No. 15-

IN THE

Supreme Court of the United States

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY, *et al.*,

Petitioners,

v.

JONODEV OSCEOLA CHAUDHURI, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NATIONAL INDIAN GAMING COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress, by enacting legislation permitting an Indian tribe to purchase land on the open market and to hold it in "restricted fee," created "Indian country," thereby completely divesting a state of its territorial sovereignty over that land, despite the absence of any explicit statutory language reflecting congressional intent to transfer sovereignty to the tribe?

2. Whether the Indian Commerce Clause (U.S. Const., art. I, § 8) gives Congress authority to completely divest a state of the sovereignty it had previously exercised over land for more than two centuries and transfer that sovereignty to an Indian tribe by enacting legislation permitting an Indian tribe to buy such land on the open market and to hold it in "restricted fee."

3. Whether the mere congressional designation of "restricted fee" status on tribally-owned land pursuant to the Indian Nonintercourse Act (25 U.S.C. § 177) implies an intent to transfer governmental power over that land to the tribe?

LIST OF PARTIES

The additional Petitioners not listed in the caption are:

Joel Rose and Robert Heffern, as Co-Chairpersons; G. Stanford Bratton, D. Min. Reverend, Executive Director of the Network of Religious Communities; Network of Religious Communities; National Coalition Against Gambling Expansion; Preservation Coalition of Erie County, Incorporated; Coalition Against Gambling in New York-Action, Inc.; Campaign for Buffalo-History Architecture & Culture; Sam Hoyt, Assemblyman; Maria Whyte; John McKendry; Shelley McKendry; Dominic J. Carbone; Geoffrey D. Butler; Elizabeth F. Barrett; Julie Cleary; Erin C. Davison; Alice E. Patton; Maureen C. Schaeffer; Joel A. Giambra, Individually and as Erie County Executive; Keith H. Scott, Sr., Pastor; Dora Richardson; and Josephine Rush.

The additional Respondents not listed in the caption are:

The National Indian Gaming Commission; Sally Jewell, in her official capacity as Secretary of the Interior; and The United States Department of the Interior.

In the proceedings below, Gale A. Norton was originally a party in her capacity as Secretary of the Department of the Interior, and Philip N. Hogen was originally a party in his capacity as Chairman of the National Indian Gaming Commission. Secretary Norton was replaced, successively, by Dirk Kempthorne, Ken Salazar, and Sally Jewell, each in

his or her official capacity as Secretary of the Department of the Interior; and Chairman Hogen was replaced successively by Tracie Stevens and Jonodev Osceola Chaudhuri, each in his or her official capacity as Chair of the National Indian Gaming Commission.

Pursuant to Supreme Court Rule 29.6, each corporate Petitioner states that there is no parent company or publicly held company owning 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported as *Citizens Against Casino Gambling v. Chauduri* at 802 F.3d 267 (2d Cir. 2015) and appears at Appendix A to the Petition.

The opinions of the United States District Court for the Western District of New York, consolidated for purposes of the appeal, are as follows: (i) *Citizens Against Casino Gambling v. Kempthorne*, Appendix "F" to the Petition, reported at 471 F. Supp. 2d 295 (W.D.N.Y. 2007), *as amended*, 2007 U.S. Dist. LEXIS 29561 (W.D.N.Y. Apr. 20, 2007) ("*CACGEC I*"); (ii) *Citizens Against Casino Gambling v. Hogen*, Appendix "E" to the Petition, unpublished and available at 2008 U.S. Dist. LEXIS 52395 (W.D.N.Y. Jul. 8, 2008) ("*CACGEC II*"); and (iii) *Citizens Against Casino Gambling v. Stevens*, Appendix "B" to the Petition, reported at 945 F. Supp. 2d 391 (W.D.N.Y. 2013) ("*CACGEC III*").

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its opinion, the subject of this Petition, on September 15, 2015 and entered its final judgment on September 15, 2015. No party filed a petition for rehearing. The Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 of the United States Constitution (commonly referred to as the Indian Commerce Clause) provides in pertinent part:

> The Congress shall have Power … To regulate Commerce … with the Indian Tribes.

The Indian Nonintercourse Act, 25 U.S.C. § 177, states: "No purchase, grant, lease, or other conveyance of lands ... from any Indian nation or tribe ... shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

The Seneca Nation Settlement Act of 1990, 25 U.S.C. § 1774-1774h, *et seq*. is reprinted at App. 393a.

The Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701-2721, is reprinted at App. 403a.

INTRODUCTION

This case affords the Court an opportunity to provide a much-needed clarification to a profoundly important constitutional issue regarding the extent, if any, to which Congress, in the exercise of its power under the Indian Commerce Clause of the Constitution (Art. 1, § 8, cl. 3), can enact legislation completely divesting a state of the sovereign jurisdiction it had theretofore exercised over land within its borders. In recent decades, federal courts have been confronted with a growing number of cases raising thorny jurisdictional conflicts that inevitably arise as Native Americans have become increasingly active in efforts to not only reacquire their land, but also their sovereignty over such land. *See, e.g.*, *Michigan v. Bay Mills Indian Community,* 572 U.S. _____, 134 S.Ct. 2024 (2014); *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005); *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (Congress may not invoke the Indian Commerce Clause to abrogate a state's sovereign immunity). These Native American claims continue to collide with the interests of states and their citizens concerned about the disruptive effect that would ensue from the loss of sovereignty and the resulting inability to regulate the use of land they had governed from the moment they entered the Union.

In this case, the U.S. Second Circuit Court of Appeals held that in enacting the Seneca Nation Settlement Act (25 U.S.C. § 1774 *et seq.*) ("SNSA"), Congress intended to: (a) create "Indian country" and eliminate in its entirety the uninterrupted

sovereignty New York State had exercised for the past 200 years over a 9½ acre parcel of land in the heart of downtown Buffalo, New York, the State's second largest city with an overwhelmingly non-Indian population; and (b) transfer that sovereignty to the Seneca Nation of Indians ("SNI"). As a result the Second Circuit concluded that the land was now "Indian land" within the meaning of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"), because the Tribe could now exercise "governmental power" over the land, thereby enabling it to open a casino on the site despite New York's constitutional and statutory prohibitions against such gambling.

The court said that Congress had the power to transfer such sovereignty under the "plenary" authority given to it under the Indian Commerce Clause "which vests exclusive legislative authority over Indian affairs in the federal government … *vis-à-vis* the states [and] allows tribal sovereignty to prevail in Indian country [leaving] no room for state regulation."[1] App. 28a. The Second Circuit further held that this was indeed what Congress had intended in enacting SNSA. The Second Circuit said the 9½ acre Buffalo Parcel had become a "dependent Indian community" which is one of three categories of land that make up "Indian country." 18 U.S.C. § 1151. App. 29a. It inferred this intent from two provisions

[1] The "plenary" nature of Congress' power may not be as absolute as the term implies. *See, e.g.*, G. Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012 (2015); R. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denv. U. L. Rev. 201 (2007).

in SNSA. The first was the appropriation of a sum of money for the Tribe which it could use for a multitude of purposes, including the acquisition of land in a vast area of western New York (including, but not limited to, the City of Buffalo), without specifying its exact location. The second was that any land so acquired would be eligible for so-called "restricted fee" status, *i.e.,* it could not be sold without the Federal Government's approval. The Second Circuit concluded that these two provisions were a sufficient manifestation of congressional intent to effectuate a complete divestiture of New York's sovereignty over any land the Tribe might decide to buy despite the absence of any explicit expression of an intent to transfer "sovereignty," a word that appears nowhere in the statute.

Petitioners contend that Congress had no such intention, and if it had, it would have been required to make such a seismic event unequivocally clear. "Congress does not hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). They argue that the Second Circuit violated the rule of "constitutional avoidance," a fundamental canon of statutory interpretation that instructs courts to avoid imparting to a statute an interpretation that would raise serious constitutional questions. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009); *see Adoptive Couple v. Baby Girl*, 570 U.S. _____; 133 S.Ct. 2552, 2569-70 (2013) (Thomas, J., concurring) (urging "limited construction of the Indian Commerce Clause" to avoid constitutional issues). The Second Circuit's misreading of the statute that resulted from its failure to adhere to the

constitutional avoidance rule has resulted in a decision that threatens the sovereignty of all states whenever Congress provides money to a tribe to acquire land.

In holding that the Buffalo Parcel was Indian country, the court badly misconstrued the term "dependent Indian community," which the Court interpreted for the first and only time in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998). Whatever else it might be, the 9½ acre site of a non-residential gambling casino in the middle of New York's second-largest city, overwhelmingly populated by non-Indians, is not a "dependent Indian community."

The Second Circuit's stunning conclusion that SNSA completely divested New York of sovereignty over the land, despite the lack of any statement of such congressional intent, and without the State's explicit consent, raises serious questions of profound constitutional dimension. A statute that seeks to achieve a result as monumental as the unilateral divestiture of a state's sovereignty must do so explicitly, yet the word "sovereignty" appears nowhere in SNSA, as the Second Circuit conceded. App. 39a. The decision undermines the bedrock principle of dual and co-equal sovereignty between the states and the Federal Government, a fundamental part of our Nation's "constitutional blueprint." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). It encroaches on state sovereignty and erodes federalism.

The ruling conflicts with more than 150 years of this Court's precedents recognizing the power of Congress to create new Indian territory only on land that is not already part of a state or where the state expressly cedes sovereignty. It misconstrues both IGRA and SNSA by allowing an Indian tribe to exercise governmental power over land it acquired on the open market within an existing state without any showing that Congress confronted and decided whether the tribe would – or even could – acquire jurisdiction, and thus the right to exercise governmental power, over the land. This opens the door to future unilateral usurpations of territorial sovereignty, ostensibly through Congress's so-called "plenary" authority under the Indian Commerce Clause, over land within any state's borders. This stretches the Indian Commerce Clause beyond the breaking point.

Certiorari is warranted. If allowed to stand, the Second Circuit's ruling will upset the delicate balance between state and tribal sovereignty, not just in New York, but throughout the Nation. Due to the broad language of the Indian Nonintercourse Act, 25 U.S.C. § 177, this will open the floodgates to claims by other Indian tribes that they also may exercise governmental power over land they hold in restricted fee. It will only exacerbate the confusing and disruptive problems of alternating "checkerboard" jurisdiction that this Court sought to avoid in its landmark decision in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 205, 214, 219 (2005) (holding that an Indian tribe could not rekindle "embers of sovereignty that long ago had grown cold" by

reacquiring on open market title to land that had been part of its former reservation).

These issues, while arising here in the discrete context of a specific Indian settlement act, have broad implications for other Indian tribes located in many states throughout the Nation. The Second Circuit's expansive interpretation of the Indian Commerce Clause provides tribes with a roadmap to circumvent state law not just on their reservations, but also on off-reservation land under the sovereign control of a state for more than a century and in some cases since the Nation was founded.

STATEMENT OF THE CASE

A. Background

In 1988, after this Court decided *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), Congress enacted IGRA to provide a statutory basis for the federal regulation of gambling on "Indian land" as defined in IGRA. The statute specifies when, where and under what circumstances Indian tribes may engage in gambling on Indian land. Outside Indian land, state law, not IGRA, applies.

IGRA divides gambling into three classes, of which the most closely regulated is Class III, including "casino games, slot machines, and horse racing." *See* 25 U.S.C. § 2703(8). Class III gambling can occur only on "Indian lands within the tribe's jurisdiction." *See id.* at § 2710(d)(1). IGRA defines "Indian lands" as all lands either "held in trust by the United States for the benefit of any Indian tribe or individual" or "held by any Indian tribe or individual

subject to restriction by the United States against alienation" and over which "an Indian tribe exercises governmental power." *See id.* at § 2703(4). Even on Indian lands, IGRA prohibits gambling "on lands acquired by the Secretary of the Department of Interior ("DOI") in trust for the benefit of an Indian tribe after October 17, 1988," the date of IGRA's enactment. *Id.* at § 2719(a). This prohibition against gambling on after-acquired lands is subject to several exceptions, including one for such lands "taken into trust as part of . . . a settlement of a land claim." *Id.* at § 2719(b)(1)(B)(i).

In 1990, two years after IGRA's enactment, Congress passed SNSA to resolve a long-simmering crisis in and around the City of Salamanca, about 65 miles southwest of Buffalo. *Id.* at § 1774(b). At that time, the situation was about to reach its boiling point because of the then-impending expiration on February 19, 1991, of 99-year leases on land the SNI owned and had leased to non-Indians in and around the City of Salamanca, in the southwestern corner of New York State. *See id.* at § 1774(a)(4). SNSA settled the dispute by ratifying an agreement between the City of Salamanca and the SNI calling for the negotiation of new leases with terms of 40 years, with the right to renew for 40 more years based on fair market value. App. 193a.

Under SNSA, the United States and the State of New York appropriated a total of $60 million ($35 million from the United States and $25 million from New York). 25 U.S.C. § 1774d(a)-(c). SNSA allowed the SNI to spend the appropriated sum however it chose, including, at its discretion, the acquisition of

land anywhere within a vast expanse of western New York that had once been part of the tribe's aboriginal territory long before the Nation was formed. This included, but by no means was limited to, the City of Buffalo. A miscellaneous provision in SNSA exempted the settlement funds, and any income derived from them, from state or local taxation and protected them from levy, execution, forfeiture, garnishment, lien, encumbrance or seizure. *Id.* at § 1774f(a). If the SNI used SNSA funds to acquire land within its "aboriginal area" or within or near its former reservation lands, SNSA imposed a corresponding tax exemption and protection from forfeiture of the land. *Id.* at § 1774f(c). State and local governments were given a period of 30 days after notification to comment on the impact of the removal of such lands from real property tax rolls. *Id.* Unless the Secretary determined within 30 days after the comment period that the lands should not be subject to the Indian Nonintercourse Act, that Act would apply, and the SNI would hold the land in "restricted fee status." *Id.* The Indian Nonintercourse Act, 25 U.S.C. § 177, restricts and invalidates any "purchase, grant, lease, or other conveyance of land" from an Indian nation or tribe unless "made by treaty or convention entered into pursuant to the Constitution." The restriction on the power to transfer fee title (full ownership rights) is what gives the land its "restricted fee status."

SNSA was a relatively non-controversial measure, which passed easily in both chambers by voice vote. SNSA made no mention of the transfer of "sovereignty" over any such land from the State to the

SNI. In fact, the term "sovereignty" appears nowhere in the statute.

On November 25, 2002, the SNI submitted a proposed Class III gaming ordinance to the Chairman of the National Indian Gaming Commission ("NIGC"), who must approve any such ordinance as a prerequisite to gambling. 25 U.S.C. § 2710(d)(1)(A)(iii). The next day, November 26, 2002, NIGC Chairman Hogen approved the ordinance "for gaming only on Indian lands, as defined in the IGRA, over which the Nation has jurisdiction." App. 346a. At the time of the approval, the SNI had not yet purchased any land in Buffalo.

Three years later, in 2005, the SNI purchased on the open market 9½ acres of land in downtown Buffalo (the "Buffalo Parcel"). The SNI notified New York State, Erie County and the City of Buffalo officials that they had 30 days to comment on the removal of the land from the tax rolls. On November 7, 2005, after the 30 days expired, the land passed into "restricted fee" pursuant to 25 U.S.C. § 1774f(c).

B. Proceedings Below

Thereafter, Petitioners, a coalition of individuals who resided near the Buffalo Parcel and organizations who opposed gambling in the area, brought a series of three actions to challenge the determinations of the NIGC permitting the SNI to conduct gambling operations on the Buffalo Parcel. They argued that: (i) the SNI lacked jurisdiction over the Buffalo Parcel, and therefore, the land did not meet IGRA's definition of Indian lands; (ii) if it did,

the land was subject to IGRA's prohibition against gambling on lands acquired after 1988; and (iii) SNSA did not settle a land claim, so the settlement of a land claim exception to the after-acquired lands prohibition did not apply.

Petitioners prevailed in the first two actions. In the first case, the federal district court issued a decision, dated January 12, 2007, vacating and remanding the NIGC's approval of the SNI's ordinance because the NIGC had failed to make the necessary threshold determination that the site was "Indian land" as the ordinance was not site-specific. *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F.Supp.2d 295 (W.D.N.Y. 2007) (*"CACGEC I"*). App. 325a.

After the remand, the SNI adopted an amended ordinance specifying the Buffalo Parcel, and on July 2, 2007, the NIGC approved the amended ordinance. Although the Chairman found that IGRA's after-acquired land prohibition applied to restricted fee land, he opined that the land nevertheless met the "settlement of a land claim" exception because the Tribe acquired the property with proceeds from SNSA and thus could operate a Class III gambling casino there. The following day, July 3, 2007, the SNI rolled in slot machines and opened a gambling operation on the Buffalo Parcel. The gambling has continued ever since.

In Petitioners' second action challenging the amended ordinance approval, the federal district court again vacated the NIGC's approval of the ordinance. *Citizens Against Casino Gambling in Erie*

County v. Hogen 2008 U.S. Dist. LEXIS 52395 (W.D.N.Y. Jul. 8, 2008) ("*CACGEC II*"). After concluding that the Buffalo Parcel met IGRA's definition of "Indian lands," the court held, as had the Chairman of the NIGC, that IGRA's Section 20 prohibition against gambling on after-acquired lands applied to both trust and restricted fee land, because the contrary argument was "clearly at odds with section 20's purpose." App. 297a. The district court also concluded that the "settlement of a land claim" exception did not apply, because SNSA did not settle any claim, let alone a land claim. App. 317a.

That should have resolved the issue, but it did not. The SNI continued to gamble on the Buffalo Parcel, and the NIGC failed to take any action to bring the gambling to an end. On July 14, 2008, plaintiffs moved to compel compliance with the court's order. App. 140a. In its opposition to the motion, the Government disclosed, for the first time, that on May 20, 2008, while the litigation in *CACGEC II* was pending, and without advising the district court, the U.S. Department of the Interior ("DOI") had published final regulations reversing its former position on the applicability of the after-acquired land prohibition to restricted fee land. Earlier proposed regulations had stated that the prohibition applied to both trust and restricted fee land. DOI included its "about face" in an introductory preamble (not in the regulations themselves) after noting that it had received a comment that the proposed regulations should clarify the applicability of the after-acquired land prohibition to restricted fee lands. The agency declined to adopt the change, the preamble stated, because "section

2719(a) refers only to lands acquired in trust after October 17, 1988." 73 Fed. Reg. 29354 (May 20, 2008). The preamble continued: "[t]he omission of restricted fee from section 2719(a) is considered purposeful, because Congress referred to restricted fee lands elsewhere in IGRA." *Id.* at 29355. The DOI did not disclose that the comment it had rejected was from the NIGC, the agency charged with interpreting and administering IGRA or that it had rejected the NIGC's comment at the behest of the SNI, which stood to benefit from the change.

By order dated August 26, 2008 (App. 137a), the district court chastised the Government for what it termed an "egregious" tactic of first publishing a proposed rule in 2000, which lay dormant, amending it years later in 2006, but arguing against its applicability in the litigation when the plaintiffs sought to rely on it, and then amending it again to change its meaning in 2008 while summary judgment motions were pending, all without giving any indication that a final rule was imminent. App. 157a. The court directed NIGC "to comply forthwith" with Congress's mandate to provide written notice to the SNI of IGRA violations, and with NIGC regulations. App. 163a.

On the morning of January 20, 2009, just before the Inauguration of President Obama and the resulting change in Administrations, the NIGC Chairman adopted a DOI opinion issued just two days earlier stating that IGRA's after-acquired land prohibition does not apply to "restricted fee" land but only to "trust" land, repudiating the position previously articulated by then Secretary of the

Interior Gale Norton in 2002. App. 62a. NIGC's Chairman used this as the basis for "reversing" his own determination (that he had previously said was "the only sensible interpretation") on the applicability of the after-acquired land prohibition to restricted fee land. Based on that opinion, he approved yet a third ordinance adopted by the Tribe that was virtually identical to the one the district court had invalidated in *CACGEC II* only five months earlier. *Id.*

In the third case, Petitioners challenged the third iteration of the ordinance. *Citizens Against Casino Gambling in Erie County v. Stevens*, 941 F.Supp.2d 391 (W.D.N.Y. 2013) ("*CACGEC III*"). The district court reversed its own prior holding in *CACGEC II* and upheld the Chairman's approval of the third ordinance. Given that DOI's regulations now provided that the after-acquired lands prohibitions in IGRA (25 U.S.C. § 2719) did not apply to restricted fee land, the court determined that the after-acquired land prohibition did not apply to the Buffalo Parcel which was, therefore, "gambling-eligible" after all. *See* App. 83a. Since the prohibition no longer applied, the court decided it was unnecessary to readdress the question whether the land was subject to the "settlement of a land claim" exception to the prohibition. App. 95a.

The United States Court of Appeals for the Second Circuit affirmed the district court's ruling in *CACGEC III*. *Citizens Against Casino Gambling in Erie County v. Chadhuri*, 802 F.3d 267 (2d Cir. 2015). App. 1a. The appellate court opined that New York would "not have jurisdiction if [the Buffalo Parcel] … [is] 'Indian country.'" App. 29a. Recognizing that

IGRA requires a tribe to have jurisdiction over its land, the court conducted an analysis to determine whether the Buffalo Parcel fit the characteristics of a "dependent Indian community," a category of Indian country. As such, the court held that "tribal sovereignty prevailed … leaving no room for state regulation." App. 28a. It concluded that by establishing a process for lands acquired with SNSA funds to attain restricted fee status, Congress had demonstrated its intent – despite the lack of any clear statement to this effect – to set aside the Buffalo Parcel under federal superintendence. App. 34a. As a result, the court ruled that the SNI "has jurisdiction over this land, and New York has therefore been divested of its jurisdiction." App. 36a. The Second Circuit also concluded that the property qualified as "Indian lands" over which an Indian tribe exercises governmental power, because the tribe policed the land, fenced it, posted signs and enacted ordinances and resolutions applying SNI law. App. 42a. Finally, the court held that the after-acquired land prohibition applies only to "lands acquired by the Secretary [of the Interior] in trust for the benefit of an Indian tribe," not -- as here -- to "lands held in restricted fee by a tribe." App. 43a.

REASONS FOR GRANTING THE PETITION

A. The Second Circuit's Opinion Conflicts with the Requirement that Any Statute's Abrogation of Sovereignty Must Be Clearly Stated

The Second Circuit concluded that Congress shifted sovereignty over land from a State to an

Indian tribe without making its intention to do so unmistakably clear in the statutory language, without inviting comment from area stakeholders on the loss of sovereignty, and without mentioning it in the Congressional hearings held prior to the statute's enactment. Assuming that Congress could effect a transfer of sovereign jurisdiction, it would never have done so in such an obscure, oblique manner, via voice vote on a non-controversial bill that did not identify with any specificity the land, if any, the Tribe might choose to purchase. This Court's review is necessary to correct the appellate court's grave error.

Under our Constitution, the federal government possesses only limited and delegated powers; the rest are reserved to the states respectively, or to the people. U.S. Const. amend. X. This system of dual sovereignty is fundamental to the constitutional framework. This Court has repeatedly instructed, "[i]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers," *Bond v. United States*, --- U.S. ---, 134 S. Ct. 2077, 2089 (2014) (citing authorities), by making their "intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). In "traditionally sensitive areas" affecting the federal-state balance, "the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bond*, --- U.S. at ---, 134 S. Ct. at 2089 (and cases cited therein); *Gregory*, 501 U.S. at 461.

In numerous contexts, this Court has recognized that an abrogation of sovereignty must be express. For example, in *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009), the Court held that a federal "apology resolution" with respect to the involvement of the United States in the overthrow of the native Hawaiian government could not be interpreted to divest the State of Hawaii of its sovereign authority over land that the United States had ceded to Hawaii upon its admission to the Union. Among the grounds for the Court's decision, the apology resolution revealed "no indication – much less a "clear and manifest" one – that Congress intended *sub silentio* to "cloud" the absolute fee title the United States had transferred to Hawaii upon statehood in 1959. In other cases involving traditionally sensitive areas, the Court has similarly required a clear statement of congressional intent to abrogate attributes of state sovereignty. *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (to abrogate a state's sovereign immunity, Congress cannot act implicitly, but must make its intention unmistakably clear in the language of the statute); *see also FAA v. Cooper*, --- U.S. ---, 132 S. Ct. 1441 (2012) ("waiver of sovereign immunity must be 'unequivocally expressed' in statutory text"); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (when Congress "radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit") (quoting Frankfurter, F., *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539 (1947). This approach is rooted in the respect for the

states as independent sovereigns in the federal system.

SNSA does not contain any clear or manifest statement transferring jurisdiction to the SNI. Congress did not use any explicit cession language, such as "cede, sell, relinquish, or convey," *cf. South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), reflecting the intent to affect sovereignty over any land the SNI might purchase with SNSA funds. In fact, the statute is silent on the question of jurisdiction, governmental power and even gambling.

The mere imposition of restrictions on alienation under 25 U.S.C. § 177 is not an express, or even implied, statement of intent to abrogate state sovereignty. Historically, 25 U.S.C. § 177 was a vehicle for protecting Indian land ownership, by certain claims based upon state law, such as adverse possession, statutes of limitations, or laches, which may have the effect of transferring title to Indian property to non-Indian claimants. "The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent." *FPC v. Tuscarora Indian Natio*n, 362 U.S. 99, 119 (1960). It is not a vehicle for transferring jurisdiction. When Congress said the SNI could hold land in "restricted" fee status, it did not say the tribe could own their land "without restrictions" imposed by state law.

Congress knew how to use the words "jurisdiction" and "governmental power" when it wanted to refer to those characteristics. Two years earlier, in IGRA, Congress had defined gambling-eligible "Indian lands" (whether trust or restricted fee) in terms of both tribal jurisdiction, 25 U.S.C. § 2710(d), and governmental power, *id.* at § 2703(4)(B). In SNSA, however, Congress referred only to "restricted fee status," without any reference to jurisdiction or governmental power. The lack of a clear statement expressing such intent creates the presumption Congress had no such intent at all. *See Carcieri v. Salazar*, 555 U.S. 379, 393 (2009) (courts presume Congress says what it means and means what it says).

There are other indicia in SNSA, aside from its resounding silence on the subject, that Congress had no intent to confer sovereignty upon the SNI. For example, the opportunity of state and local governments to comment upon an acquisition of land with SNSA funds is limited to the effect of removing the lands from the real property tax rolls. A loss of sovereignty would mean, in addition, the loss of state authority to regulate local zoning, environmental impacts, and public health and safety, as well as gambling. If Congress had intended state and local municipalities to cede not just property taxes but also regulatory jurisdiction, it surely would have asked for comment on that, as it did in the Torres-Martinez Desert Cahuilla Indians Claims Settlement Act, 25 U.S.C. § 1778d(a) (authorizing Secretary to convey lands into trust status, unless local municipality objects within 60 days), and the Mohegan Nation

(Connecticut) Land Claims Settlement Act, 25 U.S.C. § 1775c(b)(1)(B) (requiring consultation with town on impact of removal from taxation, problems concerning jurisdiction and potential land use conflicts). The limited opportunity for municipal comment is textual evidence that Congress intended similar limitations on the effect of the restricted fee designation. *Cf. Tarrant Regional Water Dist. v. Herrmann*, --- U.S. ---, 133 S. Ct. 2120, 2133 (2012) ("States rarely relinquish their sovereign powers," so "the better understanding is that there would be a clear indication of such devolution, not inscrutable silence").

So too, SNSA's legislative history does not mention sovereignty, jurisdiction, governmental power, or even gambling. In testifying before Congress prior to SNSA's enactment, SNI witnesses gave no hint, even when pressed, of the possibility of gambling on land to be purchased with SNSA funds. S. Rep. No. 101-511, at 15, 17-18 (1990); H.R. Rep. No. 101-832, at 36 (1990). If Congress had intended any such effect, it would have been highly controversial, provoked extensive debate, prompted a recorded (not voice) vote, and may well have met a resounding defeat. Yet the legislative history contains not a single word on the issue. The lack of any reference to governmental power or even gambling in SNSA, or even its legislative history, is strong evidence that Congress never intended to grant the SNI governmental power over its restricted fee lands or thereby to create off-reservation "Indian lands" within the meaning of IGRA. Congress does not "hide

elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

Under the Admissions Clause (U.S. Const. art. IV, § 3) and the Equal Footing Doctrine, the territorial sovereignty of a state cannot be diminished without the consent of the state's legislature. *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 205 (1984). That consent cannot be implied or tacit. *Ft. Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 538-539 (1885). The Second Circuit's decision cannot be reconciled with these precedents.

B. The Second Circuit's Court Ruling Disregards the Canon of Constitutional Avoidance

Closely related to the clear statement rule with respect to the abrogation of sovereignty is the "well-established principle" that the courts should not "decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984); *see Adoptive Couple v. Baby Girl*, 570 U.S. ---, 133 S.Ct. 2552 (2013) (Thomas, J., concurring) (urging "limited construction" of Indian Commerce Clause and concurring in majority's statutory construction to avoid reaching constitutional issues); *Hawaii*, 556 U.S. at 176 (applying canon of constitutional avoidance, based on reasonable presumption that Congress did not intend statutory construction which raises "grave constitutional concern").

The proposition that Congress can shift jurisdiction from a state to an Indian tribe without an

express cession of jurisdiction by the state raises serious constitutional issues. In our federalist system, "the states possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). Nothing is so central to sovereignty as the matter here at issue: governmental power over land, exclusively non-Indian at the time of acquisition, within the geographic borders of the state. The failure of the Second Circuit to adhere to the rule of constitutional avoidance caused a head-on collision between two powerful and competing constitutional principles – the plenary power of Congress under the Indian Commerce Clause versus the inviolability of state sovereignty under our federal system.

The constitutional question lurking beneath the appellate court's ruling is whether Congress would be within its powers under the Indian Commerce Clause to displace a state's territorial jurisdiction and reallocate it to an Indian tribe. To say that Congress has plenary authority to regulate "commerce" with the Indians is one thing, but to say Congress can unilaterally dismantle a state's territorial integrity is quite another. *See Adoptive Couple*, 570 U.S. at ---, 133 S. Ct. at 2569-70 (2013) (Thomas J., concurring) (urging "limited construction" of Indian Commerce Clause). This is a recurring question of importance not only to New York and its citizens, but also to a host of other states, where Congress has enacted land claim settlement acts and other statutes affecting the rights of Indian tribes to

land. *See, e.g., Carcieri v. Salazar*, 555 U.S. 379 (2009). The question assumes heightened significance where, as under SNSA, the statute does not contain language suggesting that Congress intended to alter the state's historic sovereignty over its land.

This Court's review is necessary to give SNSA a construction consistent with its plain language and constitutional principles, neither of which would displace a state's territorial jurisdiction.

C. The Second Circuit's Ruling Contradicts This Court's Definitive Ruling on What Constitutes a "Dependent Indian Community"

The appellate court's holding that Congress through SNSA set aside the Buffalo Parcel for the SNI's use and subjected it to federal superintendence, thereby creating a "dependent Indian community," deviated from the Court's holding and analysis in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998).

In *Venetie*, this Court held that the term "dependent Indian community" refers to a "limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements – first, they must have been set aside by the Federal government for the use of the Indians as Indian land; second, they must be under federal superintendence." 522 U.S. at 527. In the cases upon which the Court relied, Congress had set aside specific land for the purpose of the long-term settlement of an Indian community. *See United States v. McGowan,* 302 U.S.

535, 537 (1938) (in creating the Reno Indian colony, Congress intended "to provide lands for needy Indians scattered over the State of Nevada, and to equip and supervise these Indians in establishing a permanent settlement"); *United States v. Pelican*, 232 U.S. 442, 449 (1914) (allotted lands retained "a distinctively Indian character, being devoted to Indian occupancy under the limitations imposed by Federal legislation"); *United States v. Sandoval*, 231 U.S. 28, 39 (1913) (Congress had confirmed the land grants from the King of Spain to the Pueblo Indians and the adjacent reservation "for the use and occupancy of the Indians"); *Donnelly v. United States,* 228 U.S. 243, 255 (1913) (Congress set the lands aside as reservations "which shall be of suitable extent for the accommodation of the Indians of said state" (quoting Act of April 8, 1864, § 2, 13 Stat. at L. 39, chap. 48)).

By contrast, in SNSA Congress did not "set aside" any specific lands where Indians lived, but instead authorized the payment of money, which the SNI could hold or invest in its discretion. If the SNI used SNSA funds to acquire land within its "aboriginal area," state and local governments would have a period of 30 days after notification to comment on the impact of the removal of such lands from real property tax rolls. 25 U.S.C. § 1774f(c). Assuming Congress used the term "aboriginal area" in its common sense, *see McBoyle v. United States*, 283 U.S. 25, 26 (1931), in 1797, this may have encompassed as much as 4,250,000 acres in western New York (*see Banner v. United States*, 238 F.3d 1348, 1350 n.1 (Fed. Cir. 2001)), or about 12% of New York's total land mass of 34,915,840 acres. *See Seneca Nation of*

Indians v. New York, 206 F. Supp. 2d 448, 458 (W.D.N.Y. 2002), *aff'd*, 382 F.3d 245 (2004) (describing the vast area of aboriginal SNI land). Unless the Secretary determined otherwise within 30 days after the comment period, SNI would hold the land in "restricted fee status." *Id.* The imposition of a restriction on alienation on as-yet unidentified land, distinctly non-Indian in character, located anywhere within such a vast expanse, without the purpose of protecting Indians residing there, is not a federal set-aside consistent with *Venetie* or the precedents upon which it relied. Simply stated, it is ludicrous to suggest that Congress intended to create a dependent Indian community within the City of Buffalo, New York State's second largest city that had been under the State's sovereign control for two centuries, such that New York law would no longer apply. What Congress intended to be a benign non-controversial piece of legislation passed by voice vote to remedy a local problem 65 miles distant from the City of Buffalo evolved into a jurisdictional nightmare as a result of the circuit court's failure to adhere to fundamental rules of statutory construction.

The Second Circuit, however, used the same element to satisfy both requirements – the federal set-aside and federal superintendence – of the dependent Indian community analysis. In the cases establishing the dependent Indian community category, the U.S. did not simply restrict alienation, but rather by statute expressly assumed jurisdiction and control over virtually all facets of the Indian community to supervise, protect and sustain the Indians living there. *See McGowan*, 302 U.S. at 537-39 (U.S.

retained title to land to protect Indians living there); *Pelican*, 232 U.S. at 447 (allotments were "under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians"); *Sandoval*, 231 U.S. at 37 n.1 (federal statute placed Pueblo lands under the "absolute jurisdiction and control of the Congress of the United States"). As this Court explained in *Venetie*, the federal superintendence requirement guarantees that the Indian community is sufficiently "dependent" on the federal government that it and the tribe, rather than the state, are to exercise primary jurisdiction over the land. 522 U.S. at 527 n.1. The requisite federal superintendence and resulting tribal dependence is completely lacking in the Buffalo Parcel.

