15-1667-cv(L), 15-1937-cv(CON)

United States Court of Appeals

for the

Second Circuit

CAYUGA NATION, JOHN DOES, 1-20,

Plaintiffs-Appellants,

– v. –

HOWARD TANNER, Village of Union Springs Code Enforcement Officer, in his Official Capacity, EDWARD TRUFANT, Village of Union Springs Mayor, in his Official Capacity, CHAD HAYDEN, Village of Union Springs Attorney, in his Official Capacity, BOARD OF TRUSTEES OF THE VILLAGE OF UNION SPRINGS, NEW YORK and VILLAGE OF UNION SPRINGS, NEW YORK,

Defendants-Appellees.

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

BRIEF FOR DEFENDANTS-APPELLEES

O'CONNELL AND ARONOWITZ, P.C.
Attorneys for Defendants-Appellees
54 State Street
Albany, New York 12207
(518) 462-5601

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

Federal Statutes

Federal Regulations

Other

PRELIMINARY STATEMENT

This is an appeal by a faction within the Cayuga Indian Nation of New York (the "Nation") that claims to represent the entire tribe. They seek to relitigate a previous case involving precisely the same issues that were fully disposed of by the District Court nearly a decade ago against the Nation. In that case, the Nation sought a declaratory judgment and injunctive relief against the Village of Union Springs, claiming that the Village could not enforce against the Nation its zoning and land use ordinances prohibiting gambling with respect to a bingo hall operated by the Nation at a venue (Lakeside Entertainment) located on property the Nation had recently purchased in fee simple within the Village's boundaries. The Nation unsuccessfully argued then, and those claiming to represent the Nation here attempt to argue once again, that the Indian Gaming Regulatory Act ("IGRA") preempts the Village's application or enforcement of the Village's ordinances on the theory that (1) the land is within "Indian country" because it lies within the boundaries of the Nation's "historic reservation" that has never been "disestablished"; (2) that the Nation, therefore, could legally engage in gambling under IGRA; and (3) that even if the Nation's gambling were illegal, only the Federal Government, and not

state or local officials, had exclusive authority to enforce the law in Indian Country. *See* 18 U.S.C. § 1166.

Although the District Court ten years ago originally agreed with the Nation and granted injunctive relief, *Cayuga Indian Nation v. Village of Union Springs*, 317 F.Supp.2d 128 (N.D.N.Y. 2004), the Village appealed to this Court, which thereafter issued a mandate remanding the case to the District Court for reconsideration in light of the intervening decision by the United States District Court in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 187 (2005). In *City of Sherrill*, the Supreme Court held that Indian nations could not reacquire sovereign jurisdiction they had long since lost over land that had once been part of their historic reservation merely by thereafter reacquiring fee simple title to the land via open market purchases.

Following remand to the District Court pursuant to this Court's mandate, the District Court reversed itself and issued a decision dismissing the Nation's complaint, granting summary judgment to the Village, and vacating the Court's previously issued injunction. The District Court noted at the time that the Supreme Court's "… strong language in *City of Sherrill* regarding the disruptive effect on the everyday administration of state and local governments bars the Nation from asserting immunity from state and

local zoning laws and regulations." *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F.Supp.2d 203, 206 (N.D.N.Y. 2005). The Nation thereafter shut down its gambling operation at Lakeside Entertainment.

Since that time, the Nation has attempted to place certain properties, including Lakeside Entertainment, in trust pursuant to Section 5 of the Indian Reorganization Act (25 U.S.C. § 465). Indeed, this was the route that the Supreme Court itself recognized in *City of Sherrill* as the proper means for an Indian tribe seeking to reacquire sovereign jurisdiction over its historic reservation land. *City of Sherrill*, 544 U.S. at 220. To date, however, the subject land has not been placed in trust. Nevertheless, ten years after the District Court's aforementioned decision, the Plaintiffs here, a faction within the Nation led by Clint Halftown (the "Halftown Faction") claiming to be the Nation's authorized representatives, have restarted gambling at Lakeside Entertainment. Together with a group of unnamed Plaintiffs, some of whom were later identified as part of the faction, they have brought this new action that is virtually identical to the one the District Court dismissed ten years ago. They seek a declaratory judgment that the Village may not enforce its ordinances and an injunction barring such

enforcement against the Nation and/or its employees or agents operating the bingo hall. They have brought this action notwithstanding (1) an ongoing internal dispute within the Nation as to who is authorized to represent it, (2) half of the Nation's Governing Council opposes the new gambling venture; and (3) the Federal Government's executive branch refuses to grant full recognition to either side.

When the present action was brought, the District Court granted an initial injunction, but the Village thereafter moved to dismiss the complaint on two separate independent the grounds: (a) *res judicata* based on the decision 10 years ago; and (b) lack of standing because the faction claiming to represent the Nation lacked the authority to do so. The Court below granted the motion to dismiss the case, but did so on lack of standing, without addressing the Village's independent, separate *res judicata* arguments.

The Halftown faction moved for reconsideration and for an injunction pending an appeal to this Court. The District Court denied reconsideration but granted an injunction pending appeal. This Court has placed this case on an expedited appeal calendar pursuant to Local Rule 31.2(b)(1)(A).

For the reasons hereinafter set forth, the judgment of the lower court should be affirmed, either on *res judicata* or lack of standing grounds, and the injunction vacated. In the ARGUMENT section of this Brief, *infra*, the Village will address the standing argument first because that was the sole basis for the District Court's decision although it submits that its *res judicata* argument is equally – if not more – compelling. The Village's third argument addresses the reasons why the Plaintiffs should not be entitled to a preliminary injunction, even if the case is allowed to proceed in the District Court, because there is little likelihood of this succeeding on the merits.

ISSUES PRESENTED

1. Whether Plaintiffs (the Halftown Faction) have standing to represent the Cayuga Indian Nation given that (i) there is an internal leadership dispute within the Nation, (ii) one-half of the Nation's governing body disputes Clint Halftown's authority to act on behalf of the Nation and opposes the filing of the lawsuit, and (iii) the Executive Branch of the U.S. Government has recognized Halftown as the Nation's federal representative only for the limited purpose of administering existing contracts the Tribe has with the Federal Government pursuant to the Indian Self-Determination Act?

2. Whether, even if the Halftown Faction had standing, this case should be dismissed on *res judicata* grounds given the District Court's previous decision ten years ago that the anti-gambling ordinance of the Village of Union Springs could be applied to the Nation's bingo operation (*Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F.Supp.2d 203 (N.D.N.Y. 2005))?

3. Assuming this case were to be allowed to proceed, should the Nation be entitled to a preliminary injunction despite the remote likelihood of success given the Supreme Court's decisions in (a) *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) holding that Indian nations could not assert sovereignty over part of their historic reservation land merely by reacquiring fee simple title to such land on the open market; (b) *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014) holding that Indian sovereign immunity does not extend to Nation officials engaged in illegal gambling; and (c) *United States v. Cook*, 922 F.2d 1026 (2d Cir. 1991), holding that state and local authorities have jurisdiction to prosecute offenses against state gambling laws in Indian country.

STATEMENT OF FACTS

A. PRIOR 2003 ACTION

On April 28, 2003, the Cayuga Indian Nation (the "Nation") purchased property on the open market within the Village and within the boundaries of the Nation's historic reservation (the "Property"). On November 12, 2003, the former governing body of the Nation adopted a Class II gaming ordinance pursuant to the Indian Gaming Regulatory Act ("IGRA"), and submitted it for approval to the National Indian Gaming Commission ("NIGC"). JA39, JA483.[1] Less than a week later, on November 18, 2003, the NIGC issued a conditional approval of the ordinance and advised the Nation that, "the Ordinance is only approved for gaming on Indian lands, as defined in the IGRA and the NIGC's regulations, *over which the Nation has jurisdiction*." (emphasis added). JA369. In conditionally approving the ordinance, the NIGC made no determination that the Property was gaming-eligible Indian land. In 2004, the Nation began to conduct Class II gaming at a facility called Lakeside Entertainment, located at 271 Cayuga Street, Union Springs, N.Y. JA399.

