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

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

Plaintiffs

09-CV-0291
Hon. William M. Skretny

v.

PHILIP N. HOGEN, *et al.*,

Defendants.

MEMORANDUM IN SUPPORT OF
SENECA NATION OF INDIANS' MOTION TO INTERVENE

INTRODUCTION AND BACKGROUND

Pursuant to Fed. R. Civ. P. 24(b), the Seneca Nation of Indians (the "Nation"), respectfully moves for permission to intervene as a defendant in this action.[1] The federal Defendants have consented to the Nation's intervention. The Plaintiffs are not willing to consent to the Nation's intervention, and have indicated that they may oppose it. The Nation's Council has passed a Resolution effecting a limited waiver of the Nation's sovereign immunity in order

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[1] The Nation limits its motion to a request for permissive intervention under Rule 24(b), even though it believes that it amply meets the standards for intervention as of right under Rule 24(a). The Nation does so in light of the Court's conclusion in the first round of litigation between the United States and the CACGEC plaintiffs that the Nation did not qualify as a necessary party to their dispute under Fed R. Civ. P. 19(a). *See CACGEC v. Kempthorne*, No. 06-cv-0001S, W.D.N.Y. ("*CACGEC I*"), January 12, 2007 Decision and Order (Docket No. 67 at 23-30). While the Nation respectfully disagrees with the Court's conclusion on that point and believes that developments since that decision underscore the Nation's Rule 19 position, Second Circuit case law is clear that "if a party is not 'necessary' under Rule 19(a), then it cannot satisfy the test for intervention as of right under Rule 24(a)(2)." *MasterCard Intern., Inc. v. Visa Intern. Service Ass'n, Inc.*, 471 F.3d 377, 389 (2d Cir. 2006). That case law decidedly does not preclude the Nation from seeking permissive intervention here. *See, e.g., International Design Concepts, LLC v. Saks, Inc.*, 486 F.Supp.2d 229, 234 (S.D.N.Y. 2007) ("[E]ven if Oscar were not a necessary party under Rule 19, permissive intervention is appropriate under Rule 24(b)").

to facilitate its intervention as a defendant. *See* Council of the Seneca Nation Resolution to Authorize Intervention in *CACGEC III* ("Resolution"), May 29, 2009 (Attachment A). As set forth in that Resolution, the Nation's proposed intervention and participation as a defendant in this action are expressly restricted to the three claims for relief specified in the Plaintiffs' Complaint (Docket No. 1, filed March 31, 2009), namely:

> (1) whether, as restricted fee lands over which the Nation exerts governmental authority, the Buffalo Creek Territory qualifies as "Indian lands" under IGRA; (2) whether the Territory is subject to the general prohibition found in section 2719 of IGRA against gaming on trust lands acquired after IGRA's effective date even though the Territory consists of restricted fee rather than trust lands; and (3) whether, if the Territory is subject to section 2719's general prohibition, class III gaming may nevertheless proceed on it because the Territory was acquired in settlement of a land claim.

Resolution at ¶ (1) (Attachment A). *See McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989) ("[T]he 'terms of [a sovereign's] consent to be sued in any court define that court's jurisdiction to entertain the suit.' . . . Thus, a tribe's waiver of sovereign immunity may be limited") (quoting *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987) (quoting in turn *United States v. Testan,* 424 U.S. 392, 399 (1976))); *see also Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F.Supp.2d 995, 1000 (W.D. Wisc. 2004) (explaining that sovereign "entities may intervene for a limited purpose" and ruling there that the intervening Indian nation's "consent to be sued is limited to a determination of the sole issue on which it moved to intervene. It has not waived its sovereign immunity as it relates to any other issue").

The Nation seeks to intervene in this action to safeguard its vital governmental and economic interests in its Buffalo Creek Territory. As the Court knows, the current action forms the latest chapter in an ongoing dispute that has extended over a period of three years. While the Nation has not been named as a party, and could not be named as a party without its consent, the

fundamental issues at stake have consistently centered on the sovereign status of the Nation's Buffalo Creek Territory and the legality of the Nation's gaming operations undertaken on that Territory. Thus far, the Nation has appeared in the action as an *amicus curiae*. For the reasons set forth below, the Nation now asks this Court to permit it to participate directly as a party defendant in the further development and resolution of the issues involved in this dispute, which are fundamental to the Nation's sovereignty, welfare and self-determination.

