UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK; ANDREW M. CUOMO, in his capacity as Governor of the State of New York; ERIC T. SCHNEIDERMAN, in his capacity as Attorney General of the State of New York; MADISON COUNTY, NEW YORK; and ONEIDA COUNTY, NEW YORK,

Plaintiffs,

- v -

SALLY JEWELL, Secretary, United States Department of the Interior; JAMES E. CASON, Associate Deputy Secretary of the Interior; P. LYNN SCARLETT, Deputy Secretary of the Interior; FRANKLIN KEEL, Eastern Regional Director, Bureau of Indian Affairs; UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES OF AMERICA; DAN M. TANGHERLINI, Acting Administrator, United States General Services Administration; UNITED STATES GENERAL SERVICES ADMINISTRATION,

Defendants,

and

ONEIDA NATION OF NEW YORK,

Defendant-Intervenor.

Index No. 6:08-CV-00644 (LEK) (DEP)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO CAYUGA INDIAN NATION'S MOTION TO INTERVENE

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PRELIMINARY STATEMENT

Fully five years after commencement of this action challenging a decision by the Secretary of Interior to take land into trust for the Oneida Nation of New York,[1] the Cayuga Indian Nation of New York ("CN") belatedly seeks to intervene in the action. See Dkt. No. 280 ("the Motion"). As its years of silence alone make clear, the CN has no interest in the subject matter of this action, or the claims or defenses that the parties to this action have actively litigated during its pendency. Instead, the CN acts now for the purpose of disrupting and delaying a landmark settlement between the State, Counties and ON which puts to rest not only the matters in dispute in this case, but a series of highly contentious issues which have long divided the State, the Counties and the ON, and which have spawned literally decades of litigation (the "Settlement Agreement"). The transparent purpose of the CN's Motion is to bootstrap the CN into a Class III gaming compact with the State despite the fact that under the plain terms of the Indian Gaming Regulatory Act ("IGRA"), the CN does not now (and may never) qualify for Class III gaming. The CN's attempt to hold hostage the consummation of a global resolution of State/County-ON disputes in order to achieve some tactical advantage in the CN's dealings with the State is not a proper basis for intervention.

Plaintiffs[2] submit this memorandum of law and accompanying declaration of Aaron M. Baldwin (the "Baldwin Decl.") in opposition to the Motion. The Motion fails to satisfy the requirements for intervention and should be denied for a number of reasons. Most

[1] The following abbreviations are used herein: the CN's motion to intervene (the "Motion") and the CN's memorandum of law in support ("CN Mem."); the State of New York ("State"); Andrew M. Cuomo, in his capacity as Governor of the State of New York ("Governor"); Eric T. Schneiderman, in his capacity as Attorney General of the State of New York (the "Attorney General" and together with the State and the Governor, the "State"); Madison County and Oneida County (the "Counties"); Department of Interior ("DOI"); Bureau of Indian Affairs of the DOI ("BIA"); Secretary of Interior ("Secretary" and together with the United States and other federal government defendants, the "Federal Defendants"); the determination by the DOI to take 13,003.89 acres of land in the Counties into trust for the benefit of the ON (the "Determination"); Oneida Nation of New York ("ON").

[2] This opposition is submitted on behalf of all Plaintiffs.

fundamentally, the CN lack standing, as the CN's claimed injury is speculative, the claims it asserts are not ripe, and the Motion relies on hypothetical and speculative facts. Even if it had standing to assert the objections it raises, however, the CN would be barred from doing so since the State is immune from suit under the Eleventh Amendment and has not waived that immunity as to any interest the CN purports to assert against it. The Motion also fails under the plain terms of Rule 24. The CN has not met the requirements for either as of right or permissive intervention, and have failed to append to their motion a proposed pleading as required by Rule 24(c).

STATEMENT OF RELEVANT FACTS

Procedural History And Status Of Proceeding

The State and Counties filed this action on June 19, 2008, following the Secretary's publication of a Record of Decision detailing the Determination on May 20, 2008. Plaintiffs' original complaint asserted seventeen claims, in which the Plaintiffs, among other things, challenged the constitutionality of the Indian Reorganization Act ("IRA") under which the DOI made the Determination, asserted that the Determination was made without statutory authorization, challenged the Determination as arbitrary, capricious and contrary to law, and asserted violations of the Freedom of Information Act. Following the DOI's acceptance in trust for the ON of a separate 18 acres of land under 40 U.S.C. § 523, Plaintiffs supplemented their complaint in 2009 and added claims challenging that decision.

The parties have briefed and argued, and the Court has decided, a series of dispositive motions and procedural motions. Over the course of 2008 and 2009, the Federal Defendants and ON moved twice to dismiss a number of causes of actions, and the Plaintiffs moved for summary judgment on one cause of action. The Court issued a decision on those motions on September

29, 2009. Dkt. No. 132. Following the filing by the Federal Defendants of the administrative record, and amendments thereto, the parties engaged in additional motion practice regarding extra-record discovery. After completion of discovery, the parties briefed cross-motions for summary judgment, which resulted in the Court's decision to remand the Determination back to the DOI for consideration of the ON's eligibility under 25 U.S.C. § 465 and the Supreme Court's decision in Carcieri v. Salazar, 555 U.S. 379 (2009). See Dkt. No. 276.

At no point in the five years that this action has been pending has the CN sought to intervene, or even requested permission to appear as amicus curiae. It is only now, nine months after the Court's last decision, when the State, Counties and ON have announced their agreement to resolve this action, along with many other disputes among them, that the CN takes an interest and moves to intervene to block that settlement.