---

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

On October 20, 2003, the Nation commenced an action in this Court against the Village of Union Springs, seeking a declaration that the Property is Indian county within the meaning 18 U.S.C. § 1151(a) and that the Nation has jurisdiction and the right to self-government over the Property. JA693. *Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F.Supp.2d 128, 133 (N.D.N.Y. 2004). The Nation also sought an order permanently enjoining the Village from interfering with the Nation's ownership and possession of the Property. *Id*.

By order dated April 23, 2004, the lower court granted summary judgment on the Nation's Complaint, declaring that the Property was Indian County pursuant to 18 U.S.C. § 1151(a), and that the Village and its officers were "without authority or jurisdiction, and were preempted from, applying or enforcing their zoning and land use laws or any other laws, ordinances, rules, regulations, or other requirements which seek or purport to regulate, control, or otherwise interfere with activities by or on behalf of the plaintiff Cayuga Indian Nation of New York occurring on the Property." *Cayuga Indian Nation*, 317 F.Supp.2d at 151-52. The court further enjoined and restrained the Village from applying or enforcing any of its laws purporting to "regulate, control or otherwise interfere with" the Nation's activities on

the Property, and from commencing any actions to apply or enforce such laws against the Nation. *Id*. The Village subsequently appealed to this Court.

On March 29, 2005, while the Village's appeal was pending, the Supreme Court decided *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) – a case that "dramatically altered the legal landscape" of Indian land claims. *See Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266, 273 (2d Cir. 2005). In *Sherrill*, the Supreme Court rejected the Oneida Indian Nation's claim to sovereign authority to real property that was part of the Oneida's reservation, but that had been sold, and then repurchased by the Oneidas on the open market. The Supreme Court held that the equitable considerations of laches, acquiescence, and impossibility barred the tribe's claim that its open-market purchases of the parcels unified the fee and aboriginal title such that the tribe could assert sovereign dominion over the parcels and avoid payment of city property taxes. In rejecting the unification theory, the Supreme Court stated that the "standards of federal Indian law and federal equity practice preclude the Tribe from rekindling the embers of sovereignty that long ago grew cold," *id*. at 214, and that the "Oneidas long ago relinquished the reins of

government and cannot regain them through open market purchases from current titleholders," *id*. at 203.

On May 23, 2005, in light of the Supreme Court's decision in *City of Sherrill*, this Court issued a mandate directing the lower court to reconsider the April 23, 2004 injunction and declaratory judgment. The Village subsequently moved to vacate the injunction pursuant to Fed. R. Civ. P. 60(b) and further moved for summary judgment pursuant to Fed. R. Civ. P. 56. Both motions were vigorously opposed by the Nation. The lower court granted the Village's motions in their entirety, vacated the injunction, dismissed the Complaint, and held that the "Supreme Court's strong language in *City of Sherrill* regarding the disruptive effect on the every day administration of state and local government bars the Nation from asserting immunity from state and local zoning laws and regulations." *Cayuga Indian Nation*, 390 F.Supp.2d at 206. Shortly thereafter, the Nation closed the gambling facility. JA20. No gaming occurred at the Property for the next eight years.

B. CURRENT 2014 ACTION

On July 3, 2013, in direct defiance of the District Court's prior ruling, the Halftown Faction unilaterally decided on behalf of the Nation to re-open

the gaming facility without approval from the Village of Union Springs, or the Nation's currently recognized leadership. JA20, JA473. On July 9, 2013, the Nation was served with an "Order to Remedy Violations," signed by the Village Code Enforcement Officer, stating that the Nation was in violation of the Games of Chance Ordinance dated May 19, 1958 (the "Gaming Ordinance"), and other provisions of the Village's zoning code, because it was operating bingo without a license issued by the Village of Union Springs. JA93. The Order directed and ordered the Nation itself, and not any specific individuals, to comply with the Gaming Ordinance, and stated that the Village "may seek injunctive relief in the New York Supreme Court." *See id*. The Halftown Faction ignored the Order to Remedy Violations, and continued to operate the casino in violation of the Village's laws and ordinances.

On August 8, 2013, Betty Jane Radford, a former manager of Lakeside Entertainment, submitted a completed application for a Certificate of Occupancy to Howard Tanner, the Village Code Enforcement Officer. JA296-98. In follow-up correspondence dated August 13, 2013, Mr. Tanner notified Ms. Radford that the Nation was still in violation of the Village's zoning laws and ordinance due to its illegal operation of the Bingo Hall, and

that he had found no evidence to support the Nation's claims of exemption from the New York State Building Code. JA301-02. Therefore, he advised the Nation that it was required to apply for and obtain a use variance from the Zoning Board of Appeals. *Id.* Mr. Tanner's letter did not threaten any civil or criminal action against Ms. Radford personally.

On December 20, 2013, Mr. Tanner issued two additional Orders to Remedy Violations based on the continuing violation of the Gaming Ordinance and failure to obtain a certificate of occupancy in violation of the Village's zoning law ("Zoning Law"). JA333-34. The Orders stated that the Nation was "directed and ordered to comply with the law" no later than December 28, 2013, and that a failure to do so "may constitute a fine or imprisonment or both" and that the Village "may seek injunctive relief" in state court. *See id*. On March 24, 2014, Mr. Tanner sent a letter to the Nation reiterating the Village's position that the gaming operation was in violation of the Zoning Law and Gaming Ordinance. JA339.

On October 28, 2014, the Halftown Faction, purporting to act on behalf of the Nation, filed the present action against the Village of Union Springs and various municipal officials. As with the prior 2003 action, the Plaintiffs sought broad declaratory and injunctive relief against the Village

of Union Springs with respect to the Nation's activities on the Property, asking for a declaration that the Gaming Ordinance and "all other state and local laws prohibiting gambling are preempted by federal law as applied to the Nation's Class II gaming activities at Lakeside Entertainment." JA32-33. They also sought an injunction to prevent the Defendants from interfering with the Nation's use and ownership of the Property, and from commencing any actions to apply or enforce the Village's laws and ordinances against the Nation. JA33.

C. LEADERSHIP DISPUTE WITHIN THE NATION AND DECISIONS BY THE DEPARTMENT OF THE INTERIOR

The reopening of the bingo hall has escalated a long-running dispute over who are the proper governing officials of the Nation.[2] This internal leadership dispute has been the subject of numerous decisions issued by the Department of the Interior, none of which authorizes Mr. Halftown to sue on the Nation's behalf.

[2] The leadership dispute primarily involves two groups. The first group is made up of Clint Halftown, Tim Twoguns, and Gary Wheeler (the Halftown Faction). JA741. The second group is composed of Karl Hill, William Jacobs, Justin Bennett, Samuel Campbell, Chester Isaac, and Samuel George (the "Unity Council"). The Unity Council believes that Clint Halftown was properly removed from the Nation's Council and his position as federal representative in accordance with Cayuga law. *Id*.

On August 19, 2011, Franklin Keel, then-Director of the Eastern Region of the BIA, issued a decision on the composition of the Nation's council and the identity of its federal representatives. JA530-33. In the decision, he acknowledged the removal of Mr. Halftown, Mr. Twoguns and Mr. Wheeler from the Nation's Council and recognized the appointment of new federal representatives for government-to-government purposes. JA533, JA536. Mr. Halftown, Mr. Twoguns, and Mr. Wheeler appealed the decision to the Interior Board of Indian Appeals (the "IBIA").

On January 16, 2014, the IBIA vacated the Regional Director's decision as an impermissible intrusion into tribal affairs, since no separate matter required action by the BIA or implicated the government-to-government relationship between the United States and the Cayuga Indian Nation. JA537. Rather than recognize one side or the other, the IBIA vacated the decision without expressing "any view" on "the current leadership of the Nation, or the identity or scope of authority of any individual to represent or take action on behalf of the Nation." *Id*. The IBIA subsequently cautioned that, when there is an internal governance dispute within a tribe, "any decision by the BIA that has the effect of taking sides in

the dispute, or appearing to do so, even if only on an interim basis, necessarily intrudes into tribal affairs." JA505 n.1.