ARGUMENT

Intervention is appropriate under Fed. R. Civ. P. 24(b) where an applicant's motion to intervene is "timely," involves "a claim or defense that shares with the main action a common question of law or fact," and where granting the motion will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b); *see In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 202 (2d Cir. 2000). Courts also consider "the nature and extent of the intervenors' interests, the degree to which those interests are adequately represented by other parties, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *H.L. Hayden Co. of New York v. Siemens Medical Systems, Inc.*, 797 F.2d 85, 89 (2d Cir. 1986) (citation and internal quotation marks omitted); *see In re Bank of New York Derivative Litig.*, 320 F.3d 291, 300 n.5 (2d Cir. 2003) (citing *H.L. Hayden Co.* for factors relevant to permissive intervention). Here, all of the relevant factors weigh strongly in favor of granting the Nation's motion to intervene.

1. The Nation's Application for Intervention is Timely

There can be no doubt as to the timeliness of the Nation's motion. Factors relevant to determining the timeliness of a motion to intervene include "how long the motion to intervene

was delayed, whether the existing parties were prejudiced by that delay, [and] whether the movant will be prejudiced if the motion is denied." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 182 (2d Cir. 2001). The plaintiffs initiated this action on March 31, 2009, and the Nation has promptly moved to intervene within the time allowed for the Defendants to file their Answer or other responsive pleading. To date, no other substantive developments have occurred in this action, and there will be no prejudice to either Plaintiffs or the federal Defendants as a result of the timing of the Nation's intervention.

Denying the Nation's motion, on the other hand, would significantly prejudice the Nation. Absent intervention, the Nation will be unable to exercise important legal rights associated with party status, including full participation in briefing and oral argument and the ability to seek stays of and to appeal any adverse decisions. *See Heaton v. Monogram Credit Card Bank of Georgia*, 297 F.3d 416, 424 (5th Cir. 2002) ("To deny intervention would deprive the [movant] of the opportunity to exercise the legal rights associated with formal intervention, namely the briefing of issues, presentation of evidence, and ability to appeal" (internal quotation marks omitted)). The Nation participated in prior rounds of this litigation as an *amicus curiae* but, given the course of the litigation, has concluded that such a limited role is insufficient to protect its vital governmental and economic interests that are implicated here. Those interests are further discussed in subsection 4 below.

2. The Nation's Proposed Defenses Share Common Questions of Law with the Main Action

The Plaintiffs seek to litigate three issues: (1) whether the Nation's Buffalo Creek Territory qualifies as "Indian lands" under IGRA; (2) if the Territory is "Indian land," whether it is subject to the presumption in 25 U.S.C. § 2719 against gaming on trust lands acquired after IGRA's effective date; and (3) if that presumption applies, whether it is nevertheless trumped

because the Territory is land acquired in settlement of a land claim. *See* Complaint (Docket No. 1) at ¶¶ 94-135. These are precisely the substantive issues the Nation seeks to litigate as an intervenor. Indeed, as discussed above, the Nation's limited waiver of sovereign immunity and corresponding participation in this action are expressly restricted to those three issues. *See* Resolution at ¶ (1). Accordingly, granting the Nation's Motion to Intervene will not inject collateral issues into this action or otherwise expand it or render it more complex. *See Washington Elec. Co-op., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990).

3. There will be No Prejudice to the Adjudication of the Existing Parties' Rights

Whether intervention will unduly delay or prejudice the adjudication of the existing parties' rights is the "principal consideration" in deciding whether to grant permissive intervention. *U.S. Postal Service v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978); *see also U.S. v. Pitney Bowes, Inc.*, 25 F.3d 66, 73 (2d Cir. 1994) (same). Intervention by the Nation in this action will not unduly delay or prejudice the adjudication of the Plaintiffs' or the federal defendants' rights. There will be no delay because, as discussed above, the Nation has filed this motion promptly within the time allowed for the federal defendants to file their responsive pleading. And because of the identity of issues between the Nation's defenses and the main action, intervention will not expand, complicate or otherwise prolong the action. Moreover, based on its participation as *amicus curiae* in prior stages of this litigation, the Nation is well-versed in the matters at issue in the action, and the existing parties and the Court are familiar with the Nation, its attorneys and its general positions on the relevant issues. Thus, the existing parties' ability to litigate the action in the manner each sees fit, without undue surprises or delay,

will not be prejudiced by the Nation's participation, and intervention will not place undue burdens on the Court to any party's detriment.