The Settlement

The State, Counties and ON have entered into a comprehensive settlement agreement – which they anticipate will soon be submitted to the Court for approval – that addresses an array of outstanding issues that have been in dispute for years, including the land-into-trust decision that is the subject of this action. In addition to the issues raised in this proceeding, the Settlement Agreement (attached to the CN's papers at Dkt. No.280-4) resolves issues relating to the amount of land the ON may in the future seek to have taken into trust; the taxation of ON land; the status of ON and County real property tax litigation with respect to ON land; the application of sales tax to sales of tobacco and fuel to non-Indians occurring on ON land; and gaming under the State/ON gaming compact, including, among other things, to authorize the ON to offer slot machines and related gaming devices at its Turning Stone Casino and Resort, along with the State's commitment to provide gaming exclusivity within a defined geographic area. In addition,

and in consideration of all of the foregoing, especially the resolution of the taxation of ON lands, the ON has agreed to pay the State a percentage of the revenue from gaming devices, a portion of which the State will distribute to the Counties. Under the exclusivity provisions of the Settlement Agreement, the State agrees that subject to certain exceptions, it will not install or operate, or authorize anyone to install or operate, Class III gaming activities in Oneida, Madison, Onondaga, Oswego, Cayuga, Cortland, Chenango, Otsego, Herkimer and Lewis Counties (the "Exclusivity Zone"). Settlement Agreement at p. 6 (§ IV(A)). Contrary to the apparent contention of the CN, however, the Settlement Agreement does not prohibit the State from negotiating with other tribes with jurisdiction over tribal lands within the Exclusivity Zone concerning the conduct of Class III gaming on such tribal lands.

The CN

The CN is a federally recognized tribe that owns land within Cayuga and Seneca Counties that it considers to be part of its historic reservation. Halftown Decl. (Dkt. No. 280-3) ¶ 2. Despite its location within the boundaries of what the CN alleges to be its historic reservation, the CN does not have sovereignty or jurisdiction over the land, a pre-requisite to negotiations with the State regarding Class III gaming. See infra Section I.B.

In an apparent effort to obtain jurisdiction, the CN has applied to the DOI to take land CN owns in Cayuga and Seneca Counties into trust, although no final determination has been made on those applications. Halftown Decl. ¶ 3. In those applications, the CN has identified certain of the land it seeks to have taken into trust as land on which it intends to resume conducting Class II (i.e., bingo and related types of gaming) gaming operations, but mentioned no plans for Class III gaming. Baldwin Decl. Exs. A & B (proposing no change in use of its land).

Although the CN has made a pro forma request to enter into negotiations with the State for a Class III gaming compact, see Baldwin Decl. Ex. C (June 6, 2013 letter from Clint Halftown & Tim Twoguns , CN to Governor Andrew M. Cuomo) (the "June 6 Letter"),[3] it has also implicitly acknowledged that it would need the DOI to take land into trust before it would be eligible to conduct such activities. Baldwin Decl. Ex. D (May 21, 2013 letter from Clint Halftown & Tim Twoguns, CN to Governor Andrew M. Cuomo) ("The Nation expects that its trust application will be approved. Thus, even if the Nation were not currently eligible to conduct gaming pursuant to IGRA in Cayuga County, it will be eligible to do so in the future.").

The CN's Motion

The CN has moved to intervene under Federal Civil Procedure Rules 24(a)(2) and (b), claiming that its purported rights to Class III gaming under IGRA (including its purported right to conduct good faith negotiations with the State for a gaming compact) are harmed by the Settlement Agreement's Exclusivity Zone because the Exclusivity Zone includes the CN's land in Cayuga County. CN Mem. (Dkt. No. 280-2) at 4. In addition, the CN claims that if the United States signs a stipulation of dismissal of this action incorporating the terms of the Settlement Agreement, it will violate its trust obligation to the CN.

Consistent with the fact that the CN does not have, or claim to have, any interest in the subject matter of this action, and does not seek to participate in the claims or defenses asserted by the parties, the CN does not purport to intervene on the side of the Plaintiffs or the Defendants and does not attach a proposed complaint, answer, cross-claim or any other pleading to the

[3] There are serious questions as to whether the purported request for negotiations with the State is a proper and valid request under IGRA, including but not limited to the lack of CN jurisdiction over the land on which it seeks to conduct gaming operations and the uncertainty of the CN's land-into-trust application (see infra Section I.B), the lack of a tribal ordinance authorizing Class III gaming (id.), and the uncertain status of Clint Halftown and Tim Twoguns, signatories to the June 6 Letter, as the rightful representatives of the CN. See infra note 4. The State, however, is continuing to evaluate the June 6 Letter and has not yet reached a determination as to how to respond to it.

Motion. Instead, the CN encloses a Notice of Intended Objections to the Settlement Agreement. Those objections are based upon the CN's argument, described above, that "the Agreement would *prohibit* the State from allowing the Nation to conduct Class III gaming in the county where the majority of its reservation land is located – and thus would prohibit the State from negotiation with the Nation in good faith for such a compact." CN Mem. at 7.

ARGUMENT

I. THE CN LACKS STANDING TO INTERVENE

A. The CN Does Not Intervene On Either Side Of The Dispute And Thus Must Establish Its Own Standing

Although courts typically do not inquire as to the standing of a putative intervenor (see, e.g., United States Postal Serv. v. Brennan, 579 F.2d 188, 190 (2d Cir. 1978)), that rule has no application here because the CN does not seek to intervene as a plaintiff or defendant, but rather seeks to challenge the actions of all the existing parties based on claims that have not been raised in, and have no bearing on, the merits of this action. In these circumstances, the CN cannot simply rely on the standing of the existing parties, but must independently establish its own standing. See Diamond v. Charles, 476 U.S. 54 (1986). In Diamond, the Supreme Court held that a defendant-intervenor in the trial court had no standing on appeal where the original defendant did not appeal. The Court held that the "ability to ride 'piggyback'" on the defendant's standing ceased to exist when the defendant was not an appellant and "there is no case" to join. Id. at 68. The Supreme Court found that "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." Id. at 68 (emphasis added).

