11-5171-cv(L),
11-5466-cv(CON), 13-2339-cv(CON), 13-2777-cv(XAP)

United States Court of Appeals

for the

Second Circuit

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY, JOEL ROSE and ROBERT HEFFERN, as Co-Chairpersons, D. MIN. G. STANFORD BRATTON, Reverend, Executive Director of the Network of Religious Communities, NETWORK OF RELIGIOUS COMMUNITIES, NATIONAL COALITION AGAINST GAMBLING EXPANSION, PRESERVATION COALITION OF ERIE COUNTY, INCORPORATED,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

PAGE PROOF REPLY BRIEF FOR PLAINTIFFS-APPELLANTS-CROSS-APPELLEES AND INTERVENORS-APPELLANTS

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COALITION AGAINST GAMBLING IN NEW YORK-ACTION, INCORPORATED, CAMPAIGN FOR BUFFALO-HISTORY ARCHITECTURE & CULTURE, SAM HOYT, Assemblyman, MARIA WHYTE, JOHN McKENDRY, SHELLEY McKENDRY, DOMINIC J. CARBONE, GEOFFREY D. BUTLER, ELIZABETH F. BARRETT, JULIE CLEARY, ERIN C. DAVISON, ALICE E. PATTON, MAUREEN C. SCHAEFFER, JOEL A. GIAMBRA, Individually and as Erie County Executive, KEITH H. SCOTT, SR., Pastor, DORA RICHARDSON, JOSEPHINE RUSH,

Plaintiffs-Appellants-Cross-Appellees,

– v. –

PHILIP N. HOGEN, in his official capacity as Chairman of the National Indian Gaming Commission, NATIONAL INDIAN GAMING COMMISSION, UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees-Cross-Appellants.

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INTRODUCTION

Less than a decade ago, in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), another Native American tribe in New York State unsuccessfully attempted to reclaim sovereignty over land it purchased on the open market that for over two centuries had been governed by the State of New York and its county and municipal units. *Id.* at 202. There, as here, the land was in a city distinctly non-Indian in character with less than 1% of its population consisting of Native Americans. *Id.* The Supreme Court rejected the relief sought, noting that the tribe's complaint "… must be evaluated in light of the long history of state sovereign control of the territory." *Id.* The Court went on to hold that "… the re-establishment of present and future Indian sovereign control, even over land purchased in the open market, would have disruptive practical consequences." *Id.* at 219.

The Court concluded that the "proper avenue" for the tribe to reclaim sovereignty over territory it last held some 200 years earlier was Section 5 of the Indian Reorganization Act ("IRA") (25 U.S.C. § 465), which authorizes the Secretary of the Interior to acquire land in trust for Indians. *Id.* at 221. The Court further noted that such a procedure was "… sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain

sovereign control over territory…" by virtue of implementing regulations that require the Secretary, before approving any such acquisition, to consider, *inter alia*, "… jurisdictional problems and conflicts of land use which may arise." *Id.* at 221 (citing 25 C.F.R. § 151.10(f)).

Had the Seneca Nation of Indians ("SNI") followed that "proper avenue" here, it might have reestablished sovereignty. Even if it had, however, there is no doubt that the SNI would still have been subject to the after-acquired lands prohibition against gambling set forth in § 20 of IGRA (25 U.S.C. § 2719) as the land so acquired would have been "trust land." The SNI ignored the Supreme Court's opinion, however, and opted instead for a different approach by invoking another statute, which it now claims simultaneously (1) restored its sovereignty, even though that alternative did not contain the same safeguards afforded the State and localities with respect to the jurisdictional problems and conflicts of land use under the "land into trust" process, and (2) exempted the tribe from the after-acquired lands prohibition.[1] That statute was the Seneca Nation Settlement Act ("SNSA"),

[1] There is a serious question whether the SNI could have availed themselves of § 465 even had they otherwise so desired, as they had long ago "opted out" of the IRA. *See* 25 U.S.C. § 478. *See also Amicus* Brief of the SNI ("*Amicus* Br.") at 4 n.2. As noted by the District Court in *CACGEC II*, the SNI viewed the IRA as "superfluous." (*CACGEC II*, Dkt. 61 at 22.)

Public Law 101-503, codified at 25 U.S.C. §§ 1774-1774g. It was enacted in 1990 to provide, *inter alia*, for the renegotiation of certain leases of land the SNI owned in and around the city of Salamanca, New York and to compensate the tribe for past inequities with respect to the adequacy of the rents paid under those leases. SNSA contemplated that the SNI might, although it was not required to, choose to purchase additional land with funds appropriated by the Act that could become "restricted fee" land. It is significant that although SNSA was already 15 years old when the Supreme Court decided *City of Sherrill* in 2005, the Court made no mention whatsoever of using the type of "restricted fee" approach set forth in SNSA as a way to regain sovereignty. Indeed, there is no mention of "sovereignty" or the "transfer of jurisdiction" anywhere in SNSA. Moreover, SNSA contains not a syllable about gambling.

Despite SNSA's total silence with respect to both sovereignty and gambling, that is all that the Government and the SNI rely upon. That reliance is misplaced as their respective briefs fall well short of establishing that, in enacting SNSA, Congress intended *sub silentio* to divest New York State, Erie County and the City of Buffalo of the sovereign jurisdiction they had exercised over the land in question for more than two centuries. Nor

have they shown that Congress intended to permit gambling on that land in direct violation not only of IGRA's prohibition against gambling on after-acquired land, but also Article I, § 9 of the New York State Constitution and Article 225 of the Penal Law that prohibited such gambling.[2]

The "plenary power" given by the Constitution to Congress under the Indian Commerce Clause (Art. I, § 8, cl. 3) is not so expansive that it allows Congress to unilaterally transfer governmental power from a State to an Indian Nation simply by enacting a statute declaring that any land a tribe subsequently purchases will be "restricted fee" land. Otherwise, the sovereignty of every state in the Union would be in peril. The canon of "constitutional avoidance" in interpreting statutes dictates that SNSA should not be so construed. *See Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009).

[2] Art. I, § 9 of the New York Constitution was amended in November 2013 to allow limited casino gambling, but that was 23 years after SNSA's enactment, a development that was certainly not foreseeable by Congress at the time of its passage.

ARGUMENT

POINT I

The Buffalo Parcel is not Indian Lands Because Congress in SNSA did not Give the SNI the Right to Exercise Governmental Power Over It

A. The Lower Court's Holding That the Buffalo Parcel is Indian Land Merely Because it is Restricted Fee Land Renders Superfluous IGRA's Additional Requirement That the Tribe Must Also Exercise Governmental Power Over That Land

All parties agree that under the Indian Gaming Regulatory Act ("IGRA"), a tribe with restricted fee land also must exercise governmental power over the land for it to qualify as "Indian lands" and to be gambling-eligible. "Tribal jurisdiction" is a threshold requirement to the exercise of governmental power, which requires that the tribe ***both*** have legal jurisdiction ***and*** actually exercise governmental power over the land.[3] (*See* Appellants' Br. at 44 n.10 and cases cited therein; *CACGEC III*, Dkt. 58-4 at

[3]This follows from IGRA's definition of "Indian lands" requiring that any trust or restricted fee land must also be land "over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4). It is also consistent with IGRA's language limiting Class III gaming activities to "[a]ny Indian tribe ***having jurisdiction*** over Indian lands," or to "Indian lands within such tribe's ***jurisdiction***." 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1), 2703(7)(D), and 2713(d) (emphasis added); *see Rhode Island v. Narragansett*, 19 F.3d 685, 701-03 (1st Cir. 1994).

9.)[4]

The National Indian Gaming Commission ("NIGC"), in its Indian lands opinion on the Buffalo Parcel, recognized that the "governmental power" determination "is not as straightforward as simply noting that the Nation holds the land subject to restriction by the United States against alienation." (*CACGEC III*, Dkt. 58-4 at 9.) Yet the NIGC relied on little more than the land's restricted fee status in reasoning that: (i) there is a presumption of tribal jurisdiction within Indian country; (ii) under prior case law,[5] lands held in trust or restricted fee "may all be considered" Indian country; (iii) therefore, the SNI has jurisdiction over its restricted fee land, including the Buffalo Parcel. (*Id.* at 9-10.) In the NIGC's view, which the court below adopted, when the Secretary "allowed the Buffalo Parcel to pass into restricted fee pursuant to the SNSA, the land became Indian country

[4] References to *CACGEC I, II, or III* are to the three cases in the Western District of New York appealed from herein involving the Citizens Against Casino Gambling in Erie County. *CACGEC I* is reported at 471 F.Supp.2d 295 (W.D.N.Y. 2007), *CACGEC II* is reported at 2008 WL 2746566 (W.D.N.Y. 2008) and *CACGEC III* is reported at 945 F.Supp.2d 391 (W.D.N.Y. 2013). Citations in this page-proof brief are to the numbered docket entries abbreviated (Dkt.) and page references are to the machine-generated docket stamp at the top of the page.

