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

FINAL FORM 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.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants, Citizens Against Casino Gambling in Erie County, Network of Religious Communities, National Coalition Against Gambling Expansion, Preservation Coalition of Erie County, Inc., Coalition Against Gambling in New York – Action, Inc., the Campaign for Buffalo, History Architecture and Culture, state that they have no parent corporations or affiliates and none of their stock is held by a publicly-held corporation.

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 as these cases all involve the application of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 as the decisions appealed from in all three cases are final. The U.S. District Court for the Western District of New York entered final judgment in Docket No. 11-5466, *Citizens Against Casino Gambling in Erie County v. Kempthorne* ("*CACGEC I*"), on January 12, 2007, and the Notice of Appeal was filed on June 14, 2007. The court entered final judgment in Docket No. 11-5171(L), *Citizens Against Casino Gambling in Erie County v. Hogen* ("*CACGEC II*"), on July 8, 2008. Plaintiffs-Appellants filed a Notice of Appeal on October 23, 2008, and Defendant-Appellees filed a Notice of Cross-Appeal on October 24, 2008. The court entered final judgment in Docket No. 13-2339, *Citizens Against Casino Gambling in Erie County v. Stevens* ("*CACGEC III*"), on May 13, 2013, and Plaintiffs-Appellants filed their Notice of Appeal on June 12, 2013. By this Court's order dated September 11, 2013, the cases have been consolidated for this appeal.

ISSUES PRESENTED FOR REVIEW

1. Did the district court err in holding that a 9-1/2 acre parcel of land in downtown Buffalo became "Indian lands" within the meaning of the Indian Gaming Regulatory Act ("IGRA") when the Seneca Nation of Indians ("SNI") purchased it as "restricted fee" land in 2005 with proceeds from the Seneca Nation Settlement Act ("SNSA"), such that the SNI could operate a Las Vegas-style gambling casino there despite:

   (a) the absence of any legislative history that Congress intended in SNSA to abrogate the sovereign jurisdiction New York had exercised over that land for over two centuries and replace it with Indian sovereignty; and

   (b) the mere designation of land as "restricted fee" does not create Indian sovereignty over that land?

2. Did the district court err in *CACGEC III* when it reversed its own holding in *CACGEC II* that Congress clearly intended to prohibit gambling on lands acquired in "restricted fee" by Indian tribes after IGRA's enactment in 1988?

(a) Once the district court ruled that Congress clearly intended for IGRA's after-acquired lands prohibition to apply to "restricted fee" land, could DOI issue regulations directly contradicting that holding?

(b) Did the district court accord undue deference to the determination of the National Indian Gaming Commission ("NIGC') which failed to offer a reasoned explanation for its revised interpretation of the applicability of IGRA's after-acquired lands prohibition to "restricted fee" land?

(c) Did the Secretary of the Interior have the authority to issue regulations interpreting IGRA after Congress had assigned responsibility under IGRA for regulating Indian gaming to NIGC?

(d) Did the DOI's reversed regulations violate the Administrative Procedure Act because the final iteration directly contradicted and was not a logical outgrowth of what was contained in the Notice of Proposed Rulemaking?

(e) Were the regulations contaminated by an illegal conflict of interest because a high-ranking DOI official directly involved in drafting the final regulations was married to a partner in the law firm that

represented the SNI, which was the only Indian tribe in the Nation that could benefit from the reversed interpretation?

STATEMENT OF THE CASE

These consolidated appeals arise out of three legal actions commenced pursuant to the Administrative Procedure Act ("APA") in the United States District Court for the Western District of New York by Citizens Against Casino Gambling in Erie County and other community residents and leaders (together, "Plaintiffs"). Defendants are the Secretary of the U.S. Department of the Interior ("DOI") and the Chairman of the National Indian Gaming Commission ("NIGC"). Plaintiffs challenge the validity of three gambling ordinances approved by the Chairman authorizing the SNI to operate a Las Vegas-style casino on 9-1/2 acres of land in downtown Buffalo (the "Buffalo Parcel") after he concluded such land is "Indian lands" and, therefore, eligible for gambling under IGRA. There are three final judgments at issue.

The first case, *Citizens Against Casino Gambling in Erie County v. Kempthorne*, Civ. No. 06-CV-001S ("*CACGEC I*"), is reported at 471 F.Supp.2d 295 (W.D.N.Y. 2007), *as amended*, 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007) (SPA57-70). In *CACGEC I*, the district court invalidated the Chairman's first ordinance approval and remanded the case to NIGC to make a determination whether the Buffalo Parcel was "Indian lands." Plaintiffs

appealed on the grounds that the land was not "Indian lands" as a matter of law, and remand was, therefore, unnecessary.

The second case, *Citizens Against Casino Gambling in Erie County v. Hogen*, No. 07-CV-451S ("*CACGEC II*"), is available at 2008 WL 2746566 (W.D.N.Y. July 8, 2008) (SPA71-197). In *CACGEC II*, the district court invalidated the Chairman's second ordinance approval. The court held that although the Buffalo Parcel was "Indian lands," it was nevertheless subject to the Section 20 prohibition against gambling on lands acquired after IGRA's enactment in 1988, which the court ruled applied regardless of whether the tribe owned the land in "restricted fee" or the U.S. held it "in trust" for the benefit of the tribe. The court also decided the land did not qualify for the "settlement of a land claim" exception to the after acquired land prohibition in IGRA Section 20(b)(1)(B)(i). It ruled that SNI used SNSA-funds to purchase the land, but SNSA did not settle a land claim. Plaintiffs appealed from the determination that the land was "Indian lands," and Defendants cross-appealed from the determination that the IGRA's after-acquired lands prohibition applied and SNSA did not settle "any" claim, let alone a "land claim."

The third case, *Citizens Against Casino Gambling in Erie County v. Stevens*, 09-CV-291S ("*CACGEC III*"), is available at 2013 WL 1966380

(W.D.N.Y. May 10, 2013) (SPA289-327).[1] In *CACGEC III*, the district court reversed its own prior holding in *CACGEC II* and upheld the Chairman's approval of a third ordinance identical to the one the court had invalidated in *CACGEC II*. It now determined that the after-acquired lands prohibition did not apply to "restricted fee" land, as distinguished from land the U.S. held "in trust" for the benefit of a tribe, and the Buffalo Parcel was, therefore, "gambling-eligible" under IGRA. Since the court held the prohibition no longer applied, it decided it was unnecessary to readdress whether the land was subject to the "settlement of a land claim" exception to that prohibition. Plaintiffs have appealed from that determination.

[1] In this brief, "A" refers to the Joint Appendix and "SPA" refers to the Special Appendix.

STATEMENT OF FACTS

A. Congress Enacts IGRA and SNSA

1. The Indian Gaming Regulatory Act of 1988

In 1988, Congress enacted IGRA "to provide a statutory basis for the operation and regulation of gaming by Indian tribes." *Seminole Tribe v. Florida*, 517 U.S. 44, 48 (1996). IGRA specifies when, where and under what circumstances Indian tribes may engage in gambling. It divides Indian gambling into three different classes -- the most sophisticated of which is "Class III," which includes "slot machines, casino games, banking card games, etc." *Id.* at 48. Class III gambling is the only type of gambling at issue in this case.

IGRA generally prohibits gambling on lands acquired after IGRA's enactment, 25 U.S.C. § 2719(a), unless, *inter alia*, the tribe acquires those lands as part of a settlement of a land claim. 25 U.S.C. § 2719(b)(1)(B)(i). An Indian tribe can conduct such gambling only on "Indian lands," which IGRA defines as:

> (a) lands within the limits of an Indian reservation; and
>
> (b) any lands title to which is either held in trust by the United States for the benefit of an Indian tribe or individuals subject to restriction by the United States against alienation ***and over which an Indian tribe exercises governmental***

power.

25 U.S.C. § 2703(4) (emphasis supplied). Before a tribe can conduct gambling on such lands, it must first enter into a Tribal-State Compact with the State in which the land is located, and obtain Compact approval from the DOI Secretary. *Id.* § 2710(d)(1)(C) and (d)(3)(A), (B). In addition, the tribe must adopt a gaming ordinance and submit it to the NIGC Chairman for approval. *Id.*, § 2710(d)(1)(A)(iii).

2. The Seneca Nation Settlement Act of 1990

In 1990, Congress enacted SNSA to resolve a long-simmering crisis that was about to reach its boiling point because of the then-impending expiration on February 19, 1991, of 99-year leases on land the SNI owned and had leased to non-Indians in and around the City of Salamanca, New York, approximately 65 miles south of Buffalo. SNSA settled that dispute by ratifying an agreement between the City of Salamanca and the SNI. The agreement called for new leases with terms of 40 years, with the right to renew for 40 more years based on fair market value.

To compensate for the below-market rents the SNI had received under the pre-existing leases, Congress appropriated the sum of $35 million, $30 million of which the SNI could spend as it saw fit. 25 U.S.C. § 1774d(a). SNSA also

contains a provision entitled "Miscellaneous Provisions," 25 U.S.C. § 1774f, dealing with the SNI's potential subsequent acquisition of land. Subsection (c) states:

> **Land acquisition.** Land within its aboriginal area in the State or situated within or near proximity to former reservation land ***may*** be acquired by the Seneca Nation with funds appropriated pursuant to this Act. State and local governments shall have a period of 30 days after notification by the Secretary or the Seneca Nation of acquisition of, or intent to acquire such lands to ***comment on the impact of the removal of such lands from real property tax rolls of State political subdivisions***. Unless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of section 2116 of the Revised Statutes (25 U.S.C. 177), such lands shall be subject to the provisions of that Act [section] and shall be held in restricted fee status by the Seneca Nation. Based 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 this purpose**.

25 U.S.C. § 1774h(c) (emphasis supplied).

B. The Nation-State Compact of 2002

On August 18, 2002, some 14 years after IGRA's enactment and 12 years after SNSA's enactment but well before the SNI purchased any lands with SNSA proceeds, the SNI and New York Governor George Pataki executed a

Nation-State Compact (the "Compact") purporting to permit the Tribe to conduct "Class III gambling" on three New York sites, including an unspecified location in Buffalo (or elsewhere in Erie County). (A109-40.) Under IGRA, Secretary Norton had 45 days to approve or disapprove the Compact or it would be "deemed approved," but only to the extent consistent with IGRA. 25 U.S.C. § 2710(d)(8)(C). Secretary Norton "reluctantly" declined to act (A201), and on October 25, 2002, the Compact passed into effect by operation of law. *See* Notice of Nation-State Gaming Compact Taking Effect, 67 Fed. Reg. 72968 (Dec. 9, 2002). As discussed below, Edith Blackwell, a high-ranking attorney in the Solicitor's office (*see* A1548), and Michael Rossetti, then the Secretary's personal counselor (and later a partner at Akin Gump, the SNI's law firm) (A878-82), were involved in the Compact review process. (A231.)

On November 12, 2002, Secretary Norton sent letters to the SNI President (A201-08) and Governor Pataki (A223-30) explaining her reluctant "non-decision decision" that had allowed the Compact to pass into effect. She stated that any lands that might be placed in restricted status under SNSA would be set aside for the SNI's use under federal superintendence and thus meet the definition of sovereign Indian country. (A228.) She also stated that lands held

in "restricted fee status" are subject to IGRA's restrictions on gambling on land acquired after IGRA's enactment.

> I cannot conclude that Congress intended to limit the restriction to gaming on after-acquired land to only *per se* trust acquisitions. The Settlement Act ***clearly contemplates*** the acquisition of Indian lands which would otherwise constitute after-acquired lands. To conclude otherwise would arguably ***create unintended exceptions to the Section 20 prohibitions and undermine the regulatory regime prescribed by IGRA***. I believe that lands held in restricted fee status pursuant to an Act of Congress such as is presented within this Compact ***must be subject to the requirements of Section 20 of IGRA***.