In light of the procedural defects identified by the IBIA, the Regional Director subsequently asked the parties to submit supplemental briefing on two discrete issues: "(1) whether there are matters pending before the Region such as those described above involving the Cayuga Nation's ISDA [Indian Self-Determination Act] grants and the request for funds for water management that require Federal action and trigger the need for a decision as to who is the Nation's Federal representative; and (2) whom the Region should recognize as the leadership of the Cayuga Nation." JA505.

On February 20, 2015, the Eastern Regional Office issued an interim decision on the leadership dispute. Specifically, it determined that it could not meet its obligation to provide funding to the Nation pursuant to the Indian Self-Determination Act ("ISDA") contract for community services, and therefore it "must issue an interim recognition of a governing body for the Nation so that the Nation's designees may sign contract modifications adding funds for this fiscal year." JA744. It decided to recognize, on an interim basis, the Nation's 2006 Council[3] as the last undisputed leadership of

[3] The Nation 2006 Council is composed of William Jacobs, Chester Isaac,

the Nation and Clint Halftown as the Nation's representative for purposes of administering existing ISDA contracts. JA741. Although "the scope of powers of the federal representative is a question of Nation law not properly resolved by the Region," it assumed, for purposes of the decision, that, "the 'federal representative' under Cayuga law will be the Nation's representative for purposes of administering ongoing ISDA contracts." JA741 n.1. The BIA noted that the interim decision "should not be interpreted as a rejection of the possibility that the BIA may at a later time conclude that Mr. Halftown, Mr. Twoguns, and Mr. Wheeler have been removed from the Nation's Council pursuant to applicable Nation law." JA745. Three of the six members of the Nation's 2006 Council – specifically, Jacobs, Isaac, and George – do not support the present action and oppose gaming on the Nation's land. JA473-78.

D. DECISIONS BELOW

One day after the Plaintiffs filed the present action against the Village, the District Court issued an order directing the Village to show cause why a preliminary injunction should not be entered granting the Plaintiffs' requested relief. SA2. The Village opposed the request for a

---

Samuel George, Clint Halftown, Tim Twoguns, and Gary Wheeler.

preliminary injunction and filed a cross-motion to dismiss the Complaint on the grounds of *res judicata* and lack of subject matter jurisdiction.

On May 19, 2015, the District Court issued a decision and order granting the Village's cross-motion to dismiss, denying the Plaintiffs' motion for a preliminary injunction as moot, and dismissing the Complaint in its entirety. SA10. In dismissing the Complaint, the District Court held that the Plaintiffs had not satisfied their burden of establishing standing under Article III of the Constitution, but did not separately address the Village's *res judicata* argument. *Id.*

The District Court's holding was primarily based on its determination that, "Cayuga Law requires a consensus among its leaders to authorize certain actions, such as the filing of this lawsuit" and since "three members of the Nation 2006 Council support this lawsuit and three members oppose it, it is unclear whether the action has been properly authorized pursuant to Cayuga Nation Law." SA8. As the District Court rightfully noted, the resolution of the above issue involved the interpretation of tribal law, and tribal law is not within the jurisdiction of the federal courts. *See Id.*

With respect to the individual Plaintiffs, the District Court concluded that the BIA's limited recognition of Mr. Halftown was insufficient to confer

standing because the BIA did not provide "Halftown with the unilateral authority to initiate lawsuits or enter into new contracts on the Nation's behalf" but rather "supplied a practical temporary fix to the above noted need for a representative to administer existing contracts." SA9. The John Doe Plaintiffs were also correctly dismissed from the action, because the Complaint's "vague allegations asserted on behalf of unnamed persons do not constitute a 'concrete, particularized, and actual or imminent' injury for purposes of Article III standing." SA10 n.8.

The Plaintiffs filed two emergency motions the very next day. The John Doe Plaintiffs moved for reconsideration of the May 19, 2015 Decision of the District Court insofar as it dismissed them from the action, and the Nation, which appealed the decision to this Court, moved for a preliminary injunction pending the outcome of the appeal. The District Court denied the motion for reconsideration, but granted the request for an injunction pending appeal. SA28.

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY DISMISSED THE PLAINTIFFS' COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION BASED ON STANDING

The existence of subject matter jurisdiction depends on whether the party filing the lawsuit has the authority to do so. *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315 (1927). As a threshold of subject matter jurisdiction, the party invoking federal jurisdiction bears the burden of establishing the three elements of constitutional standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "First, the plaintiffs must have suffered an 'injury in fact,' – an invasion of a 'legally protected interest' which is (a) concrete and particularized, and (b) actual or imminent, and not conjectural or hypothetical." *Id*. (citations omitted). The second and third requirements demand a showing that, respectively, a causal connection exists between the injury and conduct complained of, and the injury will likely be "redressed by a favorable decision." *Id*. The District Court correctly concluded that it lacked subject matter jurisdiction over the action.

A. Clint Halftown's Interim Status as Federal Representative Does Not Confer Standing

Plaintiffs contend that Clint Halftown properly authorized the filing of the lawsuit on the Nation's behalf because "nothing in BIA's February 20 decision provides a basis for refusing to defer to the Nation's recognized federal representative." *See* Plaintiffs' Brief ("Pl. Bl.") at 21. To the contrary, the BIA repeatedly stated throughout the decision that it was only recognizing Mr. Halftown "for purposes of administering existing ISDA contracts" and that "the scope of powers of the federal representative is a question of Nation law not properly resolved by the Region." JA741 n.1. Thus, the District Court correctly deferred to the express judgment of the executive branch in concluding that the BIA's limited recognition decision did not provide Mr. Halftown with the unilateral authority to sue on the Nation's behalf.

The BIA issued the February 20 recognition decision for the purpose of determining how it was going to meet its funding obligation under the Nation's ISDA contract for community services ("Community Services Contract"). Such funding could not be released without the Nation's approval of proposed modifications to the existing contract. JA744. However, due to the internal governance dispute between two competing

leadership factions, the BIA was required to identify "which leadership group it will recognize – at least on an interim basis – as having the authority to enter such contract modifications for the Nation." JA741.

Citing the IBIA's decision in *Cayuga Indian Nation*, 58 IBIA 171, 184 (2014), the BIA acknowledged that "the mere administration and funding of an existing ISDA contract between the BIA and the Nation is not an adequate predicate for a recognition decision." JA744. Nevertheless, it determined that the need for recognition of a governing body was appropriate under the circumstances, at least on an interim basis, because "the Region does need to identify a tribal representative to the extent the BIA is obligated to engage in communication with the Nation for purposes of administering the ISDA contract." JA741 n.1; *see* 25 C.F.R. §§ 900.8(e), 900.12. Ultimately, the BIA elected to recognize "the Nation's 2006 Council as the last undisputed leadership of the Nation, with Clint Halftown as the Nation's representative for purposes of administering existing ISDA contracts." JA741.

The limited nature of the recognition decision is crystal clear and for that reason, Plaintiffs' reliance on it is misplaced. The BIA's stated intention in issuing the decision was to provide the Nation with "additional

time" to resolve its leadership dispute without interference from the BIA, while, in the meanwhile, set up a temporary framework for ensuring that the agency could meet its existing contractual obligations to fund activities described in the Community Services Contract.[4] JA741, JA7416. Cognizant of the fact that both groups used the term "federal representative" in their submission papers, the BIA assumed, for purposes of the decision, that "the federal representative under Cayuga law will be the Nation's representative for purposes of administering ongoing ISDA contracts." JA741 n.1. Nothing more, nothing less.

In elaborating on this point, the BIA emphasized that, in *Samuel George v. Eastern Regional Director*, 49 IBIA 164 (2009), "the IBIA expressed no view whatsoever regarding the scope of powers of the federal representative under Nation law, and the Region echoes that limitation on the scope of the decision we are issuing today. The scope of the powers of the federal representative is a question of law not properly resolved by the Region." JA741 n.1; *see also Cayuga Indian Nation of N.Y. v. E. Reg'l Dir.*, IBIA, 58 IBIA 171, 185 n.12 (2014) ("BIA cannot supply the necessary authorization from a tribe if such authorization does not exist as a matter of

[4] The BIA stated that it would "request a consensus resolution of the Nation 2006 Council before entering into subsequent contracts." JA746.

tribal law."). It is not properly resolved by a federal court either. *See Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 712 (2d Cir. 1998)(holding that the issue of tribal leadership, which involves questions of tribal law, is not properly resolved by a federal court).