[5] The NIGC cited *United States v. Sandoval*, 231 U.S. 28 (1913) (restricted fee); *United States v. Pelican*, 232 U.S. 442 (1914) (allotment); *United States v. McGowan*, 302 U.S. 535 (1938) (trust land). *See* § I(B), *infra*.

within the meaning of 18 U.S.C. § 1151," and the SNI thus "possesses jurisdiction to exercise governmental authority over the Buffalo Parcel." (*CACGEC III*, Dkt. 58-4 at 10, 11; Dkt. 67 at 20, 24; *CACGEC II*, Dkt. 61 at 103.) The NIGC's flawed logic is a classic example of circular reasoning. The agency argues that the tribe can exercise governmental power over the Buffalo Parcel, held in restricted fee, because the land is "Indian country," and the land is "Indian country" because the tribe holds it in restricted fee. In 25 U.S.C. § 2703(4) the use of the conjunctive "and" clearly indicates Congress's intent that for restricted fee land to qualify as "Indian lands," the tribe must also have the legal right to exercise governmental power over such restricted fee land. The NIGC, however, relies on the same element, restricted fee land, to establish both requirements in the "Indian lands" definition, restricted fee and governmental power.[6]

It is a "cardinal principle of statutory construction" that the court must "give effect, if possible, to every clause and word of a statute" and avoid constructions that would render a word or phrase redundant or meaningless.

[6] It is misleading for the United States (at 30) and *Amicus* (at 11**)** to suggest that CACGEC does not dispute the SNI's exercise of tribal governmental power over the Buffalo Parcel. Without the right to exercise governmental power, any purported exercise of such power is a nullity. Here, at best, the SNI exercises the trappings of commercial ownership (*e.g.*, erecting a fence and putting up signage), not governmental power.

See Williams v. Taylor, 529 U.S. 362, 404 (2000) (quoting *United States. v. Menasche*, 348 U.S. 528, 538-39 (1955)). The NIGC's Indian lands opinion on the Buffalo Parcel uses the same characteristic, restricted fee land, to meet both prongs of the Indian lands definition. In so doing, it reads the governmental power requirement entirely out of the statute, in derogation of this cardinal principle of construction.

If the mere designation of land as restricted fee were sufficient to confer governmental power, then a tribe would have governmental power over all of its restricted fee land. If that were the case, IGRA would not require, as a separate element, that a tribe seeking to conduct Class III gaming on its trust or restricted fee lands also demonstrate governmental power. In this respect, IGRA treats both trust and restricted fee land similarly, but not in any way that helps the SNI or the Buffalo Parcel: under 25 U.S.C. § 2703(4), the governmental power requirement applies to both trust and restricted fee land, albeit not to reservation lands.

Restricted fee (or trust) status and governmental power are separate and independent requirements, and the existence of one does not, without more, satisfy the other. The NIGC's May 25, 2012 Indian lands opinion

concerning the Kialegee Tribal Town concretely illustrates this principle.[7] There, the NIGC concluded that the Kialegee's proposed gaming site in Oklahoma was restricted fee land but did not qualify under IGRA for Indian gaming, because the tribe did not have the legal right to exercise jurisdiction over it. Thus, while the parcel satisfied the first prong of the Indian lands requirement, restrictions on alienation, the tribe did not demonstrate jurisdiction, and its restricted fee lands were thus not "Indian lands" eligible for gambling under IGRA. The district court upheld the NIGC's interpretation in *Oklahoma v. Hobia*, 2012 WL 2995044 (N.D. Okla. July 20, 2012), *reh. denied*, 2012 WL 3096634 (N.D. Okla. July 30, 2012).

Years earlier, the court in *Miami Tribe of Okla. v. United States*, 927 F. Supp. 1419 (D. Kan. 1996), reached the same conclusion when it rejected the tribe's argument that the restricted status of an Indian allotment was proof of the tribe's jurisdiction.[8] The tribe, rather than appeal the court's

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[7] The NIGC's memorandum on the Kialegee Tribal Town's proposed site is available at http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2freadingroom%2fgameopinions%2fkialegeetribaltownopinion52412.pdf&tabid=120&mid=957. As the NIGC there explained, when the Kialegee formed, its constitution did not specify the geographical jurisdiction of the tribal town, and another tribe, the Muscogee Nation, had legal jurisdiction over the proposed site.

[8] The restricted fee status arose from the terms of the conveyance, which

decision, adopted the original landowner's descendants, who leased the tract to the tribe and consented to its exercise of jurisdiction. *See Miami Tribe of Okla. v. United States*, 5 F.Supp.2d 1213 (D. Kan. 1998); *Graves v. United States*, 86 F.Supp.2d 1094 (D. Kan. 2000); *Kansas v. United States*, 249 F.3d 1213, 1219 (10th Cir. 2001); and *Miami Tribe of Oklahoma v. United States*, 656 F.3d 1129, 1145 (10th Cir. 2011). The district court held, 86 F.Supp.2d at 1099, and the Tenth Circuit agreed, 249 F.2d at 1219, that the tribe's actions did not create jurisdiction, because a "tribe's jurisdiction derives from the will of Congress, not from the consent of fee owners pursuant to a lease."

To the same effect, in a series of Indian lands opinions involving Native Villages in Alaska, the Solicitor of the Department of Interior ("DOI") expressed doubt whether the tribes had jurisdiction over their restricted fee lands within the meaning of IGRA's governmental power requirement. For example, while the Native Village of Eklutna's restricted allotments were Indian country under 18 U.S.C. § 1151, the Solicitor was "not convinced" that the tribe exercised governmental power over the land and thus could not conclude that the land was "Indian lands" under IGRA.

"contained a clause stating that the land could not be conveyed or sold" without the consent of the Secretary of Interior. *Id.* at 1426 n.5.

The Solicitor expressed the same doubt about the restricted townsites of the Native Villages of Akiak and Barrow and a "restricted Native allotment" owned by a member of the Kenaitze Indian Tribe.[9]

Under SNSA, it is not enough for a tribe to hold its lands in restricted fee status. In addition, the tribe must have legal jurisdiction to exercise governmental power. In this case, however, the NIGC concluded and the lower court agreed that the Buffalo Parcel "became Indian country" when it passed into restricted fee and, because the SNI holds it in restricted fee, the SNI "possesses jurisdiction to exercise governmental authority over the Buffalo Parcel." (*CACGEC III*, Dkt. 58-4 at 10, 11.) This interpretation renders IGRA's "governmental power" requirement superfluous. Thus, it is not a reasonable or permissible interpretation.

B. The Court Below Misconstrued the Definition of a "Dependent Indian Community" in 18 U.S.C. § 1151 Which Refers to a Very Limited Category of Land to Which the Buffalo Parcel Does Not Belong

The Government's and SNI's repeated refrain is that the SNI has jurisdiction to exercise governmental power over the Buffalo Parcel because

[9] The Indian lands opinions on the Native Village of Eklutna, dated May 17, 1995, the Native Village of Akiak, dated March 2, 1995, the Native Village of Barrow, dated April 10, 1995, and the Kenaitze Indian Tribe, dated May 12, 1995, are available in the NIGC's electronic reading room at http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx.

it is restricted fee land and thus meets the definition of a "dependent Indian community" under 18 U.S.C. § 1151. As the Supreme Court has made clear, however, the dependent Indian community category is a "limited" and narrow adjunct to the more typical types of Indian country surrounding it in Section 1151 that Congress created to extend Indian country status to land that Congress dedicated for Indian use and occupancy as the equivalent of a reservation. *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998). The district court departed from over a century's worth of settled precedent in holding that the Buffalo Parcel is a dependent Indian community over which the SNI exercises governmental power.

The Section 1151 definition of Indian country, according to the Reviser's Notes, is based on the Supreme Court's opinion in *United States v. McGowan*, 302 U.S. 535 (1938), following *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *see also United States v. Pelican*, 232 U.S. 442 (1914); *Donnelly v. United States*, 228 U.S. 243 (1913). The phrase "dependent Indian community" comes from *Sandoval*, 231 U.S. at 46, which involved the U.S.'s authority to enforce its laws proscribing the introduction of liquor onto the Pueblo's ancestral lands in New Mexico. Congress by statute had specified the Pueblo lands were "Indian country, *see id*. at 37 n.1, and the

Supreme Court, emphasizing that the existence of Indian country is for Congress, not the courts, to determine, *id.* at 47, gave effect to that congressional designation.

