No. 11-5171cv (L)

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY, et al.,
Plaintiffs-Appellants-Cross-Appellees,

v.

PHILIP N. HOGEN, in his official capacity as Chairman of the National Indian Gaming Commission, et al.,
Defendants-Appellees-Cross-Appellants.

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

FINAL PRINCIPAL AND RESPONSE BRIEF
FOR THE FEDERAL APPELLEES-CROSS-APPELLANTS

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JURISDICTION

This matter involves four consolidated appeals from final district court judgments in three successive cases. The three cases are:

(1) *Citizens Against Casino Gambling in Erie County v. Kempthorne*, No. 06-CV-0001 (W.D.N.Y.) (*CACGEC I*), final judgment entered January 12, 2007 (2d Cir. No. 11-5466);

(2) *Citizens Against Casino Gambling in Erie County v. Hogen*, No. 07-CV-0451 (W.D.N.Y.) (*CACGEC II*), final judgment entered July 8, 2008 (2d Cir. Nos. 11-5171(L) and 13-2777(X); and

(3) *Citizens Against Casino Gambling in Erie County v. Hogen*, No. 09-CV-0291 (W.D.N.Y.) (*CACGEC III*), final judgment entered May 13, 2013 (2d Cir. No. 13-2339).

The district court had jurisdiction in each of these cases under 28 U.S.C. § 1331 and 5 U.S.C. § 702.

The Plaintiffs-Appellants-Cross-Appellees Citizens Against Casino Gambling in Erie County, *et al.* (collectively, Plaintiffs) filed timely appeals from each final judgment, as set forth in their opening brief (p. 1). Defendants-Appellees-Cross-Appellants Phillip N. Hogen, *et al.* (collectively, the Agencies), filed a timely cross-appeal in *CACGEC II* on October 24, 2008, within 60 days after the district court denied the Agencies' timely filed Rule 59(e) motion (Docket

(D) 65, 76). This Court has jurisdiction over these appeals under 28 U.S.C. § 1291.

ISSUES PRESENTED

In each of the three consolidated cases, Plaintiffs challenged a decision by the Chairman of the National Indian Gaming Commission (NIGC) approving a gaming ordinance of the Seneca Nation of Indians (Nation), under which the Nation sought to conduct gaming on approximately nine acres in Buffalo, New York (Buffalo parcel). Gaming on tribal lands is governed by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721. IGRA allows gaming on "Indian lands," which include, as relevant here, lands "held by an Indian tribe * * * subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." *Id.* §§ 2710, 2703(4)(B). IGRA section 20 prohibits gaming on "lands acquired by the Secretary [of the Interior] in trust for the benefit of an Indian tribe after [IGRA's enactment on] October 17, 1988." *Id.* § 2719(a). IGRA, however, makes certain exceptions to that prohibition, including for lands "taken into trust as part of * * * a settlement of a land claim." *Id.* § 2719(b)(1)(B).

The Nation acquired the Buffalo parcel on which it sought to game under the Seneca Nation Settlement Act of 1990 (Settlement Act), 25 U.S.C. §§ 1774-1774h. That Act settled claims by the Nation seeking redress for Congress's decision in

1890 to issue 99-year, below-market leases on the Nation's reservation over its vigorous objections. In December 2005, pursuant to the Settlement Act, the Buffalo parcel became subject to restriction by the United States against alienation and entered "restricted fee" status – the status under which the Nation holds its reservation lands.

The NIGC Chairman made three determinations in approving the Nation's gaming ordinance, which are presented for review under the APA's deferential standard. The first two issues identified below were presented in Plaintiffs' opening brief and the Agencies address them here in their status as Appellees. As explained *infra*, pp. 7-8, the third issue is presented by the Agencies in their capacity as Cross-Appellants in *CACGEC II* as well as in their capacity as Appellees in *CACGEC III*.

Issues Addressed as Appellees in *CACGEC III*

1. Whether the Buffalo parcel is "Indian land" within the meaning of IGRA.

2. Whether the Buffalo parcel is subject to IGRA's section 20 prohibition against gaming on lands "acquired by the Secretary in trust" after IGRA's enactment.

Issue Addressed as Cross-Appellants in *CACGEC II* and Appellees *in CACGEC III*

3. Whether, even if the Buffalo parcel is subject to IGRA's section 20 prohibition, the parcel is eligible for gaming because it satisfies the exception to that prohibition for lands that "are taken into trust as part of * * * a settlement of a land claim."

STATEMENT OF THE CASE

Plaintiffs challenge the Chairman's approval of an ordinance allowing the Seneca Nation to game on the Buffalo Parcel acquired pursuant to the Seneca Nation Settlement Act. The Settlement Act extinguished the Nation's claims based on 99-year leases that Congress in 1890 had compelled the Nation to accept at below-interest rates on approximately one-third of its Allegany Reservation. In his decision underlying *CACGEC III* – the key decision at issue in these appeals – the Chairman determined that the Buffalo parcel is "Indian lands" under IGRA because the Act provided funds and a Secretarial process for the land to become subject to a restriction by the United States against alienation and declared the parcel would be held in restricted fee status – the same status in which the Nation holds its reservation lands. The Chairman determined that the Buffalo parcel is not subject to the section 20 prohibition, which applies to lands "acquired by the

Secretary in trust," because the parcel was instead held by the Nation in restricted fee status – long-established, distinct ways of holding tribal lands that IGRA recognizes elsewhere in the statute. Finally, the Chairman determined that, even if the Buffalo parcel is subject to the section 20 prohibition, it satisfies the exception for lands acquired as part of the settlement of a land claim, because Congress's authorization for the Nation to acquire restricted fee lands with Settlement Act funds furthered the Act's purpose to settle the Nation's land claims based on its loss of possession and fair market value of its reservation lands as a result of the congressionally imposed 99-year leases.

The outlines of the procedural history, discussed in more detail in the Statement of Facts, are as follows. In the first case, the district court vacated and remanded the Chairman's approval of the Nation's gaming ordinance because the Chairman had not determined whether the Buffalo parcel is eligible for gaming under IGRA, *CACGEC v. Kempthorne* (*CACGEC I*), 471 F. Supp. 2d 295 (W.D.N.Y. 2007) (Special Appendix (SPA) 1-55), *as amended*, 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007) (SPA57-70). That appeal was stayed pending decision on the remand.

In the second case, the district court upheld the Chairman's determination that the Buffalo parcel is "Indian lands" but concluded that it was ineligible for gaming under IGRA's section 20. In reaching that conclusion, the district court accepted the parties' unified position that the Buffalo parcel was subject to the section 20 prohibition. The court rejected, however, the Chairman's determination that the parcel satisfied the settlement of a land claim exception to that prohibition, and vacated the Chairman's decision. *CACGEC v. Hogen* (*CACGEC II*), 2008 WL 2746566 (W.D.N.Y. July 8, 2008) (SPA71-197).

After *CACGEC II* was briefed, but before final decision, the Interior Department, which was preparing to finalize IGRA section 20 regulations proposed in 2001 and 2006, reassessed its interpretation of the section 20 prohibition and issued final regulations applying it only to trust lands, not to restricted fee lands like the Buffalo parcel. 25 C.F.R. Part 292. After the *CACGEC II* decision, the Nation submitted to the NIGC a new site-specific ordinance, seeking approval under the new regulations. The Chairman (1) determined again that the parcel is Indian lands; (2) concurred with the Secretary and Interior regulations that, on further consideration, the Buffalo parcel is not subject to the section 20 prohibition; and (3) in the alternative, accepted the Secretary's determination that under Interior's new regulations the parcel satisfied

the settlement of a land claim exception to the section 20 prohibition. Plaintiffs' sued, and the prior appeals were consolidated and stayed pending decision in *CACGEC III*. On final judgment, the district court upheld the Chairman's approval of the ordinance on the ground that IGRA's section 20 does not apply to the Buffalo parcel. *CACGEC v. Stevens* (*CACGEC III*), 945 F. Supp. 2d 391 (W.D.N.Y. 2013) (SPA289-327). Plaintiffs appealed, the stay on the prior appeals was lifted, and the appeals were consolidated.

While the matter before this Court involves appeals from all three cases, the issues may largely be addressed in the context of *CACGEC III*. Plaintiffs' appeal in *CACGEC I*, which they describe as seeking vacatur of the remand to the Chairman (Br. 6), was rendered moot by the Chairman's approval of the Nation's second ordinance after remand.

Plaintiffs' appeal in *CACGEC II* is also effectively moot. Plaintiffs' appealed on the theory that affirmance of the judgment on the ground that the Buffalo parcel is not Indian lands would enlarge the judgment in their favor and thus required an appeal. Plaintiffs may now address that issue as a basis for reversal of the judgment in *CACGEC III*. The Agencies' appeal in *CACGEC II*, seeking to reverse the judgment, has also been largely mooted by the favorable judgment in *CACGEC III*, but in an abundance of caution, the Agencies maintain

that appeal to avoid any estoppel effect that might arise from the ruling that the Buffalo parcel did not satisfy the settlement of a land claim exception to the section 20 prohibition. Thus the Agencies address that issue herein both as an appeal from the district court's ruling in *CACGEC II* and as an alternative ground for affirmance in *CACGEC III*.

STATEMENT OF FACTS

A. Statutory and Regulatory Background

1. Seneca Nation Settlement Act

The Seneca Nation, a federally recognized Indian tribe, is one of the historic Six Nations of the Iroquois Confederacy, which at one time exercised dominion over nearly thirty-five million acres, including most of New York and Pennsylvania. *See Banner v. United States*, 238 F.3d 1348, 1350 (Fed. Cir. 2001). The aboriginal lands of the Seneca Nation centered on what is now western New York State. S. Rep. No. 101-511, at 4 (1990) (Appendix (A) 1438). In 1794, the Treaty of Canandaigua with the Six Nations recognized the right of the Seneca Nation to a portion of the Confederacy's lands that remained at that time, which included all of the State of New York west of the Genessee River. *Id.*

By the mid-nineteenth century, the Nation had lost most of the lands recognized in the treaty through fraud and coercion, leaving it with three

reservation tracts, including the Allegany Reservation near the City of Salamanca. *Id.* In 1875 and 1890, over the vigorous objection of the Nation, Congress renewed leases that the Nation had entered into on the Allegany Reservation with white farmers, railroad employees, and others. The leases, first extended for 12 years and then for 99, were executed with rates as low as $1 per year with no escalation provision and deprived the Nation of the use of nearly one-third of the reservation. *Id.* at 5 (A1440). The City of Salamanca and the outlying villages were founded in major part on these leases. *Id.*

The Seneca Nation Settlement Act was enacted to resolve disputes regarding the 99-year leases, which were scheduled to expire in 1991. The Act effectuated an agreement between the Nation and the City and villages providing for negotiation of new 40-year leases, with an option to renew for an additional 40 years, in exchange for the payment of $35 million by the United States and $25 million by the State of New York, as well as authorization to use some of those funds to acquire other land for the Nation. A stated purpose of the Act is "to avoid the potential legal liability on the part of the United States that could be a direct consequence of not reaching a settlement." *Id.* § 1774(b)(8). The statute requires the Nation to "relinquish[] all claims against the United States, the State, the City, the congressional villages, and all prior lessees for payment of annual rents" under

the 99-year leases. *Id.* § 1774b(b). It further provides that "[t]he relinquishment of claims against the United States shall be effective upon payment by the United States" of the $35 million required by the Act. *Id.* § 1774b(c).

