UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al.,

Plaintiffs,

v. **6:08-cv-644 (LEK/DEP)**

SALLY JEWELL, et al.,

Defendants.

DEFENDANT-INTERVENOR ONEIDA NATION'S
OPPOSITION TO THE CAYUGA NATION'S MOTION TO INTERVENE

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This is an APA case filed five years ago by the State and two counties to challenge DOI's Oneida trust land decision. The parties recently reached a historic settlement, resolving not only this trust action but also all of the disputes that have plagued them for decades. The Cayuga Nation, which never has been able to resolve its disputes with the State, moved to intervene upon learning of the settlement, with the obvious intention to hold the Oneida settlement hostage in order to secure the Cayugas' own agreement with the State.

The IGRA-based casino gaming rights offered by the Cayugas in support of intervention are insufficient for two dominant reasons. First, the Cayugas' argument that IGRA entitles them to a Cayuga County casino and that, in bad faith, the State will not agree to one is entirely hypothetical, involving numerous contingencies and uncertain future negotiations with the State over a gaming compact. Second, under IGRA, any casino rights that the Cayugas have can be protected in a separate lawsuit filed under IGRA or through administrative procedures at DOI.

As a consequence of these two circumstances, the Court lacks jurisdiction to decide the Cayugas' IGRA objection to settlement. Because of the speculative, hypothetical nature of the Cayugas' casino gaming rights under IGRA, the Cayugas cannot establish the article III standing required to give the Court jurisdiction. The Cayugas tout the progress of their trust application, but there is no basis to believe there will be a sudden decision on the application. The Cayugas actually represented to DOI as part of the trust process that they do not intend to have a casino on their trust land. DOI accepted that representation, memorialized it in an FEIS, and concluded that it was consistent with the fact that development of a casino on the Cayugas' lands in Cayuga County or Seneca County is infeasible. Moreover, in the 25 years since IGRA's passage, the Cayugas have never seen fit to enact the casino gaming ordinance required by IGRA or to get approval of it from the National Indian Gaming Commission. Indeed, the Cayugas never saw fit

to formally notice the compact negotiations required to have gaming in Cayuga County or Seneca County, doing so for the first time only two business days before filing their motion to intervene in this case.

The Court also lacks jurisdiction, and the Cayugas lack a cause of action, because IGRA specifies the exclusive remedy that is available to the Cayugas – a bad faith suit against the State if the Cayugas find in the future that they are unable to negotiate a satisfactory compact with the States. The timing for filing suit and for various actions by the Court, the parties, a mediator and the Secretary of the Interior during litigation are highly specific and intricate. Suits cannot be brought under IGRA except according to the conditions precisely specified in IGRA. One of those conditions is that an Indian tribe may bring a bad faith suit only after it has attempted to negotiate a compact for at least 180 days. An Indian tribe cannot prematurely sue and preempt negotiations by predicting that a State will not negotiate in good faith, and cannot indirectly vindicate IGRA rights by seeking to intervene in unrelated trust land litigation. If and when the State refuses to negotiate in good faith for a gaming compact, the Cayugas have a clear statutory remedy for that refusal, with ultimate recourse to the Secretary of the Interior, who is required by IGRA to impose a fair gaming compact.

The Cayugas also cannot make the showing required by Rule 24 for intervention. They do not have the interest required by Rule 24(a)(2) for intervention of right because the casino interest they assert is not related to the property or transaction that is the subject of this action, which is the Oneida trust land decision. Even their casino interest is too remote and contingent, suffering the same flaws of contingency and uncertainty that deprive the Cayugas of constitutional standing. Nor do the Cayugas have a claim or defense that shares with the main action, a trust land case, a common question of law or fact, as required by Rule 24(b)(2) for

permissive intervention. Moreover, the Cayugas' casino interest can be protected in a properly filed separate lawsuit under IGRA, and intervention to delay and undo an historic trust land settlement would be prejudicial and unfair to the existing parties. The Cayugas therefore cannot show that denial of intervention will impair their ability to protect their interests, as required for intervention of right under Rule 24(a)(2), and also cannot refute the delay and prejudice to the existing parties that the Court must consider under Rule 24(b)(3) with respect to permissive intervention.

This is the wrong forum for the Cayugas to litigate casino rights, and now is the wrong time for such litigation.

RELEVANT FACTS

More than eight years ago (April 4, 2005), the Oneida Nation applied to the Department of the Interior to transfer deeds to approximately 17,370 acres of land owned by the Oneida Nation to the United States to be held in trust pursuant to 25 U.S.C. § 465. DOI granted the application in part on May 20, 2008. *See* 73 Fed. Reg. 30144 (May 23, 2008).

On June 19, 2008, the State plaintiffs, Madison County and Oneida County challenged DOI's decision by filing this APA action. (ECF No. 1). The Oneida Nation was permitted to intervene on November 5, 2008. (ECF No. 48). Since then, after overseeing very active litigation, the Court remanded the trust decision to DOI to address an issue concerning the Nation's eligibility for trust land. The Court noted in its remand order that "this matter has already languished too long before various tribunals." (ECF. No. 276, at 27).

A. The Settlement Agreement

On May 16, 2013, the parties announced a settlement agreement. Declaration of Michael R. Smith ("Smith Decl."), Ex. 1 (settlement agreement). It provides for dismissal of a range of litigation, including this case and foreclosure litigation involving a petition for writ of certiorari

that is pending before the Supreme Court. It also solves numerous other property tax, sales tax, land, gaming and regulatory disputes and provides for payments from the Nation to the benefit the State and the Counties to offset tax losses.