Consistent with the February 20 decision, the lower court properly determined that the agency had only recognized Mr. Halftown as federal representative for limited purposes, and that there was "nothing in the BIA decision that provides Halftown with the unilateral authority to initiate lawsuits or enter into new contracts on the Nation's behalf." SA9. In fact, the BIA's decision explicitly ruled out this possibility, since a federal representative's authority is defined and controlled by the Nation, not by the BIA. JA741 n.1 ("The scope of powers of the federal representative is a question of Nation law not properly resolved by the Region."). Because the scope of powers of the federal representative is a question of tribal law, and federal courts do not have jurisdiction to resolve disputes involving questions of tribal law, the Court correctly held that the Plaintiffs had failed to meet their burden of establishing standing.

The Plaintiffs acknowledge, as they must, that "courts defer to tribal leadership determinations made by the executive branch" and that the BIA's

decision only recognizes Mr. Halftown as federal representative "for the limited purpose of receiving funds on the Nation's behalf." *See* Pl. Br. at 19, 20, 35. However, they have taken the position that the express limitation on Mr. Halftown's recognition is "irrelevant," because the BIA "always" recognizes federal representatives for discrete purposes and that, because the court cannot resolve issues of Cayuga Law, it must necessarily "treat that representative as having authority to act for the Nation."[5] *See* Pl. Br. at 34-35.

The Plaintiffs are engaging in double-speak: they argue, on the one hand, that "federal courts must follow the Interior Department's recognition decisions," and, on the other hand, that the District Court erred in following

[5] There is no legal authority for this proposition. In fact, federal courts consistently examine whether a lawsuit has been properly authorized by an Indian nation's governing body. *See, e.g., Navajo Tribal Util. Auth. v. Ariz. Dep't of Rev.*, 608 F.2d 1228 (9th Cir. 1979)(affirming dismissal of lawsuit brought by the Navajo Tribal Utility Authority, which had been created by the tribe as a subordinate economic enterprise but was not the tribe's governing body) and *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935 (D.C. Cir. 2012)(holding that "individuals claiming to be the Tribal Council" lacked standing to bring the lawsuit). *See also Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)(stating that "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review'")(citation omitted). As discussed below in Point I.B., the Nation's governing body did not authorize the filing of the present action.

the express language of the BIA's recognition decision regarding the scope of Mr. Halftown's powers. *See* Pl. Br. at 26, 32. The Plaintiffs cite nothing to support their inconsistent, self-serving positions.

If the Plaintiffs' argument were accepted, the scope of authority of a "federal representative" would be boundless, or more accurately, only limited by the representative's self-serving view of his own authority. And, since the precise contours of a representative's authority is a matter of tribal law, federal courts would have to blindly accept the representative's self-proclaimed assertion of his own authority, even where, as here, three members of the currently recognized tribal council actively oppose the suit and further dispute Mr. Halftown's authority to file the suit. JA473-78.[6] Federal courts "owe deference to the judgment of the Executive Branch," *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 938 (D.C. Cir. 2012), and "must not turn a blind eye to facts in assessing jurisdiction." *Id*.[7]

---

[6] The Plaintiffs make much of the fact that the NIGC has not shut down the bingo hall and has chosen to deal with Mr. Halftown and the other officials who purportedly authorized this lawsuit. This is a red-herring since the NIGC does not make recognition decisions, only the BIA.

[7] The Plaintiffs erroneously contend that *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708 (2d Cir. 1998), requires reversal here. *See* Pl. Br. at 29. In *Shenandoah*, the plaintiffs challenged the authority of Arthur Raymond Halbritter to sign a lease agreement on behalf of the Oneida Indian Nation, and not his authority to bring a lawsuit on behalf of the tribe. Also,

As frustrating as this standstill may be for the Nation, it is not the function of the executive branch, or the federal courts, to come up with a solution. *See California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008)(stating that it is a "bedrock principle of federal Indian law that every tribe is capable of managing its own affairs and governing itself."). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)(discussing the well-established federal policy of furthering Indian self-government). The BIA was sensitive to the complexities and seriousness of the leadership dispute, but reminded the competing groups that, "the Nation needs to come together to figure out a way forward" and that "the BIA cannot do this difficult work for the Nation." JA745. *See also Cayuga Indian Nation v. E. Reg'l Dir.*, 58 IBIA 171, 178 (Jan. 16, 2014) ("[D]isfunctionality [sic] or even paralysis within a tribal government, standing alone, does not … trigger some free-standing obligation for BIA to end the stalemate to ensure that the tribal government remains functional."). Because federal courts are required to defer to the express judgments of the executive branch and do not have jurisdiction to resolve intra-tribal disputes,

---

unlike this case, the BIA did not address the scope of the purported representative's authority to act on behalf of the tribe.

the District Court was correct in concluding that Mr. Halftown did not have authority to sue on behalf of the Nation.

B. The Nation's Governing Council Has Not Authorized the Lawsuit

The Plaintiffs have not shown that the lawful government of the Nation properly authorized the filing of the lawsuit, or the re-opening of the gambling facility. Nor can they. As Mr. Halftown previously acknowledged, the Nation's decision making process under Cayuga law and tradition is governed by "consensus," and "consensus" is only achieved "when all of the members of the Nation's council are 'of one mind.'" *George v. E. Reg's Dir.*, BIA, 49 IBIA 164, 166 (2009); *see also id.* at 188 (Mr. Halftown testified that consensus means unanimity and that disputes were tabled until agreement occurs). Here, there has been no showing that the members of the Nation's 2006 Council (the currently recognized governing body of the Nation) are "of one mind," since three of the six members – specifically, Jacobs, Isaac, and George – are adamantly opposed to the present action and gambling on the Nation's land. JA473-78. Even if, as the lower court has suggested, it is "unclear" whether the lawsuit was properly authorized pursuant to Cayuga Nation law, the resolution of the issue would impermissibly require the Court to "delve into, interpret, and

apply Nation law." SA8. *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 712 (2d Cir. 1998)(holding that the issue of tribal leadership, which involves questions of tribal law, is not properly resolved by a federal court*)*. *See also Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985)("We believe the district court correctly held that resolution of such disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court."); *Barnes v. White*, 494 F. Supp. 194, 200 (N.D.N.Y. 1980)("[P]laintiffs' complaint stems from an intratribal dispute which federal policy dictates should be handled within the Tribe and not by this Court."). Thus, the lower court correctly concluded that the standing of the Cayuga Nation could not be established.

C. The John Doe Plaintiffs Do Not Have Standing to Sue in Their Own Right

The "irreducible constitutional minimum" of Article III standing contains three elements: the injury a party seeks to redress must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and likely, as opposed to merely speculative, to be redressed by a favorable decision. *Lujan*, 504 U.S. 555, 560 (1992). Allegations of "possible future injury" are not sufficient to satisfy Article III. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990); *see also Lujan*, 504 U.S. at 564 n.2

(stating that allegations of a future harm at some indefinite time does not equate to"actual or imminent injury"). Instead, "[a] threatened injury must be 'certainly impending,'" *Whitmore*, 495 U.S. at 158, and "proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Lujan*, 504 U.S. at 564 n.2; *Whitmore*, 495 U.S. at 155 (explaining that the imminence requirement "ensures that courts do not entertain suits based on speculative or hypothetical harms").

An imminent threat of prosecution must target the plaintiff's conduct "with some degree of specificity." *Jones v. Schneiderman*, 2015 WL 1454529, at *4 (S.D.N.Y. Mar. 31, 2015). For example, "[a] government official's statement that a statute prohibits a type of conduct in the abstract – even where the official also states her intent to enforce the statutory prohibition against the public generally – is usually insufficient, without more, to establish that prosecution is imminent against a particular plaintiff." *Id*. *See also Rincon Band of Mission Indians v. San Diego Cnty.*, 495 F.2d 1, 4 (9th Cir. 1974) (holding that government officials' statements to plaintiffs that gambling was impermissible on tribal land "under [a] county ordinance," and that "all the laws of the county would be enforced," failed to

establish a sufficient threat of prosecution for standing purposes.). Here, the John Doe Plaintiffs failed to allege a sufficiently imminent threat.