In *Venetie*, the U.S. exercised a degree of protection over the lands by exempting them from real property taxes, adverse possession claims, and certain other judgments, *see* 43 U.S.C. § 1636(d). Nevertheless, the unanimous Court concluded, "[t]hese protections, if they can be called that, simply do not approach the level of superintendence over the Indians that existed in our prior cases," in which the U.S. "actively controlled the lands in question, effectively acting as a guardian for the Indians." 522 U.S. at 533. So too here, the minimal protections resulting from the restriction on alienation and associated property tax exemption fall far short of the level of superintendence over the Indians and their lands in the precedents establishing the dependent Indian community category of Indian country. The appellate court's misreading of *Venetie* is an open

invitation to Congress to erode state sovereignty elsewhere – whether to advance Indian gambling or any other enterprise. Review is necessary to correct the error.

D. The Second Circuit's Ruling Conflicts with this Court's Precedents Recognizing State Jurisdiction to Regulate Conduct in Indian Country within Its Borders

In asserting that New York will "not have jurisdiction if [the Buffalo Parcel] . . . [is] 'Indian country'" leaving no room for state regulation, and then concluding that the Buffalo Parcel is Indian country, the Second Circuit's ruling conflicts with more than 150 years of authority recognizing that a state has jurisdiction over Indian country within its borders.

As early as 1859, in *New York ex rel. Cutler v. Dibble*, 62 U.S. 366, 370 (1859), the Court recognized New York's authority to enact statutes protecting Indians on their tribal lands from intrusion by others. The New York Indian Law, codified at Chapter 26 of the Consolidated Laws (L. 1909, ch. 31), contains many provisions regarding the State's powers in its dealings with the Indians, including the establishment of a peacemakers' court to hear and determine questions involving title to real estate on the reservation. *See, e.g.,* N.Y. Indian Law § 46. In *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13 (1925), the Court recognized that New York, "at the request of the Indians, assumed governmental control

of them and their property … and that Congress has never undertaken to interfere with this situation or to assume control." *Id.* at 16-17.

The principle that a state has jurisdiction on Indian reservations, and thus in "Indian country," is firmly recognized in, but by no means limited to, New York. In *United States v. McBratney*, 104 U.S. 621 (1882), the Court held that the Colorado state courts, not the federal courts, had jurisdiction to prosecute the murder of one non-Indian by another on an Indian reservation. The Act of Congress admitting Colorado into the Union placed it "upon an equal footing with the original states,"[2] so Colorado had criminal jurisdiction over non-Indians "throughout the whole of the territory within its limits, including the Ute Reservation," and the United States no longer had "sole and exclusive jurisdiction" over the reservation, except to the extent necessary to carry out treaties. *Id.* at 623-24; *see Draper v. United States*, 164 U.S. 240 (1896) (Montana had power to punish non-Indian for

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[2] The State Enabling Acts of other western states, in contrast, include language excluding Indian lands from the State's territorial jurisdiction. *See, e.g.*, Act of May 30, 1854, ch. 59, 10 Stat. 277 (Kansas and Nebraska); Act of Feb. 22, 1884, ch. 180, § 4, 25 Stat. 676 (North Dakota, South Dakota, Montana, and Washington); Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107 (Utah); Act of June 16, 1906, ch. 3335, 34 Stat. 267 (Oklahoma); Act of June 20, 1910, ch. 310, §§ 2, 20, 36 Stat. 557 (New Mexico and Arizona); Act of July 7, 1958, Pub. L. 85-508, § 4, 72 Stat. 339, *as amended* by Pub. L. 86-70, § 2(a), 73 Stat. 141 (1959) (Alaska). Idaho and Wyoming, both admitted to statehood in 1890 without prior Enabling Acts, inserted disclaimers in their State Constitutions. *See* Idaho Const., Art. 21, § 19 (1890); Wyo. Const., Art. 21, § 26 (1890).

murder committed on reservation or Indian lands). In *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946), the Court applied *McBratney* – which it found "in harmony with general principles governing this subject," *id.* at 499 n.4 (citations omitted) – to uphold New York's jurisdiction to prosecute the murder of a non-Indian committed by another non-Indian on the SNI's Allegany Reservation in New York. "In the absence of a limiting treaty obligation or Congressional enactment," the Court stated, "each state had a right to exercise jurisdiction over Indian reservations within its boundaries." *Id.* at 499.

In the 1940s, Congress permitted several states to assert criminal jurisdiction, and sometimes civil jurisdiction as well, over certain Indian reservations. *See, e.g.*, Act of June 30, 1948, ch. 759, 62 Stat. 1161; Act of July 2, 1948, ch. 809, 62 Stat. 1229; Act of Sept. 13, 1950, ch. 917, 64 Stat. 845; Act of Oct. 5, 1949, ch. 604, 63 Stat. 705. In 1948 and 1950, Congress granted jurisdiction to New York, with limited exceptions, over offenses committed by or against Indians on Indian reservations in New York, and over actions between Indians or involving an Indian and any other person. 25 U.S.C. §§ 232, 233; *see Oneida Nation of N.Y. v. County of Oneida*, 414 U.S. 661 (1974) (referring to 25 U.S.C. §§ 232 and 233 as a congressional "grant of civil jurisdiction to the State of New York with the indicated exceptions"). Beginning in 1953, Congress granted to several other states, subject to limited exceptions, full civil and criminal jurisdiction over Indian reservations. 18 U.S.C. § 1162 (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin); 28 U.S.C. § 1360

(same); *see Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) ("even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law").

More recent cases continue to recognize the rights of states, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands. *See, e.g.*, *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) ("State sovereignty does not end at a reservation's border."); *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992) (state jurisdiction over relations between reservation Indians and non-Indians may be permitted unless the application of state laws "would interfere with reservation self-government or impair a right granted or reserved by federal law").

The Second Circuit, however, with the stroke of a pen, stripped New York of authority over the Buffalo Parcel. This ruling will create confusion across the Nation as to the reach of a state's civil and criminal jurisdiction in Indian country.

E. The Second Circuit's Mistaken Inference that the Mere Designation by Congress of the Buffalo Parcel as "Restricted Fee" Implied an Intent to Transfer Governmental Power Raises Wide-Ranging and Significant Issues

The issues in this case, though arising in the discrete context of a specific Indian settlement act, have wide applicability to other Indian tribes located throughout the Nation. This is because the Indian Nonintercourse Act, 25 U.S.C. § 177, which creates restricted fee land, applies by its terms to any "purchase, grant, lease, or other conveyance of land" from an Indian nation or tribe. Its only purpose was to ensure that the land would not be subject to taxation in order to ensure that the Tribe got the full benefit of the bargain it had struck pursuant to SNSA. The appellate court's ruling, however, creates a roadmap for other Indian tribes to assert that they have purchased land which they hold in restricted fee and over which, under the appellate court's reasoning, they can exercise governmental power, including (but not limited to) gambling, on the theory that IGRA's prohibition against gambling on after-acquired land would not apply to restricted fee land. This could open the floodgates to extensive shifts in sovereignty in communities throughout the United States.

It would also render the land-into-trust process under the Indian Reorganization Act, 25 U.S.C. § 465 ("IRA"), largely superfluous. The IRA permits the Secretary, after an extensive process that takes into account the interests of others with stakes in the

area's governance and well-being, to take land into trust for the benefit of an Indian tribe. In *Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 220-21 (2005), the Court stated that "Section 465 provides the proper avenue" for an Indian tribe to reestablish sovereign authority over territory. Under IGRA, newly acquired trust land is subject to the after acquired land prohibition, unless a statutory exception applies. If an Indian tribe can circumvent the after-acquired land prohibition by acquiring land subject to the Indian Nonintercourse Act and thereby divest the state of sovereignty, "little would prevent [tribes across the nation] from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." *See Sherrill,* 544 U.S. at 220; *see also Felix v. Patrick*, 145 U.S. 317, 335 (1892). The issues are of national importance, implicating allocations of authority and sovereignty between states and tribes.

The consequences of a loss of sovereignty cannot be overestimated. They include the loss of state authority to regulate not only gambling, but also local zoning, the environmental public health and safety. The loss of sovereignty can open the land to unregulated gasoline stations, cigarette (and marijuana) manufacturing facilities, payday loans and other pollutants and noxious consequences which are irreversible and which state and local governments have no authority to control.

This Court's review is warranted to avoid such significant and unintended effects.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

December 14, 2015
Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DECIDED SEPTEMBER 15, 2015

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 11-5171, 11-5466, 13-2339, 13-2777

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY, JOEL ROSE and ROBERT HEFFERN, as Co-Chairpersons; D. MIN. G. STANFORD BRATTON, Reverend, Executive Director of the Network of Religious Communities; NETWORK OF RELIGIOUS COMMUNITIES; NATIONAL COALITION AGAINST GAMBLING EXPANSION; PRESERVATION COALITION OF ERIE COUNTY, INCORPORATED; COALITION AGAINST GAMBLING IN NEW YORK-ACTION, INCORPORATED; CAMPAIGN FOR BUFFALO-HISTORY ARCHITECTURE & CULTURE; SAM HOYT, Assemblyman; MARIA WHYTE; JOHN MCKENDRY; SHELLEY MCKENDRY; DOMINIC J. CARBONE; GEOFFREY D. BUTLER; ELIZABETH F. BARRETT; JULIE CLEARY; ERIN C. DAVISON; ALICE E. PATTON; MAUREEN C. SCHAEFFER; JOEL A. GIAMBRA, Individually and as Erie County Executive; KEITH H. SCOTT, SR., Pastor; DORA RICHARDSON; and JOSEPHINE RUSH,

Plaintiffs-Appellants-Cross-Appellees,

v.

Appendix A

JONODEV OSCEOLA CHAUDHURI, in his official capacity as Chairman of the National Indian Gaming Commission; THE NATIONAL INDIAN GAMING COMMISSION; SALLY JEWELL, in her official capacity as Secretary of the Interior; and THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees-Cross-Appellants.[*]

Appeal from the United States District Court for the Western District of New York. Nos. 06-cv-001, 07-cv-451, 09-cv-291 -- William M. Skretny, *Judge*.

January 16, 2015, Argued
September 15, 2015, Decided

Before: KATZMANN, Chief Judge, LOHIER and DRONEY, Circuit Judges.

The plaintiffs, organizations and individuals who oppose the operation of a casino on land owned by the Seneca Nation of Indians in Buffalo, New York, filed an action in the United States District Court for the Western District of New York against the National Indian

* The Clerk of the Court is directed to amend the official caption to conform to the above. Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Jonodev Osceola Chaudhuri, the present Chairman of the National Indian Gaming Commission, and Sally Jewell, the present Secretary of the Interior, are automatically substituted as defendants herein for their respective predecessors.

Gaming Commission, its Chairman, the Department of the Interior, and the Secretary of the Interior, arguing that the National Indian Gaming Commission acted arbitrarily and capriciously and abused its discretion in approving an ordinance that permitted the Seneca Nation to operate a class III gaming facility in Buffalo. The district court (Skretny, J.) dismissed the action, and the plaintiffs appealed. We hold that the Seneca Nation's lands in Buffalo are gaming-eligible under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, as "Indian lands" under the Seneca Nation's jurisdiction and that IGRA Section 20's prohibition of gaming on trust lands acquired after IGRA's enactment, 25 U.S.C. § 2719(a), does not apply. Accordingly, we **AFFIRM**.

DRONEY, *Circuit Judge:*

The plaintiffs-appellants ("plaintiffs") are organizations and individuals that oppose the operation of a casino in Buffalo, New York, by the Seneca Nation of Indians. They brought three successive lawsuits in the United States District Court for the Western District of New York against the National Indian Gaming Commission ("NIGC"), its Chairman, the U.S. Department of the Interior ("DOI"), and the Secretary of the Interior. In these three actions, the plaintiffs argued that the NIGC did not act in accordance with federal law in approving an ordinance and subsequent amendments to that ordinance that permitted the Seneca Nation to operate a class III gaming facility--a casino--on land owned by the Seneca Nation in Buffalo ("the Buffalo Parcel"). In the third lawsuit ("*CACGEC III*"), which addressed the NIGC's

approval of the most recent version of the ordinance, the district court (Skretny, *J.*) denied the plaintiffs' motion for summary judgment and entered judgment dismissing the case.

We hold that the district court correctly dismissed the plaintiffs' complaint in *CACGEC III* because the DOI and the NIGC's determination that the Buffalo Parcel is eligible for class III gaming under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, was not arbitrary or capricious, an abuse of discretion, or in violation of law. We further hold that Congress intended the Buffalo Parcel to be subject to tribal jurisdiction, as required for the land to be eligible for gaming under IGRA. Finally, we hold that IGRA Section 20's prohibition of gaming on trust lands acquired after IGRA's enactment in 1988, 25 U.S.C. § 2719(a), does not apply to the Buffalo Parcel. Because the gaming ordinances at issue in the first two lawsuits ("*CACGEC I*" and "*CACGEC II*") have been superseded by the most recent amended ordinance, the appeals of *CACGEC I* and *CACGEC II* are moot. Accordingly, we **AFFIRM** the judgment of the district court in *CACGEC III* and dismiss the appeals of *CACGEC I* and *CACGEC II*.

BACKGROUND

This appeal has a long history that, as mentioned above, includes three lawsuits. While much of that background is described here, a more detailed history can be found in the district court's prior opinions in those cases. *See Citizens Against Casino Gambling in Erie*

Cty. v. Kempthorne, 471 F. Supp. 2d 295 ("*CACGEC I*"), *amended on reconsideration by* No. 06-CV-0001, 2007 U.S. Dist. LEXIS 29561, 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007); *Citizens Against Casino Gambling in Erie Cty. v. Hogen*, No. 07-CV-451 (WMS), 2008 U.S. Dist. LEXIS 52395, 2008 WL 2746566 (W.D.N.Y. July 8, 2008) ("*CACGEC II*"); *Citizens Against Casino Gambling in Erie Cty. v. Stevens*, 945 F. Supp. 2d 391 (W.D.N.Y. 2013) ("*CACGEC III*").

I. Statutory Background

Understanding the factual and procedural background of this appeal requires familiarity with two statutory schemes: the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, and the Seneca Nation Settlement Act of 1990 ("SNSA"), 25 U.S.C. §§ 1774-1774h.

A. The Indian Gaming Regulatory Act

Congress enacted IGRA in 1988 "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA established independent federal regulatory authority and federal standards for gaming on Indian lands. *See id.* § 2702(3). It also established the NIGC as a commission within the DOI to monitor gaming and promulgate regulations and guidelines to implement IGRA. *See id.* §§ 2704(a), 2706(b).

Appendix A

IGRA authorizes gaming on "Indian lands," which it defines as (1) "all lands within the limits of any Indian reservation" and (2) "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 tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."[1] *Id.* § 2703(4).

Three classes of gaming may be permitted on Indian lands, subject to different levels of regulation. *See id.* § 2710. At issue here is "class III" gaming, which is "the most closely regulated" form of gaming under IGRA. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2028, 188 L. Ed. 2d 1071 (2014). It "includes casino games, slot machines, and horse racing." *Id.*

Indian lands are eligible for class III gaming activities only if those activities are:

> (A) authorized by an ordinance or resolution that--
>
> > (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

1. The distinction between lands held in trust by the United States and lands held subject to a restriction against alienation is discussed later in this opinion.

> (ii) meets the requirements of subsection (b) of this section,[2] and
>
> (iii) is approved by the Chairman [of the NIGC],

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect.

25 U.S.C. § 2710(d)(1). In this way, IGRA "seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003).

Section 20 of IGRA, however, prohibits gaming "on lands acquired by the Secretary [of the Interior] in trust for the benefit of an Indian tribe after October 17, 1988," the date of IGRA's enactment. 25 U.S.C. § 2719(a). This prohibition is subject to some exceptions, including one of relevance here for subsequently acquired "lands [that]

2. Subsection (b) provides that "[t]he Chairman [of the NIGC] shall approve any tribal ordinance or resolution concerning the conduct[] or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if [certain conditions are met]." *See* 25 U.S.C. § 2710(b)(2). The additional conditions listed in subsection (b) are not at issue on this appeal.

are taken into trust as part of . . . a settlement of a land claim." *Id.* § 2719(b)(1)(B)(i).

B. The Seneca Nation Settlement Act of 1990

1. The Seneca Nation of Indians

The Seneca Nation of Indians is one of the Six Nations of the Iroquois Confederacy. *See Banner v. United States*, 238 F.3d 1348, 1350 (Fed. Cir. 2001); *Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448, 458 (W.D.N.Y. 2002), *affd*, 382 F.3d 245 (2d Cir. 2004). Prior to the colonization of North America, the Iroquois Confederacy occupied approximately thirty-five million acres of land east of the Mississippi River, mostly in modern-day New York and Pennsylvania. *See Banner*, 238 F.3d at 1350.

By the end of the Revolutionary War, the Six Nations lost most of what has been referred to as their "aboriginal lands" to the European settlers. *See id.* The Senecas--who had been allied with Great Britain during the war--were largely driven from their villages and settled along the banks of Buffalo Creek in what is now Buffalo, New York. *See Seneca Nation of Indians*, 206 F. Supp. 2d at 469, 471.

In 1790, Congress passed the first Indian Trade and Intercourse Act ("the Non-Intercourse Act"), ch. 33, 1 Stat. 137 (1790); *see Mohegan Tribe v. Connecticut*, 638 F.2d 612, 616 (2d Cir. 1980). The Act provided that:

> no sale of lands made by any Indians, or any nation or tribe of Indians . . . within the United

> States, shall be valid to any person or persons, or to any state, . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Non-Intercourse Act § 4, 1 Stat. at 138. The Act's "obvious purpose" was "to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, acting as parens patriae[3] for the Indians, to vacate any disposition of their lands made without its consent." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119, 80 S. Ct. 543, 4 L. Ed. 2d 584 (1960). The Non-Intercourse Act (in amended form) remains in effect today and now prohibits the "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians" without federal authorization. 25 U.S.C. § 177.

In 1794, the United States and the Iroquois Confederacy entered into the Treaty of Canandaigua (Treaty with the Six Nations), Nov. 11, 1794, 7 Stat. 44. *See Banner*, 238 F.3d at 1350. The treaty described the Seneca Nation's lands as encompassing much of the western part of New York. *See*

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3. When the Government acts as parens patriae, it acts "in its capacity as provider of protection to those unable to care for themselves." *Parens Patriae*, Black's Law Dictionary 1287 (10th ed. 2014). "[T]he traditional concept of parens patriae . . . [was drawn from] the King's power as guardian of persons under legal disability to act for themselves . . . ." *Commonwealth of Puerto Rico ex rel. Quiros v. Bramkamp*, 654 F.2d 212, 217 (2d Cir. 1981).

id. at 1350; *see also* 7 Stat. at 45. "[O]ccupancy of the[se] land[s] . . . was granted the Senecas free of the operation of state laws." *United States v. City of Salamanca*, 27 F. Supp. 541, 544 (W.D.N.Y. 1939). In the treaty, the United States acknowledged that these lands were "the property of the Seneka [N]ation . . . until they choose to sell [them]" and promised that the United States would "never claim the same [lands]." 7 Stat. at 45.

The Seneca Nation's land base decreased significantly, however, through a series of subsequent treaties. Most notably, in the Treaty of Big Tree in 1797, the federal government authorized Robert Morris to purchase the vast majority of the Seneca Nation's landholdings. *See* Treaty of Big Tree (Treaty with the Seneca, 1797), Sept. 15, 1797, 7 Stat. 601; *see also City of Salamanca*, 27 F. Supp. at 544. This purchase left the Seneca Nation with approximately 200,000 acres of reservation lands, including the Allegany Reservation in Cattaraugus County, New York. *See* 7 Stat. at 602; *City of Salamanca*, 27 F. Supp. at 544.

2. The Allegany Reservation Leases

The present Seneca Nation's "Allegany Reservation lies along that part of the Allegheny River that hooks into New York. It extends approximately 42 miles along a narrow strip averaging a mile wide on both sides of the river from Vandalia, New York, to the Pennsylvania border." H.R. Rep. No. 101-832, at 3 (1990). While it was originally considered to be of little value, the land's worth increased significantly as railroads were built through

it to the west. *City of Salamanca*, 27 F. Supp. at 544. Throughout the mid-1800s, non-Indians settled in an area of the Allegany Reservation located at the junction of three major intercontinental railroads. *Banner*, 238 F.3d at 1351. The junction and the settlement that arose around it became what is now the City of Salamanca in Cattaraugus County. *Id.*

Early settlers on the Allegany Reservation entered into property leases with the Seneca Nation. *Id.* Sometime before 1875, New York state courts declared the leases invalid under the Non-Intercourse Act, because they had been taken without the authorization of the federal government. *See City of Salamanca*, 27 F. Supp. at 544; *see also Buffalo, R. & P.R. Co. v. Lavery*, 27 N.Y.S. 443, 444, 75 Hun 396 (N.Y. Gen. Term 1894). The State of New York subsequently asked Congress to provide authorization for the leases by ratifying them. *City of Salamanca*, 27 F. Supp. at 544.

In 1875, Congress ratified the leases, providing that they would be valid for five years and renewable for a period not exceeding twelve years. *See* Act of Feb. 19, 1875, ch. 90, 18 Stat., pt. 3, at 330; *City of Salamanca*, 27 F. Supp. at 544. In 1890, Congress extended the lease renewal period to ninety-nine years. *See* Act of Sept. 30, 1890, ch. 1132, 26 Stat. 558; *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 544 (2d Cir. 1991).

The leases became a source of tension between the Seneca Nation, its lessees, and the state and federal governments. *See* 25 U.S.C. § 1774(a). "The average rent

on these leases was a nominal amount, between $1 and $10 annually, and did not increase over the entire 99 year term of the leases." *Banner*, 238 F.3d at 1351. Accordingly, the Seneca Nation claimed that it had been forced to accept below-market rents for the leases, and that the federal government had participated in denying the Nation fair value for the land by ratifying the leases. *See id.* at 1351-52.

3. The Seneca Nation Settlement Act

In anticipation of the expiration of the renewed leases in 1991, the State of New York began negotiating new leases with the Seneca Nation in 1969. *See Fluent*, 928 F.2d at 544. The Seneca Nation agreed to provide new 40-year leases to its lessees, with a right to renew the leases for an additional 40 years. *Id.* One of the conditions of this agreement between the Seneca Nation and New York was that New York and the federal government would pay the Seneca Nation the estimated difference between the rents that the Seneca Nation had actually received and the fair market rental value of the leases over the 99-year period. *See id.*

Congress responded by enacting the SNSA, which appropriated thirty-five million dollars to the Seneca Nation.[4] *See* 25 U.S.C. §§ 1774, 1774d(b). Release of these funds was contingent upon the Seneca Nation agreeing to offer new leases and relinquishing its claims for rental payments accrued prior to February 20, 1991. *See id.*

4. New York paid an additional twenty-five million dollars. *See Fluent*, 928 F.2d at 544.

§ 1774b. Of these funds, Congress designated thirty million dollars "to be managed, invested, and used by the [Seneca] Nation to further specific objectives of the [Seneca] Nation and its members, all as determined by the [Seneca] Nation in accordance with the Constitution and laws of the [Seneca] Nation." *Id.* § 1774d(b)(1) . The other five million dollars was "to be used for the economic and community development of the Seneca Nation." *Id.* § 1774d(b)(2)(A).

Also especially important to this case is a provision of the SNSA that permitted the Seneca Nation to acquire additional land with the funds it provided:

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

Id. § 1774f(c) (emphasis added).

The SNSA is unique in creating a mechanism for newly acquired tribal lands to be held in restricted fee. Most restricted fee lands attained this status under the allotment system of the late nineteenth and early twentieth centuries, when the federal government transferred parcels of tribal lands to individual Indians via either "trust patents" or "restricted fee patents." *See United States v. Bowling*, 256 U.S. 484, 486-87, 41 S. Ct. 561, 65 L. Ed. 1054 (1921); *see also Cohen's Handbook of Federal Indian Law* § 16.03[1] (Nell Jessup Newton ed., 2012) ("*Cohen's Handbook*"); Louis R. Moore & Michael E. Webster, 2-26 Law of Federal Oil and Gas Leases § 26.01(3) (2014). Under trust patents, title was held by the United States in trust for the allottee, while under restricted fee patents, Indians received fee title subject to restrictions on alienation imposed by the United States. *See Bowling*, 256 U.S. at 486-87; Moore & Webster, *supra* § 26.01(3). As a practical matter, the distinction between the two kinds of patents had little effect, since both types of allotments were subject to restrictions imposed by the United States. *See, e.g., Okla. Tax Comm'n v. United States*, 319 U.S. 598, 618, 63 S. Ct. 1284, 87 L. Ed. 1612 (1943) ("The power of Congress over 'trust' and 'restricted' lands is the same, and in practice the terms have been used interchangeably." (citation omitted)); *Bowling*, 256 U.S. at 487 ("As respects both classes of allotments--one as much as the other--the United States possesses a supervisory control over the land . . . .").

Although the allotment system was for the most part abandoned by 1934, *see Cohen's Handbook* § 16.03[2][c], limitations on trust lands and restricted fee lands continue to affect Indian landholding. *See, e.g.*, 25 C.F.R. § 151.2(d), (e); 43 C.F.R. § 4.201. DOI regulations, first enacted in 1980, define "[t]rust land or land in trust status" as "land the title to which is held in trust by the United States for an individual Indian or a tribe." 25 C.F.R. § 151.2(d). In contrast, "[r]estricted land or land in restricted status" is defined as follows:

> land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations.

Id. § 151.2(e).

Most newly acquired tribal lands today are held in trust by the federal government pursuant to the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461-494a.[5] *See* 25 U.S.C. § 465; *Cohen's Handbook* § 15.03;

5. Under the IRA, "[t]he Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands . . . , within or without existing reservations, . . . for the purpose of providing land for Indians." 25 U.S.C. § 465. Title to any lands acquired pursuant to the IRA "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian

see also City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 220-21, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005) (discussing this mechanism of the IRA). The IRA authorizes the Secretary of the Interior to convert fee lands owned by a tribe to trust status by accepting legal title to these lands in the name of the United States in trust for the tribe. *See Cohen's Handbook* § 15.07[1][b]; *see also* 25 U.S.C. § 465.

In contrast to the IRA, § 1774f(c) of the SNSA authorizes the Secretary of the Interior to permit the Seneca Nation to hold lands that the tribe acquires with SNSA funds in restricted fee status. *See* 25 U.S.C. § 1774f(c). As mentioned previously, the SNSA appears to be unique in this regard.

II. Factual Background to This Action

On August 18, 2002, the Seneca Nation and the State of New York executed a Nation-State Gaming Compact ("the Compact"), stating that the Seneca Nation would be permitted to establish class III gaming facilities in the City of Buffalo on lands purchased with SNSA funds. New York agreed to support the Seneca Nation "in its use of the procedure set forth in . . . 25 U.S.C. § 1774f(c), to acquire restricted fee status for [those] site[s]." J.A. 124.

Because then-Secretary of the Interior Gale A. Norton declined to approve or disapprove the Compact

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for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." *Id.*

within 45 days after it was submitted for approval, it was considered approved under IGRA as of October 25, 2002.[6] In her written statement, Secretary Norton concluded that the prohibition of gaming on after-acquired land in Section 20 of IGRA applied to restricted fee lands, but that class III gaming activities would nevertheless be permissible on the lands described in the Compact because they were "Indian lands" subject to the tribe's jurisdiction and Section 20's "settlement of a land claim" exception applied. See 25 U.S.C. §§ 2710(d)(1), 2719(b)(1)(B)(i).

On November 25, 2002, the Seneca Nation submitted a proposed class III gaming ordinance to the NIGC Chairman for approval. The proposed ordinance stated that it would permit and regulate gaming on the Seneca Nation's "Nation lands," which were equivalent to "Indian lands" as defined in IGRA, but it did not specify a particular geographic location. J.A. 241. On November 26, 2002, then-NIGC Chairman Philip N. Hogen approved the ordinance.

On October 3, 2005, the Seneca Nation purchased approximately nine acres of land in Buffalo, New York--the Buffalo Parcel. That same day, the Seneca Nation President notified the Governor of New York, the County

6. IGRA provides that "[i]f the Secretary [of the Interior] does not approve or disapprove a compact . . . before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of [IGRA]." 25 U.S.C. § 2710(d)(8)(C).

Executive of Erie County, and the Mayor of the City of Buffalo of the purchase, stating that the lands were "acquired . . . for the purposes set forth in the 'Nation-State Gaming Compact.'" J.A. 212, 216, 220.

After 30 days passed without comment, the Seneca Nation notified the Secretary of the Interior of its "compliance" with the SNSA and stated that "the Buffalo Parcel[] w[as] acquired by the Seneca Nation in order to operate Class III gaming and related facilities pursuant to the Nation-State Gaming Compact." J.A. 142. The Secretary of the Interior did not determine within 30 days after the comment period that the Buffalo Parcel should not be subject to the Non-Intercourse Act, 25 U.S.C. § 177. Accordingly, at that time, the Buffalo Parcel became "restricted fee" land by operation of the SNSA. *See* 25 U.S.C. § 1774f(c).

III. Proceedings in the District Court

A. The First Lawsuit (*CACGEC I*)

In January 2006, the plaintiffs--certain anti-gaming groups, legislators, and individual residents and owners of land in Buffalo--sued the NIGC and the DOI, challenging the approval of the ordinance. *See* Compl., *Citizens Against Casino Gambling in Erie Cty. v. Kempthorne*, No. 06-CV-001 (WMS) (W.D.N.Y. filed Jan. 3, 2006). The defendants moved to dismiss the complaint, and the plaintiffs moved for summary judgment. *See CACGEC I*, 471 F. Supp. 2d at 302.

On January 12, 2007, the district court denied the defendants' motion to dismiss the plaintiffs' claims against the NIGC, concluding that the NIGC Chairman had not determined whether the lands were subject to IGRA before approving the ordinance. *See CACGEC I*, 471 F. Supp. 2d at 303. In particular, there was no indication in the record that the NIGC Chairman had considered the location where the Seneca Nation intended to purchase land or the manner in which it intended to acquire and hold that land. *See id.* The court found that "whether Indian gaming will occur on Indian lands is a threshold jurisdictional question that the NIGC must address on ordinance review." *Id.* The court therefore vacated the ordinance approval and remanded the ordinance to the NIGC. *Id.* at 323-27.

B. The Second Lawsuit (*CACGEC II*)

After *CACGEC I*, the Seneca Nation submitted an amended class III gaming ordinance identifying the Buffalo Parcel to the NIGC. On July 2, 2007, Chairman Hogen approved the ordinance, finding that the Buffalo Parcel was eligible for gaming for the same reasons articulated by Secretary Norton.

On July 12, 2007, the plaintiffs filed a new lawsuit challenging the approval of the amended ordinance. *See* Compl., *Citizens Against Casino Gambling in Erie Cty. v. Hogen*, No. 07-CV-451 (WMS) (W.D.N.Y. filed Jul. 12, 2007). The defendants moved to dismiss the complaint, and the plaintiffs moved for summary judgment. *See CACGEC II*, 2008 U.S. Dist. LEXIS 52395, 2008 WL

2746566 at *2. The Seneca Nation appeared as *amicus curiae* in support of the defendants. *See* 2008 U.S. Dist. LEXIS 52395, [WL] at *28.

The district court agreed with the defendants that the Seneca Nation has jurisdiction over the Buffalo Parcel and that the Buffalo Parcel constitutes "Indian lands" under IGRA, 2008 U.S. Dist. LEXIS 52395, [WL] at *51, but found the NIGC's conclusion that the Buffalo Parcel was exempt from Section 20's prohibition to be arbitrary and capricious. 2008 U.S. Dist. LEXIS 52395, [WL] at *61-62. The court rejected the Seneca Nation's argument as *amicus curiae* that the prohibition does not apply to restricted fee lands,[7] *see* 2008 U.S. Dist. LEXIS 52395, [WL] at *53, and concluded that the "settlement of a land claim" exception did not apply. 2008 U.S. Dist. LEXIS 52395, [WL] at *58-61. The court therefore granted the plaintiffs' motion for summary judgment and vacated the amended ordinance. 2008 U.S. Dist. LEXIS 52395, [WL] at *62-63. The plaintiffs appealed the court's holding that the Buffalo Parcel was "Indian lands" subject to tribal jurisdiction, and the defendants cross-appealed the grant of the plaintiffs' motion for summary judgment.

C. The Third Lawsuit (*CACGEC III*)

While decision on the parties' cross-motions was pending in *CACGEC II*, the DOI promulgated final

7. In *CACGEC II*, neither the plaintiffs nor the defendants challenged Chairman Hogen's conclusion that Section 20's prohibition applies to lands held in restricted fee. *See CACGEC II*, 2008 U.S. Dist. LEXIS 52395, 2008 WL 2746566, at *53.

regulations regarding IGRA Section 20. *See* 25 C.F.R. §§ 292.1-292.26; Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354-01 (May 20, 2008). The regulations prohibit gaming on "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. The DOI explained that it specifically declined to include restricted fee lands in this definition because Section 20 "refers only to lands acquired in trust" and "[t]he omission of restricted fee from [Section 20] is considered purposeful, because Congress referred to restricted fee lands elsewhere in IGRA, including at [25 U.S.C. §§] 2719(a)(2)(A)(ii) and 2703(4)(B)." 73 Fed. Reg. at 29,355. The regulations became effective on August 25, 2008. Gaming on Trust Lands Acquired After October 17, 1988; Correction, 73 Fed. Reg. 35,579-02 (June 24, 2008).

On October 22, 2008, the Seneca Nation submitted another amended gaming ordinance to the NIGC for approval. On November 14, 2008, the NIGC requested that the DOI explain its new interpretation of Section 20 to assist the Chairman in deciding whether to approve the amended ordinance.

On January 18, 2009, the DOI responded with a Solicitor's M-Opinion.[8] The Solicitor concluded that by

8. The Solicitor of the DOI has authority over the DOI's "legal work." 43 U.S.C. § 1455. An M-Opinion is a formal legal opinion signed by the Solicitor. *See* Sam Kalen, *Changing Administrations and Environmental Guidance Documents*, 23 Nat. Res. & Env't 13, 14 (2008). "[T]he Solicitor's M-Opinions are binding on the DOI as a whole. After an M-Opinion is completed, the DOI will

its plain text Section 20 unambiguously applies only to trust lands, and that even if the phrase "in trust" was ambiguous, the DOI's interpretation was reasonable. The Solicitor concluded that, in reaching the opposite conclusion, Secretary Norton had mistakenly assumed that all off-reservation lands acquired by tribes after IGRA would automatically be subject to the restriction on alienation imposed by the Non-Intercourse Act. According to the Solicitor, off-reservation lands acquired in fee are not automatically subject to the Non-Intercourse Act in the absence of further action by the federal government.[9]

On January 20, 2009, the NIGC Chairman approved the Seneca Nation's second amended gaming ordinance. The Chairman stated that the NIGC had reexamined its position regarding the applicability of Section 20 to restricted fee lands in light of the DOI's regulations. In a 22-page letter, the Chairman detailed his analysis of whether the Buffalo Parcel was eligible for class III gaming. The Chairman concluded that the Seneca Nation

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take action consistent with the legal interpretation explained by the Solicitor." *Sims v. Ellis*, 972 F. Supp. 2d 1196, 1202 n.5 (D. Idaho 2013).