(A229 (emphasis supplied).) She then concluded that land under the Compact would qualify for the "settlement of a land claim" exception to IGRA's "after-acquired lands prohibition." (*Id.*)

C. The SNI's First Ordinance

On November 25, 2002, 13 days after the Secretary's letter explaining her actions, the SNI submitted a proposed Class III Gaming Ordinance to the NIGC Chairman for approval. (A238-58.) The next day, November 26, 2002, Chairman Hogen approved it "for gaming only on Indian lands, as defined in the IGRA, over which the Nation has jurisdiction." (A238.) The Chairman did not make an affirmative determination that the lands were "Indian lands" or otherwise gambling eligible under IGRA Section 20. (*Id.*) Indeed, the SNI still

had not purchased any land in Buffalo and would not for another 3 years.

D. The Buffalo Parcel

In 2005, 17 years after IGRA's enactment, 15 years after SNSA's enactment, and 3 years after the execution and approval of the Compact, the SNI purchased 9-1/2 acres of land in downtown Buffalo (the "Buffalo Parcel"). On October 3, 2005, the SNI's attorneys, Akin Gump Strauss Hauer & Feld ("Akin Gump"), recorded the deed in the Erie County Clerk's Office. (A174-76.) The SNI notified New York State, Erie County and the City of Buffalo they had 30 days to comment on the removal of the land from the tax rolls as SNSA required. (A211-22.) On November 7, 2005, after the 30 days expired, the SNI asked DOI Secretary Norton to place the land in restricted fee. (A141-54, 209-10.) The Secretary did not decide within 30 days that the land should not be subject to 25 U.S.C. § 177, and accordingly it passed into "restricted fee" by operation of law pursuant to SNSA. 25 U.S.C. § 1774f(c).

E. The *CACGEC I* Litigation

Now that there was (i) an "approved" Compact between the SNI and New York State, (ii) an "approved" ordinance to operate a casino, and (iii) a parcel of land in downtown Buffalo which the SNI owned in "restricted fee," on January 3, 2006, Plaintiffs filed *CACGEC I* in the Western District of New York before

the SNI commenced any Class III gambling on the Buffalo Parcel. (A83-108.) Plaintiffs argued, among other things: (i) although the Buffalo Parcel was "restricted fee" land, the SNI had no governmental power over it and, therefore, the land did not fall within IGRA's definition of "Indian lands," and (ii) even if it did, the land was subject to IGRA's after-acquired lands prohibition against gambling in 25 U.S.C. § 2719(a), because the SNI had acquired it after October 1988, and the settlement of a land claim exception to the prohibition did not apply. 25 U.S.C. § 2719(b)(1)(B)(i).

On January 12, 2007, the district court held that NIGC, as "gatekeeper for gaming on Indian lands," had a duty to make a threshold "Indian lands" determination before approving a proposed gambling ordinance. (SPA46.) NIGC had not made that determination, so the district court vacated the portion of the ordinance approval permitting gambling on land "at a location in the City of Buffalo to be determined" and remanded the matter to NIGC for reconsideration. (SPA50-51.)

F. The SNI's Second Ordinance

Following remand, NIGC did not reconsider the ordinance. Instead, on June 9, 2007, the SNI enacted an amended ordinance specifying the Buffalo Parcel, and on July 2, 2007, NIGC approved the amended ordinance. (A1132.)

In the ordinance approval letter, the Chairman stated that the SNI holds the Buffalo Parcel subject to "restrictions against alienation, thus making it Indian country." (A1134.) The requisite "governmental authority" exists, the Chairman opined, because the SNI erected a fence, posted signs, installed marshals to patrol the grounds, and enacted ordinances applying its law to the Buffalo Parcel. (A1135.) The Chairman repeated and endorsed the Secretary's interpretation in her November 12, 2002 letter that IGRA's Section 20 prohibition applies to both trust and restricted fee land. Specifically, the Chairman stated, "[t]he section can only sensibly be read to include trust land and restricted fee lands." (*Id.*) Nevertheless, the Chairman opined, the SNI met the "settlement of a land claim" exception because it acquired the property with proceeds from SNSA and thus could operate a Class III gambling casino on the Buffalo Parcel. (A1136.) The following day, July 3, 2007, without notice to the district court, the SNI rolled in slot machines and opened a temporary gambling facility on the site. (SPA107.)

G. The *CACGEC II* Litigation

On July 12, 2007, Plaintiffs filed *CACGEC II* challenging the Chairman's approval of the SNI's second amended ordinance. (A272-91.) Plaintiffs alleged: (i) the Buffalo Parcel was not gambling eligible "Indian lands"; (ii)

IGRA's Section 20 prohibition against gambling on after-acquired lands applied to the Buffalo Parcel; and (iii) SNSA did not settle a land claim and therefore IGRA's "settlement of a land claim" exception to the after-acquired lands prohibition did not apply. (*Id.*) Plaintiffs also alleged the Buffalo Parcel did not meet the criteria in DOI's then-pending proposed rules, at 71 Fed. Reg. 58769 (Oct. 5, 2006) (A298-305), for determining whether a parcel of land qualifies for the settlement of a land claim exception.

H. DOI Issues Revised Regulations Completely Reversing Its Prior Position

Ten months later, on May 20, 2008, while *CACGEC II* was *sub judice*, and without advising the district court, DOI published final regulations at 73 Fed. Reg. 29354 (May 20, 2008) (A1083-1130), effective August 25, 2008, outlining the process for considering tribal applications to gamble on after-acquired lands. In the preamble, DOI stated it had received a comment that the regulations should clarify that the after-acquired lands prohibition applies to restricted fee lands, but it was not adopting the proposed change because "section 2719(a) refers only to lands acquired in trust after October 17, 1988." DOI stated:

> The omission of restricted fee from section 2719(a) is considered purposeful, because Congress referred to

> restricted fee lands elsewhere in IGRA, including at sections 2719(a)(2)(A)(ii) and 2703(4)(B).

73 Fed. Reg. at 29356. DOI did not disclose that the comment it had rejected was from NIGC, the agency charged with interpreting and administering IGRA. NIGC had asked DOI to codify Secretary Norton's interpretation, in her November 12, 2002 letter, that the Section 20 prohibition applies not only to *per se* trust acquisitions, but also to restricted fee land acquisitions. (A804-05, 811-12.)

DOI also did not disclose that it had rejected NIGC's comment at the behest of the SNI, the only known tribe with congressionally designated restricted fee lands acquired after IGRA's enactment. (SPA148 n.49.) The SNI had submitted a comment urging that Section 20 "is limited to trust lands and there is no basis for extending it[s] reach beyond its plain and clear language." (A829.)

DOI had published proposed Part 292 regulations in 2000 and amended the proposed regulations in 2006. In neither case had DOI solicited comment on the applicability of IGRA's after-acquired lands prohibition to restricted fee lands. In fact, the 2006 proposed rulemaking made clear that the prohibition applied to restricted fee land. In answer to the question "What criteria must trust land meet for gaming to be allowed under the exceptions listed in 25 U.S.C.

2719(a) of IGRA?," DOI replied:

> (a) For class II or class III gaming to be allowed ***on trust or restricted fee land*** under section 2719(a)(1) of IGRA, the land must either:
>
> (1) Be located within or contiguous to the boundaries of the reservation of the tribe on October 17, 1988; or
>
> (2) Meet the requirements of paragraph (b) of this section.

71 Fed. Reg. 58769, 58773 (emphasis supplied). The final rulemaking was not a logical outgrowth of the prior proposal, but a 180-degree reversal in DOI's position since at least 2002, when Secretary Norton explained her reluctant "non-approval approval" of the Compact, and 2006, when DOI published the draft regulations for public comment, 71 Fed. Reg. 58769 (Oct. 5, 2006), and at every step of the *CACGEC II* litigation.

When DOI issued the final regulations, the parties' dispositive cross-motions in *CACGEC II* were fully briefed and pending before the district court. (A311-17, 326-27, 332-37.) DOI gave no hint to the court that it had just published a final rule reversing the Secretary's interpretation of the after-acquired lands prohibition.

I. The Decision and Order in *CACGEC II*

On July 8, 2008, the district court in *CACGEC II* issued its Decision and Order, holding that the Buffalo Parcel is not eligible for Class III gambling

under IGRA. (SPA196.) The court ruled, "the NIGC Chairman's determination -- that the Buffalo Parcel, purchased with SNSA funds and held in restricted fee status, is "Indian country" over which the SNI has jurisdiction -- is entirely consistent with and gives effect to Congress's expressed intent." (SPA173.) The court concluded, therefore, that the Buffalo Parcel was "Indian lands" within the meaning of IGRA. That, by itself, however, was not sufficient to make it gambling-eligible under IGRA. The court noted further that Plaintiffs and Defendants agreed with the Chairman's conclusion that IGRA's Section 20 prohibition applies to restricted fee land such as the Buffalo Parcel (SPA174 (citing *CACGEC II*, Dkt. 28-2 at 25; 36-2 at 42)), but noted that the SNI, which participated in the litigation as *amicus curiae*, challenged this conclusion. The court then analyzed the SNI's argument that IGRA reflected an intent to limit the prohibition to trust land only, and rejected it as ***"clearly at odds with section 20's purpose"*** (SPA176-77 (emphasis supplied).) Since the court held the after-acquired lands prohibition applied, it also needed to address whether the land the SNI acquired with SNSA funds was gambling-eligible under the "settlement of a land claim" exception to the after-acquired lands prohibition. It concluded that SNSA did not settle any claim, "because the SNI did not posses[s] an enforceable right to relief relative to [the 99-year leases]." (SPA192.) The

court, therefore, vacated NIGC's approval of the second ordinance as arbitrary and capricious. (SPA193-94, 196.)

J. The Gambling Continues Unabated and the SNI Adopts and Submits Yet Another Ordinance for Approval

Despite the district court's ruling, the SNI continued to gamble on the Buffalo Parcel, and the Government failed to take any action to bring the illegal gambling to an end. (A347-48.) The Government's inaction prompted Plaintiffs, on July 14, 2008, to move to enforce the court's July 8 Decision. (A338-39.)

Two days later, on July 16, 2008, the SNI submitted another ordinance, identical to the one the court had rejected in *CACGEC II*. (A371-96.) The Government used this post-*CACGEC II* ordinance on July 22 as the pretext for a motion to remand the case to NIGC for reconsideration. (A360.) In its motion papers, the Government revealed to the court, for the first time, that DOI had issued revised regulations changing its interpretation regarding the applicability of the Section 20 prohibition to restricted fee Indian lands. The Government suggested that remand to NIGC may be "appropriate." (A366.) The Government also opposed Plaintiffs' motion to enforce on the ground that NIGC's decision not to enforce IGRA was "immune from judicial review," and

the district court was powerless to require the gambling to stop. (A369, 398-99.) The SNI submitted an *amicus* brief (A368), supporting the Government's motion for remand and opposing CACGEC's motion to enforce.

On August 26, 2008, the district court granted Plaintiffs' motion to enforce, in part, and denied the Government's motion to remand. (SPA200.) The court expressed annoyance with the Government's "egregious" approach of first publishing a proposed rule in 2000, which lay dormant, amending it years later in 2006, but arguing against its applicability when CACGEC sought to rely on it, and then amending it again to change its meaning while summary judgment motions were pending in 2008, all without giving any indication to the court that the final rule was imminent. (SPA214.) The court directed NIGC "to ***comply forthwith*** with Congress's mandate as set forth in 25 U.S.C. § 2713(a)(3)" (which requires NIGC to provide written notice of IGRA violations) and with NIGC regulations. (SPA207 (emphasis supplied).)

K. The Notice of Violation

Despite the court's directive, NIGC refused to enforce the law. Initially, on September 3, 2008, NIGC issued a Notice of Violation (the "NOV") charging the SNI with violating IGRA by operating a Class III gambling operation without an approved ordinance. (A401-02.) The SNI contested

NIGC's charges, and a DOI "hearing officer" stayed enforcement at the NIGC's request, notwithstanding the court's July 8 and August 26 Decisions. (A444.) Gambling continued, even though no ordinance was in effect.