4. The Nation's Interests in the Action Amply Suffice to Warrant Intervention

To intervene permissively under Rule 24(b), a movant must have "an interest sufficient to support a legal claim or defense which is founded upon [that] interest." *Diamond v. Charles*, 476 U.S. 54, 77 (1986) (O'Connor, J., concurring) (quotation marks omitted). This standard is less stringent than that for intervention as of right under Rule 24(a), which requires that the movant's interest be "direct, substantial, and legally protectable." *Washington Elec. Co-op., Inc.*, 922 F.2d at 96; *see also Diamond*, 476 U.S. at 77 ("[P]ermissive intervention plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation" (internal quotation marks omitted)). The Nation's interests in this action are fundamental and would easily meet the more stringent standard of Rule 24(a). They have no difficulty satisfying the lesser standard of Rule 24(b).

Plaintiffs formally state claims against officials and agencies of the United States. *See* Complaint at ¶¶ 94-135. Yet, in doing so, they take direct aim at core sovereign and economic interests of the Nation. The undeniable objective of Plaintiffs' lawsuit is to extinguish the Nation's sovereignty over, and as a result its right to conduct class III gaming on, its Buffalo Creek Territory.

In the opening sentence of their Complaint, Plaintiffs state that "[t]his is an action to declare illegal and permanently enjoin the operation [of a class III gaming facility] by the Seneca Nation of Indians ('SNI') at a 9 ½ acre site in downtown Buffalo." *See* Complaint at ¶ 1. Economic development of the Nation's Buffalo Creek Territory, including the operation of a class III gaming facility under the provisions of IGRA, is critical to the Nation's present and

long-term ability to provide governmental and social services and employment opportunities to its members, as well as to its fundamental interest in self-determination. As Congress expressly found in enacting IGRA, Indian nations have a strong interest, recognized by federal policy, in "economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). In explaining the major provisions of IGRA, Congress confirmed that "[a] tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents [and] realizing the objectives of economic self-sufficiency and Indian self-determination." S. REP. 100-446, S. Rep. No. 446, 100th Cong., 2nd Sess. 1988, 1988 WL 169811, *13. Likewise, in *CACGEC I*, this Court expressly found in the context of ruling on the Nation's status as a necessary party under Rule 19 that the Nation possessed

> an interest relating to the subject matter of this action. In this Court's view, the SNI certainly has an interest in its ability to use property that it owns in the City of Buffalo in the manner it wishes; namely to construct and operate a class III gambling casino.

CACGEC I, January 12, 2007 Decision and Order (Docket No. 67 at 25). The "interest" requirement under Rule 19 "mirror[s]" that required for intervention as of right under Rule 24(a). *See MasterCard Intern., Inc.*, 471 F.3d at 389-90. Thus, if the Nation's interest in lawfully making use of its Buffalo Creek Territory as it wishes satisfies the Rule 19 requirement, it also satisfies Rule 24(a). It follows *a fortiori* that it meets the lesser standard for permissive intervention under Rule 24(b). *See Diamond*, 476 U.S. at 77.

Even if Plaintiffs' Complaint made no mention of their fundamental objective of "permanently halt[ing]" the Nation's class III gaming operations at its Buffalo Creek Territory, *see* Complaint, Prayer for Relief at ¶ 6, the Complaint challenges key legislative and regulatory acts and provisions by which the Nation is able to conduct those gaming operations lawfully.

Plaintiffs seek, among other things, to strike down the Seneca Nation Settlement Act ("SNSA") in part as unconstitutional, to strike down the NIGC's approval of the Nation's January 20, 2009 gaming ordinance amendments, and to invalidate the Secretary's Revised After-Acquired Land Regulations. *See* Complaint at ¶¶ 94-135; *id.* at Prayer for Relief ¶¶ 1-3. The Nation has a substantial and direct interest in the continued validity of these legislative and regulatory acts. *See, e.g., CACGEC II*, Decision and Order Granting Leave to File Amicus Brief (Docket No. 55 at 3) ("The Nation will be directly affected by the decision in the present case."); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547 (2d Cir. 1991) (finding Seneca Nation met Rule 19 interest standard in part because "as the beneficiary of a substantial sum of money from the federal government, it is manifest that the Nation has *a vital interest* in the constitutionality of the [SNSA]" (emphasis added)); *see also New York Public Interest Research Group, Inc. v. Regents of the University of New York*, 516 F.2d 350, 352 (2d Cir. 1975) ("[W]e hold that [the movant] has a sufficient interest to permit it to intervene since the validity of a regulation from which its members benefit is challenged.").