Oneida County's legislature approved the settlement agreement on May 28, 2013. Smith Decl., Ex. 2. Madison County's legislature gave its approval on May 30, 2013. Smith Decl., Ex. 3. On June 21, 2013, the New York Legislature approved the agreement. Smith Decl., Ex. 4. If the Court approves the settlement and a stipulation of dismissal, this trust litigation will be over, and a half-century of rancor on numerous issues will come to an end.

B. The Cayuga Nation's Motion to Intervene

On June 12, 2013, the Cayuga Nation moved to intervene to block approval of the settlement and dismissal of this case. The motion to intervene is based solely on an asserted interest in a single term of the Oneida settlement agreement that has nothing to do with the merits of this case. The Cayugas object to the settlement term that gives the Oneida Nation exclusive rights to engage in casino gaming in a ten-county region that includes Cayuga County, where the Cayugas own land and claim a 42,089-acre reservation, but not Seneca County, where the Cayugas also own land and claim a 21,926-acre reservation. *See* Smith Decl., Ex. 5 (map taken from DOI's trust land FEIS) & Ex. 6 (maps taken from original Cayuga land claim complaint). The Cayugas assert that the settlement "effectively forbids the State from negotiating 'in good faith' with the [Cayuga] Nation" to enter into a gaming compact that sites a casino in Cayuga County, in violation of IGRA. (ECF. No. 280-2) (hereafter "Mem." at 4).

C. Omissions from the Cayugas' Intervention Papers

The Cayugas' papers are important for what they do not say. They leave out the fact that the Cayugas only requested that the State negotiate a class III casino gaming compact on June 6, 2013, just two business days before moving to intervene. Smith Decl., Ex. 7. The Cayugas'

papers do not address any of the detailed steps under IGRA that are to be followed in negotiating a compact or in getting redress if a State is in bad faith and will not agree to a fair compact. 25 U.S.C. § 2710(d)(7)(A)-(B) (negotiations must occur for no less than 180 days, to be followed by bad faith litigation governed by a complicated, lengthy set of time-frames).

The intervention papers also do not assert that the Cayugas have even satisfied IGRA's other prerequisites for class III casino gaming. That is because the Cayugas' "governing body" has not enacted a tribal resolution or ordinance signifying the tribe's intention to engage in class III casino gaming, as mandated by IGRA. *See* 25 U.S.C. § 2710(b)(1) & § 2710(d)(1)(A). Consequently, the National Indian Gaming Commission (NIGC) has not approved an ordinance, as required by IGRA for casino gaming. *See id.* § 2710(d)(1)(A)(iii).

The intervention papers lean on an implication that the Cayugas will engage in class III casino gaming when DOI approves the Cayuga trust application. Other than stating that a BIA regional office in Nashville views the prospect of a trust transfer favorably, the papers offer no basis to believe that DOI actually will accept Cayuga land into trust.

Crucially, the intervention papers do not say that the Cayuga trust application is for casino gaming. DOI requires tribes that intend to develop a new casino on trust land to request an opinion from DOI's Office of Indian Gaming during the trust application process. 25 C.F.R. §§ 292.3(b) & 292.26(b); *see* 25 C.F.R. § 151.10(c) (evaluation of application must include "[t]he purposes for which the land will be used"); *South Dakota v. DOI*, 423 F.3d 790, 801 (8th Cir. 2005) (DOI entitled to process application in reliance on tribal promise not to use land for casino); *see* Smith Decl., Ex. 8 (Cayuga letters applying for trust land transfers).

In fact, the FEIS issued by DOI in connection with the Cayuga trust application shows (1) that DOI considered a casino to be infeasible in Cayuga County and Seneca County and (2) that

the Cayugas disclaimed an intention to have a casino, presumably so that they could expedite DOI's preparation of an EIS and review of the trust application. 75 Fed. Reg. 65372 (Oct. 22, 2010) (notice of availability of FEIS); www.cayuganationtrust.net/FEIS (FEIS). As to infeasibility:

> The Seneca County and Cayuga County gaming market is small, and the gaming facilities are also appropriately small, and represent only a local draw. Neither of the current [class II bingo] gaming facilities is located along roadways large enough to provide easy access to customers traveling from outside the region, nor are any of the other Cayuga Nation properties that are large enough to develop a destination resort located along a sufficient thoroughfare. Customers that require other amenities have easier access by traveling to the casinos owned by the Oneida or Seneca, all within reasonable driving distances. None of the Cayuga Nation properties requested for trust status meet the necessary marketing requirements for a destination resort casino. [FEIS, Response 1-31 in Appendix A, Comments and Responses to Section 1.]

As to the Cayugas' disclaimed casino interest, DOI's Federal Register notice is careful to note that the trust application concerns two convenience stores that once had been the site of class II [i.e., bingo-type] facilities and that might be used for that purpose again, but there is no mention of class III casino gaming. 75 Fed. Reg. 65372 (Oct. 22, 2010). The "executive summary" in the FEIS (pages S-2 to S-3) also states that the Cayugas will operate bingo facilities and that, if the Nation were to get trust land, "[t]he Nation has no plans for further development of the properties on which the Nation's Enterprises are located." At page 2-1 of the FEIS, DOI explains that the Cayugas will operate bingo facilities and, even if land were taken into trust, "[t]he Nation has no plans for further development of the properties on which the Nation's Enterprises are located." Response 10-41 in App. A, Comments and Responses to Section 10 of the FEIS, states that casino gaming issues "are not relevant to the proposed action, under which the Cayuga Indian Nation would continue to operate its class 2 [bingo] gaming facilities." DOI recognized that the Cayugas disclaimed any casino interest because they understood that no

feasible market exists. *"The Cayuga Nation's determination that the use of the properties would not change may indicate that they are aware of the limitations in the local gaming market."* FEIS, Response 1-31 in Appendix A, Comments and Responses to Section 1 (emphasis added).