The Act allows the Nation to use funds appropriated under the Act to acquire land located "within its aboriginal area in the State or within or near proximity to former reservation land." *Id.* § 1774f(c). It provides "[s]tate and local governments * * * 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." *Id.* At that point,

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

Id. The "Act" referenced therein, 25 U.S.C. § 177, is generally known as the "Non-Intercourse Act" and prohibits the alienation of tribal lands unless approved by Congress.[1] "Restricted fee" status is the status under which the Nation holds its

[1] The Non-Intercourse Act provides in relevant part: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim 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.

reservation lands. *See Huron Group, Inc. v. Pataki*, 785 N.Y.S. 2d 827, 832 (N.Y. Sup. Ct. 2004) ("Because New York State was never solely Federal territory, the United States normally does not hold Indian lands in the State in trust for a Tribe; rather, such land may be held in restricted fee."); *see also City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 205 n.2 (2005). In contrast to "trust" land, in which the United States holds legal title for the beneficial use by Indians,[2] "restricted fee" land is owned by the Indians, subject to a restriction against alienation imposed by the Non-Intercourse Act, other statute, or other operation of law. A1140.

2. Indian Gaming Regulatory Act

Congress enacted IGRA in the wake of the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which held that states lack civil regulatory authority to regulate gaming on Indian reservations. IGRA applies only to federally recognized tribes and governs gaming on "Indian lands." 25 U.S.C. § 2710. "Indian lands" include all lands within the limit of an Indian reservation, as well as "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian

[2] The term "Indians" is used in this brief to refer to both Indian tribes and individual Indians.

tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." *Id.* § 2703(4)(B); *see also* 25 C.F.R. § 502.12(b)(2).

IGRA generally prohibits gaming activities on "lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988." *Id.* § 2719(a).[3] But the statute makes certain exceptions to this prohibition. A general exception is made for any such "after-acquired" lands where the Secretary, with the Governor's concurrence, determines that gaming "would be in the best interest of the Indian tribe and its members and would not be detrimental to the surrounding community" – known as a "Secretarial determination."*Id.* § 2719(b)(1)(A). Several more specific exceptions exist including, as relevant here, lands "taken into trust as part of * * * a settlement of a land claim." *Id.* § 2719(b)(1)(B).

IGRA distinguishes three classes of gaming – Class I, II, and III – each subject to a different regulatory regime. This case involves Class III gaming, which includes slot machines and casino games. A tribe may engage in Class III gaming only if (1) it has a governing ordinance approved by the NIGC Chairman; (2) the

[3] This general prohibition does not include lands acquired within or contiguous to a tribe's existing reservation or in some circumstances within a former reservation. 25 U.S.C. §§ 2719(a)(1) & (2).

State "permits such gaming for any purpose by any person, organization, or entity;" and (3) the tribe and the State enter into a compact approved by the Secretary of the Interior to govern the conduct of such gaming. *Id.* § 2710(d). The ordinance or compact is deemed approved if the Chairman or Secretary, respectively, does not act within specified time frames (90 days for an ordinance; 45 days for a compact). *Id.* §§ 2710(d)(8)(c) & (e). Only the Chairman's approval of the Nation's ordinance is at issue here.

3. Interior's IGRA Section 20 Regulations

In 2000, Interior published proposed regulations to establish procedures that a tribe must follow when seeking a "Secretarial determination" that would except land from the IGRA section 20 prohibition. 65 Fed. Reg. 55,471 (2000). Interior accepted comments on the proposal but took no further action to finalize the rule. In 2006, the Secretary published a new proposed rule articulating standards that Interior would follow in interpreting *all* exceptions to the section 20 prohibition. 71 Fed. Reg. 58,769 (2006). Interior interprets section 20 when a tribe requests the Secretary to take land into trust for gaming. The Secretary has broad authority to take land into trust under the Indian Reorganization Act (IRA), 25 U.S.C § 465, and may be additionally authorized to do so on a case-by-case basis in specific statutes. The final regulations were published on May 20, 2008 and became

effective on August 25, 2008, while the district court's decision in *CACGEC II* was pending. 73 Fed. Reg. 29,354 (2008).

The final regulations use the term "newly acquired land" to describe the scope of the IGRA section 20 prohibition, and they define that term – closely following the statutory language – to mean "land that has been taken, or will be taken, in trust for the benefit of an Indian tribe by the United States after October 17, 1988." 25 C.F.R. § 292.2. In finalizing the regulations, Interior rejected a suggestion that it clarify that restricted fee lands are subject to the section 20 prohibition, explaining that "[t]he omission of restricted fee from Section 2719(d) 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) [the "Indian lands" definition]."73 Fed. Reg. 29,355.

The regulations also describe what is required for a parcel to satisfy the "settlement of a land claim" exception to the section 20 prohibition. They define "land claim" to include "the impairment of title or other real property interest or loss of possession" that "arises under [federal law], is "in conflict" with the claimed interest, and either "accrued on or before" [IGRA's enactment] or "involves lands held in trust or restricted fee for the tribe" prior to that time. 25 C.F.R. § 292.2. The exception applies to a settlement that, as relevant here,

"resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, in legislation enacted by Congress." *Id.* § 292.5(a).

B. Factual Background

1. Approval of the First Ordinance and the Compact

On August 18, 2002, the Nation and the State of New York executed a tribal-state gaming compact for Class III gaming. The compact authorizes the Nation to conduct Class III gaming at three sites – a selected location in Niagara County, a location to be determined in the City of Buffalo, and on current Nation reservation land – with the Niagara Falls and Buffalo sites to be purchased using Settlement Act funds.

The Secretary took no action within the 45-day statutory period, causing the compact to be deemed approved to the extent consistent with IGRA. 67 Fed. Reg. 72,968 (2002). In a subsequent letter dated November 12, 2002, however, the Secretary explained the policy reasons for her inaction, which are irrelevant here. A223-230. The Secretary opined that the future Niagara and Buffalo parcels "will come within the definition of 'Indian lands' in IGRA" because "the Settlement Act contemplates that lands placed in restricted fee status be held in the same legal manner as existing Nation lands are held and thus, subject to the Nation's

jurisdiction." A228. And while the Secretary believed the lands would be subject to the IGRA section 20 prohibition, she concluded that the Settlement Act intended "to settle some of the Nation's land claim issues" so that the lands would fall within the exception for such lands. A229.

On November 25, 2002, the Nation submitted to the NIGC a tribal gaming ordinance, which did not specify the specific sites where gaming would occur. The Chairman approved the ordinance on November 26, 2002. A238. The Chairman's approval letter stated that the ordinance "is approved for gaming only on Indian lands, as defined in IGRA, over which the Nation has jurisdiction." *Id.*

In October 2005, the Nation acquired the Buffalo parcel. In November 2005, after allowing for the requisite 30-day comment period by state and local governments, the Nation submitted documentation to Interior demonstrating that the Buffalo parcel complied with the requirements of the Settlement Act for restricted fee status and noting that the parcel was acquired for Class III gaming purposes. A141. The Secretary took no action within the 30-day period provided in the Act and, in December 2005, the parcel assumed restricted fee status pursuant to the Act.

2. Litigation in *CACGEC I*

In January 2006, Plaintiffs filed suit against the Agencies under the APA, IGRA, and other statutes irrelevant here. Plaintiffs claimed that the Chairman, by approving the gaming ordinance, and the Secretary, by declining to disapprove the compact, violated IGRA because (1) the Buffalo parcel is not ""Indian lands" within the statute's meaning; and (2) the Buffalo parcel falls within the IGRA section 20 prohibition and is not subject to any of the exceptions from that prohibition. A83-108.

On January 12, 2007, pursuant to the Agencies' motion to dismiss or for summary judgment, the district court dismissed the claims against the Secretary for lack of final agency action but vacated the Chairman's ordinance approval with respect to the Buffalo parcel. *CACGEC I*, 471 F. Supp. 2d 295 (SPA1). The court held that, because the ordinance was accompanied by a compact specifying the nature of the land on which the Nation was permitted to game, IGRA required the Chairman, in reviewing the ordinance, to make a site-specific "Indian lands" determination for the Buffalo parcel. The court remanded to the Chairman to make such a determination.[4] *Id.* at 328-329 SPA54.

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[4] On April 20, 2007, the district court denied the United States' motion for reconsideration but struck a sentence from the opinion stating that no deference is (continued...)

3. Litigation in *CACGEC II*

On June 9, 2007, because the original ordinance on remand was general in nature and did not identify the Buffalo parcel, the Nation submitted a second ordinance for the Chairman's approval. The second ordinance was identical to the first except that it contained a site-specific legal description of the Buffalo parcel, which it stated was held by the Nation in restricted fee pursuant to the Settlement Act. A318.

a. The Chairman's Decision

On July 2, 2007, the Chairman approved the second ordinance. A318-322. The Chairman concluded that the parcel is "Indian lands" under IGRA because: (1) under the Settlement Act, the parcel is subject to restriction by the United States against alienation, and thus constitutes "Indian country" over which the tribe has jurisdiction; and (2) various tribal actions with respect to the land, including enactment of ordinances applying the Nation's law to the parcel, demonstrated that the Nation in fact exercised governmental power over the land. A319-320.

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[4](...continued)
owed to the Secretary's interpretation of IGRA's terms because Interior is not charged with the statute's administration. *CACGEC I*, 2007 WL 1200473, *4 (SPA54).

The Chairman further determined that the Buffalo parcel was eligible for gaming under IGRA section 20. Applying the reasoning in the Secretary's November 2002 letter, the Chairman interpreted the section 20 prohibition to apply to restricted fee land as well as to trust land out of concern that to do otherwise would create a loophole unintended by Congress. The Chairman concluded, however, that the parcel satisfied the "settlement of a land claim" exception to the section 20 prohibition. The Chairman deferred to the Secretary's conclusion, in her November 2002 letter, that the exception applied because a purpose of the Settlement Act was to settle some of the Nation's land claim issues. The Chairman concluded that the Secretary's interpretation was reasonable because: (1) the Nation purchased the land with Settlement Act funds; (2) a "land claim" need not be a claim for return of land but an assertion of an existing right to land; and (3) the right that gave rise to the Settlement Act – the Nation's property right to control and define the terms of leases of its land – constituted a "land claim" within the meaning of IGRA. A321-322.

b. District Court Proceedings

After the second ordinance was approved, the Nation began gaming activities in a temporary casino on the Buffalo parcel. On July 12, 2007, Plaintiffs sued the Agencies again, alleging that the Buffalo parcel is not "Indian lands"

under IGRA and was not acquired as part of a settlement of a land claim. A272. On July 8, 2008, on cross-motions for summary judgment, the district court determined that the Chairman erroneously approved the ordinance and vacated his decision. *CACGEC II*, 2008 WL 2746566 (SPA71-197).