Here, the CN does not seek to "piggyback" on the standing of the Plaintiffs, the Federal Defendants, or the Defendant-Intervenor, ON. Rather, it attempts to assert new unrelated interests that are adverse to all of the parties. As such, the CN must demonstrate that it has constitutional standing to assert these interests. See Diamond, 476 U.S. at 68.

B. The CN Lacks Constitutional Standing And Its Asserted Interests Are Not Constitutionally Ripe

Constitutional standing requires a showing of three elements:

> First, the plaintiff must have suffered an 'injury in fact'-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'' Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted). In addition, this Court has recognized that "[r]ipeness is a constitutional perquisite to a federal court's exercise of jurisdiction . . . [a] case must be ripe before a federal court has jurisdiction to grant relief." DiBello v. Town of N. Greenbush Planning Bd., No. 1:09-cv-00692, 2012 WL 6058136, at *3 (N.D.N.Y. Dec. 6, 2012) (Kahn, J.) (Baldwin Decl. Ex. J).

The only interest identified by the CN and the allegedly threatened harm to such interest, are hypothetical and conjectural rather than actual and imminent, and thus do not support standing. The lynchpin of the Motion is the contention that the Exclusivity Zone of the Settlement Agreement may prevent the State from negotiating with the Cayuga for a Class III gaming compact. See CN Mem. at 7.

As a threshold matter, the CN does not have the capacity to engage in Class III gaming.[4] An essential predicate for the CN to have that capacity is tribal sovereignty over the land on which the gaming is to be conducted. Specifically, Section 2710 of IGRA states that in order to conduct Class III gaming, on "Indian lands" such activities must be "authorized by an ordinance or resolution that – (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands, (ii) meets the requirements of subsection (b) of this section, and (iii) is approved by the Chairman." 25 U.S.C. § 2710(d)(1)(A). The June 6 Letter references no such ordinance or resolution, nor has any ordinance or resolution been approved and published by the National Indian Gaming Commission ("NIGC"). See NIGC, Gaming Ordinances, available at http://www.nigc.gov/Reading_Room/Gaming_Ordinances.aspx (last visited July 23, 2013). Indeed, such an ordinance or resolution would need to be adopted by a tribe "having jurisdiction over such lands," a requirement that the CN does not presently satisfy. 25 U.S.C. § 2710(d)(1)(A)(i). Moreover, such gaming activities must be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect." 25 U.S.C. § 2710(d)(1)(C).

[4] The standing of the current CN leadership to even assert claims regarding Class III gaming is suspect. The current CN federal representatives and CN Council, Clint Halftown (whose declaration supports the Motion) Tim Twoguns, and Gary Wheeler were removed from office by Cayuga Nation Resolution 11-001, and the BIA recognized new CN Council members and federal representatives in a letter by Franklin Keel, Director of the Eastern Region, dated August 19, 2011. Baldwin Decl. Ex. E (Letter from Franklin Keel, BIA to Daniel J. French, counsel for CN). Although that determination has been stayed pending Mr. Halftown's appeal to the IBIA, no final decision has been made. The new CN council members and federal representatives have stated that "[w]e don't believe in gaming." Baldwin Decl. Ex. F (New Leader Promises No Gambling, Seneca Daily News, Aug. 23, 2011, also available at http://senecadaily.com/?p=4334 (last visited July 23, 2013)). If the new leadership were to be affirmed by the IBIA, then the current proposed intervenors would not represent the CN and they would lack standing to press the claims asserted in this Motion. Timbisha Shoshone Tribe v. Salazar, 678 F.3d 935 (D.C. Cir. 2012). See also Shenandoah v. U.S. Dept. of Interior, 159 F.3d 708, 713 (2d Cir. 1998) ("…the BIA's determination that [a certain member] does not represent the Nation may well moot plaintiffs' claims. . . . In light of the fact that the Department has before it an appeal in which the Nation leadership has been raised and may be determined, we think it appropriate to afford the Department an opportunity in the first instance to decide this threshold issue upon which plaintiffs' first five claims may turn").

In order to properly request a state to enter into negotiations for a Class III compact, the tribe must have "jurisdiction" over the land on which the gaming is to occur. See 25 U.S.C. § 2710(d)(3)(A) ("Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact. . . ."); 2710(d)(1)(A); see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler, 173 F. Supp. 2d 725, 727-28 (W.D. Mich. 2001), aff'd 304 F.3d 616 (6th Cir. 2002) (dismissing IGRA claim for good faith negotiation by tribe that did not have "jurisdiction over that land"). Owning land in fee simple does not constitute "having jurisdiction" over that land. Engler, 173 F. Supp. 2d at 727-28.

The CN does not have sovereignty or jurisdiction over any Indian lands, [5] a fact that has been repeatedly made clear by the cases. In its seminal decision in Sherrill, the Supreme Court held that a tribe, like the CN, cannot reacquire tribal sovereignty over land within the bounds of an historic reservation by purchasing such land. The Second Circuit and district courts have applied this holding specifically to the CN. Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266 (2005) (applying Sherrill to the CN); Cayuga Indian Nation of New York v. Village of Union Springs, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005) (holding that CN is subject to jurisdiction of State and municipalities); Cayuga Indian Nation of New York v. Seneca County, 890 F. Supp. 2d 240 (W.D.N.Y. 2012) ("[A]ccording to Sherrill, the Cayugas cannot assert any