9. The plaintiffs claim that the DOI regulations regarding Section 20 and the Solicitor's M-Opinion were infected by a conflict of interest due to the involvement of a particular attorney at the DOI's Solicitor's Office. That attorney was married to a partner at a law firm that has performed lobbying work for the Seneca Nation in the past. We have considered this argument and found it to be without merit because, *inter alia*, the record does not demonstrate an actual conflict of interest that affected the regulations or the M-Opinion.

has jurisdiction over the Buffalo Parcel and that the Buffalo Parcel qualifies as "Indian lands"; adopted the DOI's position that as restricted fee land it is not subject to Section 20's prohibition; and approved the ordinance.

On March 31, 2009, the plaintiffs filed a third lawsuit, challenging the NIGC's approval of the most recent ordinance. Compl., *Citizens Against Casino Gambling in Erie Cty. v. Stevens*, No. 09-CV-291 (WMS) (W.D.N.Y. filed Mar. 31, 2009). The plaintiffs challenged the defendants' (1) determination that the Buffalo Parcel qualifies as "Indian lands" and that the Seneca Nation has jurisdiction over it, (2) interpretation of Section 20, and (3) interpretation of the "settlement of a land claim" exception. The plaintiffs also alleged that the DOI had acted arbitrarily and capriciously in promulgating its Section 20 regulations.

The defendants filed the Administrative Record of the NIGC and the DOI concerning the NIGC's January 2009 approval of the Seneca Nation's gaming ordinance with the court.

On September 20, 2012, the plaintiffs moved for summary judgment on all claims. *See CACGEC III*, 945 F. Supp. 2d at 393.

In a May 10, 2013 opinion, the district court denied the plaintiffs' motion and dismissed the case, finding that the Buffalo Parcel is eligible for class III gaming under IGRA. *Id.* at 411, 413. The district court first reaffirmed its earlier holding in *CACGEC II* that the Buffalo Parcel is subject to tribal jurisdiction and constitutes "Indian

lands." *Id.* at 400-05. As to Section 20, however, the court found that a "new and critical dispute ha[d] surfaced" because the parties no longer agreed that Section 20's prohibition applied to lands held in restricted fee.[10] *Id.* at 393. Pointing to IGRA's plain text, the district court held that Congress intended Section 20's prohibition to apply only to lands held in trust. *See id.* at 407. The court also found the agencies' interpretation of Section 20 to be reasonable, observing that the "NIGC fully considered Secretary Norton's earlier reasoning" and that "both [the] DOI and NIGC considered the body of Indian law existing at the time of IGRA's passage and thereafter." *Id.* at 408. Finally, because the Buffalo Parcel was not subject to Section 20's prohibition, the court declined to address the applicability of the "settlement of a land claim" exception and dismissed the plaintiffs' claims. *Id.* at 412-13.

The plaintiffs appealed. On September 11, 2013, the appeal of *CACGEC I*, cross-appeals of *CACGEC II*, and appeal of *CACGEC III* were consolidated.

DISCUSSION

The plaintiffs contend that the district court erred in *CACGEC III* in upholding the DOI and the NIGC's determination that the Buffalo Parcel is eligible for class III gaming and in upholding their approval of the amended gaming ordinance. The plaintiffs argue that the agencies

10. The district court concluded that its discussion of this issue in *CACGEC II* was dictum because the argument had been raised only by the *amicus curiae*. *CACGEC III*, 945 F. Supp. 2d at 406.

acted arbitrarily and capriciously, and in violation of law, in concluding (1) that the Buffalo Parcel is subject to the Seneca Nation's tribal jurisdiction, which is a prerequisite for land to be eligible for gaming under IGRA, (2) that the Buffalo Parcel qualifies as "Indian lands" as defined in IGRA, 25 U.S.C. § 2703(4), and (3) that the Parcel is not subject to Section 20's prohibition on gaming on lands acquired after IGRA's enactment.[11]

I. Standard of Review

"Under the Administrative Procedure Act [("APA"), 5 U.S.C. §§ 701-706], a [district] court may 'hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Nat. Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 96-97 (2d Cir. 2001) (ellipsis in original) (quoting 5 U.S.C. § 706(2)(A)).

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11. The parties and the district court apparently regarded the question of whether the Buffalo Parcel was subject to tribal jurisdiction to be part of the analysis of whether it qualifies as "Indian lands," as defined in IGRA, 25 U.S.C. § 2703(4). *See, e.g., CACGEC III*, 945 F. Supp. 2d at 400-05. Because we find that other provisions of IGRA--beyond the definition of "Indian lands"--expressly require a finding of tribal jurisdiction as a prerequisite to gaming, *see* 25 U.S.C. § 2710(b)(2), (d)(1)(A), we discuss the tribal jurisdiction question and the "Indian lands" question separately below. It is clear, though, from the plaintiffs' arguments before the district court and on appeal that the plaintiffs' challenge to the agencies' "Indian lands" determination includes a challenge to the agencies' determination that the Seneca Nation has jurisdiction over the Buffalo Parcel. *See* Appellants' Br. at 31-52.

> [A]gency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Nat. Res. Def. Council v. U.S. EPA, 658 F.3d 200, 215 (2d Cir. 2011) (quoting *Motor Vehicle Mfrs. Ass-n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)).

"Review under [5 U.S.C. § 706(2)(A)] is 'narrow,' limited to examining the administrative record to determine 'whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Muszynski*, 268 F.3d at 97 (second alteration in original) (quoting *City of New York v. Shalala*, 34 F.3d 1161, 1167 (2d Cir. 1994)). "This court reviews a district court's review of an agency action de novo." *Id.* at 96.

Agency actions are generally reviewable under the APA as long as (1) there has been a "final agency action," (2) the final agency action is not committed to agency discretion by law, and (3) Congress, subject to constitutional constraints, did not implicitly or explicitly preclude judicial review. *See Sharkey v. Quarantillo*, 541 F.3d 75, 87 (2d Cir. 2008). IGRA expressly provides that

"[d]ecisions made by the Commission pursuant to section[] 2710, [which includes approval of gaming ordinances,] . . . shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to [the APA]." 25 U.S.C. § 2714. Where a "final agency action" is presented for review, "intermediate actions leading up to that final action are reviewable as well." *Benzman v. Whitman*, 523 F.3d 119, 132 (2d Cir. 2008) (citing 5 U.S.C. § 704).

II. Whether the Seneca Nation Has Jurisdiction Over the Buffalo Parcel

IGRA requires that any tribe seeking to conduct gaming on land must have jurisdiction over that land. *See* 25 U.S.C. § 2710(d)(1)(A) ("Class III gaming activities shall be lawful on Indian lands only if such activities are . . . authorized by an ordinance or resolution that . . . is adopted by the governing body of the Indian tribe having jurisdiction over such lands, [and] . . . meets the requirements of subsection (b) of this section . . . ."); *id.* § 2710(b)(2) ("The Chairman [of the NIGC] shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if [certain conditions are met]."). Thus, we first address the plaintiffs' argument that the agencies erred in concluding that the Seneca Nation has jurisdiction over the Buffalo Parcel.

We begin our analysis by noting that what we refer to as "tribal jurisdiction" is a combination of tribal and federal jurisdiction over land, to the exclusion of the jurisdiction of

the state. Lands subject to federal and tribal jurisdiction have historically been referred to as "Indian country."[12] *See, e.g.*, *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1, 118 S. Ct. 948, 140 L. Ed. 2d 30 (1998); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1006 (8th Cir. 2010); *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 973 (10th Cir. 1987) (collecting cases). "[P]rimary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Venetie*, 522 U.S. at 527 n.1. Thus, "[a] state ordinarily may not regulate the property or conduct of tribes . . . in Indian country." *Cohen's Handbook* § 6.03[1][a]. "The limitation on state power in Indian country stems from the Indian commerce clause, which vests exclusive legislative authority over Indian affairs in the federal government." *Id.; see* U.S. Const. art. I, § 8, cl. 3. "This constitutional vesting of federal authority vis-à-vis the states allows tribal sovereignty to prevail in Indian country, unless Congress legislates to the contrary." *Cohen's Handbook* § 6.03[1][a]. "Because of plenary federal authority in Indian affairs, there is no room for state regulation." *Id.*

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12. The term "Indian country" is not to be confused with the term "Indian lands," which is statutorily defined in IGRA, 25 U.S.C. § 2703(4). *See id.* ("The term Indian lands' means--(A) all lands within the limits of any Indian reservation; and (B) 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 tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."). Whether the Buffalo Parcel satisfies the definition of "Indian lands" under IGRA is discussed below in Section III.

Thus, the question here is whether, through the SNSA, Congress removed the Buffalo Parcel from New York State's jurisdiction.

New York will "not have jurisdiction if [the Buffalo Parcel] . . . [is] 'Indian country.'" *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 427, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975); *see id.* at 427 & n.2; *see also Venetie*, 522 U.S. at 527 & n.1. "Indian country" is now statutorily defined as

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. Although by its terms § 1151 relates only to federal criminal jurisdiction, it has been "recognized [as] . . . appl[ying] to questions of [a tribe's] civil jurisdiction" as well. *Venetie*, 522 U.S. at 527.

The Buffalo Parcel is neither reservation land nor an allotment. Therefore, we consider whether it qualifies as a "dependent Indian communit[y]." *See* 18 U.S.C. § 1151.

Significantly, the term "dependent Indian communities" developed historically, as "[t]he entire text of § 1151(b), . . . [including] the term 'dependent Indian communities,' is taken virtually verbatim from [*United States v.] Sandoval*[, 231 U.S. 28, 46, 34 S. Ct. 1, 58 L. Ed. 107 (1913)], which language [the Supreme Court] later quoted in [*United States v.] McGowan*[, 302 U.S. 535, 538, 58 S. Ct. 286, 82 L. Ed. 410 (1938)]." *Venetie*, 522 U.S. at 530. "[T]he Historical and Revision Notes to the statute that enacted § 1151 state that § 1151's definition of Indian country is based on the latest construction of the term by the United States Supreme Court in *U.S. v. McGowan* . . . following *U.S. v. Sandoval*." *Id.* (internal quotation marks omitted).

Despite the long historical use of the term, it was explicitly defined by the Supreme Court only within the last two decades. In *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. at 527, the Supreme Court defined "dependent Indian communities" as referring to "a limited category of . . . lands . . . that satisfy two requirements--first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Id.* "The federal set-aside requirement ensures that the land in question is occupied by an 'Indian community'" and "reflects the fact that because Congress has plenary power over Indian affairs, some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country."[13] *Id.* at 531

13. We do not view the Supreme Court's reference to "land . . . *occupied* by an 'Indian community'" as requiring actual Indian

& n.6 (citation omitted). "[T]he federal superintendence requirement guarantees that the Indian community is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." *Id.* at 531. Federal superintendence has been found where "the Federal Government actively control[s] the lands in question, effectively acting as a guardian for the Indians." *Id.* at 533. The Supreme Court observed that its cases prior to the enactment of § 1151 had "relied upon a finding of both a federal set-aside and federal superintendence [to] conclud[e] that the Indian lands in question constituted Indian country and that it was permissible for the Federal Government to exercise jurisdiction over them." *Id.* at 530. The Court's definition of "dependent Indian communities" in *Venetie* was "based on [its] conclusion that in enacting § 1151, Congress codified these two requirements, which previously . . . [were] held necessary for a finding of 'Indian country' generally." *Id.* at 527.

Venetie involved an effort by the Native Village of Venetie's tribal government to impose taxes upon non-members of the tribe who were conducting business on tribally owned land. *See id.* at 525. The land had been acquired pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601-1629h. *See Venetie*,

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residency, as the plaintiffs suggest. *Venetie*, 522 U.S. at 531 (emphasis added). Rather, as discussed more fully below, we view the federal set-aside requirement as described in *Venetie* as requiring only that the federal government has set aside the land for tribal use in order to further tribal interests.

522 U.S. at 524. Under the ANCSA, Congress revoked reservation status for land that had been set aside for the tribe, provided $962.5 million in state and federal funds to newly created, state-chartered, private corporations owned by tribal members, and authorized the transfer of former reservation lands in fee simple to the private corporations. *Id.* The tribe acquired title to former reservation land after it was transferred to the private corporations. *Id.* Alaska challenged the tribe's authority to impose a tax on non-members conducting business on that land. *Id.* at 525. The district court held that the tribe lacked such authority, finding that ANCSA lands were not "dependent Indian communities" under 18 U.S.C. § 1151. *Venetie*, 522 U.S. at 525.

The Supreme Court agreed, concluding that neither the federal set-aside nor the federal superintendence requirement was met. Federal set-aside was absent because ANCSA "transferred reservation lands to private, state-chartered Native corporations, without any restraints on alienation or significant use restrictions, and with the goal of avoiding 'any permanent racially defined institutions, rights, privileges, or obligations.'" *Id.* at 532-33 (quoting 43 U.S.C. § 1601(b)). Thus, "[b]y ANCSA's very design, Native corporations c[ould] immediately convey former reservation lands to non-Natives, and such corporations [were] not restricted to using those lands for Indian purposes." *Id.* at 533.

As to the superintendence requirement, the Court concluded that ANCSA had "*ended* federal superintendence over the Tribe's lands." *Id.* (emphasis added). The Court

observed that "ANCSA revoked the Venetie Reservation . . . and Congress stated explicitly that ANCSA's settlement provisions were intended to avoid a 'lengthy wardship or trusteeship.'" *Id.* (quoting 43 U.S.C § 1601(b)). It also noted that "Congress conveyed ANCSA lands to state-chartered and state-regulated private business corporations," which was "hardly a choice that comports with a desire to retain *federal* superintendence over the land." *Id.* at 534. The Court distinguished the federal government's remaining protection of the land--which was "essentially limited to a statutory declaration that the land [was] exempt from adverse possession claims, real property taxes, and certain judgments as long as it has not been sold, leased, or developed"--from the federal involvement that existed in the Supreme Court's prior cases where superintendence was found; in those cases, "the Federal Government actively controlled the lands in question, effectively acting as a guardian for the Indians." *Id.* at 533.

We agree with the Tenth Circuit that "[s]imply put, *Venetie* held that Congress--not the courts, not the states, not the Indian tribes--gets to say what land is Indian country subject to federal jurisdiction." *Hydro Res., Inc. v. E.P.A.*, 608 F.3d 1131, 1151 (10th Cir. 2010) (en banc). In determining whether Congress has designated land as a "dependent Indian community," we consider whether the land bears the dual marks of federal set-aside and federal superintendence. The set-aside requirement ensures that the federal government designated the land to serve the interests of an "Indian community"--the tribe qua tribe--while the superintendence requirement ensures that the tribe is "dependent" on the federal government in the sense of being subject to federal control.

We conclude that the Buffalo Parcel satisfies both requirements.

First, through the SNSA, Congress demonstrated its intent that lands acquired with SNSA funds that attained restricted fee status pursuant to the SNSA be set aside for the use of the Seneca Nation. Congress limited the lands that the Seneca Nation could purchase using SNSA funds to "[l]and[s] within [the Seneca Nation's] aboriginal area in the State or situated within or near proximity to former reservation land," 25 U.S.C. § 1774f(c), reflecting its intent to enable the Seneca Nation to restore some of its lost land base in proximity to land historically occupied by the tribe. Congress also designated these lands for tribal use by directing that the SNSA funds used to purchase them be "managed, invested, and used by the [Seneca] Nation to further specific objectives of the Nation and its members, all as determined by the Nation in accordance with the Constitution and laws of the Nation." *Id.* § 1774d(b)(1); *see id.* § 1774f(c). Finally, by creating a mechanism for these lands to attain restricted fee status, Congress ensured that the tribe would maintain ownership of its restricted fee lands, through the restriction that required approval of the federal government before the lands could be transferred. *See id.* § 177. The set-aside requirement is therefore satisfied. *See Venetie*, 522 U.S. at 528 (observing that the requirements of a dependent Indian community were satisfied in *Sandoval* where "Congress had recognized the [tribe's] title to their ancestral lands by statute, . . . Executive orders had reserved additional public lands for the [tribe's] use[,] . . . [and] Congress had enacted legislation with respect to the lands . . . [that]

includ[ed] federal restrictions on the lands' alienation" (internal quotation marks omitted)). *Compare* 25 U.S.C. §§ 1774d(b)(1), 1774f(c), *with Venetie*, 522 U.S. at 533 ("Because Congress contemplated that non-Natives could own the former Venetie Reservation, and because the Tribe is free to use it for non-Indian purposes, we must conclude that the federal set-aside requirement is not met.").

Second, Congress demonstrated its intent for the Buffalo Parcel to be subject to federal superintendence by providing for federal control in both the process by which the Parcel attained restricted fee status and in limiting the alienability of this land once it attained restricted fee status. The SNSA provides that lands acquired by the Seneca Nation may be made subject to the Non-Intercourse Act unless the Secretary decides otherwise. *See* 25 U.S.C. § 1774f(c). Thus, lands purchased using SNSA funds are not automatically subject to a restriction against alienation. Rather, only after a period of comment by state and local governments and a determination by the Secretary do the lands become subject to the Non-Intercourse Act. *See id.* Land therefore attains restricted fee status only if the Secretary declines to exercise his or her power to prevent the land from doing so. In allowing lands to pass into restricted fee status, the Secretary decides to take responsibility for those lands "to prevent unfair, improvident or improper disposition by [the Seneca Nation] . . . [and] to vacate any disposition of their lands made without [the federal government's] consent." *Tuscarora Indian Nation*, 362 U.S. at 119. Once the lands become subject to the Non-Intercourse Act, there

is no limit on how long the restriction against alienation will remain in effect; the lands continue to be held in restricted fee absent action by the federal government. *See* 25 U.S.C. §§ 177, 1774f(c). Accordingly, by creating this process in the SNSA, Congress demonstrated its intent to "actively control[] the lands in question, effectively acting as a guardian for the [Seneca Nation]"--hallmarks of federal superintendence. *Venetie*, 522 U.S. at 533. *Compare* 25 U.S.C. § 1774f(c), *with Venetie*, 522 U.S. at 533-34 (holding that in ANCSA Congress ended federal superintendence over the tribe's lands by revoking the lands' reservation status, conveying the lands to private business corporations, and specifying that the ANCSA's provisions "were intended to avoid a 'lengthy wardship or trusteeship'" (quoting 43 U.S.C. § 1601(b))).

Thus, we conclude that Congress--through the SNSA--set aside the Buffalo Parcel for the Seneca Nation's use in order to further tribal interests and provided that the Parcel would be subject to federal superintendence. Because these dual requirements are met, the Seneca Nation has jurisdiction over this land, and New York has therefore been divested of its jurisdiction.

Congress's intent that the Buffalo Parcel be subject to the tribe's jurisdiction is also apparent from the similarities between § 1774f(c) of the SNSA and § 465 of the IRA. The plaintiffs do not dispute that lands that are taken into trust under the IRA are subject to tribal jurisdiction. *See City of Sherrill*, 544 U.S. at 220-21.[14] Such

14. The plaintiffs argue that *City of Sherrill* holds that the IRA is the sole means for a tribe to establish jurisdiction over off-reservation fee lands. In *City of Sherrill*, the Supreme Court

lands bear the marks of both federal set-aside and federal superintendence. *See Buzzard v. Okla. Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir. 1993); s*ee also Narragansett Indian Tribe of R.I. v. Narragansett Elec. Co.*, 89 F.3d 908, 920-21 (1st Cir. 1996). For land to attain trust status under the IRA, the Secretary of the Interior must consider, among other things, "the Indian's need for the land, and the purposes for which the land will be used" and then decide to take the land in trust. *Buzzard*, 992 F.2d at 1076 (citation omitted); *see also* 25 C.F.R. §§ 151.2, 151.9, 151.10, 151.11. In doing so, the federal government takes action indicating that the land is designated for Indian use. *See Buzzard*, 992 F.2d at 1076. The federal set-aside requirement is therefore fulfilled. *See id.*

The federal superintendence requirement is satisfied as well because the federal government is actively involved in the land when it decides to take it in trust. *See id.* The Secretary considers several factors, including the impact of removing the land from the state tax rolls and

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held that the Oneida Indians could not *unilaterally* revive tribal sovereignty over lands that had been subject to state jurisdiction for over two hundred years. 544 U.S. at 202-03. The Court noted that the tribe had a congressionally authorized avenue available to it to restore jurisdiction--the IRA. *See id.* at 220-21. But the Supreme Court did not state that this was the *only* avenue. In the SNSA, Congress provided a mechanism comparable to the IRA through which the Seneca Nation could attain jurisdiction over lands purchased with SNSA funds. Accordingly, the Seneca Nation did not unilaterally assert jurisdiction over the Buffalo Parcel; the land became subject to tribal jurisdiction pursuant to an express act of Congress and approval of the Secretary when she allowed it to pass into restricted fee.

the jurisdictional problems that might arise, prior to taking the land in trust. *See id.* (citing 25 C.F.R. § 151.10). Once the Secretary decides to take the land in trust, the Secretary holds title as trustee, demonstrating that the federal government "is prepared to exert jurisdiction over the land." *Id.*

The SNSA's restricted fee mechanism bears analogous marks of federal set-aside and federal superintendence, and the obvious similarities between the IRA and the SNSA demonstrate congressional intent for the SNSA to have similar jurisdictional effects. Like the IRA, the SNSA provides the Secretary with discretion to determine whether lands held by tribes in fee should be taken into restricted fee. *Compare* 25 U.S.C. § 1774f(c), *with id.* § 465. As a critical step in this process, the SNSA requires the Seneca Nation or the Secretary of the Interior to first notify state and local governments of the acquisition of lands under the SNSA. *Id.* § 1774f(c). Likewise, after a tribe requests trust status under the IRA, the Secretary is directed to notify state and local governments having regulatory jurisdiction over the lands to be acquired. *See* 25 C.F.R. § 151.10. Under both statutes, states and local governments then have a thirty-day period after notification to comment. *Compare* 25 U.S.C. § 1774f(c), *with* 25 C.F.R. § 151.10. Following this comment period, the Secretary has an additional period to determine whether the land should pass into restricted fee (under the SNSA) or be held in trust (under the IRA). *Compare* 25 U.S.C. § 1774f(c), *with* 25 C.F.R. §§ 151.11, 151.12. The SNSA, like the IRA, therefore anticipates the jurisdictional tensions between the federal government,

the tribe, and the state, and provides the Secretary with discretion, after considering the state's concerns, to determine the jurisdictional ramifications of conferring this new status on the lands. *Cf. City of Sherrill*, 544 U.S. at 220 (describing the IRA as "a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well-being"). If the Secretary permits the land to pass into restricted fee or to be held in trust, then the land is used for tribal purposes and may not be transferred or disposed of without further action by the Federal Government. *See* 25 U.S.C. §§ 465, 1774f(c); *Cohen's Handbook* § 15.03, 15.07[1].

We recognize that neither the text of the IRA nor that of the SNSA explicitly states that lands that pass from fee to trust or restricted fee status are subject to tribal jurisdiction. The IRA states that lands taken into trust "shall be exempt from State and local taxation." 25 U.S.C. § 465. In similar language, the SNSA provides that lands may attain restricted fee status after a period of comment on the impact of "removal of such lands from real property tax rolls of State political subdivisions." *Id.* § 1774f(c). But, "[r]ather than reading the omission of a provision exempting the lands from state regulation as evidencing a congressional intent to allow state regulation," courts construing the IRA have instead read "the omission as indicating 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." *Santa Rosa Band of Indians v. Kings Cty.*,

532 F.2d 655, 666 n.17 (9th Cir. 1975); *see also Chase v. McMasters*, 573 F.2d 1011, 1018 (8th Cir. 1978); *City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 166 (D.D.C. 1980). We conclude that Congress intended this language to be interpreted the same way when used in the context of a closely related Indian law concept--restricted fee--in the SNSA.[15] *See United States v. Johnson*, 14 F.3d 766, 770 (2d Cir. 1994) (holding that "[t]he fact that Congress chose to adopt . . . substantially identical language [in a new statute] . . . bespeaks an intention to import the established . . . interpretation of [the existing language]

15. This reading is also consistent with a long history of courts and Congress treating lands held in trust and those held in restricted fee identically for jurisdictional purposes. In the context of jurisdiction over allotments, the Supreme Court has held that there is no difference between trust lands and restricted fee lands, observing that "[i]n practical effect, the control of Congress . . . is the same." *United States v. Ramsey*, 271 U.S. 467, 471, 46 S. Ct. 559, 70 L. Ed. 1039 (1926). Congress has also treated trust lands and restricted fee lands as equally subject to a number of federal controls. *See, e.g.*, 25 U.S.C. §§ 323 (Secretary's authority to grant rights-of-way), 407d (Secretary's authority to charge purchasers of timber for special services), 483a (individual Indian's power to execute mortgage or trust deed subject to approval by the Secretary), 1321 (limitation on tribe's ability to consent to state jurisdiction for certain criminal offenses), 1322 (same as to civil jurisdiction). Federal control over restricted fee lands is reflected in the DOI's implementing regulations as well. *See, e.g.*, 25 C.F.R. § 1.4(a) ("[N]one of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property . . . shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.").

into the new statute"); *Air Transp. Ass'n of Am. (ATA) v. Prof'l Air Traffic Controllers Org. (PATCO)*, 667 F.2d 316, 321 (2d Cir. 1981) (stating that courts "can presume that Congress is aware of settled judicial constructions of existing law").

For the foregoing reasons, we hold that Congress intended lands purchased with SNSA funds and held in restricted fee to be subject to the Seneca Nation's tribal jurisdiction. We therefore affirm the district court's holding that the Buffalo Parcel is subject to tribal jurisdiction, as required by IGRA.

III. Whether the Buffalo Parcel is "Indian Lands" under IGRA, 25 U.S.C. § 2703(4)(B)

The plaintiffs next argue that the district court erred in upholding the DOI and the NIGC's conclusion that the Buffalo Parcel is "Indian lands" as defined in IGRA, 25 U.S.C. § 2703(4)(B), another prerequisite for lands to be eligible for gaming. *See id.* § 2710(d)(1). For non-reservation lands, IGRA defines "Indian lands" as "lands [1] title to which is either held in trust by the United States for the benefit of any Indian tribe . . . or held by any Indian tribe . . . subject to restriction by the United States against alienation and [2] over which an Indian tribe exercises governmental power." *Id.* § 2703(4)(B). Both parties acknowledge that the Seneca Nation holds the Buffalo Parcel in restricted fee.

The plaintiffs argue in a footnote of their reply brief that the Buffalo Parcel is not "Indian lands" under IGRA because the Seneca Nation has not exercised governmental power over it. The plaintiffs claim that the Seneca Nation

has "at best . . . exercise[d] the trappings of commercial ownership" on this land. Appellants' Reply Br. at 7 n.6. This is insufficient to raise the argument on appeal. *Cf. Gross v. Rell*, 585 F.3d 72, 95 (2d Cir. 2009) ("Merely mentioning the relevant issue . . . is not enough; issues not sufficiently argued are in general deemed waived and will not be considered on appeal." (internal quotation marks omitted)).

Moreover, in approving the most recent ordinance prior to *CACGEC III*, the NIGC Chairman concluded that the Seneca Nation had exercised governmental power over the Buffalo Parcel since 2005 by policing the land with its own Marshal's Office, fencing the land, posting signs stating that the Buffalo Parcel is subject to the Seneca Nation's jurisdiction, and enacting ordinances and resolutions applying Seneca law to this land. The plaintiffs did not challenge this aspect of the NIGC's determination in their complaint in *CACGEC III*, and they have not cited any authority demonstrating that this determination was arbitrary and capricious, an abuse of discretion, or otherwise in violation of law. Thus, we conclude that the district court did not err in upholding the agencies' determination that the Buffalo Parcel is "Indian lands" within the meaning of IGRA.

IV. Whether IGRA Section 20's Prohibition Applies to the Buffalo Parcel

Finally, the plaintiffs argue that, even if the Buffalo Parcel is "Indian lands" and subject to tribal jurisdiction, it is nonetheless ineligible for class III gaming because IGRA Section 20's prohibition applies. The plaintiffs

claim that the district court erred in *CACGEC III* by accepting the DOI and the NIGC's conclusion that Section 20 does not apply to lands held in restricted fee, and thus not to the Buffalo Parcel. The plaintiffs argue that this interpretation was arbitrary and capricious and an abuse of discretion because it undermines congressional intent to limit gaming on lands acquired after IGRA's enactment.

Section 20 prohibits gaming on "lands acquired *by the Secretary in trust* for the benefit of an Indian tribe after [the date of IGRA's enactment]." 25 U.S.C. § 2719(a) (emphasis added). The plain text of Section 20 therefore refers only to trust lands acquired by the Secretary, not to lands held in restricted fee by a tribe.[16] "When the words of a statute are unambiguous, . . . 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S. Ct. 698, 66 L. Ed. 2d 633 (1981)); *see also United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981).

Other principles of statutory construction confirm this plain text reading. The concept of lands being held by the Secretary in trust has a long history and well-established

16. The statute uses this "trust" language again in enumerating the exceptions to Section 20's prohibition. *See* 25 U.S.C. § 2719(b)(1)(B) ("Subsection (a) of this section will not apply when . . . lands are *taken into trust* as part of--(i) a settlement of a land claim, (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition." (emphasis added)).

meaning in Indian law. *See Cohen's Handbook* § 15.03. "It is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken." *Air Wis. Airlines Corp. v. Hoeper*, 134 S. Ct. 852, 861-62, 187 L. Ed. 2d 744 (2014) (internal quotation marks omitted). The terms "trust lands" and "restricted lands" were already defined and distinguished from one another in DOI regulations in effect at the time of IGRA's enactment. *See* 25 C.F.R. § 151.2(d), (e); *see also* Land Acquisitions, 45 Fed. Reg. 62,034, 62,036 (Sept. 18, 1980). We presume that Congress was familiar with the regulatory definition of these terms when enacting IGRA because Congress is "aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990).

Congress's awareness of the distinction between trust lands and restricted fee lands is also explicit in the text of IGRA itself. Congress referred both to lands held by the Secretary "in trust" and to lands held "subject to restriction by the United States against alienation" at other points in IGRA, most notably in the definition of "Indian lands." 25 U.S.C. § 2703(4). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) (internal quotation marks omitted). We therefore read Section 20's reference to trust lands, and exclusion of any reference to restricted fee lands, as intentionally confining Section 20's application to trust lands.

This interpretation comports with another principle of statutory construction as well: "In construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." *Comm'r v. Clark*, 489 U.S. 726, 739, 109 S. Ct. 1455, 103 L. Ed. 2d 753 (1989). In IGRA, Congress embodied its policy of "provid[ing] . . . for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Section 20 is an exception to that general policy. A narrow reading of Section 20 therefore accords with Congress's intent to promote tribal interests through gaming. *See Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Att'y for W. Dist. of Mich.*, 369 F.3d 960, 971 (6th Cir. 2004) ("[T]he only evidence of intent strongly suggests that the thrust of the IGRA is to promote Indian gaming, not to limit it. Although [Section 20] creates a presumptive bar against casino-style gaming on Indian lands acquired after the enactment of the IGRA, that bar should be construed narrowly . . . in order to be consistent with the purpose of the IGRA, which is to encourage gaming." (citation omitted)). This reading is also consistent with the congressional policy underlying the SNSA of "promot[ing] economic self-sufficiency for the Seneca Nation and its members." 25 U.S.C. § 1774(b)(6).

Finally, the Supreme Court has directed that "'statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'" *Bryan v. Itasca Cty.*, 426 U.S. 373, 392, 96 S. Ct. 2102, 48 L. Ed. 2d 710

(1976) (quoting *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89, 39 S. Ct. 40, 63 L. Ed. 138, 4 Alaska Fed. 709 (1918)). The explicit policy underlying IGRA was to benefit tribes by helping them to achieve self-sufficiency and to grow economically. *See* 25 U.S.C. § 2702(1). We therefore conclude that because the Buffalo Parcel was not "acquired by the Secretary" and is not held "in trust," Section 20's prohibition does not apply.

The plaintiffs claim that the absence of a reference to restricted-fee lands in the text of Section 20 simply reflects that there was no mechanism prior to the SNSA for after-acquired lands to attain restricted fee status, and Congress--had it foreseen such a development at the time--would have intended such lands to be subject to Section 20 as well. But we are not permitted to disregard the plain text of the statute or the reading that follows from well-established principles of statutory construction. Moreover, Congress was aware of IGRA at the time it enacted the SNSA. *Cf. Miles*, 498 U.S. at 32. When it decided to provide for restricted fee lands, Congress had the power also to prohibit gaming on those lands. Congress could have prohibited gaming in the SNSA itself, as it had done before in other Indian legislation. *See, e.g.*, 25 U.S.C. § 1708(b) (stating, in the Rhode Island Indian Claims Settlement Act, that "for purposes of the Indian Gaming Regulatory Act . . . , settlement lands shall not be treated as Indian lands"). Alternatively, Congress could have amended Section 20 of IGRA to account for after-acquired restricted fee lands at the same time that it enacted the SNSA. Congress, however, chose to do neither. There is therefore no indication that Congress intended lands that pass into restricted fee pursuant to the SNSA to be subject to Section 20 of IGRA.

For these reasons, we hold that the Buffalo Parcel is not subject to Section 20's gaming prohibition. We therefore affirm the district court's decision in *CACGEC III* and hold that neither the DOI nor the NIGC acted arbitrarily or capriciously, abused their discretion, or acted in violation of law in concluding that Section 20 did not apply to the Buffalo Parcel. Because we uphold the NIGC's approval of the Seneca Nation's most recent gaming ordinance, and that ordinance superseded the ordinances at issue in *CACGEC I* and *CACGEC II*, we conclude that the appeals and cross-appeal[17] of those earlier decisions are moot.