An adverse ruling by this Court could bind the Secretary and the NIGC in ways that directly and dramatically impair the Nation's ability to use its Buffalo Creek land in the best economic and social interests of itself and its members. In *CACGEC II*, this Court (in reviewing agency action taken by the NIGC predating that which will be at issue in this action), ruled that class III gaming could not lawfully occur on the Nation's Buffalo Creek Territory, vacated the NIGC's approval of the Nation's gaming ordinance amendments for that Territory, and directed the NIGC to issue a Notice of Violation ("NOV") to the Nation under section 2713(a)(3) of IGRA. *See CACGEC v. Kempthorne*, No. 07-cv-0451S, W.D.N.Y. ("*CACGEC II*"), July 8, 2008 Decision and Order (Docket No. 61 at 121-22); *id.*, August 26, 2008 Decision and Order (Docket

No. 76 at 8). The NOV issued by the NIGC charged that the Nation had "violated IGRA by operating a Class III gaming operation without an approved Class III gaming ordinance and by gaming on Indian Lands ineligible for gaming." *See CACGEC II* (Docket No. 77-2 at 2). Such developments vividly illustrate the high stakes necessitating the Nation's participation as a party in this litigation.

In addition to attacking the Nation's economic and governmental interests in the development and use of its Buffalo Creek Territory, Plaintiffs challenge the Nation's very sovereignty over that Territory. "Plaintiffs contend that *the Buffalo Parcel is not sovereign Indian land, but sovereign soil of the State of New York*[.]" Complaint at ¶ 3 (emphasis added); *see, also, e.g.*, Complaint at ¶ 4 ("[T]he Buffalo parcel is not sovereign Indian land, . . . it remains under the jurisdiction, control and laws of the State of New York"); *id.* at ¶ 5 ("Congress never intended, in enacting the SNSA, to create sovereign Indian land"); *id.* at ¶ 6 (Secretary's taking of Buffalo parcel into restricted fee status "did not suddenly create sovereign 'Indian land'"); *id.* at ¶ 9 (Secretary "acted illegally . . . in determining that the Buffalo Parcel was sovereign 'Indian land'"). The Court has already thoroughly rejected Plaintiffs' argument that the Nation's Buffalo Creek Territory is not "Indian Country" over which the Nation has jurisdiction. *See CACGEC II*, July 8, 2008 Decision and Order (Docket No. 61 at 52-97, 121) ("For the reasons fully stated above, the Court finds that, as a matter of law, the NIGC's determination that the Buffalo Parcel is 'Indian Country' over which the Seneca Nation of Indians has jurisdiction is in accord with Congress's intent in enacting the SNSA."). Plaintiffs, however, appear intent on re-litigating that very issue, and seek to bolster their attack on the Nation's core interests by attacking the constitutionality of the SNSA. *See* Complaint at ¶¶ 94-

109. In doing so, they have only enhanced the Nation's interests in the litigation. *See Fluent*, 928 F.2d at 547 (noting Nation's "vital interest" in the constitutionality of the SNSA).

The Nation's interests in participating as a party in an action where its territorial sovereignty is being directly challenged cannot be overstated. It is axiomatic that a sovereign government has a fundamental interest in exercising power over individuals or entities within its territory and in having its lawful power over that territory recognized by other sovereigns. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 601 (1982). That a claim of territorial sovereignty qualifies under Rule 24(b) as "an interest sufficient to support a legal claim or defense which is founded upon [that] interest," *Diamond*, 476 U.S. at 77, is well evidenced by territorial dispute cases between sovereigns. *See, e.g., New Jersey v. New York,* 523 U.S. 767 (1998); *California v. Nevada,* 447 U.S. 125 (1980); *Mississippi v. Arkansas,* 415 U.S. 289 (1974). Indeed, and not surprisingly, the federal courts have not hesitated to find that claims of sovereign interests meet the more stringent standards of Rule 24(a) and Rule 19. For example, in *Seneca Nation v. New York*, 383 F.3d 45 (2d Cir. 2004), the Second Circuit ruled that an action contesting the validity of an easement (claimed by the State) across the Nation's land could not proceed "in equity and good conscience" in the absence of the State because a judgment for the Nation "would undeniably prejudice the State's governmental interest in securing and protecting property rights acquired on behalf of the people of the state[.]" *Id.* at 48 (internal quotations marks omitted). The Second Circuit's solicitude for the State's sovereign interests in its property is equally applicable to the Nation's sovereign interests in its Buffalo Creek Territory, which indisputably encompass "property rights acquired on behalf of the people" of the Nation. *Id.*