The district court upheld the Chairman's determination that the Buffalo parcel is "Indian lands." In a detailed analysis, the court determined that the Buffalo parcel is "Indian country" under tribal jurisdiction as defined in statute and case law because pursuant to the Settlement Act it was (1) set aside by the federal government for the use by Indians as Indian land and (2) under federal superintendence. *Id.* at *27-51 (SPA127-173). In reaching this finding, the court cited numerous cases, congressional statutes, and federal regulations recognizing trust and restricted fee land as being equally subject to federal and tribal jurisdiction, including in IGRA itself. *Id.* at *34-38 (SPA139-147).

The court next turned to the IGRA section 20 prohibition, which the parties agreed applied to Buffalo parcel, but which the Nation as *amicus* argued applies only to trust land. The district court, while recognizing that the Nation's argument was consistent with the ordinary meaning of section 20's terms, stated that the Chairman's interpretation "is a permissible construction of the statute" that furthered Congress's intent to limit gaming on tribal lands acquired after IGRA's

enactment. *Id.* at *54 (SPA178). The district court rejected, however, the Chairman's determination that the Buffalo parcel satisfies the exception for land acquired as part of the "settlement of a land claim." Despite the statute's express purpose of settling legal claims against the United States, the court conducted an independent analysis of whether the Nation had valid, enforceable rights against the United States based on the leases and concluded that it did not. *Id.* at *58-61 SPA178-194). The district court thus held that the Buffalo parcel was not gaming-eligible and vacated the Chairman's approval of the second ordinance.

c. Post-Judgment Proceedings

In the meantime, on July 16, 2008, as Interior's section 20 regulations were about to go into effect, the Nation submitted a third ordinance to the NIGC seeking approval on the basis that the Buffalo parcel was *not* subject to section 20 under the new regulations. The United States asked the district court to remand the Chairman's decision, and Plaintiffs asked the court to direct the NIGC to order the Nation to immediately close Class III gaming operations at the Buffalo site. On August 26, 2008, the district court denied the United States' motion to remand, concluding that the NIGC would be able to address the new regulations when reviewing the Nation's third ordinance. See *CACGEC v. Hogen*, 2008 WL 4057101, *5-11 (W.D.N.Y. Aug. 26, 2008) (SPA199, 207-218). The court granted

Plaintiffs' motion to enforce in part. It ordered the NIGC to issue a notice of violation to the Nation but, due to the NIGC's enforcement discretion, declined to order any particular remedy for the violation. *Id.* at *1-5 (SPA200-207). The NIGC issued the notice but stayed proceedings on the Nation's appeal therefrom after the Chairman approved the Nation's third ordinance. A401-408; A444.

4. Litigation in *CACGEC III*

a. The Chairman's Decision

On October 22, 2008, the Nation, which had withdrawn the third ordinance it had submitted to the Chairman in July, resubmitted the ordinance for approval. A1060. The Chairman again found that the Buffalo parcel constitutes "Indian lands," based on his prior analysis in *CACGEC II* as well as the district court's reasoning in that case. A1066-1069.

As to IGRA section 20, the Chairman reconsidered his prior decision and concluded, consistent with Interior's new regulations, that section 20 does not apply to restricted fee lands. In reaching this determination the Chairman evaluated and concurred with a Memorandum Opinion of the Solicitor of the Interior (M-Opinion) that further explained Interior's analysis underlying that aspect of the section 20 regulations. A1069-1079; A1138-1144. Performing his own analysis, the Chairman concluded that the Agencies' new interpretation adheres to IGRA's

explicit language because, *inter alia*, the terms "trust" and "restricted fee" are terms of art that Congress must be presumed to have understood would have two distinct meanings; and because Congress referred to both types of land elsewhere in IGRA, including in defining "Indian lands," but referred only to trust land in describing the section 20 prohibition. A1075-1077; A1141. The Chairman further concluded, consistent with Interior's M-Opinion, that even if the statute is deemed ambiguous, the regulations reasonably interpret section 20 to apply only to trust lands. That is because, on further consideration, the Agencies understood that, as pertinent to section 20, off-reservation restricted fee land can only be created by Congress. Thus, limiting the section 20 prohibition to trust land does not create a loophole that would defeat the section's intent. A1077-1079; A1142-1144.

Finally, the Chairman determined that, even if the Buffalo parcel is subject to the section 20 prohibition, under the new regulations, the parcel satisfies the settlement of a land claim exception. A1079-1080. The Chairman relied on a letter from the Solicitor of the Interior – the agency that administers the Settlement Act – interpreting the regulations as applied to that statute. A1146-1148. The Solicitor concluded that the Buffalo parcel satisfied the exception as defined by regulation because the Act settled claims by the Nation that: (1) arose under federal law

pertaining to takings and breach of fiduciary duty; (2) involved a conflict over a tribal property interest; and (3) accrued before IGRA's enactment. A1148. The Chairman thus approved the third ordinance.

b. District Court Proceedings

On March 31, 2009, Plaintiffs filed suit in *CACGEC III*, reiterating their claims in *CACGEC II* and adding claims that the Settlement Act is unconstitutional and that the tribal-state compact does not apply to the Buffalo parcel. A445. The district court dismissed the latter claims on March 30, 2010, *CACGEC III*, 704 F. Supp. 2d 269 (W.D.N.Y. 2010), and Plaintiffs do not pursue them in these appeals.

Between October 2010 and July 2012, Plaintiffs repeatedly sought privileged communications and discovery of extra-record materials including, as relevant in these appeals, documents related to the involvement of Edith Blackwell, then Interior's Associate Solicitor of Indian Affairs, in Interior's section 20 regulations. Plaintiffs contended such involvement would have been improper due to recusal requirements imposed on Ms. Blackwell as a result of her personal relationship with and subsequent marriage to an attorney for Akin Gump, which represented the Seneca Nation. With the exception of two documents, however, the court rejected Plaintiffs' request for privileged documents pertaining to Ms.

Blackwell's involvement, concluding that Plaintiffs' complaint identified no cause of action based on improper motivation by a decision-maker. *See CACGEC v. Stevens*, 814 F. Supp. 2d 261 (2011); *CACGEC v. Stevens*, 2012 WL 2405195 (W.D.N.Y. June 23, 2012); *CACGEC v. Stevens*, 2012 WL 3962505 (W.D.N.Y. Sept. 10, 2012). Plaintiffs do not appeal any of these orders but continue to contend that Ms. Blackwell acted improperly and that Interior's section 20 regulations are thus invalid to the extent they exclude restricted fee lands from the section 20 prohibition on gaming.

On May 10, 2013, the district court denied Plaintiffs' motion for summary judgment and dismissed the case. *CACGEC III*, 945 F. Supp. 2d 391 (SPA289-327). The district court again held that the Buffalo parcel is "Indian lands" under IGRA, applying the same reasoning as in *CACGEC II* and rejecting Plaintiffs' new arguments. *Id.* at 400-405 (SPA303-312). Turning to IGRA section 20, the court characterized its prior discussion of the issue, in which it "accepted the parties' unified position5" as "dicta." *Id.* at 405-406 (SPA313-315). The court then agreed with the Chairman that "Congress intended that section 20 apply only to lands held in trust." *Id.* at 407-411 (SPA315-324). Having found the Buffalo parcel eligible for gaming, the district court concluded that analyzing whether the Buffalo parcel satisfied the settlement of a land claim exception was "neither necessary nor

instructive to the resolution" of the case, and that the issue was moot. *Id.* at 412-413 (SPA324-327).

STANDARD OF REVIEW

This Court reviews the district court's grant or denial of summary judgment *de novo*. *Fund for Animals v. Kempthorne*, 538 F.3d 124, 131 (2d Cir. 2008). Review of the Chairman's ordinance approval under IGRA is governed by the APA and must be upheld unless it was arbitrary, capricious, or an abuse of discretion or contrary to law. *Id.* at 131; 5 U.S.C. § 706(2)(A).

SUMMARY OF ARGUMENT

1. Indian Lands. The NIGC Chairman properly determined that the Buffalo parcel is "Indian lands" as defined in IGRA. It is undisputed that the parcel satisfies IGRA's requirements that the parcel be "subject to restriction by the United States against alienation." It is also undisputed that, if the parcel is subject to tribal jurisdiction, the Nation has "exercise[d] governmental power" over it. The only question is whether the Nation in fact has jurisdiction over the parcel under the Settlement Act.

In making this determination, the Chairman properly relied on the statutory standard, as elucidated in case law, for identifying land that is under tribal jurisdiction, generally referred to as "Indian country." Under these standards,

"Indian country" is land that is "set-aside" by the federal government for the use of Indians and is "under federal superintendence." The Chairman correctly concluded that the Settlement Act "set aside" the Buffalo parcel for the Nation by earmarking funds for land acquisition, identifying the geographic boundaries within which the parcel could be acquired, providing a Secretarial process by which the parcel would be subject to a restriction against alienation, and declaring the Nation would then hold the parcel in restricted fee status. The Chairman also correctly concluded that the Settlement Act provided for "federal superintendence" over the Buffalo parcel because the Act prohibits the Nation from alienating the parcel without congressional approval and, by designating the parcel "restricted fee," applied to it a term of art that the courts and Congress have consistently understood to pertain to land over which the United States and the tribes have primary jurisdiction.

Even without applying the two-part Indian country analysis, it is clear that the Settlement Act unambiguously allows the Nation to acquire new tribal sovereign lands. The Act provides funds that the Nation may use to replace some of its leased restricted fee land, over which the Nation unquestionably had jurisdiction, with new lands within its aboriginal area also held by the Nation in "restricted fee." Recognizing that the Nation was "deprived of the use of its land

for over one hundred years," and in exchange for the Nation's agreement to continue leasing its reservation land for another 40 to 80 years, Congress allowed the Nation to use Settlement Act funds to "acquire lands to increase the land base of the Seneca Nation." The Chairman's "Indian lands" determination should be upheld.