The phrase "validly set apart for the use of the Indians as such, under the superintendence of the Government" comes from *Pelican*, where the Court used it to describe allotments which the U.S. by statute had created out of a diminished Indian reservation and held in trust for the benefit of individual Indians. 232 U.S. at 446, 449; *see McGowan*, 302 U.S. at 538; *United States. v. John*, 437 U.S. 634, 648-49 (1978); *Donnelly*, 228 U.S. at 269 (tract of land that, "being a part of the public domain, is lawfully set apart as an Indian reservation"). *McGowan* involved land Congress had purchased and set apart for "needy Indians scattered over the State of Nevada" as a permanent settlement designated as an "Indian colony." 302 U.S. at 537. Although the colony was not technically a reservation, Congress had set it apart for the use of the Indians like a reservation. *Id.* at 538. Under *McGowan*, with congressional intent as the touchstone, the "dependent Indian community" category is Indian territory that is like a reservation in everything but the name Congress gave it.

"Words of art bring their art with them," and "if a word is obviously

transplanted from another legal source … it brings the old soil with it." F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) ("*Reflections*"). This trilogy of cases (*Pelican*, *Sandoval* and *McGowan*) establishes that the dependent Indian community category, like the two Indian country categories (reservations and allotments)[10] surrounding it in 18 U.S.C. § 1151, is a narrow one, grounded in a clear congressional purpose to create Indian country. These cases circumscribe the meaning of section 1151(b): a dependent Indian community is land that Congress has set aside for Indians as the equivalent of an Indian reservation or allotment. *See Venetie*, 522 U.S. at 530-31.

Applying these principles in *Venetie*, the Supreme Court held that the lands in question were not "dependent Indian communities" because that term referred to a limited category of Indian lands that were set aside by the federal government for the use of the Indians as Indian land and were under federal superintendence. Under the Alaska Native Claims Settlement Act ("ANSCA"), Congress did not intend to set land aside under federal superintendence, because the congressional intent was to remove federal

[10] The maxim *noscitur a sociis*, a word is known by the company it keeps, is often applied to avoid giving unintended breadth to an Act of Congress. *See, e.g., Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961) (citing *Neal v. Clark*, 95 U.S. 704, 708-09 (1878)).

superintendence, and there was no showing that the federal government actively controlled, or intended to control, the property. Additionally, there was no restriction on the landowners that the property had to be used or owned by Indians. Thus the landowners did not constitute a dependent Indian community under § 1151.

The Buffalo Parcel does not fit, neatly or otherwise, into any of Section 1151's three categories. First, the requisite set-aside does not exist. In other cases where the Court found a set-aside, Congress explicitly designated specific land where Indians lived as "Indian country," *Sandoval*, 231 U.S. at 37, a "reservation," *John*, 437 U.S. at 648; *Pelican*, 232 U.S. at 449; *Donnelly*, 228 U.S. at 269, or its equivalent, *McGowan*, 302 U.S. at 537 & n.4, or "trust land," *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505, 511 (1991), thereby dedicating the land to Indian use and occupancy.

In SNSA, however, Congress did not designate specific land where Indians lived, or even define the SNI's "aboriginal area." Assuming Congress used this term in its common sense, *see McBoyle v. United States*, 283 U.S. 25, 26 (1931), in 1797, the SNI's "aboriginal" landholdings may have encompassed as much as 4,250,000 acres in western New York, (*see*

CACGEC II, Dkt. 61 at 17 n.14 (citing *Banner v. United States*, 238 F.3d 1348, 1350 n.1 (Fed. Cir. 2001))), or about 12% of New York State's total land mass of 34,915,840 acres.[11] The imposition of a restriction on alienation on as-yet unidentified land, non-Indian in character, located anywhere within such a vast expanse, without the purpose to protect the Indians residing there, is not a federal set-aside consistent with the Supreme Court's precedents.[12]

The court below confused cause and effect in erroneously concluding, without regard to congressional intent, that the designation of land in restricted fee was a sufficient "set-aside" to create a dependent Indian community. *See CACGEC II*, Dkt. 61 at 95 (citing *Venetie*, 522 U.S. at 528 n.4). In *Venetie*, the Court cited *Sandoval*, 231 U.S. at 48, which in turn cited *United States v. Candelaria*, 271 U.S. 432 (1926), for its conclusion that Congress intended to "exercise … Government's guardianship over the

[11] This is based on the total area of 54,555 square miles, as reported by the U.S. Census Bureau of the U.S. Department of Commerce, at https://www.census.gov/geo/reference/state-area.html.

[12] Such an interpretation would be unusual. Especially after the enactment of IGRA, Congress typically includes geographic guidance when it authorizes a tribe to obtain new lands that would fall under its legal jurisdiction. *See, e.g.*, Auburn Indian Restoration Act, 25 U.S.C. § 1300*i*-2 (1996) (lands in Placer County); Ponca Restoration Act, 25 U.S.C. § 983h(c)(l) (1990) (lands in Knox or Boyd Counties).

[Indian] tribes and their affairs," through legislation, including restrictions on alienation. There, the Court had implied the existence of restrictions on alienation to protect the Pueblos, "a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races," *id*. at 441-42. In each case, *Venetie* included, it was not the designation of land as "fee simple" or "restricted fee" that signaled a "dependent Indian community," but the congressional intent to safeguard an Indian community dependent (*i.e.*, a "dependent Indian community") on the protections of the federal government for its continued existence. In SNSA, that intent did not exist (*see* Point IC, *infra*).

The issue is not, as the lower court put it, whether Congress determined that restricted fee status was "appropriate" for all land within the SNI's aboriginal area (*CACGEC II*, Dkt. 61 at 79, 84), but whether the congressional purpose in SNSA was to set aside in advance, as the equivalent of an Indian reservation or allotment, any land the SNI might subsequently choose within that vast expanse, thereby leaving it to the tribe to determine the location and existence of Indian country. The lower court's interpretation that it did draws no support from the prior cases and flies in the face of the limited nature of the federal set-aside requirement, as the

Supreme Court construed it in *Venetie*.

Federal superintendence, the other principal requirement, is also lacking. In the cases establishing the dependent Indian community category, the U.S. did not simply restrict alienation, but rather by statute expressly assumed jurisdiction and control over virtually all facets of the Indian community to supervise, protect and sustain the Indians living there. *See McGowan*, 302 U.S. at 537-39 (U.S. retained title to land to protect Indians living there); *Pelican*, 232 U.S. at 447 (allotments were "under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians"); *Sandoval*, 231 U.S. at 37 n.1 (federal statute placed Pueblo lands under the "absolute jurisdiction and control of the Congress of the United States"). As the Court explained in *Venetie*, the federal superintendence requirement guarantees that the Indian community is sufficiently "dependent" on the federal Government that it and the tribe, rather than the State, are to exercise primary jurisdiction over the land. 522 U.S. at 527 n.1.

In SNSA, Congress did nothing of the sort. As the district court recognized (*CACGEC II*, Dkt. 61 at 29), one of the express purposes of SNSA was to promote the SNI's ***economic self-sufficiency***, while

facilitating the negotiation of new leases and providing stability and security for Salamanca residents. 25 U.S.C. § 1774(b). To that end, Congress earmarked $5 million of the $35 million it paid for the SNI's "***economic and community development***," *id.* § 1774d(b)(2)(A), and left it to the SNI to determine how to use the remaining $30 million. *Id.* § 1774d(b)(1). This is qualitatively different from the paternalistic control, characteristic of a bygone era, that Congress assumed in the earlier cases.

The SNI, a justly proud, independent and autonomous nation which rejected the Indian Reorganization Act due to concerns over maintaining its sovereignty (*see, e.g., Amicus* Br. at 4 n.2), does not, cannot and should not simultaneously claim to be dependent on or subject to the guardianship and protection of the U.S. government. It is unreasonable to assume – and certainly not without a clear statement to this effect – that Congress would promote tribal self-sufficiency by creating a "dependent community" on a parcel where no one lives. The absence of federal control over the land, without more, is itself a sufficient basis to reverse the lower court as to the Indian country issue.