Finally, the Cayugas' papers do not identify a property that they contend is a suitable site for their uncertain future casino. The Cayugas are trying to upset a historic settlement based on a purported interest to build a casino at some unknown site. The omission presumably is due to the same market and practical limitations, including environmental limitations, that caused the Cayugas to back away from casino gaming in order to get trust status for their properties. The Cayugas' trust application likely would return to square one at DOI if the Cayugas were to identify one of the Cayuga County properties as a casino gaming site.[1]

ARGUMENT

I. THE COURT LACKS JURISDICTION.

A. The Cayugas Lack Article III Standing.

This Court's jurisdiction over the IGRA issues raised by the Cayugas depends in the first instance on whether the Cayugas have demonstrated constitutional standing by showing an injury in fact sufficient to satisfy article III case or controversy requirements. *Town of Baylon v. Fed'l Housing Fin. Agency*, 699 F.3d 221, 228 (2d Cir. 2012); *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 89 (2d Cir. 2009). The Cayugas cannot establish constitutional standing because whether the Cayugas ever might have a right to conduct class III casino gaming in Cayuga County depends on multiple contingencies that may never occur, including repudiation by the Cayugas of their commitment to DOI with respect to their trust application.

[1]The land in Cayuga County where the Cayugas conducted bingo is 300 feet from the Union Springs Central School. *Cayuga Indian Nation v. Village of Union Springs*, 317 F. Supp.2d 128, 148 (N.D.N.Y. 2004), *inj. vacated*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005). That is the property referenced in the FEIS as a former bingo site and a current convenience store. 72 Fed. Reg. 65372 (Oct. 22, 2010). Most maps also show that Union Springs has insufficient roads for casino traffic, and is located near Cayuga Lake and the Montezuma National Wildlife Refuge. *See* 78 Fed. Reg. 19000 (March 28, 2013) (describing Refuge's location, habitats and purpose).

We recognize that, when the parties are still litigating a case, an intervenor usually does not need to prove standing because the Court already has Article III jurisdiction over the case or controversy presented by the parties. *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978). That rule does not apply to the Cayugas, however, because the existing parties no longer present a live case or controversy, and also because a case or controversy regarding Oneida trust land would not, in any event, be relevant to the Cayugas' IGRA-based issues. In such circumstances, an intervenor must establish its own constitutional standing. *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986) ("Although intervenors are considered parties entitled, among other things, to seek review by this Court . . . 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."); *Schulz v. Williams*, 44 F.3d 48, 52 (2d Cir. 1994) ("The Supreme Court has made clear 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.'"); *see San Juan County v. United States*, 503 F.3d 1163, 1172 (10th Cir. 2007) (en banc) ("[I]f the original party on whose side a party intervened drops out of the litigation, the intervenor will then have to establish its own standing to continue pursuing the litigation.").

The Cayuga Nation's claimed injury – "the Agreement purports to bar the Nation from exercising its federal right to pursue a compact governing Class III gaming on its lands in Cayuga County" (ECF No. 280-5, ¶ 31) – is neither actual and imminent, nor concrete and particularized, as required to support article III jurisdiction. *E.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Rather, the claimed future injury is hypothetical and speculative, and depends on a chain of contingencies and legal conclusions that cannot, as a matter of well-

established standing law, give rise to a present injury in fact. *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013); *see Thompson v. ABA*, 2007 WL 987807 (D. Ct. 2007) (insufficiency of claim of predetermined outcome where contingencies existed and review of decision was available).

First, as explained above, the Cayugas have not satisfied the prerequisites to have a class III casino under IGRA, and it is unclear that they ever will. The Cayugas' governing body has never taken the simple step of enacting the class III gaming ordinance required by IGRA in order to conduct casino gaming, and thus has never sought the requisite ordinance approval from the NIGC. 25 U.S.C. §2710(d)(1)-(2). Although the Cayugas predict that they will get trust land in Cayuga County, it is unclear if and when the trust transfers might be approved and consummated. As for a gaming compact, the Cayugas formally requested that the State negotiate a gaming compact only two business days before seeking to intervene here, never having made that request in the twenty-five years since IGRA's 1988 passage. Smith Decl., Ex. 7. It is impossible to predict that the Cayugas will go through with an entire negotiation and successfully negotiate all the terms of a compact.[2]

Second, the Cayugas' claim of injury is speculative because of the Cayugas' decision to disclaim any intention to have casino gaming on their land in Cayuga County or in Seneca County, as reflected in the Cayuga trust land FEIS. *See* www.cayuganationtrust.net/FEIS. Those representations were made to persuade DOI to forego a more complicated EIS. They drain all force from any contrary representation (or implication) offered to support intervention. *Cf. DeRosa v. Nat'l Envelope Corp.*, 595 F.3d 99, 103 (2d Cir. 2010) (judicial estoppel

[2]For over a decade the Cayugas have made public statements offering assurances that DOI was about to accept land into trust for them and that the State was about to agree to a gaming compact. Despite the optimistic assurances, all of that fell through. Smith Decl., Ex. 9. The assurances offered in support of intervention are no less optimistic, and no more reliable. The record suggests much more reason for the Cayugas to be pessimistic than optimistic. Their willingness in the trust process to forego casino gaming seems to suggest as much.

principles apply to administrative proceedings); *see South Dakota v. DOI*, 423 F.3d 790, 801 (8th Cir. 2005) (in trust process, DOI entitled to rely on promise of no casino on trust land).