L. The Resubmitted Third Ordinance

On October 14, 2008, just prior to the end of the 90-day period in which NIGC would have had to act on the third ordinance, the SNI withdrew the pending ordinance. (A430, 1159.) On October 22, 2008, the SNI resubmitted the very same ordinance it had just withdrawn (A1064, 1159), which was identical to the one the district court had rejected in *CACGEC II*. This two-step maneuver commenced the running of a new 90-day period for NIGC review, timed to expire on Inauguration Day, January 20, 2009, just before a new Administration would take office.

M. The Second Motion to Enforce

Meanwhile, on October 21, 2008, CACGEC had filed a second motion to enforce and/or to hold NIGC and its Chairman in contempt for failure to comply with the July 8 and August 26 orders. On October 24, 2008, the Government appealed the district court's July 8 Decision to this Court (A439-40), then opposed the contempt motion on the grounds that the appeal divested the district court of jurisdiction and that NIGC has unreviewable discretion over whether to

issue a closure order. (A442-43.) The SNI submitted an *amicus* brief supporting these positions and arguing that the federal courts lack power to "intrude" on an agency's discretion. (A441.)

N. The Government's Conflict of Interest

At the time, the Government's refusal to enforce the law, and its willingness to allow the SNI to continue gambling despite the absence of a valid ordinance, seemed inexplicable. It was only later -- in *CACGEC III* -- that Plaintiffs learned about the significant conflict of interest involving Edith Blackwell, a high-level attorney in DOI's Solicitor's Office, who was married to Michael Rossetti, who had been Secretary's former personal counselor, and by then had become a partner in the Akin Gump law firm representing the SNI. (A833-91, 1215.) Blackwell had been living with Rossetti since at least March 2007. During this period, Rossetti's firm Akin Gump represented the SNI and was receiving hundreds of thousands of dollars for legal representation and lobbying the Government on issues affecting Indian sovereignty. (A892-954.) Blackwell was (or at least should have been) "recused from all matters that involve the firm of Akin Gump" (A956 at ¶ 2) and "matters involving the SNI" (A600), including "Seneca Nation gaming matters" (A594) and "the specific matter of the Seneca litigation." (A614-15.) Nevertheless, Blackwell was

involved in discussions on the section 2719 regulations. (A615.)

O. The M-Opinion

In deciding whether to approve the third ordinance, after the district court had agreed with the NIGC Chairman's prior view that IGRA's after-acquired lands prohibition applied to restricted fee land, NIGC realized that to reverse itself, contradict the court and accommodate the SNI, the Chairman needed a "reasoned analysis for this new interpretation." (A515.) On October 14, 2008, NIGC's counsel asked DOI for a post-decisional memorandum explaining the reversal.

In a rush to obtain ordinance approval before the change in Administrations, DOI responded on Sunday, January 18, 2009 -- the day before the Martin Luther King holiday and two days before a new President was to be sworn into office -- with a so-called Solicitor's "M-Opinion." (A505-11.) The M-Opinion stated that IGRA's after-acquired lands prohibition does not apply to "restricted fee" land, but only to "trust" land. While acknowledging DOI's prior position, the DOI Solicitor said that the DOI Secretary -- and, it would appear, the NIGC Chairman, the U.S. Attorney General in this case and district court as well -- all got it wrong. In the final paragraph, the M-Opinion rescinded the Secretary's prior interpretation: "Based on the reasons explained above, that

portion of Secretary Norton's letter that recites a legal conclusion about the application of section 2719 to restricted fee lands is superseded by this memorandum." (A511.) Blackwell, Plaintiffs learned in *CACGEC III*, played a pivotal role in drafting the M-Opinion. (A963-64, 1549-1602.)

P. The Third Ordinance Approval

On the morning of January 20, 2009, just under the wire before the noon Inauguration, the Chairman adopted the M-Opinion as the basis for "reversing" his own determination (that he himself had previously said was "the only sensible interpretation") on the applicability of the Section 20 prohibition to restricted fee land. (A1060-81.) Based on the NIGC's determination, which approved the SNI's third resubmitted ordinance, the SNI continued -- and to this day continues -- to operate its Class III gambling casino on the Buffalo Parcel.

Q. The *CACGEC III* Litigation

On March 31, 2009, the Plaintiffs filed *CACGEC III* challenging the NICG's approval of yet another ordinance. (A445-81.) Plaintiffs alleged: (i) under IGRA, the Buffalo Parcel is not gambling eligible "Indian lands"; (ii) even if it were, IGRA's Section 20 prohibition against gambling on after-acquired lands applies to the Buffalo Parcel; and (iii) SNSA did not settle a land claim and, therefore, IGRA's "settlement of a land claim" exception to the after-

acquired lands prohibition is inapplicable. (*Id.*) Plaintiffs further alleged the revised regulations, upon which the Government relied to rationalize the ordinance approval, were illegal because they directly contradicted the Notice of Proposed Rulemaking and the clear intent of Congress. (*Id.*) Plaintiffs also challenged the integrity of the decision-making process based on the Blackwell/Rossetti marital relationship. (*Id.*)

On May 10, 2013, the district court issued a decision upholding NIGC's approval of the third ordinance. (SPA289-327.) The court reaffirmed its prior decision that the Buffalo Parcel is Indian lands, reversed its prior ruling in *CACGEC II* and held the after-acquired lands prohibition does not apply to restricted fee land and the settlement of a land claim issue was, therefore, moot. (SPA312, 316, 326.) Attempting to explain its reversal on the applicability of IGRA's after-acquired lands prohibition to "restricted fee" lands, the court characterized as mere "dicta" its conclusion in *CACGEC II* that the prohibition applies. (SPA315.) Plaintiffs appealed from each and every aspect of that decision.

SUMMARY OF ARGUMENT

The ordinance authorizing the SNI to gamble on the Buffalo Parcel was invalid because that property is not "Indian land" within the meaning of IGRA, and it is, therefore, not "gambling-eligible." The mere fact that Congress provided that lands the SNI might choose to purchase with funds from SNSA could become "restricted fee" land was not, by itself, sufficient to convert that land into "Indian land." The Buffalo Parcel, located in New York's second-largest city and overwhelmingly populated by non-Indians, has been under the sovereign jurisdiction of the State of New York for the better part of two centuries. SNSA did not give the SNI the right to exercise "governmental power" over that land, which is an additional prerequisite before "restricted fee" land can qualify as "Indian land" under IGRA. SNSA's legislative history contains no evidence Congress ever intended such monumental consequences when SNSA passed both houses of Congress by voice vote. Interpreting SNSA in a manner that would abrogate a State's sovereignty in such an oblique, casual, offhand manner without any explicit expression of Congressional intent violates well-settled precedent that Congress may not strip a State of its sovereignty via implication, inference, or, even worse, inadvertence. Congress provided a very simple, straightforward mechanism for creating Indian land by having it placed

into trust for the benefit of an Indian tribe pursuant to the Indian Reorganization Act. 25 U.S.C. § 465. *See City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 221 (2005) ("Section 465 provides the proper avenue … to re-establish [Indian] sovereign authority over territory last held … 200 years ago."). Defendants would nevertheless have this Court believe Congress deliberately eschewed this straightforward method in favor of a convoluted, backdoor approach to achieve the same result.

Even if, however, the land were "Indian land," it is nevertheless subject to IGRA's prohibition against gambling on after-acquired lands as the Defendants themselves agreed in the first two rounds of litigation until their sudden, stunning about-face when they issued the Revised Regulations stating that the prohibition did not apply to "restricted fee" land. Despite that reversal, IGRA prohibits gambling on "Indian lands" acquired after 1988, unless a specific statutory exception applies. The after-acquired land prohibition applies to the Buffalo Parcel because the SNI acquired it after 1988 and, as the Secretary of the Interior in 2002 and the Chairman of the NIGC in 2007 properly recognized, excluding restricted fee land from that prohibition would be inconsistent with IGRA and undermine Congressional intent. DOI's subsequent 180-degree "U-turn" revising its 2008 regulations to reverse the Secretary's prior interpretation

was unreasonable, arbitrary, capricious and was not, therefore, entitled to any judicial deference. The integrity of the revised rule-making was fatally compromised by the participation of a DOI official married to a lobbyist for the law firm representing the SNI, the only tribe that stood to benefit from the change. Once the district court had declared in *CACGEC II* that any other interpretation was "clearly at odds with [IGRA's] purpose," the agency lacked authority to issue regulations contradicting that interpretation. *Chevron, U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Moreover, the only arguable exception to the after-acquired land prohibition -- the "settlement of the land claim" exception -- does not apply to the Buffalo Parcel because the Secretary did not take the land into trust as part of the settlement of a land claim, as the district court found in *CACGEC II*. (SPA192.) Accordingly, this Court should reverse the district court's holding in *CACGEC III* and reinstate its earlier conclusion in *CACGEC II* that § 20 applies to the Buffalo Parcel and the settlement of a land claim exception is inapplicable.

STANDARD OF REVIEW

A final agency action cannot stand if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). "On appeal from a grant of summary judgment in a challenge to agency action under the APA," this Court "review[s] the administrative record and the district court's decision *de novo*." *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 77 (2d Cir. 2006). Under the U.S. Supreme Court' familiar two-step analysis in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), if "Congress has directly spoken to the precise question at issue" and "the intent of Congress is clear," then "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." It is only where the statute is silent or ambiguous, that the court at step two considers "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the agency's position is not reasonable, deference is not appropriate. *Id.* at 845.

ARGUMENT

POINT I

THE NIGC'S APPROVAL OF THE SNI'S ORDINANCE FOR GAMBLING ON THE BUFFALO PARCEL WAS ILLEGAL BECAUSE THE BUFFALO PARCEL IS NOT "INDIAN LANDS" AS IGRA REQUIRES

A. There is Not a Scintilla of Evidence that, in Enacting SNSA, Congress Intended to Create "Indian Lands" in the City of Buffalo upon which Gambling Could Occur

Under IGRA, tribal-owned "restricted fee" land is gambling-eligible only if the tribe also has the right to exercise governmental power over that land. 25 U.S.C. § 2703(4)(B). A careful analysis of SNSA and its legislative history make clear that Congress did not intend to transfer sovereignty over any land the SNI might acquire with SNSA-funds, let alone land in the middle of New York's second largest city, with its overwhelmingly non-Indian population.

1. SNSA, by its Terms, Did Not Confer Upon the SNI the Right to Exercise Governmental Power

The most probative evidence of congressional intent is the language of the statute that gave the SNI the choice, but not the obligation, to acquire land with SNSA funds and to hold it in restricted fee. Under SNSA, the SNI received $30

million from the U.S., *see* 25 U.S.C. § 1774d, which the SNI could spend as it saw fit. Under a so-called "Miscellaneous" provision, the SNI was free to use SNSA funds to acquire land "within its aboriginal area in the State or situated within or near proximity to former reservation land." If the SNI acquired such land, SNSA gave State and local governments 30 days "to comment on the impact of the removal of such lands from real property tax rolls of State political subdivisions." Under this provision:

> Unless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of section 2116 of the Revised Statutes (25 U.S.C. 177), such lands shall be subject to the provisions of that Act [section] and shall be held in restricted fee status by the Seneca Nation.

25 U.S.C. § 1774f(c).

Through this provision, Congress created a process for the U.S. to impose a restriction against alienation upon lands to be purchased with SNSA funds. Congress, however, did not, in words or in substance, give the tribe the right to exercise governmental power over the land.[2]

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[2] *Cf.* 25 U.S.C. § 2719(b)(1)(A) (exception to after-acquired lands prohibition where Secretary, in consultation with tribe and State and local officials, determines that gaming establishment "would not be detrimental to the surrounding community," provided the Governor also concurs).