The situation here is analogous to *Venetie*, where the U.S. exercised protection over the lands by exempting them from real property taxes,

adverse possession claims, and certain other judgments. *See* 43 U.S.C. § 1636(d). There, the unanimous Court concluded, "[t]hese protections, if they can be called that, simply do not approach the level of superintendence over the Indians that existed in our prior cases," in which the U.S. "actively controlled the lands in question, effectively acting as a guardian for the Indians." 522 U.S. at 533. Here, as in *Venetie*, the minimal protections resulting from restrictions on alienation and exemption from taxes fall far short of the level of superintendence over the Indians and their lands in *McGowan*, *Pelican* and other cases.

The lower court's ruling expands the concept of a dependent Indian community beyond recognition. Construing section 18 U.S.C. § 1151(b) in the light of history and its intended scope, the Buffalo Parcel does not fall within, or even anywhere near, the dependent Indian community category. The SNI is not "dependent," and the Buffalo Parcel is not a "community." Thus, it cannot reasonably be said, as the court below erroneously concluded, that Congress evinced an intent to give the SNI governmental power over the land by allowing the tribe to hold it in restricted fee.

C. Congress did not Unambiguously Express the Intent to Transfer to the SNI Governmental Power Over Lands It Purchased with SNSA Funds

The touchstone for determining the existence of Indian country is the intent of Congress. As the U.S. Supreme Court stated in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998), "because Congress has plenary power over Indian affairs, *see* U.S. Const., Art. I, § 8, cl. 3, some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country." *Id.* at 531 n.6; *see South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Consequently, in determining the existence of Indian country, "congressional intent will control." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977); *United States v. Soldana*, 246 U.S. 530, 531 (1918) (whether land "is Indian country depends on the construction to be given the act of Congress"). Here, the U.S. and *amicus* have offered nothing in SNSA's text, structure or history to support their view that Congress intended to transfer legal jurisdiction to exercise governmental power over lands the SNI might acquire and hold in restricted fee.

1. SNSA's Text Does Not Manifest a Clear Expression of Congressional Purpose to Transfer Governmental Power to the SNI

The clearest expression of congressional purpose is the statutory language. *See United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543 (1940). SNSA § 1774(b) sets forth the statute's purposes: (i) to support an agreement between the SNI and Salamanca and facilitate the negotiation of new leases; (ii) to assist in resolving past inequities involving the leases and secure fair and equitable compensation for the SNI; (iii) to provide a productive environment for the negotiation of new leases; (iv) to provide stability and security for Salamanca and the congressional villages; (v) to promote the economic growth of Salamanca and the congressional villages; (vi) to promote economic self-sufficiency for the SNI and its members; (vii) to promote cooperative economic and community developments on the part of the SNI and Salamanca; and (viii) to avoid potential liability for the U.S. that could be a result of not reaching a settlement.[13] Congress in SNSA said nothing about transferring

[13] These reflect the legislative findings in SNSA § 1774(a) – the disputed leases in Salamanca and the congressional villages, the strained relations between Indian and non-Indian communities, and the uncertainty and concern for Salamanca and its residents arising from the imminent expiration of the 1890 leases – that impelled Congress into action.

governmental power over land the SNI might purchase with SNSA funds.

In SNSA, Congress gave the SNI money, not land, "to be managed, invested and used by the Nation to further specific objectives," including "economic and community development." 25 U.S.C. § 1774d(b). During the hearings, Dennis Lay, then-President of the SNI, spoke to those "specific objectives": he said the tribe anticipated "placement of the great majority of the Salamanca monies in a broadly diversified investment fund, specializing in holding funds for the long term benefit of the investor."[14] He also said the tribe could use interest earned on the invested funds to further the SNI's long term objectives, which included: providing care for the elderly; funding education and youth programs; economic development and job creation; environmental programs to protect the Nation's land, water, and air; possible land acquisition and the creation of substance abuse programs. *Id.* He said nothing about opening a casino.

Congress realized the SNI might use the money for land acquisition, *id*., and it envisioned non-contiguous land purchases as real estate

[14] *See* Supplemental Statement of Dennis Lay, President, Seneca Nation concerning the Nation's budget process and its planned use and management of settlement funds, as incorporated in S. Rept. 101-511, Providing for the Renegotiation of Certain Leases of the Seneca Nation, and for Other Purposes, 101st Congress (1990).

investments or developments consistent with the SNI President's specific objectives. To facilitate those goals, SNSA allowed the SNI to seek a property tax exemption, much as governments often extend to encourage businesses development, for its real property acquisitions. Under SNSA's "land acquisition" provision, state and local governments had a period of 30 days after notice of the acquisition of or intent to acquire such property "to comment on the impact of the removal of such lands from real property tax rolls of State political subdivisions." 25 U.S.C. § 1774f(c). Congress did not contemplate a transfer of governmental power to the SNI, and there was no need to solicit comment on an outcome that it did not intend to occur.

If Congress had envisioned that the state and local municipalities would be ceding not just property taxes but also regulatory jurisdiction, it would have asked for comment on that, as it did, for example, in the Torres-Martinez Desert Cahuilla Indians Claims Settlement Act, 25 U.S.C. § 1778d(a) (authorizing Secretary to convey lands into trust status, unless local municipality governing body objects within 60 days to conveyance).[15] *See*

[15] To similar effect, DOI's regulations under the Indian Reorganization Act require the Secretary to give state and local governments an opportunity to provide written comments on the potential impact of the acquisition "on regulatory jurisdiction, real property taxes, and assessments." 25 C.F.R. § 151.11(d).

also The Mohegan Nation (Connecticut) Land Claims Settlement Act, 25 U.S.C. § 1775c(b)(1)(B) (requiring consultation with town on impact of removal from taxation, problems concerning jurisdiction and potential land use conflicts). The limited scope of the municipal comment is textual evidence that Congress intended similar limitations on the effect of the restricted fee designation.

Congress realized the SNI might want to use some of the money to expand its reservations, and in SNSA, Congress created an explicit method for the SNI to do that: "[b]ased on the proximity of the land acquired to the Seneca Nation's reservations, land acquired may become a part of and expand the boundaries of the Allegany Reservation, the Cattaraugus Reservation, or the Oil Spring Reservation in accordance with the procedures established by the Secretary for that purpose." 25 U.S.C. § 1774f(c). In addition to other benefits from reservation status, IGRA's governmental power requirement does not apply to lands within the limits of a reservation. 25 U.S.C. § 2703(4)(A).

Congress well understood the difference in IGRA's "Indian lands" definition between reservation and restricted fee land. Just two years earlier in IGRA, it opted to use the term "Indian lands," which it defined to include

all lands ***within an Indian reservation***, and trust or restricted fee land outside a reservation "***over which an Indian tribe exercises governmental power***," 25 U.S.C. § 2703(4). The term "Indian lands" in 25 U.S.C. § 2703(4) is not the same as the term "Indian country" in 18 U.S.C. § 1151. As the Counsel on Indian Affairs to the Committee on Interior and Insular Affairs explained, Congress eschewed "Indian country" in favor of "Indian lands" in IGRA specifically to avoid the "dependent Indian community" category, which had "become a legal bone of contention." F. Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 Ariz. St. L.J. 99, 139-40 (2010). Significantly, for off-reservation trust or restricted fee lands, IGRA requires the tribe not only to possess the lands, but also to exercise "governmental power" over them. 25 U.S.C. § 2703(4).[16]

Without a grant of governmental power, SNSA-restricted fee land would ***not*** meet IGRA's Indian lands definition, and the SNI could ***not*** expand off-reservation gambling onto any parcel of its choosing. The expression of two separate land-acquisition processes – one for expanding

[16] According to the U.S. (Br. at 44), the requirement of governmental power is unique to IGRA. Thus, the definition of Indian lands under other statutes and regulations does not bear on its meaning under IGRA.

the reservation and another for acquiring off-reservation lands with restrictions on alienation and property tax exemptions ***but not governmental power*** – is structural evidence that Congress did ***not*** intend to allow the SNI to expand off-reservation gambling onto any restricted fee parcel of its own choosing, such as one in the heart of New York State's second largest city.

2. SNSA Does Not Satisfy the Presumption that to Alter the Balance of State and Federal Power, Congress Must Act Explicitly

The distinction between sovereign "Indian lands" over which a tribe exercises governmental power, on one hand, and lands that a tribe holds subject to a restraint on alienation, on the other hand, cannot be overstated. The legal effect of "Indian Country" status is that lands become subject to the primary jurisdiction of the federal and tribal governments, and the State loses its inherent sovereignty over the lands in question. *See, e.g., Venetie Tribal Gov't*, 522 U.S. at 527 n.1 (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998)). Primary sovereignty, the right to exercise governmental power, is the most fundamental attribute of any body politic. In contrast, the effect of 25 U.S.C. § 177, as the Solicitor's staff well understood, is to preempt "certain claims based upon state law, such as adverse possession, statutes of limitations, or laches, which may have the

effect of transferring title to Indian property to non-Indian claimants." *CACGEC III*, Dkt. 42-2 at 19 (citing Cohen's Handbook of Federal Indian Law at 512, 520 (1982 ed.); *see, e.g., Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998).