The Nation's sovereign interests in its Buffalo Creek Territory extend beyond its economic and property interests in land acquired on behalf of the Seneca people through special federal legislation. The Nation exercises active governmental authority over the Buffalo Creek Territory. *See CACGEC II*, Brief *Amicus Curiae* of the Seneca Nation of Indians (Docket No. 46-2 at 13 n.6). For example, all of the Nation's various ordinances that apply in the Nation's other Territories apply with full force in the Buffalo Creek Territory. *Id.* The Nation intensively regulates matters associated with the site, including fire safety, construction safety, the provision of water, sewer, and electric services and casino licensing and surveillance. *Id.* Nation Gaming Authority inspectors, surveillance officers, and auditors staff the gaming facility to ensure compliance with the Compact. *Id.* Finally, the Buffalo Creek Territory is demarcated by Nation fencing, is identified by large signs indicating that the site is subject to the Nation's jurisdiction, and is policed by the Nation's Marshal's Office. *Id.*

As a sovereign entity exercising jurisdiction over its Territory, the Nation clearly has a significant interest in an action seeking to extinguish that sovereignty and thereby to strip it of its power to regulate, police, administer justice within and otherwise to govern that Territory. *See, e.g., Dawavendewa v. Salt River Agric. Improvement and Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002) (finding Navajo Nation a necessary party under Rule 19 based in part on that nation's interest in "its sovereign capacity . . . to govern the Navajo reservation"); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (finding Indian nation to be a necessary party "to an action which could . . . jeopardize their authority to govern the lands in question" (quotation marks omitted)); *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) (finding Quinault Nation to be a necessary party in part because "the Quinault Nation undoubtedly has a legal interest in the litigation. Plaintiffs seek a complete

rejection of the Quinault Nation's current status as the exclusive governing authority of the reservation"); *Miami Tribe of Oklahoma v. Walden*, 206 F.R.D. 238, 241-42 (S.D. Ill. 2001) ("Illinois' claim of an interest in sovereignty and jurisdiction over the [land] . . . is sufficient to constitute a claim of 'an interest relating to the property or transaction which is the subject of the action.' Rule 24(a)(2). . . . A governmental body's sovereign interest is the type of direct, significant and legally protectable interest that could justify intervention under Rule 24(a)(2)").

In sum, the Nation's critical governmental and economic interests in the subject matter of this action easily meet the standard for permissive intervention under Rule 24(b).

5. Adequate Representation

In determining whether to grant permissive intervention under Rule 24(b), a court may consider "the degree to which [an applicant's] interests are adequately represented by other parties[.]" *H.L. Hayden Co.*, 797 F.2d at 89. In adjudicating the Nation's status as a necessary party under Rule 19 in *CACGEC I*, the Court determined that the Nation's interests in the action were adequately represented by the United States. *CACGEC I*, January 12, 2007 Decision and Order (Docket No. 67 at 26). That conclusion does not and should not preclude the Court from granting the Nation's motion for permissive intervention here.

First, when this Court determined that the United States could adequately represent the Nation's interests in *CACGEC I,* it did so in the context of deciding whether that litigation should be dismissed given the absence of the Nation as a party. That is obviously a very different context than the present one, where the question is whether the Nation should be permitted to intervene and to defend its own very strong interests in litigation that will go forward regardless of how the Nation's motion is resolved.

Second, while adequacy of representation may be a dispositive factor for intervention as of right under Rule 24(a), *see, e.g.*, *Brennan*, 579 F.2d at 191 ("[F]ail[ure] to show any inadequacy of representation . . . is dispositive of this appeal" under Rule 24(a)(2)); *Pitney Bowes*, 25 F.3d at 70 ("Under Rule 24(a)(2) the purported intervenor *must show* that its interest is not adequately represented" (emphasis added)), it is decidedly not a dispositive factor for permissive intervention under Rule 24(b). *See, e.g., H.L. Hayden Co.*, 797 F.2d at 89 (listing mandatory considerations under Rule 24(b), then listing adequacy of representation among "[a]dditional relevant factors"); *Brennan*, 579 F.2d at 191 (same).