[5] It is disputed that the CN's lands constitutes Indian lands as defined under IGRA. 25 U.S.C. §§ 2703(4). The issue of whether the CN today possess a reservation as a matter of federal law is at issue in a matter pending before the Second Circuit. See Cayuga Indian Nation of New York v. Seneca County, No. 12-3723-cv (2d Cir. 2013); Baldwin Decl. Ex. G (Seneca County Appellant Brief) at 1-2. In the absence of reservation status, there are additional requirements as to the CN's land that must be satisfied before the lands may be considered Indian lands under IGRA – which requirements in part mirror the "having jurisdiction" as a prerequisite to compact negotiations requirements set forth above. See Kansas v. United States, 249 F.3d 1213, 1228 (10th Cir. 2001) (In order for a tract to qualify as "Indian lands" under IGRA, "(1) the Tribe must have jurisdiction over the tract, (2) fee title to the tract must be restricted or not freely alienable, and (3) the Tribe must exercise governmental power over the tract.").

sovereign authority over the recently-purchased land, 'in whole or in part,' due to equitable considerations, even though it may lie within the Reservation."); Cayuga Indian Nation of New York v. Gould, 14 N.Y.3d 614, 642-43 (2010) (cited at CN Mem. at 3) ("City of Sherrill certainly would preclude the Cayuga Nation from attempting to assert sovereign power over its convenience store properties . . . .").[6]

In the absence of jurisdiction over the land, the CN does not have any right to conduct Class III gaming. For the same reasons, it does not appear that the CN has the capacity to properly request the State to negotiate the terms of a gaming compact to govern such gaming. See Engler, 304 F.3d at 618 ("Having jurisdiction over land for the casino is a condition precedent to negotiations and federal jurisdiction."). See also Mechoopda Indian Tribe of Chico Rancheria v. Schwarzenegger, No. Civ. S-03-2327, 2004 WL 1103021, at *7 (E.D. Cal. Mar. 12, 2004) (Baldwin Decl. Ex. K(("[S]tanding under 25 U.S.C. §§ 2710(d)(3)(A) and (d)(7) to compel compact negotiations with defendants requires that the Tribe presently possess jurisdiction over 'Indian lands,' as defined by the IGRA"). As noted above, the CN appears to recognize that obstacle. See Baldwin Decl. Ex. D.

Although the CN has applied to have certain of its fee-owned land taken into trust, presumably in order to try to remedy the lack of jurisdiction over its land, the DOI has not made a determination on that application. Moreover, in its application, the CN has not identified any of its land as intended for Class III gaming. Before the Supreme Court's decision in Sherrill, the CN unlawfully operated Class II gaming operations on two parcels – one each in Cayuga County

[6] The CN in fact has conceded before the Second Circuit that it does not have sovereign authority over its tribally owned land under Sherrill and its progeny regardless of the reservation's current legal status. Baldwin Decl. Ex. H (CN Appellee Brief) at 32 n.12. Indeed, in Sherrill, the Supreme Court specifically cited the CN as an example of the deleterious effects that would result from a tribe being able to unilaterally exercise jurisdiction over land that has been under the State's and municipalities' jurisdiction. See City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 219 n.13 (2005) (noting that the CN sought to renovate land "located within 300 yards of a school" for use as a gaming facility). Justice Ginsburg was referring to the same land on which the CN claims it has a right to conduct Class III gaming operations in this Motion.

and Seneca County – before shutting down those operations post-Sherrill after challenges to their legality. See generally Union Springs, 390 F. Supp. 2d at 206. The environmental impact statement filed in support of the land into trust does not contain any discussion of the impact of constructing and operating a Class III gaming facility on those or other parcels, as it would have if the CN were to use the land for Class III gaming facilities. Baldwin Decl. Ex. I (Final Environmental Impact Statement for CN land-into-trust application) ("Consistent with federal regulations, the LakeSide Entertainment Class II gaming facilities will not be 'casinos' with table gaming (e.g., poker, blackjack, or roulette) or slot machines."). Even if land were to be taken in trust for the benefit of the CN, IGRA generally prohibits gaming activities on land acquired into trust after October 17, 1988, subject to certain exceptions. See 25 U.S.C. §§ 2719(a), 2719(b)(1).

In short, the CN's professed concern that the State may decline to negotiate in good faith with the CN regarding a Class III gaming compact is at best hypothetical because, even assuming the validity of the June 6 Letter as a proper request under IGRA, the State has 180 days to evaluate such request and enter into good faith negotiations. 25 U.S.C. § 2710(d)(7)(A)(i), (B)(i). Such period would end on December 3, 2013. That speculative nature of the CN's interest is further underscored by an examination of the basis for the CN's purported concerns – the allegation that the Settlement Agreement effectively prevents the State from permitting the CN or anyone else to conduct Class III gaming within an area that includes Cayuga County, where the CN currently own land. In fact, the Settlement Agreement does not prevent the State from negotiating a Class III gaming compact with the CN.

The CN claims that its historic reservation encompasses land in both Cayuga and Seneca Counties. Seneca County does not come within the Exclusivity Zone defined in the Settlement

Agreement at all, so there is nothing in the agreement which could possibly be construed as preventing the State from negotiating a Class III gaming compact with the CN. And, notably, IGRA imposes no obligation on a state to negotiate for Class III gaming on a specific site chosen by a requesting tribe. See Wisconsin Winnebago Nation v. Thompson, 824 F. Supp. 167, 169 (W.D. Wis. 1993), aff'd 22 F.3d 719 (7th Cir. 1994) (A tribe "does not have the right under the Indian Gaming Regulatory Act to determine unilaterally where on its Indian lands it will conduct Class III gaming."). Thus, a state fulfills its obligation under IGRA if it negotiates in good faith for a Class III facility on the Indian lands of a requesting tribe. Given the availability of CN-owned land in Seneca County upon which a Class III gaming facility could be located, the Settlement Agreement could in no way prevent the State from meeting its obligations under IGRA.[7]

In other words, the Settlement Agreement does not threaten any "actual or imminent" harm to a cognizable interest of the CN, and its claims are not constitutionally ripe.