CONCLUSION

The district court in *CACGEC III* correctly dismissed the plaintiffs' complaint because the DOI and the NIGC's determination that the Buffalo Parcel is eligible for class III gaming under IGRA was not arbitrary or capricious, an abuse of discretion, or in violation of law. Congress intended lands that attain restricted fee status under the SNSA to be subject to tribal jurisdiction, as required by IGRA. Finally, IGRA Section 20's prohibition of gaming

17. The defendants cross-appealed the district court's grant of summary judgment in *CACGEC II*, including the court's determination that the "settlement of a land claim" exception did not apply to the Buffalo Parcel. The defendants conceded at oral argument that we need not reach this issue if we conclude that Section 20's prohibition does not apply to restricted-fee lands. Because we hold that the Buffalo Parcel is not subject to Section 20, there is no need to address the applicability of the "settlement of a land claim" exception.

on trust lands acquired after IGRA's enactment does not apply to the Buffalo Parcel. Because the gaming ordinances at issue in *CACGEC I* and *CACGEC II* have been superseded by the most recent amended ordinance at issue in *CACGEC III*, the appeals of *CACGEC I* and *CACGEC II* are moot. The court has considered the plaintiffs' other arguments and found them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court in *CACGEC III* and dismiss the appeals of *CACGEC I* and *CACGEC II*.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK, FILED MAY 10, 2013

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

09-CV-291S

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY (Joel Rose and Robert Heffern, as Co-Chairpersons), REV. G. STANFORD BRATTON, D. MIN., NETWORK OF RELIGIOUS COMMUNITIES, NATIONAL COALITION AGAINST GAMBLING EXPANSION, PRESERVATION COALITION OF ERIE COUNTY, INC., COALITION AGAINST GAMBLING IN NEW YORK—ACTION, INC., THE CAMPAIGN FOR BUFFALO—HISTORY ARCHITECTURE AND CULTURE, ASSEMBLYMAN SAM HOYT, MARIA WHYTE, Erie County Legislator, JOHN MCKENDRY, SHELLEY MCKENDRY, DOMINIC J. CARBONE, GEOFFREY D. BUTLER, ELIZABETH F. BARRETT, JULIE CLEARY, ERIN C. DAVISON, ALICE E. PATTON, MAUREEN C. SCHAEFFER, DORA RICHARDSON, and JOSEPHINE RUSH,

Plaintiffs,

v.

Appendix B

TRACIE STEVENS,[1] in her Official Capacity as Chairwoman of the National Indian Gaming Commission, the NATIONAL INDIAN GAMING COMMISSION, the UNITED STATES DEPARTMENT OF THE INTERIOR, KEN SALAZAR, in his Official Capacity as the Secretary of the Interior, and BARACK OBAMA, in his Official Capacity as President of the United States,

Defendants.

May 10, 2013, Decided
May 10, 2013, Filed

DECISION AND ORDER

I. INTRODUCTION

On March 31, 2009, Plaintiffs commenced this action challenging the legality of a gambling casino operated by the Seneca Nation of Indians ("SNI") in the city of Buffalo (the "Buffalo Parcel"). Their Motion for Summary Judgment, now before the Court, has been fully briefed by the parties and by *amicus* SNI.

This action is the third lawsuit commenced by largely the same plaintiffs, who have sought the same relief in their successive suits—*i.e.*, a declaration that Indian gaming in

1. Pursuant to Fed. R. Civ. P. 25(d), Tracie Stevens is substituted for Philip N. Hogen as the National Indian Gaming Commission's Chairperson.

Buffalo is unlawful. Each lawsuit alleges violations of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702 *et seq*., and in each, the plaintiffs have claimed that certain decisions and actions by the defendants were arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

To persons familiar with these serial actions, many of the facts and legal principles discussed below will have a familiar ring; they relate to disputes addressed in prior cases. To the extent new arguments and authority are presented in support of ongoing disputes, those matters are addressed herein. In addition, one new and critical dispute has surfaced regarding the National Indian Gaming Commission's ("NIGC") approval of the SNI's new gaming ordinance. Whereas the parties had agreed in prior suits that the SNI's Buffalo Parcel is subject to an IGRA prohibition against gaming on land acquired after October 17, 1988, that is no longer the case. Defendants have revisited their interpretation of the statute, and now conclude that the IGRA prohibition does not apply to the Buffalo Parcel. Because the Court agrees that Defendants' revised interpretation comports with Congress's clear intent, Plaintiffs' motion is denied in its entirety, and this case is dismissed.

II. BACKGROUND

A. The Relevant Statutory Provisions

Two statutes have been central to plaintiffs' claims—the Indian Gaming Regulatory Act ("IGRA"), under which

gaming eligibility determinations are made, and the Seneca Nation Settlement Act of 1990 ("SNSA"), which permitted the SNI to acquire land to be held in restricted fee status. A discussion of the relevant provisions of each, in the context of the factual background of this case, is warranted.

1. *The IGRA*

Congress enacted IGRA in 1988 to establish a comprehensive statutory scheme governing gambling on Indian lands. 25 U.S.C. §§ 2701-2721.[2] IGRA "seeks to balance the competing sovereign interests of the federal government, state governments and Indian tribes, by giving each a role in the regulatory scheme." *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002), *aff'd*, 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 543 U.S. 815, 125 S. Ct. 51, 160 L. Ed. 2d 20 (2004).

The statute provides for three classes of gaming on Indian land, each of which is subject to a different level of regulation. § 2710. The SNI has repeatedly sought to conduct class III gaming on the Buffalo Parcel. This is the "most heavily regulated and most controversial form of gambling" under IGRA, *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003), and includes, *inter alia*, slot machines, games such as baccarat, blackjack, roulette, and craps, and sport betting, parimutuel wagering and lotteries, § 2703(8) and (7)(B); 25 C.F.R. § 502.4. For class III gaming to be lawful: (1) the

2. Unless otherwise noted, all subsequent statutory citations are to Title 25 of the United States Code.

governing body of the tribe having jurisdiction over the "Indian land" on which it wishes to conduct its gambling operation must authorize class III gaming by adopting an "ordinance" or resolution; (2) the Chairman of the National Indian Gaming Commission ("NIGC" or "Commission") must approve the ordinance; (3) the state in which the "Indian land" is located must permit such gaming; and (4) the gaming must be conducted in conformance with a "tribal-state compact" that regulates such gaming. § 2710(d)(1).

In this case, as in the preceding cases, Plaintiffs maintain that the SNI does not have jurisdiction over the Buffalo Parcel; even if it does, the Parcel is subject to a statutory prohibition against gaming; and the Parcel does not fall within any exception to that prohibition. Two IGRA provisions are at the core of this dispute. First is the statute's definition of Indian lands as:

> (A) all lands within the limits of any Indian reservation; and
> (B) 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 tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.*

§ 2703(4) (emphasis supplied). Next is section 20 of IGRA,[3] which provides, in pertinent part:

3. Codified at § 2719.

Appendix B

Gaming on lands acquired after October 17, 1988.

(a) **Prohibition on lands acquired in trust by Secretary.** Except as provided in subsection (b), 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 the date of enactment of this Act [enacted Oct. 17, 1988] unless— . . .

(b) **Exceptions.**

(1) Subsection (a) will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

In its suits, the plaintiffs have challenged the applicability of these provisions to the Buffalo Parcel, which the SNI purchased in 2005 with funds it received through the Seneca Nation Settlement Act of 1990.

2. *The SNSA*

For more than a century prior to SNSA's enactment, the SNI had leased land on its Allegany Reservation[4] to non-Indians. § 1774(a)(2)(A) and (B). The leases were primarily concentrated near railroad lines in the city of Salamanca and nearby villages. §§ 1774(a)(1) and 1774a(10). Prior to the SNSA's passage, the bulk of these land leases were for a term of ninety-nine years and were set to expire on February 19, 1991. §§ 1774(a)(2)(C) and (4).

In 1969, the New York State legislature created the Salamanca Indian Lease Authority ("SILA") as a public benefit corporation authorized to negotiate and enter into a new lease with the SNI for all leased reservation lands underlying the city. N.Y. Pub. Auth. Law §§ 1790-99. Approximately twenty years of lease negotiations ensued, and finally concluded in May 1990. Fluent v. Salamanca Indian Lease Authority, 847 F. Supp. 1046, 1049-50 (W.D.N.Y. 1994). A condition of the lease renewal agreement was that the federal and state governments agree to pay to the SNI a total of $60 million, an amount believed to approximate the difference between the rents the SNI had actually received over the previous 99 years

4. The SNI has three reservation areas in western New York State, Allegany, Cattaraugus, and Oil Spring. § 1774a(7).

and the fair market rental value of the leased land over that same time period. The federal government was asked to pay $35 million, and the state government $25 million. *Id.* at 1050; *see also*, S. REP. NO. 101-511, at 23 (1990). Both governments agreed to do so, and Congress passed "An Act to provide for the renegotiation of certain leases of the Seneca Nation, and for other purposes," 104 Stat. 1292 (1990), to which it assigned the short title "Seneca Nation Settlement Act of 1990."

The SNSA requires that the SNI use five million dollars of the United States' payment for economic and community development. *Id.* § 1774d(b)(2). The bulk of the payment—$30,000,000—was to be "managed, invested, and used . . . as determined by the Nation in accordance with [its] Constitution and laws . . . ." *Id.* § 1774d(b)(1). The SNSA permits the SNI to acquire with SNSA funds land that is "within its aboriginal area in the State [of New York] or situated within or near proximity to former reservation land." *Id.* § 1774f(c) (alteration added).

> State and local governments shall have a period of 30 days after notification by the Secretary or the Seneca Nation of acquisition of, or intent to acquire such lands to comment on the impact of the removal of such lands from real property tax rolls of State political subdivisions. Unless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of section 2116 of the Revised Statutes (25 U.S.C. 177), such lands shall be subject to the provisions of that

> Act and shall be held in restricted fee status by the Seneca Nation. Based on the proximity of the land acquired to the Seneca Nation's reservations, land acquired may become a part of and expand the boundaries of the Allegany Reservation, the Cattaraugus Reservation, or the Oil Spring Reservation in accordance with the procedures established by the Secretary for this purpose.

Id. Land that is held in restricted fee status cannot be sold, leased, or otherwise conveyed without the approval of the federal government. § 177.

3. *Intersection of the IGRA and SNSA*

On August 18, 2002, the SNI and the State of New York executed a Tribal-State Gaming Compact (the "Compact") for the conduct of class III gaming at three locations in New York State, one of which was a then-unidentified site to be purchased in the city of Buffalo. The Compact reflects the SNI's intent to use funds it received under SNSA to purchase that land.

Once signed, gaming compacts are forwarded to the Interior Secretary, who may approve, disapprove or take no action on it. § 2710(d)(8). "If the Secretary does not approve or disapprove a compact [within] 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with [IGRA]." § 2710(d)(8)(C).

In this particular instance, the Compact was deemed approved by virtue of then-Secretary Norton's decision not to approve or disapprove it. In a letter to the SNI, Norton opined that land to be purchased with SNSA funds would be "Indian lands" within the meaning of IGRA, and would fall within the "settlement of a land claim" exception to IGRA's general prohibition on gaming on lands acquired after 1988. (Docket No. 58-21 at 6-7.) The Secretary nonetheless declined to affirmatively approve the Compact because of policy concerns over its likely impact on the proliferation of off-reservation gaming development. (*Id*. at 2.) The SNI went on to purchase the Buffalo Parcel, consisting of approximately 9 acres, in October 2005. It gave notice to the State of New York and local governments in accordance with §1774f(c), and the Parcel assumed restricted fee status by operation of law on December 2, 2005.

B. Procedural Background

1. *The Prior Lawsuits*

The plaintiffs' first lawsuit, filed in January 2006, challenged former-Secretary Norton's conclusions that the Buffalo Parcel was "Indian lands" which fell within the "settlement of a land claim" exception, and also the NIGC Chairman's 2002 decision to approve the SNI's ordinance. *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 06-CV-00001-WMS (*CACGEC I*). In January 2007, the Court found no indication in the record that the NIGC Chairman had considered the threshold jurisdictional question of whether a future land purchase made with SNSA funds would be gaming-eligible

Indian lands.[5] The Court vacated the NIGC Chairman's decision to approve the SNI's gaming ordinance, and remanded so that NIGC could address whether the Buffalo Parcel is gaming-eligible Indian land under IGRA. 471 F. Supp. 2d 295, 326-27 (W.D.N.Y. 2007), *amended in part on reconsideration*, 2007 U.S. Dist. LEXIS 29561 (W.D.N.Y. Apr. 20, 2007).

Thereafter, in July 2007, the Chairman concluded that the Buffalo Parcel is gaming eligible Indian land, and he approved an amended ordinance the SNI had enacted on June 9, 2007. The plaintiffs commenced their second lawsuit on July 12, 2007, urging that the Buffalo Parcel is not "Indian country" over which the SNI has jurisdiction and, even if it were, the Parcel does not fall within the settlement of a land claim exception to the general prohibition against gaming on newly acquired land. *Citizens Against Casino Gambling in Erie County v. Hogen*, 07-CV-00451-WMS (*CACGEC II*). Here, the Court concluded the Buffalo Parcel is Indian country, but is not gaming eligible land.[6] Therefore, it again vacated the NIGC Chairman's approval of the SNI's ordinance. 2008 U.S. Dist. LEXIS 52395, at *209 (W.D.N.Y. July 8, 2008).[7]

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5. There was no indication in the administrative record that the Chairman was aware of and considered Secretary Norton's 2002 opinion in this regard, or that he independently took up the question.

6. As noted, the parties agreed, in *CACGEC II*, that land purchased after 1988 and held in restricted fee status was subject to the section 20 prohibition on gaming.

7. Both *CACGEC I* and *CACGEC II* are with the Second Circuit on appeal. Defendants moved to stay the appeals until

2. *The IGRA Regulatory Process*

IGRA provides that NIGC "shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of [25 U.S.C. §§ 2701-19]." §2706(b)(10). In 1992 and 1993, the Commission published regulations establishing certain definitions, requirements, and procedures relative to the conduct of gaming under IGRA.[8] 25 C.F.R. Chapter III, Parts 501-99.

Several years later, in 2000, the Bureau of Indian Affairs ("BIA") published a proposed rule to establish "procedures an Indian tribe must follow in seeking a Secretarial determination [under § 2719(b)(1)(A)]" that a gaming establishment on newly acquired land would be in the best interest of the tribe and its members, and would not be detrimental to the surrounding community. 65 Fed. Reg. 55471 (Aug. 25, 2000). Comments on the proposed rule were permitted until November 13, 2000, and later reopened and extended until March 27, 2002. 66 Fed. Reg. 66847 (Dec. 27, 2001); 67 Fed. Reg. 3846 (Jan. 28, 2002). Thereafter, the proposal lay dormant for several years.

On October 5, 2006, the BIA published an amended proposed rule, with the expanded purpose of setting out "procedures that the Department of the Interior will use to determine whether class II or class III gaming can

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final judgment is entered in the current action. That motion was granted on March 12, 2010.

8. 57 Fed. Reg. 12382 (Apr. 9, 1992) (definitions); 58 Fed. Reg. 5802, 5818 (Jan. 22, 1993) (requirements and procedures).

occur on land acquired in trust for an Indian tribe after October 17, 1988." 71 Fed. Reg. 58769, 58772 (Oct. 5, 2006). The BIA explained it was "publishing a new proposed rule because [it] determined that the rule should address not only the exception contained in Section 20(b)(1)(A) of IGRA (Secretarial Determination), but also the other exceptions contained in Section 20 [*i.e.*, settlement of a land claim, initial reservation, and restored lands], in order to explain to the public how the Department interprets these exceptions." *Id.* at 58770. The deadline for comments was twice extended and expired on February 1, 2007. 71 Fed. Reg. 70335 (Dec. 4, 2006); 72 Fed. Reg. 1954 (Jan. 17, 2007). The final rule was published on May 20, 2008, and took effect on August 25, 2008. 73 Fed. Reg. 29354 (May 20, 2008); 73 Fed. Reg. 35579 (June 24, 2008). The final regulations reflect DOI's revised interpretation of IGRA's section 20.

3. *The Instant Lawsuit*

After *CACGEC II* was decided and the new regulations became effective, the SNI submitted to NIGC a second amended gaming ordinance for the Buffalo Parcel. In a letter dated November 14, 2008, NIGC's Acting General Counsel advised DOI of the submission and made the following request:

> We understand that DOI believes the new interpretation [of section 2719] complies with the plain meaning of the statute and agree with that position. However, if the Chairman is to approve the Nation's gaming ordinance

> on the grounds that section 2719 does not apply to restricted fee land, he must provide a reasoned analysis for this new interpretation. A description of DOI's policy reasons for the change will assist the Chairman in providing that analysis.

(Docket No. 58-38, BIA-AR000034.) In response, DOI forwarded to NIGC a Solicitor's M-Opinion, M-37023, dated January 18, 2009, which acknowledged that the new regulations were a departure from the DOI's prior position on restricted fee lands, and discussed reasons for that change of position. (Docket No. 58-8.) Two days later, on January 20, 2009, the NIGC Chairman approved the SNI's ordinance, affirming "NIGC's intent to follow the regulations, including the interpretation that excludes restricted lands from the general prohibition of gaming on after acquired lands." (Docket No. 58-4 at 5.) The Chairman went on to conclude that the Buffalo Parcel, held in restricted fee, is not subject to section 20's after-acquired land prohibition at all and, even if it were, the Buffalo Parcel was acquired as part of the settlement of a land claim and would be excepted from the prohibition. (Docket No. 58-4.)

The instant lawsuit followed, and Plaintiffs challenge the Buffalo Parcel's status as Indian lands, the validity of the new regulations, and the NIGC's ordinance approval. In their three claims for relief, Plaintiffs maintain that: 1) the Parcel is not Indian country and does not fall within IGRA's definition of Indian lands; 2) even if it were Indian land, it is subject to IGRA's prohibition against gambling

on newly acquired land; and 3) the Parcel's acquisition does not qualify for the settlement of a land claim exception.

On June 15, 2009, Defendants moved to dismiss the first claim, which Plaintiffs supported by way of three discrete arguments. On March 30, 2010, the Court granted Defendants' motion in part.[9] Thereafter, Defendants answered the remaining claims and filed certified administrative records from NIGC and DOI.

III. DISCUSSION

A. Applicable Legal Standards

1. *The Summary Judgment Standard*

When deciding a motion for summary judgment under Rule 56, the court must draw all justifiable inferences from the record in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Vann v. City of New York*, 72 F.3d 1040, 1048-49 (2d Cir. 1995). Summary judgment will be granted when the moving party demonstrates that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 330, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). While a material question

9. The Court dismissed Plaintiffs' first and second arguments which urged that the Buffalo Parcel is not Indian land because: 1) the SNSA is unconstitutional, and 2) the Compact between the SNI and State of New York, which was deemed approved in 2002, did not authorize gambling on land that had not yet been purchased.

of fact is to be reserved for a jury, questions of law are appropriately decided on a motion for summary judgment. *Scott v. Harris*, 550 U.S. 372, 381 n.8, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

Where, as here, the moving party "seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 348 U.S. App. D.C. 77, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (citations omitted). More specifically, "[t]he question whether an agency's decision is arbitrary and capricious . . . is a legal issue." *Connecticut v. United States DOC*, 04cv1271, 2007 U.S. Dist. LEXIS 59320, at *2 (D. Conn. Aug. 15, 2007). Thus, in the agency review context, Plaintiffs' claims that Defendants acted in an arbitrary and capricious manner, or made determinations that are contrary to law, are legal questions that can be resolved on review of the agency record and/or the governing statutes, regardless of whether the questions are presented in the context of a motion to dismiss or in a motion for summary judgment. *University Med. Ctr. v. Shalala*, 335 U.S. App. D.C. 322, 173 F.3d 438, 441 n.3 (D.C. Cir. 1999) (citations omitted).

2. *APA Review of Agency Action*

The APA provides that a reviewing court must "set aside agency action" that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

Appendix B

When a court is asked to review an agency's construction of the statute it administers, its review is guided by the principles announced in *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The Supreme Court has directed that a court must first employ "traditional tools of statutory construction" to determine whether Congress has expressed its intent on the question before the court. *Id.* at 842, n.9.

> If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of

> authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 842-43; *accord, Bacolitsas v. 86th & 3rd Owner, LLC*, 702 F.3d 673, 683 n.5 (2d Cir. 2012) (because statute is unambiguous, court need not rely on agency's implementing regulations).

A unique canon of construction applies to statutory provisions involving Indians. Under this canon, "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985); *Connecticut ex rel. Blumenthal v. United States DOI*, 228 F.3d 82, 92 (2d Cir. 2000). Absent ambiguity, however, this canon cannot be used to expand upon or disregard the clear intent of Congress. *Negonsott v. Samuels*, 507 U.S. 99, 110, 113 S. Ct. 1119, 122 L. Ed. 2d 457 (1993) (citing *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506, 90 L. Ed. 2d 490, 106 S. Ct. 2039 (1986)).

B. Plaintiffs' First Claim

In what remains of their first claim for relief, Plaintiffs allege that the Buffalo Parcel is neither "Indian country" nor "Indian lands."

1. *The Buffalo Parcel is Indian Country*

Indian country is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, not with the States." *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1, 118 S. Ct. 948, 140 L. Ed. 2d 30 (1998) (citation omitted); *see also, Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 511, 111 S. Ct. 905, 112 L. Ed. 2d 1112

(1991) (tribes are "domestic dependent nations" that have inherent sovereign authority over their members and the Indian country that is validly set apart for their use).

In *CACGEC II*, the parties agreed that tribes have territorial authority over "Indian country," and that territorial jurisdiction must exist before a tribe can validly exercise its governmental power over the land. Plaintiffs had maintained that the Buffalo Parcel is not "Indian country," and Defendants urged that it is. After considering the parties' extensive arguments, the Court concluded that the Buffalo Parcel is "Indian country," such that the SNI has primary jurisdiction over the land.

When Plaintiffs set out the same allegations here, Defendants moved to dismiss based on collateral estoppel and *res judicata*. The Court concluded Defendants had not met their burden of demonstrating that the claim is barred by *res judicata*. Collateral estoppel does not apply because the appellate stay Defendants procured prevents Plaintiffs from obtaining review of the *CACGEC II* decision until this current case ends. (Docket No. 21 at 14-18.) Plaintiffs now maintain that, the Court's prior decision notwithstanding, they are entitled to summary judgment on this issue.

While the Court was compelled to conclude that Plaintiffs are now positioned to take another bite at this apple, that fact alone is not reason to address arguments and authority already fully considered. For example, Plaintiffs recycle arguments and case law they presented in *CACGEC II* in support of their ongoing contention that,

in enacting SNSA, Congress did not intend to transfer to the SNI primary jurisdiction over land it might purchase with SNSA funds. (Docket No. 58-2 at 40-47.) All such repetitive arguments are rejected for the reasons fully stated in *CACGEC II*.

Plaintiffs do offer one new case in support of their argument that sovereignty does not rest in the SNI. They cite *Hawaii v. Office of Hawaiian Affairs*, a 2009 United States Supreme Court decision, for the proposition that a congressional transfer of sovereignty must be express, not inferred or implied. 556 U.S. 163, 129 S. Ct. 1436, 173 L. Ed. 2d 333. The case involved a joint resolution of Congress which, *inter alia*, "apologized" to Native Hawaiians for the overthrow of the Kingdom of Hawaii and "acknowledged" the resultant suppression of the inherent sovereignty of the Native Hawaiian people. *Id.* at 168-69. The Hawaii State Supreme Court found that Congress had thereby divested Hawaii of its sovereign authority to sell or transfer public lands until potential native claims to the land were resolved. The United States Supreme Court reversed, finding that the resolution's conciliatory and precatory terms were "not the kind that Congress uses to create substantive rights—especially those that are enforceable against the co sovereign States." *Id.* at 173.

Plaintiffs have made no attempt to reconcile the conciliatory language at issue in *Hawaii* with the SNSA's directive terms, which authorize payment to the SNI, permit the Nation to use funds to acquire land, and provide an avenue for the land to be placed under governmental protection against alienation and removed from state and

local tax rolls. This Court found, in *CACGEC II*, that the SNSA does precisely what Plaintiffs contend is required; it expresses an intent to transfer sovereignty to the SNI in language mirroring that of other statutes that have been found to effect such transfers. 2008 U.S. Dist. LEXIS 52395, at *141-48. Plaintiffs point to nothing in *Hawaii* that warrants revising that conclusion.

The two additional cases Plaintiffs cite in their reply brief reinforce, rather than call into question, the *CACGEC II* conclusion on this issue. The SNI has jurisdiction over the Buffalo Parcel because Congress expressly provided for transfer, after giving the state and local governments opportunity to comment. *See Miami Tribe of Oklahoma v. United States*, 656 F.3d 1129, 1145 (10th Cir. 2011) (jurisdiction is established by federal authority and derives from the will of Congress). Conversely, where no expression of congressional intent or purpose exists, a tribe cannot establish jurisdiction through its unilateral actions. *See Oklahoma v. Hobia*, 2012 U.S. Dist. LEXIS 100793 (July 20, 2012) (landless Kialagee Tribal Town did not obtain jurisdiction over a restricted allotment owned by members of the Muscogee Nation through unilateral act of leasing the land).

Plaintiffs next urge the Court to take another look at its prior Indian country analysis because "the administrative record reflects that DOI [now] views the definition of 'Indian country' to be irrelevant to the definition of 'Indian lands.'" (Docket No. 58-2 at 47 (citing Docket No. 58-38, BIA-AR000500; 73 Fed. Reg. 29354, 29357).) From there, they conclude that the Court's Indian country analysis in

CACGEC II was neither necessary to, nor dispositive of, the question of jurisdiction over the Buffalo Parcel. This argument mischaracterizes the administrative record. Defendants consistently have stated that there is a two-step process to determine whether restricted fee land is "Indian lands" within the meaning of IGRA. The initial inquiry is whether the tribe has territorial jurisdiction over the land, and the "Indian country" analysis is directed to this question. The next inquiry involves the tribe's relationship to the land. "Indian country" held by a tribe in restricted fee is not "Indian lands" for purposes of IGRA unless the tribe actually asserts its governmental power over the land.[10]

In support of their argument that DOI has changed its view on the import of the "Indian country" analysis, Plaintiffs point to its refusal to adopt 18 U.S.C. § 1151's definition of reservation in its section 20 regulations. (Docket No. 58-2 at 47-48.) But one need only look to section 20's purpose to understand that Plaintiffs' argument lacks merit. As noted, Defendants consider the "Indian country" analysis central to the question of jurisdiction. IGRA's section 20, however, does not come into play until after tribal jurisdiction has been established and it is determined that the land in question is "Indian lands" for purposes of IGRA.

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10. As former-Secretary Norton observed in her 2002 letter to the SNI, "the Nation will have jurisdiction over these parcels [to be purchased with SNSA funds] because they meet the definition of 'Indian country' under 18 U.S.C. § 1151" and they "will come within the definition of 'Indian lands' in IGRA [only] if the Nation exercises governmental power over them." (Docket No. 58-21 at 6.)

Appendix B

One question addressed under section 20 is whether, for purposes of gaming eligibility, a newly acquired parcel of trust land (over which a tribe necessarily has jurisdiction) is within, or contiguous to the tribe's *reservation* boundaries as they existed on October 17, 1988. § 2719(a)(1). Because there is no need to revisit the question of jurisdiction to make this geographic determination, DOI found no need to reference or incorporate 18 U.S.C. § 1151's definition of reservation. In short, the statements Plaintiffs' point to are unrelated to the subject of jurisdiction and do not represent a change in position.

Finally, in their reply, Plaintiffs urge that the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005), "effectively uncouples the Indian country issue from the jurisdiction question." (Docket No. 65 at 8-9.) The Court disagrees. *City of Sherrill* involved various parcels of city land purchased by the Oneida Nation in the late 1990s. The parcels were within the tribe's historic reservation area, but last possessed by the tribe in 1805. 544 U.S. at 202. The Oneidas refused to pay property taxes, claiming sovereignty over the reacquired parcels, and the district court concluded the parcels were not taxable. The Second Circuit affirmed, ruling that the land had been set aside by treaty for the Oneida's use, and Congress had not since acted to diminish or disestablish that reservation. Therefore, the parcels qualified as "Indian country" under 18 U.S.C. § 1151. *Id.* at 212; *see also, Solem v. Bartlett*, 465 U.S. 463, 471, 79 L. Ed. 2d 443, 104 S. Ct. 1161 (1984) ("Once a block of land

is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.").

Significantly, the Supreme Court did not disturb the Second Circuit's conclusion that a historic reservation that was never disestablished remains "Indian country," but it did reverse on other grounds. The Court found that the reestablishment of Indian sovereign control over land that had undergone significant development in the intervening centuries, had been part of the tax base throughout, and was located in an area populated overwhelmingly by non-Indians, "would have disruptive practical consequences" that rendered a shift in governance inequitable. *Id.* at 221. There is nothing in this holding that signals a *carte blanche* rejection of the long established relationship between "Indian country" and tribal jurisdiction. Rather, the decision suggests that the facts of a particular case and equitable principles are properly considered where, though jurisdiction historically remains with a tribe, it has not occupied the land or exercised governmental authority over it for centuries. This result is a far cry from "effectively uncoupling" the Indian country definition from the jurisdictional question in all instances.

For the reasons stated, the Court finds there is no need to revisit the necessity for, our outcome of, the *CACGEC II* Indian country analysis. The Court previously concluded that the Buffalo Parcel is sovereign territory, and after considering Plaintiffs' new arguments, it confirms that holding today.

2. *The Buffalo Parcel is Indian Lands*

As discussed above, Plaintiffs previously challenged the Buffalo Parcel's status as "Indian lands" based solely on their assertion that SNSA did not transfer primary jurisdiction to the SNI. Here, they advance a new argument and urge that a historical understanding of how trust and restricted fee lands came to exist compels but one conclusion; Congress "inten[ded] to limit Indian gambling [to] lands that were subject to aboriginal jurisdiction as of the enactment of IGRA." (Docket No. 58-2 at 40.)

The history of Indian land holdings was discussed in detail in *CACGEC II*, and is summarized here for the convenience of those who may be unfamiliar with the prior cases. Early in America's history, Native Americans, through treaty negotiations, relinquished vast territories to the United States or the States. Some tribes retained reserved land within their aboriginal territory, others were removed westward to new land in exchange for their aboriginal holdings. Statutes enacted during this period understood "Indian lands" to include lands that tribes may cede to the United States by treaty. § 152, 5 Stat. 135 (1837).

In the latter 1800s, there was a shift in U.S. policy. The government abandoned treaty making in favor of allotment and assimilation. Under the General Allotment Act of 1887, tribe members gave up their ownership interest in commonly held reservation land for an individual land allotment that either was held by the government in

"trust" for the Indian, or by the Indian in "restricted fee." §§ 331 *et seq.*, 24 Stat. 388. The land remained in trust or restricted status for a specified number of years, after which the government conveyed it to the individual by fee patent, without restriction on alienation. *Id.* Statutes enacted thereafter recognized this new form of "Indian lands," in addition to those previously recognized. § 231, 45 Stat. 1185 (1946) (tribal lands, reservations, and allotments therein); § 319, 31 Stat. 1083 (1901) (reservations, lands held by tribe in Indian territory, allotments which have not been conveyed to the allottee with full power of alienation).

The allotment policy persisted until 1934, when Congress passed the Indian Reorganization Act ("IRA"). §§ 461 *et seq.*, 48 Stat. 984. Among other things, the IRA was directed toward stemming the loss of Indian land that had resulted from allotment. The statute put an end to the granting of allotments, § 461, extended indefinitely all existing periods of trust or restriction on remaining allotments, § 462, and authorized the Secretary to restore surplus lands to tribal ownership, § 463, permit the transfer of restricted Indian lands to the tribe, § 464, and acquire land in the name of the United States in trust for an Indian tribe or individual Indian, § 465. A number of statutes enacted after the IRA include a definition of "Indian lands" quite similar to IGRA, § 81, 114 Stat. 46 (2000); § 407d, 70 Stat. 721 (1956); § 1680n, 106 Stat. 4589 (1992).

Plaintiffs now urge that, by including non-reservation trust and restricted fee lands in IGRA's "Indian lands" definition, Congress was necessarily referring to

historical land holdings and thereby intended to limit gaming to lands over which tribes had "aboriginal" or "preexisting"[11] jurisdiction at IGRA's enactment. (Docket No. 58-2 at 40.) In short, the "Indian lands" definition itself prohibits gaming on land acquired after IGRA's passage.

The Court is not persuaded for the simple reason that "trust lands" clearly are not limited to historical allotments. To the contrary, the IRA's trust provision remains the long standing method by which new lands, both on and off reservation, are acquired for the benefit of Indians. As Defendants and *amicus* correctly observe, Plaintiffs' interpretation would render at least a portion of IGRA superfluous. *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991) (expressing "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988) (courts look to the statutory language at issue as well as the language and design of the statute as a whole). Section 20 expressly prohibits gaming on lands acquired by the Secretary in trust after October 17, 1988. § 2719(a). If, as Plaintiffs maintain, Congress intended the term "Indian lands" to itself prohibit gaming on trust lands acquired after IGRA's enactment, the section 20 prohibition serves no purpose.

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11. Plaintiffs use both of these terms in their brief. When IGRA was enacted, tribes may have had "preexisting" jurisdiction over land that was not part of their "aboriginal" territory. This analysis applies to either circumstance.

Plaintiffs also point to *Carcieri v. Salazar* in support of their argument that Congress intended to take a purely historic view of "Indian lands." 555 U.S. 379, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009). In that case, the State of Rhode Island challenged the Secretary's authority to accept into trust a 31-acre parcel of land adjacent to the Narragansett tribe's existing land.[12] The IRA permits the Secretary to accept land into trust for "the purpose of providing land for Indians." § 465. At issue was the meaning of § 479, which defines the term "Indian" as "all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*." (emphasis added.) The Supreme Court was asked to decide whether the term "now under Federal jurisdiction" referred to 1934, when Congress enacted the IRA, or 1998, when the Secretary accepted the 31 acres into trust. *Id.* at 388. The Court concluded that the word "now" in § 479 unambiguously "limits the Secretary's trust authority under § 465 to those members of tribes that were under federal jurisdiction at the time the IRA was enacted." *Id.* at 391. Because the Narragansett tribe was neither federally recognized nor under the jurisdiction of the federal government in 1934, the Secretary was without authority to accept land into trust on its behalf. *Id.* at 395-396.

Plaintiffs do not attempt to explain *Carcieri's* relevance to IGRA's definition of "Indian lands." They point to no limiting language in § 2703(4)—such as "now,"

12. The existing land had been acquired by statute, in settlement of a suit in which the tribe alleged its territory was misappropriated in violation of the Non-Intercourse Act, § 177. *Id.* at 384.

"presently," "aboriginal," or "preexisting"—to support their assertion that only lands that were under tribal governance on October 17, 1988 can qualify as "Indian lands." To the contrary, the definition is written entirely in the present tense and it expansively includes "all" and "any" lands falling within the categories specified.

For fee land to qualify as "Indian lands," it need only be "held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." § 2703(4). Thus, the Court rejects Plaintiffs' contention that land meeting this criteria is not "Indian lands" simply because it was acquired after 1988.

As was the case in *CACGEC II*, Plaintiffs do not contest the NIGC's finding that, since purchasing the Buffalo Parcel, the SNI has exercised its tribal governmental authority over the land. Accordingly, as in *CACGEC II*, Plaintiffs have offered no basis upon which the Court can conclude that the Parcel is not "Indian lands" within the meaning of IGRA.

C. The Buffalo Parcel is Gaming Eligible

The fact that land acquired after 1988 may qualify as "Indian lands" does not mean that the land is gaming eligible. IGRA's section 20 sets forth circumstances in which gaming on newly acquired land is prohibited, and the meaning and scope of its provisions are now at issue. In their second claim, Plaintiffs urge that, even assuming the Buffalo Parcel is Indian lands, it is subject to section

20's prohibition against gaming on lands purchased after October 17, 1988.