2. IGRA's Section 20 Prohibition. The Chairman properly determined that, consistent with the Interior Department's regulations, the Buffalo parcel is not subject to the IGRA section 20 prohibition against gaming on lands "acquired by the Secretary in trust for the benefit of an Indian tribe" after IGRA's enactment. The Chairman properly concluded that IGRA unambiguously compels this result for three reasons. First, "trust" and "restricted fee" lands are terms of art with distinct meanings that Congress is presumed to have understood when enacting the Settlement Act. Second, only trust lands are "acquired by the Secretary," whereas restricted fee lands are held in fee by the tribe subject to a statutory restriction imposed by Congress. And third, Congress defined "Indian lands" by reference to *both* "land held in trust by the United States" and land "held by any Indian tribe * * * subject to a restriction by the United States against alienation" but applied the section 20 prohibition only to land "acquired by the Secretary in trust."

Even if the statute is ambiguous, under well-established principles of agency deference, the Chairman's interpretation of section 20 – made in concurrence with Interior and consistent with its regulations – should be upheld because he reasonably concluded that his interpretation would not create a loophole in the section 20 prohibition that would undermine Congress's intent. He correctly concluded that off-reservation restricted fee lands can only be created by Congress, and that Congress can determine, when creating restricted fee lands, to preclude gaming if it wishes.

3. Settlement of a Land Claim Exception. Even if the Buffalo parcel is subject to IGRA's section 20 prohibition, the Chairman reasonably determined, in reliance on Interior's interpretation of its regulations, that the Buffalo parcel is nevertheless eligible for gaming because it was "taken into trust as part of * * * a settlement of a land claim." The parcel was placed in restricted fee status pursuant to the Settlement Act, which expressly declares that it settles potential claims by the Nation against the United States based on Congress's compelled and below-market leasing of lands within the Nation's Allegany Reservation. And under Interior's regulations, these potential claims were "land claims" because they were breach of trust and takings claims arising under federal law; involved a conflict

over the Nation's property interest in the possession and leasing of its lands, both past and future; and involved claims that arose before IGRA's enactment.

ARGUMENT

Issues Addressed as Appellees in *CACGEC III*

I. The NIGC Chairman reasonably determined that the Buffalo parcel is "Indian lands" within the meaning of IGRA.

Under IGRA, the Buffalo parcel constitutes "Indian lands" if it is "held by an Indian tribe * * * subject to restriction by the United States against alienation" and if it is land "over which [the] tribe exercises governmental power." 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b)(2). Plaintiffs do not challenge the Chairman's determination that the Buffalo parcel, pursuant to the requirements of the Settlement Act, is held by the Nation subject to restriction by the United States against alienation. Nor do they dispute his determination that the Nation, if it has jurisdiction to do so, exercised governmental power over the parcel.

Whether the parcel is "Indian lands" thus turns on whether the parcel is subject to tribal jurisdiction. And pursuant to statute and more than a century of case law, tribal jurisdiction exists in what is termed "Indian country." As discussed below, the Settlement Act's provision of funds, authority, and a federal process for

placing lands acquired by the Nation in "restricted fee" status plainly results in such lands being "Indian country" over which the Nation has jurisdiction.

A. Restricted fee land set apart for a tribe is "Indian country" subject to tribal jurisdiction.

The Buffalo parcel, which is held by the Nation in "restricted fee" status, is Indian country and subject to the Nation's jurisdiction under clear precedents of the United States Supreme Court dating back more than a century. "Generally speaking, primary jurisdiction over land that is *Indian country* rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) (emphasis added). Congress legislated with regard to "Indian country" as early as 1834, but a legislative definition was lacking for many years, leaving development of the law to the courts. *See Donnelly v. United States*, 228 U.S. 243 (1913).

While it was clear that Indian country extended to aboriginal lands over which a tribe had an original right of possession, the Supreme Court recognized other types of land to be Indian country as the circumstances of the Indian tribes changed. *Id.* at 269. In what may be seen as one line of cases, pertaining to existing or former reservation lands, the Court determined that Indian country included: (1) any area lawfully set apart as an Indian reservation, even if it was not on

aboriginal lands, *see id.*; (2) land on a former Indian reservation that had been allotted to individual Indians and was held in trust by the United States, *see United States v. Pelican*, 232 U.S. 442 (1914); and (3) land on a former reservation that was not held in trust but was subject to a restriction on alienation, *see United States v. Ramsey*, 271 U.S. 467, 470 (1926). The underlying rationale in each of these cases – whether the land was trust land or restricted fee – was that the land had been "set apart for the use of the Indians as such, under the superintendence of the Government." *Pelican*, 232 U.S. at 449.

In another line of cases, the Court applied this same rationale to find that certain off-reservation lands constituted Indian country as well. This included land held by the Pueblo Indians in fee simple that Congress had designated as Indian country. *See United States v. Sandoval*, 231 U.S. 28 (1913). The Court held that Congress could exercise power over this land because federal law had long treated the Pueblos as "dependent communities" entitled to the United States' aid and protection – by recognizing the Pueblos' title to their ancestral lands, reserving additional public lands for their use and occupancy, and exercising guardianship over the lands by, *inter alia*, "imposing federal restrictions on the lands' alienation." *Venetie*, 522 U.S. at 528. It also included off-reservation lands owned by the United States and held in trust for the benefit of the Indians, *see United*

States v. McGowan, 302 U.S. 535 (1938). The Court found that it was immaterial whether an area was designated a reservation or whether it was in trust or restricted fee status: it constituted Indian country if it was established for "the protection of dependent people" by being "set apart for the use of Indians and, as such, under federal superintendence." *Id.* at 538-539 (quoting *Pelican*, 232 U.S. at 449).

In 1948, Congress incorporated these court-created standards into the definition of Indian country in the Major Crimes Act, which remains the governing statutory definition today. *See* 18 U.S.C. § 1511. Questions regarding a tribe's civil as well as criminal jurisdiction are generally addressed under this definition. *See DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427, n.2, (1975). This statute defines "Indian country" to mean "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government * * *; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof * * * ; and (c) all Indian allotments, the Indian titles to which have not been extinguished * * * ." 25 U.S.C. § 1511. Under this definition, land that is not within a reservation or an Indian allotment (like the Buffalo parcel) is Indian country if it is a "dependent Indian community."

Under this statute, the Supreme Court and the courts of appeals have continued to recognize that off-reservation lands in trust or restricted fee status constitute "dependent Indian communities" and have thus continued to deem them to be Indian country. *See, e.g.*, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) (trust land); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (same); *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967 (10th Cir. 1987) (restricted fee); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1021-22 (8th Cir. 1999) (restricted fee).

Thus when, as in this case, the land in question is not within a reservation or an Indian allotment, whether the land is "Indian country" turns on whether it is a "dependent Indian communit[y]." And, drawing on the pre-existing decisions, the Supreme Court has declared that a dependent Indian community exists if the land is (1) "set aside by the Federal Government for the use of the Indians as Indian land; and (2) "under federal superintendence." *Venetie*, 522 U.S. at 529. The federal set-aside requirement "ensures that the land in question is occupied by an 'Indian community;'" the federal superintendence requirement "guarantees that the Indian community is sufficiently 'dependent' on the federal government that it and

the Indians involved, rather than the states, are to exercise primary jurisdiction over the land in question." *Id.* at 531.

B. The courts and Congress treat trust and restricted fee land as jurisdictional equivalents.

Also important to this case are the distinctions and similarities between trust and restricted fee land. Restricted fee land is land to which Indians hold title but that is subject to a legal restriction by the United States against alienation. The restriction is usually imposed by the Non-Intercourse Act, 25 U.S.C. § 177, but may also be imposed by treaty, executive order or, as here, pursuant to a tribe-specific statute. A1062. Trust land is land to which the United States holds legal title for the beneficial use of Indians, by virtue of which the land is protected against alienation. *Id.* Trust lands generally arise from federal lands that are set-aside for Indians or land to which the Secretary acquires legal title under the IRA or other statute. Tribal lands in restricted fee status most often arise in instances where an Indian tribe's grant of jurisdiction predates its relationship with the United States, as in the original 13 colonies, so that the land becomes officially recognized as being under tribal jurisdiction and subject to the Non-Intercourse Act without the federal government ever attaining ownership thereof. Tribes in Oklahoma who were given land in fee by the government also hold their

reservation land in restricted fee status, and other specific instances exist as well. A1142.

Since 1934, the Secretary of the Interior has had authority to take land into trust for Indian tribes or individuals under the Indian Reorganization Act (IRA), 25 U.S.C. § 465. The Secretary has no authority to impose restricted fee status on Indian lands, which can only be created by Congress. In addition, with respect to trust lands, the United States – pursuant to statute or other positive law sources – may owe certain land management duties to the trust beneficiaries and may be responsible for managing revenues generated from the use of the lands. A1140-1141.

Even in contexts other than Indian country decisions, courts have repeatedly held that both types of land enjoy the same jurisdictional status. *See, e.g., West v. Okla. Tax Comm'n*, 334 U.S. 717, 726-27 (1948) (no "substantial difference for estate tax purposes between restricted property and trust property"; *Bd. of County Comm'rs of Creek County v. Seber*, 318 U.S. 705, 717 n.21 (1943) "power of Congress" over trust and restricted fee allotments "is the same"); *Heckman v. United States*, 224 U.S. 413, 437 (1912).

In addition, as the district court explained in detail, Congress has "treated trust and restricted fee land as jurisdictional equivalents." *See CACGEC II*, 2008

WL 2746566, *37-38 (SPA144-146) (discussing 25 U.S.C. § 323, pertaining to grants of rights-of-way over Indian lands; *id.* § 407d , pertaining to purchase of timber on Indian lands; *id.* §§ 1321 &1322, pertaining to certain state jurisdiction over criminal and civil offenses; *id.* §§ 3501(12) and 3703, pertaining to Indian energy and agricultural resource management); *see also Export-Import Bank of U.S. v. Asia Pulp & Paper Co., Ltd.*, 609 F.3d 111, 116 n.4 (2d Cir. 2010) (federal debt collection statute, 28 U.S.C. § 3002(12) excludes "trust" land and "Indian lands subject to restrictions against alienation imposed by the United States"). Most notably, such equivalent treatment is provided by IGRA, which defines "Indian lands" as trust or restricted fee lands over which a tribe exercises governmental power. 25 U.S.C. § 2703(4); *see also CACGEC II*, 2008 WL 2746566, *37 [*CII*:D61, 76].

C. The Settlement Act unambiguously provides for the Nation to exercise jurisdiction over the Buffalo parcel.

Against this backdrop, the district court correctly upheld the Chairman's determination that the Buffalo parcel is "Indian land" under IGRA. In construing a statute implemented by an administrative agency, courts first consider, as always, whether Congress has "directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Congressional intent is determined first by examining the statute's plain language; if the plain language is not clear, the court looks to the legislative history and purposes of the statutory scheme. *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 279 (2d Cir. 2012); *Li v. Renaud*, 654 F.3d 376, 382 (2d Cir. 2011). If the statute is silent or ambiguous on the issue, the question for the court is whether the agency's interpretation is permissible. *Chevron*, 467 U.S. at 843.