C. The CN's Claim Lacks Prudential Ripeness

Even if the CN has constitutional standing to assert its claims, its claims lack prudential ripeness. "Both constitutional and prudential ripeness are addressed to this concern of maturity but are not coextensive . . . [prudential ripeness] is a more flexible doctrine of judicial prudence, and constitutes an important exception to the usual rule that where jurisdiction exists a federal court must exercise it." D'Agostino v. DiNapoli, No. 1:09-CV-1347, 2010 WL 2925703, at *3 (N.D.N.Y. July 20, 2010) (Kahn, J.) (citation omitted) (Baldwin Decl. Ex. L). AMSAT Cable Ltd. v. Cablevision of Connecticut Ltd., 6 F.3d 867, 872 (2d Cir. 1993) (Courts "will find a case

[7] Moreover, the Settlement Agreement does not by its terms prevent the State from negotiating with the CN for Class III gaming even in Cayuga County. Although there might be adverse consequences to the State (under the Settlement Agreement) if the State were to consummate a gaming compact with the CN permitting Class III gaming in Cayuga County, that is not a bar to the State's engaging in such negotiations with the CN.

to lack ripeness when it 'involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all.") (citations omitted). First, the harm cited by the CN is hypothetical and speculative because the CN's rights are contingent on future events that may not occur. Second, denial of the Motion will not cause the CN a hardship because IGRA provides it with a private right of action in the event that the CN were to establish a threshold right to negotiate with the State for a gaming compact and the State refuses.

At this time, the CN cannot claim that it has been deprived of rights to negotiate for a Class III gaming compact with the State because, as set forth above, it has no such rights at this time without jurisdiction over its land. See supra Section I.B. In order for such rights to arise and an injury to possibly exist to support standing here, the following conditions, among others, must exist: 1) the Court must approve the Settlement Agreement; 2) the DOI must decide to take land into trust for the benefit of the CN in Cayuga County (and not Seneca County) so that the CN only has jurisdiction over the land in Cayuga County (see 25 U.S.C. § 2710(d)(1) & (d)(3)); 3) the CN must decide to conduct Class III gaming in Cayuga County; 4) the CN must then make a proper request the State to negotiate a gaming compact in good faith; 5) the State must refuse to negotiate in good faith; and 6) the CN must have no available judicial or administrative remedy for the State's refusal to so negotiate (i.e., the State invokes its sovereign immunity from suit if and when the CN pursues an action under IGRA, and the CN is unable to obtain lawful administrative relief from the DOI).

The CN's Motion is implicitly based on the presupposition that all of the enumerated events above will occur. Thus, any opinion issued by the Court at this juncture would be an advisory opinion based on a set of hypothetical, and Plaintiffs submit, highly unlikely, facts.

Given the possibility that any of the above events do not occur – and none are certain at this point in time – the claim CN asserts is not ripe for adjudication.

In any event, even if the June 6, 2013 Letter were a proper request, the CN can assert a cause of action against the State for failure to negotiate in good faith "only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations." 25 U.S.C. § 2710(d)(7)(B)(1). After that time has passed, if in fact the State has failed to negotiate in good faith, the CN will have an express remedy, a remedy which under IGRA is the tribe's exclusive remedy. See 25 U.S.C. § 2710(d)(7)(B)(i) – (vii) (prescribing procedures for filing an action against the State for failure to negotiate in good faith, renegotiation after a finding of lack of good faith negotiation by the court, court appointment of a mediator, and resort to the Secretary for terms of a compact). There is nothing in the Settlement Agreement that impairs this remedy.

II. THE RELIEF SOUGHT BY THE CN IS BARRED BY SOVEREIGN IMMUNITY

The CN essentially seeks to judicially compel the State to negotiate regarding Class III gaming independent of the underlying lawsuit. The State is, however, immune from suit under the Eleventh Amendment and the relief sought in the Motion is therefore barred. See Western Mohegan Tribe & Nation v. Orange County, 395 F.3d 18, 20-21 (2d Cir. 2004) ("The reach of the Eleventh Amendment has, of course, been interpreted to extend beyond the terms of its text to bar suits in federal courts against states, by their own citizens or by foreign sovereigns, in federal court."). Absent waiver of that immunity, the courts have repeatedly held that the Eleventh Amendment shields states from suits by Indian tribes. See, e.g., Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991) (holding that states enjoy Eleventh Amendment immunity from suits brought by Indian tribes).

The CN cites no basis for finding a waiver by the State of its immunity in the context of this case. IGRA – the only federal statute that CN invokes in its papers – does not abrogate a State's Eleventh Amendment immunity. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72-73 (1996) (Congress lacked authority under the Indian Commerce Clause to abrogate the State's Eleventh Amendment immunity in IGRA, such that the State may not be judicially compelled to negotiate, and the doctrine of Ex Parte Young was inapplicable in light of IGRAs "intricate remedial scheme" for failure of State to negotiate in good faith).

In addition, the provision for "Limited Waivers of Sovereign Immunity" in the Settlement Agreement "for the limited purpose of, and consent to, enforcement of the terms of this Agreement according to its terms by arbitration or before the Northern District of New York having jurisdiction to enforce the settlement . . . " is unambiguously limited to enforcement of the agreement by and between the parties. Settlement Agreement § VII(A). It is, therefore, of no aid to CN. See Lane v. Pena, 518 U.S. 187, 192 (1996) ("[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign."). See also Diaz v. United States, 517 F.3d 608, 611 (2d Cir. 2008) ("Waivers of sovereign immunity must be 'unequivocally expressed;' the government's consent to be sued is strictly construed and cannot arise by implication."); SEC v. Credit Bancorp, Ltd., 297 F.3d 127, 136-37 (2d Cir. 2002) ("[T]he court has no power to broaden a limited waiver of immunity.").