Section 20 states, in pertinent part:

> (a) Prohibition on lands acquired in trust by Secretary Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary *in trust* for the benefit of an Indian tribe after October 17, 1988, unless—

§ 2719(a) (emphasis added). Defendants maintain that the plain language of this provision limits the prohibition to trust lands only, and so it does not apply to the Buffalo Parcel.

This dispute is a matter of first impression. In *CACGEC II* the parties agreed that, notwithstanding the prohibition's specific reference to "trust" lands, Congress intended that it would also apply to newly-acquired restricted fee lands such as the Buffalo Parcel. Former-Secretary Norton had set out the DOI's reasoning, with which Plaintiffs concurred, in a 2002 letter to the SNI:

> Section 20 of IGRA, 25 U.S.C. § 2719 contains a general prohibition on gaming on lands acquired in trust by the Secretary for the benefit of an Indian tribe after October 17, 1988, unless one of several statutory exceptions is applicable to the land. Under the Compact, the Nation plans to use the provisions of the Settlement Act to

> acquire the land in restricted fee, rather than in trust. The Department has examined whether Section 20 of IGRA applies to the Compact. We have reviewed whether Congress intended, by using the words "in trust" in Section 20 of the IGRA, to completely prohibit gaming on lands acquired in restricted fee status by an Indian tribe after October 17, 1988. I cannot conclude that Congress intended to limit the restriction on gaming on after-acquired land to only *per se* trust acquisitions. The Settlement Act clearly contemplates the acquisition of Indian lands which would otherwise constitute after-acquired lands. To conclude otherwise would arguably create unintended exceptions to the Section 20 prohibitions and undermine the regulatory regime prescribed by IGRA. I believe that lands held in restricted fee status pursuant to an Act of Congress such as is presented within this Compact must be subject to the requirements of Section 20 of IGRA.

(Docket No. 58-21 at 6-7.) The NIGC also adopted this view when it approved the SNI's amended gaming ordinance.

The BIA's proposed regulations, published on October 5, 2006, adhered to the same interpretation:

> § 292.4 What criteria must trust land meet for gaming to be allowed under the exceptions listed in 25 U.S.C. 2719(a) of IGRA?

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

71 Fed. Reg. 58769, 58773 (emphasis supplied). Defendants continued to advance this position, and did not deviate from it, in litigating *CACGEC II*.[13]

The only opposition to this view appeared in the SNI's *CACGEC II* amicus brief. The Nation urged that IGRA must be interpreted in accord with its plain text, which compels the conclusion that Congress intended the section 20 prohibition to apply only to trust lands. But, as was noted earlier in CACGEC II, absent exceptional circumstances, *amicus curiae* cannot implicate issues not presented by the parties. 471 F. Supp. 2d 295, 311 (W.D.N.Y. 2007). The Court accepted the parties' unified position that the term "in trust," as used in the section 20 prohibition, included both trust and restricted fee land. Because the parties were in accord on this issue and the SNI did not argue exceptional circumstances, any discussion of this issue in *CACGEC II* is necessarily *dicta*.

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13. The action was commenced on July 12, 2007, and closed on July 8, 2008.

While Defendants did not put this issue into dispute in *CACGEC II*, it did alter its position during the pendency of that litigation. During that time, the BIA removed all reference to restricted fee land from its final regulations, published May 20, 2008, and stated its revised position that section 20, by its plain language, applies only to lands held in trust. 73 Fed. Reg. 29354, 29355-56.

Now that section 20's meaning is squarely at issue, Plaintiffs urge that congressional intent is clear, and the Court need not go beyond *Chevron's* step one to confirm that, as the parties agreed in *CACGEC II*, IGRA generally prohibits gaming on all newly acquired Indian land. They further maintain that, even were the statute ambiguous, neither the DOl's nor the NIGC's new interpretation is entitled to deference.

Defendants, too, argue that congressional intent is clear, but they reach the opposite conclusion—that the section 20 prohibition applies to trust land only. And, they contend, even assuming ambiguity, their revised interpretation is a reasonable construction of the statute. In this regard, the NIGC Chairman concluded that his "new interpretation is superior and entitled to deference" because the change "presently only affects one tribe," and the new reading conforms to the plain language of the statute, resolves any ambiguity in favor of Indian tribes, and "frees restricted land from section 2719's prohibition, thus promoting, rather than inhibiting, IGRA's objective to encourage tribal economic development." (Docket No. 58-4 at 12, 18-19.)

To answer questions of congressional intent, *Chevron* directs courts to first apply the "traditional tools of statutory construction" and determine if intent is clear. 467 U.S. at 842, n.9. There are many such tools, but prime among them is a plain text reading of the statute. As discussed fully below, having fully considered the parties' arguments, the Court finds that Congress intended that section 20 apply only to lands held in trust.

1. *The DOl's Regulations*

Much of Plaintiffs' briefing is devoted to challenging the DOl's interpretation of the phrase "in trust" as set forth in the section 20 regulations. They do so by arguing that the BIA's new regulations are invalid and, alternatively, that the regulations are not entitled to deference. In particular, Plaintiffs urge that DOI lacks authority to issue legislative regulations under IGRA,[14] it improperly used the rulemaking process to pull a "surprise switcheroo" during the course of litigation, it did not provide adequate notice of its changed position, and did not provide a reasoned analysis for the change.

None of these issues need be resolved here. Even assuming, *arguendo*, the rulemaking process was somehow defective, or the regulations not entitled to deference, that would not be the end of the matter. The final agency action here, as in *CACGEC II*, is the NIGC's approval of the SNI's gaming ordinance. Thus, it is the

14. The DOI readily agrees and states that its regulations are interpretive, not legislative.

validity of the NIGC's interpretation and application of section 20 that is determinative of Plaintiffs' challenge to SNI gaming on the Buffalo Parcel.

2. *The Ordinance Approval*

When NIGC received the SNI's second amended gaming ordinance, it asked DOI for a description of its policy reasons for altering its position on section 20's applicability to restricted fee land. NIGC noted that "if the Chairman is to approve the [SNI's] gaming ordinance on the grounds that section 2719 does not apply to restricted fee land, he must provide a reasoned analysis for this new interpretation." (Docket No. 58-38, BIA-AR000034.)

The DOI responded with the Solicitor's M-Opinion. Therein, the DOI observed that the phrase "'in trust' has a common and generally well-accepted meaning in Indian law," particularly as it relates to fee ownership. The United States holds legal title to trust lands, while Indians are the owners of restricted fee lands. (Docket No. 58-8 at 5-6.) Reading "in trust" as including only those lands in which the United States has legal title and the Indian "owner" has beneficial title honors that distinction. It also comports with the whole act rule, which assumes that Congress is internally consistent in its use of terms and phrases when drafting legislation. The DOI expressly noted, in its final regulations, that it considered Congress's use of the term "in trust" to be purposeful "because Congress referred to restricted fee lands elsewhere in IGRA" and, so, would have included restricted fee land in section 20 if that is what was intended. 73 Fed. Reg. 29355. The NIGC

Chairman concurred, noting in his ordinance approval that section 20 "only references trust land acquired after October 17, 1988" and "I believe that the Seneca Nation's restricted fee lands do not fall within the provisions of section 2719." (Docket No. 58-4 at 11, 20.)

In moving for summary judgment on this issue, Plaintiffs maintain that: 1) NIGC's reliance on DOl's revised position was unreasonable; 2) the Chairman considered the "in trust" language in isolation, without regard to congressional intent; and 3) the Chairman's stated reasons for his changed position are unsupportable. Each argument is addressed below.

Plaintiffs first urge that the Chairman should not have relied on DOl's revised position because its regulatory drafting team was tasked with devising regulations "of general applicability." (Docket No. 58-2 at 31.) NIGC, on the other hand, was required to consider section 20 in the "unique fact specific context" of SNSA, as former-Secretary Norton had done in 2002. (*Id*.) It is quite evident, on the face of the Chairman's ordinance approval, that NIGC fully considered Secretary Norton's earlier reasoning, which NIGC had previously adopted, in his analysis. Thus, the charge of error in this regard is without merit.

In support of their second argument, Plaintiffs generally maintain the Chairman abused his discretion by failing to take into account "the language and design of IGRA as a whole, its legislative history, and the impact of SNSA on [section 20]." (*Id*. at 32.) They contend that

former-Secretary Norton understood the necessity for such an approach when, in 2002, she concluded that Congress did not intend to limit section 20 "to only per se trust acquisitions" because such a construction would undermine IGRA's regulatory regime.

It is evident here that both DOI and NIGC considered the body of Indian law existing at the time of IGRA's passage and thereafter. The DOl's M-Opinion confirms that: "[s]ince 1934, ... the Secretary has had broad authority under the [IRA] to acquire lands ... in trust ... , [but] the Secretary lacks any general authority to place restrictions on lands tribes acquire in fee."[15] (Docket No. 58-8 at 3.) NIGC, too, recognized this reality when it stated that "only Congress, or the Secretary acting pursuant to explicit authorization from Congress, can create restricted fee Indian land." (Docket No. 58-4 at 20.) The Chairman further observed that, because there was no existing mechanism for the creation of restricted fee land when IGRA was enacted, "there was no need for [Congress] to include it in the section 2719 prohibition." (*Id*. at 20.) He went on to conclude, however, that when it omitted restricted fee land from section 20, Congress "intend[ed] for such land to be eligible for gaming under IGRA unless [it] explicitly provides to the contrary." (*Id*.)

15. The M-Opinion further notes that, since IGRA's enactment, new lands for Indians have been acquired in trust. According to DOI, the historic restricted fee lands that continue to exist are comprised of tribal lands in what were the original Thirteen Colonies, some individual allotments, and some tribal lands subject to statutory restrictions. (Docket No. 58-8 at 6.)

It is this conclusion that Plaintiffs dispute, and they maintain the Chairman abused his discretion when he changed the position he had taken in his earlier ordinance approval. There, the Chairman had found that section 20 can only sensibly be read to include both trust land and restricted fee lands because, otherwise, tribes could avoid the prohibition against gaming by taking land into restricted fee and creating exceptions Congress likely did not intend. (Docket Nos. 58-2 at 33; 58-7 at 4.) Based on what he then viewed as a loophole that would permit gaming in circumstances Congress had not envisioned, the Chairman found section 20 was ambiguous, and went on to provide a "reasonable interpretation" that would resolve the perceived conflict. (Docket No. 58-7 at 4.) *See Brown v. Gardner*, 513 U.S. 115, 118, 130 L. Ed. 2d 462, 115 S. Ct. 552 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context").

As part of his analysis in the current ordinance approval, the Chairman revisited his previously stated concern that tribes might go out and purchase new land in fee and then claim the acquisitions are "Indian lands" eligible for gaming. Citing *CACGEC II*, 2008 U.S. Dist. LEXIS 52395, at *135-36, the Chairman observed that "the Non-intercourse Act [§ 177] does not apply to off reservation fee land acquired by a tribe outside of Indian country,"[16] and concluded that, "therefore, there will be no sudden dramatic increase"[17] in gaming on fee lands

16. In short, restricted fee status does not attach automatically to a tribe's fee purchases outside of Indian country.

17. Plaintiffs maintain, in their third argument, that this is an unsupportable reason for the Chairman's changed position.

under the new interpretation. (Docket No. 58-4 at 14.) The Court agrees with NIGC's statement of the law for all of the reasons set forth in *CACGEC II*.

A matter the Chairman did not discuss, but implicitly recognized, is that there are circumstances in which tribes may acquire fee land that is in "Indian country." One question, then, is whether tribes have the potential to circumvent IGRA by acquiring such land. The Court finds *City of Sherrill* instructive in this regard. 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386. As previously discussed, the Oneida Nation purchased land within a reservation that had never been disestablished. The Circuit Court concluded the reacquired land was "Indian country" subject to tribal jurisdiction. While the Supreme Court did not disturb the "Indian country" determination, it considered the equities involved in reestablishing Indian sovereignty over land that had been under state and local control for almost two centuries, and reversed on the Circuit's holding on jurisdiction.

In light of *City of Sherrill*, it seems evident that a tribe's long-dormant sovereignty is not presumptively revived where it reacquires "Indian country."[18] Rather, absent guiding legislation, the question will be one for the courts and a balancing of equities will apply. As such,

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The discussion that follows necessarily addresses this argument, as well.

18. Even assuming such revival were possible, the logical question is whether a historic reservation that was never disestablished would be subject to section 20 at all.

the Chairman's revised conclusion, in which he found that that IGRA's intent is not undermined if section 20 is read to apply only to newly-acquired trust land, is neither an abuse of discretion nor contrary to law.

Finally, Plaintiffs urge that it may be necessary, in the course of construing the meaning of a statute, to consider the implications of a later statute. They quote extensively from *FDA v. Brown & Williamson Tobacco Corp.* for this proposition, and suggest the Chairman erred when he failed to consider the impact of the later-enacted SNSA on section 20's meaning. 529 U.S. 120, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000).

Brown & Williamson involved regulations promulgated by the FDA concerning the "promotion, labeling, and accessibility to children and adolescents" of tobacco products. *Id.* at 128. The Court was asked to determine whether the FDA has authority, under the Federal Food Drug, and Cosmetic Act ("FDCA"), to regulate in this area. In discussing statutory construction, the Court observed that an existing statute "may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand," *id.* at 132, and that "'a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it has not been expressly amended,'" *id.* at 143 (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31,118 S. Ct. 1478, 140 L. Ed. 2d 710 (1998)). After considering 35 years of post-FDCA legislation, in which Congress enacted several tobacco-specific statutes and repeatedly reserved to itself exclusive

policymaking authority with regard to cigarettes, the Court concluded that the FDA lacked authority to promulgate regulations regulating tobacco products. *Brown & Williamson*, 529 U.S. at 148-55.

The present case is readily distinguished. IGRA was enacted to establish a regulatory scheme governing the conduct of all Indian gaming. SNSA is a later-enacted statute that is neither a statute of general applicability[19] nor one that speaks to the topic of gaming at all. Plaintiffs do not explain how and why a statute that is directed at a single tribe and does not express any policy position on Indian gambling should have controlled the NIGC Chairman's construction of IGRA. Here, too, the Court rejects Plaintiffs' assertions that the Chairman disregarded congressional intent in his analysis or that his reasoning is unsupportable as a matter of law.

3. *The SNSA*

As Plaintiffs correctly note, the specific question of whether gaming can occur on the Buffalo Parcel does not end with the section 20 analysis. Because a subsequent statute, SNSA, permits the SNI to acquire new "Indian lands," the Court must look to that Act to determine whether Congress also addressed the issue of gaming on such lands. In this regard, the NIGC Chairman concluded

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19. The Court recognized the unique attributes of SNSA's land acquisition provision in *CACGEC II* when it noted that "there appears to be no other statute then in effect or since enacted that contemplates taking land into restricted fee status." 2008 U.S. Dist. LEXIS 52395, at *128-29, n.49.

that: "if and when Congress enacts a law which allows a tribe to have restricted fee land, it intends for such land to be eligible for gaming under IGRA unless Congress explicitly provides to the contrary." (Docket No. 58-4 at 20.)

The tools of statutory construction support this view. Courts have long assumed "that Congress is aware of existing law when it passes [new] legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990) (citation omitted). Moreover, federal Indian law has been described as "a subject that cannot be understood if the historical dimension of existing law is ignored." *Sac & Fox Tribe v. Licklider*, 576 F.2d 145, 147 (8th Cir.), *cert. denied*, 439 U.S. 955, 99 S. Ct. 353, 58 L. Ed. 2d 346 (1978). Thus, it is assumed that Congress understood, when enacting SNSA, that it was authorizing the creation of "Indian lands" under IGRA, but was directing that the land be acquired in a manner not contemplated by section 20's prohibition on gaming.[20]

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20. Though it is sufficient for purposes of statutory construction to assume Congress's knowledge of existing law, the Court notes that the first Indian gaming bills introduced after the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987) (upholding sovereign right of Indians to engage in gaming on tribal lands), expressly reflect congressional understanding in this regard. The proposed language for what is now the section 20 prohibition provided that "gaming regulated by this Act shall be unlawful on any lands acquired by the Secretary *under existing authority* in trust for the benefit of any Indian tribe after the date of enactment of this Act." 133 Cong. Rec. S 7454, S. 1303 § 4(a)(1) (emphasis supplied); *see also*, 133 Cong. Rec. H 3915 (introduction

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When Congress passes a specific, narrow statute permitting an action that is otherwise unavailable under law, any restrictions on that action must necessarily be addressed in the new statute. As the SNI observes in its *amicus* brief, Congress has "amply demonstrated its ability" to address Indian gaming in tribe specific legislation. (Docket No. 62 at 26.)

One example is the Rhode Island Indian Claims Settlement Act, enacted in 1978 to effectuate the resolution of land claims brought by the Narragansett Tribe of Indians. §§ 1701 *et seq*. At that time, the Narragansett Tribe was not acknowledged by the federal government, and so the settlement lands were to be acquired, held, and managed by a state corporation. §§ 1706, 1707(c). The Tribe received federal recognition in 1983, and thereafter requested that the Secretary take the settlement lands into trust. *Carcieri v. Salazar*, 555 U.S. at 384-85. In 1996, Congress amended the Settlement Act to provide that: "[f]or purposes of the Indian Gaming Regulatory Act ..., [Narragansett] settlement lands shall not be treated as Indian lands." § 1708. In short, even assuming the Secretary's trust acquisition fell within a section 20 exemption or exception, no gaming could occur there. *See also*, Alabama Coushatta Restoration Act, § 737(a) (1987 (pre-IGRA)) ("All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe.").

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of identical H.R. 2507). The fact that the emphasized language does not appear in the final statute does not negate Congress's understanding that the sole existing authority for creating new "Indian lands" was through the IRA's trust provision and that section 20 is directed solely to that circumstance..

Similarly, where, as in SNSA, Congress provides for the creation of new "Indian lands" in a manner not contemplated in section 20, the land is gaming eligible under IGRA unless Congress provides otherwise. There is no such statement of intent in SNSA, express or implied, nor has Congress acted, in the many years this dispute has been pending, to limit gaming on land acquired with SNSA funds.

D. The Issue of Whether a section 20 Exception Applies is Moot

In *CACGEC II*, the Court accepted the position taken by Defendants in that litigation —*i.e.*, that restricted fee land falls within the section 20 prohibition and also its exceptions.[21] It therefore went on to consider whether, as Defendants claimed, the Buffalo Parcel falls within an exception which would allow gaming. Specifically, Defendants had argued that SNSA settled an SNI land claim and that the Buffalo Parcel, purchased with SNSA funds, was therefore acquired "as part of a settlement of a land claim." § 2719(b)(1)(B)(I). The Court concluded the Buffalo Parcel did not fall within the settlement of a land claim exception.

At that time, there was no regulatory definition of "land claim" in effect. The Court, in concluding SNSA did not settle a "land claim," applied what it found was

21. Plaintiffs agreed that restricted fee lands were included in the prohibition, but argued that the same phrase—"in trust"—had a different meaning for purposes of the exceptions.

the least restrictive definition of the term Congress could have intended—*i.e.*, the possession of an enforceable right to relief against the United States, whether or not that right had ever been asserted. 2008 U.S. Dist. LEXIS 52395, at *186. The parties agreed that any enforceable right against the United States relating to the SNSA land leases would have arisen from the Nonintercourse Act. *Id.* at 189. But, as fully discussed in *CACGEC II*, prior to the SNI's negotiation of the 99-year leases discussed in SNSA, Congress had expressly authorized the SNI to negotiate its Salamanca leases without the need for formal treaty or convention, thereby taking the land outside the Nonintercourse Act, 25 U.S.C. § 177. *Id.* at 191-202. In short, the Act could not be the source of an enforceable right giving rise to a land claim.

The BIA's final regulations now define a "land claim" as:

> any claim by a tribe concerning the impairment of title or other real property interest or loss of possession that:
> (1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;
> (2) Is in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and
> (3) Either accrued on or before October 17, 1988, or involves lands held in trust or restricted fee for the tribe prior to October 17, 1988.

25 C.F.R. § 292.2. The regulations further provide that the "settlement of a land claim" exception applies if the land at issue is:

> [a]cquired under a settlement of a land claim that 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.

25 CFR 292.5

In his most recent ordinance approval, the Chairman acknowledges that "NIGC is bound by [the *CACGEC II*] decision unless it is overturned on appeal." (Docket No. 58-4 at 20.) He opines, nonetheless, that, if the Court were to reject the government's revised interpretation of the section 20 prohibition, the Buffalo Parcel's acquisition "would meet the requirements of section 2719's settlement of a land claim exception under the new regulations." (*Id.* at 21.) Plaintiffs' third claim for relief is directed to this statement.

The Court has thoroughly reviewed the arguments presented by the parties and *amicus*. It finds, however, that further analysis of this issue is neither necessary nor instructive to the resolution of this action. Having concluded that section 20's intent is clear and that the SNI's newly-acquired restricted fee lands are not subject to the prohibition at all, Plaintiffs' third claim for relief is denied as moot.

Appendix B

IV. CONCLUSION

For the reasons stated, Plaintiffs' motion is denied in its entirety and this case is dismissed.

V. ORDERS

IT HEREBY IS ORDERED that Plaintiffs' Motion for Summary Judgment (Docket No. 58) is DENIED.

FURTHER, that the Clerk of the Court is directed to enter Judgment in favor of Defendants and to close this case.

SO ORDERED.

Dated: May 10, 2013
Buffalo, New York

/s/ William M. Skretny
WILLIAM M. SKRETNY
Chief Judge
United States District Court

APPENDIX C — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK, FILED MARCH 30, 2010

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

09-CV-0291S

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY (JOEL ROSE AND ROBERT HEFFERN, AS CO-CHAIRPERSONS), REV. G. STANFORD BRATTON, D. MIN., EXECUTIVE DIRECTOR OF THE NETWORK OF RELIGIOUS COMMUNITIES, NETWORK OF RELIGIOUS COMMUNITIES, NATIONAL COALITION AGAINST GAMBLING EXPANSION, PRESERVATION COALITION OF ERIE COUNTY, INC., COALITION AGAINST GAMBLING IN NEW YORK - ACTION, INC., THE CAMPAIGN FOR BUFFALO, HISTORY ARCHITECTURE AND CULTURE, ASSEMBLYMAN SAM HOYT, ERIE COUNTY LEGISLATOR MARIA WHYTE, JOHN MCKENDRY, SHELLEY MCKENDRY, DOMINIC J. CARBONE, GEOFFREY D. BUTLER, ELIZABETH F. BARRETT, JULIE CLEARY, ERIN C. DAVISON, ALICE E. PATTON, MAUREEN C. SCHAEFFER, DORA RICHARDSON, AND JOSEPHINE RUSH,

Plaintiffs,

v.

Appendix C

PHILIP N. HOGEN, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NATIONAL INDIAN GAMING COMMISSION, THE NATIONAL INDIAN GAMING COMMISSION, THE UNITED STATES DEPARTMENT OF THE INTERIOR, KEN SALAZAR, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE INTERIOR, AND BARACK OBAMA, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES,

Defendants.

March 30, 2010, Decided
March 30, 2010, Filed

DECISION AND ORDER

I. INTRODUCTION

On March 31, 2009, Plaintiffs commenced this action challenging the legality of a gambling casino operated by the Seneca Nation of Indians ("SNI") in the City of Buffalo on land it acquired in 2005 (the "Buffalo Parcel"). Plaintiffs allege that Defendants, all government officials and agencies, acted illegally, arbitrarily, capriciously, and not in accordance with law when they determined the Buffalo Parcel is gaming-eligible "Indian land," and approved the SNI's second amended ordinance authorizing gambling on the Parcel. Plaintiffs also contend that legislation and regulations Defendants relied on are unconstitutional or were illegally adopted.

Appendix C

There are two motions before the Court: the Seneca Nation of Indians' Motion to Intervene and for Leave to File Proposed Answer (Docket No. 10), and Defendants' Motion to Dismiss the first of Plaintiffs' three claims for relief (Docket No. 11). Both motions are fully briefed, and the Court has determined that oral argument is not necessary. For the reasons discussed below, Defendants' Motion to Dismiss Plaintiffs' first claim for relief is granted in part, and denied in part, and the SNI's Motion to Intervene is denied.

II. BACKGROUND

This is the third lawsuit commenced by largely the same plaintiffs, who seek to bar the SNI from operating a gambling facility in Buffalo, New York. Familiarity with the underlying factual and legal background is presumed, and will be discussed only to the extent necessary to resolve the pending motions. A brief procedural history follows.

The first action, filed in January 2006, challenged various decisions by the Secretary of the Interior (the "Secretary") and the Chairman of the National Indian Gaming Commission (the "NIGC") that permitted gambling on the Buffalo Parcel. *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 06-CV-00001-WMS (*CACGEC I*). In January 2007, the Court found there was no indication the NIGC Chairman had considered the threshold jurisdictional question of whether the SNI's proposed gambling facility in Buffalo would be sited on gaming-eligible Indian lands. The Court

vacated the NIGC Chairman's decision to approve the SNI's gaming ordinance, and remanded to provide the NICG an opportunity to determine, in the first instance, whether the Buffalo Parcel is gaming-eligible Indian land under the Indian Gaming Regulatory Act (the "IGRA"). 471 F. Supp. 2d 295, 326-27 (W.D.N.Y. 2007), *amended in part on reconsideration*, 2007 U.S. Dist. LEXIS 29561 (W.D.N.Y. Apr. 20, 2007).

Thereafter, in July 2007, the NIGC Chairman determined that the Buffalo Parcel is gaming-eligible Indian land, and approved an amended ordinance enacted by the SNI on June 9, 2007. The second lawsuit was commenced on July 12, 2007, challenging, *inter alia*, the NIGC Chairman's conclusions. *Citizens Against Casino Gambling in Erie County v. Hogen*, 07-CV-00451-WMS (*CACGEC II*). In that case, the Court concluded the Buffalo Parcel is Indian land, but is not gaming eligible under the IGRA, and again vacated the NIGC Chairman's approval of the SNI's ordinance. 2008 U.S. Dist. LEXIS 52395, at *209 (W.D.N.Y. July 8, 2008).[1]

On August 25, 2008, new Department of the Interior regulations took effect relative to "Gaming on Trust Lands Acquired After October 17, 1988"—*i.e.*, relating to interpretation of certain IGRA provisions at issue in *CACGEC I* and *CACGEC II.* 73 Fed. Reg. 2934 (May 20, 2008); 73 Fed. Reg. 35579 (June 24, 2008). Thereafter, the

1. Both *CACGEC I* and *CACGEC II* have been appealed to the Second Circuit. Defendants have moved to stay the appeals until final judgment is entered in the current action. That motion was granted on March 12, 2010.

SNI submitted to the NIGC a second amended gaming ordinance for the Buffalo Parcel. On January 20, 2009, the NIGC Chairman approved the ordinance, concluding that, under the new regulations, the Buffalo Parcel is gaming-eligible Indian land. This lawsuit followed.

In their first claim for relief, Plaintiffs contend the Buffalo Parcel is not "Indian land," but rather, sovereign soil of the State of New York. They advance three discrete arguments in support of their claim:

> (A) the Seneca Nation Settlement Act ("SNSA"), which permitted the SNI to purchase the Buffalo Parcel and to have it held in restricted fee status, violates the Tenth Amendment because it enabled the "taking" of land in Western New York absent the consent of New York State;
>
> (B) the Tribal-State Compact between the SNI and the State of New York, deemed approved in November 2002 and authorizing the SNI to conduct gaming on "Indian land," does not apply to the Buffalo Parcel, which was not acquired until 2005; and
>
> (C) "Indian land," within the meaning of the IGRA, requires that the land be within the limits or boundaries of an existing reservation, which the Buffalo Parcel is not.

(Docket No. 1, ¶¶ 94-109.)

Defendants have moved to dismiss this first claim in its entirety pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.[2] The SNI has moved to intervene in this action, under Fed. R. Civ. P. 24(b), and for leave to file its proposed answer in intervention, in order to defend its sovereignty over the Buffalo Parcel.[3]

III. DISCUSSION

A. The Government's Motion to Dismiss

Defendants urge that this Court can rule on each argument advanced in support of Plaintiffs' first claim as a matter of law, without referring to the not-yet-filed administrative record. They seek dismissal with respect to each of Plaintiffs' arguments on the grounds that:

> (A) Plaintiffs' challenge to the constitutionality of the SNSA is time-barred, they lack standing to challenge the constitutionality of the SNSA, and they fail to state a claim for relief;

---

2. Defendants have filed a memorandum of law in support (Docket No. 11-2), with exhibits (Docket No. 11-3), and a reply memorandum of law (Docket No. 20.) Plaintiffs filed a memorandum of law in opposition (Docket No. 17), and the affidavit of Cornelius D. Murray, Esq., sworn to July 15, 2009, with exhibits A - C (Docket No. 17-2).

3. The SNI has filed a memorandum of law in support (Docket No. 10-3), with attachment A (Docket No. 10-4), a proposed answer (Docket No. 10-5), and a reply memorandum of law (Docket No. 18.) Plaintiffs filed a memorandum in opposition. (Docket No. 14.) The SNI states that Defendants do not oppose its motion. Defendants did not file a response.

(B) Plaintiffs' challenge to the Tribal-State Compact does not fall within the Administrative Procedure Act's ("APA") waiver of sovereign immunity and the associated statute of limitations; and

(C) Plaintiffs are barred by collateral estoppel and *res judicata* from relitigating the issue of whether the Buffalo Parcel is "Indian land."

In addition, Defendants urge, as they did in *CACGEC I* and *CACGEC II*, that the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, preserves the Government's immunity from suit with regard to Plaintiffs' first claim for relief.

1. ***Standards of Review***

a. *Rule 12(b)(1)*

A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir. 2000). The plaintiff bears the burden of establishing the existence of federal jurisdiction. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Where, as here, the jurisdictional challenges are raised at the pleading stage, the court accepts as true all factual allegations in the complaint and draws all reasonable inferences in the plaintiff's favor. *Sharkey*

v. Quarantillo, 541 F.3d 75, 83 (2d Cir. 2008). It is "presume[d] that general [fact] allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) (alterations added). The court also may consider affidavits and other evidence outside the pleadings to resolve the jurisdictional issue, but it may not rely on conclusory or hearsay statements contained in affidavits. *J.S. v. Attica Cent. Schs.,* 386 F.3d 107, 110 (2d Cir. 2004), *cert. denied*, 544 U.S. 968, 125 S. Ct. 1727, 161 L. Ed. 2d 616 (2005). Indeed, courts "must" consult factual submissions "if resolution of a proffered factual issue may result in the dismissal of the complaint for want of jurisdiction." *Robinson v. Gov't of Malaysia,* 269 F.3d 133, 140 n.6 (2d Cir. 2001).

"In assessing whether a plaintiff has sufficiently alleged or proffered evidence to support jurisdiction . . . , a district court must review the allegations in the complaint, the undisputed facts, if any, placed before it by the parties, and—if the plaintiff comes forward with sufficient evidence to carry its burden of production on this issue—resolve disputed issues of fact . . . ." *Id.* at 140.

b. *Rule 12(b)(6)*

Rule 12(b)(6) allows dismissal of a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12 (b)(6). Federal pleading standards are generally not stringent. Rule 8 requires only a short and plain statement of a claim. FED. R. CIV. P. 8(a)(2). But the plain statement must "possess enough heft to show that

the pleader is entitled to relief." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955, 1966, 167 L. Ed. 2d 929 (2007) (internal quotation marks and alteration omitted).

In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court must liberally construe the claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *See Roth v. Jennings,* 489 F.3d 499, 510 (2d Cir. 2007); *Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir. 2008). However, to withstand a motion to dismiss, a plaintiff's "allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly,* 550 U.S. at 555 (internal quotation marks, citations, and alterations omitted). Legal conclusions are not afforded the same presumption of truthfulness. *See Ashcroft v. Iqbal,* __ U.S. __, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2008) ("the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions").

When determining the sufficiency of a plaintiff's claim for Rule 12(b)(6) purposes, courts may consider the factual allegations in the plaintiff's complaint, documents attached to the complaint as an exhibit or incorporated in it by reference, matters of which judicial notice may be taken, or documents that were either in plaintiff's possession or of which plaintiff had knowledge and relied on in bringing suit. *Brass v. American Film Technologies, Inc.,* 987 F.2d 142, 150 (2d Cir. 1993); *see also*, *Cortec Ind.,*

Inc. v. Sum Holding L.P., 949 F.2d 42, 47-48 (2d Cir. 1991), *cert. denied*, 503 U.S. 960, 112 S. Ct. 1561, 118 L. Ed. 2d 208 (1992) (documents must be integral to the complaint).

2. *The Constitutionality of the Seneca Nation Settlement Act*

Plaintiffs first allege that Congress exceeded its powers in enacting the SNSA "by essentially delegating to another sovereign entity, namely the SNI, the power to designate a parcel of land anywhere in a vast area of Western New York that was not then under the governmental control or jurisdiction of the SNI for the creation of a separate sovereign nation." (Docket No. 1 ¶ 5, also ¶ 97.) According to Plaintiffs, Congress has no power to create new Indian land by taking it from existing states (or allowing the SNI to do so) and thereby depriving the State and local governments of sovereignty. (*Id.* ¶¶ 6-7, 96.) Thus, they conclude, the SNSA is unconstitutional "to the extent that it might be interpreted to create new sovereign Indian land via the restricted fee process . . . ." (*Id.* ¶ 98, also ¶¶ 68, 108.)

a. *Timeliness*

Section 1774g of the SNSA provides, in pertinent part, that:

> Notwithstanding any other provision of law, any action to contest the constitutionality or validity under law of this subchapter shall be barred unless the action is filed on or before the date which is 180 days after November 3, 1990.

Based on this provision, Defendants urge that any challenge to the constitutionality or validity of the SNSA filed after May 2, 1991 is untimely, and Plaintiffs' 2009 lawsuit clearly is time-barred. As Defendants correctly note, the Supreme Court has held that "[a] constitutional claim can become time-barred just as any other claim can." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983); *see also*, *Seneca Nation of Indians v. New York,* 206 F. Supp. 2d 448, 534 (W.D.N.Y. 2002) (citing *Block* and acknowledging that the United States can establish a statute of limitations for a constitutional claim)). This Court agrees that a challenge to the SNSA's constitutionality is time-barred.

But in their opposing memorandum of law, Plaintiffs deny they are questioning the constitutionality of the SNSA. Rather, they say, their challenge is to the NIGC Chairman's January 20, 2009 decision to approve the SNI's second amended gaming ordinance. Plaintiffs urge that the NIGC Chairman "dispensed with the second prong of [the IGRA 'Indian land'] test, *i.e.*, whether the Tribe also exercised governmental power over the land," when he determined that the Buffalo Parcel's restricted fee status renders it "Indian country" within the meaning of 18 U.S.C. 1151, a statute that pertains to criminal jurisdiction. According to Plaintiffs, the NIGC Chairman's 2009 analysis involved an interpretation of the SNSA that, for the first time, raised a constitutional issue under the Tenth Amendment. From there, they conclude that a six-year statute of limitations governs their claim, running from the date of the NIGC Chairman's determination.