If Congress had intended to confer on the SNI governmental power over restricted fee lands, it would have been a significant and transformative development, and Congress would have made a clarion statement to that effect in the legislation. *See Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes").[17] If SNSA had included a hint of any such effect, it would have been highly controversial, provoked extensive debate, prompted a recorded (not voice) vote, and in all likelihood, fallen in resounding defeat. The ***lack of any reference to governmental power*** or even gambling in SNSA, or even its legislative history, is strong evidence that Congress never intended to grant the SNI governmental power over its restricted fee lands or thereby to create off-reservation "Indian lands" within the meaning of

[17] This is a question of law for the Court to decide, and deference to the agencies would be inappropriate. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (no deference where "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").

IGRA.[18]

In construing statutes, courts recognize that "'Congress legislates against the backdrop' of certain unexpressed presumptions." *Bond v. United States*, --- U.S. ---, 134 S.Ct. 2077 (June 2, 2014) (citation omitted). One of these is the presumption, well known to Congress in 1990, that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)); *see BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (when Congress "radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit") (quoting Frankfurter, *Reflections*, 47 Colum. L. Rev. at 539).

Closely related to this is the "well-established principle" that the courts should not "decide a constitutional question if there is some other

[18] The SNI, in its June 4. 2014 "supplemental authority," cites the Supreme Court's decision in *Michigan v. Bay Mills Indian Community*, --- U.S. ---, 134 S. Ct. 2024 (2014), for the proposition that courts have no "roving license … to disregard clear language" on the view that "Congress 'must have intended' something broader." That principle applies, first and foremost, to the issue of Indian lands: Congress does not create new Indian lands by designating them as restricted fee.

ground upon which to dispose of the case." *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984); *see Adoptive Couple v. Baby Girl*, 570 U.S. ---, 133 S.Ct. 2552 (2013) (Thomas, J., concurring) (urging a "limited construction of the Indian Commerce Clause" and concurring in majority's statutory construction to avoid reaching the constitutional issues); *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009) (applying the canon of constitutional avoidance, based on the reasonable presumption that Congress did not intend a statutory construction which raises serious constitutional doubts). The Constitution created a federal government of limited powers by conferring upon Congress "not all governmental powers, but only discrete, enumerated ones." *Printz v. United States*, 521 U.S. 898, 919 (1997).[19] In our federalist system, "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). Nothing is so central to sovereignty as the matter here at issue: governmental power over land, exclusively non-Indian at the time of acquisition, within the geographic borders of the State.

[19] Under the Constitution, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the Sates, are reserved to the States Respectively, or to the people." U.S. Const. amend. X.

What these principles share in common is the recognition that when the federal government radically readjusts the balance of State and national authority, it does so explicitly. *BFP v. Resolution Trust Corp.*, 511 U.S. at 544. The requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision. *United States v. Bass*, 404 U.S. 336, 349 (1971). There is no such assurance here.

Congress knew how to use words like jurisdiction and governmental power. In SNSA, unlike in other settlement acts,[20] Congress declined to make such a statement. SNSA does not mention governmental power, jurisdiction, sovereignty, or any related term in describing the SNI's relation to land it might acquire in restricted fee land. It is silent about the transfer of jurisdiction or governmental power and neither refers to, nor purports to transfer to, the SNI authority to exercise governmental power over the lands

[20] *See, e.g.*, Aroostook Band of Micmacs Settlement Act, 25 U.S.C. § 1721 (1991) (contemplating agreements with State regarding jurisdiction); Mohegan Nation (Connecticut) Land Claims Settlement, 25 U.S.C. §§ 1775(a)(9)(A), 1775c(b)(1)(B) (noting that town "will be affected by the loss of a tax base from, and jurisdiction over," lands to be held in trust and requiring consultation on impact to town from problems concerning determination of jurisdiction and potential land use conflicts); Santo Domingo Pueblo Claims Settlement, 25 U.S.C. § 1777(b)(3) (including among the statutory purposes "to clarify governmental jurisdiction over the lands within the Pueblo's land claim area").

to be acquired with SNSA funds. SNSA's legislative record is devoid of any mention of a transfer of governmental power, jurisdiction, or sovereignty. It does not address "Indian lands" under IGRA. Indeed, as the court below noted (*CACGEC III*, Dkt. 67 at 34), SNSA is not a statute "that speaks to the topic of gaming at all." Thus, nothing in SNSA provides anything close to the requisite "clear and manifest" statement that Congress intended to alter the federal-state balance by divesting the State and its political subdivisions of their governmental power and authority, *Gregory*, 501 U.S. at 461, or even that "in fact faced, and intended to bring into issue," *Bass*, 404 U.S. at 349, the constitutional implications of a transfer of legal jurisdiction to exercise governmental power. SNSA's silence speaks volumes about congressional intent.

Amicus points to a statement of Rep. Amory Houghton regarding the provision of services, such as police, water and libraries, over lands the tribe might acquire with SNSA funds as supposed evidence of its intent to transfer governmental power to the SNI over its restricted fee lands. (*Amicus* Br. at 31, 32 n.10 (citing H.R. Hrg. Rpt. No. 101-63, *CACGEC III*, Dkt. 58-33 at 163; S. Rep. No. 101-1186 at 44.)) *Amicus* pulls the statement misleadingly out of context: Rep. Houghton was responding to a question about

"potential loss of tax revenues," H.R. Rpt. No. 101-63 at 158, if the SNI were to use SNSA funds "to expand the reservation." (*Id.* at 151; *see also* S. Rpt. No. 101-1186 at 43-44.) There was no mention of any transfer of governmental power over lands not proximate to the reservation which the SNI might hold in restricted fee.

It is absurd to suggest (*see Amicus* Br. at 16) that when Congress allowed the SNI to hold land in restricted fee, it designated the land as Indian country over which the tribe could exercise governmental power. A restriction on fee is a restraint, analogous to an easement, on the right to transfer land without governmental approval. The restriction gives the SNI ***less*** power over its land, not more, than the ordinary landowner possesses. In SNSA, the SNI relinquished power – the right to alienate its land freely – in exchange for money in the form of a tax exemption. It did not, by virtue of that restriction, somehow also acquire the right to exercise governmental power over a potentially unlimited number of sites within its aboriginal area.

Rep. Houghton's statement would be an especially slender reed upon which to impute an intent to transfer governmental power over restricted fee land, both because it (like the entirety of SNSA) says ***nothing*** about the matter at issue, and also because to do so would defy accepted principles of

statutory construction: Congress makes law by writing statutes, which requires putting words on paper in a way that conveys a reasonably definite meaning, and courts must look primarily to the statutes in interpreting them. Frankfurter, *Reflections*, 47 Colum. L. Rev. at 538-39 (legislative purpose "is not drawn, like nitrogen, out of the air," but "evinced in the language of the statute, as read in the light of other external manifestations of purpose"). Where, as here, the extra-statutory text does not contradict the statutory text, there is no basis to "question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987) (citation omitted).

To illustrate the absurdity, imagine that the SNI, instead of purchasing the Buffalo Parcel, chose to invest the $30,000,000 federal cash payment, *see* 25 U.S.C. § 1774d(b)(1), in 6,000 vacant lots, $5,000 apiece, in downtown Buffalo. Under the lower court's interpretation, the SNI need only notify state and local governments, which would have 30 days to comment on the tax impact. Then, unless the Secretary were to determine otherwise (and as a high-ranking DOI official, Edith Blackwell, put it, "SNSA doesn't provide much ability to say no," *CACGEC III*, Dkt. 42-2 at 10), the vacant lots would be subject to 25 U.S.C. § 177 and the SNI would

hold them in restricted fee ***and***, so the Government argues, it would also possess legal jurisdiction to exercise governmental power over them. Congress would not have intended to create such a "checkerboard of state and tribal jurisdiction," *City of Sherrill*, 544 U.S. at 202-03, especially given the complete lack of discussion of gambling in SNSA and its legislative history. Nor would Congress ever – certainly not without major debate – intend to permit the "spot zoning" creation of Indian lands on a city street where no Indians lived or would live and which is simply the site of a single commercial enterprise.