Third, although the Cayugas imply an intention to have a Cayuga County casino, whether that intention could be real is speculative. The Cayugas have not actually said in their intervention papers that they want a Cayuga County casino and intend to put one on trust land there, as opposed to Seneca County. They have not identified the parcel of land on which they would like to site a casino. It is pure speculation whether, in the future, the Cayugas *might* actually intend to have a casino in Cayuga County, *might* identify a particular place for it there, and *might* demand a compact authorizing a casino there, which the State *might not* agree to.

Fourth, unstated future plans for developing unidentified land are also speculative because the Cayuga trust land FEIS shows that the agency concluded that the market and infrastructure would not support a Cayuga casino in Seneca County or Cayuga County. The FEIS indicates that the Cayugas appeared to agree with that and convincingly represented to DOI that no casino would be built on trust land in the two counties.

Finally, whether the State will negotiate a gaming compact in good faith with the Cayugas cannot be answered now; it is something that lies in the unknowable future. Bad faith cannot be known by reading the Oneida settlement agreement or IGRA. IGRA requires that that a State "shall negotiate in good faith," but does not dictate the terms of compacts. 25 U.S.C. § 2710(d(3)(A). IGRA makes clear that a State may consider any number of factors in negotiating in good faith with an Indian tribe, including "the public interest, public safety, criminality, financial integrity, and adverse impacts on existing gaming activities." 25 U.S.C. § 2710(d)(7)(B)(iii). Thus, a State may insist as a condition of a gaming compact that a casino be located in a specific place, not elsewhere on tribal land, and that is not bad faith. *Wisconsin*

Winnebago Nation v. Thompson, 22 F.3d 719 (7th Cir. 1994), *affirming* 824 F. Supp. 167 (W.D. Wisc. 1993).[3] It is impossible to determine *ex ante* whether the State can or will negotiate in good faith with the Cayugas. "IGRA's legislative history . . . makes clear that the good faith inquiry is nuanced and fact-specific, and is not amenable to bright line rules." *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1113 (9th Cir. 2003). Indeed, IGRA also makes it clear that an Indian tribe may not even sue a State for bad faith in compact negotiations until 180 days have passed after a formal request for negotiations. 25 U.S.C. §2710(d)(7)(B)(i). That 180-day rule locates any possible injury well into the future and makes it dependent upon the existence of an actual record of negotiation on which bad faith can be concretely and meaningfully assessed. Negotiations may actually produce an agreement with the State for a class III gaming facility in Cayuga County, even though it may breach the Oneida settlement agreement and lead to a court-ordered remedy, such as a reduction in the quarterly Oneida Nation payment to the State under the agreement. The more likely scenario is that if the Cayugas ever manage to satisfy the requirements for a class III gaming compact, any resulting casino would be in Seneca County - - which is entirely unaffected by the Oneida settlement.

B. IGRA Specifies the Exclusive Actions and Remedies Available to Vindicate IGRA-Based Rights and Does Not Provide Jurisdiction for the Cayugas to Litigate IGRA Rights in this Trust Land Case.

This Court lacks jurisdiction to hear the Cayugas claim for a second reason as well: the elaborate remedial scheme set forth in IGRA provides the *exclusive* means of redress for IGRA-related injuries, and IGRA confers federal-court jurisdiction over compact-related disputes only 180 days after the State has purportedly failed to negotiate in good faith.

[3]Compacts often restrict gaming to a specific location. Examples include the La Posta Band of Mission Indians, Oklahoma tribes such as the Chickasaw Nation, and the Flandreau Santee Sioux tribe in South Dakota. Other examples can be found in the compacts available at http://www.nigc.gov/Reading Room/compacts.aspx.

IGRA regulates the process by which tribes can seek and obtain approval to engage in Class III gaming within a State and requires that a tribe negotiate a "compact" with the State before engaging in gaming. 25 U.S.C. § 2710(d)(3)(C). When negotiating a compact, a State must negotiate in good faith. 25 U.S.C. § 2710(d)(3)(A); *Rincon Band v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010).

IGRA grants tribes the right to enforce that good-faith obligation by way of federal suit. 25 U.S.C. § 2710(d)(7)(A). The statute provides that "[t]he United States district courts shall have jurisdiction over" – and then lists only two types of suits that an Indian tribe may file suit to enforce IGRA rights. The only suit relevant here is when a State has not negotiated a compact "in good faith." *Id*. § 2710(d)(7)(A)(i). Any suit that does not fit as one of the specific suits authorized by IGRA "is outside of the jurisdictional grant in the plain language of the IGRA." *Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655, 661 (7th Cir. 2006).