None of the allegations in the Complaint can be construed as constituting "imminent" or "certainly impending" injuries, as required by Article III of the Constitution. *See, i.e.,* JA29 (noting that the Village "intends to proceed with enforcement action" against the gambling facility); *see also* JA18 (generally stating that the John Doe Plaintiffs are "at risk of criminal or civil penalties for conduct relating to the operation of Lakeside Entertainment gambling facility"). The Plaintiffs' alleged injuries stem from a series of "Orders to Remedy Violations" issued by the Village of Union Springs in connection with their illegal operation of the gambling facility. These orders specifically cited the Nation for operating the bingo hall without a license in violation of the Village's zoning laws and ordinance. The December 20, 2013 order, for example, advised that, "No change shall be made in the nature of the occupancy of an existing building unless a certificate of occupancy authorizing the change has been made." JA56.

Although the meaning of "imminence" for standing purposes is a "somewhat elastic concept," the Plaintiffs were required to show that they were targeted "with some degree of specificity." *See Jones*, 2015 WL

1454529 (S.D.N.Y. March 31, 2015). They have not done so here. Notably, no specific warnings or enforcement threats have been communicated to any of the John Doe Plaintiffs, or any other officials, employees or representatives of the Nation. Rather, the Village's notices were exclusively addressed to the Nation, and identified various zoning issues related to the Nation's activities at Lakeside Entertainment.[8] *See* SA18. The Plaintiffs' failure to explain how the alleged injury can be "certainly impending" for a period of approximately fifteen months (*i.e.*: the Village first notified the Nation of its intention to commence an enforcement action on July 9, 2013), and their delay in filing the present action significantly undercut any claim of imminence.

Even assuming, *arguendo*, the alleged injuries were imminent, the John Doe Plaintiffs would still not have standing because their requested relief is not likely to redress or prevent their alleged injuries. This is because a favorable decision on their claims will not conclusively determine the gaming eligibility of the Property under IGRA. As individual members of

[8] Although one letter from the Village was personally addressed to B.J. Radford (who, at the time, was manager of Lakeside Entertainment), she is apparently no longer an employee of the Nation and the letter did not threaten any civil or criminal action. The letter only indicated that the Village would be unable to grant the request for a Certificate of Occupancy.

the Nation, the John Doe Plaintiffs have no legally protected interest to engage in Class II gaming under the Indian Gaming Regulatory Act ("IGRA"), or to dictate what sort of activities should occur on property owned and controlled by the Nation. Rather, the right to use and control the Property is solely vested in the lawful government of the Nation. *See* 25 USC § 2710(b)(2) ("An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands with such tribe's jurisdiction."). *See Willis v. Fordice*, 850 F.Supp. 523, 528 (S.D. Miss. 1994) (holding that a member of the Mississippi Band of Choctaw Indians lacked standing to seek to invalidate his tribe's state-tribal gaming compact and to stop construction of a casino on tribal trust lands), *aff'd*, 55 F.3d 633 (5th Cir. 1995); *see also Hackford v. Babbitt,* 14 F.3d 1457, 1466 (10th Cir. 1994). Moreover, an Indian nation may not engage in Class II gaming unless and until "the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman." 25 U.S.C. § 2710(b).

Here, the Plaintiffs cannot demonstrate that the governing body currently recognized by the executive branch as the "undisputed leadership of the Nation" authorized the re-opening of the gambling facility, because three out of the six members are opposed to gambling. JA473-78. Thus, it

is far from "likely" that a favorable decision on the issues presented in the Complaint will provide the John Doe Plaintiffs with any ability to exercise federal gaming rights on behalf of the Nation free from governmental interference.

Finally, even if the John Doe Plaintiffs are somehow deemed to have standing to maintain their action, they would not be allowed to proceed on behalf of the Nation, or any of the Nation's officers, employees or representatives. Rather, they would only have standing to seek an injunction to prevent the town from enforcing the Gaming Ordinance against them. *Warth v. Seldin*, 422 U.S. 490, 498 (1975)("[T]his Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties.").

POINT II

EVEN IF PLAINTIFFS DID HAVE STANDING, THEIR COMPLAINT SHOULD BE DISMISSED ON RES JUDICATA GROUNDS

There is a separate and independent basis for dismissing this case that is equally as compelling as the standing argument relied upon by the District Court. The core issue in this case, the applicability of the Village's ordinances to the bingo hall operation, was decided a decade ago. On May 23, 2005, in light of the Supreme Court's decision in *City of Sherrill*, this Court issued a mandate directing the lower court to reconsider a broadly-worded injunction, dated April 23, 3004, enjoining the Village from applying or enforcing its laws and ordinances with respect to the Nation's activities on the property. *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F.Supp.2d 203 (N.D.N.Y. 2005). In subsequently vacating the injunction and dismissing the previous 2003 action, the lower court determined that the Supreme Court's decision in *City of Sherrill* deprived the Nation of its ability to assert sovereignty over the Property or immunity from state and local laws and regulations. *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F.Supp.2d 203 (N.D.N.Y. 2005).

As discussed below, the legal issues raised by the complaint in the present action, including federal preemption, tribal sovereignty and sovereign immunity, were already litigated and conclusively decided in the Village's favor in the 2003 action. Accordingly, this Court should exercise its discretion to affirm the lower court's decision on the additional ground of *res judicata* not addressed by the court below. *Poloron Prods. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1018 (2d Cir. 1976)(acknowledging that "an appellate court may affirm a judgment of a lower court upon a theory not considered below").

Res judicata, or claim preclusion, applies when (1) the previous action involved an adjudication on the merits; (2) the previous action involved the parties or those in privity with them; and (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action. *Monahan v. New York City Dept. of Corrections*, 214 F.3d 275, 285 (2d Cir. 2000). Claim preclusion "prevents a party from litigating any issue or defense that could have been raised or decided in a previous suit, even if the issue or defense was not actually raised or decided." *Clarke v. Frank*, 960 F.2d 1146 (2d Cir. 1992).[9]

[9] There is no dispute that the previous action involved the same parties, or

In the 2003 dismissed action, the Plaintiffs sought expansive declaratory and injunctive relief against the Village of Union Springs with respect to the Nation's activities on the Property. In particular, the Plaintiffs sought a declaration that: (1) the Property is Indian Country within the meaning of 18 U.S.C. § 1151(a); (2) the Nation has jurisdiction and the right to self-government over the Property; and (3) the Defendants are without authority or jurisdiction, and are preempted from, applying or enforcing their "zoning and land use laws, or any other laws, ordinances, rules, regulations or other requirements which seek or purport to regulate, control or otherwise interfere with activities by or on behalf of the Nation occurring on the Property." JA693. Plaintiffs also sought an injunction enjoining and restraining the Defendants from applying or enforcing the Village's "zoning and land use laws" or "any other laws" regulating or otherwise interfering with the Nation's activities on the Property, and from commencing any actions to apply or enforce such laws against the Nation. *Id*.

The Plaintiffs' request for injunctive relief extended to all of the Village's laws and ordinances, and clearly included the application and enforcement of the Gaming Ordinance. *See, e.g.*, JA691 ("Defendants'

---

those in privity with them, and constituted an adjudication on the merits.

application and purported enforcement of local laws, regulations and ordinances against the Nation and the Property is unlawful."). Indeed, as the lower court noted at the time, the whole purpose of the Nation's initiation of the prior 2003 action was to clear the way for the establishment of a Class II gaming facility under IGRA. *See Cayuga Indian Nation*, 390 F.Supp.2d at 205 ("The genesis of this litigation was … to renovate certain property … including the establishment of a Class II gaming facility.").[10]

After remand from this Court, the District Court relied on the Supreme Court's decision in *City of Sherrill* when it dismissed the Complaint and vacated the permanent injunction, stating that "[i]f avoidance of taxation is disruptive, avoidance of complying with local zoning and land use laws is no less disruptive. In fact, it is even more disruptive." *Cayuga Indian Nation*, 390 F.Supp.2d at 206. After acknowledging that the "Nation is seeking relief that is even more disruptive than the non payment of taxes," the lower court concluded that the "Supreme Court's strong language in *City*

[10] Other court documents reflect the expansive nature of the relief sought by the Nation in the prior action. For example, the Nation acknowledged its broad based claims in its Opposition to Defendants' Motion for Injunction Pending Appeal, stating that this "Court has broadly enjoined Defendants … from interfering with the Nation's Class II establishment, through … the assertion of their local laws and regulations … which … purport to interfere with 'the plaintiffs ownership and possession of the Property.'" 2004 WL5614564 (N.D.N.Y 2004).

of Sherrill regarding the disruptive effect on the every day administration of state and local governments bars the Nation from asserting immunity from state and local zoning laws and regulations." *Id*.