Because the CN seeks relief against the State which does not come within the State's narrow waivers of immunity, the CN's claims are barred by the Eleventh Amendment. As such, the Motion must be denied.

III. THE CN'S MOTION SEEKS IMPERMISSIBLE SPECIAL STATUS AND DOES NOT SATISFY THE PLEADING REQUIREMENT OF RULE 24

The Federal Rules do not anticipate "limited, 'special status' intervenors," New York News Inc. v. Newspaper & Mail Deliverers' Union, 139 F.R.D. 291, 292-93 (S.D.N.Y. 1991), which is why "the Federal Rules require potential intervenors to submit with their applications a proposed pleading, setting forth the claim sought to be pursued." Id. District Courts in the Second Circuit disfavor such special intervenor status:

> The movants here, on the other hand, do not seek to join this action as either plaintiffs or as defendants. They have no claim to press against defendants; nor have they any defense to assert against plaintiffs. In fact, they have no intention whatsoever of litigating the causes of action asserted in the federal complaint. Their sole purpose in submitting their motion is to delay the prosecution of the federal action. With this goal in mind, they dress in the language of Rule 24 what is in reality an application for some special status permitting them to press their motion for a stay. For this reason alone, the court believes that the application to intervene should be denied.

Kamerman v. Steinberg, 681 F. Supp. 206, 211 (S.D.N.Y. 1988). Yet, that is exactly what CN attempts to do here. Not only does it not submit a pleading (as discussed below) but it does not address the claims and defenses asserted in the action by the parties in any way. The Motion is an impermissible request for the CN to be accorded special status as an objector to the parties' settlement.

Rule 24(c) expressly provides that a motion to intervene must be "accompanied by a pleading that sets out the claim or defense for which the intervention is sought," a requirement that this Court has recognized and applied in this case. See Dkt. No. 48 (addressing ON's motion to intervene). Rule 7(a) defines the term pleading through an exhaustive list of examples: a complaint, an answer to a complaint, an answer to a counterclaim designated as a counterclaim, an answer to a crossclaim, a third-party complaint, an answer to a third-party complaint, and a reply to an answer. Fed. R. Civ. P. 7(a) ("Only these pleadings are allowed . . . ."); Arthur

Williams, Inc. v. Helbig, No. 00 Civ. 2169 SHS, 2001 WL 536946, at *2 (S.D.N.Y. May 21, 2001) (Baldwin Decl. Ex. M) ("Only those papers specifically named in Rule 7(a) constitute pleadings" (citing Burns v. Lawther, 53 F.3d 1237, 1241 (11th Cir. 1995) (Rule 7(a) provides "a clear and precise meaning of 'pleadings' . . . [and] explicitly excludes everything else from its definition of pleadings")).

The CN has not attached a "pleading" to its Motion and does not – because it cannot – present a claim as an intervenor-plaintiff or a defense as an intervenor-defendant. The exhaustive list of pleadings in Rule 7 does not include a Notice of Intended Objections to a settlement, which is the only thing the CN does attach to its motion. Consequently, the Motion should be denied.

IV. THE CN DOES NOT MEET THE STANDARDS FOR RULE 24(a) INTERVENTION

Four requirements must be met before an intervention as of right under Rule 24(a) is permitted: (1) a timely application, (2) an interest relating to the property or transaction which is the subject of the action, (3) the applicant is so situated that the disposition of the action may . . . impair or impede the applicant's ability to protect that interest, (4) unless the applicant's interest is adequately represented by existing parties. Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co., 922 F.2d 92, 96 (2d Cir. 1990) (quoting Fed. R. Civ. P. 24(a)(2)). The CN do not meet any of the requirements, and thus the motion to intervene should be denied.

A. The CN Does Not Have A Legitimate, Protectable Interest

In order to satisfy Rule 24(a), a movant's interest must be "direct, substantial and legally protectable." Washington Elec. Coop., 922 F.2d at 96. The CN's claimed interest is none of those things.

1. The CN Has No Federally Protected Right To Class III Gaming Or Good Faith Negotiation With The State Under IGRA

As noted above, in order to conduct Class III gaming on Indian Lands, and in order to request a State to negotiate a compact to govern the conduct of Class III gaming, the tribe in question must have jurisdiction over the land on which such gaming is to take place. See 25 U.S.C. § 2710(d)(3)(A) ("Any Indian tribe having jurisdiction over the Indian lands upon which a Class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such compact.") (emphasis added). Although the CN claims that its "reservation in New York state remains extant" (CN Mem. at 3), the uniform case law is that the CN does not have jurisdiction over that land – the State and municipalities do. See Sherrill, 544 U.S. at 203; Pataki, 413 F.3d 266 (applying Sherrill to CN); see also Union Springs, 390 F. Supp. 2d at 206; Gould, 14 N.Y.3d at 642-43.

Accordingly, since the CN does not have jurisdiction over any land it owns in Cayuga County, it has no claim to rights for Class III gambling or good faith negotiation under IGRA.

2. Any Interest Claimed By The CN Is Too Remote And Contingent

An interest asserted under Rule 24(a) "must be direct, as opposed to remote or contingent." Restor-A-Dent Dental Labs. v. Certified Alloy Prods., Inc., 725 F.2d 871, 874-75 (2d Cir. 1984) (denying Rule 24(a) intervention where the interest asserted depended on two contingencies).

The CN claims that "IGRA protects the Nation's ability to conduct Class III gaming on its reservation land pursuant to a duly negotiated compact" and that the Settlement Agreement "would prohibit the State from negotiation with the Nation in good faith for such a compact."