The opportunity of State and local governments to comment is limited to the effect of removing the lands from the real property tax rolls. A loss of sovereignty, however, would mean, in addition, the loss of State authority to regulate not only gambling, but also local zoning, environmental impact, and public health and safety. It could open the land to unregulated gasoline stations, cigarette manufacturing facilities, payday loans and other noxious consequences. It would create a "checkerboard" of state and tribal jurisdiction, which would "adversely affect landowners neighboring the tribal patches," create conflicts over access, land use and ecological management, and seriously burden state and local governments. These are the "disruptive practical consequences" to which the Supreme Court alluded in *Sherrill*, 544 U.S. at 221, when it stated that 25 U.S.C. § 465 "provides the proper avenue . . . to reestablish sovereign authority over territory." If Congress intended restricted fee status to mean the loss of State sovereignty, it would surely have invited comment about these significant consequences from those with a stake in the area's governance and well-being.[3] Its failure to do so is strong evidence that Congress had no such intent.

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[3] SNSA further provided that, based on proximity to the SNI's reservations, "land acquired may become a part of and expand the boundaries of" the

Congress knew how to use the words "governmental power" when it wanted to refer to "Indian lands." Just two years earlier, in 1988, Congress in IGRA had defined "Indian lands" in terms of both restricted fee and governmental power. 25 U.S.C. § 2703(4)(B). In SNSA, however, Congress referred only to "restricted fee status," without any reference to governmental power. If Congress had intended to create "Indian lands," it would have used language clearly expressing its intent to confer sovereignty over the land.

This is not a question of using "magic words," as the district court opined in *CACGEC II* (A164), but of **any** words clearly expressing such intent. The lack of any statement expressing such an intent creates the presumption Congress had no such intent at all. *See Carcieri v. Salazar*, 555 U.S. 379, 393 (2009) (courts presume Congress says what it means and means what it says).

2. SNSA's Legislative History is Devoid of any Congressional Intent to Cede Sovereignty to the SNI

SNSA's legislative history contains no evidence that Congress intended to give the SNI governmental power over the lands it might purchase with SNSA

SNI's existing reservations "in accordance with the procedures established by the Secretary for this purpose." This would have been unnecessary if the land were already "Indian lands" merely by virtue of its designation as "restricted fee" land.

funds. The SNI began leasing its Cattaraugus County reservation lands, a major part of which became the City of Salamanca, in the mid-19th century. (A1264-65.) Following some early challenges, Congress confirmed the existing leases, in 1875 for a 12-year period (18 Stat. 330) and in 1890 for a 99-year period (26 Stat. 558). (A1265-66.) The 99-year leases were due to expire on February 19, 1991. (A1267.) As the date approached, "great alarm and concern" arose in the City of Salamanca because an increase in rental payments would be a "great financial shock" to the lessees, particularly the elderly. (A1440, 1487.) To avoid that result and to facilitate the negotiation of new leases, Congress enacted SNSA. SNSA addressed the problem of below-market 99-year leases in the City of Salamanca, by ratifying an agreement for the resolution of the leases. The congressional intent was to help the people in the City of Salamanca, **not to create sovereign Indian lands in the City of Buffalo**.

The purpose of the settlement payment was to compensate the SNI for below-market leases on the Allegheny Reservation, near the New York-Pennsylvania border. As a "Miscellaneous" provision, SNSA provided that "none of the funds … and none of the income derived therefrom … shall be subject to … State or local taxation." (A1476.) The designation of land as "restricted fee" conferred a benefit upon the SNI by limiting the loss of tribal

assets through per capita distribution and diminution of value through State and local taxation. If Congress had intended to do something as monumental as deprive the State of sovereignty over such as-yet unidentified land as the SNI might choose to purchase, it would have expressed that intent openly and explicitly, rather than burying it in an obscurely labeled "miscellaneous" provision. Any such suggestion would have created a storm of controversy, which Congress would have debated contentiously and subjected to a roll-call vote. The is no mention whatsoever of gambling anywhere in SNSA or its legislative history.

In testifying before Congress before SNSA's enactment, SNI witnesses did not mention the possibility of gambling on land to be purchased with settlement funds. Instead, they "advised the Committees that the Nation had already developed the outlines of their plan for the use and distribution of the funds the Nation would receive under this Act," and while it was considering a "modest" per capita distribution, "the vast majority of the funds would be used for tribal programs and economic development projects." (A1447.) Dennis Lay, the SNI's President at the time, submitted a supplemental statement stating:

> The Nation . . . anticipates placement of the great majority of the Salamanca monies in a broadly diversified investment fund, specialized in holding funds for the long term benefit

> of the investor …. The Nation has also considered the use of these funds to make capital investments important to the long-term growth of the Nation.

(A1449-50, 1516.) There was no mention in Lay's supplemental statement that the SNI might use SNSA funds to acquire off-reservation Indian lands for the purpose of Indian gambling. Congress never discussed the issue and cannot be deemed to have intended that result.[4]

Congress had no reason to believe the SNI had a hidden agenda. At the time, the SNI leadership was on record as opposing Indian gambling.[5] The New York Constitution (N.Y. Const. art. I, § 9), public policy (N.Y. Gen. Mun. Law § 185) and criminal law (N.Y. Penal Law, Art. 225), all unequivocally prohibited such activity, and the congressional delegation from Buffalo (which supported SNSA), vehemently opposed gambling. It is highly unlikely the measure would have passed the House and Senate by voice vote[6] if Congress had intended to open a door to gambling that violated New York's Constitution

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[4] Amory Houghton, the bill's chief sponsor, and John J. LaFalce, a co-sponsor and Congressman from Buffalo, have publicly stated that Congress did not intend SNSA to enable the SNI acquire land for casinos. *See* M. Beebe, "Senecas dodge federal taxes on casino payouts," Buffalo News at A1. (Jul. 16, 2006). (A1519-20.)

[5] See A. Palazzetti, "Seneca Referendum Rejects Proposal on Casino Gambling," Buffalo News (May 11, 1994). (A1524.)

[6] *See* 101st Congress, H.R. 5367 Bill Summary & Status (available at

and criminal law. More likely, any Member of Congress from the affected area would have requested a recorded vote if there was the slightest suggestion that sovereignty of land in Buffalo might be at stake.

3. An Abrogation of Sovereignty must be Explicit and is Much Too Important to be Left to Implication by Silence

When the SNI purchased the Buffalo Parcel on the open market, it did not have preexisting jurisdiction over the land. Where a tribe does not have jurisdiction over land, the authority to convey such jurisdiction lies solely with Congress. Congress, in turn, has delegated limited authority to the Secretary, under 25 U.S.C. § 465, to acquire land and to hold it in trust in the name of the U.S. to provide land for Indians. *See City of Sherrill*, 544 U.S. 197 (2005). The SNI did not pursue the 25 U.S.C. § 465 land-into-trust process here.[7]

A diminution of sovereignty must be express. It does not occur automatically or by default or by silence or through unilateral action by an Indian tribe. In *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009), the Supreme Court considered the legal effect of a congressional apology for the

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http://thomas.loc.gov/cgi-bin/bdquery/z?d101:HR05367:@@@X.

[7] For this reason, the court's suggestion in *CACGEC III* (SPA320-21) that a tribe may acquire fee land in "Indian country" and seek to revise its "long-dormant sovereignty," is irrelevant and adds nothing to the analysis.

federal government's seizure of the land from native Hawaiians. *Id.* at 169. The Court rejected the contention that the apology implied a congressional intention to transfer sovereignty over the land from Hawaii to the Office of Hawaiian Affairs, acting on behalf of native Hawaiians. *Id.* at 175. The Court reasoned that the transfer of a sovereign's control of its land is far too important to be inferred from vague, apologetic language. *Id.* Instead, the court held, Congress could not deprive a state of sovereignty without a "clear and manifest" intention to do so. *Id.*

In cases involving traditionally sensitive areas, such as sovereignty, federalism and sovereign immunity, the Supreme Court requires a clear statement of congressional intent to avoid the implicit abridgement of traditional understandings. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (while Congress can abrogate a state's sovereign immunity in some situations, it cannot do so implicitly, but must make its intention unmistakably clear in the language of the statute). A clear statement of intent is essential to ensure that Congress "has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

So too here, as in *Hawaii*, there must be an explicitly stated intent to deprive a sovereign of its authority to exercise governmental power over its lands. Without an explicit statement of intent, the courts should not presume congressional intent to divest a State of its essential sovereign power. In fact, the opposite must be true: absent a clear statement of intent, Congress must be deemed **not** to have transferred sovereignty from a State to an Indian tribe.[8] This approach promotes federalism by protecting the balance of power between the States and the Federal Government.

While SNSA permitted the SNI to hold lands purchased with SNSA funds in restricted fee, the statute did not give the SNI jurisdiction or the right to exercise governmental power over those lands. SNSA's legislative history, likewise, evinces no congressional intent to confer upon the SNI the right to exercise governmental power over unidentified lands which the tribe might someday acquire. Neither can Congress be deemed to have done so by implication. As the Supreme Court held in *City of Sherrill*, 544 U.S. 197, 221

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[8] Under the Enclave Clause, U.S. Const. art. I, § 8, cl. 17, Congress has power "[t]o exercise exclusive Legislation" on land used for certain categories of activities, but only when it purchases the land "by the Consent of the legislature of the State in which the same shall be located." Here, there has been no cession of jurisdiction by the State to the U.S.

(2005), the fee-to-trust process under 25 U.S.C. § 465 is the proper avenue to reestablish sovereignty over territory. In *Sherrill*, the Court did not mention the "restricted fee" process as an alternative. It is inconceivable that in 1990 Congress intended to empower, in advance, the DOI Secretary to designate as "Indian lands" any land in the vast expanse of Western New York that the SNI might possibly thereafter purchase with SNSA funds without knowing where that land would be located.[9]

In *CACGEC II*, the court based its conclusion that SNSA created sovereign "Indian lands" not on any clear manifestation of congressional intent to create Indian lands, but rather upon an inference drawn from cobbling together provisions from IGRA, SNSA and the Non-Intercourse Act.

B. The Non-Intercourse Act Restricts Alienation but Does Not Create Indian Lands

The district court's based its analysis upon a misapprehension of the Non-Intercourse Act and the historical context in which restricted fee lands arose.

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[9] Section 8(c) of SNSA provides that the SNI could purchase land anywhere within its "aboriginal area" in the State. 25 U.S.C. § 1774f(c). This encompasses a huge area of land. *See Seneca Nation of Indians v. State of New York*, 206 F. Supp. 2d 448, 458 (W.D.N.Y. 2002), *aff'd* 382 F.3d 245 (2004), *cert. denied* 547 U.S. 1178 (2006) (describing aboriginal SNI land).

The purpose of the Non-Intercourse Act was to preserve a tribe's existing governmental power base, not to create new "Indian lands."

The imposition of restrictions against alienation of Indian landholdings has a long history predating the formation of the U.S. In 1790, the newly formed federal government enacted the first Indian Non-Intercourse Act, which currently provides as follows:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claims thereto, from any Indian nation or tribe of Indians, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the Constitution.

25 U.S.C. § 177.

The statute's purpose is: (i) to prevent "unfair, improvident or improper disposition" of tribal landholdings without the consent of Congress"; and (ii) to enable the U.S. "acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960). Congress did not want Indians to sell their lands through unfair or fraudulent transactions. The Non-Intercourse Act creates a restriction upon and provides a potential cause of action for the alienation of such lands without congressional approval.

The mere imposition of restrictions upon alienation does not confer sovereignty. Thus, the mere existence of such restrictions, without more, does

not establish "Indian lands" within the meaning of IGRA. In addition, a tribe must exercise governmental power over the land. 25 U.S.C. § 2703(4)(B). For a sovereign to exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over the land. *Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001). To exercise governmental power without jurisdiction (*i.e.*, authority) places the proverbial cart before the horse. NIGC has repeatedly so held in determining whether a tribe's land constitutes "Indian lands."[10] *See* 25 U.S.C. §§ 2703(4)(B), 2710(d)(l).