Plaintiffs' explanation of their claim is not consistent with the Complaint. Subpart "A" of Plaintiffs' first claim for relief (Docket No. 1 ¶¶ 94-98) does not refer to the January 20, 2009 NIGC decision, the IGRA, or 18 U.S.C. § 1151. Likewise, preceding fact allegations regarding the NIGC's January 20, 2009 decision, incorporated into subpart "A" by reference, make no mention of the NIGC having interpreted or applied the SNSA. (*Id.* ¶¶ 92-93.) Thus, even under the most liberal construction of the Complaint, the claim Plaintiffs now purport to make simply does not appear in their pleading.

Plaintiffs' attempt to morph their argument titled "The Seneca Nation Settlement Act is Unconstitutional in Part," into something else entirely, via a memorandum of law, is both improper and unavailing. Plaintiffs could have amended their Complaint as of right in response to Defendants' Motion to Dismiss, but chose not to do so. FED. R. CIV. P. 15(a). They now disavow their plainly-stated facial challenge to the constitutionality of the SNSA. This Court construes Plaintiffs' disavowal as withdrawing their first argument in support of their first claim for relief.[4] Accordingly, dismissal of subpart "A" of their first claim, which asserts that the Buffalo Parcel is not Indian land because the SNSA is unconstitutional in part, is warranted.

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4. Indeed, Plaintiffs expressly confirm in their opposing memorandum that "[t]his action does not challenge the SNSA, or its purpose, or the manner in which Congress sought to achieve that purpose." (Docket No. 17 at 8.)

Even were the Court to accept both Plaintiffs' restatement of subpart "A" and their related timeliness argument, the restated claim would be futile. In essence, Plaintiffs now seek to claim that the NIGC Chairman incorrectly concluded that land held in "restricted fee" status under the SNSA is "Indian land" under the IGRA, and thus failed to apply the second prong of the IGRA's "Indian land" test.

As an initial matter, I note that this argument, as presented, challenges the NIGC Chairman's purported misinterpretation or misapplication of the IGRA, not the SNSA. Beyond that, the argument fails because it blatantly misstates the NIGC Chairman's January 20, 2009 decision.

This Court determined, in *CACGEC II*, that the Buffalo Parcel, which obtained restricted fee status under the SNSA, is "Indian country" under 18 U.S.C. § 1151. Primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe, not with the States.

For purposes of the IGRA, "Indian lands" include:

> (A) all lands within the limit of any Indian reservation; and
>
> (B) 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 tribe or individual subject to restriction by the

> United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4); *see also*, 25 C.F.R. § 502.12. So, under the IGRA, it is not enough that restricted fee land is Indian country over which a tribe *can* exert primary jurisdiction; to be "Indian land," the tribe *must* affirmatively exercise its governmental power.

The NIGC Chairman's January 20, 2009 determination states, in relevant part, that:

> As restricted fee land, the Buffalo Parcel is held by the [SNI] subject to restriction by the United States against alienation and, therefore, conforms to the first requirement of IGRA's *Indian Lands* definition. . . . .
>
> [O]nce the Secretary of the U.S. Department of the Interior allowed the Buffalo Parcel to pass into restricted fee pursuant to the SNSA, the land became Indian country within the meaning of 18 U.S.C. § 1151 . . . . . Accordingly, the [SNI] possesses jurisdiction to exercise governmental authority over the Buffalo Parcel.
>
> In order for the Buffalo Parcel to qualify as Indian lands under IGRA, the [SNI] must also exercise present-day, governmental authority over the land. . . . . Since acquiring the land in 2005, the [SNI polices the Parcel, has fenced and posted the site, and has] enacted several

> ordinances and resolutions applying its laws to the Parcel. . . . . Because the land described in the 2008 ordinance is held in restricted fee and the [SNI] exercises governmental authority over it, the land meets IGRA's *Indian Lands* definition.

Docket No. 17-2 at 7, 9-10 (citation omitted, emphasis in original, alterations added)).

While Plaintiffs may disagree with the NIGC Chairman's conclusions, it is evident he considered, first, whether the SNI possesses jurisdiction over the Buffalo Parcel, and second, whether the SNI is exercising that authority. So, to the extent Plaintiffs seek to alter their first argument to claim that the NIGC Chairman failed to apply the second prong of the IGRA Indian land test, their proposed amendment is directly contradicted by the document on which they rely. Accordingly, amendment would be futile.

Subpart "A" of Plaintiffs' first claim for relief is dismissed, based on their withdrawal of the claim stated in the Complaint, and alternatively, the untimeliness of the stated claim.

3. *The Tribal-State Compact's Applicability to the Buffalo Parcel*

At subpart "B" of their first claim for relief, Plaintiffs urge that the Tribal-State Compact between the SNI and the State of New York, deemed approved in November

2002 by the Secretary's inaction, does not apply to the Buffalo Parcel. (Docket No. 1 ¶ 100.) Plaintiffs claim that the Secretary may approve a compact under the IGRA only if it authorizes gambling on "Indian land," and because no such land existed in Buffalo at the time the Compact was deemed approved, the Compact could not have authorized a gambling facility on land the SNI hoped to acquire in Buffalo at some future date. (*Id.* ¶ 101.) Plaintiffs conclude by stating that land cannot attain restricted fee status unless it first is under the governmental control of an Indian tribe. (*Id.* ¶ 102.)

Paragraph 102 seems to refer, once again, to the purported unconstitutionality of the SNSA, which permits the SNI to first acquire land in fee simple (where primary jurisdiction remains with the State), and then seek "restricted fee" status as a means of obtaining jurisdiction. Because Plaintiffs' challenge to the SNSA's constitutionality already has been withdrawn, paragraph 102 of the Complaint also is deemed withdrawn.

As for paragraphs 100 and 101, Defendants read Plaintiffs' second argument as a challenge to the validity of the Tribal-State Compact, and contend that the Administrative Procedure Act ("APA") does not waive the Government's sovereign immunity with respect to this matter. The reason, according to Defendants, is that the Secretary's decision to take no action on the Compact—*i.e.*, her inaction, by which the Compact became effective—is not a "final agency action" within the meaning of the APA. 5 U.S.C. § 704. Defendants go on to argue that even were the challenged non-action reviewable, it is subject to

a six-year statute of limitations. *Polanco v. United States DEA*, 158 F.3d 647, 652-53 (2d Cir. 1998) (finding six-year statute of limitations of 28 U.S.C. § 2401(a) applies to actions brought under the APA). Because the Compact went into effect on November 12, 2002, say Defendants, the relevant date for statute of limitations purposes is November 12, 2008. Thus, even assuming the Court has jurisdiction over this claim, a challenge to the validity of the Compact, filed on March 31, 2009, is time-barred.

In response, Plaintiffs concede that, were they challenging the validity of the Compact, their claim would be time-barred. (Docket No. 17 at 23.) Once again, however, they repudiate the most straightforward and logical reading of their allegations. According to Plaintiffs, they are not challenging the validity of the Compact, but rather, the NIGC Chairman's January 20, 2009 approval of the SNI's second amended gaming ordinance for the Buffalo Parcel. Plaintiffs presume that "Chairman Hogen must necessarily have rendered a conclusion that the Compact did apply" to the Buffalo Parcel,[5] and conclude that his decision is "reviewable within the context of this APA action." (*Id*. at 23.)

Plaintiffs' explanation of their claim is not consistent with the Complaint. Subpart "B" of Plaintiffs' first claim for relief (Docket No. 1 ¶¶ 100-102) makes no reference to the January 20, 2009 NIGC decision. Likewise,

5. The Court notes that the applicability of the Compact to the Buffalo Parcel has no bearing on the purported subject of the first claim for relief—*i.e.*, whether the Buffalo Parcel is "Indian land" within the meaning of the IGRA.

preceding fact allegations relating to the NIGC's decision, incorporated into subpart "B" by reference (*Id.* ¶ 99), make no mention of the Compact.[6] (*Id.* ¶¶ 92-93.) Thus, even under the most liberal construction of the Complaint, no statement of the purported claim exists in their pleading.

To the extent Plaintiffs are attempting to amend subpart "B," via a memorandum of law, their approach is improper and unavailing. Plaintiffs had an opportunity to amend their Complaint as of right in response to Defendants' Motion to Dismiss, but chose not to do so. FED. R. CIV. P. 15(a). They now deny they are challenging the validity of the Compact's authorization of gambling on not-yet-purchased land in Buffalo. The Court construes Plaintiffs' denial as withdrawing their second argument in support of their first claim for relief. Accordingly, dismissal of subpart "B" of their first claim, which asserts that the Secretary improperly permitted the allegedly unlawful Compact to become effective, is warranted. And even assuming Plaintiffs do not intend a withdrawal, as they concede, their stated claim is time-barred.

Were the Court to consider Plaintiffs' improper attempt to amend subpart "B," their proposed claim is futile because it is contradicted by the documents they refer to and rely on in their Complaint. Plaintiffs'

6. Plaintiffs' fact allegations relate to the NIGC Chairman's conclusions that: (1) 25 U.S.C. § 2719(a) applies only to land held in trust, a conclusion challenged in their second claim for relief, and (2) the Buffalo Parcel was acquired as part of the settlement of a land claim under 25 U.S.C. § 2719(b)(1)(B), a conclusion challenged in their third claim for relief.

contention that "Chairman Hogen must necessarily have rendered a conclusion that the Compact did apply" to the Buffalo Parcel appears to imply two things: (1) that the Compact does not authorize gambling on land the SNI sought to acquire in Buffalo, and (2) the NIGC Chairman improperly extended the reach of the Compact to the later-purchased Buffalo Parcel. These implications are contrary to the Compact, which does authorize gambling "at a location in the City of Buffalo to be determined by the Nation" (Docket No. 11-3 at 15, ¶ 11(b)), and to the NIGC Chairman's January 20, 2009 determination, which makes no mention of, much less renders conclusions about, the legal sufficiency of the Compact. (Docket No. 17-2). Because Plaintiffs' proposed claim is directly contradicted by the relevant documents, the suggested amendment would be futile.

Subpart "B" of Plaintiffs' first claim for relief is dismissed, based on their withdrawal of the claim stated in the Complaint and, alternatively, the conceded untimeliness of the stated claim.

4. ***Restricted Fee Status and "Indian Land"***

Plaintiffs allege in subpart "C," as they did in *CACGEC II*, that the Buffalo Parcel is neither "Indian country," within the meaning of 18 U.S.C. § 1151, nor "Indian land" under the IGRA. (Docket No. 1 ¶ 104.) Plaintiffs urge, as they did in *CACGEC II*, that to be Indian land under the IGRA, land must be within the limits or boundaries of an existing reservation. (*Id.* ¶ 109.) Thus, they claim, Defendants "acted illegally, arbitrarily, capriciously and

not otherwise in accordance with law, in approving or causing to be approved the January 20, 2009 ordinance insofar as they determined that the Buffalo Parcel is 'Indian land.'" (*Id.* ¶ 108.)

Defendants argue for dismissal of this claim based on collateral estoppel and *res judicata*.[7] In opposition, Plaintiffs urge that neither doctrine applies.

a. *Collateral Estoppel*

Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979). "Collateral estoppel, or issue preclusion, applies where: (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the

7. Although Defendants appear to have advanced this argument with respect to the first claim in its entirety, the Court addresses it with respect to subpart "C" only in light of the facts that Plaintiffs have withdrawn their challenge to the constitutionality of the SNSA (subpart "A") and, as already noted, the Tribal-State Compact's applicability to the Buffalo Parcel (subpart "B") has no bearing on whether the Buffalo Parcel meets the IGRA's "Indian land" requirements. Additionally, subpart "B" is subject to dismissal as untimely.

merits." *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 146 (2d Cir. 2005) (citations and internal quotation marks omitted). Plaintiffs urge that none of the four factors exist with respect to their claim that the Buffalo Parcel is not "Indian land."

Among other things, Plaintiffs contend that they have not yet had a full and fair opportunity to litigate the "Indian land" issue because, while they have appealed this portion of the *CACGEC II* decision, they have not yet obtained appellate review. The Second Circuit has held that "issue preclusion cannot apply[ ] 'if there is an inability to obtain [appellate] review or there has been no review, even though an appeal has been taken.'" *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 897 (2d Cir. 1997) (quoting *Johnson v. Watkins*, 101 F.3d 792, 795 (2d Cir. 1996) (alteration in original); *see also*, *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986) ("although failure to appeal does not prevent preclusion, inability to obtain appellate review, or the lack of such review once an appeal is taken, does prevent preclusion").

Defendants contend, in reply, that Plaintiffs withdrew their appeal from active consideration, and that any failure to obtain appellate review is therefore self-inflicted. This Court takes judicial notice of the following. The parties jointly withdrew their respective appeals from consideration until December 4, 2009, and expressly agreed that their withdrawal would not operate as a dismissal. Docket Nos. 08-5219 and 08-5257 (granted July 21, 2009). Prior to December 4, 2009, Plaintiffs sought to reactivate their appeal, which was reinstated on December

17, 2009. *Id*. On December 21, 2009, Defendants moved to stay the appeals "until 60 days after final judgment in [this action]." *Id*. The Second Circuit granted Defendants motion to stay on March 12, 2010 and, as a result, Plaintiffs will not obtain appellate review until this case is concluded. *Id*.; also Docket No. 07-2610.

Even had Defendants pointed to authority suggesting that a delay in the appellate court impacts the preclusion analysis—which they have not—at this juncture, Plaintiffs' inability to obtain review is not "self-inflicted." Although it may seem incongruous that Plaintiffs can receive another "bite at the apple" on a question treated exhaustively in *CACGEC II*, the posture of this case and the parties' appeals appears to dictate that result. In light of this conclusion, there is no need to consider Plaintiffs' arguments with regard to each of the remaining factors, and Defendants' motion to dismiss "subpart C" based on collateral estoppel is denied.

b. *Res Judicata*

Under *res judicata*, or claim preclusion, "a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'" *Taylor v. Sturgell*, 553 U.S. 880, __, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)). A first judgment generally will have preclusive effect where the transaction or connected series of transactions at issue in both suits is the same—that is, where the same evidence is needed

to support both claims, and where the facts essential to the second were present in the first. *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1463-64 (2d Cir. 1996) (citations and quotation marks omitted). "If the second litigation involved different transactions, and especially subsequent transactions, there generally is no claim preclusion." *Id.* at 1464 (citations omitted).

After articulating general principles of *res judicata*, Defendants state it is "clear that both cases involve the same 'claims' by Plaintiffs, so as to be barred." Docket No. 11-2 at 19.

Plaintiffs argue that claim preclusion does not apply because *CACGEC II* challenged the NIGC's approval of the SNI's amended gaming ordinance, whereas this action challenges the NIGC'S approval of the SNI's second amended gaming ordinance, which did not exist and had not been submitted for administrative approval when *CACGEC II* was decided.

In reply, Defendants merely refer again to the generalized argument in their initial memorandum.

"The party claiming *res judicata* bears the burden of proving that the second action is barred, and it is not 'dispositive that the two proceedings involved the same parties, similar or overlapping facts, and similar legal issues.'" *Carvel v. Franchise Stores Realty Corp.*, 08-CV-8938, 2009 U.S. Dist. LEXIS 113410, at *11 (S.D.N.Y. Dec. 1, 2009). Defendants have failed to meet their burden here, and their motion to dismiss subpart "C" based on *res judicata* must be denied.

5. *The Quiet Title Act*

Relying on the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, Defendants contend, as they did in *CACGEC I* and *CACGEC II*, that the Court lacks jurisdiction over Plaintiffs' first claim because the United States has not waived its sovereign immunity with regard to the IGRA "Indian land" question. This Court recognizes that Defendants seek to preserve their argument, and note that they have not offered any supporting argument or authority the Court has not already fully considered at least once and, in some instances, several times. For the reasons set forth in *CACGEC I* and *CACGEC II*, the Court finds that the QTA does not divest it of jurisdiction over this action. Accordingly, Defendants' motion to dismiss on this basis is denied.

B. The Seneca Nation of Indian's Motion to Intervene

The SNI has moved for permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure, which provides in relevant part that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1)(B). In exercising its discretion, a district court must consider whether granting the request "will unduly delay or prejudice the adjudication of the original parties' rights." *Id.* 24(b)(3); *see In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 202 (2d Cir. 2000). "'Additional relevant factors include the nature and extent of the intervenors' interests, the degree to which those interests

are adequately represented by other parties, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.'" *Lovely H. v. Eggleston*, 05-CV-6920, 2006 U.S. Dist. LEXIS 83424, at *8 (S.D.N.Y. Nov. 15, 2006) (quoting *H.L. Hayden Co. v. Siemens Medical Sys., Inc.*, 797 F.2d 85, 89 (2d Cir. 1986)). The trial court has broad discretion to grant or deny permissive intervention. *United States Postal Service v. Brennan*, 579 F.2d 188, 192 (2d Cir. 1978).

Here, the SNI states it is seeking to intervene "in order to defend its sovereignty over its Buffalo Creek Territory, its governmental economic and social interests in the development and use of that Territory, and its interests in the continuing validity of laws, regulations and other legislative and administrative actions significant to the Nation's use of its Buffalo Creek Territory." (Docket No. 10-1). The SNI proposes to limit its intervention and consequent waiver of sovereign immunity to litigation of the three claims for relief specified in Plaintiffs' Complaint.[8]

In its motion, the SNI contends that all factors relevant to permissive intervention weigh strongly in

8. The Court already has dismissed subparts A and B of Plaintiffs' first claim for relief. Nevertheless, subpart C remains, and it encompasses the question identified by the SNI with regard to its proposed intervention on the first claim—*i.e.*, "whether . . . the Buffalo Creek Territory qualifies as 'Indian lands' under IGRA." (Docket No. 10-3 at 2.)

its favor. In contrast, its says, denying the motion would prevent the SNI from fully participating in briefing and oral argument, and from seeking stays of and appealing any adverse decisions. Plaintiffs urge that none of the factors weighs in favor of granting the SNI's motion. Each factor is examined below.

1. *Timeliness*

When determining whether a motion to intervene is timely, courts may consider: (1) the length of time the applicant knew of its interest but failed to intervene, (2) prejudice to existing parties from the delay, (3) prejudice to the applicant if the motion is denied, and (d) the presence of any unusual circumstances militating for or against a finding of timeliness. *Long Island Trucking v. Brooks Pharm.*, 219 F.R.D. 53, 54-55 (E.D.N.Y. 2003); *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 182 (2d Cir. 2001).

The SNI asserts that it promptly moved to intervene in this action within the time allowed for Defendants to file a responsive pleading or a motion. Plaintiffs, in turn, characterize the motion as "gamesmanship," noting the SNI's longstanding participation as *amicus curiae* with respect to the very issues on which it now seeks to intervene.

Although *CACGEC I*, *CACGEC II*, and the instant action challenge different agency determinations, each lawsuit has been predicated on Plaintiffs' assertions that the Buffalo Parcel: (1) does not qualify as "Indian land"

under the IGRA, (2) is subject to the after-acquired lands prohibition against gaming, and (3) does not fall within the "settlement of a land claim" exception to the prohibition. These are precisely the questions on which the SNI seeks to intervene.

The Court agrees that the SNI has been aware of its interest with regard to these issues since in or about January 2006, and that it chose not to seek permission to intervene until some three and one-half years later, in June 2009. In *CACGEC I*, the SNI chose not to waive its sovereign immunity and intervene in the action, even for the limited purpose of seeking dismissal under Rule 19 of the Federal Rules of Civil Procedure. Instead, it pursued only *amicus curiae* status. Likewise, in *CACGEC II*, the SNI again sought only *amicus* status with regard to briefing precisely the same issues on which it now seeks to intervene. Both prior cases were appealed, and the SNI made a calculated decision to forego the opportunity to participate as a party in the underlying cases and on appeal. Thus, the purported prejudice it will suffer—its inability to fully participate "in briefing and oral argument and . . . to seek stays of and to appeal any adverse decisions"—appears to be nothing more than an attempt to circumvent the consequences of a strategy it no longer wishes to be bound by.

Were the Court to view the instant lawsuit in isolation, the SNI's motion would be considered timely. However, the history of this serial litigation presents an "unusual circumstance" that militates against a finding

of timeliness.[9] *See*, *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987) (affirming district court's denial of motion as untimely where applicant had notice of litigation affecting its interests over three and one-half years prior to seeking intervention).

2. *Claims or Defenses Sharing Common Question of Law or Fact*

The SNI contends that, as intervenor, it seeks to defend the validity of the rules, statutes,[10] and governmental actions Plaintiffs challenge in their three claims for relief. And because the SNI limits its waiver of sovereign immunity to the claims raised in the Complaint, it urges that its participation will not interject new issues or delay this action.

Plaintiffs argue that the SNI does not possess the requisite "claim or defense" that would permit it to intervene. In their Complaint, Plaintiffs first claim that Defendants acted arbitrarily, capriciously, and not otherwise in accordance with law when they determined that the Buffalo Parcel is Indian land. They also allege that IGRA regulations published in May 2008, on which Defendants predicated the determinations challenged

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9. Prejudice to the existing parties, a factor for purposes of both timeliness and the overall permissive intervention determination, is discussed separately below.

10. Because Plaintiffs have withdrawn their claim that the SNSA is unconstitutional in part, this action no longer challenges the validity of any statute.

in the second and third claims, violate the APA and are invalid. The SNI makes no similar claims; it seeks only to defend the validity of Defendants' actions. So the question is whether any of its defenses share a common question of law or fact with the main action.

Plaintiffs contend that, because only the Government can be subject to claims that it failed to act in conformance with the IGRA and other federal requirements, "[i]t follows that only the governmental agencies and officials who are responsible for complying with the federal requirements can be appropriate defendants to such an action." (Docket No. 14 at 13.)

Plaintiffs cite to several cases in support of this proposition, which is essentially a standing argument. However, with the exception of a single case, the decisions or portions thereof from which the purportedly supporting language is drawn, relate to motions to intervene as of right under Rule 24(a). Because an entirely different standard applies to Rule 24(b) motions, such references simply are not relevant to permissive intervention. Moreover, the Court finds the limited analysis in the single citation that is applicable, *Habitat Educ. Center, Inc. v. Bosworth*, to be unpersuasive. 221 F.R.D. 488, 496-97 (E.D. Wis. 2004).

In *Bosworth*, the district court first confirmed that Article III standing is not required of applicants for permissive intervention. However, the court went on to conclude that the putative defendant-intervenor could not have a defense in common with the government

because there was no statutory basis for extending the plaintiff's claims to run against the intervenor, as well. In other words, to meet the common defense requirement, defendant-intervenors are limited to those persons or entities who can themselves be sued on the underlying claims. The *Bosworth* court offered no explanation for determining that standing is not required, and then concluding that an applicant without standing cannot meet the requisite common claims or defenses factor.

This Court finds a case offered by the SNI[11] and reaching the opposite conclusion to be persuasive. In *Kootenai Tribe of Idaho v. Veneman*, the Ninth Circuit analyzed permissive intervention under Rule 24(b) and concluded that the defense in common requirement was met where the intervenors' defenses were directly

11. While the SNI objects to Plaintiffs' citation to Rule 24(a) cases in opposition to its Rule 24(b) motion, the majority of cases it offers in reply also involve Rule 24(a) motions. Because Rule 24(a) involves a different showing and analysis than is at issue here, the SNI's citations are equally unhelpful. The SNI also cites to several cases in which a tribe had been granted intervenor status in an earlier decision. The Court has been unable to locate the underlying decisions granting intervention and thus has no way to know whether the tribes moved under Rule 24(a) or 24(b), the particular circumstances that existed, or the factors the courts found persuasive. To the extent any information can be gleaned from the decisions, there is nothing to suggest similarity between the cited cases and this one. *See, e.g.*, *State of Oregon v. Norton*, 271 F. Supp. 2d 1270 (D. Or. 2003) (tribe intervened in challenge to Secretarial determination that followed from prior suit instituted by the tribe). The Court declines to draw any conclusions from citations devoid of analysis on the issue for which they are offered.

responsive to the claims asserted by the plaintiffs. 313 F.3d 1094, 1110-1111 (9th Cir. 2002) (affirming grant of permissive intervention to environmental groups wishing to defend validity of government's rulemaking where groups had no direct interest in government rulemaking procedures, but did assert interest in use and enjoyment of lands impacted by the challenged rule, and where government declined to fully defend its own actions).

This Court finds an analysis that focuses on the nature of the defense, rather than the status of the intervenor, to be in keeping with a plain reading of Rule 24(b). Here, the SNI's proposed Answer sets forth defenses common to those asserted by Defendants in their Motion to Dismiss and directly responsive to Plaintiffs' claims. Accordingly, the Court finds this requirement for intervention is met.

3. ***Prejudice to the Existing Parties***

In determining whether permissive intervention should be granted, district courts must consider whether intervention will cause undue delay or prejudice. Fed. R. Civ. P. 24(b)(3). The Second Circuit has referred to this as the "principal consideration," once the requirements of 24(b)(2) are met. *United States Postal Serv. v. Brennan*, 579 F.2d 188, 191 (1978).

The SNI urges that there will be no undue delay or prejudice because it promptly filed its motion, and its intervention will be limited to asserting defenses to Plaintiffs' three claims for relief. Thus, it contends, its party status will not expand, complicate or otherwise prolong the action.

Plaintiffs contend that they will be prejudiced by the SNI's intervention because the SNI seeks the benefits of party participation while shielding itself from the consequences of an adverse determination. They point to the SNI's Resolution, which is the source of its waiver of sovereign immunity here and expressly limits the waiver "to the adjudication of the three claims raised in the Complaint filed March 32, 2009 (Docket Number 1) in *CACGEC III*." (Docket No. 10-4.) According to Plaintiffs, the effect of this language and a series of express disclaimers that follows,[12] would allow the SNI to assert its defenses without submitting itself to the Court's jurisdiction on the very issues on which it seeks to intervene. Specifically, Plaintiffs urge that, should they receive a favorable determination, the SNI's limited waiver would preclude Plaintiffs from seeking relief for any failure by the SNI to abide by the Court's determinations.[13]

In reply, the SNI characterizes this argument as a "classic straw man" and cites to several cases standing for the proposition that when a party intervenes, it has full party status, renders itself vulnerable to complete

12. One such disclaimer provides that the SNI's waiver "does not extend to any amendment or supplement to the Complaint, or to any cross-claim, counterclaim, third-party claim, or claim of any other nature that may be filed by any present or future party in *CACGEC III*." (Docket No. 10-4 at 4.)

13. After *CACGEC II* was decided, the Defendants did not bring an end to gambling on the Buffalo Parcel and Plaintiffs moved for enforcement of the Court's judgment and for contempt. The Court presumes this is the kind of relief Plaintiffs allude to.

adjudication by the federal court of the issues in litigation between the intervenor and the adverse party, and assumes the risk that the plaintiff will be able to obtain relief against it. *See, e.g.*, *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017, 247 U.S. App. D.C. 217 (D.C. Cir. 1985); *see also*, *County Sec. Agency v. Ohio DOC*, 296 F.3d 477, 483 (6th Cir. 2002) (a motion to intervene is fundamentally incompatible with an objection to jurisdiction). Yet after citing cases standing for these well-established propositions, the SNI turns its argument upside-down and contends that these rules are not true with respect to entities that have sovereign immunity as they may intervene for a limited purpose only. (Docket No. 18 at 9, fn.3 (citing *Lac Du Flambeau Band v. Norton*, 327 F. Supp. 2d 995, 1000 (W.D. Wis. (2004) (tribe that was indispensable party did not waive its sovereign immunity to underlying litigation by intervening for sole purpose of pursuing Rule 19 dismissal)). The SNI goes on to state it has the prerogative not to expose itself to additional claims of an amorphous and unpredictable nature. In short, it appears to confirm that its Resolution and limited waiver will permit the SNI to argue defenses, which Plaintiffs will be required to respond to, while remaining insulated from potential post-judgment relief.

As this Court recognized in *CACGEC I*, tribes certainly may limit their waiver of sovereign immunity.[14]

14. In *CACGEC I*, the SNI sought to move, via an *amicus curiae* brief, for Rule 19 dismissal of the case on the grounds that it was a necessary party. The SNI argued that it did not want to intervene to bring its motion because, by doing so, it would risk waiving its sovereign immunity. The Court noted that

But the question to be addressed here is whether the waiver, as presented, prejudices Plaintiffs. The Court concludes that it does.

The SNI does not contend that Plaintiffs have misread the scope of its intended limitations. Such a waiver places the Plaintiffs in the position of litigating against the SNI, but divests them of post-judgment remedies with regard to the very matters the SNI seeks to litigate. It would allow the SNI to be heard as a full party, yet raise the shield of immunity to certain consequences of an adverse determination. Beyond that, it would permit the SNI to obtain party status with regard to an appeal of the Court's decision, even though it heretofore has been unwilling to waive immunity for that privilege. This, too, holds the potential for further delay and complexity. The appeals in *CACGEC I* and *CACGEC II*, to which the SNI is not a party, are stayed pending the outcome of this litigation. The SNI's participation in this case, which in all likelihood will also be appealed, has the potential to impact and complicate issues of consolidation on appeal, and further proceedings here, should one or more of the three cases be remanded.

Thus, the Court finds the potential for delay and prejudice does exist, and this factor does not weigh in favor of intervention.[15]

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the SNI could intervene for the sole purpose of seeking Rule 19 dismissal, as other tribes have done, without waiving immunity to the substantive claims. 471 F. Supp. 2d at 312 (citations omitted).

15. The Court has reviewed all cases on which the SNI relies for its waiver argument. (Docket Nos. 10-3 at 2 and 18 at 9 fn.3.)

4. *The SNI's Interests*

The SNI contends that in challenging the constitutionality of the SNSA and seeking to permanently enjoin gambling on the Buffalo Parcel, Plaintiffs are taking direct aim at the SNI's core sovereign and economic interests. It urges that defense of its territorial sovereignty[16] and pursuit of economic development on the Buffalo Parcel are interests "sufficient to support a legal claim or defense which is founded upon [that] interest." (Docket No. 10-3 at 6 (quoting *Diamond v. Charles*, 476 U.S. 54, 77, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986) (O'Connor, J., concurring) (citation and internal quotation marks omitted).) Plaintiffs do not contend otherwise.

Those not discussed above are not relevant to the permissive intervention determination. The cited cases involved tribes that initiated suit. The sovereign immunity discussions addressed whether, by commencing an action, the tribe waived immunity from counterclaims or related suits. Those discussions are not relevant here. However, one court did expressly note that by commencing an action, a tribe necessarily accepts the risk that it will be bound by an adverse determination. *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989). Plaintiffs concern here is that the SNI has crafted its waiver and disclaimers so as to retain immunity from the consequences of an adverse determination it otherwise would necessarily accept by intervening.

16. Although Plaintiffs have withdrawn their challenge to the SNSA's constitutionality, they still claim that land acquired under the SNSA and held in "restricted fee" is not "Indian country." Although the Court determined otherwise in *CACGEC II*, a potential challenge to sovereignty over the Buffalo Parcel remains.

In *CACGEC I*, this Court considered whether the SNI was a necessary party for purposes of Rule 19, and concluded that "the SNI certainly has an interest in its ability to use property that it owns in the City of Buffalo in the manner it wishes." 471 F. Supp. 2d at 326-27. The same legal issues and same interests are present here, and weigh in favor of intervention under Rule 24(b).

5. *Party Representation of the SNI's Interests*

Where a movant has a sufficient interest in the litigation, "the degree to which [the putative intervenor's] interests are adequately represented by other parties" is an additional relevant factor in the permissive intervention determination. *Lovely H.*, 2006 U.S. Dist. LEXIS 83424, at *8.

The SNI acknowledges this Court's conclusion, in *CACGEC I*, that its interests in that action were adequately represented by the United States. The Court arrived at that determination in adjudicating the SNI's status as a necessary party under Rule 19. The SNI urges, and this Court agrees, that the prior conclusion does not preclude the Court from granting a motion for permissive intervention here.

Next, the SNI notes that, in contrast to a motion to intervene as of right under Rule 24(a), adequacy of representation is not a dispositive factor in the Rule 24(b) analysis. Again, this Court agrees. The instant factor is one of several "relevant factors" to be weighed. Alone, it is not dispositive. *See Arizona v. California*, 460 U.S. 605,

615, 627, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983) (tribes whose interests were found to be adequately represented by government were permitted to intervene in lawsuit seeking additional water rights).

The SNI is tellingly silent, however, on the actual question of whether Defendants adequately represent its interests here. The Court finds it quite clear that the SNI's interests in the validity of the NIGC's conclusions that the Buffalo Parcel is sovereign SNI territory on which the SNI can conduct gambling, are substantially similar, if not identical, to the Government's interests in defending its regulations and determinations. In short, the SNI and Defendants have the same objective; to uphold the NIGC Chairman's determination.

The SNI does not contend that Defendants will not advance all appropriate legal arguments in support of their actions, and has not otherwise identified any aspect of its claimed interests that will not be adequately represented. Indeed, the Court has the benefit of having observed Defendants staunch representation of the SNI's interests in *CACGEC I* and *CACGEC II*, the same interests identified here.[17]

Accordingly, despite the SNI's suggestion to the contrary, this non-dispositive, "relevant factor" does not weigh in favor of intervention. *Bosworth*, 221 F.R.D. at

17. Moreover, on the one point of statutory interpretation where Defendants and the SNI previously disagreed, Defendants have now changed direction, and espouse an interpretation consistent with that previously asserted by the SNI.

496-97 (holding that, even assuming defense in common existed, intervention was not warranted because applicants had participated in prior administrative proceedings where they made their views known and government was likely to provide adequate representation); *see also*, *Kootenai Tribe*, 313 F.3d at 1111 (intervenors seeking to defend governmental action would contribute to equitable resolution of case where the government declined to defend its actions, and intervenors' related interests, fully from the outset).

6. *The SNI's Contribution to Full Development of the Issues*

The SNI "believes that it can significantly contribute to full development of the factual issues in this suit," noting that in *CACGEC II*, it extensively briefed the history of its restricted fee land holdings and the substantial body of law regarding restricted fee lands and "Indian country." (Docket No. 10-3 at 14.)

Plaintiffs have not spoken to this factor. Nevertheless, the Court disagrees with the SNI's suggestion that it weighs in favor of intervention. As the SNI noted in response to an argument Plaintiffs raised relative to discovery, this is an administrative record case. The claims here involve precisely the same questions[18] presented in *CACGEC II*, and to the extent the history of Indian land

18. Plaintiffs have withdrawn what would have been additional questions relative to the constitutionality of the SNSA and validity of the Compact.

policy and related statutes proves to be relevant here, that background was fully developed in *CACGEC II*. Because there are no factual issues to develop here, the SNI's suggestion that this factor weighs in favor of intervention is rejected.

* * * *

In summary, the Court finds that intervention is not warranted here because the SNI's motion is untimely. Even were all requisite factors present, the remaining relevant factors do not weigh in favor of intervention. There is the potential for delay and prejudice, the SNI does not contend that its interests will not be adequately represented by Defendants, and its participation will not significantly contribute to full development of factual issues.