CN Mem. at 7. As discussed supra Section I.B., the CN has no present right under IGRA to conduct Class III gaming or to properly request good faith compact negotiations with the State. Such an interest is contingent upon the occurrence of: 1) a valid, final determination by the DOI taking land into trust for the CN so that the CN is an "Indian tribe having jurisdiction" over such lands under 25 U.S.C. § 2710(d); 2) the CN deciding that Class III gaming "is to be conducted," and passing and ordinance or resolution approved by the Chairman of the NIGC,[8] and 3) the CN properly requesting the State to enter into negotiations for a gaming compact pursuant to 25 U.S.C. § 2710(d)(3)(A).

3. The Court Is Presently Without Jurisdiction To Hear The CN's IGRA Claim And The Relief Sought Is Not Sanctioned By IGRA

IGRA provides a detailed statutory scheme created an express private cause of action and a specific remedy. Section 2710(d)(7) lays out the jurisdictional prerequisites for an action against a State under IGRA, and the enumerated, limited relief available. As the Sixth Circuit stated, IGRA "establishes a jurisdictional prerequisite to federal court relief," to wit:

> Having jurisdiction over land for the casino is a condition precedent to negotiations and federal jurisdiction. The plain language of § 2710(d)(3)(A) states that for federal courts to have jurisdiction, the tribe seeking relief must be an "Indian tribe having jurisdiction over the Indian lands upon which a Class III gaming activity is ... to be conducted." Section (3)(A) describes not just an Indian tribe, but one that is in possession of land. As the district court found, "[t]he sentence is best read conjunctively-the party must be an Indian tribe **and** it must have land over which it exercises jurisdiction **and** it must be operating or contemplating the operation of a gaming casino."

Engler, 304 F.3d at 618 (citation omitted). Indeed, Section 2710(7)(A) expressly limits district courts' jurisdiction: "The United States district courts shall have jurisdiction over . . . any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations

[8] As explained above, it is far from certain that the CN leadership in place when and if the CN has rights under IGRA to good faith Class III gaming compact negotiation will seek to conduct Class III gaming. See supra note 4.

with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith." 25 U.S.C. § 2710(d)(7)(A)(i).

Since the CN does not exercise sovereign jurisdiction over the land it presently owns in Cayuga County, the jurisdictional prerequisites are not met. Even if the June 6 Letter is a valid request under IGRA, the CN has to wait until the "close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A)" before it can bring suit. 25 U.S.C. § 2710(d)(7)(B)(i).

Even if the CN could satisfy the jurisdictional prerequisites, the remedy it seeks – denial of a settlement agreement between the State and a different tribe – is not supported by IGRA. The Ninth Circuit has held that IGRA does not provide for a private cause of action "for every violation of IGRA." See Hein v. Capitan Grande Band of Digueno Mission Indians, 201 F.3d 1256 (9th Cir. 2000) ("[W]here IGRA creates a private cause of action, it does so explicitly. . . . Where a statute creates a comprehensive regulatory scheme and provides for particular remedies, courts should not expand the coverage of the statute."). Indeed, the Supreme Court recognized that "Congress intended § 2710(d)(3) to be enforced against the State in an action brought under § 2710(d)(7); the intricate procedures set forth in that provision show that Congress intended therein not only to define, but also to limit significantly, the duty imposed by § 2710(d)(3)." Seminole Tribe, 517 U.S. at 74-75. "[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); see also Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 63 F.3d 1030, 1049 (11th Cir. 1995) (dismissing claim under IGRA and declining to read a private right of action into IGRA where Congress has expressly provided for them).

Notably absent from the comprehensive remedies under Section 2710(d)(7)(B) is the relief that the CN seeks in this action – status to block a settlement between the State and a different tribe. Accordingly, the Motion must be denied.

B. Even If The CN Did Have A Direct And Protectable Interest, It Is Not Related To The Subject Matter Of This Action

A key requirement for intervention under Rule 24(a) is that the interest must relate directly to the subject matter of the action. See Alston v. Coughlin, 109 F.R.D. 609, 613 (S.D.N.Y. 1986) (denying intervention where intervenor's interest "relates to the subject matter of the suit only in an indirect and hypothetical manner"). "The purpose of the rule allowing intervention is to prevent a multiplicity of suits where common questions of law or fact are involved." Washington Elec. Coop., 922 F.2d at 97. Intervention under Rule 24(a) "requires a showing that disposition of the proceeding without the involvement of the putative intervenor would impair the intervenor's ability to protect its interest." Id. at 98 (denying intervention where disposition of the proceeding "will not operate to bar under the doctrines of res judicata or collateral estoppel" any future attempts of the movant to pursue its concerns). In fact, "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 Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc., 471 F.3d 377, 389-90 (2d Cir. 2006). As such, "[i]ntervenors must take the pleadings in a case as they find them" and cannot "radically alter that scope to create a much different suit." Washington Elec. Coop., 922 F.2d at 97.

This is an action under the Administrative Procedure Act challenging the Federal Defendants' decision to take land into trust for the ON as arbitrary and capricious and contrary to the DOI's regulations and procedures. The Administrative Record and Determination in this case do not relate at all to the CN's purported interest. Put another way, the CN's absence from

this litigation will not cause harm to its interests, see MasterCard, 471 F.3d at 390, and the CN is not a necessary party because approval of the Settlement Agreement will not bar any claim by the CN under 25 U.S.C. § 2710(d)(7) that the State has refused to negotiate in good faith.