A tribe's "bad faith" suit cannot be filed under IGRA before 180 days have after the Indian tribe noticed compact negotiations. *Id.* § 2710(d)(7)(A)(i), (B)(i). After the bad faith question is litigated, if the court concludes that the State has failed to negotiate in good faith, it shall order the State and the tribe to conclude a compact within a 60-day period. *Id*. § 2710(d)(7)(B)(iii). If the tribe and the State fail to do so, they must each submit to a court-appointed mediator a proposed compact representing their last best offer. *Id*. § 2710(d)(7)(B)(iv). The mediator will choose between the two proposed compacts. *Id*. § 2710(d)(7)(B)(iv)-(v). If the State does not accept the mediator's chosen compact within 60 days, the Secretary of the Interior at some point thereafter shall prescribe the conditions upon which the tribe may engage in class III casino gaming. *Id*. § 2710(d)(7)(B)(vii).[4]

[4]If a State defends against a tribe's IGRA suit on immunity grounds, the tribe has a remedy through DOI regulations, which "establish procedures that the Secretary will use to promulgate rules for the conduct of Class III

IGRA provides no implied right of action. *UCE v. Salazar*, No. 5:08-cv-633, 2010 WL 827090 (N.D.N.Y. Mar. 4, 2010) (Kahn, J.). Rather, it establishes an "elaborate remedial scheme" for a Tribe to challenge a State's determination with respect to Title III gaming. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 50 (1996). In *Seminole Tribe*, the Court rejected the Tribe's contention that it could use *Ex parte Young* to bring State officials into compliance with IGRA's duty to negotiate in good faith, reasoning that, "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right, we have in suits against federal officers, refused to supplement that scheme with one created by the judiciary." *Id.* at 74; *see id.* ("[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations. . . ."). The Court described at length "the intricate procedures set forth in [§ 2710(d)(7)]," which "show that Congress intended therein not only to define, *but also to limit significantly*, the duty imposed by [§ 2710(d)(3)]." *Id.* (emphasis added).

The Cayugas ask this Court to ignore IGRA's intricate remedial scheme and to permit them to prematurely challenge negotiations that have not yet occurred, and to do that indirectly by attacking settlement of trust litigation, thereby preempting both the negotiations and the IGRA bad faith suit laid out with precision in IGRA. *See United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984) (adopting a flexible approach to Rule 24, but

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Indian gaming when: (a) a State and an Indian tribe are unable to voluntarily agree to a compact and; (b) the State has asserted its immunity from suit brought by an Indian tribe under 25 U.S.C. § 2710(d)(7)(B)." 25 C.F.R. § 291.1; *see* Class III Gaming Procedures, 64 Fed. Reg. 69,17536 (Apr. 12, 1999). In such event, a tribe may submit a proposed compact to the Secretary, who then affords the State sixty days to comment and submit an alternative. 25 C.F.R. § 291.7. At that point, the rules prescribe two tracks depending on whether the State chooses to submit an alternative compact. If the State does not submit an alternative, the Secretary reviews the Tribe's proposal and approves it or offers a conference between the state and the tribe." 25 C.F.R. § 291.8. The Secretary must then make a "final decision either setting forth the Secretary's proposed Class III gaming procedures for the Indian tribe, or disapproving the proposal." *Id.* If the State submits an alternative, the Secretary appoints a mediator who, following the same procedures as IGRA prescribes, will resolve differences between the two proposals. 25 C.F.R. §§ 291.9, 291.10. The Secretary then may reject or accept the mediator's proposal, but "must prescribe appropriate procedures within 60 days under which Class III gaming may take place." 25 C.F.R. § 291.11.

cautioning that "[t]he requirements for intervention embodied in Rule 24(a)(2) must be read also in the context of the particular statutory scheme that is the basis for the litigation and with an eye to the posture of the litigation at the time the motion is decided."); *see also UCE*, 2010 WL 827090, at *13 (Kahn, J.) ("The presence of these causes of action [in IGRA], particularly in light of the sensitive balancing of interests involved in IGRA, has indicated that Congress did not intend there to be any implied private right of action in favor of an individual seeking to enforce compliance."). Indeed, the "legislative history of IGRA indicates that Congress, in developing a comprehensive approach to the controversial subject of regulating tribal gaming, struck a careful balance among federal, state, and tribal interests ... [and that it] would frustrate this intent—and upset the carefully-struck congressional balance ... [to] recogniz[e] an implied right of action under IGRA"). *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1249 (11th Cir. 1999). This decision is especially relevant here because it holds that a State, which IGRA authorizes to sue Indian tribes to stop IGRA violations *if* the State has entered into a gaming compact, may not sue a tribe to stop IGRA violations if it has not entered into a compact. In other words, even a party that IGRA authorizes to sue may not sue a defendant that IGRA specifies may be sued *unless the suit is brought in conformity with the pre-conditions to suit that IGRA specifies*.[5]

IGRA makes clear that any injury to the Cayugas stemming from the State's refusal to negotiate in good faith has not occurred and can occur, if at all, only in the future. "An Indian tribe may initiate a cause of action ... only after the close of the 180-day period," which is

[5]IGRA's specification of the condition on which a tribe may sue to remedy a State's bad faith – a record of 180 days of compact negotiation from which the existence of and the reasons for impasse may be determined – is equally an element of a cause of action as it is a basis for subject matter jurisdiction. Any Cayuga objection based on a right to good faith compact negotiation under IGRA necessarily fails if the Cayugas cannot allege that the 180-day condition has been met prior to enforcement of the good faith negotiation right. While the oft-stated rule that the right to intervene does not depend on the merits of an intervenor's claim, courts do not permit intervention where it would be futile. *United States v. Town of Moreau*, 979 F. Supp. 129 (N.D.N.Y. 1997) (denying motion on ground of futility), *aff'd*, 160 F.3d 853, 856 (2d Cir. 1998); *In re Merrill Lynch & Co. Research Reports Sec. Lit.*, 2008 WL 2594819 (S.D.N.Y. June 26, 2008) (recognizing futility as a ground for denying intervention).

measured from a tribal request for compact negotiations (June 2013). 25 U.S.C. §2710(d)(7)(B)(i). IGRA thus treats the Cayugas' bad faith predictions as hypothetical, conjectural, not sufficiently real or concrete to permit adjudication. The right to sue under IGRA does not depend on predictions, but on an actual record from which an informed decision about bad faith, a fact-bound issue, can be made.

