintiffs argue for the first time that because the Chairman, "dispensed with the second prong of the test [for Indian lands under IGRA], *i.e.*, whether the Tribe also exercised governmental power over the land[,]" in his ordinance approval letter, this raises a constitutional issue under the Tenth Amendment. Pls. Resp. 7. Plaintiffs state that they are challenging this interpretation. Id.

To begin with, the Chairman does discuss the Seneca Nation's jurisdiction and exercise of governmental authority over the Buffalo Parcel in the approval letter. Seneca Nation of New York Ord. Approval Ltr. 8-10, Jan. 20, 2009.[2/] Second, the final agency action that is the subject of this lawsuit is the Chairman's approval of the Seneca Nation's third gaming ordinance, not any action taken pursuant to the terms of the Settlement Act. Indeed, the Chairman does not administer the Settlement Act and the Chairman was not responsible for setting the Buffalo Parcel aside as Indian Country or Indian lands – an action which Plaintiffs have already challenged in the prior lawsuits. Therefore, no final agency action was taken by the Chairman

[2/] Available at http://nigc.gov/ReadingRoom/GamingOrdinances/tabid/909/Default.aspx#S.

under the Settlement Act, so Plaintiffs' argument that their challenge is an "as-applied" challenge makes no sense.

B. The 180- day Statute of Limitations in the Settlement Act is Applicable to Plaintiffs' Claim

Plaintiffs next argue that the 180-day statute of limitations in Section 1774g of the Settlement Act is inapplicable to "as-applied" constitutional challenges. Pls. Resp. 7-9. Inexplicably, Plaintiffs cite Narragansett Indian Tribe v. NIGC, 158 F.3d 1335, 1338 (D.C. Cir. 1998) in support of their proposition. Narragansett does not discuss, much less address, whether the 180-day statute of limitations contained in Section 1711 of the Rhode Island Indians Claims Settlement Act ("Rhode Island Settlement Act"), 25 U.S.C. §§ 1701-1716, applies to facial or "as-applied" constitutional challenges to the Act.[3/] Instead, Narragansett discusses whether the statute of limitations in the Rhode Island Settlement Act applies to an amendment to the Act passed 18 years later. Because the amendment did not involve the original land settlement and the rights, title and interest of the United States, the Narragansetts, or the State of Rhode Island, the D.C. Circuit concluded that Section 1711's time and jurisdictional limitations only applied to constitutional challenges to the original land settlement. Narragansett, 158 F.3d at 1339. The amendment neither revived the old land claims nor unsettled land titles, it simply clarified that the lands that the Narragansett acquired pursuant to the Rhode Island Settlement Act were not

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[3/]The statute of limitations provision of the Rhodes Island Settlement Act states, "[n]otwithstanding any other provision of law, any action to contest the constitutionality of this subchapter shall be barred unless the complaint is filed within one hundred and eighty days of September 30, 1978." Compare 25 U.S.C. § 1711, with Seneca Nation Settlement Act, 25 U.S.C. § 1774g ("Notwithstanding any other provision of law, any action to contest the constitutionality or validity under law of this subchapter shall be barred unless the action is filed on or before the date which is 180 days after November 3, 1990.").

eligible for gaming. Id.

In contrast, Plaintiffs claim in this case is a direct challenge to the terms of the original land settlement as codified in the Settlement Act. In return for relinquishing their claims against the United States, Settlement funds were provided to the Seneca Nation. See 25 U.S.C. §§ 1774a(c)(1), 1774d. These funds, in turn, could be used by the Seneca Nation to acquire additional restricted fee Indian lands within their aboriginal territory in the State of New York. 25 U.S.C. § 1774f(c). If Plaintiffs were to prevail in their claim that the land acquisition section of the Settlement Act is unconstitutional, the terms of the settlement that Congress crafted would be upset in contradiction to Congress' clear intent. Moreover, Section 1774g does not distinguish between facial or "as-applied" constitutional challenges – it bars all constitutional challenges – so Plaintiffs' argument is contrary to the plain language of the statute.

Finally, Plaintiffs argue that the general statute of limitations in 28 U.S.C. § 2401 (six years), applicable in APA cases, applies here. Pls. Resp. 6. In passing the Settlement Act, Congress included a specific statute of limitations, rendering 28 U.S.C. § 2401 inapplicable. See, e.g., Grabbe v. Brownell, 247 F.2d 402, 404 (2d. Cir. 1957) ("we cannot apply a general statute of limitations to a class of claims for which Congress has provided a specific statute fixing the time within which suit may be brought."). Even if it were applicable, Plaintiffs are not challenging any final agency action under the Settlement Act and as a result, their constitutional challenge to the Settlement Act should be dismissed.