Similarly, the court below misread history in concluding that SNSA and the IRA are similar and that both create Indian lands. The purpose of the IRA was to restore land for the Indians and to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). It "reflected a new policy of the Federal government and aimed to put a halt to the loss of tribal lands through allotment," which "gave the Secretary of the Interior power to create new reservations," by taking land into trust for them, "thereby to encourage tribes to revitalize their self-government." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151

(1973).

Under SNSA, in contrast, Congress authorized the SNI, not the U.S., to purchase the land. It authorized the SNI to hold the land in fee, subject to 25 U.S.C. § 177, not to have the U.S. hold it in trust for the tribe. "During the late 19th century, the Federal Government changed its policy of setting aside reservation lands exclusively for Indian tribes under federal supervision." *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998). Since 1934, Congress has consistently used the trust mechanism under the Indian Reorganization Act, 25 U.S.C. § 461, *et seq.*, not the Nonintercourse Act, 25 U.S.C. § 177 – a statute intended to protect, not create tribal lands, and with no regulatory procedures to guide the determination – as the mechanism for creating new Indian lands. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005). As the court below acknowledged (*CACGEC II*, Dkt. 61 at 80 n.49), there is no other case construing the imposition of restrictions under 25 U.S.C. § 177 as "authorizing the acquisition of congressionally designated restricted fee lands." (*Id.*) As there was no prior case, there was no way for Congress to anticipate the result here.

In short, the court below misconstrued the appropriate judicial

inquiry, which is properly directed to the intent of Congress, and inappropriately expanded the "dependent Indian community" category of Indian country, which is relatively narrow and accounts for only a small portion of Indian country nationwide. Most significantly, the court below disregarded the lack of any evidence of congressional intent to confer governmental authority on the SNI over land it purchased with SNSA funds. The lower court's holding on the "Indian lands" issue should be reversed.

POINT II

Even If The Buffalo Parcel Were "Indian Land" Within the Meaning of IGRA, It Is Still Not Gambling-Eligible By Virtue of Section 20's After-Acquired Lands Prohibition

A. Secretary Norton's November 2002 Letter Was Not Based Upon an Erroneous Assumption About Section 20's Applicability to Restricted Fee Land

Both the Government and the SNI argue that the principal justification for the sudden 180° about-face with respect to the applicability of § 20's after-acquired land prohibition to restricted fee was that Secretary Norton "misapprehended" what qualified as restricted fee land in her November 2002 letter to both Governor Pataki and the then-head of the SNI, Cyrus Schindler. The letter stated that the after-acquired land prohibition applied both to "trust land" and "restricted fee" land. (*CACGEC III*, Dkt. No. 58-21

at 8.) Secretary Norton said that to interpret the statute otherwise would open a huge loophole if lands tribes might purchase after IGRA's enactment could become restricted fee land, thereby enabling them to circumvent Congress's intent to restrict gambling to the existing inventory of tribal land absent certain statutorily defined exceptions. (*See CACGEC III*, Dkt. 58-4 at 13; Dkt. 58-8 at 7; s*ee also* Government's Br. at 53.) [21] Appellees suggest that neither Secretary Norton – nor, by implication, NIGC and/or the Bureau of Indian Affairs ("BIA") within the Department of the Interior – realized at the time that only Congress could create restricted fee land and that an Indian tribe could not unilaterally create it. (*Id.*) The subsequent about-face by the DOI and the NIGC was nothing more, they argue, than an effort to correct Secretary Norton's error made 6 years earlier, that Indians could unilaterally create restricted fee land.

This argument is belied, however, by the fact that in her letter Secretary Norton was fully aware that she was addressing the issue of

[21] In a December 21, 2010 Indian lands opinion for the Bay Mills Indian Community, the Solicitor opined that the "legislative purpose of IGRA, Section 20 . . . was to freeze every tribe's gaming eligible Indian lands as they existed at the time of IGRA's enactment, subject to certain delineated exemptions . . ." The complete opinion is available at: http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2fBayMills+Sol+Op+letter+(2).pdf&tabid=120&mid=957.

Congressionally-designated restricted fee land to be owned by the SNI, rather than just any land an Indian tribe might thereafter purchase. (*CACGEC III*, Dkt. 58-21 at 6) ("The Settlement Act [SNSA] also provides that lands acquired pursuant to the Act … shall be held in restricted fee."). An Indian tribe's supposed ability to create restricted fee land, unilaterally, therefore, had nothing to do with Secretary Norton's conclusion. In fact, the Government concedes that five years before Secretary Norton's letter, in a brief it filed in 1997 with the Supreme Court in *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), it had taken the position that tribes could not unilaterally create restricted fee land. (Government's Br. at 53-54.)[22] This invites the question how such an important letter would have been allowed to go out over Secretary Norton's signature five years later without other members of the staff of the Agency alerting her to this position if it were erroneous.[23] It strains credibility to suggest that Secretary Norton, as head of the Department of the Interior, did not know what she was talking about.

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[22] The Solicitor's M-Opinion is very misleading as it clearly implies that the "better view of the law" developed only after Secretary Norton's letter. (*CACGEC III*, Dkt. 58-8 at 7.)

[23] Secretary Norton was speaking not only for herself as she said that "… the Department has examined whether § 20 of IGRA applies to the Compact." (*CACGEC III*, Dkt. 58-21 at 8.)

In terms of *Chevron* deference, a difference of opinion within the ranks of the same agency also raises the question as to exactly whose interpretation within the agency is entitled to judicial deference. Is it the head of the agency or a subsequent opposing interpretation advanced only in the cause of litigation by the agency's attorneys? *See* Frederick Liu, *Chevron as a Doctrine of Hard Cases*, 66 Admin. L. Rev. 285, 333-34 (2014). *See also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (judicial deference to an agency's convenient litigating position unwarranted).

Unlike the Government and the SNI, Secretary Norton did not "cherry-pick" words out of context. She did not look just at the words of the statute, but the clear and unambiguous overall intent to confine Indian gambling to Indian land already in existence in the absence of exceptions not applicable here. If anyone is entitled to deference, it should be the head of the agency rather than its subordinates. *See* Antonin Scalia, *Remarks on the 25th Anniversary of Chevron*, reprinted in 66 Admin. L. Rev. 243, 248-49 (2014).

B. The Application of the After-Acquired Lands Prohibition to Restricted Fee Carries Out Congress' Statutory Intent

The Government and SNI invoke *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to argue for a strict, literal and wooden interpretation of IGRA to ascertain Congressional intent, but *Chevron* itself is not so confining. It directs courts to employ the "traditional tools of statutory construction" to determine the meaning of a statute. *Id.* at 843 n.9. The Court should not, therefore, limit itself to examining the text of a particular statute in isolation, as its meaning can only be gleaned by placing the words in context. "Statutory construction … is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because only one of the permissible meanings produces a substantive effect that is compatible with the law." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). "Some rules of statutory construction come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest possible compass. However well these rules may serve us at times in aid of deciphering legislative intent, they long have been

subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose…" *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943).[24]

Secretary Norton understood context when she authored her November 2002 letter. (*CACGEC III*, Dkt. 58-21 at 8.) Thereafter, both the NIGC and the BIA concurred that the only "sensible" reading of the statute was that Section 20 applied to restricted fee land. (*CACGEC III*, Dkt. 58-7 at 5.)

The lower court originally agreed as well, stating that any other construction was "clearly at odds with Section 20's purpose" (*CACGEC II*, Dkt. 61 at 106-107.) To permit gambling on after-acquired restricted fee

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[24] Literal interpretations reached "… in a vacuum, acontextually and untethered from other parts of the operative text …" are to be avoided. *King v. Burwell*, _____ F.3d _____, 2014 WL 3582800, at *15 (4th Cir. July 22, 2014), (Davis, J., concurring), citing *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007); *cf. Halbig v. Burwell*, 573 F.3d ____, 2014 WL 3579745 (D.C. Cir. July 22, 2014). In *King v. Burwell*, the 4th Circuit held that purchasers of health insurance on federal exchanges under the Affordable Care Act were entitled to the same tax credits as purchasers of health insurance on state exchanges despite Congress' failure to explicitly so state. Otherwise, the entire statutory regime would have been undermined. *See also Utility Air Regulatory Grp. v. EPA*, _____ U.S. _____, 2014 WL 2807314 at *9 (June 23, 2014). In *Utility Air*, the Court also noted that where the context warrants, the same words may have different meanings in different parts of the same statute so as not to undermine Congress' intent. *Id.*

land while forbidding it on after-acquired trust land made no sense. The fact that in IGRA Congress did not explicitly forbid gambling on after-acquired restricted fee land was, moreover, unnecessary because, at the time, there existed no statutory mechanism for any such additional land to come into existence (*Amicus* Br. at 42.)[25]