C. IGRA's "Indian Lands" Definition Denoted Existing Restricted Fee Lands Over which Tribes had Retained Jurisdiction and had Continued to Exercise Governmental Power

As the district court recognized in *CACGEC II*, "issues relating to Indian law cannot be considered without historical context." 2008 WL 2746566 at *53

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[10] *See, e.g.*, Mem. to G. Skibine dated Jan. 7, 2010 re Indian Lands -- Iowa Tribe of Okla. (http://www.nigc.gov/LinkClick.aspx?fileticket=wLKzu9GzCx8%3D&tabid=69&mid=345); Ltr. dated Apr. 23, 2008 from P.J. Coleman to Muscogee (Creek) Nation re Holdenville Site Land (http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2Findianlands%2FHoldenville+Site+Land+Opinion+4+23+08.pdf&tabid=120&mid=957); Mem. to P.N. Hogen from JM Shyloski dated Nov. 15, 2005 regarding Kiowa Indian Tribe of Oklahoma – Gaming Site (http://www.nigc.gov/LinkClick.aspx?link=reading_room%2Fland_determinations%2F01_kiowatribefinalldsopn.pdf&tabid=120&mid=957).

(citing *Sac & Fox Tribe* v. *Licklider*, 576 F.2d 145, 147 (8th Cir. 1978) (Federal Indian law "cannot be understood if the historical dimension of existing law is ignored"). In 1988, when Congress included in IGRA's definition of "Indian lands" those restricted fee lands "over which an Indian tribe exercises governmental power," there was an existing inventory of former reservation land which Indians or tribes held in restricted fee and over which the tribe continued to exercise governmental power. This was the historical by-product of the federal policy of allotment, under which individual Indians or tribes held their lands for a time in "restricted fee," during which they continued to exercise governmental power over their territory. Ultimately, the policy of allotment failed, because Indian allottees could sell their land, through unwise or fraudulent transactions, as quickly as they received it. *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 254 (1992) (Scalia, J.). To address this situation, Congress in 1887 enacted the General Allotment Act, 25 U.S.C. § 331, authorizing the imposition of restrictions upon the alienation of allotted lands.

During this period, there developed two primary methods to impose restrictions upon alienation of allotments: (i) the "trust patent," and (ii) the "restricted fee." Felix S. Cohen, *Handbook of Federal Indian Law*, 109-10

(1941) ("*Cohen*"). Under both methods, the tribe continued to exercise governmental power over their restricted allotments during the period of restriction and until the issuance of the patent conveying free and clear title. *See, e.g., U.S. v. Pelican*, 232 U.S. 442 (1914) (lands part of Indian country before allotment remained Indian land during 25-year period of restriction). In those cases, unlike here, the tribes' governmental power ***preexisted*** the imposition of restrictions on alienation. The restrictions did not create, but rather preserved, the tribe's existing governmental power base.

In 1934, Congress enacted the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.* (the "IRA"). The IRA repudiated the federal policy of allotment and authorized the Secretary to acquire any interest in lands or land rights within or without existing reservations, including trust lands or restricted allotments, to provide land for Indians. At the time of the IRA's passage, there were in existence restricted allotments as to which the stated period of restriction had not yet expired. The IRA extended and continued "[t]he existing periods of trust placed upon any Indian lands and any restriction on alienation thereof until otherwise directed by Congress." 25 U.S.C. § 462. Consequently, under the IRA, tribes retained their **preexisting** authority to exercise governmental power over their lands. The IRA's continuation of the restrictions

on alienation did not create, but rather safeguarded, the tribes' preexisting governmental power.

The fact that restricted fee lands continued to exist at the time of IGRA's enactment in 1988 was also the by-product of history and shifting U.S. policy toward Indians and their lands. "Courts assume that Congress is aware of existing law when it passes legislation." *See CACGEC II*, 2008 WL 2746566 at *53 (citations omitted).

When Congress in IGRA referred to trust or restricted fee "over which an Indian tribe exercises governmental power," its intent was to include the two types of lands -- trust lands and restricted fee lands over which the periods of restriction had not expired (and over which the tribe continued to exercise its preexisting governmental power) -- that were understood in 1988 to constitute Indian lands. IGRA's definition of "Indian lands" specifically embraces the two methods -- trust patents and restricted fee patents -- that the U.S. had historically used under existing law to impose restrictions on the alienation of allotments. *See Cohen* at 109-10. With the use of these terms, Congress expressed its intent to limit Indian gambling on lands that were already subject to Indian jurisdiction as of the enactment of IGRA. *Cf. Carcieri* v. *Salazar*, 555 U.S. 379 (2009) (the

term "now under Federal jurisdiction" referred only to tribes that were federally recognized when the IRA was enacted).

D. The District Court's Reliance on an "Indian Country" Analysis was Irrelevant to Whether Congress Intended SNSA to Create "Indian Lands"

The "Indian lands" analysis in *CACGEC II* hinges on the court's efforts to equate "restricted fee" land under the Non-Intercourse Act with "Indian country" and from there to equate "Indian country" with "Indian lands." This was grave error. (SPA172-73.) The Administrative Record reflects that DOI itself viewed the definition of "Indian country" to be irrelevant to the definition of "Indian lands." (A1595) ("The question of whether a parcel of land is ***Indian country is irrelevant because IGRA looks to the definition of Indian lands and not Indian Country.***"); (A1569-70 (declining to revise definition of "reservation," because Congress in enacting IGRA chose to use the concept of "Indian lands" instead of "Indian country" (citing 73 Fed. Reg. 29357))).

1. "Indian Country" and "Indian Lands" Are Not Synonymous

Over the years, the issue of what constitutes "Indian country" has spawned a plethora of litigation as federal, state, and tribal governments have disputed the Indian country status of lands throughout the U.S. For that reason,

and as IGRA's legislative history reflects, the term "Indian lands" in IGRA, 25 U.S.C. § 2703(4), is not the same as the term "Indian country" in 18 U.S.C. § 1151. In 1985, Rep. Morris Udall introduced H.R. 1920, a precursor to IGRA. Paragraph (4) of H.R. 1920 changed the phrase "Indian country" to "Indian lands" and added a definition of "Indian lands" later in the bill. The former Counsel on Indian Affairs to the House Committee on Interior and Insular Affairs during IGRA's development, shed light on the reason for the change:

> One reason for dropping the use of the term "Indian country" was the definition of Indian country in [18 U.S.C. § 1151]. Section 1151 defines "Indian country" to be all land within the boundaries of a reservation and, outside of a reservation, dependent Indian communities and Indian allotments to which Indian title had not been extinguished. **The question of what constituted a dependent Indian community had become a legal bone of contention. The House Committee felt that using the term "Indian lands" and defining that term as all land within a reservation and all trust or restricted land outside a reservation over which a tribe exercised jurisdiction would be clearer and less fraught with legal problems.**

Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 Ariz. St. L.J. 99, 139-40 (2010) (footnote omitted, emphasis supplied).

The definition of a "dependent Indian community" (upon which the court focused in *CACGEC II*) was contentious and confusing. To avoid such

contention under IGRA, Congress carved out the concept of dependent Indian communities from the definition of "Indian lands" and limited Indian gambling to those existing "Indian lands" over which a tribe continued to hold aboriginal title. The use and definition of the term "Indian lands" rather than "Indian country" reflects this intent. The court below erred in deciding the "Indian lands" issue by reference to "Indian country," which was the concept that Congress, in enacting IGRA, had removed from the definition of "Indian lands."

DOI well understood that "Indian country" was not coextensive with "Indian lands." DOI alluded to the distinction in response to a comment suggesting "that the term 'reservation' in IGRA be the same as Indian Country in 25 [sic] U.S.C. 1151." 73 Fed. Reg. at 29357. Disagreeing, DOI stated:

> We did not adopt this comment because Congress in enacting IGRA chose to use the concept of Indian lands instead of Indian Country….

Id. The Solicitor's staff within DOI likewise understood that "the question of whether a parcel of land is Indian country is irrelevant because IGRA looks to the definition of Indian lands and not Indian Country." (A1595.) The Department of Justice ("DOJ") took issue with the distinction, noting that "[a] critical victory in an otherwise dismal *CACGEC II* decision was that the judge held as a matter of law that the Buffalo lands were Indian lands, as defined by

IGRA." (*Id.*) DOI and DOJ wanted to stay away from the distinction so as not to risk the lower court's "Indian lands" holding, which was premised on the concept of a "dependent Indian community." As DOI and DOJ understood, resolution of the Indian lands issue properly turns not on whether the Buffalo Parcel is a dependent Indian community, but whether Congress in SNSA intended to create gambling-eligible Indian lands. Although Congress had no such intent, the court below nevertheless persisted in applying that erroneous analysis.

2. Older Cases Arising under Different Factual and Legal Circumstances Provide No Precedent to Conclude that SNSA Created Indian Lands By Designating Them as "Restricted Fee" Lands

Trust and restricted fee lands are not jurisdictional equivalents. In its *amicus* brief before the court below, the SNI cited cases involving restricted allotments. These cases stand for the proposition that a restricted allotment retains its attributes as "Indian country" during the period of allotment and prior to issuance of fee title.[11] They do not address the question here, which is whether a statute merely designating newly acquired land as restricted fee,

[11] *See U.S. v. Ramsey*, 271 U.S. 467, 470-71 (1926); *U.S. v. Pelican*, 232 U.S. 442, 449 (1914); *see also Oklahoma Tax Comm'n v. Sac & Fox*, 508 U.S. 114 (1993).

without also conveying governmental power, creates "Indian lands" under IGRA. Other cases involved aboriginal or trust[12] lands. The Buffalo Parcel, in contrast, is neither ancestral lands nor lands held in trust for the benefit of Indians residing there. Indeed, the vast majority of Buffalo's population is non-Indian, and the Buffalo Parcel is not residential. The SNI's cases are factually inapposite and do not bear on the jurisdictional significance of SNSA-created restricted fee lands.

The SNI purchased the Buffalo Parcel on the open market, purportedly with SNSA funds, and holds it in restricted fee under the Non-Intercourse Act, 25 U.S.C. § 177. SNSA is unique, as the court held in *CACGEC II*, as "there appears to be no other statute then in effect or since enacted that contemplates taking land into restricted fee status." (SPA148 n.49.) Because SNSA is unique, older cases describing restricted allotments or ancestral and trust lands do not bear on the legal consequences of SNSA-restricted fee land. Instead, the issue must be resolved, as discussed above, by reference to IGRA's definition of "Indian lands" and congressional intent in enacting SNSA. When analyzed in

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[12]*See U.S. v. McGowan*, 302 U.S. 535, 536-37 & n.4 (1938); *U.S. v. Sandoval*, 231 U.S. 28, 39-40 & n.1, 47-48 (1913); *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *U.S. v. Roberts*, 185 F.3d 1125, 1133 (10th Cir. 1999).

that context, it is clear that SNSA did not create "Indian lands" within the meaning of IGRA.

Any other interpretation would implicate serious constitutional questions about the power of Congress to divest a state of its sovereign jurisdiction. *See Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009). It is a well-settled cardinal principle of statutory construction that potentially unconstitutional interpretations should be avoided whenever possible. *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936). Such is the case here.

POINT II

EVEN IF THE BUFFALO PARCEL WERE "INDIAN LANDS," THE LOWER COURT ERRED IN REVERSING ITSELF TO HOLD THAT THE IGRA SECTION 20 PROHIBITION DOES NOT APPLY TO THE BUFFALO PARCEL

Even if the Buffalo Parcel were "Indian lands," it is still not gambling-eligible because of IGRA's Section 20 prohibition against gambling on after-acquired land. 25 U.S.C. 2719(a). The district court committed multiple errors in adopting the NIGC Chairman's reinterpretation that Section 20 did not apply to "restricted fee" land. ***First***, the court misinterpreted *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), in deferring to the Chairman's reinterpretation of the Section 20 prohibition, after holding squarely in *CACGEC II* that the Section 20 prohibition applies to both trust and restricted fee land. ***Second***, the court erred in adopting the NIGC's reversed position, because the Chairman failed adequately to explain the reversal or to provide any reasoned explanation that is consistent with congressional intent. ***Third***, the court erred in failing to consider that DOI issued the reversed regulation, which formed the basis for the Chairman reversal, under the cloud of a disabling conflict of interest, without adequate notice or opportunity for comment and without acknowledging or explaining the Secretary's policy reversal.