The 2014 Complaint in this case seeks identical relief. In particular, the Plaintiffs seek a declaration that the Gaming Ordinance and "all other state and local laws prohibiting gambling are preempted by federal law as applied to the Nation's Class II gaming activities at Lakeside Entertainment." *See* JA32-33. They also seek an injunction to prevent the Defendants from interfering with the Nation's use and ownership of the Property, and from commencing any actions to apply or enforce the Village's laws and ordinances against the Nation. JA33.[11] However, as previously determined, the Nation is not entitled to immunity from state and local regulation because the Supreme Court's decision in *City of Sherrill* deprives the Nation of its ability to assert sovereignty over the Property (which is a prerequisite to preemption under federal law). Although the lower court dismissed the action solely on standing grounds, and did not

[11] Plaintiffs' reliance on the ordinance the NIGC approved is misplaced because, by its very terms, it was not site-specific and was predicated on the assumption any gambling would be on gaming-eligible land under IGRA. The Lakeside Entertainment property does not fit that description as the Tribe has no governmental power of the land. *See City of Sherrill*, 544 U.S. 187 (2005) and 25 U.S.C. §§ 2703(4) and 2710(b)(1).

address the Village's *res judicata* arguments, this Court should reject the Plaintiffs' attempt to resurrect the 2003 dismissed action based on that argument.

The Village should not have to waste taxpayer dollars by being forced to go back to the District Court yet again in a seemingly endless judicial version of the childhood game of Chutes and Ladders to argue the *res judicata* prong of its motion to dismiss. It thought it had put an end to that game a decade ago after having visited this Court once and the District Court twice.

It's time to stop the merry-go-round. Plaintiffs are serving up old wine in new bottles. If they want to try to legitimize their gambling operation, they will need the Nation to reacquire sovereignty over the land it now owns in fee simple by having it placed in trust pursuant to 25 U.S.C. § 465 as the Supreme Court articulated ten years ago in *City of Sherrill*, 544 U.S. at 220. Unless and until that is accomplished, Plaintiffs' argument that the Nation has jurisdictional power over the land to the exclusion of state and local governmental authorities directly contradicts what the Supreme Court said in *City of Sherrill*.

POINT III

PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY JUNCTION

Even if this Court were to reverse the District Court's standing-based dismissal of the Cayuga Nation Plaintiffs, and even if it decided not to address the Village's *res judicata* arguments and to remand this case to the District Court, the Plaintiffs would still not be entitled to a preliminary injunction.

To obtain a preliminary injunction, a party "must establish that it will suffer irreparable harm in the absence of an injunction and demonstrate either (1) 'a likelihood of success on the merits' or (2) 'sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of the hardships tipping decidedly' in the movant's favor." *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996). However, when a party, such as the Plaintiffs, challenges "government action taken in the public interest pursuant to a statutory or regulatory scheme," it must establish irreparable harm and a likelihood of success on the merits – the lesser 'fair ground for litigation' will not suffice. *Fair Housing in Huntington Comm. v. Town of Huntington,* 316 F.3d 357, 365 (2d Cir. 2003).

A. Plaintiffs Cannot Succeed on the Merits

As discussed above in Point II, this action is barred by the doctrine of *res judicata* because the claims set forth in the Plaintiffs' Complaint in this case were either raised, or could have been raised, in the prior 2003 action. *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38 (2d Cir. 1992). Thus, for this reason alone, the Plaintiffs cannot show a likelihood of success on the merits, and their request for a preliminary injunction should be denied. However, even if this Court were to reach the merits of the Complaint, Plaintiffs would fare no better because IGRA does not preempt the application of state and local laws prohibiting gaming on the Property, or the prosecution by the Village of Union Springs for violations of the 1958 Ordinance.

B. The Property Is Not Eligible for Gaming Because the Nation Does Not Have Jurisdiction Over It

As the Plaintiffs recognize, in order to be authorized to conduct gaming under IGRA, the Nation must satisfy at least two criteria: (a) the land on which it seeks to game must be "Indian lands" as that term is defined in 25 U.S.C. § 2703(4); and (b) the land must be "within such tribe's jurisdiction." 25 U.S.C. § 2710(b)(1). Even assuming for purposes of this appeal that the Property falls under the statutory definition of "Indian lands,"

the Property is not eligible for Class II gaming under IGRA because it is not subject to the Nation's jurisdiction.

It is well-established that tribal jurisdiction is a prerequisite to conducting Class II gaming under IGRA. *See* 25 U.S.C. §§ 2710(b)(1)("An Indian tribe may engage in, or license and regulate, class II gaming on *Indian lands within such tribe's jurisdiction* ..."); 2710(b)(2) ("The Chairman shall approve any tribal ordinance or resolution concerning ... class II gaming on the *Indian lands within the tribe's jurisdiction*"); 2710(b)(4)(A) ("... class II gaming activity conducted on *Indian lands within the jurisdiction of the Indian tribe* ..."); 2710(d)(1)(A)(i) ("... [ordinance] adopted by the governing body of the Indian *tribe having jurisdiction over such [Indian] lands* ..."); 2710(d)(1)(3)(A) ("Any Indian *tribe having jurisdiction over the Indian lands* upon which a class III gaming activity is being conducted...") (emphasis added).

Case law is equally clear on this point. *See Kansas v. United States*, 249 F.3d 1213, 1228 (10th Cir. 2001) (In order for a tract to qualify as "Indian lands" under IGRA, "the Tribe must have jurisdiction over the tract ...."). *See also Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F.Supp.2d 295, 304 (W.D.N.Y. 2007)("The consistent and

overarching requirement common to each class of gaming is that it be sited on Indian land within the tribe's jurisdiction.").

The National Indian Gaming Commission ("NIGC") expressly recognized this jurisdictional requirement when it approved the Nation's Class II Gaming Ordinance on November 18, 2003. In its conditional approval letter, the NIGC stated that the Ordinance was approved only for gaming "on Indian lands" and, even then, only if the Nation "has jurisdiction" over those lands. JA369 ("It is important to note that the Ordinance is only approved for gaming on Indian lands, as defined in the IGRA and the NIGC's regulations, over which the Nation has jurisdiction.").

This two-step approach to determining the gaming-eligibility of Indian land was formerly employed by the NIGC Office of General Counsel ("OGC") whenever an Indian lands question was raised: the OGC would consider whether the lands at issue constituted Indian lands and then whether the tribe exercised jurisdiction over those lands. *See* JA597.[12] *See also* JA619 ("[T]he Gaming Site does not constitute 'Indian lands' under IGRA

[12] This test was driven by the outcome in *Kansas v. United States*, 86 F.Supp.2d 1094 (D. Kan. 2000), in which the District Court held that the NIGC's failure to focus on the threshold question of whether the tribe possessed jurisdiction over a tract of land rendered the ultimate conclusion arbitrary and capricious.

because the UKB currently lacks jurisdiction over the Gaming Site."). The NIGC subsequently determined that, in some instances, there is no need for a complete jurisdictional analysis, and, in 2005, it revised its analytic approach to Indian lands within reservation boundaries and adopted a shortcut to assess whether a tribe has jurisdiction over a particular tract of land. JA597-98. Under this approach, the NIGC will in some cases forgo a complete jurisdictional analysis and instead employ the following presumption – "[a] tribe is presumed to have jurisdiction on its own reservation. Therefore, if the gaming is to occur within a tribe's reservation, under IGRA, we can presume that jurisdiction exists." *Id*. Based on the Supreme Court's holding in *City of Sherrill*, the NIGC's "presumption" is easily rebutted here.