Here, the Chairman, in concurrence with the Secretary, correctly concluded that the Settlement Act unambiguously provided for lands placed in restricted fee status pursuant to that Act to be "Indian country" under the Nation's jurisdiction. The Act "set aside" the Buffalo parcel for the Nation by earmarking funds for land acquisition, defining the geographic boundaries within which the land could be purchased, providing for the Secretary's considered evaluation of whether the land should be subject to a restriction against alienation under the Non-Intercourse Act, and doing so in a process similar to that by which the Secretary considers whether to take land into trust under the IRA. A1068. The imposition of the restriction on alienation further dedicates the land to tribal use, by precluding the Nation from selling it to others. 25 U.S.C. 1774f(c). Thus, as the district court correctly held, the "the text of the [Act] alone [is] sufficient to compel the conclusion that valid

set-aside exists" as it "includes the precise elements for a valid federal set-aside" identified in case law.[5] *CACGEC II*, 2008 WL 2746566, *39 (SPA149).

The Chairman also correctly concluded that the Settlement Act provides for the parcel to be "under federal superintendence" because, pursuant to the restriction on alienation, the parcel can be sold only with Congress's approval. A1068-1069. In addition, the Act provides that the land shall be held by the Nation in "restricted fee" status, invoking a term of art that Congress and the courts have repeatedly understood to refer to Indian country, and that is the same status in which the Nation holds its reservation lands.

Even if the statute's plain language does not settle the matter, the Act's purpose and legislative history further demonstrate that the Nation has jurisdiction over lands acquired thereunder. The congressional reports describe at length the harm done to the Nation by the forced leasing of its sovereign reservation lands; explain that the leases "deprived the Nation of significant portions of the Allegany Reservation;" and declare that the purpose of the Act's land acquisition provision

[5] The district court also correctly rejected Plaintiffs' contention (Br. 49-52) that the Indian country analysis is irrelevant to identifying "Indian lands" under IGRA. The court rejected Plaintiffs' reliance on statements by Interior and Justice Department officials as "mischaracteriz[ing the administrative record" because the statements "are unrelated to the subject of jurisdiction." *CACGEC III*, 945 F. Supp. 2d at 402 (SPA306-307).

is to allow the Nation "to acquire lands to *increase the land base* of the Seneca Nation." S. Rep. No. 101-511, at 5, 24 (A1440, 1460-1461) (emphasis added). Because the existing land base of the Seneca Nation was reservation land over which it exercised sovereign power, "increas[ing]" that land base necessarily contemplated that lands acquired pursuant to the Settlement Act would be subject to tribal jurisdiction. In sum, the Settlement Act addressed harm to the Nation by the deprivation of its sovereign, reservation lands and plainly provided a mechanism for the Nation to increase its tribal land base in partial compensation for that loss. By its language, purpose, structure, and legislative history, the Act unambiguously provides for land acquired thereunder – such as the Buffalo parcel – to be under tribal jurisdiction.

D. Assuming the Settlement Act is ambiguous, this Court should defer to the Chairman's determination.

Even if the Settlement Act is ambiguous on this question, the Chairman's interpretation – made in reliance on and consistent with the Secretary's interpretation of the Act – should be upheld under principles of *Chevron* deference because the interpretation is "permissible." An agency's interpretation of a statutory provision qualifies for *Chevron* deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law,

and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001).

Congress's delegation of authority to the Secretary to determine whether land acquired by the Nation with Settlement Act funds may be subject to a restriction by the United States against alienation necessarily requires the Secretary to determine what the implications of such a restriction would be.[6] *See Mead*, 533 U.S. at 227 ("Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and- comment rulemaking, or by some other indication of a comparable congressional intent."); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (*Chevron* deference may be justified by considerations including "the related expertise of the Agency, the importance of the question to administration of the statute, [and] the complexity of that administration"). If the statute is ambiguous on that question, then the Secretary must be able to make her own interpretation in order to carry out the role assigned to her. And once made, that determination has the "force of law," because it

[6] The First Circuit has held that the Secretary has the authority to reconcile IGRA with an Indian land claim settlement act. *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 794 (1st Cir. 1996).

defines whether the United States and the Nation, rather than the State, have primary jurisdiction over the land.

If *Chevron* deference does not apply here, the Chairman's determination merits *Skidmore* deference because the Chairman's thorough and valid reasoning is made in the context of IGRA's formal ordinance approval process and thus has "the power to persuade," even if lacking the "power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

E. Plaintiffs' contrary arguments fail.

1. Plaintiffs misinterpret the Settlement Act's statutory language.

Plaintiffs contend that the Settlement Act by its terms does not provide for land the Nation acquires to be under tribal jurisdiction for several reasons, all of which lack merit.

Plaintiffs' first argument (Br. 32-33), that the Act gives the Nation a choice rather than an obligation to obtain restricted fee lands under the Act, fails because Plaintiffs provide no explanation or authority as to why this is relevant to the analysis, and there is none.

Plaintiffs' second argument (Br. 34) is that the Act's provision for state and local governments to comment on the impacts of removing the land from the tax

rolls indicates that freedom from taxation is the only aspect of tribal sovereignty Congress intended to adhere to the land. But the provision of the IRA that allows the Secretary to take land into trust also expressly mentions, as its only benefit, that such lands "shall be exempt from state and local taxation." 25 U.S.C. § 465. Although the IRA – like the Settlement Act – includes only language exempting trust land from state and local taxation, trust land is indisputably subject to full tribal jurisdiction. *See Santa Rosa Band of Indians v. Kings Cnty*., 532 F.2d 655, 666 (9th Cir. 1975) (IRA's omission of provision exempting lands from state regulation indicates that "Congress simply took it for granted that the states were without such power, and that an express provision was unnecessary; *i.e.*, that the exemption was implicit in the grant of trust lands under existing legal principles"); *Chase v. McMasters*, 573 F.2d 1011, 1018 (8th Cir. 1978).

In addition, while the Settlement Act provides for comments on the impact of exempting the land from taxation, the Settlement Act has no affirmative provision providing such exemption. Thus, this exemption must be understood to derive from Congress's understanding that tax exemption would result because the land, as restricted fee, would be subject to the Nation's sovereign powers.

Third, Plaintiffs note (Br. 35) that the Settlement Act, unlike IGRA, does not use the term "governmental power." But the exercise of governmental power in

IGRA is in *addition* to the requirement that lands constitute Indian country by virtue of being trust or restricted fee lands – a requirement that prevents gaming by one tribe on land held by another or on land of individual Indians where the tribe may lack governing authority. This requirement is particular to IGRA. None of the numerous statutes discussed by the district court as treating trust and restricted fee land as subject to tribal jurisdiction contain such a requirement. *See supra*, p. 37. And no such requirement was necessary under the Settlement Act, which provided that the lands would be "held by the Nation." 25 U.S.C. § 1774f(c).

Finally, Plaintiffs' state in a footnote (Br. 34 n.3) that the Settlement Act's provision for restricted fee lands to be incorporated in a nearby reservation indicates that lands *not* so incorporated are not under tribal jurisdiction. An argument "mentioned only in a footnote in a primary brief is not adequately raised or preserved for appellate review." *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993) (internal quotation marks omitted). In any event, the argument is wrong. The Settlement Act – by providing for lands to have the status of Indian country and additionally allowing those lands to be incorporated into a reservation – again parallels the IRA. The IRA authorizes the Secretary both to take lands into trust, 25 U.S.C. § 465 – lands that indisputably become Indian country as a result – and to add such lands to an existing reservation, *id.* § 467.

Reservation status can be important, as the IRA implicitly recognizes, because it can confer additional benefits on existing Indian country. For example, land within the limits of an Indian reservation "has the distinct property of retaining its status 'notwithstanding the issuance of any patent,'" and thus "remains part of the reservation even if sold." *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1011 (8th Cir. 2010) (quoting 18 U.S.C. § 1511(a)). In addition, numerous federal programs are available only within reservations. *See, e.g.*, 25 C.F.R. §§ 20.100, .300, .303, .324, .400, .500 (eligibility for direct assistance; general assistance; burial assistance; services to children, elderly, and families; and child assistance tied to residence on or near reservation); 25 U.S.C. § 1613a(b)(3)(C)(i) (Indian Health Scholarship active duty service obligation met by service on a reservation); 25 U.S.C. § 2007(f) (Indian reservation residence relevant to defining "eligible Indian student" for purposes of monetary allotments to BIA-funded schools).

2. Plaintiffs misread the Act's legislative history.

Plaintiffs' legislative history arguments also fail. As a matter of statutory construction, the Act's plain language, providing for land to be subject to a restriction by the United States against alienation and held in restricted fee, confirms that the Buffalo parcel is Indian country, precluding any resort to the

legislative history. *WPIX, Inc. v. ivi, Inc.*, 691 F.3d at 279. In addition, Congress is presumed to be aware of previous enactments, *see United States v. Johnson*, 14 F.3d 766, 770 (2d Cir. 1994), and thus to know that land placed in restricted fee status pursuant to the Settlement Act – as land subject to tribal jurisdiction – could constitute Indian lands under IGRA.

In any event, Plaintiffs' contention (Br. 36) that the legislative history demonstrates that Congress intended only to help the City of Salamanca is belied by the legislative history's repeated and extensive discussions of the "heavy toll paid by the Nation in the historical development of the City of Salamanca" and the need for recompense for that harm. *See, e.g.*, S. Rep. No. 101-511, at 3-11, 16 (A1438-1447, 1451). And, contrary to Plaintiffs' assertions (Br. 37), the legislative history *does* show that Congress understood that the Nation undertook gaming activities because it identified bingo as a primary source of Nation revenues, *id.* at 13 (A1449), and bingo is class II gaming regulated under IGRA and authorized to take place only on Indian lands. *See* 25 U.S.C. §§ 2710(a)(2) & (b), 2703(7)(A)(i).

Finally, Plaintiffs' suggestion (Br. 37-38) that there is something nefarious about the Nation's deciding to game on lands acquired by the Settlement Act runs counter to Congress's repeated concerns, in enacting the Settlement Act, that the Nation use the funds provided for the long-term economic development and

enhancement of the welfare of the tribe. S. Rep. No. 101-511, at 11-15 (A1447-1450). Tribal economic development is a major purpose of IGRA. 25 U.S.C. § 2701(4); *see Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 472 (2d Cir. 2013). The Nation is properly and legitimately pursuing such economic development in accordance with the statute.