A. The Court Erred in Deferring to the Agency's Interpretation after Previously Reaching a Contrary Conclusion based on the Statute's Clear Intent

Chevron confirms that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9. In *CACGEC II*, the district court concluded, properly, that congressional intent was clear and IGRA's Section 20 prohibition applies to trust and restricted fee land. (SPA175-76.) Thus, after *CACGEC II*, there was no ambiguity for the agency to interpret. In *CACGEC III*, however, the very same court reversed itself, and adopted the Chairman's reversed position in the ordinance approval. It was error for the court to defer to the Chairman's reversed position after holding that interpretation to be "clearly at odds with section 20's purpose." (SPA176.)

1. The Court Failed to Recognize that its Prior Holding Trumped the Agency's Revised Interpretation

In *CACGEC II*, the parties had agreed that IGRA's after acquired land prohibition applies to trust and restricted fee land, but the SNI argued that it applies only to trust, and not restricted fee land. Although the district court did not have to allow the SNI, as *amicus*, to raise a new issue, it did allow the SNI to argue this point, and then squarely rejected it. In analyzing the issue, the

court considered the language of the statute in light of the contextual evidence, including the whole act and its legislative purpose. Given the existing state of the law and "Congress's careful construction," it held, "Congress intended to prohibit gaming on *all* after-acquired land, unless one of the section 20 exceptions applies." (*Id.*) The district court concluded that SNI's alternative interpretation -- that "Congress intended that if there was a subsequent change in the law regarding the manner in which lands could be set aside for Indians, section 20 would be inapplicable and newly acquired Indian lands automatically would be gaming-eligible, without restriction" – was "clearly at odds with section 20's purpose." (*Id.*)

This holding in *CACGEC II* settled the issue. NIGC lacked discretion to reconsider it and substitute its views in place of the court's holding by approving the SNI's resubmitted ordinance after the district court invalidated it. When NIGC did so, the court below misapplied *Chevron* by departing from its prior holding, without the slightest showing that its prior analysis in *CACGEC II* was erroneous or misguided in any way.

In *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), the Supreme Court held that a "prior judicial construction of a statute trumps an agency construction" where "the prior court decision holds

that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." More recently, in *United States v. Home Concrete & Supply, LLC*, --- U.S. ---, 132 S. Ct. 1836 (2012), the Supreme Court reinforced the implication in *Brand X* that an agency may not issue new rules during litigation that contradict court precedent. Once a court determines that the intent of Congress is clear, the agency no longer has any interpretative or advisory role. Thus, the agency lacks authority to issue a contrary interpretation, even through regulation, and if it does, deference is inappropriate. "It would be difficult, perhaps impossible, to give the same language here a different interpretation without effectively overruling [an earlier precedent], a course of action that basic principles of *stare decisis* wisely counsel us not to take." *Id.* at 1841 (citations omitted). Here, it would be difficult, if not impossible, to give IGRA's Section 20 prohibition a different interpretation in *CACGEC III* without overruling *CACGEC II*.

This is not to say that an agency cannot reverse itself. Absent binding judicial authority, an agency is free within the limits of reasoned interpretation to change course, so long as it adequately justifies the change. *See Brand X*, 545 U.S. at 1001. But where the court decides a statute's meaning as a matter of law, the agency cannot reverse the court's decision by publishing a conflicting

regulation. To hold otherwise would be to turn the principle of separation of powers on its head.

A court, too, can reconsider and reverse a prior holding if it has grounds to do so, for example, if it overlooked a controlling decision or factual matters which, had it considered them, would have altered the outcome. *See* Fed. R. Civ. P. 59(e), 60(b). Here, however, the court in *CACGEC II* already had concluded that such grounds did not exist. The Government sought remand in *CACGEC II* in light of the revised regulations. (A360-67.) The district court, however, denied the motion, because there were no grounds for reconsideration, *see North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 63 F.3d 160, 165 (2d Cir. 1995) (stating that the court should be "loath" to revisit earlier decisions "in the absence of extraordinary circumstances"), and it would be unfair to let the Government, having lost below, "try out a new legal position." (SPA216-17 (citing *Department of Interior v. South Dakota*, 519 U.S. 919, 921 (1996) (Scalia, J., dissenting))). The court's decision in *CACGEC III* to revisit its earlier holding and accept the Government's new legal position allowed it to do just that. This reversal was both unexplained and inexplicable.

It is no answer to assert, as the lower court did (SPA315), that its conclusion in *CACGEC II* about the applicability of the Section 20 prohibition

was dictum. Dictum is "an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner." Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. Rev. 1249, 1263 (2006). If a proposition is "superfluous to the decision," it is dictum. *Id.* A "holding," in contrast, is "[a] court's determination of a matter of law pivotal to its decision" or "a principle drawn from such a decision." Black's Law Dictionary 800 (9th ed. 2009).

Here, the court unequivocally decided that Congress intended to prohibit gambling on after-acquired restricted fee land. If it had concluded otherwise, there would have been no grounds to consider the applicability of the land claim exception, and no grounds to vacate the Chairman's ordinance approval or to direct NIGC to terminate the gambling at the Buffalo Parcel, as the lower court properly did in *CACGEC II*.[13] The holding that the Section 20 prohibition applies to the Buffalo Parcel was pivotal on the question at issue -- the gambling eligibility of the Buffalo Parcel. The lower court failed, therefore, in its attempt to explain away its earlier holding as mere "dicta."

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[13] Since the court in *CACGEC II* correctly held that the settlement of a land claim exception did not apply, and in *CACGEC III* it did not readdress that issue, Plaintiffs will not address that issue in this Brief but will reserve its arguments for their Reply Brief, if necessary.

The fatal flaw in the court's reasoning was that it disregarded the import of the Supreme Court's statement in *Brand X* that a "prior judicial construction" trumps a different agency construction of that statute, unless that statute's wording is ambiguous. 545 U.S. at 982. The reason, the court explained in *Home Concrete,* is that agencies, not courts, fill statutory gaps, but "[t]he fact that a statute is unambiguous means that there is 'no gap for the agency to fill' and thus 'no room for agency discretion.'" *Home Concrete*, 132 S. Ct. at 1843 (citing *Brand X*, 545 U.S. at 982-83). Consequently, it is for the court to decide the issue, as a matter of law. Under the circumstances, the district court's deference to the agency was inappropriate.

2. The DOI Abused its Authority by Using the Rulemaking Process to Manipulate the Outcome in *CACGEC II*, in which it was a Party

The lower court's error allowed DOI to use its rulemaking authority to control the outcome of pending litigation, in violation of the principle of separation of powers, which prevents the "accumulation of all powers, legislative, executive, and judicial, in the same hands." The Federalist No. 47, at 244 (J. Madison) (G. Willis ed. 1982). According to Jefferson: "The concentrati[on of these powers] in the same hands[] is precisely the definition of despotic government." The Federalist No. 48, at 252 (Madison quoting

Jefferson); *see id.* at 250. Madison, associating such accumulation with "tyranny," rejected the suggestion that the Constitution is "chargeable with the accumulation of power or with a mixture of powers having a dangerous tendency to such an accumulation." The Federalist No. 47, at 244. As the Supreme Court has recognized, the Framers "viewed the principle of separation of powers as the central guarantee of a just government." *Freytag v. Commissioner*, 501 U.S. 868, 870 (1991).

Here, DOI and NIGC engaged in manipulative conduct to control the outcome of the judicial process. In the midst of a legal battle, DOI secretly amended its draft regulations under Section 20 to remove any reference to restricted fee land, 73 Fed. Reg. 29354, 29355-56, which it then argued had the effect of removing restricted fee land from the prohibition against gambling on after acquired lands. DOI published its final rule on May 20, 2008, under the radar, while cross-motions for summary judgment were pending. After the lower court ruled in *CACGEC II*, the SNI openly flouted the court's authority and continued to gamble on the Buffalo Parcel. (*See* A347-48.) It was only after Plaintiffs moved to enforce (A338-39) that the Government revealed, for the first time, its position that the Secretary's "new" regulations issued May 2008 -- before the court ruled -- had changed DOI's interpretation of the

applicability of Section 20 to restricted fee. This was a 180-degree reversal in DOI's position since at least 2002, when Secretary Norton explained her reluctant "non-approval approval" of the Compact, and 2006, when DOI published the draft Part 292 regulations for public comment, 71 Fed. Reg. 58769 (Oct. 5, 2006), and at every step of the *CACGEC II* litigation. The SNI resubmitted its ordinance -- the same ordinance at issue in *CACGEC II* -- to NIGC for reconsideration (A371-96), and on July 22, Defendants used the resubmitted ordinance as the pretext for a motion to remand to NIGC. (A360-67.) All this while, there was no valid ordinance in effect, but the SNI continued to gamble on the Buffalo Parcel.

Eight months later, the DOI Solicitor's staff tried to manufacture an explanation for the regulatory reversal. Unable to provide a reasoned analysis, they relied on Blackwell, who had worked on the regulations (A1550), to cobble together a legal argument staking out a reversed position on the application of 25 U.S.C. § 177 to restricted fee land. The purpose was to create the semblance of a basis for the Chairman to reverse himself and apply the revised regulations to benefit the SNI, the client of the law firm where Blackwell's husband, Rossetti, was a partner. DOI then issued a directive, in the form of an M-

Opinion,[14] binding NIGC and all other agencies to that determination. (A1138-44.) NIGC concurred in the DOI's determination.

These actions reflect an abuse of the rulemaking process that can only be classified as arbitrary and capricious. In the Government's view, the DOI can invoke its rulemaking authority (a delegation of Congress's legislative function) to dictate the outcome of a specific NIGC decision (a delegation of executive authority) and thereby control the outcome of specific case to which both agencies are parties (a usurpation of judicial power). According to the Government, the DOI has the power, through rulemaking, to compel the judiciary to rule in its favor, even after the executive has submitted to the jurisdiction of an independent judiciary, and the judiciary has ruled against it -- as did the court below in *CACGEC II*. This "heads I win, tails you lose" approach vitiates the independence of the judiciary.

The Supreme Court has repeatedly condemned efforts by agency counsel to manipulate the outcome of pending cases to which the government is a party by cloaking their legal arguments in the deference that is normally reserved for

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[14] An M-Opinion is a "final legal interpretation," which is binding on all DOI offices and officials and "may be overruled or modified only by the Solicitor, the Under Secretary, or the Secretary." *See* DOI's Dep'l Manual, Part 209, Ch. 3, 3.2(A)(11)(A1238).

formal agency rulemaking. In *Home Concrete*, for example, the Supreme Court refused to allow the IRS to overrule by regulation the court's previous determination more than 50 years earlier in a similar case. Likewise, in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988), the court explained that "[d]eference to what appears to be nothing more than an agency's convenient litigation position" is "entirely inappropriate." This Court, too, has condemned the use of the rulemaking process to prop up an agency litigation position. *See, e.g.*, *NRDC v. Abraham*, 355 F.3d 179, 201 (2d Cir. 2004); *NRDC v. Herrington*, 768 F.2d 1355, 1428 (D.C. Cir. 1985); *see Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of NY*, 273 F.3d 481, 491 (2d Cir. 2001).