The Court notes that the SNI sought and was granted *amicus curiae* status in *CACGEC I* and *CACGEC II*. To the extent it wishes to submit *amicus* briefing in this case, it may do so without further motion or order from the Court.

IV. CONCLUSION

For all of the reasons stated above, Defendants' Motion to Dismiss Plaintiffs' first claim for relief is granted in part, and denied in part. Specifically, subparts "A" and "B" of the first claim for relief (Docket No. 1 ¶¶ 94-102) are dismissed. Defendants' motion is denied as to subpart "C" of Plaintiff's first claim. The SNI's motion to

intervene is denied, but the SNI may participate in this action as *amicus curiae*.

V. ORDERS

IT HEREBY IS ORDERED that Defendants' Motion to Dismiss (Docket No. 11) is GRANTED IN PART and DENIED IN PART.

FURTHER that the Seneca Nation of Indians' Motion to Intervene (Docket No. 10) is DENIED.

FURTHER that the Seneca Nation of Indians may file briefs *amicus curiae* in this action without further order of the Court.

SO ORDERED

Dated: March 30, 2010
Buffalo, New York

/s/ William M. Skretny
WILLIAM M. SKRETNY
Chief Judge
United States District Court

APPENDIX D — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, FILED AUGUST 26, 2008

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

07-CV-0451S

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY (JOEL ROSE and ROBERT HEFFERN, as Co-Chairpersons), REV. G. STANFORD BRATTON, D. MIN., Executive Director of the Network of Religious Communities, NETWORK OF RELIGIOUS COMMUNITIES, NATIONAL COALITION AGAINST GAMBLING EXPANSION, PRESERVATION COALITION OF ERIE COUNTY, INC., COALITION AGAINST GAMBLING IN NEW YORK—ACTION, INC., THE CAMPAIGN FOR BUFFALO—HISTORY ARCHITECTURE AND CULTURE, ASSEMBLYMAN SAM HOYT, MARIA WHYTE, JOHN MCKENDRY, SHELLEY MCKENDRY, DOMINIC J. CARBONE, GEOFFREY D. BUTLER, ELIZABETH F. BARRETT, JULIE CLEARY, ERIN C. DAVISON, ALICE E. PATTON, MAUREEN C. SCHAEFFER, JOEL A. GIAMBRA, PASTOR KEITH H. SCOTT, SR., DORA RICHARDSON, and JOSEPHINE RUSH,

Plaintiffs,

v.

Appendix D

PHILIP N. HOGEN, in his Official Capacity as Chairman of the National Indian Gaming Commission, the NATIONAL INDIAN GAMING COMMISSION, the UNITED STATES DEPARTMENT OF THE INTERIOR, and DIRK KEMPTHORNE, in his Official Capacity as the Secretary of the Interior,

Defendants.

August 26, 2008, Decided
August 26, 2008, Filed

DECISION AND ORDER

I. INTRODUCTION

On July 8, 2008, the Court issued a Decision and Order on all motions pending in this case and entered a final judgment vacating the National Indian Gaming Commission's approval of the Seneca Nation of Indians' June 9, 2007 Class III Gaming Ordinance ("Ordinance"). Currently before the Court are two post-judgment motions. Plaintiffs have filed a Motion for an Order Enforcing the Judgment (Docket No. 63) and Defendants have filed a Motion to Amend the Judgment to include a Remand to the Chairman of the National Indian Gaming Commission ("NIGC") (Docket No. 65). As set forth fully below, Plaintiffs' Motion is granted in part and denied in part, and Defendants' motion is denied.

Appendix D

II. DISCUSSION

A. Plaintiffs' Motion to Enforce the Judgment

Plaintiffs ask that the Court enforce its July 8, 2008 Decision by directing Defendants, and in particular the Chairman of the NIGC, to order the permanent closure of the Seneca Nation of Indians' ("SNI") gambling casino located on a 9-1/2 acre site in downtown Buffalo, New York, referred to in the Decision as the "Buffalo Parcel."

1. Background

Under the Indian Gaming Regulatory Act ("IGRA"), Class III gambling is lawful only when, among other requirements: (1) the tribe wishing to conduct gambling activities adopts a gaming ordinance that meets the IGRA's requirements; and (2) the ordinance is approved by the NIGC Chairman. 25 U.S.C. § 2710(d)(1). The Court's July 8, 2008 Decision vacated the Chairman's approval of the SNI's Ordinance. NIGC regulations state that the operation of a gaming facility "without a tribal ordinance or resolution that the Chairman has approved under part 522 or 523 of this chapter" is a "substantial violation" of the IGRA. 25 C.F.R. § 573.6 (emphasis supplied).

On the same day the Court issued its Decision, Plaintiffs' counsel wrote to the United States Attorney's Office requesting that it "immediately advise whether or not the Chairman of the NIGC intends to exercise his authority pursuant to 25 U.S.C. § 2713(b) to order immediate cessation of the current gaming operation

conducted by the Seneca Nation of Indians at the Buffalo Parcel." Docket No. 63-3, Ex. B. Plaintiffs' counsel followed, on July 9, 2008, with a request that the U.S. Attorney's Office advise "no later than 5:00 p.m. Eastern Daylight Time on Thursday, July 10, 2008, with respect to whether or not the Chairman of the National Indian Gaming Commission will be taking the steps specified in my letter to you yesterday, and if so, when." *Id.*, Ex. C. Penny Coleman, Esq., counsel for the NIGC, apparently contacted Plaintiffs' counsel on the afternoon of Thursday, July 10, 2008, to advise that the NIGC was still considering its options and that there would be nothing further to report by 5:00 p.m. that day. *Id.*, Ex. D. Plaintiffs filed their motion seeking enforcement on Monday, July 14, 2008. The parties have not advised the Court of any further communications between them relative to this matter. Defendants do not indicate that they have taken any enforcement action.

In moving for relief, Plaintiffs point to the NIGC Chairman's authority under the IGRA to order the temporary closure of gaming activities. They urge that, in the face of the Court's ruling, the NIGC's refusal to issue an order directing the SNI to close its Buffalo casino frustrates the purpose of the Court Decision.

In opposition to Plaintiffs' motion, Defendants concede that the IGRA grants the Chairman authority to order the closure of gaming facilities. However, they contend that Congress vested the NIGC with absolute discretion relative to enforcement and "has not expressed an intent to circumscribe the discretion of the NIGC to decide *when*

or whether to pursue enforcement actions." Docket No. 71 at 4 (emphasis supplied). According to Defendants, because the IGRA provides no meaningful standard by which to evaluate the NIGC's exercise of its "prosecutorial discretion," a decision not to enforce is not subject to judicial review and the Court is without jurisdiction to compel the NIGC to act. *Id.* at 5-6.

Plaintiffs' motion requires the Court to first consider the IGRA's remedial scheme.

2. The IGRA's Enforcement Provisions

Congress established the National Indian Gaming Commission when it enacted the IGRA. 25 U.S.C. § 2704(a). The Commission is comprised of three members: a Chairman appointed by the President with the advice and consent of the Senate, and two associate members appointed by the Secretary of the Interior. *Id.* § 2704(b). At least two Commission members must be enrolled members of any Indian tribe, and no more than two members can be of the same political party. *Id.* § 2704(b)(3).

Congress charged the NIGC and its Chairman with the enforcement of IGRA's provisions, and directed the NIGC to promulgate such regulations and guidelines as it deems appropriate to implement the Act. 25 U.S.C. §§ 2705, 2706. In short, Congress entrusted the NIGC with the important task of ensuring that operators of tribal gaming facilities comply with the law.

Appendix D

The IGRA's enforcement procedure is set forth in 25 U.S.C. § 2713. Generally speaking, the Chairman is authorized to level and collect civil fines for "any violation" of the IGRA or its regulations, *id.* § 2713(a)(1), and to order the temporary closure of a gaming facility for a "substantial violation" of the IGRA or its regulations, *id.* § 2713(b)(1). Enforcement is triggered by § 2713(a)(3), which provides, in pertinent part, that:

> *Whenever* the Commission has reason to believe that the tribal operator of an Indian game . . . is engaged in activities regulated by this chapter . . . that may result in the imposition of a fine under subsection (a)(1) of this section [or] the permanent closure of such game . . . the Commission *shall provide such tribal operator . . . with a written complaint* stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission. The allegation shall be set forth in common and concise language and must specify the statutory or regulatory provisions alleged to have been violated, but may not consist merely of allegations stated in statutory or regulatory language.

(emphasis supplied). *See Amoco Prod. Co. v. Watson*, 366 U.S. App. D.C. 215, 410 F.3d 722, 733 (D.C. Cir. 2005) (noting that under 25 U.S.C. § 2713(a)(3), administrative proceedings are initiated by issuance of a "complaint"); *Sac & Fox Tribe of the Mississippi in Iowa v. United States*,

264 F. Supp. 2d 830, 836-37) (N.D. Iowa 2003) ("complaint" must be issued before Chairman can assess fines or issue temporary closure order); *Cheyenne-Arapaho Gaming Comm'n v. National Indian Gaming Comm'n*, 214 F. Supp. 2d 1155, 1161 (N.D. Okla. 2002) (same).

The NIGC's regulations provide that the complaint, referred to in the regulations as a "notice of violation" ("NOV"), may also be issued by the Chairman alone. 25 U.S.C. § 2705(b); 25 C.F.R. § 573.3. The NOV shall contain: (1) a citation to the federal requirement that has been or is being violated; (2) a description of the circumstances surrounding the violation, set forth in common and concise language; (3) measures required to correct the violation; (4) a reasonable time for correction, if immediate measures cannot be taken; and (5) notice of rights of appeal. 25 C.F.R. § 573.3. If the Chairman concludes that a fine is appropriate, NIGC regulations anticipate that he will serve a proposed assessment within 30 days after the NOV is issued. *Id.* § 575.5(b). The Chairman may issue a temporary closure order contemporaneous with or subsequent to issuance of the NOV. *Id.* § 573.6. Alleged violators have the right to appeal to the Commission, *inter alia*, any violation alleged in a NOV, the assessment of a civil fine, or an order of temporary closure. *Id.* § 577.1.

The parties' respective requests and arguments must be considered in light of this statutory scheme. The Court first rejects Defendants' assertion that the NIGC has been granted absolute discretion to "decide when or whether to pursue enforcement actions." Section 2713(a)(3) provides that the NIGC *shall* issue a complaint *whenever* it has

reason to believe a tribal gaming facility is operating in violation of the IGRA. This language is mandatory, it connotes immediacy, and it is entirely consistent with Congress's charge to the NIGC to safeguard the integrity of Indian gaming. Congress directs the NIGC to act upon any indication of the existence of a violation; it does not give the Commission discretion to ignore violations or choose not to issue a complaint.

Congress did give the Chairman and the Commission discretion, within the IGRA's mandatory remedial framework, to determine what type of enforcement action is appropriate to the circumstances of a particular violation or substantial violation. Thus, Plaintiffs' request that the Court give effect to its July 8, 2008 Decision by directing the Chairman to take a specific enforcement action is not in accord with the IGRA's remedial scheme.[1]

The question that remains is whether the All Writs Act, upon which Plaintiffs base their request, is applicable in light of the IGRA's enforcement provisions.

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1. Plaintiffs request that the Court direct the Chairman to issue a permanent closure order. The Court notes that the Chairman is not statutorily authorized to issue a permanent closure order. The Chairman's authority extends only to the issuance of temporary orders, which can be made permanent only by a vote of not less than two members of the Commission, following a hearing. 25 U.S.C. § 2713(b)(2). Plaintiffs' request for permanent closure is also overbroad in light of their acknowledgment that gaming can lawfully occur on the Buffalo Parcel if the Secretary makes a determination favorable to the SNI under 25 U.S.C. § 2719(b)(1)(A). Docket No. 73 at 2.

3. The Applicability of the All Writs Act

The All Writs Act states, in pertinent part, that:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a). Relying on *United States v. New York Tel. Co.*, Plaintiffs contend that the Court has inherent power pursuant to the All Writs Act, to direct such action "as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." 434 U.S. 159, 172, 98 S. Ct. 364, 54 L. Ed. 2d 376 (1977).

Since *New York Tel.*, the Supreme Court has constrained the expansive reading it gave the All Writs Act in that decision. Some eight years later, the Supreme Court explained that "[t]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue in hand, it is that authority, and not the All Writs Act, that is controlling." *Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 43, 106 S. Ct. 355, 88 L Ed. 2d 189 (1985). Thus, in *Penn. Bureau of Corr.*, the Supreme Court held that the All Writs Act did not vest the district court with authority to direct the U.S. Marshals Service to transport a prisoner from a state facility to federal court to testify

in a civil rights proceeding because the habeas statute was controlling. *Id.* at 38. The habeas statute, 28 U.S.C. § 2243, provides that only the person having custody of a prisoner can be required to produce the prisoner for a court appearance. *Id.* at 38-39. In that case, the custodian was the Commonwealth of Pennsylvania. The Supreme Court stated that the All Writs Act "does not authorize [federal courts] to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Id.* at 43.

Later decisions have established that the All Writs Act does not, by its terms, provide federal courts with an independent grant of jurisdiction. *Syngenta Crop Prot., Ind. v. Hurley*, 537 U.S. 28, 123 S. Ct. 366, 154 L. Ed. 2d 368 (2002) (holding that All Writs Act did not provide jurisdictional basis to remove an action from state to federal court where the district court did not have original jurisdiction over the dispute). "While the All Writs Act authorizes employment of extraordinary writs, it confines the authority to the issuance of process 'in aid of' the issuing court's jurisdiction. . . . [It] does not enlarge that jurisdiction." *Clinton v. Goldsmith*, 526 U.S. 529, 535-35, 119 S. Ct. 1538, 143 L. Ed. 2d 720 (1999) (citation omitted) (Court of Appeals for the Armed Forces' order enjoining the President and various military officials from dropping respondent from the rolls of the Air Force was not "in aid of" that court's strictly circumscribed jurisdiction to review court-martial findings and sentences).

More recently, in *Norton v. Southern Utah Wilderness Alliance*, the Supreme Court noted that writs of

mandamus under the All Writs Act are "normally limited to enforcement of a specific, unequivocal command, the ordering of a precise, definite act about which an official ha[s] no discretion whatsoever." 542 U.S. 55, 63, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004) (internal citations, quotation marks and alterations omitted).

Applying the foregoing principles to this case, the Court finds as follows. The IGRA mandates that the NIGC take prompt action once it has reason to believe that a violation exists. The IGRA and NIGC's regulations state that operating a gaming facility absent the Chairman's approval of a gaming ordinance is unlawful and a substantial violation of the IGRA. The Court's July 8, 2008 Decision vacated the Chairman's approval of the SNI's Ordinance. Defendants do not dispute that the SNI has been operating a gaming facility on the Buffalo Parcel without an approved ordinance since July 8, 2008.

The IGRA's mandate to the NIGC provides authority to issue a writ in aid of the Court's exercise of its jurisdiction in *CACGEC II*. There are no controlling statutory procedures governing the NIGC's failure to act in accordance with its statutory duty with which a writ will conflict. An order compelling the NICG and its Chairman to carry out their congressionally-mandated obligations in the face of the Court's July 8, 2008 Decision vacating the Chairman's Ordinance approval appears to be precisely the type of action contemplated by the All Writs Act.

Accordingly, the Court directs the NIGC and its Chairman to comply forthwith with Congress's mandate

as set forth in 25 U.S.C. § 2713(a)(3), and with NIGC regulations. Upon issuance of the notice(s) of violation, the Chairman is directed to take such action as is consistent with the Court's July 8, 2008 Decision, the IGRA's mandates and intent, and NIGC regulations.

B. Defendants' Motion to Remand

Defendants request that the Court alter or amend its Judgment, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, and remand the Chairman's approval of the SNI's Ordinance to the Chairman. They urge two bases for remand. First, they argue that the Court exceeded the permissible scope of review when it considered statutes and decisional authority not contained in the administrative record to determine a question of statutory interpretation relative to the "settlement of a land claim" exception in Section 20 of the IGRA.[2] Next, Defendants contend that remand is appropriate in light of two "new" developments: (1) the Bureau of Indian Affairs' publication, on May 20, 2008, of regulations relative to Section 20 of the IGRA, which became effective on August 25, 2008; and (2) the SNI's submission of a new class III gaming ordinance to the NIGC on July 16, 2008.[3]

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2. The Court notes that its July 8, 2008 Decision also contains a determination on another question of statutory interpretation—the meaning of "Indian lands." There, too, the Court considered statutes and decisional authority not contained in the administrative record. Defendants apparently do not believe the Court exceeded the permissible scope of review with respect to that aspect of the Decision, which was resolved in their favor.

3. Plaintiffs filed a passionate and lengthy response to Defendants' motion. Unfortunately, that well-written response,

Appendix D

1. The Standard for Rule 59 Motions

Alteration of a court's judgment pursuant to Rule 59(e) is an "extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *USA Certified Merchants, LLC v. Koebel*, 273 F. Supp. 2d 501, 503 (S.D.N.Y. 2003) (citations omitted). "A court is justified in reconsidering its previous ruling if: (1) there is an intervening change in the controlling law; (2) new evidence not previously available comes to light; or (3) it becomes necessary to remedy a clear error of law or to prevent obvious injustice." *Atlantic States Legal Found., Inc. v. Karg Bros., Inc.*, 841 F. Supp. 51, 53 (N.D.N.Y.1993) (quoting *Larsen v. Ortega*, 816 F. Supp. 97, 114 (D. Conn.1992)).

The standard for granting a Rule 59(e) motion is strict, and reconsideration is generally denied as Rule 59(e) "motions are not a vehicle for re-litigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite of the apple." *Celeste v. East Meadow Union Free Sch. Dist.*, 2008 U.S. Dist. LEXIS 61099, at *3 (E.D.N.Y. Aug. 5, 2008) (internal quotation marks and citation omitted); *see also*, *Exxon Shipping Co. v. Baker*, U.S. , 128 S. Ct. 2605, 2617 n.5, 171 L. Ed. 2d 570 (2008) (Rule 59(e) "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment" (citation omitted)).

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in large part, lacks relevant law directed to the arguments raised and authority advanced by Defendants. As such, it is of limited value on the precise questions before the Court.

A decision to grant or deny a Rule 59(e) motion is within the sound discretion of the court, and the motion should be granted only when the moving party can demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion and which, had they been considered, would have changed its decision. *Atlantic Cas. Ins. Co. v. Joney Const. Corp.*, 2008 U.S. Dist. LEXIS 54151, at *3-4 (E.D.N.Y. July 12, 2008) (citations omitted); *see also*, *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 63 F.3d 160, 165 (2nd Cir. 1995), *cert. denied*, 516 U.S. 1184, 116 S. Ct. 1289, 134 L. Ed. 2d 233 (1996) ("A court should be 'loath' to revisit an earlier decision in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" (citations omitted)).

2. The Court's Interpretation of the "Settlement of a Land Claim" Exception

On July 2, 2007, the NIGC Chairman considered whether the Buffalo Parcel was acquired as part of the "settlement of a land claim" and answered that question in the affirmative. Defendants now contend that the Court erred when it cited statutes and decisional authority not contained in the administrative record in finding that the Chairman's determination was arbitrary and capricious. They urge that when deciding a question of law, the Court is limited to a review of the law relied on by the agency. If the administrative record does not contain all of the law the Court believes is relevant, Defendants contend that the Court should not decide the matter, but should remand

the case. Before discussing Defendants' contentions, some background is warranted.

In early 2002, when the Secretary of the Interior was presented with the SNI's gaming compact with New York State, the Secretary considered whether land the SNI intended to purchase in the City of Buffalo with funds received under the Seneca Nation Settlement Act would be land acquired as part of the "settlement of a land claim." The Secretary answered this question of statutory interpretation in the affirmative in an opinion letter.

In that same year, the NIGC Chairman was presented with, and approved, a gaming ordinance adopted by the SNI on November 16, 2002. When the Chairman's final agency action was challenged in *Citizens Against Casino Gambling in Erie County v. Kempthorne* ("CACGEC I"), the Court found no evidence in the record that the NIGC had ever considered the questions of whether land to be purchased by the SNI in Buffalo would be "Indian lands" or would be gaming eligible under the "settlement of a land claim" exception contained in Section 20 of the IGRA. 471 F. Supp. 2d 295, 326 (W.D.N.Y. 2007), *amended by* 2007 U.S. Dist. LEXIS 29561 (W.D.N.Y. Apr. 20, 2007). The Court declined to interpret the statutory language the *CACGEC I* plaintiffs had placed in dispute, reasoning that the NIGC, which is charged with administering and interpreting the IGRA, should first have an opportunity to address these questions. *Id.* at 326-27. The Court remanded the matter to the NIGC on January 12, 2007, with instructions that the Chairman make the necessary "Indian lands" and Section 20 determinations, and explain the bases for his conclusions. *Id.* at 327.

On remand, the Chairman considered the "Indian lands" question and "the applicability of IGRA's 'settlement of a land claim' exception." AR00009.[4] On July 2, 2007, he concluded that the Buffalo Parcel is "Indian lands" and that the "settlement of a land claim" exception applies, making the Parcel eligible for Indian gaming. AR00009-13. The Chairman's July 2, 2007 Ordinance approval was challenged in *Citizens Against Casino Gambling in Erie County v. Hogen* ("CACGEC II"), where the Court entered the judgment Defendants now seek to amend. 2008 U.S. Dist. LEXIS 52395 (W.D.N.Y. July 8, 2008).

In moving for relief, Defendants fail to acknowledge that this same matter previously was remanded to the NIGC for the express purpose of affording the Chairman the opportunity to consider the at-issue statutory provisions in the first instance. The Chairman specifically addressed the "settlement of a land claim" question and provided an explanation for his decision. Now, in light of an adverse result, Defendants request a fourth[5] administrative bite at the apple. AR00013. The authority on which Defendants rely does not support their request. That authority stands for the proposition that courts

4. References to AR are to the NIGC's administrative record, Docket No. 27.

5. The Secretary of the Interior first addressed the "settlement of a land claim" question in her 2002 opinion letter. The NIGC could have addressed the question in the Chairman's 2002 ordinance approval, but did not do so. The Court remanded to provide the Chairman that opportunity in the first instance. The Chairman did then undertake the question, largely deferring to the Secretary's earlier reasoning in support of his conclusion.

should remand questions to an agency where the agency has not considered the question in the first instance. The cases do not mandate remand where the agency has decided the question and the reviewing court disagrees with its conclusion.

Defendants first cite to *Immigration and Naturalization Serv. v. Ventura*, 537 U.S. 12, 123 S. Ct. 353, 154 L. Ed. 2d 272 (2002), a case this Court relied on in *CACGEC I* to support its *sua sponte* decision to remand. In *Ventura*, an Immigration Judge considered and denied a Guatemalan's application for asylum. *Id.* at 14. In addition to finding that the applicant had failed to meet his burden of demonstrating that he faced persecution based on his perceived political opinion, the Immigration Judge concluded that conditions in Guatemala had changed enough to call into question any motivation for future persecution. *Id.* at 15. The Board of Immigration Appeals ("Board") affirmed on the ground that the applicant did not meet his burden of establishing that he had faced the threat of persecution, and then declined to address the question of changed conditions in Guatemala. *Id.*

On appeal, the Ninth Circuit rejected the Board's conclusion that the applicant had not met his initial burden of proof. *Id.* Both sides requested that the Circuit Court remand the case to the Board for its determination of the question of "changed conditions." *Id.* at 13. While the Ninth Circuit "recognized that the [Board] had not decided the 'changed circumstances' question and that 'generally' a court should remand to permit that consideration," it determined that there was no need for remand where it

was clear the Court would reverse the Board's decision if the Board decided the matter against the applicant. *Id.* at 15.

The United States Supreme Court reversed the Ninth Circuit insofar as it denied remand to the Board on the "changed conditions" question. The Supreme Court held that the Ninth Circuit had disregarded the agency's legally-mandated role and "independently created far-reaching legal precedent . . . without giving the [Board] the opportunity to address the matter in the first instance in light of its own expertise." *Id.* at 17. The Supreme Court did not disturb the Ninth Circuit's decision to reject the Board's determination on the question it did have an opportunity to *consider—i.e.*, whether the applicant had met his burden of establishing that he faced persecution.

Another case on which Defendants rely, *Gonzales v. Thomas*, also involved a Board of Immigration Appeal determination. 547 U.S. 183, 126 S. Ct. 1613, 164 L. Ed. 2d 358 (2006). There, the applicant family sought asylum on two grounds: (1) their race and political views, and (2) their membership in a particular social group. *Id.* at 184. The Immigration Judge and the Board both focused on the applicants' race and political views and rejected their claim. *Id.* On review, the Ninth Circuit noted that the Board had not considered the family's claim of persecution because of "membership in a particular social group." The Ninth Circuit then engaged in statutory interpretation in the first instance and concluded that the applicant family fell within the scope of that statutory term. *Id.* at 184-85. The Supreme Court vacated the Ninth Circuit's judgment

and found that it erred in failing to remand to the Board a question it had not yet considered. *Id.* at 186.

The instant case is readily distinguished. Although no party requested a remand in *CACGEC I*, the Court remanded the issues raised in that complaint to the NIGC precisely so the NIGC could consider in the first instance the very questions raised again in *CACGEC II*. The NIGC squarely addressed the "settlement of a land claim" question on which Defendants now base their remand request.

Defendants confuse two distinct concepts: whether the agency has had an opportunity to consider the question presented in the first instance, and whether the agency's determination on that question is found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). The latter circumstance is the one that exists here and remand is not warranted. Indeed, to require the NIGC to provide additional analysis or explanation in support of a determination that the Court has concluded is arbitrary, capricious and contrary to a century's worth of settled law and agency policy[6] would be the height of futility.

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6. Defendants do not acknowledge the Court's finding that, in addition to being arbitrary and capricious, the NIGC Chairman's determination on the settlement of a land claim question is contrary to law:

> [B]oth the NIGC's determination and the Secretary's opinion are at odds with the text of four successive congressional acts . . . , a significant body of decisional authority relative to those four acts, and the DOI's own

The Court also rejects Defendants suggestion that, when reviewing an agency's determination on a question of law, the court is unable to consider relevant statutes and decisional authority not contained in the administrative record. This argument is nonsensical and finds no support in Defendants' cited cases.

Accordingly, the Court declines to remand this matter to the NIGC on the ground that the NIGC's "settlement of a land claim" analysis did not acknowledge relevant, well-settled law.

3. "New" Legal Developments

Defendants state that they now would like to inform the Court of a development that emerged during the pendency of *CACGEC II*, but which they chose not to disclose to the Court while the action was pending. Specifically, the Bureau of Indian Affairs ("BIA") published a final rule on May 20, 2008, with an effective date of August 25, 2008, which "articulates standards that the BIA will follow in interpreting the various exceptions to the gaming prohibitions contained in section 2719 of IGRA." 73 Fed. Reg. 29354 (May 20, 2008).

Defendants have made no attempt whatsoever to explain or justify their failure to bring their own rulemaking, which they now claim is highly relevant, to

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> stated [positions]. In other words, they are contrary to more than a century of law and agency action.

CACGEC II, 2008 U.S. Dist. LEXIS 52395, at *205.

the Court's attention during the pendency of *CACGEC II*. The Department of the Interior ("DOI") certainly cannot claim to have been unaware of its own Bureau's publication, and Defendants clearly were in the best position to timely bring this "new" development to light.[7] Defendants' absolute silence in this regard appears to suggest a belief that the onus was on the Court to scour the Federal Register on a daily basis to discern whether the DOI, the BIA, the NIGC, or any other federal agency had taken any administrative action that might impact this case. An alternative explanation, of course, is that Defendants simply made what they believed was a sound strategic decision not to disclose this development.

Whatever their reasons, Defendants' approach is particularly egregious in light of the history here. A proposed rule relative to section 2719 of the IGRA was first published in 2000. 65 Fed. Reg. 55471 (Sept. 14, 2000). Following a comment period, the proposed rule lay dormant for several years. On October 5, 2006, the BIA published an amended proposed rule and set a deadline for the receipt of comments. 71 Fed. Reg. 58769. The deadline was twice extended and finally expired on February 1, 2007. 72 Fed. Reg. 1954 (Jan. 17, 2007). The DOI, through the BIA, then presumably commenced work on a final rule. Some five months after the comment period closed, on July 2, 2007, the NIGC issued its Ordinance approval and section 2719 analysis.

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7. The NIGC is deafeningly silent as to its knowledge of the BIA publication. However, in light of the relationship between the DOI, the BIA, and the NIGC, generally and in this case, it is difficult to imagine that the NIGC was not also aware of the BIA's progress on and publication of a final rule.

Appendix D

In *CACGEC II*, Plaintiffs sought to rely on language in the BIA's 2006 proposed rule to challenge the NIGC's "settlement of a land claim" analysis. Docket Nos. 35 at 23 and 34-2 at 47. In response, Defendants reconfirmed the NIGC's position, and argued against the proposed rule's applicability. Specifically, Defendants urged that the proposed rule was irrelevant and did not have the force of law because it was not codified, and that it "represent[ed] neither the Department's nor the NIGC's current interpretation of the Section 20 'settlement of a land claim exception.'" Docket Nos. 28-2 at 30 and 45 at 25. They gave no indication that publication of a final rule was imminent.

The BIA published its final rule on May 20, 2008, while the motions in *CACGEC II* remained pending. 73 FR 29354. Although the proposed rule had been a subject of dispute between the parties and Defendants now urge the final rule's relevance, Defendants failed to notify the Court that a final rule was published. Likewise, Defendants gave no indication that they wished to reconsider legal positions previously advanced or ignored in light of the final rule. On June 26, 2008, *more than one month after publication of the final rule*, the Court advised the parties that it would issue its Decision no later than July 8, 2008. Again, Defendants declined to inform the Court of, or take any action premised upon, the BIA's publication.

Defendants now contend that remand is appropriate so that the NIGC can apply both the DOI's changed "interpretation of the applicability of Section 2719 of IGRA to restricted fee Indian lands" and its "new legal

interpretation of the settlement of a land claim exception" to the SNI's June 9, 2007 Ordinance. Docket No. 65 at 7-8. According to Defendants, a remand "will allow the NIGC to review its decision and determine in the first instance whether to alter that decision." *Id.* at 7. The obvious problem with this rationale is that Defendants had the opportunity throughout the pendency of *CACGEC II*, and certainly no later than May 20, 2008, to file supplemental legal memoranda on this very issue and/or to seek a stay of court proceedings to consider whether to revise their legal theories or take further agency action. Defendants apparently chose to stay the course and then alter their legal positions only if faced with an adverse outcome.

Defendants cite a number of cases they claim support their request for remand. All are distinguishable from the circumstances here. First, none of the cited cases involve a request for the extraordinary remedy of Rule 59(e) relief. In two of the cases, the legal development on which remand was premised arose *after* judgment was entered by the courts *below—i.e.*, it truly was an intervening change. *Lawrence v. Chater*, 516 U.S. 163, 116 S. Ct. 604, 133 L. Ed. 2d 545 (1996) (Supreme Court granted agency's request to remand case to Fourth Circuit where agency reinterpreted statute in a manner that might benefit claimant *after* the Circuit Court entered judgment against her); *Department of the Interior v. South Dakota*, 519 U.S. 919, 117 S. Ct. 286, 136 L. Ed. 2d 205 (1996) (Supreme Court remanded case based on DOI's promulgation of new regulation *after* Eight Circuit ruled

against it).[8] In the third case, *SKF USA Ind. v. United States*, an agency altered its position and sought a remand *while the case was still pending*, an option Defendants in this case also had, but did not avail themselves of. 254 F.3d 1022 (Fed. Cir. 2001). The lower court denied the request. The Federal Circuit concluded that the agency's remand request should have been granted, noting there was no indication the agency acted in bad faith and it had brought the matter to the attention of the lower court prior to judgment. *Id.* at 1030.

The circumstances here are quite different and must be assessed in accordance with Rule 59(e) standards. Here, Defendants had more than sufficient opportunity to alert the Court to the final rule and request appropriate relief during the pendency of *CACGEC II*. The failure to do so, without explanation, does not warrant post-judgment relief. *See, e.g.*, *Daley v. Commissioner of Soc. Sec.*, 2008

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8. Justice Scalia issued dissents in both of the remand cases cited by Defendants. In *DOI v. South Dakota*, he stated as follows:

> [W]e have never before GVR'd [granted certiorari, vacated and remanded] simply because the Government, having lost below, wishes to try out a new legal position. The unfairness of such a practice to the litigant who prevailed in the Court of Appeals is obvious. ("Heads I win big," says the Government; "tails we come back down and litigate again on the basis of a more moderate Government theory.") Today's decision encourages the Government to do what it did here: "go for broke" in the [court below], rather than get the law right the first time.

519 U.S. at 921 (emphasis in original, alterations added).

U.S. Dist. LEXIS 34257 (N.D.N.Y. Apr. 24, 2008) (denying Rule 59(e) motion where Commissioner brought existing administrative publications to court's attention after judgment was entered); *Cordero v. Astrue*, 574 F. Supp. 2d 373, 2008 U.S. Dist. LEXIS 52711 (S.D.N.Y. July 7, 2008) (denying Rule 59(e) motion based on the advancement of legal theories not previously raised before the court); *Pan Building, Inc. v. Philadelphia Hous. Auth.*, 1989 U.S. Dist. LEXIS 7421 (E.D. Pa. 1989) (Rule 59 motion denied where counsel sought new trial based on evidence discovered at least two weeks before court issued its decision, but which counsel failed to disclose until after receiving adverse result); *Currie v. Baxter, Brown & Co., Inc.*, 145 F.R.D. 66 (S.D. Miss. 1992) (denying Rule 59(e) motion to alter or amend judgment where plaintiff had opportunity to bring relevant precedent to attention of the court, but failed to do so).

Defendants also suggest that a remand will conserve the resources of the parties and the Court. The Court does not agree. Had Defendants requested a stay or remand during the pendency of *CACGEC II*, that argument may have carried some appeal. Waiting until *CACGEC II* was decided, however, ensured the maximum expenditure of party and Court resources in the case. To the extent that Defendants are speaking of future resources, the Court is inclined to believe that regardless of whether the NIGC reconsiders the SNI's June 9, 2007 ordinance on remand or takes action on the SNI's new class III gaming ordinance, filed on July 16, 2008, the possibility that the Court will have to consider these issues again is precisely the same.

Nor can the Court conclude that denying remand will result in manifest injustice to Defendants. As Defendants note, the SNI already has filed another amended ordinance with the NIGC which the Chairman will have the opportunity to act upon if he so chooses.

Finally, the Court is concerned that the relief Defendants request may be contrary to the "new" rule, which provides that "[t]hese regulations do not *alter* final agency decisions made pursuant to 25 U.S.C. 2719 before the date of enactment of these regulations." 25 C.F.R. § 292.26(a) (emphasis supplied). It appears that the BIA sought to grandfather in and prevent the subsequent alteration of all final agency actions by the NICG on section 2719 taken prior to August 25, 2008. The Court declines to remand with a direction to the NIGC to violate the BIA's new rule.