3. The case law on which Plaintiffs' rely is inapplicable.

Plaintiffs rely (Br. 39-41) on *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009), for the proposition that the creation of Indian country subject to tribal jurisdiction must be express. As established above, Congress's express provision for the Nation to acquire land under the Act in restricted fee *does* explicitly create Indian country. But *Hawaiian Affairs* imposes no such requirement and has no relevance here. In that case, the Supreme Court held that a congressional resolution that "apologized" to native Hawaiians for the overthrow of the Kingdom of Hawaii and "acknowledged" the suppression of their sovereignty used only "conciliatory or precatory" terms that were not "the kind that Congress uses to create substantive rights." 556 U.S. at 173. It further refused to rely on the resolution's "whereas" clauses which "do[] not have operative effect." *Id.* at 175. As the district court explained, Plaintiffs fail to reconcile this "conciliatory" language with the Settlement Act's "directive terms," which does "precisely what Plaintiffs contend

is required" by "express[ing] an intent to transfer sovereignty to the Nation." *CACGEC III*, 945 F. Supp. 2d at 401 (SPA305).

Plaintiffs rely (Br. 43-45) on *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), for the proposition that the Non-Intercourse Act alone does not confer sovereignty and that the IRA's trust acquisition process provides the proper avenue for doing so. In contrast to this case, however, *City of Sherrill* addressed a tribe's claim to hold land in restricted fee status solely by its acquisition of land in fee within historic reservation boundaries. 544 U.S. at 202. *City of Sherrill*, applying principles of laches, held that the tribe could not "unilaterally" reassert sovereign control over a parcel and remove it from the local tax rolls. *Id.* at 219-221. Here, no such unilateral action by the Nation has occurred; rather, Congress provided funds, authority, and a federal process for placing lands in restricted fee status.

4. Plaintiffs' contention that no "Indian lands" may be created after IGRA's enactment has no support and would render IGRA section 20 irrelevant.

Plaintiffs' grasp at straws in arguing that IGRA pertains only to Indian lands that were under tribal jurisdiction as of IGRA's enactment (Br. 47-48). Plaintiffs identify no statutory or case support for this argument. The district court identified

numerous problems with this argument, but its most glaring flaw is that it would render entirely superfluous the section 20 prohibition on gaming on trust lands over which a tribe gained jurisdiction *after* IGRA's enactment. *See CACGEC III*, 945 F. Supp. 2d at 404-405 (SPA309-312). "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant * * * ." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (internal quotation marks omitted).

II. The Chairman properly determined that the Buffalo parcel is not subject to section 20's prohibition against gaming on lands acquired in trust after IGRA's enactment.

A. IGRA unambiguously applies the section 20 prohibition only to lands acquired by the Secretary in trust.

The Chairman correctly concluded, consistent with Interior's regulations and M-Opinion, that section 20 unambiguously applies only to lands acquired by the Secretary in trust and not to lands held by Indians in restricted fee. Section 20 provides that "gaming regulated by this Act shall not be conducted on *lands acquired by the Secretary in trust* for the benefit of an Indian tribe" after IGRA's enactment. 25 U.S.C. § 2719(a) (emphasis added). A court or agency must "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254

(1992). As the Chairman noted, because "lands acquired in trust by the Secretary" does not by its terms refer to restricted fee lands, which are not acquired by the Secretary but are held by Indians subject to a statutory restriction on alienation, it must be presumed that the prohibition applies only to trust lands. A1075.

Furthermore, "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice," Congress "presumably knows and adopts the cluster of ideas that were attached to each borrowed word." *Wilkie v. Robbins*, 551 U.S. 557, 564 (2007) (internal quotation marks omitted). As discussed *supra*, pp. 35-36, 39, the words "trust" and "restricted fee" are terms of art with longstanding meanings in federal Indian law. As Interior explained in its M-Opinion, with which the Chairman concurred,

> the phrase "in trust" has a common and generally well-accepted meaning in Indian law. It refers to a form of ownership in which legal title is held by the United States or the Secretary as trustee, while beneficial title is held by the Indian owner of the land. It does not describe the way in which restricted fee lands are owned.

A1142. In support of this point, the Chairman identified numerous statutes exemplifying Congress's understanding that "restricted fee" lands are distinct from "trust lands." A1076. Thus, Congress must be presumed to have understood and adopted the meaning of "lands acquired by the Secretary in trust" as distinct from lands held by a tribe in restricted fee.

Moreover, while section 20 applies by its terms to lands "acquired by the Secretary in trust," Congress expressly applied other provisions of IGRA to lands "subject to a restriction by the United States on alienation" or "restricted fee." Most notably, IGRA defines "Indian lands" to include both lands "held in trust by the United States for the benefit of any Indian tribe" and "held by any Indian tribe * * * subject to restriction by the United States against alienation." 25 U.S.C. § 2703(4)(B). Because Congress defined Indian lands subject to gaming under IGRA to include both trust and restricted fee lands but applied section 20 only to trust lands, Congress must be understood to have excepted restricted fee lands from the section 20 gaming prohibition. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (Congress is presumed to act intentionally when it includes particular language in one section of a statute but omits it in another section of the same Act).

Based on these considerations, the Chairman correctly determined that "[t]he plain meaning of the statute establishes that the prohibition against gaming on after acquired lands does not apply to restricted land." A1077. Interior also properly based its regulatory interpretation of the scope of IGRA section 20 on a similar reading of the statute's unambiguous intent. *See* 73 Fed. Reg. 29,355 (Congress's omission of restricted fee lands from section 20(a) is "purposeful");

A1141 ("Congress's intent is clear on the face of the IGRA."). The district court correctly agreed, finding that "Congress intended that section 20 apply only to lands held in trust." *CACGEC III*, 945 F. Supp. 2d at 407.

B. Assuming the statute is ambiguous, the Chairman's determination should be upheld.

The Agencies recognized, of course, that this reading of the statute departed from the position they took in *CACGEC II*. That former position was based on the Secretary's November 2002 letter addressing the state-tribal compact, which stated that applying section 20 only to trust lands would "arguably create unintended exceptions" thereto and "undermine the regulatory scheme contemplated by IGRA." A229. Thus, in his determination underlying *CACGEC II*, the Chairman found section 20 to reveal "an ambiguity when viewed in the context of Congressional intent." A321.

But while the Agencies initially deemed section 20 ambiguous, in developing the regulations, Interior had the "opportunity to reconsider the meaning of section 2719 and to examine more closely the law governing the creation of restricted fee lands." A1141. From that review, Interior concluded that "the language of section 2719 is plain and cannot be ignored" and that the "concern about the potential loophole for restricted fee lands was based on an incorrect

understanding of the law." *Id.* The Chairman, after reviewing the analysis in Interior's M-Opinion, agreed. A1077-1079.

The Agencies' prior concern for avoiding a significant loophole was based on their assumption that the law allowed tribes to take unilateral actions that could result in the creation of new, off-reservation restricted fee land without congressional approval.[7] But, as the Agencies subsequently recognized, that assumption was based on a misunderstanding about the application of the Non-Intercourse Act, 25 U.S.C. § 177. On further review, the Agencies determined that the Non-Intercourse Act's restriction on alienation applies only in Indian country, and land acquired in fee by a tribe outside a reservation, without more, is not Indian country. A1071-1072; A1143 ("when a tribe purchases new lands off-reservation and those lands are held by the tribe in fee, then the land is not, without more, automatically subject to restrictions against alienation"). The Agencies noted that this view is consistent with positions previously taken by the United States. Specifically, in 1997, the United States had filed a Supreme Court brief arguing that land acquired by a tribe in fee within its reservation boundaries is

[7] The creation of new on-reservation restricted fee land does not implicate the provisions of the section 20 prohibition, which generally does not apply to lands within reservation boundaries. *See* 25 U.S.C. §§ 2719(a)(1) & (2).

protected by the Non-Intercourse Act, suggesting that lands acquired outside a reservation are not. A1072; A1143 (citing *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), Brief of the United States, 1998 WL 25517). Interior subsequently affirmed this view in a letter informing the Lac du Flambeau tribe that off-reservation land it had acquired in fee was not subject to federal jurisdiction. A1072; A1144.

Thus, even if the statute is ambiguous, the Agencies' construction of the section 20 prohibition should be upheld under deference principles. The Chairman's reasonable determination should be accorded *Chevron* deference to the extent it relies on Interior's regulations, which were promulgated with notice and comment and have the force of law. *See Mead*, 533 U.S. at 226-227. Alternatively, the Chairman's determination should be accorded *Skidmore* deference, because it has power to persuade. 323 U.S. at 140. As explained above, under the Chairman's interpretation, section 20 continues to operate with respect to newly created Indian lands except for those created by Congress, allowing Congress itself to determine whether gaming should be prohibited on such lands when it creates them. A1079. Also, this interpretation furthers IGRA's purpose "to promote tribal economic development, self-sufficiency and strong tribal

governments," 25 U.S.C. § 2701(4). A1078. As established below, Plaintiffs provide no basis for overriding this interpretation, and it should be upheld.

C. Plaintiffs' arguments on the merits of the Chairman's decision fail.

Plaintiffs' challenges to the merits of the Chairman's interpretation of section 20 are limited and unpersuasive. Attempting to refute the Agencies' plain language analysis, Plaintiffs argue (Br. 70-71) that IGRA's other textual references to restricted fee land pertain only to *historic* restricted fee. But IGRA's definition of "Indian lands" contains no such limitation, and Plaintiffs do not identify one. Plaintiffs also argue (Br. 69-70) that section 20 lacks a "clear statement" that Congress intended to create gaming eligible lands. As established *supra*, pp. 47-48, no such explicit language is required and, regardless, the language of section 20 *is* clear: it expressly limits the prohibition to lands "acquired in trust by the Secretary."

Plaintiffs also speculate (Br. 69) that Congress did not reference restricted fee lands in the section 20 prohibition because no method existed for creating such lands when IGRA was enacted. Such unfounded speculation provides no basis for statutory interpretation. Moreover, this argument actually *supports* the Agencies' conclusion that the omission of restricted fee land does not undermine section 20's

purpose because, as relevant to section 20, only Congress can authorize the creation of restricted fee land and Congress can bar gaming in the legislation creating such land if it so desires.

Plaintiffs' contention (Br. 71-72) that the Settlement Act bars gaming fails for the same reason. As the district court recognized, it is assumed "'that Congress is aware of existing law when it passes [new] legislation.'" *CACGEC III*, 945 F. Supp. 2d at 411 (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (citation omitted)) (SPA323). If Congress wanted to prohibit gaming on restricted fee lands acquired under the Settlement Act, it could have said so. Absent such a limitation in the Settlement Act, the Buffalo parcel is not subject to section 20.

Turning to the Agencies' rationale, Plaintiffs argue (Br. 72-75) that the Agencies' analysis was based not on a general concern about whether their interpretation would create a general loophole but rather constituted an arbitrary choice to disregard the law in a single case. That argument misrepresents the record and disregards the Agencies' thorough analysis of every aspect of the question whether limiting the section 20 prohibition to trust lands would impair Congress's intent to limit gaming on after-acquired lands.