C. Plaintiffs' Lack Standing to Assert Their Tenth Amendment Claim

As discussed in the United States' Motion For Partial Dismissal, the law of the Supreme Court and the Second Circuit is clear: private parties like Plaintiffs have no standing to allege a

violation of the Tenth Amendment because such a claim belongs to the States. U.S. Mot. Partial Dismissal 14-15. In their response, Plaintiffs cite to cases outside the Second Circuit that have found private parties have standing. Pls. Resp. 10-12. However, Plaintiffs fail to point out that in Brooklyn Legal Services v. Legal Services Corp., 462 F.3d 219 (2d Cir. 2006), cert. denied, 128 S.Ct. 44 (2007), the Second Circuit addressed these cases:

> We recognize that construing *New York* to diminish the weight of *Tenn. Elec.'s* reasoning is one possible reading of the case, *see, e.g., Gillespie v. City of Indianapolis,* 185 F.3d 693, 703-04 (7th Cir.1999), but the federal courts have come to no settled consensus on the issue, *see Medeiros,* 431 F.3d at 35-36 (collecting and discussing cases reaching conflicting conclusions with respect to Tenth Amendment standing); *cf. Pierce County, Wash. v. Guillen,* 537 U.S. 129, 148 n. 10, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003) (declining to address the certiorari-granted question whether private plaintiffs have standing to assert a claim under the Tenth Amendment). *But cf. Flast,* 392 U.S. at 105, 88 S.Ct. 1942 (implying that private individuals may *not* assert the states' interest in their legislative prerogatives). We are nonetheless bound by the rule that "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); *Tenet v. Doe,* 544 U.S. 1, 10-11, 125 S.Ct. 1230, 161 L.Ed.2d 82 (2005).

Brooklyn Legal Services Corp. v. Legal Services Corp. at 236.[4/] The court then concluded, "[i]n sum, *Tenn. Elec.* here controls, and the district court erred by ruling otherwise and by failing to dismiss the plaintiffs' Tenth Amendment claim pursuant to Rule 12(b)(1) for lack of standing." Id. For the same reasons, Plaintiffs' Tenth Amendment claim should be dismissed in this case.

Even if Plaintiffs have standing to press their claim, the Tenth Amendment reserves to the

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[4/] See also U.S. v. Hacker, 565 F.3d 522, 526-28 (8th Cir. 2009) ("We now join the majority of circuits and hold that a private party does not have standing to assert that the federal government is encroaching on state sovereignty in violation of the Tenth Amendment absent the involvement of a state or its instrumentalities.").

States all powers not granted to the federal government by the Constitution. See U.S. Const. amend. X. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." New York v. United States, 505 U.S. 144, 156 (1992). The only question is whether authority over Indians has been entrusted by the Constitution to the states or to the federal government, and that is made clear by the Constitution's Indian Commerce Clause, U.S. Const. art. 1, § 8, cl. 3. For that reason Plaintiffs' Tenth Amendment claim should be dismissed.

II. Collateral Estoppel and Res Judicata Bar Plaintiffs' First Claim

A. The Identical Issue was Litigated in CACGEC II

In their response, Plaintiffs assert that the identical "Indian land" issue was not present in Citizens Against Casino Gambling in Erie County v. Hogen, 2008 WL 2746566 (W.D.N.Y. 2008) ("CACGEC II"), because the Chairman allegedly does not discuss the Seneca Nation's jurisdiction and exercise of governmental authority over the Buffalo Parcel in the approval letter at issue in this case. Pls. Resp. 18-19. Therefore, collateral estoppel does not apply. However, as discussed above, that is incorrect. The Chairman addressed the Seneca Nation's jurisdiction and exercise of governmental authority over the Buffalo Parcel in the approval letter for the third ordinance, just as the Chairman did in the Indian land opinion that was the subject of the CACGEC II litigation. Compare Ord. Approval Ltr. 8-10, with Seneca Nation Indian land Op. 3-4, July 7, 2007.[5/] In fact, the Chairman relied on this Court's opinion in CACGEC II as the basis

[5/] Available at http://nigc.gov/ReadingRoom/IndianLandOpinions/tabid/120/Default.aspx.

for the Indian land discussion in the approval letter for the third ordinance. The Chairman was able to do so because the underlying factual circumstances and Indian land issues are identical.