It is ironic that while the Government argues (Br. at 35-36) that for purposes of the Indian land analysis, restricted fee land and trust land are "jurisdictional equivalents," at the same time it argues that for purposes of the after-acquired lands prohibition, the two are distinctly different. The Government may not have its proverbial cake and eat it too. As the lower court noted in *CACGEC II*, "[i]n the SNSA, Congress chose to create a process for restricted fee status that parallels the language of the IRA's trust provision and other trust-related statutes. The Court reads that choice as indicative of Congress's intent that use of the same language have the same effect." (*CACGEC II*, Dkt. 61 at 90.) It follows that since trust land is

[25] Indeed, even when Congress creates additional restricted fee land, that, by itself, does not make such land "Indian land" absent a concomitant conferral of governmental power. *See* 25 U.S.C. § 2703(4)(b)(ii). *See also* letter dated December 21, 2010 at p. 15, n.12, addressed to NIGC from the Solicitor of the DOI, regarding land owned by the Bay Mills Indian Community, available at http://www.nigc.gov/linkclick.aspx?link=NIGC+Uploads%2findianlands%2fBayMills+Sol+Op+letter+%282%29.pdf&tabid=120&mid=957

undeniably subject to the after-acquired lands prohibition, then restricted fee land should be as well.

In fact, in terms of alienability, trust land and restricted fee land are indeed identical. Trust land obviously may not be sold absent Government approval because the Government holds title to the land in the first place, whereas the Non-Intercourse Act, 25 U.S.C. § 177, applies to certain lands title to which is held by an Indian tribe, rather than the Federal government. The Non-Intercourse Act does not apply to trust land because it would be redundant, but the statute is necessary to protect land held in fee by Indian tribes because a tribe could sell it without the Government's approval. It follows that the mere fact that restricted fee lands cannot be sold absent Government approval should not exempt them from the after-acquired lands prohibition. Trust lands also may not be sold without the Government's acquiescence, but they are nevertheless subject to the after-acquired lands prohibition.

C. The District Court's Decision in *CACGEC II* Was Not *Dicta*

Both the Government and the SNI delight in pointing out that in *CACGEC III*, the District Court disowned its own ruling in *CACGEC II* that Section 20's after-acquired land prohibition did not apply to restricted fee

land, referring to it as "dicta." (*See* Government's Br. at 57; *Amicus* Br. at 47-50.) No matter how the District Court may now seek to rationalize overruling itself, the truth is that what it said in *CACGEC II* was anything but *dicta*. *Dicta* is a court's "aside" that is not necessary to the conclusion it reaches. (*See* Appellants' Br. at 60.) In *CACGEC II*, the District Court faced the question whether the Buffalo Parcel was gambling-eligible. It was required to answer three questions: (1) whether the land was "Indian land"; (2) if so, whether it was subject to the after-acquired lands prohibition; and (3) if so, whether it nevertheless fell within the settlement of the land claim exception to the prohibition. If the answer to either of the first two questions had been negative, there would have been no need to address the third. The Court, however, responded affirmatively to the first two, thereby necessitating that it address the third as well in order to dispose of the case. Its holding with respect to the second question (the applicability of the after-acquired lands prohibition to restricted fee land) was, therefore, essential to the conclusion it reached. (*See* Appellants' Br. at 59-61.) Accordingly, the District Court's rationalization that its prior decision was *dicta* is simply false.

D. The Government's Reliance on the Revised Regulations That Violated the Administrative Procedure Act Is Misplaced

Both the Government (Br. at 58) and the SNI (Br. at 48) cite *National Cable and Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) for the proposition that an agency can revise its own interpretation of a statute, even when a Court has previously interpreted the statute to read the opposite way. *Id.* at 1001. This is true, however, only when the agency's new interpretation furthers rather than frustrates Congressional intent. *Id.* at 982. To allow gambling on after-acquired restricted fee land contravenes Congress's intent to halt the proliferation of such gambling.

Moreover, the revised interpretation is based on regulations that are not "legislative."[26] *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2000). Those regulations are only "interpretive" as opposed to legislative, as the e-mail exchange between BIA and NIGC confirmed. (*CACGEC III*, Dkt. 58-38 at 73.) *See also Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87,

[26] Reliance on the 2008 regulations is also questionable for another reason. *See* 25 C.F.R. § 292.26. By their terms, the regulations do not apply to prior final decisions. In 2007, the NIGC had opined that the after-acquired lands prohibition did apply to restricted fee land. (*CACGEC III*, Dkt. 58-7 at 5.) So had the Secretary all the way back in November 2002. *See also* 25 C.F.R. § 292.26(b), stating that the regulation also does not apply to future actions when the NIGC had written a prior opinion with respect to the applicability of Section 20 of IGRA.

99 (1995). As such, they are entitled to considerably less deference, especially where, as here, they represent a complete reversal of the agency's own prior decision. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). The Government, in fact, had on numerous occasions taken the position in this very litigation that the after-acquired lands prohibition applied to both trust and restricted fee land. (*CACGEC II*, Dkt. 28-2 at 26; Dkt. 36-2 at ¶59; Dkt. 45-2 at ¶ 59; Dkt. 59 at 8.)

The Administrative Procedure Act is violated when final regulations are not the logical outgrowth of the prior proposed regulations issued by an agency. *See* 5 U.S.C. § 553; *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986) (citing *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied sub nom. Lead Industries Ass'n v. Donovan*, 453 U.S. 913 (1981). When the proposed regulations were promulgated in 2006, DOI unequivocally stated that both trust and restricted fee land had to meet the requirements of § 2719(a) of IGRA (the after-acquired lands prohibition). 71 Fed. Reg. 58769, 58773. (Appellants' Br. at 18.) There was, therefore, no reason for anyone to suspect that before publication of the final regulations, the DOI would execute an about-face and abandon the position taken by Secretary Norton in 2002, the NIGC in

approving a prior ordinance in *CACGEC II*, and the Government in its briefs throughout *CACGEC II*. (*CACGEC III*, Dkt. 58-2 at 28-29; Dkt. 58-21 at 16; Dkt. 58-7 at 5; *CACGEC II*, Dkt. 28-2 at 26; Dkt. 36-2 at ¶ 59; Dkt. 45-2 at ¶ 59; Dkt. 59 at 8.)

It is simply preposterous, therefore, to suggest that the final regulations were a logical outgrowth of the prior proposal. Rather, they were a transparent attempt to add a veneer of legitimacy to a new interpretation that flew in the face of the governing statute in order to benefit the SNI. This is precisely the type of mischief Justice Scalia predicted might occur in the wake of the Supreme Court's decision in *United States v. Mead Corporation*, 533 U.S. at 246 (Scalia, J., dissenting). He feared that an agency could adhere to the formalities of adopting a regulation with notice and comment which would then earn not only *Chevron* deference, but *Auer* deference as well. *See Auer v. Robbins*, 519 U.S. 452 (1997) (an agency's interpretation of their own regulations is controlling). *Id.* at 461 (*Chevron* on steroids). *See* Antonin Scalia, *Remarks on the 25th Anniversary of Chevron v. NRDC*, *reprinted in* 66 Admin. L. Rev. 243, 245 (2014).

In light of the clear "surprise switcheroo" and the failure to properly adopt a proper rulemaking procedure, however, the revised interpretation is

entitled to no deference. *Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). *See also Allina Health Servs. v. Sebelius*, 746 F.3d 1102 (D.C. Cir. 2014); *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013), *cert granted sub nom. Nickols v. Mortgage Bankers Ass'n*, 134 S.Ct. 2820 (June 16, 2014) (once an administrative agency has given a "definitive" interpretation, any subsequent significant revision requires the opportunity to afford interested parties notice and the opportunity to comment).

Here, there was absolutely no reason for the Plaintiffs to comment following the publication of the 2006 Notice of Proposed Rulemaking because there was nothing therein that would alert them to the sudden 180° about-face that subsequently occurred when the final regulations were adopted.

E. The Conflict of Interest Eliminates Any Deference That Should Be Accorded the Revised Regulation

While the Government and the SNI invoke *Brand X*, 545 U.S. 967 (2005), and *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) to justify their revised interpretation of the statute, whatever little deference might otherwise be afforded them is totally eroded by virtue of the

unequivocal conflict of interest that permeated and tainted the integrity of the whole rulemaking process.