In similar circumstances the courts have rejected intervention. See Sokaogon Chippewa Community v. Babbitt, 214 F.3d 941 (7th Cir. 2000). In that case, a partnership of tribes applied to acquire trust land for gaming purposes. Id. at 943-944. The application was denied by the DOI and the applicants challenged the decision under the APA alleging that the denial "was arbitrary and capricious and violated applicable laws, regulations, and internal policies and procedures." Id. at 944. The parties eventually entered into a settlement agreement stipulating that the DOI would withdraw the denial and re-review the application. The settlement expressly stated that competition with respect to other tribes' casinos "shall not be determinative in Interior's decisionmaking." Id. at 944-945. The St. Croix tribe, operator of a nearby casino, filed a motion to intervene days before the negotiations ended. The court found that the tribe

> cannot use alleged legal problems with the Settlement Agreement to bootstrap itself into this litigation. That the St. Croix waited until settlement was imminent strongly suggests that the tribe was not interested in intervening in the litigation but in blocking a settlement between the parties – or, at a minimum, this settlement.

Id. at 948.

A similar situation is present here. Like the underlying litigation in Sokaogon, this suit challenges the practices the DOI used to arrive at the Determination (in addition to challenging the constitutionality of the land-into-trust provisions of the Indian Reorganization Act). See Sokaogon, 214 F.3d at 947 ("However hard it may be for the St. Croix to show that it has an interest in the ultimate outcome of the application process, here it faces the even tougher job of showing that it has a right to complain about the procedures the agency is using."). And like the

St. Croix in Sokaogon, the CN has no interest in intervening in the action, but instead seek only to block the implementation of the Settlement Agreement which it would be unable to accomplish if this litigation were not pending.

The CN does not claim that any protectable interest is prejudiced by the Determination or subsequent acceptance by the DOI of lands into trust for the benefit of the ON (nor could it validly do so), and consequently, the CN's claimed interest is simply not encompassed within this action.[9] The CN's rights under IGRA are irrelevant to this action. And, as the Seventh Circuit noted, "[t]he district court's approval of the Settlement Agreement, however, is only binding between the parties to it . . . . Others – like the St. Croix – who are not parties to the Settlement Agreement are not bound by its terms and are free to challenge any administrative decisions that emerge from the process." 214 F.3d at 949. If the CN is ever in a position properly to request a Class III gaming compact and the State does not negotiate in good faith, the CN may seek to maintain judicial action under IGRA or, if the State invokes immunity, may seek any valid administrative remedy provided by the DOI.

Consequently, since any interest of CN is wholly unrelated to the subject matter of this action, the Motion must be denied.

V. THE CN DOES NOT MEET THE STANDARD FOR PERMISSIVE INTERVENTION UNDER RULE 24(b)

Under Rule 24(b) a movant must prove that it "has a claim or defense that shares with the main action a common question of law or fact," Fed. R. Civ. P. 24(b)(1)(B), and the court must consider in its discretion "whether the intervention will unduly delay or prejudice adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). "Additional relevant factors 'include the

[9] Even if the CN could assert an interest and tie it to the underlying action, this motion would be untimely as the issues at play in this litigation were joined over three years ago when the Federal Defendants and the ON answered the Second Amended and Supplemental Complaint. See Dkt. Nos. 136, 137.

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. v. Siemens Med. Sys., Inc., 797 F.2d 85, 89 (2d Cir. 1986) (affirming denial of intervention under Rule 24(b) where would-be intervenor "has no direct interest in the underlying litigation" and failed to demonstrate "that intervention by it will assist in the just and equitable adjudication of any of the issues between the parties") (citations omitted). In addition, permissive intervention can be inappropriate where "intervention would unduly complicate and further delay the litigation" or the interjection of collateral issues to the litigation. See Washington Elec. Coop., 922. F.2d at 98; Great Atlantic & Pacific Tea Co. v. Town of East Hampton, 178 F.R.D. 39, 44-45 (E.D.N.Y. 1998) ("It is also clear, however, that intervention should not be used as a means to inject collateral issues into an existing action, particularly where it serves to delay and complicate the litigation."); United States v. City of New York, 198 F.3d 360, 368 (2d Cir. 1999) (affirming denial of Rule 24(b) intervention where claimed interests "although broadly related to the subject matter of the action, are extraneous to the issues before the court").

For many of the same reasons discussed above, the Court should deny the CN's Motion insofar as it seeks permissive intervention.

There is no common question of law or fact between the CN's purported "claim or defense" regarding its rights under IGRA and the subject matter of this action – to wit, the validity of the DOI's Determination to take land into trust for the ON. As discussed supra Section IV.B, the grounds relied on for the CN's intervention are wholly unrelated to this action. Allowing the CN to intervene and submit its "intended objections" would "radically alter" the

scope of this litigation, creating a completely new action. See Washington Elec. Coop., 922 F.2d at 97 ("[T]he rule is not intended to allow for the creation of whole new suits by intervenors."). There is no record upon which to evaluate the CN's rights under IGRA.

As a result, granting the CN's Motion would cause undue delay and prejudice the adjudication of the original parties' rights by forcing the parties to construct a record of relevant facts and address how the Settlement Agreement – which would settle decades of disputes between the parties, including this action which has been pending for five years – would not affect the speculative and hypothetical rights of the CN under a section of IGRA that is not addressed by the pleadings or supported by the record. Conversely, the CN will not be prejudiced by a denial of the Motion as IGRA provides a private right of action and specific remedy for the precise injury the CN fears, should it ever occur. See 25 U.S.C. § 2710(d)(7).

Not only does the Motion fail to satisfy the threshold factors under Rule 24(b), the other relevant factors identified by the Second Circuit also weigh in favor of denial. The CN has not identified any direct, non-contingent, protectable interest (see supra Section IV.A.2), and the intervention of the CN will not contribute to the development of factual issues in this suit or to the equitable adjudication of the legal questions presented, because it will necessary present new facts and new legal questions that do not arise out of a real case or controversy.

Accordingly, in addition to denying the Motion under Rule 24(a), the Court should deny the Motion under Rule 24(b).

CONCLUSION

For all the foregoing reasons, the Motion should be denied.

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