The issue before the *Sherrill* Court was whether the Oneida Indian Nation had the right to exercise sovereign authority over land it purchased within the boundaries of its former reservation area. *Sherrill*, 544 U.S. at 202 ("In the instant action, OIN resists the payment of property taxes to Sherrill on the ground that OIN's acquisition of fee title to discrete parcels of historic reservation land revived the Oneidas' ancient sovereignty piecemeal over each parcel."). The Supreme Court held that it could not. Although the

Oneida Nation's historic reservation may continue to exist today, the Supreme Court in *Sherrill* unequivocally held that the tribe cannot "unilaterally revive its ancient sovereignty" over its historic reservation area through open market purchases. *Sherrill*, 544 U.S. at 202-03. The Court further stated that '"standards of federal Indian law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *Id*. at 214. As a result, the mere fact that land may still be part of an historic reservation that had not been formally disestablished does not mean that a tribe retains jurisdiction over it. *Id*. at 221 ("Section 465 provides the proper avenue for the OIN to reestablish sovereign authority over territory last held by the Oneidas 200 years ago."). As the lower court recognized in dismissing the 2003 action, the Supreme Court's decision in *Sherrill* applies here with equal force, and deprives the Nation of its ability to assert sovereignty over the Property – which is an essential prerequisite to gaming under IGRA. Because the Nation's gaming facility is not authorized by federal law, IGRA does not preempt state and local laws or regulations prohibiting bingo or any other Class II gaming on the Property.

None of the decisions cited by the Plaintiffs dictates, or even supports, a different result here. For example, the Plaintiffs cite *Cayuga Indian*

Nation of New York v. Gould, 14 N.Y.3d 614 (2010), for the proposition that the Nation's reservation in New York State remains in existence. However, as the *Sherrill* Court held, the fact that a reservation was not disestablished does not mean that the Nation can exercise jurisdiction over it. Indeed, neither the *Gould* Court nor the Nation suggested that the Nation's "reacquisition of the convenience store parcels revive[d] its ability to exert full sovereign authority over the property." *Id*. at 641. Moreover, despite the Plaintiff's repeated emphasis on the reservation status of the Property, it is not necessary to determine whether the 1838 Treaty of Buffalo Creek diminished or disestablished the Nation's reservation, or even whether the Property is characterized as a reservation. *See Sherrill*, 544 U.S. at 215 n.9. Even assuming the Property falls under the statutory definition of "Indian lands," it is not eligible for gaming under IGRA because it is not land over which the Nation exercises jurisdiction.

C. New York Has Concurrent Jurisdiction to Prosecute Violations of Anti-Gambling Laws on Indian Reservations

Contrary to the Plaintiffs' contentions, 18 U.S.C. § 1166 does not bar state or local officials from enforcing violations of the 1958 Ordinance, or any other anti-gambling law, because Congress has granted criminal

jurisdiction to the State of New York over offenses committed by or against Indians on Indian reservations. 25 U.S.C. § 232 ("The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere in the state."). In *U.S. v. Cook*, this Court analyzed the effect of Section 232 in the wake of IGRA's enactment and concluded that the federal government had exclusive jurisdiction over criminal prosecutions for violations of state laws, "*unless criminal jurisdiction has been transferred to the state*." 922 F.2d 1026, 1034 (2d Cir. 1991) (emphasis added). In enacting Section 232, Congress did just that, and ceded criminal jurisdiction to the State of New York over offenses committed on Indian reservations. In *Cook*, this Court recognized that IGRA did not impliedly repeal Section 232's grant of jurisdiction when it held that the "plain language of the statute leads us to conclude that section 232 extended concurrent jurisdiction to the State of New York." This holding was reaffirmed by this Court in *U.S. v. Markiewicz*, 978 F.2d 786 (2d Cir. 1992).

Consistent with this Court's holdings in *Cook* and *Markiewicz*, IGRA's legislative history indicates that New York retained its criminal

jurisdiction over gambling activities on Indian reservations after the enactment of IGRA and IGRA's penal provision, 18 U.S.C. § 1166. Support for this conclusion is contained in the Senate Committee Report on the IGRA, which states: "it is the intention of the Committee that nothing in the provision of this section or in this act will supersede any specific restriction or specific grant of Federal authority or jurisdiction which may be encompassed in another Federal statute." S.Rep. No. 446, 100th, 2nd Sess. 12 (1988), *reprinted in 1988* U.S.C.C.A.N. 3071, 3082. This statement would certainly apply to the grant of criminal jurisdiction contained in Section 232. Therefore, the Village of Union Springs has jurisdiction, concurrent with the federal government, to enforce the 1958 Ordinance.

In addition, there is a more fundamental reason why Section 1166 does not preempt the Village from exercising criminal enforcement authority over the Property. Section 1166 only has preemptive effect if the land is Indian country with the meaning of 18 U.S.C. 1151, and the Supreme Court's decision in *Sherrill* calls into question the Property's "Indian country" status. The *Sherrill* Court stated that the OIN did not have sovereign authority over the land, regardless of whether Congress had formally disestablished or diminished the ancient reservation, and that the

proper avenue for the tribe to reestablish sovereignty was through the land into trust process. *Sherrill*, 544 U.S. at 216 n.9. The fact that the *Sherrill* Court rejected the OIN's claim of present and future sovereign authority, while also recognizing that the reservation had never been formally disestablished or diminished, was not lost on Justice Stevens, who articulated the substantive effect of the majority's holding in his dissent when he stated that it "effectively proclaimed a diminishment of the Tribe's reservation." *Id*. at 225. Thus, it is highly questionable, to say the least, whether land over which an Indian tribe does not have jurisdiction can qualify as a reservation within the meaning of 1151. *City of Sherrill v. Oneida Indian Nation*, 337 F.3d 139, 153 (2d Cir. 2003)("In general, 'Indian Country' refers to the geographic area in which tribal and federal laws normally apply and state laws do not."), *rev'd on other grounds*, 125 S. Ct. 1478 (2005).

But even assuming the Nation's ancient reservation has not been disestablished, that does not mean that the Property is Indian country within the meaning of 18 U.S.C. 1151. *See* 18 U.S.C. 1151 (defining Indian country as "all land within the limits of any Indian reservation *under the jurisdiction of the United States Government*")(emphasis added); *see also*

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991)("[T]he test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation land.'"). As set forth by the United Stated Supreme Court in *U.S. v. John*, the test for determining whether land constitutes "Indian country" is whether it "had been validly set apart for the use of Indians as such, under the superintendence of the Government." 437 U.S. 634, 649 (1978) (citations omitted). The Plaintiffs have failed to demonstrate, or even allege, that 271 Cayuga Street, Union Springs, New York is under the active supervision of the federal government. *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 530 n.5 (1998) (stating that "it is the land in question, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government."). *See also Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 920 (1st Cir. 1996)(holding that federal superintendence exists only "where the degree of congressional and executive control over the tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area."). Notwithstanding the fact that the Nation is a federally recognized tribe and may be eligible to receive

benefits from the federal government, the provision of health, education, and welfare benefits to the tribe's members, for example, does not support a finding of active federal superintendence. *See Venetie*, 522 U.S. at 534 (rejecting the government's provision of social programs as merely general federal aid, and not indicia of active federal control). Accordingly, the Plaintiffs are not likely to show that the Property is under the superintendence of the federal government or otherwise qualifies as Indian country within the meaning of 18 U.S.C. 1151.

D. The Village Can Enforce the Gaming Ordinance against Individuals Responsible for Illegal Conduct on the Property

The Village is not powerless to enforce its laws and ordinances against gambling at the Lakeside Entertainment venue. Although the Village cannot seek relief against the Nation, tribal officials are not clothed with sovereign immunity and can be prosecuted for criminal and civil violations of the Village's laws and ordinances. Thus, the Village of Union Springs would not be barred from bringing suit against tribal officials and other individuals who are responsible for the illegal activity on the Nation's property. *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 86 (S.D.N.Y. 2002)(*citing Puyallup Tribe, Inc. v. Dep't of*

Game of State of Washington, 433 U.S. 165 (1977)(stating that "tribal sovereign immunity does not extend to individual members of a tribe.").