The Record reveals beyond a shadow of a doubt the direct involvement of a high-ranking DOI official, Edith Blackwell, in the Section 20 discussions at the very time the regulations reversing the agency's prior interpretation of this statute were being finalized in 2008. (Appellants' Br. at 23-24, 83-85.) By then, she was already married to Michael Rossetti who, in 2008, was a partner and lobbyist working in the Indian law practice area for the law firm representing the SNI. Immediately prior to that employment Mr. Rossetti had been counselor to the Secretary of DOI whom he assisted in formulating and implementing policy regarding Indian gaming and land acquisition. (*CACGEC III*, Dkt. 37-27 at 2.)

In its Brief, the SNI understandably avoids the issue altogether. The Government seeks to gloss over it, simply accusing Appellants of a "total fabrication with no Record support." (Government's Br. at 64.) The Government manages only one self-serving statement by a DOI official that this high-ranking official "left the room whenever a question arose whether restricted fee lands were encompassed in the Section 20 prohibition." (*Id.* at 64.) It cannot get off the hook that easily. The Record unequivocally

discloses that she was the very same person who wrote a memorandum to Department of Justice officials prior to the release of the revised regulations stating that "***we*** spen[t] a lot of time on restricted fee," and "that ***we*** are considering a couple of things (1) saying that Section 20 doesn't apply to RF lands." (Admin. Record, BIA-3747, reprinted in Appellants' Br. at *CACGEC III*, Dkt. 58-2 at 11) (emphasis supplied).

The Record also shows that beginning with Secretary Norton's 2002 letter and later in the ordinance approval and subsequent briefs to the District Court in *CACGEC II*, Appellees consistently took the firm position that the only "sensible" reading of Section 20 was that it applied to restricted fee land. The subsequent extraordinary turnabout initially began below the radar within BIA just after the SNI purchased land in downtown Buffalo, finally surfacing just as the District Court was about to rule against the SNI in *CACGEC II*.

The Government's *post hoc* rationalization for its revised interpretation does not pass the "smell test." It reeks of favoritism and insider influence. Secretary Norton's supposed "misapprehension" of the meaning of the term "restricted fee" was a pretext for the issuance of revised regulations, containing a "surprise switcheroo" that was intended to bestow a

huge benefit on a single Indian tribe. It was a way for that tribe to circumvent IGRA's policy against the proliferation of gambling on after-acquired land by sneaking through the back door of SNSA, notwithstanding that statute's total silence on gambling.

POINT III

SNSA Did Not Settle a Land Claim and, Therefore, the Buffalo Parcel Does Not Qualify for an Exception to IGRA's Prohibition Against Gambling on After-Acquired Land

In *CACGEC II*, the District Court went to great lengths to explore the history of SNSA, and following that analysis unequivocally concluded that it did not constitute the settlement of a land claim. (*CACGEC II*, Dkt. 61 at 108-122.) In *CACGEC III*, the Court did not revisit that issue, as it was no longer relevant to the Court's determination because, in *CACGEC III*, the Court reversed its earlier determination in *CACGEC II* with respect to the applicability of the after-acquired lands prohibition in Section 20 of IGRA. Since *CACGEC III* concluded that that prohibition did not apply to restricted fee land, the question whether the SNSA settled a land claim was rendered "moot." (*CACGEC III*, Dkt. 67 at 38.)

The Government, however, has cross-appealed from that determination because, if this Court reverses the District Court and holds

that IGRA's § 20 prohibition applies to restricted fee land, that would bring the settlement of a land claim exception to that prohibition back into play. (Government's Br. at 64.) The Government and the SNI claim that the District Court erred in *CACGEC II* in holding that SNSA was not the settlement of a land claim. That argument fails for a number of reasons.

A. The Revised Regulations that Redefined a "Land Claim" Were, Once Again, Not a Logical Outgrowth of the Prior Proposed Rule

The Government argues that in approving the ordinance permitting the SNI to gamble, the Chairman of the NIGC properly relied on the Solicitor's January 18, 2009 letter (*CACGEC III*, Dkt. 58-9 at 3-4), to the effect that the revised regulations provided a basis for not having to follow the District Court's determination in *CACGEC II*. (Government's Br. at 22-23, 65.)

Those regulations, however, had undergone yet another mysterious change between the time they were initially proposed and their final iteration. Just like the after-acquired lands prohibition, the final regulations made another remarkable accommodation to benefit only the SNI. When first published in proposed form in 2006, they defined a "land claim" as one that had either (1) been filed in court and not dismissed on substantive

grounds, or (2) was included in the list prepared by the Department of the Interior of pre-1966 claims published under the Indian Claims Limitation Act of 1982. 71 Fed. Reg. at 58773. There is no dispute that SNSA qualified under neither criterion and the District Court noted that no claim had been filed at the time of SNSA's enactment. (*CACGEC II*, Dkt. 61 at 112.) The District Court also correctly alluded to the fact that Chapter 19 of Title 25 of the United States Code codified all the so-called Indian Settlement Act statutes. In all but SNSA, Congress expressly acknowledged that the tribes that were the subject of those statutes had filed or asserted land claims alleging the wrongful dispossession of their land. (*Id.* at 110.) Remarkably, however, when the final regulations were published, another surprise was in store. The definition of a "land claim" had been expanded dramatically to encompass "any claim … concerning the impairment of title ***or other real property interest*** or loss of possession" regardless of whether any claim had been filed. 73 Fed. Reg. at 29376 (emphasis supplied). The Government jumps on the phrase "or other real property interest" in order now to equate a rental dispute with a "land claim." (Government's Br. at 14, 68.) This is because SNSA was enacted to resolve "past inequities involving leases." 25 U.S.C. § 1774(b)(2), (3).

However, a dispute over leases and the settlement of a land claim are not the same. As the Court correctly pointed out, the lease disputes in any event did not involve the United States as they were between the SNI and other non-Indian parties. (*CACGEC II*, Dkt. 61 at 110, 111.) While Congress, in enacting SNSA, acknowledged a "moral responsibility" to compensate the SNSA for the inadequacy of past leases (25 U.S.C. § 1774(a)(6)), that did not equate to a prior enforceable "land claim." (*CACGEC II*, Dkt. 61 at 111.)

B. Under SNSA, the SNI Received Money, Not Land, as Part of the Settlement

IGRA itself does not speak to the situation in SNSA. IGRA's "settlement of the land claim exception" to the after-acquired lands prohibition applies to land taken "as part of the settlement of a land claim." 25 U.S.C. § 2719(b)(1)(B)(i). The Buffalo Parcel was not received as part of the settlement of a land claim. Instead, money, not land, was given to the SNI under SNSA. If the SNI so chose, it could thereafter purchase land, but it was not required to do so. *See* 25 U.S.C. § 1774f(c). The settlement was not conditioned on the transfer of any land to the Senecas.

For all the foregoing reasons, it is clear that the Buffalo Parcel was not "part of" the settlement of the land claim within the meaning of IGRA.

Thus, even assuming said land were Indian land, it would still be subject to the prohibition against gambling on after-acquired lands.

C. By the Regulation's Own Terms, the Settlement of a Land Claim Exception Does Not Apply to Restricted Fee Land

Finally, the Government's argument also fails because its very own regulations specify that "newly-acquired lands" means "land that has been taken, or will be taken, ***in trust*** for the benefit of an Indian tribe by the United States after October 17, 1988." 73 Fed. Reg. 29376 (emphasis supplied). Since the Buffalo Parcel was not "trust land," the settlement of a land claim exception does not apply. This is not inconsistent with Appellants' argument that trust land and restricted fee land are the same for purposes of Section 20's prohibition against gambling on after-acquired land, because Appellants' argument was advanced based upon the interpretation of a statute and Congress' intent. Here, conversely, the final regulation is one issued by the Department of Interior after the applicability of the after-acquired lands prohibition to restricted fee land had become an issue. At that point, DOI clearly intended "trust land" to be separate from "restricted fee."

CONCLUSION

The judgment of the District Court in *CACGEC III* upholding the January 20, 2009 approval by the NIGC of an ordinance allowing the SNI to conduct casino gambling on the Buffalo Parcel should be reversed and the ordinance annulled. This Court should also declare that the Buffalo Parcel is not gambling-eligible under IGRA because it is not Indian land, and even if it were, it is subject to the after-acquired lands prohibition in § 20(a) of IGRA and does not qualify for the settlement of a land claim exception in § 20(b)(1)(B)(i).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionately spaced, has a typeface of 14 points, and contains 12,631 words. This word count excludes the corporate disclosure statement, table of contents, table of authorities, and signatures and certificates of counsel.

DATED: August 26, 2014

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