D. Plaintiffs' procedural arguments also fail.

Most of Plaintiffs' section 20 arguments do not challenge the substance of the Chairman's decision but rest instead on procedural matters. These arguments are incorrect. Moreover, this Court need not address these arguments as they pertain to Interior's regulations because this Court, like the district court, may affirm the Chairman's decision based on his own review of Interior's analysis and independent concurrence with it.

1. *CACGEC II* does not bar the Agencies' and district court's decisions in *CACGEC III*.

Plaintiffs' contention that the district court's discussion of the section 20 prohibition in *CACGEC II* controls on this question (Br. 56-61) is wrong. First, the district court correctly characterized its discussion of this issue as "dicta." *CACGEC III*, 945 F. Supp. 2d at 405-406 9SPA313-315). As the court recognized, in *CACGEC II*, the parties agreed on the interpretation of the section 20 prohibition. *Id.* The district court's discussion of this undisputed issue, made only in response to amicus brief; could not bind the court or the parties. *See United States v. Rubin*, 609 F.2d 51, 69 n. 2 (2d Cir. 1979) (Friendly, J., concurring) ("A judge's power to bind is limited to the issue that is before him * * * ."); *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1084 (D.C. Cir. 2003)

("because the successorship issue was undisputed in *Lincoln Park Zoological Society*, these statements are dicta").

Assuming the district court's discussion in *CACGEC II* was not dicta, it still does not preclude the Agencies from altering their statutory interpretation under *Chevron* principles because a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute." *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 982 (2005). The district court held that the Chairman's construction of section 20 was "permissible," thus acknowledging that other interpretations also might be permissible. Moreover, a court's construction of a statute based on its unambiguous terms can preclude an alternate agency construction only within that court's precedential scope; the district court could not bind the Agencies or this Court in these appeals. *See, e.g., Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 789 (D.C. Cir. 2012).

Nor were the Agencies bound by the position they took on the question in *CACGEC II*. "Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *Brand X*, 545 U.S. at 981. It is immaterial that the new position was taken and altered during litigation.

Contrary to Plaintiffs' assertions (Br. 83-85), the regulations – initiated in 2001 and re-proposed in 2006 – were not prompted by this litigation but, under Supreme Court case law, it would be "immaterial to [the] analysis" if they were. *Id.*

2. CACGEC's arguments regarding Interior's regulations are incorrect and largely irrelevant.

In an attempt to defeat the Chairman's claim of *Chevron* deference to his decision-making, Plaintiffs attack Interior's regulatory process. The Chairman's decision, and the Interior regulations, are primarily based on the Agencies' reading of the statute's unambiguous intent for which no deference is due, so these attacks are largely irrelevant. Furthermore, assuming this Court concludes the statute is ambiguous, the Chairman set forth a thorough and convincing rationale for his determination that provides a strong basis for upholding his decision without resort to *Chevron* deference. In any event, Plaintiffs' arguments are wrong.

a. The Secretary has authority to issue the section 20 regulations.

Plaintiffs are incorrect (Br. 75-77) that the Secretary lacks delegated authority to issue regulations pertaining to IGRA section 20. The Secretary is responsible for making various determinations that require interpretation of section 20. These include determining whether to accept land into trust for gaming purposes, *see* 25 U.S.C. § 465, pursuant to which the Secretary evaluates various

section 20 exceptions, and making "Secretarial determinations" under IGRA section 20(b)(1)(A), 25 U.S.C. § 2719(b)(1)(A). Furthermore, the Secretary has broad and longstanding statutory authority to issue regulations pertaining to Indian matters. *See, e.g.*, 25 U.S.C. §§ 2, 9. The Secretary thus has responsibility for administering section 20 and is authorized by Congress to issue regulations to assist in that administration.

While IGRA provides that the NIGC shall promulgate such regulations as it deems appropriate to administer the statute, 25 U.S.C. § 2706(b)(10), the grant of authority is non-exclusive. The grant was necessary because the NIGC came into existence via IGRA and, unlike the Secretary, had no pre-existing authority to issue regulations pertaining to Indian matters. Furthermore, the statute by its terms recognizes that the Secretary may retain authority over various IGRA provisions. It provides that, after IGRA's enactment, "the Secretary shall continue to exercise those authorities vested in the Secretary on the day before October 17, 1988, relating to *supervision of Indian gaming* until such time as the Commission is organized and prescribes regulations." 25 U.S.C. § 2709 (emphasis added).

Thus, while the "supervision of Indian gaming" was transferred to the NIGC, other responsibilities of the Secretary related to IGRA's implementation remained with the Secretary. *See Redding Rancheria v. Salazar*, 881 F. Supp. 2d

1104, 1113-1114 (N.D. Cal. 2012) (upholding Interior's authority to promulgate section 20 regulations), *appeal pending*. *See also* 25 U.S.C. § 2719(c) ("Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.").[8] Indeed, Congress expressly rejected a court's limitation on the Secretary's authority under section 20 in 2001. After the 10th Circuit held that the Secretary lacked authority to interpret the term "reservation" in IGRA section 20, *see Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1265 (10th Cir. 2001), Congress enacted legislation providing that "[t]he authority to determine whether a specific area of land is a 'reservation' for purposes of [IGRA] was delegated to the Secretary of the Interior on October 17, 1988." Pub. L. No. 107-63, § 134, 115 Stat. 414 (2001).

b. Further notice and comment on the regulatory scope of the section 20 prohibition was not required.

Plaintiffs are also incorrect (Br. 77-81) that Interior was required to solicit further notice and comment before clarifying the meaning of the word "trust" in sections 292.1 and 292.2 of the regulations. Interior's proposed regulations "fairly apprise[d] interested persons of the subjects and issues" of the rulemaking.

[8] The Secretary has promulgated regulations pertaining to certain of Interior's responsibilities under IGRA in addition to those under section 20. *See* 25 C.F.R. Part 290 (pertaining to revenue allocation plans under 25 U.S.C. § 2710(b)(3)(A)); 25 C.F.R. Part 293 (pertaining to gaming compacts under 25 U.S.C. § 2710(d)).

Riverkeeper, Inc. v. U.S. Environmental Protection Agency, 475 F.3d 83, 113 (2d Cir. 2007) (citation and internal quotation marks omitted), *rev'd on other grounds*, *Entergy Corp. v. Riverkeeper*, 556 U.S. 208 (2009). The proposed regulations by their terms described the regulations as applying only to "trust" lands. *See* 71 Fed. Reg. 58,772-58,773 (pertaining to sections 292.1 and 292.3). The proposed regulations thus appeared to apply section 20 to trust land only, or at most left open the question of the applicability to non-trust lands.[9] In comments on the proposed regulations, two parties involved with this litigation – the Nation and the NIGC – asked Interior to address the issue. A804; A828. Plaintiffs' failure to comment on any aspect of the regulations is not due to lack of notice of the matters that the regulations intended to address. Indeed, Plaintiffs had *actual* notice of the

[9] The proposed regulations used the term "restricted fee" in one provision that could have suggested that the section 20 prohibition pertains to restricted fee lands, but it was in a subpart of the regulations that pertained to "After-Acquired *Trust* Lands," and in a section (292.4) that addressed "[w]hat criteria must *trust* land meet for gaming to be allowed under the exceptions listed in 25 U.S.C. 2719(a) of IGRA." 71 Fed. Reg. 58,773 (emphasis added). Particularly when combined with the other references to "trust" lands in the regulations, the proposed regulations provided no basis for Plaintiffs' supposed reliance on the proposal as pertaining to restricted fee lands. The only relevant change in the final regulations was to eliminate that one use of "restricted fee." Compare 25 C.F.R. §§ 292.1 & 292.4 with proposed regulations 292.1, 292.3 & 292.4 (71 Fed. Reg. 58,772-58,773). Contrary to Plaintiffs' assertions, the final regulations were thus a "logical outgrowth" of the proposed regulations.

regulations and the debate pertaining to their scope from documents filed in this litigation. *See* A317; A259-260.

Under the APA, notice is sufficient if it includes "a description of the subjects and issues involved," 5 U.S.C. § 553(b)(3), not a "precise notice of each aspect of the regulations eventually adopted," *New York Dep't of Soc. Servs. v. Shalala*, 21 F.3d 485, 495 (2d Cir. 1994) (internal quotation marks omitted). That standard was clearly met. And even assuming the APA required Interior to undertake further notice and comment, such failure would be harmless error, as Plaintiffs do not demonstrate that new comments would have had "occasion to offer new and different criticisms which the Agency might find convincing." *United Steelworkers v. Marshall*, 647 F.2d 1189, 1225 (D.C. Cir. 1980).

c. Plaintiffs' conflict of interest argument fails because they plead no claim based on the integrity of the decisionmaking process and, in any event, they identify no conflict of interest in the development of the regulations.

Plaintiffs contend (Br. 83-84) that Interior's regulations "were infected with a disabling conflict of interest" because of the purported involvement of Ms. Blackwell in the regulations' decision-making process. As the district court repeatedly found, this argument is barred because the fact allegations and claims in Plaintiffs' complaint did not place the integrity of the Agencies' decisionmaking

processes at issue. *See CACGEC v. Stevens*, 2021 WL 2405195, *2. In any event, Plaintiffs identify no evidence of wrongdoing. Ms. Blackwell was cleared to work on the M-Opinion by Interior's Ethics Office. *CACGEC v. Stevens*, 814 F. Supp. 2d at 272. And the official charged with making decisions on the regulations attested that Ms. Blackwell left the room whenever the question arose whether restricted fee lands were encompassed in the section 20 prohibition and that he did not receive legal advice from Ms. Blackwell in making the decision on that issue. A961. Plaintiffs show nothing to the contrary, and their statement that Ms. Blackwell "revised the Part 292 regulations to remove references to restricted fee" is a total fabrication with no record support.

In sum, the district court correctly upheld the Chairman's determination that the Buffalo parcel is not subject to the section 20 gaming prohibition in IGRA, a determination this Court should affirm.

Issue Addressed as Cross-Appellants in *CACGEC II* and Appellees in *CACGEC III*

III. Assuming the Buffalo parcel is subject to IGRA Section 20, it is eligible for gaming because it was taken into trust as part of a settlement of a land claim.

As set forth in Part II, the district court correctly upheld the Chairman's determination that the Buffalo parcel is not subject to IGRA section 20. If this

Court concludes that the parcel *is* subject to section 20, it should find that the Chairman reasonably determined that the parcel is nevertheless eligible for gaming under the exception for lands that are "taken into trust as part of * * * a settlement of a land claim." 25 U.S.C. § 2719(b)(1)(B)(i). As noted *supra* pp. 21, 25-26, the district court rejected this argument in *CACGEC II* and did not revisit it in *CACGEC III*. The Agencies present this argument primarily as an alternative ground for affirmance in *CACGEC III* but maintain their appeal on this ruling in *CACGEC II* to avoid any potential estoppel consequences of that decision.