The courts and DOI, like the Cayugas, are not bound by the Oneida settlement agreement, and there is no basis to think that the Court or DOI would view approval of the agreement as authorizing or requiring the State to take a position during compact negotiations that is forbidden by IGRA – indeed, the Supremacy Clause would preclude that result. That the Cayugas take "little consolation" from the fact that they can, at the right time, "file a subsequent, independent suit," Mem. 8, does not detract from the reality that the Cayugas have a statutory or regulatory remedy if they are right about their entitlement to a casino in Cayuga County.

II. THE CAYUGA NATION'S MOTION TO INTERVENE SHOULD BE DENIED.

A. The Cayugas Cannot Intervene of Right under Rule 24(a)(2).

1. The Cayugas Do Not Claim an Interest in the Oneida Trust Decision, and So Do Not "Claim[] an Interest Relating to the Property or Transaction that Is the Subject of the Action."

Rule 24(a)(2) permits intervention of right only where a would-be intervenor "claims an interest relating to the property or transaction that is the subject of the action." "An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule." *Washington Elec. Coop, Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990).

The Cayugas' stated interest in a term of the Oneida settlement related to gaming has nothing to do with the property or transaction that is the subject of this action, which concerns an APA challenge to trust decision. What the Cayugas want is to hold the settlement of this case

hostage in the hope of furthering their own negotiations with the State, which the Cayugas quickly started when learning that the Oneida Nation had settled with the State. If the Cayugas were permitted to intervene, the result would be to "radically alter" the "scope" of this case "to create a much different suit," an outcome not permitted by Rule 24. *Washington Elec.*, 922 F.2d at 97. "Intervention cannot be used as a means to inject collateral issues into an existing action." *Id.*; *see also id.* ("[T]he rule is not intended to allow for the creation of new suits by intervenors."). Applying these principles, the Seventh Circuit affirmed denial of a tribe's bid to intervene to attack another tribe's settlement of an APA claim. *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946-49 (7th Cir. 2000). Although the APA claim concerned the gaming rights of the existing tribal party, the tribe seeking to intervene did not present any claim or defense related to the APA claim itself. The tribe sought intervention to object to the effect of settlement on its gaming rights by introducing a potential gaming competitor. Such an interest was insufficient to permit intervention because it did not concern the APA claim that the existing parties were settling, but instead concerned only a feature of the settlement.

The Cayugas rely on decisions involving settlements governing employment of public employees.[6] *See* Mem. 7 (citing *Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469 (2d Cir. 2010), and *Brennan v. New York City Bd. of Educ.*, 260 F.3d 123 (2d Cir. 2011)). Both cases involved claims by African-American employees of disparate impact discrimination caused by exam-scoring practices. When the employees entered into a settlement involving a race-conscious remedy changing exam-scoring practices, Hispanic employees intervened, asserting that the change would illegally compromise their civil rights. The intervenors did not bring new issues into the case; they asserted claims that related to the transaction that was the subject of the

[6]The Cayugas also quote *Butler, Fitzgerald & Potter v. Sequa Capital Corp.*, 250 F.3d 171 (2d Cir. 2001), Mem. at 7, but that decision affirmed denial of intervention. *Id.* at 176-79. There is no similarity between an attorney's claim to own part of a judgment and the Cayugas' collateral arguments objecting to settlement.

action (exam scoring in a particular workplace), and directly involved the property at issue in the action (jobs and promotions in that workplace). The intervenors had competing interests in the merits issues and thus were entitled to intervene from the very beginning of the case.

The Cayugas, by contrast, could not have intervened in this case at the outset because they have no interest in the merits of the Oneida trust dispute. Rule 24(a) does not contain a settlement-only exception when objection to settlement is unrelated to the merits of the APA dispute that existed between the parties. If at some future date the State violates the Cayugas' rights under IGRA, the Cayugas are not bound by the settlement between the Oneidas and the State, and, as the Cayugas acknowledge, Mem. at 8, they can bring an action seeking to vindicate their rights. The approval of the Oneida settlement cannot deprive the Cayugas of any rights they may have under IGRA, or limit the ability of any court to protect those rights.

2. The Cayugas' Purported Interest Is Remote and Contingent, Not Direct, Substantial and Legally Protectible, as Required.

For an "interest" to be cognizable under Rule 24(a)(2), it must be "direct, substantial, and legally protectable," *Wash. Elec.*, 922 F.2d at 97. "[S]uch an interest must be direct, as opposed to remote or contingent." *Restor-A-Dent Dental Labs, Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871, 874 (2d Cir. 1984).

For the same reasons that the Cayuga Nation lacks standing for want of "injury in fact," *see* section I(A), *supra*, the remote and contingent nature of the Cayugas' interest deprives them of the "interest" required by Rule 24(a)(2). The Cayugas preemptively claim future bad faith as to a negotiation that has not occurred. The intervention papers do not claim an actual, current intention to have a Cayuga County casino, or identify where it would be located. One can conclude from the Cayugas' papers only that, *if* the Cayugas get land into trust, *if* the land is located in Cayuga County, *if* the Cayugas ever enact and get approval for the class III ordinance

required by IGRA, *if* the State enters into gaming compact negotiations, *if* the Cayugas actually end up wanting and bargaining for a casino in Cayuga County, *if* the State bargains for a casino to be placed elsewhere (e.g., Seneca County) and declines a Cayuga County location, and *if* the Cayugas refuse to agree to a casino outside of Cayuga County and refuse to enter into a compact – only then, if all those *ifs* fall into place, can the Cayugas have a claim that is ripe with respect to the casino in Cayuga County that they argue IGRA guarantees to them. Moreover, on top of these *ifs*, the Cayugas must change their minds and inform DOI that they seek trust land for casino gaming purposes.