The Supreme Court addressed this limitation on sovereign immunity in *Michigan v. Bay Mills Indian Community* to enjoin the operation of a casino on non-Indian land. 134 S. Ct. 2024 (2014). Although the Supreme Court held that Michigan's lawsuit against the tribe was barred by the doctrine of Indian sovereign immunity, it acknowledged that "Michigan could bring suit against tribal officials (rather than the tribe itself) seeking an injunction for, say, gambling without a license." *Bay Mills*, 134 S. Ct. at 2035. The Supreme Court further acknowledged that, if such civil remedies proved ineffective, "Michigan could resort to its criminal law, prosecuting anyone who maintains – or even frequents – an unlawful gaming establishment." *Id*.

This limitation on sovereign immunity derives from the century old doctrine articulated in *Ex parte Young*, 209 U.S. 123 (1907), which allows for a suit against officers of a sovereign government where the plaintiffs allege continuing unlawful conduct, and seek declaratory and injunctive relief only. *See Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002). Tribal officials are protected by sovereign immunity if they are sued

in their official capacities and are acting within the scope of their authority. *Chayoon v. Chao,* 355 F.3d 141, 143 (2d Cir. 2004). However, sovereign immunity does not bar a suit for prospective relief against tribal officials allegedly acting in violation of the law. *See Bay Mills*, 134 S. Ct. at 2035 (stating that "tribal immunity does not bar such suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct"). *See also Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 87-88 (2d Cir. 2001); *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 310 (N.D.N.Y. 2003) ("*Ex parte Young* offers a limited exception to the general principle of state sovereign immunity and has been extended to tribal officials acting in their official capacities … to enjoin conduct that violates federal law.") (*citing CSX Transp., Inc. v. New York State Office of Real Prop. Servs.*, 306 F.3d 87, 98 (2d Cir. 2002)). Accordingly, even if the Nation is immune from suit for violations of state and local anti-gambling laws, an individual who is engaging in illegal conduct on the Property cannot take refuge in the tribe's sovereign authority, and can be sued for injunctive relief. Plaintiffs have, therefore, failed to establish a likelihood of success on the merits.

E. Plaintiffs Have Not Shown Irreparable Harm

Plaintiffs' have similarly failed to establish irreparable harm. In order to make an adequate showing of irreparable harm, the moving party must establish that injury is likely, which is to say harm is "actual and imminent, not remote or speculative." *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002)(citation omitted). Moreover, for an injury to be deemed irreparable, "it must be the kind of injury for which an award of money cannot compensate, *see Sperry Int'l Trade, Inc. v. Government of Israel*, 670 F.2d 8, 12 (2d Cir. 1982), and for which adequate redress cannot be reached by a trial on the merits. *See Kamerling*, 295 F.3d at 214. "A movant's failure to establish irreparable harm is alone sufficient for a court to deny injunctive relief." *Ayco Co. v. Feldman*, 2010 WL 4286154, at *5 (N.D.N.Y. Oct. 22, 2010).

Although the Village notified the Nation of its intention to commence an enforcement action on at least three separate occasions over a fifteen-month period, the Plaintiffs make no attempt to explain why they waited so long to file the 2014 action. Such undue delay in seeking injunctive relief "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury."

Tough Traveler, Ltd. v. Outbound Prods., 60 F.3d 964, 968 (2d Cir. 1995). *See also Gidatex, S.R.L. v. Campaniello Imports, Ltd.*, 13 F.Supp.2d 417 (S.D.N.Y. 1998)("[C]ourts typically decline to grant preliminary injunctions in the face of unexplained delays of more than two months."); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276-77 (2d Cir. 1985)(delays of ten weeks suggests no irreparable injury).[13]

Nonetheless, the Plaintiffs have not shown that they will suffer irreparable harm as a result of the Village's potential enforcement action.

First, the Plaintiffs assert that they will suffer economic loss during the pendency of the action. The fact of the matter is that the Plaintiffs decided to reopen the bingo hall eight years after the lower court unequivocally held that the Nation could not assert immunity from the Village's law and ordinances. Such indirect and self-inflicted harm does not qualify as irreparable. *Pennsylvania v. New Jers*ey, 426 U.S. 660 (1976)(holding that a litigant cannot "be heard to complain about damage inflicted by its own hand."); *Lee v. Christian Coal. of Am., Inc.*, 160 F.Supp.2d 14, 33 (D.D.C. 2012)(holding that a movant does not satisfy the

[13] Although the Village and the Nation entered into a Standstill Agreement as an interim measure, it expired on May 30, 2014, and did not prohibit the Plaintiffs from bringing the present action.

irreparable harm criterion when the alleged harm is self-inflicted); *Safari Club Int'l v. Salazar*, 852 F.Supp.2d 102, 123 (D.D.C. 2012)(no irreparable harm when plaintiffs could avoid harm).

Nonetheless, it is well-established that economic damages are insufficient to establish irreparable harm. *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75 (2d Cir. 1990)("[I]t is settled law that when an injury is compensable through money damages there is no irreparable harm."); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70 (2d Cir. 1979)("For it has always been true that irreparable injury means injury for which a monetary award cannot be adequate compensation and that where money damages is adequate compensation a preliminary injunction will not issue."). Because the bingo hall was recently closed for a period of eight years, it is clear that its operation is not essential for the Nation's survival, as the Plaintiffs claim.

Second, the Plaintiffs argue that a potential enforcement action would encroach upon the Nation's sovereignty. This is similarly insufficient to justify injunctive relief because gambling is not essential to the Nation's sovereignty, and any potential enforcement action against individuals who

are responsible for the illegal conduct will not infringe upon the Nation's ability to govern itself or otherwise exercise its sovereign rights.

F. The Balance of Harms Favors the Village

The balance of the hardships and the public interest weigh heavily in favor of the Village. Although the Plaintiffs are sounding the alarm of "grave irreparable harm," a denial of their request for injunctive relief would restore them to the same position they were in when the lower court dismissed the Nation's Complaint nearly ten years ago. That position is the "status quo" that needs to be preserved here, not the one that the Plaintiffs have attempted to manufacture by flouting this Court's prior decision and operating the gaming facility in violation of the Village's land use laws and zoning ordinances.

Despite Plaintiffs claims to the contrary, the re-opening of the bingo hall has accelerated the Nation's internal dispute to the point of violence and lawlessness, as competing factions of the tribe have competed and continue to compete for control of businesses owned by the Nation. JA623-25. This power struggle has necessitated intervention by state and county police forces on multiple occasions, as well as road closures and hospitalizations. *See id*. In light of the proximity of the bingo hall to a local school, the

residents of the Village fear for the safety of their children. JA623-24. Although this case raises issues of sovereignty and tribal governance that could take months or even years to sort out if the action is allowed to proceed, that cannot be an excuse for the continued violence that immediately threatens the welfare and safety of the citizens of the Village. Under these circumstances, the threat of harm to the community clearly outweighs any harm to the Plaintiffs resulting from a denial of their requested for a preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgments below, either on *res judicata* or lack of standing grounds, and deny Plaintiffs' request for a preliminary injunction.

DATED: September 1, 2015

Respectfully submitted,

s/Cornelius D. Murray
Cornelius D. Murray, Esq.
O'Connell and Aronowitz
Attorneys for Defendants-Appellees
54 State Street
Albany, NY 12207-2501
Tel: (518) 462-5601
Fax: (518) 462-6486
cmurray@oalaw.com

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 12,172 words. This word count excludes the table of contents, table of authorities, and signatures and certificates of counsel.

DATED: September 1, 2015

s/Cornelius D. Murray
Cornelius D. Murray, Esq.
O'Connell and Aronowitz
Attorneys for Defendants-Appellees
54 State Street
Albany, NY 12207-2501
Tel: (518) 462-5601
Fax: (518) 462-6486
cmurray@oalaw.com