Plaintiffs also assert that collateral estoppel does not bar their "Indian lands" claim because the "Indian lands" determination was not necessary to support this Court's judgment in CACGEC II and the Court's determination that the Buffalo Parcel was not eligible for gaming under the settlement of a land claim exception was the essential holding of the case. Pls. Resp. 16. This assertion is contrary to Plaintiffs' arguments there and the plain language of IGRA. In CACGEC II, Plaintiffs' First Claim challenged the Chairman's decision that the Buffalo Parcel fit within the IGRA definition of "Indian lands" when approving the second gaming ordinance. CACGEC II at *27. This Court then devoted a significant portion of its opinion in that case to the Indian lands claim, CACGEC II at *27-51, before turning to the settlement of a land claim exception, concluding, "the Court finds no basis to conclude that the Indian country determination is arbitrary, capricious, an abuse of discretion, or not in accordance with law." Id. at *51. In its analysis, this Court recognized that, "[a]n IGRA requirement applicable to all three classes [of gaming] is that the gaming operation be sited on *Indian land* within the tribe's jurisdiction[,]" and Class III gaming, at issue in this case, is only permitted if "the governing body of the tribe having jurisdiction over the *Indian land* on which gaming is to take place authorizes class III gaming by adopting an ordinance or resolution that is then approved by the NIGC Chairman . . . ." CACGEC II at 14, citing 25 U.S.C. §§ 2710(a)(1), (b)(1), 2710(d)(1), (d)(1)(A)(i) and (d)(2)(A). If the "Indian lands" determination was unnecessary, why did Plaintiffs assert it as their First Claim for relief in CACGEC II, leading this Court to undertake the extensive analysis that it did regarding that issue? Because Plaintiffs, and this Court,

recognized that it would not be necessary to reach a determination as to whether the Buffalo Parcel fit within Section 2719's settlement of a land claim exception if it did not fit within IGRA's definition of Indian lands because the lands would already be ineligible. That determination was necessary to the judgment in CACGEC II because the Court could not reach the settlement of a land claim exception without first addressing Plaintiffs First Claim for relief.

The cases that Plaintiffs cite offer no support for their argument. In Knox County Educ. Ass'n v. Knox County Bd. of Educ., 158 F.3d 361, 373 -377 (6th Cir. 1998), the prior District Court opinion addressed the second prong of a drug testing policy, despite the fact that its decision on the first prong rendered any consideration of the second unnecessary. Here, however, Plaintiffs' Indian lands claim had to be decided before this Court could address the settlement of a land claim exception. Plaintiff also cites Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d 86, 91 (2d Cir. 1997). Interoceanica supports the United States argument because the transaction, evidence, and facts for Plaintiffs' Indian lands claim regarding the Buffalo Parcel remain the same. Compare Ord. Approval Ltr. 8-10, with Indian land Op. 1-4.

Nabisco, Inc. v. Amtech Intern., Inc., 2000 WL 35854, 12 (S.D.N.Y. 2000), is also inapplicable because the questions addressed at the prior proceeding were not applicable to that proceeding. In CACGEC II, the Indian lands claim was Plaintiffs' First Claim. Finally, Plaintiffs argue that collateral estoppel cannot apply because they have not obtained appellate review. In response, the United States would note that Plaintiffs did file an appeal and then voluntarily withdrew that appeal from active consideration. See CACGEC v. Hogen, Stipulation to Withdraw Appeal Without Prejudice to Reinstatement, Dkt. Nos. 08-5219, 08-5257 (July 21,

2009). Therefore, Plaintiffs inability to obtain appellate review is self-inflicted.[6/]

Finally, Plaintiffs state that collateral estoppel should not apply because of the important public significance of these issues. Pls. Resp. 19-20. This is not one of the factors that the Second Circuit applies when determining whether collateral estoppel applies and therefore, it is irrelevant to the issue. For all of these reasons, collateral estoppel applies to Plaintiffs' First Claim.[7/]

CONCLUSION

For the foregoing reasons, the United States respectfully requests that Plaintiffs' First Claim be dismissed.

DATED: August 5, 2009

Respectfully submitted,

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[6/]Plaintiffs inappropriately discuss statements made by the parties during the course of conference calls with the Second Circuit staff regarding which party would file the opening brief. These statements are extra-record and cannot be considered in a motion to dismiss. Furthermore, these statements are inadmissible hearsay. Fed. R. Evid. 802.

[7/]For many of the same reasons, Res Judicata also applies to Plaintiffs' First Claim. U.S. Mot. Partial Dismissal 18-19.