In these circumstances, no matter what the Oneida settlement agreement provides, the Cayuga Nation is many layers of contingency away from exercising any rights under IGRA to conduct class III gaming on its lands in Cayuga County. Whether the Cayugas will ever even have a gaming compact, and whether they will actually bargain for a casino in Cayuga County as opposed to Seneca County, is nothing but a guess. *See Restor-A-Dent*, 725 F.2d at 875 (interest dependent "upon two contingencies" insufficient for intervention); *United States v. Carrols Dev. Corp.*, 454 F. Supp. 1215, 1219 (N.D.N.Y. 1978) (interest based upon "assumption[s]" about future government actions insufficient for intervention).

3. The Cayuga Nation Cannot Make the Required Showing that Denial of Intervention Will "Impair or Impede" Its "Ability to Protect Its Interest."

Rule 24(a)(2) also requires the Cayugas to demonstrate that denial of intervention "may as a practical matter impair or impede" its "ability to protect its interest." Unless the Cayugas possess the requisite "interest," the Court need not address this point. Even assuming that the Cayugas have that interest, the Cayugas cannot show that their "right" to a Cayuga County casino cannot be vindicated elsewhere, if they have such a right. As explained in section I(B), *supra*, IGRA provides for a bad faith suit against the State in defined and time-limited

circumstances, and provides a detailed steps for providing the fair compact to a tribe. 25 U.S.C. § 2710(d)(7)(A)-(B) (suit ends with choice of terms and imposition of compact by Secretary of Interior). If the Cayguas "remain free to file a separate action, they have not established that they will be prejudiced if their motion to intervene is denied." *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 199 (2d Cir. 2000).[7]

If the Cayugas are entitled to a Cayuga County casino, then they will get one. The Oneida settlement does not prevent a Court (or the Secretary) from providing the Cayugas with what they are entitled to under IGRA, although that would have some consequences as between the State and the Oneida Nation under the breach provisions of the Oneida settlement agreement. As a non-party, the Cayugas cannot be bound by any decision in this case, and they recognize that they have remedies outside of this case. Mem. at 8. Although they posit that a court "might view" approval of the settlement as affecting the Cayugas' rights, the contention has no footing in the law and cannot form a basis for intervention. *See Carrols Dev. Corp.*, 454 F. Supp. at 1220 (no impairment of proposed intervenors' interests because consent judgment "is not binding upon them," and they would remain "able to assert, in an appropriate tribunal, all legal rights and remedies they may have"); *S.E.C. v. Canadian Javelin Ltd.*, 64 F.R.D. 648, 650 (S.D.N.Y. 1974) ("no possible impairment" of proposed intervenor's interests from consent judgments which "will have neither res judicata, collateral estoppel, nor *stare decisis* effects" on intervenor's own action against defendants); *New York News, Inc. v. Newspaper and Mail Delivers' Union*, 139 F.R.D. 291, 293 (S.D.N.Y. 1991) (person not entitled to intervene to move

[7]If suit were filed, the State might assert sovereign immunity under *Seminole*, but that cannot be known, as States do not uniformly do so as to tribal suits under IGRA. *E.g., Rincon Band v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010) (waiver by statute). In any event, DOI has a detailed set of administrative procedures that apply if a State asserts its immunity, and those procedures result in the same Secretarial imposition of a compact that occurs at the culmination of a bad faith suit under IGRA. 25 C.F.R. Part 291.

for sanctions against counsel for including in complaint false allegations where stipulated dismissal would not impair individual's ability to protect interests by a defamation suit).

B. The Cayuga Nation May Not Intervene Permissively Under Rule 24(b)(1)(B).

Rule 24(b) allows for permissive intervention, in the Court's discretion, when the putative intervenor "has a claim or defense that shares with the main action a common question of law or fact." The Cayugas do not assert any claim or defense, nor could they do so with regard to "a common question of law or fact" in this trust litigation. Recognizing the problem, the Cayugas rely on a statement in *Dow Jones & Co., Inc. v. Dep't of Justice*, 161 F.R.D. 247, 254 (S.D.N.Y. 1995), that "the words claim or defense are not to be read in a technical sense." Mem. at 9. But that general statement offers the Cayugas no help.[8] The "main action" here involves only APA disputes about trust land. The Cayugas present no claim or defense – or objection or anything else – having anything to do with the main action, which is plainly why they have been unable to file the required "pleading" under Rule 24(c). They have no claim or defense that could operate within the trust land case, and do not even claim to be a plaintiff or defendant who could have any role in the case.

Further, Rule 24(b)(3) mandates that the Court must consider whether permissive "intervention will unduly delay or prejudice adjudication of the original parties' rights." *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 73 (2d Cir. 1994) (once commonality is established, this is "principal guide in deciding whether to grant permissive intervention"). Here, intervention by the Cayugas at the settlement stage would needlessly prolong this litigation and unduly prejudice

[8]The court did not ignore the commonality requirement of Rule 24(b)(2). *Dow Jones* involved the intervention of Vincent Foster's widow to appeal an order to disclose his suicide note under FOIA, asserting her personal privacy interests in support of the "personal privacy" exemption. Such intervention in FOIA actions is routine because certain FOIA exemption are intended to protect the interests of private non-parties to whom the requested records may relate. *Taylor v. Sturgell*, 553 U.S. 880 (2008); *Bloomberg LP v. Bd. of Governors, Fed. Reserve*, 601 F.3d 143 (2d Cir. 2010). Thus, the intervenor's claim was essentially the same as the government's, which was that disclosure of the note would invade personal privacy, making the note subject to a FOIA exemption.