Dissenting in *Brand X*, 545 U.S. at 1017, Justice Scalia raised a hypothetical -- presaging the agency's actions here -- in which the agency is a party to the case in which the court construes a statute, and the agency then disregards that construction and seeks *Chevron* deference for its own contrary construction the "next time around." *Id.* (Scalia, J., dissenting). As "bizarre and likely unconstitutional" as that may be in subsequent actions between different parties, *id.*, the impact is more disturbing here, where it occurs in a subsequent iteration of the same controversy involving the same issues between the same

parties. In *United States v. Mead Corp.*, 533 U.S. 218, 247-48 (2001), Justice Scalia raised in dissent another hypothetical in which an agency adopts an interpretation of a regulation previously rejected by a court by promulgating it through an otherwise *Chevron*-eligible procedure. To approve such a procedure, he recognized, would be "a landmark abdication of judicial power" and "worlds apart from *Chevron* proper." *Id.* "I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency -- or have allowed a lower court to render an interpretation of a statute subject to correction by an agency." *Id.* at 248-49. This is precisely what would occur if this Court were to allow the district court's erroneous holding in *CACGEC III* to stand.

Moreover, the DOI did not wait until "future adjudications" between different parties to invoke its new interpretation. Rather, it claimed for itself the authority to serve as legislator, prosecutor, and adjudicator -- all at once -- through the promulgation of regulations meant to overturn a judicial determination to which it was a party. No party should be able to dictate the outcome of pending litigation, not even the executive. The lower court's endorsement of that procedure was a radical departure from the *Chevron* framework and an abdication of judicial power.

B. The Court Erred in Deferring to NIGC's Unreasonable Interpretation

Even if the court had not already determined the Section 20 issue as a matter of law in *CACGEC II*, deference to the Chairman's reversed interpretation would nevertheless have been unwarranted in *CACGEC III*. The Chairman's new policy does not pass muster under *Chevron* step two because it is "arbitrary, capricious, [and] manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. It is also unreasonable under *Chevron* step two because it failed adequately to explain the Chairman's change in position. *See, Northpoint Tech. Ltd. v. FCC*, 412 F.3d 145, 156 (D.C. Cir. 2005).

1. The Chairman's Reversed Interpretation was Unreasonable

In approving the resubmitted ordinance, the Chairman concurred in the Secretary's statement that Congress was "purposeful" in excluding restricted fee land from IGRA's after-acquired lands prohibition. (A1066 (citing 73 Fed. Reg. 29355)). According to the Secretary, the phrase "'in trust' has a common and generally well-accepted meaning in Indian law," particularly as it relates to fee ownership, in that the U.S. holds legal title to trust lands, while Indians are the owners of restricted fee lands. (A1142.) In addition, reading "in trust" as including only lands in which the U.S. has legal title and the Indian "owner" has

beneficial title supposedly "honors that distinction" and "comports with the whole act rule, which assumes that Congress is internally consistent in its use of terms when drafting legislation."[15] (SPA317.)

Defendants' argument, which the district court accepted, that Congress was somehow "purposeful" in omitting restricted fee land from Section 20, because it "referred to restricted fee lands elsewhere in IGRA," is a sham. (*Id.* (citing 73 Fed. Reg. at 29355)). There is no evidence, and the district court cites none, that Congress "omitted" restricted fee from the Section 20 prohibition or that it purposefully intended to do so. Instead, the more reasonable conclusion, and the one the court had reached in *CACGEC II*, is that Congress did not reference restricted fee because that was no method for creating "Indian lands" when Congress enacted IGRA in 1988. More than 50 years earlier, U.S. policy regarding Indians and their lands had stabilized, and by 1934, the only way to

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[15] This conclusion is directly at odds with the court's holding, in the "Indian lands" portion of the opinion, that "Congress has treated trust land and restricted fee land as jurisdictional equivalents in a number of Indian statutes of general applicability." (SPA144.) The court did not recognize or attempt to reconcile this inconsistency. *See Air Line Pilots Ass'n v. FAA*, 3 F.3d 449, 453 (D.C.Cir. 1993) ("internally inconsistent" statutory interpretation is "unreasonable and impermissible").

set aside new lands for Indians was through the IRA's trust provision, 25 U.S.C. § 465. When Congress enacted IGRA in 1988, there was no statutory mechanism to create "Indian lands" by designating it as restricted fee. Congress did not need to prohibit gambling on newly acquired restricted fee lands because there was no mechanism to create newly acquired restricted fee lands. "Courts construing statutes enacted specifically to prohibit agency action ought to be especially careful not to allow dubious arguments advanced by the agency in behalf of its proffered construction to thwart congressional intent expressed with reasonable clarity, under the guise of deferring to agency expertise on matters of minimal ambiguity." *NRDC v. Abraham*, 355 F.3d 179, 199 (2d Cir. 2004) (citation omitted).

The Chairman's interpretation, which the lower court accepted, advances a legal fiction -- that Congress thought about and purposefully intended to exclude later-acquired restricted fee land from the Section 20 prohibition. There is no evidence that Congress faced, and intended to bring into issue, the gambling eligibility of lands subject to a restriction on alienation under 25 U.S.C. § 177. There is no basis for speculating that Congress thought about a method of creating sovereign land that did not exist at the time of the statute's enactment. It was error for the court to accept the Chairman's reinterpretation,

premised as it was on an unreasonable assumption, drawn from silence, about congressional intent in IGRA's Section 20 prohibition. For the reasons discussed in Point I(A)(3), *supra*, this Court should require a clear statement of intent before assuming that Congress intended to create gambling-eligible Indian lands that would not be subject to the prohibition against gambling on after-acquired lands.

It is incorrect to assert, as the lower court did in *CACGEC III*, that the reference to "trust or restricted status" in two other sections in IGRA, 25 U.S.C. § 2703(4)(B) and 25 U.S.C. § 2719(a)(2)(A), reflects an intent to limit the prohibition to trust land. In 25 U.S.C. § 2703(4)(B), the reference to lands held "in trust" or "subject to restriction" reflects the historical reality of the status of post-allotment era Indian landholding in the United States. In 25 U.S.C. § 2719(a)(2)(A), Congress created an exception for Oklahoma lands to reflect the understanding that there are no reservations in Oklahoma and tribes in that state should have the same "on-reservation" ability to game as in other states. (A1574.) Significantly, 25 U.S.C. § 2719(a)(2)(A) refers to the creation of trust land (that is, ***new*** trust land) contiguous to restricted fee land (that is, ***existing*** restricted fee land). This grammatical structure reinforces the conclusion that Congress understood that after the IRA the only way to create new after-

acquired lands was through the land-into-trust process under 25 U.S.C. § 465.

The court in *CACGEC III* also failed to consider the legislative intent under SNSA. In 1990, when Congress enacted SNSA, there was no evidence that it intended to create newly acquired "Indian lands" that would be exempt from the newly acquired lands prohibition. Just two years earlier in IGRA, Congress had enacted a national policy prohibiting tribes from conducting gambling on lands they did not possess in 1988, unless an exception applied. Neither SNSA nor its legislative history refers to "Indian lands" or uses any other term that would suggest that Congress intended to create newly acquired lands that would be exempt from IGRA's Section 20 prohibition. Congress "does not … hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). If Congress had intended SNSA to create a new category of gambling-eligible restricted fee land that would be exempt from IGRA's Section 20 prohibition, it would not have concealed it in the mousehole of a "miscellaneous" provision of a statute whose text and history is devoid of any mention of gambling. The court's acceptance of the Chairman's textual analysis *CACGEC III* ultimately founders on this principle.

2. The Chairman's Purported Reasons for his Reversal are Unsupportable

The court's deference to the Chairman's revised interpretation was also misplaced because the Chairman failed to supply a "reasoned analysis," and show "good reasons for the new policy." *FCC v. Fox Television*, 556 U.S. 502, 514-15 (2009). "Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary, capricious [or] an abuse of discretion," and therefore unworthy of deference. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996).

In the ordinance approval letter, the Chairman stated that "the new interpretation of section [20] does not threaten to undermine IGRA or conflict with Congressional intent." (A1071.) The Chairman noted that SNSA is the only known act that permits the Secretary to create restricted fee land for a tribe: "Because the SNSA is the only Act permitting the Secretary to accept land into restricted fee status for a tribe, the new interpretation has a very limited effect." (A1072.) This is not a reasoned explanation, even though (or especially because) the spouse of a lawyer/lobbyist in the SNI's law firm participated in drafting it.

The role of an agency is to interpret the law and apply it to the facts. *See Negusie v. Holder*, 555 U.S. 511, 531 (2009) (Stevens, J., conc. in part, diss. in

part) ("In cases involving agency adjudication, we have sometimes described the court's role as deciding pure questions of statutory construction and the agency's role as applying law to fact."). If an interpretation would conflict with the language and intent of a statute -- as it would here -- it is impermissible. 5 U.S.C. § 706(2)(A); *Chevron*, 467 U.S. at 843 n.9 (courts "must reject administrative constructions which are contrary to clear congressional intent"). "Agencies must implement their rules and regulations in a consistent, evenhanded manner." *See FERC v. Triton Oil & Gas Corp.*, 750 F.2d 113, 116 (D.C. Cir. 1984). Thus, an agency may not abuse its discretion by arbitrarily choosing to disregard the law in a single, specific case. *Id.* There needs to be a good reason to carve out an exception, and the fact that the exception will have only a "limited effect" is not a good reason. Instead, it smacks of preferential treatment and is the polar opposite of a logical and reasoned decision.

In the ordinance approval letter, NIGC asserted it had "revisited its concern" that a tribe may argue that off-reservation property purchased in fee on the open market is restricted fee Indian lands due to the application of the Non-Intercourse Act. (A1072.) That was fiction, manufactured to supply a pretense for reversing NIGC's prior conclusion about IGRA's Section 20 prohibition. In the second ordinance approval letter, the Chairman did not express a concern

that other tribes might argue that 25 U.S.C. § 177 applies to any open market purchase of land. Instead, the Chairman relied on the Secretary's determination that "lands held in restricted fee status pursuant to an act of Congress are also subject to the requirements of Section [20] of IGRA." (A1135 n.2.) Secretary Norton, in turn, understood that she was dealing with "lands held in restricted fee status pursuant to an Act of Congress," which "would otherwise constitute after-acquired lands." (A1189.) To exempt these specific lands from the Section 20 prohibition, she recognized, would "create unintended exceptions" and "undermine" the congressional intent under IGRA. (*Id.*) It was in the fact-specific context of off-reservation SNSA-restricted land that Secretary Norton concluded "lands held in restricted fee status pursuant to an Act of Congress such as is presented within this Compact must be subject to the requirements of Section 20 of IGRA." (*Id.*) The Chairman previously said "the only sensible interpretation" was that Section 20 applies to restricted fee land (A1135), and he submitted a comment to DOI to that effect. (A804-05.) In reversing himself at the behest of the SNI, the Chairman provided no reasoned basis to conclude otherwise.

The district court, for its part, completely failed to make sense of NIGC's attempted explanation. It merely avoided the issue, stating, "[t]he Court agrees

with NIGC's statement of the law for all of the reasons set forth in *CACGEC II*." (SPA320.) In *CACGEC II*, however, the court held that Section 20 applies to restricted fee land and that a contrary interpretation would be "clearly at odds with section 20's purpose." (SPA176.) The court's reasons in *CACGEC II* offer no basis to agree with the NIGC's subsequent reinterpretation of the law.

The Chairman reversed his interpretation of the Section 20 prohibition without supplying a reasoned analysis or showing any good reasons for the reversal. This fails the test for reasonable agency action.