Third, even under the more rigorous standard for intervention as of right under Rule 24(a), the showing of inadequate representation is not an onerous one:

> An applicant for intervention as of right has the burden of showing that representation may be inadequate, although the burden "should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).

Brennan, 579 F.2d at 191. Moreover, "[t]he various components of [Rule 24] are not bright lines . . . . A showing that a very strong interest exists may warrant intervention upon a lesser showing of . . . inadequacy of representation." *U.S. v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984). And the Supreme Court has made clear that the adequate representation standard under Rule 24(b) is even less onerous than the already "minimal" standard under Rule 24(a). Indeed, it has done so in a manner making clear that where interests critical to the welfare of an Indian nation are at stake, any presumption of adequate representation normally suggested by the involvement of the United States does not apply:

> The States also oppose intervention on grounds that the presence of the United States insures adequate representation of the Tribes' interests. The States maintain that the prerequisites for intervention as of right set forth in [Rule 24(a)] are not satisfied. . . . [I]t is obvious that the Indian Tribes, *at a minimum, satisfy the standards for permissive intervention* set forth in the Federal Rules. The Tribes' interests in the water of the Colorado basin have been and will continue to

> be determined in this litigation since the United States' action as their representative will bind the Tribes to any judgment. . . . Moreover, the Indians are entitled to take their place as independent qualified members of the modern body politic. . . . Accordingly, the Indians' participation in litigation critical to their welfare should not be discouraged.

Arizona v. California, 460 U.S. 605, 615 (1983) (internal quotation marks and citations omitted) (emphasis added).

Like the water rights at issue in *Arizona v. California*, the matters at stake in this action are significant to the Nation's welfare. As discussed above, the Plaintiffs' present Complaint, to an even greater degree than its prior complaints in this ongoing dispute, takes direct and explicit aim at the Nation's territorial sovereignty over its Buffalo Creek Territory, and has added an attack upon the Nation's "vital interest in the constitutionality of the [SNSA]." *Fluent*, 928 F.2d at 547. These interests, in addition to what the Court has recognized as the Nation's "interest in its ability to use [its Buffalo Creek Territory] in the manner it wishes," *CACGEC I*, January 12, 2007 Decision and Order (Docket No. 67 at 25), certainly qualify as matters "critical to [the Nation's] welfare," *Arizona v. California*, 460 U.S. at 615, and as such invoke the Supreme Court's admonition that the Nation's participation as an intervenor in this action "should not be discouraged." *Id.*

6. The Nation Can Make a Significant Contribution to the Litigation as an Intervenor

Finally, the Nation believes that it can significantly contribute to full development of the underlying factual issues in the suit and to their accurate and just resolution. In *CACGEC II*, the Nation briefed extensively for the Court the history of the Nation's restricted fee land holdings and the substantial body of law establishing that restricted fee lands qualify as Indian Country. *See CACGEC II*, Brief *Amicus Curiae* of the Seneca Nation of Indians (Docket No. 46-2) at 4-31; *see also id.*, Decision and Order Granting Leave to File Amicus Brief (Docket No. 55 at 3)

("The Court has reviewed the Nation's *amicus* brief and finds that . . . the Nation offers a historical perspective and insights that may not be available from the parties."). And since the inception of this litigation, the Nation has been consistent in its view that restricted fee land is not subject to Section 20's general prohibition on gaming on after-acquired trust lands. While this Court was generous in the terms it established for the Nation's *amicus* participation in *CACGEC II*, the litigation has taken turns that have convinced the Nation that it would be better able to contribute to it as a party. For one thing, however this Court decides the issues now before it, the losing party is virtually certain to appeal to the Second Circuit. The limitations on the Nation's opportunity to brief, argue and to seek various forms of relief in the Circuit would significantly hamper its ability to participate and to make contributions at that stage of the litigation. Accordingly, the Nation seeks party status. *See Farmland Dairies v. Commissioner of New York State Dept. of Agric. and Markets*, 847 F.2d 1038, 1044 (2d Cir. 1988) ("[P]ost-judgment intervention is generally disfavored").

CONCLUSION

For the reasons set forth above, the Seneca Nation of Indians respectfully requests that the Court grant its Motion for Intervention and further grant it leave to file its Proposed Answer in Intervention.

DATED this 15th day of June, 2009.

Respectfully submitted,

/s/ Riyaz A. Kanji

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