the rights of the parties by attacking their carefully crafted settlement, injecting complicated litigation between the Cayugas and the State regarding Cayuga casino rights. Denial of intervention will not prejudice the Cayugas, who have statutory and regulatory remedies if their IGRA rights are violated sometime in the future. Courts deny permissive intervention intended to disrupt settlements. *See Sokaogon Chippewa*, 214 F.3d at 950 (permitting intervention by tribe solely "to block the settlement agreement" between other tribes and the Department of the Interior, after "the parties had spent substantial time (nearly six months), effort and money in settlement negotiations," would "result in the parties' combined efforts being wasted completely"); *United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 856 (2d Cir. 1998) ("[T]he relief sought by the intervenors … would delay if not altogether prevent a negotiated settlement. This finding alone warrants denial of the motion.") (quoting decision of Kahn, J.); *N.Y. News, Inc. v. Kheel*, 972 F.2d 482, 487 (2d Cir. 1992) (intervention after parties stipulated to dismissal would impermissibly prejudice parties); *Carrols Dev. Corp.*, 454 F. Supp. at 1221 (denying permissive intervention seeking to "defeat entry of the consent decree" and to "prolong this litigation"); *Canadian Javelin Ltd.*, 64 F.R.D. at 650-51 (denying permissive intervention that "would prejudice the rights of the parties and the public by upsetting a carefully negotiated settlement"); *cf. Farmland Dairies v. Comm'r of N.Y. Dep't of Agric.*, 847 F.2d 1038, 1044 (2d Cir. 1988) (holding that parties' settlement "would be jeopardized" impermissibly by intervention as of right at "late date," noting that the "interests prejudiced by intervention," including "the State's interest in avoiding continuing litigation," are "clearly substantial").

C. The Motion to Intervene also Should Be Denied because It Is Procedurally Defective.

Rule 24(c) provides that a motion to intervene "*must*" (1) be accompanied by a "pleading" that "must" (2) set out the claim or defense for which intervention is sought. Fed. R.

Civ. P. 24(c) (emphasis added); *Abramson v. Pennwood Inv. Corp.*, 392 F.2d 759, 761 (2d Cir 1968) (affirming denial of intervention because no pleading was proffered); *Tummino v. Hamburg*, No. 12-cv-763, 2013 WL 3005554, at *2 (E.D.N.Y. Apr. 5, 2013) ("Indeed, the failure to file a pleading by itself may be 'fatal' to the motion.").

The Cayugas filed a document called "Intended Objections," carefully crafted not to be a complaint, although cast in the format of a complaint. Unlike a complaint, the document asserts objections not a "claim or defense." For the Cayugas to try to assert a claim or defense would reveal that they have no interest in the merits of this trust litigation, contrary to the Rule 24(a)-(b) requirement that an intervenor have an interest related to the subject of the action or a claim or defense sharing a common question of law or fact with the main action.

The "Intended Objections" document is not a "pleading." Under Rule 7(a), "[o]nly these pleadings are allowed:" complaints and third-party complaints, answers to complaints, counterclaims, cross-claims and third-party complaints, and replies to answers. Rule 7(b) classifies other documents as motions or "Other Papers." The Cayugas' "Intended Objections" document falls under "other papers."

The Rule 24(c) deficiencies are fundamental, not technical. Intervention under Rule 24(a)-(b) requires an intervenor to "claim[] an interest relating to the property or transaction that is the subject of the action" or to have "a claim or defense that shares with the main action a common question of law or fact." The pleading envisioned by Rule 24(c) provides the means by which a court can determine if an intervenor meets Rule 24(a) and Rule 24(b)'s substantive requirements for intervention. Without a pleading, the determination cannot be made. *See* 6 J.W. Moore, et. al., Moore's Federal Practice ¶ 24.20 (3d ed. 2013) ("[A] district court will be unable to evaluate a motion to intervene, and the existing parties will be unable to make a

meaningful response to the motion, unless they know exactly what claims or defenses the movant proposes to bring to the lawsuit. A proposed pleading is, therefore, an essential part of the motion."). And there is no basis to construe the "Intended Objections" to be a pleading (a complaint) when the Cayugas strained not to write one, and when the "Intended Objections" document does not relate to the subject matter of this APA challenge to a trust decision.[9]

Dated: July 23, 2013

Respectfully submitted,

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[9]Sovereign immunity bars suit against the Oneida Nation. *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998). If the Cayugas are considered as asserting a claim, whether by a complaint or Intended Objections, it would be in adversity to the Oneida Nation, and seeking to undo the Oneida settlement agreement, a contract. *See Kiowa Tribe v. Mfg. Tech.*, 523 U.S. 751 (1998) (immunity bars suit against tribe to enforce contract); *Miller v. Wright*, 705 F.3d 919, 922 (9th Cir. 2013) (noting dismissal of challenge to tribal contract).

CERTIFICATE OF SERVICE

I certify that on July 23, 2013, I caused to be electronically filed with the Clerk of Court via the CM/ECF system the foregoing Defendant-Intervenor Oneida Nation's Opposition to the Cayuga's Nation's Motion to Intervene and also the accompanying declaration of Michael R. Smith. The parties' and the Cayuga Nation's counsel of record in this action are registered on the CM/ECF system, which will send those counsel notification of filing.

/s/ Michael R. Smith
Michael R. Smith