C. DOI Lacks Authority to Issue Legislative Regulations under IGRA, because Congress Vested NIGC with Power to Regulate Indian Gambling

An administrative interpretation of a statutory provision qualifies for *Chevron* deference only when Congress delegated authority to the agency generally to make rules carrying the force of law, and the agency promulgated its interpretation in the exercise of that authority. *Mead*, 533 U.S. at 229. No matter what the issue, "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

DOI acknowledged it did not have authority to issue legislative regulations under IGRA. (A1597) ("All -- These regulations are interpretive

regulations -- we do not have authority to promulgate legislative regulations under IGRA."). When Congress enacted IGRA, it created NIGC as an independent agency within DOI. Nominally under DOI, NIGC "functions as an independent entity." *See Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1265-66 (10th Cir. 2001) (refusing to give deference to view of DOI, which does not administer IGRA, that that land to be acquired was gambling eligible "Indian lands").[16] Congress vested NIGC and its Chairman with power to regulate Indian gambling, 25 U.S.C. §§ 2704-2709, 2711, 2713, including power to issue regulations "to implement the provisions" of IGRA. 25 U.S.C. § 2706(b)(10). In enacting IGRA, Congress intended the Secretary's authority over Indian gambling to continue during a transition phase, but only until NIGC organized and issued regulations. 25 U.S.C. § 2709.

In the quarter century since IGRA's enactment, NIGC has been fully functional. In 1992, NIGC proposed and in 1993, it finalized regulations relating to the supervision of Indian gambling. It is thus NIGC and its

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[16] Congress later delegated (as of IGRA's enactment) authority to the Secretary to determine whether land is a "reservation," Pub. L. No. 107-63 § 134 (2001), but that amendment does not authorize the Secretary to make the Indian lands determination outside the reservation context and thus is inapplicable here. See Pub. L. No. 108-108, § 131 (2003); 2007 Memorandum between DOI and NIGC (A1240-43).

Chairman, not DOI and its Secretary, that may exercise authority relating to the supervision of Indian gambling. As a result, DOI's revised regulations do not carry the force of law or warrant *Chevron* deference. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (interpretive regulations lack force of law and are not accorded weight in adjudicatory process).

D. The Secretary's Policy Reversal was not the Logical Outgrowth of any Proposed Rule

To qualify for *Chevron* deference, a final rule must also be the "logical outgrowth" of any previously issued "proposed rule" published in accordance with the APA. 5 U.S.C. § 553*; see National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986). The object is to prevent unfair surprise. The revised regulations do not meet this requirement.

In 2006, DOI published proposed regulations establishing "procedures that an Indian tribe must follow in seeking to conduct gambling on lands acquired after October 17, 1988." (A1200-13.) In the proposed regulations, DOI expressed its longstanding view that the Section 20 prohibition applies to both trust and restricted fee land. The 2006 proposed rule proposed no change regarding the applicability of the Section 20 prohibition to restricted fee land and gave no hint of a change in interpretation. Thus, the final rule amending the

applicability of Section 20 was not a logical outgrowth of the 2006 proposed rule.

Prior to May 2008, DOI, NIGC and their attorneys at DOJ had consistently affirmed their prior position that 25 U.S.C. § 2719 applies to both trust and restricted fee lands. For example, the Secretary, in her November 2002 letters concluded that Congress did not intend to limit the Section 20 prohibition to *per se* trust acquisitions only because such an interpretation "would arguably create unintended exceptions to the Section 20 prohibitions and undermine the regulatory regime prescribed by IGRA." (A1189.) Chairman Hogen, in his July 2007 ordinance approval letter, stated that NIGC interprets the Section 20 prohibition "to include land held by an Indian tribe in restricted fee." (A1135 n.2 (citing Norton's 2002 Letters.)) This provision "can only sensibly be read to include trust land and restricted fee lands," because if it applied only to trust lands then Tribes could avoid the prohibition merely by taking land in restricted fee, rather than by having the U.S. take it into trust. (*Id.*) "It is unlikely that Congress intended to create such an exception." (*Id.*)

In *CACGEC I* and *CACGEC II*, DOI and NIGC repeatedly advanced the position that Section 2719 applies to both trust and restricted fee lands. *See* SPA31; A263, 310, 315 at ¶ 59, 333 at ¶ 59 ("Statement not disputed."), 337

(Section 20 "is intended to apply to restricted fee land," because otherwise "a loophole would be created[.]"). The 2006 proposed regulation evinced no intent to alter this consistent interpretation. Thus, it did not satisfy the "logical outgrowth" requirement.

The agency's approach of proposing to clarify its existing policy and then amending the proposal to reverse that policy was an invalid "flip-flop." In *Environmental Integrity Project v. EPA*, 425 F.3d 992, 997 (D.C. Cir. 2005), the D.C. Circuit considered a rulemaking notice in which the Environmental Protection Agency "propos[ed]" to remove language from its regulations in order to "clarify" its policy in response to "numerous requests from permitting authorities and citizens requesting clarification." 67 Fed. Reg. 58561, 58564 (Sept. 17, 2002). The proposed clarification matched the EPA's then-prevailing practice. *Environmental Integrity*, 425 F.3d at 997. The final rule "did not adopt the proposed interim rule" clarifying existing policy, but "adopted a 'reinterpretation' of the unamended text." *Id*. The court rejected that "surprise switcheroo on regulated entities," because there was inadequate opportunity for comment. *Id.* at 996; *see Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 461-63 (D.C. Cir. 2012) (rule requiring online education providers to obtain authorization from States in which students were located was

not "logical outgrowth" of original proposal).

Here, despite the Government's clear and oft-repeated position that the Section 20 prohibition applies to trust and restricted fee lands, DOI did a complete about-face and adopted a new interpretation excluding restricted fee land from IGRA's after acquired land prohibition. This was a "surprise switcheroo," in contravention of the "logical outgrowth" rule. "[A]fter taking its first bite at the interpretive apple" by initially adopting one interpretation, the Secretary cannot adopt a "reinterpretation" without advance notice. *Environmental Integrity*, 425 F.3d at 997.

The two comments the agency received on the 2006 prior rule do not cure the Secretary's failure to provide notice. An agency "cannot bootstrap notice from a comment." *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991). "[A]mbiguous comments and weak signals from the agency" are not sufficient to give interested parties the "opportunity to anticipate and criticize the rule or to offer alternatives." *Int'l Union, United Mine Workers of Am. v. MSHA*, 407 F.3d 1250, 1261 (D.C. Cir. 2005). The paucity of comments on the proposal, one from NIGC and one from the SNI, hardly suggests a widespread understanding of a possible about-face. To the contrary, the fact that DOI altered the regulation at the behest of the SNI (A829) -- and contrary to the

NIGC's position (A804-05) -- strongly suggests that the DOI and the SNI were in collusion. *Cf.* Point II(C)(4), *infra*. Because DOI completely changed its position in the final rule on the applicability of IGRA Section 20 to restricted fee land, but gave no prior indication that it was considering a different approach, the change is procedurally invalid and without force or effect. *Environmental Integrity*, 425 F.3d at 997.

E. The Secretary's M-Opinion Does Not Supply a Reasoned Analysis for the Reversed Interpretation

The after-the-fact M-Opinion does not cure these procedural defects. "It is well-settled that judicial review of an agency action is normally confined to the full administrative record before the agency at the time the decision was made." *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 82 (2d Cir. 2006); *see Forest Watch v. U.S. Forest Serv.*, 410 F.3d 115, 119 (2d Cir. 2005) ("[A court may not] properly affirm an administrative action on grounds different from those considered by the agency.") (Citations omitted). Thus, the court's review must be based on the administrative record that was in existence before the agency, not some new record made after the disputed action.

Here, the M-Opinion was not part of the rulemaking record, but merely a frantic effort on DOI's part to remedy the substantive and procedural defects in

its rulemaking. The Solicitor's office developed the M-Opinion in January 2009, long after the revised regulations went public. Thus, it does not cure the defects in the revised regulations or warrant any consideration whatsoever.

The M-Opinion is also impermissible under *Chevron* step two because it "conflict[s] with the policy judgments that undergird the statutory scheme." *See Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 416 (D.C. Cir. 1994). Reasonableness is a function of the interpretation's "conformity to statutory purposes" as well as its fit with the text. *Goldstein v. SEC*, 451 F.3d 873, 880-81 (D.C. Cir. 2006) (rejecting interpretation that "falls outside the bounds of reasonableness.").

The interpretation embodied in the revised regulations and described in the M-Opinion frustrates, rather than furthers, the intent of Congress, as the Secretary Norton in her 2002 letters recognized it would. The M-Opinion does not provide any reasoned basis for the change. Thus, it does not pass muster under *Chevron* step two. *See Goldstein*, 451 F.3d at 881.

F. The Revised Regulations were Infected by a Disabling Conflict of Interest

At the time of these events, the Government's refusal to enforce the law and its willingness to allow the SNI to continue to gamble despite the lower

court's orders seemed inexplicable. It was only later that that the significant conflict of interest underlying the regulatory revision first came to light.

Since at least March 2007 -- during the time frame that DOI changed the regulation to remove restricted fee -- a high-level attorney in DOI's Solicitor's Office, Edith Blackwell, was married to a partner in the law firm that represented the SNI on lobbying issues (A878, 881-82, 1215) and was receiving hundreds of thousands of dollars for legal representation and lobbying on issues affecting Indian sovereignty (A1163-65, 1167-81, 1217-35). Blackwell was (or at least should have been) "recused from all matters" that involved the law firm (A956 at ¶ 2), and "all matters involving the SNI, including "Seneca Nation gaming matters" (A594), and "the specific matter of the Seneca litigation." (A615.) Yet when the SNI pressed DOI, this same high-ranking DOI attorney revised the Part 292 regulations to remove references to restricted fee.

It was this change that provided the claimed basis for the SNI's resubmission of its ordinance to NIGC, the Government's refusal to enforce the district court's orders pending NIGC reconsideration, the NIGC hearing officer's stay of the administrative enforcement proceeding, and NIGC's preordained approval of the resubmitted ordinance. With the stroke of a pen, the deletion of two words, "restricted fee," from the regulation created the

pretext for an intricate scheme to deviate from statutory, regulatory and policy requirements -- and to flout the court's prior orders -- to reach the predetermined end of allowing the SNI to continue to gamble on the Buffalo Parcel. Blackwell also played a pivotal role in drafting the post hoc explanation that became the Solicitor's M-Opinion (A1138-44), rationalizing that it addressed "not the specific matter of the Seneca litigation but the broader issue regarding the decision made in the 2719 regulations." (A615.) The M-Opinion paved the way for NIGC to approve the SNI's resubmitted ordinance.

In 2006, Hon. Earl Devaney, then DOI Inspector General, testified before a Congressional subcommittee about the "institutional culture of managerial irresponsibility and lack of accountability" underlying "some of the most significant failures" within DOI. (A1154.) "Short of a crime," he testified, "anything goes at the highest levels" of DOI, including "[e]thics failures on the part of senior Department officials -- taking the form of appearances of impropriety, favoritism, and bias." (*Id.*) The Inspector General's reference to "intricate deviations from statutory, regulatory and policy requirements to reach a predetermined end" aptly describes what took place in this case. (*Id.*) Under the circumstances, the application of *Chevron* deference concedes too much power to an agency functioning through individuals with divided loyalties, with

a personal stake in the outcome, and the power to seize sovereign control over land from a State and its citizens.

CONCLUSION

This Court should reverse the judgment of the district court and grant summary judgment to Plaintiffs-Appellants as follows:

- Annulling the NIGC Chairman's determination, dated January 20, 2009, approving the SNI's ordinance to operate a casino on the Buffalo Parcel site;

- Annulling the DOI Secretary's regulations under 25 C.F.R. Part 292, effective August 20, 2008, insofar as they purport to exempt "restricted fee" land from the prohibition against gambling on after-acquired lands pursuant to IGRA Section 20;

- Directing NIGC immediately to enforce the law in accordance with this Court's decision by ordering the SNI to cease and desist forthwith from continuing any further gambling at the Buffalo Parcel site.

DATED: October 14, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

By order of this Court dated October 30, 2013, Plaintiffs-Appellants' motion to file a Brief containing a maximum of 18,000 words was granted. 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 17,456 words. This word count excludes the corporate disclosure statement, table of contents, table of authorities, and signatures and certificates of counsel.

DATED: October 14, 2014

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