A. The Chairman, in reliance on Interior's 2008 regulations, reasonably determined that the Buffalo parcel satisfied the "settlement of a land claim" exception.

In making his determination, the Chairman relied on Interior's Section 20 regulations and the Secretary's interpretation thereof. A1079-1080. As established *supra*, pp. 59-61, the Secretary has authority to interpret IGRA section 20 and is the agency charged with administering the Settlement Act. The Act's language, purpose, and legislative history unambiguously demonstrate Congress's intent to settle the Nation's land claims in part by allowing the Nation to acquire additional lands with Settlement Act funds, and the Chairman's determination may be upheld on that basis. *See Chevron*, 467 U.S. at 843.

Assuming the statute is ambiguous, the Chairman's determination must be upheld on a *Chevron* step two analysis, because the regulations permissibly interpret the term "settlement of a land claim," *id.*, and – to the extent Interior's regulations are ambiguous – the Secretary's interpretation thereof as applied to the Settlement Act is not "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989). Further supporting the Chairman's and Secretary's determinations is the Indian canon of statutory construction, which requires that any ambiguity in the Settlement Act or IGRA must be construed in favor of the Nation, as both were enacted for the benefit of Indians. *See Conn. ex rel. Blumenthal v. United States Dep't of Interior*, 228 F.3d 82, 92-93 (2d Cir. 2000) (construing a settlement act); *Citizens Exposing Truth about Casinos v. Norton*, 492 F.3d 460, 471 (D.C. Cir. 2007) (construing IGRA).

Under Interior's regulations, this exception applies, as relevant here, if a parcel was (1) "[a]cquired under a settlement" of (2) "a land claim" that (3) "resolves or extinguishes with finality the tribe's land claim in whole or in part" and thus results in the "alienation or loss of possession" of lands claimed by the tribe, and (4) the settlement was effected "in legislation enacted by Congress."

25 C.F.R. § 292.5(a). Interior determined that the Buffalo parcel satisfies each of these requirements. A1146-1148.

First, the parcel was plainly "acquired under a settlement." The Buffalo parcel was acquired with funds appropriated under the Act and placed in restricted fee status as authorized by the Settlement Act. *See* 25 U.S.C. 1774f(c); A1148 ("It was undisputed in district court that the Buffalo parcel entered its restricted fee status pursuant to the Settlement Act, therefore, the land was taken into restricted fee pursuant to the settlement" of land claims). And by its terms, a purpose and effect of the Settlement Act is to settle any claims that the Nation might have against the United States respecting the 99-year leases on its Allegany Reservation. An express purpose of the Act is "to avoid the potential legal liability to the United States" that could result absent settlement. *Id.* § 1774(b)(8); *see also Banner v. United States*, 238 F.3d 1348, 1352 (Fed. Cir. 2001) ("Congress enacted the Act of 1990 because it recognized that the United States had breached its fiduciary obligation arising from 'the unique trust relationship' with Native American tribes").

In addition, the Act's findings note that the United States had previously settled claims brought by the Nation regarding the leases, but only through the end of 1946. *Id.* § 1774(a)(2)(E). And the United States' payment of $35 million to the

Nation under the Act was contingent on the Nation's extinguishment of all claims against the United States relating to annual rents under the 99-year leases. *Id.* § 1774b(b) & (c). Thus, Congress plainly intended the Act to settle potential legal claims of the Nation against the United States, which thus constitutes a "settlement" within the meaning of IGRA.

Second, the claims settled by the Settlement Act constitute "land claims." The regulations define land claim to mean, as relevant here, any claim by a tribe (1) concerning the impairment of a real property interest or loss of possession; that both (2) arises under federal law or treaty; and (3) conflicts with a property interest claimed by another individual or entity; and (4) accrued or involves lands held in trust or restricted fee status prior to IGRA's enactment. 25 C.F.R. § 292.2. The Secretary properly concluded that the Nation's claims satisfy those requirements. A1148. First, their claims – based on the compelled leasing of their lands, and compelled acceptance of unfair payment for those leases – concern the "impairment" of their property interest in and possession of the reservation lands subject to those leases. Second, their claims – for a Fifth Amendment taking and breach of fiduciary duty – arose under federal law. Third, their claims to the reservation lands involve a conflict claimed by the lessees over the proper rental rate for leasing the land and even the very existence of the leases, which the Nation

was forced to enter into. And fourth, their claims – based on the land that the Nation had held in restricted fee status since the Nation's right to that land was recognized in the Treaty of Canandaigua in 1794, and seeking recompense for the loss of possession of their lands since 1946 – both accrued and involved land held in restricted fee status prior to IGRA's enactment. *Id.*

B. The district court's ruling in *CACGEC II* has no preclusive effect here and was wrong in any event.

In *CACGEC II*, before the regulations became effective, the district court rejected the Chairman's determination that the Buffalo parcel satisfied the Section 20 exception for settlement of a land claim. 2008 WL 2746566, *55-63 (SPA177-194). That ruling has no preclusive effect because the intervening Interior regulations defining "settlement of a land claim" alter the analysis so that the "identical issue" is not presented in the two cases. *See Jenkins v. City of New York*, 478 F.3d 76, 85 (2d Cir. 2007). The district court, in fact, noted that "[n]o interpretive regulations have been issued relative to the section 20 exceptions." *CACGEC II*, 2008 WL 2746566, *61 n.67 (SPA193).

If the Court deems *CACGEC II* to have potential preclusive effect here, then the Court should address the issue in the context of the Agencies' *CACGEC II* appeal and hold that the district court's ruling on this issue in that case was wrong.

In *CACGEC II*, the Chairman determined, based on the Secretary's analysis, that the Settlement Act evidenced Congress's intent to settle land claims of the Seneca nation. A321-322. The district court, in contrast, based its ruling on its own assessment that, at the time of the Settlement Act's enactment, "there was no claim and no settlement of a claim." *CACGEC II*, 2008 WL 2746566, *56 (SPA182). In making this conclusion, the district court improperly substituted its legal analysis for the express terms and purposes of the Settlement Act. Congress, by expressly stating that the Act settled the Nation's potential land claims, took the question of the viability of any such claims out of the realm of the courts. *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 213 (1997).

Furthermore, the district court's conclusion was wrong. Embarking on an analysis that the court recognized was not briefed by the parties, the court concluded that the Nation had no claim under the Non-Intercourse Act because Congress itself had authorized the 99-year leases. The district court, however, failed to consider that the Nation had takings and breach of fiduciary duty claims for the forced, below-market leasing of its treaty-recognized lands. The legislative history demonstrates that Congress understood the Nation to have such claims, finding that the "history of legislation regarding the leases of Seneca Nation in the Allegany Reservation reflect a clear violation of this Nation's treaty obligations to

the Seneca Nation." S. Rep. No. 101-511, at 6 (A1441). It also noted that "the potential of an adverse finding on the issue of liability for these shortfalls in lease income prior to 1946 was implicitly acknowledged by the United States in its compromise settlement of the claims of the Seneca Nation * * * before the Indian Claims Commission in 1977." *Id.* at 33 (A1472) *(*citing 39 Ind. Cl. Comm. 355 (1976)).[10]

In addition, to the extent that the district court's reliance on the Non-Intercourse Act may have been based on an assumption that a "land claim" had to seek return of the land rather than compensation, nothing in IGRA imposes such a requirement. Such an interpretation would be highly prejudicial to tribes and contrary to the Indian canon of construction, because it often would be – as here – impractical or impossible to return lands to a tribe rather than to provide

[10] The conference report further states that "[t]he potential liability of the United States for the leases under the 1875 and 1890 Acts springs from the fact that the lease terms were unfair and inequitable at the time the leases were ratified by the Congress and that no escalation or capacity for renegotiation was included within the leases or the legislation." S. Rep. No. 101-511, at 33 (A1472). Turning to the Indian Claims Commission settlement, the committee found that the lease income loss to the Nation from 1946 to 1990 would be $52.5 million, not including loss of income from certain shortfalls in rental income. *Id.* The committee concluded that "the $60 million which is to be paid to the Seneca Nation by the United States and the State of New York is a fair and equitable compensation for the losses sustained by the Seneca Nation." *Id.*

compensation. Interior thus properly rejected this reading in its regulations. Under the regulations, when the relief provided by a settlement "includes the return of land, conveyance of replacement land, or money for the purchase of other real property, the land claim may meet the requirement of this section." 73 Fed. Reg. 29,359.

In *CACGEC II*, the district court also suggested, without deciding, that a "land claim" must be a claim asserted in court. *CACGEC II*, 2008 WL 2746566, *56 (SPA182). Black's Dictionary, however, defines "claim" to encompass any enforceable right to relief, *id.*, and nothing in IGRA demonstrates a congressional intent to use anything other than the term's plain meaning. Furthermore, Interior's regulations, which now guide the analysis, require only that a claim have accrued or pertain to lands held in trust or restricted fee prior to IGRA's enactment. The regulatory preamble expressly states that "a land claim does not have to be filed in court." 73 Fed. Reg. 29,356.

Accordingly, the district court's ruling is immaterial and/or erroneous, and the Chairman's determination under Interior's regulations should be upheld.

IV. This Court should dismiss Plaintiffs' claims that are moot or not raised on appeal.

Plaintiffs' appeals in *CACGEC I* and *II* are moot and should be dismissed. Any claims pertaining to the Chairman's approval of the ordinances challenged in those cases are superceded by the Chairman's approval of the third ordinance in *CACGEC III*.

Plaintiffs' ask this Court (Br. 86), if they prevail on appeal, to direct the NIGC to order the Nation to cease and desist further gaming. The district court ruled in *CACGEC II* that it lacked authority to compel the NIGC to undertake enforcement action, *see CACGEC v. Hogen*, 2008 WL 4057101, *3 (SPA218), and Plaintiffs did not address this ruling in their opening brief. Appeal on that issue is therefore waived. *See Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005).

In addition, Plaintiffs' opening brief does not argue for reversal of the district court's dismissal of certain of certain claims in *CACGEC III* – specifically that the Settlement Act is unconstitutional and that the tribal-state compact does not apply to the Buffalo parcel. *See CACGEC v. Hogen*, 704 F. Supp. 2d 269, 275-278 (2010) (SPA226-233). These claims are also waived.

CONCLUSION

The district court's judgment in *CACGEC III* should be affirmed. The appeals in *CACGEC I* and *II* should be dismissed as moot.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 28.1(e)(2)(B(i), I certify that the foregoing Principal and Response Brief for the Federal Appellees is proportionately spaced, has a typeface of 14 points, and contains 16,346 words according to WordPerfect X3.

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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