For all of the reasons stated, the Court, in its discretion, denies Defendants' request for a remand based on the BIA's "new" final rule.

III. CONCLUSION

For the reasons stated above, Plaintiffs' request that the Court enforce its Decision and Order in *CACGEC II* is granted to the extent that the NIGC and its Chairman are directed to forthwith carry out their congressionally-mandated enforcement duties under the IGRA. The motion is denied to the extent that Plaintiffs request an order that would divest the NIGC of its discretion to determine the type of enforcement action to take. The Defendants'

motion to once again remand the questions presented in *CACGEC I and II* to the NIGC is denied.

IV. ORDERS

IT HEREBY IS ORDERED, that Plaintiffs' Motion to Enforce (Docket No. 63) is GRANTED in part, and DENIED in part, consistent with the foregoing Decision.

FURTHER, that Defendants' Motion to Remand (Docket No. 65) is DENIED.

FURTHER, that the NIGC and its Chairman are directed to comply forthwith with Congress's mandate as set forth in 25 U.S.C. § 2713(a)(3), and with NIGC regulations. Upon issuance of the notice(s) of violation, the Chairman is directed to take such action as is consistent with the Court's July 8, 2008 Decision, the IGRA's mandates and intent, and NIGC regulations.

SO ORDERED.

Dated: August 26, 2008
Buffalo, New York

/s/ William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

APPENDIX E — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK, DATED JULY 8, 2008

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

07-CV-0451S

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY (JOEL ROSE and ROBERT HEFFERN, as Co-Chairpersons), REV. G. STANFORD BRATTON, D. MIN., Executive Director of the Network of Religious Communities, NETWORK OF RELIGIOUS COMMUNITIES, NATIONAL COALITION AGAINST GAMBLING EXPANSION, PRESERVATION COALITION OF ERIE COUNTY, INC., COALITION AGAINST GAMBLING IN NEW YORK—ACTION, INC., THE CAMPAIGN FOR BUFFALO—HISTORY ARCHITECTURE AND CULTURE, ASSEMBLYMAN SAM HOYT, MARIA WHYTE, JOHN MCKENDRY, SHELLEY MCKENDRY, DOMINIC J. CARBONE, GEOFFREY D. BUTLER, ELIZABETH F. BARRETT, JULIE CLEARY, ERIN C. DAVISON, ALICE E. PATTON, MAUREEN C. SCHAEFFER, JOEL A. GIAMBRA, PASTOR KEITH H. SCOTT, SR., DORA RICHARDSON, and JOSEPHINE RUSH,

Plaintiffs,

v.

Appendix E

PHILIP N. HOGEN, in his Official Capacity as Chairman of the National Indian Gaming Commission, the NATIONAL INDIAN GAMING COMMISSION, the UNITED STATES DEPARTMENT OF THE INTERIOR, and DIRK KEMPTHORNE, in his Official Capacity as the Secretary of the Interior,

Defendants.

July 8, 2008, Decided
July 8, 2008, Filed

DECISION AND ORDER

[TABLES INTENTIONALLY OMITTED]

I. INTRODUCTION

Plaintiffs Citizens Against Casino Gambling in Erie County, *et al.* (collectively, "Plaintiffs" or "CACGEC"), commenced this action on July 12, 2007, and filed a First Amended Complaint on November 28, 2007. (Docket No. 49, hereafter "Am. Compl.") Plaintiffs challenge the National Indian Gaming Commission's ("NIGC") decision to approve a Class III Gaming Ordinance that was enacted by the Seneca Nation of Indians ("SNI") on June 9, 2007. The NIGC's approval permits the SNI to operate a gambling casino in the City of Buffalo on land the tribe purchased in 2005. Plaintiffs allege that certain determinations on which the NIGC based its approval are arbitrary, capricious, an abuse of discretion and not in accordance with law. They seek declaratory and

injunctive relief, and an award of costs and fees, under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706; the Declaratory Judgments Act ("DJA"), 28 U.S.C. §§ 2201 and 2202; Rule 57 of the Federal Rules of Civil Procedure; and the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 - 2721.

Plaintiffs' Amended Complaint asserts two claims against NIGC Chairman Hogen, the NIGC, the United States Department of the Interior ("DOI"), and DOI Secretary Kempthorne (collectively, "Defendants" or "the Government"). In the first, Plaintiffs challenge the NIGC's conclusion that certain SNI-owned land in the City of Buffalo (the "Buffalo Parcel" or "Parcel") is "Indian lands," as that term is defined in the IGRA. In the second, they challenge the NIGC's determination that the Buffalo Parcel was acquired "as part of the settlement of a land claim," and is thereby excepted from the IGRA's general prohibition on gaming on lands acquired after October 17, 1988.

There are now three motions before the Court. On September 10, 2007, Defendants moved to Dismiss the Complaint or in the alternative for Summary Judgment, pursuant to Rules 12(b)(1), 12(b)(6) and 56 of the Federal Rules of Civil Procedure.[1] Defendants urge that Plaintiffs

1. In support of their Motion, Defendants filed a Memorandum of Law, the Declaration of Gina L. Allery, Esq., and a Local Rule 56.1 Statement of Material Facts. (Docket No. 28.)

Plaintiffs filed an opposing Memorandum of Law, the Affidavit of Joel Rose, the Affidavit of Rev. G. Stanford Bratton, the

lack Article Ill and prudential standing to sue, the Court lacks jurisdiction over this suit because the United States has not waived its sovereign immunity, and Defendants are entitled to judgment as a matter of law. Defendants alternatively seek summary judgment, but only if the Court does not agree with their contention that the Amended Complaint presents solely legal questions that can be resolved on a motion to dismiss. Docket No. 28-2 at 8-9.

Plaintiffs responded to Defendants' motion to dismiss, and also affirmatively moved, on October 10, 2007, for summary judgment on the merits of their claims that Defendants' actions were arbitrary, capricious, an abuse of discretion, and not in accordance with law.[2] Plaintiffs

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Affidavit of Gregory Lodinsky, the Affidavit of John McKendry, the Affidavit of Joel A. Giam bra, and a Response to Defendants' Statement of Material Facts. (Docket No. 37.)

Defendants filed a Reply Memorandum of Law. (Docket No. 44.)

2. In support of their Motion, Plaintiffs filed a Memorandum of Law, a Local Rule 56.1 Statement of Undisputed Facts, and the Affidavit of Cornelius D. Murray, Esq., with annexed exhibits 1-15. (Docket No. 36.)

Defendants filed an Opposing Memorandum of Law and a Response to Plaintiffs' Statement of Facts. (Docket No. 45.)

Plaintiffs filed a Reply Memorandum of Law, and the Reply Affidavit of Cornelius D. Murray, Esq. with annexed exhibits A and B. (Docket No. 52.)

later moved, on January 10, 2008, for Leave to Supplement the Record.[3]

All motions were fully briefed as of January 25, 2008,[4] and are now ready for disposition. The Court heard extensive oral argument on essentially the same questions in a previous action by Plaintiffs, and recently found that no additional argument is necessary. For the reasons set forth below, the Court finds that one or more plaintiffs has standing to sue and the Court has subject matter jurisdiction over this dispute. On the substantive disputes, the Court finds that, as a matter of law, the Buffalo Parcel is "Indian lands" within the meaning of the IGRA. However, the Parcel was not acquired "as part of the settlement of a land claim," and this exception to the IGRA's general prohibition against gaming on land acquired after October 17, 1988, does not apply to make the Parcel gaming-eligible.

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3. Plaintiffs filed a Memorandum of Law in Support, and the Declaration of Cornelius D. Murray, Esq. with annexed exhibits A and B. (Docket No. 56.)

Defendants filed a Memorandum in Opposition to Plaintiffs' Motion. (Docket No. 59.)

4. The Court granted the SNI leave to file a Brief *Amicus Curiae* to address the issues raised in the parties' respective dispositive motions, and the *amicus* brief was filed on January 17, 2008. (Docket No. 58.) Plaintiffs were granted leave to expand their reply memorandum to respond to the SNI's brief. (Docket Nos. 50 and 51.)

Appendix E

II. BACKGROUND

An understanding of the parties' respective arguments and the context in which they arise requires more than a passing familiarity with the SNI's historical relationship to land in western New York and its prior dealings with the federal government.[5] In addition, resolution of the pending motions requires an understanding of the IGRA, 25 U.S.C. §§ 2701 - 2721, and other relevant statutes such as the Seneca Nation Settlement Act of 1990 ("SNSA"), 25 U.S.C. §§ 1774-1774h, and the Indian Trade and Intercourse Act (the "Nonintercourse Act"), 25 U.S.C. § 177. Accordingly, the Court begins with a discussion of the historical, legal, and procedural background of this case and these statutes.[6]

A. The Aboriginal Tribes and their Territories

In aboriginal times, the SNI was one of five nations comprising the Iroquois Confederacy, or Haudenosaunee

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5. "To understand twenty-first century Native American legal issues, one must be familiar with developments often dating back to the sixteenth, seventeenth and eighteenth centuries. A wealth of seemingly non-legal data affects the legal relationship between Indians and the federal government." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, Matthew Bender (2005 ed.) (hereinafter "COHEN'S") at 7.

6. Defendants contend that this case does not require an examination of historical documents and developments; it involves nothing more than a straightforward interpretation of one recent statute. Docket No. 45 at 5-6. For reasons that will become clear, this Court disagrees.

("People of the Longhouse"), believed to have been formed in the fifteenth century.[7] *Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448, 458 n.12 (W.D.N.Y. 2002), *aff'd*, 382 F.3d 245 (2d Cir. 2004), *cert. denied*, 547 U.S. 1178, 126 S. Ct. 2351, 165 L. Ed. 2d 278 (2006) (citation omitted). The SNI was the westernmost tribe of the Confederacy and, at the time of the first European contact, its villages were all east of the Genesee River, extending from the Genesee Valley eastward to the watershed between Seneca and Cayuga Lakes. *Id.* at 458. The area to the west of the SNI's villages was occupied by three separate but allied groups—the Neutral Nation of Indians (territory encompassing both sides of the Niagara River), the Wenros (east along the south shore of Lake Ontario), and the Eries (south of present-day Buffalo and along the southeast shore of Lake Erie into Ohio). *Id.* at 457-58.

Between 1638 and 1680, the SNI engaged in warfare with, and defeated, first the Wenros, then the Neutrals, and finally, the Eries. *Id.* at 458-59. After driving these groups from the region, the SNI did not permanently occupy land west of the Genesee River, but apparently did use the area for hunting and fishing. *Id.* at 459. For the most part, the SNI continued to permanently reside between the Genesee River and Seneca Lake until the Revolutionary War. *Id.* The Senecas who moved west to

7. The five nations included the Senecas, the Cayugas, the Onondagas, the Oneidas and the Mohawks. In the early eighteenth century, the Tuscaroras joined the Confederacy, which then became known as the Six Nations of the Iroquois. *Id.; see also, Cayuga Indian Nation of New York v. Cuomo*, 413 F.3d 266, 269 n.1 (N.D.N.Y. 1983).

the Niagara region in the early 1700s did so to work for the French, carrying goods over the escarpment portage there. *Id.* at 463.

B. British Dominance and Rights of Extinguishment and Preemption

Through the mid-1700s, both the French and the British sought to claim land in present-day New York State. In 1763, following several British military victories, France and Great Britain entered into the Treaty of Paris, whereby France ceded to Great Britain all its claims to territories east of the Mississippi River. *Id.* at 464-65. On October 7, 1763, King George III issued a Royal Proclamation prohibiting the purchase or settlement of Indian lands west of the crest of the Appalachian Mountains by anyone, including the colonial governors, without permission of the Crown. *Id.* at 465. The Crown held the right to extinguish Indian title to land and the right of preemption—*i.e.*, the right to acquire Indian land once Indian title had been extinguished.[8] *Oneida Indian Nation v. New York*, 649 F. Supp. 420, 425 (N.D.N.Y. 1986), *aff'd*, 860 F.2d 1145, 1167 (2d Cir. 1988), *cert. denied*, 493 U.S. 871, 110 S. Ct. 200, 107 L. Ed. 2d 154

8. Under the "doctrine of discovery," the discovering European nations held fee title to Indian land, subject to the Indians' right of occupancy and use. That right was called Indian title or aboriginal title. *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 234, & n.3, 105 S. Ct. 1245, 84 L. Ed. 2d 169, (1985). Indian tribes could enter into agreements to dispose of the land they occupied but, under the right of preemption, a tribe could only dispose of holdings to the country holding fee title.

(1989). Great Britain's centralization of Indian affairs by the Proclamation of 1763 eventually became one of the grievances leading to the American Revolution. *Id.*

C. The Revolutionary War and Articles of Confederation

In 1776, the year after the Revolutionary War began, the colonies formally declared their independence as a new nation. In 1777, the Delegates of the thirteen states agreed to Articles of Confederation providing for perpetual union between the states. Provisions relative to land and Indian affairs in clauses 2 and 4 of Article IX state, in pertinent part, that:

> [N]o State shall be deprived of territory for the benefit of the United States.
>
> . . . .
>
> The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated . . . .

U.S.C.A. Art of Confed. art. IX, cls, 2 and 4. So, while control over Indian affairs was centralized in the new government, as it had been under the British, the thirteen states won two important guarantees. First, clause 2 protected their territories from encroachment by the

national government and, second, clause 4 confirmed their right to purchase Indian lands within their borders without the consent of Congress. *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1155-58 (2d Cir. 1988).

Ratification of the Articles of Confederation was delayed for several years, until 1781. This was due in part to a controversy over "western lands" to which seven of the thirteen states, including New York and Massachusetts, laid claim. *Seneca Nation of Indians*, 206 F. Supp. 2d at 472. States without such claims and the national government wanted to limit states' boundaries to their traditional borders. *Id.* In particular, the national government wanted to secure the western lands to finance the war debt. *Id.* A compromise was finally reached whereby the landed states ceded their western land claims to the United States in exchange for the recognition of favorable state boundaries. *Id.* at 472-73. In 1781 and 1785, respectively, New York and Massachusetts ceded their claims to lands north and west of the Ohio River. *Seneca Nation of Indians v. United States*, 12 Ind. Cl. Comm. 755, 757 (1963). This "Northwest Territory" (present-day Ohio) comprised the first land of the federal public domain. *Id.* at 758. Lands to the east remained the property of the states, individually,[9] and land retained by New York never became part of the federal public domain. *Id.* Thus, legal title to lands occupied by the SNI in New York has never

9. Britain's fee title in land to which Indian title had been extinguished and its right of preemption had passed to the individual states at the time of the Revolutionary War. *James v. Watt,* 716 F.2d 71, 74 (1st Cir. 1983), *cert. denied*, 467 U.S. 1209, 104 S. Ct. 2397, 81 L. Ed. 2d 354 (1984).

been in the *United States. Seneca Nation of Indians v. United States*, 12 Ind. Cl. Comm. 552, 561 (1963).

During the Revolutionary War, the SNI allied with the British. *United States v. Oneida Nation of New York*, 576 F.2d 870, 876, 217 Ct. Cl. 45 (1978). In 1779, the Continental Army retaliated for that allegiance by invading the SNI's Genesee Valley villages and destroying homes and crops. *Seneca Nation of Indians*, 206 F. Supp. 2d at 470. The Senecas were dispersed and many fled to Fort Niagara seeking British protection. *Id.* at 470-71. They did not return to the Genesee Valley, and settled instead along the banks of Buffalo Creek (formerly Neutral Nation territory, now known as the Buffalo River). *Id.* at 471.

D. The Treaties of Paris and Fort Stanwix

The 1783 Treaty of Paris between the United States and Great Britain ended the Revolutionary War. It confirmed the sovereignty of the United States and established boundaries between the United States and British North America, but did not include any reservation of Indian rights. *Id.* at 474. With no peace treaty in place between the United States and Britain's wartime Indian allies, the threat of hostilities continued. Of particular concern were the possibilities that the Indians would again ally with the British (who had refused to vacate some of their forts in the United States), various tribes would unite to mount a war against the United States, and hostilities would delay the settlement of western lands. *Id.*; *Oneida Indian Nation*, 649 F. Supp. at 443.

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George Washington urged that the United States negotiate a peace treaty with the Six Nations and establish boundary lines for their lands. *Seneca Nation of Indians*, 206 F. Supp. 2d at 475. The Continental Congress's Committee for Indian Affairs made a similar recommendation. *Id.* Shortly thereafter, the Congress adopted the Commitee's report and elected commissioners to negotiate with the Six Nations. *Id.* at 475-476. Formal treaty sessions began on October 12, 1784, at Fort Stanwix (now Rome, New York). The Six Nations ultimately relinquished claims to the Northwest Territory, to a four-mile-wide strip of land running from Johnston's Landing Place on Lake Ontario southward along the Niagara River to Buffalo Creek on Lake Erie, and to a six-mile-square area around Fort Oswego in exchange for goods and the peaceful possession of the lands they retained. Treaty with the Six Nations, art. III, Oct. 22 1784, 7 Stat. 15.

Of the Six Nations, the SNI lost the most land at Fort Stanwix, resulting in tribal dissatisfaction and potential unrest. *Seneca Nation of Indians*, 206 F. Supp. 2d at 480-81, 487. In 1789, the government attempted to quell possible instability by compensating the Six Nations for the land they had relinquished. *Id.* at 481; Treaty with the Six Nations, Jan. 9, 1789, 7 Stat. 33. This approach was largely ineffective and the SNI's dissatisfaction was exacerbated by an unfavorable geographical error in a survey later done in connection with the Fort Stanwix treaty. *Seneca Nation of Indians*, 206 F. Supp. 2d at 483-84. The 1784 Treaty described the western boundary of the Six Nations as running from the mouth of Buffalo Creek to the northern border of Pennsylvania. It was

thought that this line was coterminous with the western boundary of New York State. *Id.* at 483. However, when New York ceded to the United States its claim to land in the Northwest Territory in 1781, the state's actual boundary was established much farther west. *Id.* The boundary line described in the 1784 Treaty cut off all of present-day Chautauqua County and parts of Erie and Cattaraugus Counties, greatly diminishing the land base retained by the Six Nations, and particularly the SNI. *Id.*

E. The Indian Trade and Intercourse Act

The United States Constitution, which became effective on March 4, 1789, granted the federal government authority over Indian affairs. Its adoption removed any doubt as to whether, under the Articles of Confederation, certain rights over Indians continued to be reserved to the states. *United States v. City of Salamanca*, 27 F. Supp. 541, 543 (W.D.N.Y. 1939). The new federal government initially pursued a policy protective of Indians and sought to secure tribal rights to reserved lands. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 204, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005). In furtherance of that policy, Congress passed the first Indian Trade and Intercourse Act ("Nonintercourse Act"), which declared, in relevant part:

> That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States shall be valid to any person or persons, or to any state, whether having the right of preemption to such lands or not, unless the

> same shall be made and duly executed at some public treaty, held under the authority of the United States.

Act of July 22, 1790, ch. 33, 1 Stat. 137. In passing the Nonintercourse Act, Congress exercised its authority under the Indian Commerce Clause, U.S. CONST., art. I, § 8, cl. 3, to ban the states from purchasing or acquiring Indian lands without the federal government's approval. *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119, 80 S. Ct. 543, 4 L. Ed. 2d 584 (1960) ("The obvious purpose of the Nonintercourse Act is to prevent unfair, improvident, or improper disposition by Indians of lands owned or possessed by them to other parties ... [by enabling the federal government] to vacate any disposition of their lands made without its consent.") (citations omitted) (alteration added).

The Nonintercourse Act was renewed periodically and remains substantially in force today. Last modified in 1834, the Act is currently codified in 25 U.S.C. § 177. *Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917, 924 n.6 (1965) (tracing amendments). The current version provides, in pertinent part, that:

> 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.

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25 U.S.C. § 177.

F. The Treaty of Canandaigua

Hostilities between the United States and Indian tribes located west of New York and Pennsylvania continued well after the Revolutionary War. *Seneca Nation of Indians,* 206 F. Supp. 2d at 486. Attempts to treat with the western tribes ultimately failed and, in 1794, rumors began to circulate that the Six Nations, or at least the SNI, might join with the western tribes against the United States. *Id.* Largely due to concerns over the likelihood that the SNI would go to war, the United States again sought a treaty with the Six Nations. *Id.* at 486-87. In the 1794 Treaty of Canandaigua, the United States described and acknowledged a vast tract of land in western New York as belonging to the "Senekas" (the SNI),[10] and

10. One of the purposes of the Treaty of Canandaigua was to correct the geographical error in the boundaries allotted to the Six Nations in the 1784 Treaty of Fort Stanwix. *Seneca Nation of Indians*, 173 Ct. Cl. at 922 n.5. Article III of the Treaty provides that:

> The land of the Seneka nation is bounded as follows: Beginning on Lake Ontario, at the north-west corner of the land they sold to Oliver Phelps, the line runs westerly along the lake, as far as O-yong-wong-yeh Creek, at Johnson's Landing-place, about four miles eastward from the fort of Niagara; then southerly up that creek to its main fork, then straight to the main fork of Stedman's creek, which empties into the river Niagara, above fort Schlosser, and then onward, from that fork, continuing the same straight course, to that

the Six Nations, in turn, each agreed never to claim "any other lands within the boundaries of the United States." Treaty of Canandaigua, art. III and IV, Nov. 11, 1794, 7 Stat. 44. However, it was not long before land recognized by the Treaty of Canandaigua as belonging to the SNI was largely lost due to the government's shift away from a policy protective of Indian land rights.

> river; (this line, from the mouth of O-yong-wong-yeh Creek to the river Niagara, above fort Schlosser, being the eastern boundary of a strip of land, extending from the same line to Niagara river, which the Seneka nation ceded to the King of Great-Britain, at a treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the river Niagara to Lake Erie; then along Lake Erie to the north-east corner of a triangular piece of land which the United States conveyed to the state of Pennsylvania, as by the President's patent, dated the third day of March 1792; then due south to the northern boundary of that state; then due east to the south-west corner of the land sold by the Seneka nation to Oliver Phelps; and then north and northerly, along Phelps's line, to the place of beginning on Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

This Treaty returned to the SNI the land west and south of the mouth of Buffalo Creek, to the Pennsylvania border.

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G. Subsequent Treaties and SNI Land Cessions

Prior to 1786, sovereignty over most of what is now western and central New York was claimed by both New York and Massachusetts under conflicting grants from the Crown. *Seneca Nation of Indians*, 12 Ind. Cl. Comm. at 759. In 1786, New York entered into a convention agreement with Massachusetts (the Hartford Compact) by which it proposed to grant that state the preemption rights to some 6,000,000 acres in western New York,[11] in exchange for which Massachusetts relinquished its claim to sovereignty over the land. *Id.* at 759-60; *City of Salamanca*, 27 F. Supp. at 544; *Seneca Nation of Indians*, 206 F. Supp. 2d at 481. In 1796, Robert Morris, American statesman and "financier of our Revolution,"[12] acquired from Massachusetts the preemption rights to the westerly portion of that land.[13] *City of Salamanca*, 27 F. Supp. at 544. On September 15, 1797, by the Treaty of Big Tree, the federal government approved Morris' purchase of the

11. As previously noted, the right to purchase Indian lands had been reserved to the original states by the Articles of Confederation, which was in effect at the time of the Hartford Compact.

12. *Croxall v. Shererd*, 72 U.S. 268, 18 L. Ed. 572, 5 Wall. 268 (1867).

13. Preemption rights to the entire acreage had earlier been sold to Phelps and Gorham who, in 1788, purchased from the Iroquois land in the Genesee Valley and eastward. *Seneca Nation of Indians*, 12 Ind. Cl. Comm. at 760. They were financially unable to carry out the entire purchase, however, and later conveyed the westerly lands back to Massachusetts. *Id.* at 759-61, 764. The preemption rights to the remaining land were then sold to Morris.

bulk of the SNI's land holdings.[14] 7 Stat. 601. Morris, in turn, conveyed the land and his remaining rights to the Holland Land Company. *Federal Power Comm'n*, 362 U.S. at 123 n.18. In 1810, the Holland Land Company sold all right, title and interest in the SNI's remaining land to David A. Ogden for the Ogden Land Company, subject only to the rights of the SNI. *Seneca Nation of Indians*, 12 Ind. Cl. Comm. at 766. The SNI thereafter ceded most of its reserved land to the Ogden Land Company. *Seneca Nation of Indians v. United States*, 28 Ind. Cl. Comm. 12, 29 (May 3, 1972).

In 1823, the SNI ceded 16,720 acres of its Gardeau Reservation. *Id.* at 30. Three years later, in 1826, the SNI relinquished a total of 87,526 acres from eight reserves,

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14. The total area then held by the SNI encompassed approximately 4,250,000 acres which included modern-day Chautauqua, Cattaraugus, Erie (except a strip along the northern section of the Niagara River), Niagara, Orleans and Wyoming counties, most of Allegany and Genesee counties, and portions of Monroe and Livingston counties. *Seneca Nation of Indians v. United States*, 28 Ind. Cl. Comm. 12, 15 (May 3, 1972); *Banner v. United States*, 238 F.3d 1348, 1350 n.1 (Fed. Cir. 2001) ("*Banner II*"). A total of 4,030,325 acres was ceded at Big Tree. *Seneca Nation of Indians*, 28 Ind. Cl. Comm. at 16. The approximately 200,000 acres reserved for the SNI included the Allegany Reservation (in Cattauraugus County), the Cattaraugus Reservation (in Erie, Chautauqua and Cattaraugus Cos.), the Buffalo Creek Reservation (in Erie Co.), the Canadaway Reservation (in Chautauqua Co.), the Tonawanda Reservation (in Erie, Genesee and Niagara Cos.) and six smaller reservations in the Genesee Valley: Caneadea, Squaky Hill, Little Beard's Town, Big Tree, Canawagus, and Gardeau. 7 Stat. 601; *City of Salamanca*, 27 F. Supp. at 544.

including portions of its Cattaraugus (5,120 acres), Tonawanda (33,409 acres), and Buffalo Creek Reservations (33,637 acres). *Id.* at 32-36. In 1838, certain chiefs of the Six Nations, including chiefs from the SNI, entered into a treaty at Buffalo Creek that provided for the sale of all remaining tribal lands to the Ogden Land Company and the withdrawal of the Iroquois Confederacy tribes to land in Kansas. Treaty with the New York Indians, Jan. 15, 1838, 7 Stat. 550. Serious differences arose among the SNI leadership regarding the circumstances and terms of the 1838 treaty, and that dissension led to a "compromise" treaty with the SNI only, in 1842. Treaty with the Senecas, May 20, 1842, 7 Stat. 586. Under the 1842 treaty, the SNI confirmed the cession of its Tonawanda and Buffalo Creek reservations, but retained title to the Allegany (30,469 acres) and Cattaraugus (21,680 acres) Reservations.[15]

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15. The SNI has what is referred to as "recognized" title to its reservation land. Recognized title is based on a tribe's claim to immemorial rights, arising prior to white settlement, that has been recognized by federal treaty or statute. *Deere v. State of New York*, 22 F.2d 851, 854 (N.D.N.Y. 1927), *aff'd sub nom. Deere v. St. Lawrence River Power Co.*, 32 F.2d 550 (2d Cir. 1929). This is in contrast to land received in the form of a grant from the federal government. *Id.* By the Treaty of Fort Stanwix, "the right of occupation of the lands [inhabited by the Six Nations] ... was not granted, but recognized and confirmed." *Id.* (alterations added); 7 Stat. 15, 15-16. Later, in the Treaty of Canandaigua, the United States acknowledged all the land described in article III "to be the property of the Seneka nation." 7 Stat. 44, 45. Similarly, the Treaty of Big Tree "reserved" eleven specified parcels of land to the SNI, which were "clearly and fully understood to remain [SNI] property." 7 Stat. 601, 602 (alteration added). Finally, the second Treaty of Buffalo Creek acknowledged the SNI's continued right

The SNI also retained title to a one-mile square tract (640 acres) of land at Oil Spring, straddling Allegany and Cattauraugus counties, on which no Senecas resided but which encompasses a spring the SNI valued for its purported medicinal qualities.

The SNI's treaty cessions to Morris and Ogden reflect the changes then taking place in federal Indian policy. First, the nation's rapid growth in the late eighteenth and early nineteenth centuries created a demand for westward expansion and a corresponding pressure on the government to extinguish Indian title by treaty. Later, as Indian tribes became increasingly resistant to requests that they cede their territories, the government moved toward a policy of removing Indians to lands in the western states in exchange for their existing lands. *See, e.g.*, *Banner v. United States*, 238 F.3d 1348, 1351 (Fed. Cir. 2001) ("*Banner II*").

In 1871, the federal government abandoned formal treaty-making with Indian tribes altogether, Act of March 3, 1871, § 1, 16 Stat. 544 (codified in 25 U.S.C. § 71), and moved toward a policy of allotment[16] and assimilation.

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to occupy and enjoy the Cattaraugus and Allegany Reservations "with the same right and title in all things, as they had and possessed therein immediately before the [first Treaty of Buffalo Creek]." 7 Stat 586, 587 (alteration added). Recognized title has the advantage of relative permanence and constitutes "property" within the meaning of the Fifth Amendment to the Constitution of the United States. *United States v. Creek Nation*, 295 U.S. 103, 109-11, 55 S. Ct. 681, 79 L. Ed. 1331, 81 Ct. Cl. 973 (1935).

16. The General Allotment Act of 1887, commonly referred to as the Dawes Act, opened the door to further losses of Indian

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H. The Allegany Reservation

Early on, the SNI's Allegany Reservation was considered of little value. *City of Salamanca*, 27 F. Supp. at 544. That assessment changed when railroads extended through it to the west. Railroad construction purportedly was authorized by an Act of Legislature of the State of New York, May 12, 1836, Laws 1836, c. 316. This Act permitted the use of certain reservation land for railroad purposes only, but provided that fee should not vest in the railroads. *City of Salamanca*, 27 F. Supp. at 544. Inevitably, along with railroads came the growth of settlements, and settlers residing on the Allegany Reservation leased land from the SNI. *Id.*

Sometime prior to 1875, the Supreme Court of New York found that these leases had been taken without federal authority and declared them invalid based on the Nonintercourse Act, 25 U.S.C. § 177. *City of Salamanca*, 27 F. Supp. at 544; *Banner v. United States*, 44 Fed. Cl.

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lands. 25 U.S.C. §§ 331 *et seq.*, 24 Stat. 388. Under the Act, tribe members gave up their ownership interest in commonly held reservation land for an individual land allotment that either was held by the government in "trust" for the Indian, or by the Indian in "restricted fee," for a specified number of years, after which it was conveyed to the individual by fee patent, without restriction on alienation. *United States v. Ramsey*, 271 U.S. 467, 470, 46 S. Ct. 559, 70 L. Ed. 1039 (1926). Under the Dawes Act, existing reservations were diminished. Typically, only a portion of reservation land was parceled into individual allotments, with the remainder made available for sale to white settlers. *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 117, 113 S. Ct. 1985, 124 L. Ed. 2d 30 (1993).

568, 570 (1991) ("*Banner I*"). New York State petitioned Congress to ratify the leases, and Congress responded by enacting the Act of February 19, 1875, ch. 90, 18 Stat. 330. *City of Salamanca*, 27 F. Supp. at 544. That Act provided that existing leases would be valid and binding for a period of five years from its date of passage (to February 19, 1880), after which the SNI:

> through its councillors shall be entitled to the possession of the said lands, and shall have the power to lease the same: *Provided, however*, That at the expiration of said period, or the termination of said leases, as hereinbefore provided, said leases shall be renewable for periods not exceeding twelve years, and the persons who may be at such time the owner or owners of improvements erected upon such lands, shall be entitled to such renewed leases and to continue in possession of such lands, on such conditions as may be agreed upon by him or them and such councillors; and in case they cannot agree upon the conditions of such leases, or the amount of annual rents to be paid, then the said councillors shall appoint one person, and the other party or parties shall choose one person, as referees to fix and determine the terms of said lease and the amount of annual rent to be paid; and if the two so appointed and chosen cannot agree, they shall choose a third person to act with them, the award of whom, or the major part of whom, shall be final or binding upon the parties . . . .

18 Stat. 330, § 3 (12 year leases to expire February 19, 1892). Congress later passed the Act of September 30, 1890, ch. 1132, 26 Stat. 558, which extended the lease renewal period from twelve years to "a term not exceeding ninety-nine years" (to February 19, 1991), and incorporated "all other terms and conditions of the [Act of 1875]." (alteration added). Throughout these leasing periods, the SNI's ownership of the leased land was not disputed.

Following its final treaty cession in 1842, the SNI's Allegany land base remained intact until 1963. Then, the United States, by condemnation, acquired flowage rights and other easements on some 10,000 acres in the Allegheny Reservation (approximately one-third of the reserved land), as part of the Allegheny River Reservoir (Kinzua Dam) Project in southwestern New York State and Pennsylvania. *United States v. 1132.50 Acres of Land*, 441 F.2d 356, 357 (2d Cir.), *cert. denied*, 404 U.S. 850, 92 S. Ct. 86, 30 L. Ed. 2d 89 (1971). Because of its recognized title to the land, the SNI was entitled to receive, and did receive, compensation for the taking. *Id.*

I. The Indian Reorganization Act

In 1934, yet another shift in federal Indian policy was evidenced by Congress's enactment of the Indian Reorganization Act ("IRA"), 48 Stat. 984-88, codified as amended in 25 U.S.C. §§ 461 *et seq.* The government was moving from a policy of assimilation to one of Indian self-determination and the reinvigoration of tribal governments. To that end, the IRA encouraged tribes

to adopt constitutions and authorized the Secretary to issue charters of incorporation as means by which tribes could govern their internal affairs and engage in economic development. 48 Stat. at 987-88, 25 U.S.C. §§ 469, 476-477. The IRA was also directed toward stemming the loss of Indian land. It did not reactivate the federal restrictions on alienation that had been removed by fee transfers. However, the IRA did put an end to the granting of allotments, extended indefinitely the trust or restriction periods on remaining allotments, and authorized the Secretary of the Interior to restore surplus lands (reservation land previously opened up for sale) to tribal ownership, acquire land in trust in the name of the United States to provide land for Indians, and proclaim new reservations on lands acquired pursuant to the IRA. 48 Stat. at 984-86, 25 U.S.C. §§ 461-465, 467. Consistent with the IRA's goal of self-governance, Congress did not impose its provisions on Indian tribes:

> This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

48 Stat. at 988, 25 U.S.C. § 478.

Voting was held among the Iroquois nations in June 1935, and the nations, including the SNI, overwhelmingly rejected the IRA due to concerns over maintaining their sovereignty and their remaining land base. LAURENCE M. HAUPTMAN, THE IROQUOIS AND THE NEW DEAL 56-59 (1981). The SNI, who alone among the Six Nations already had an elective system of government, saw the IRA as superfluous. Wilcomb E. Washburn, *A Fifty-Year Perspective on the Indian Reorganization Act*, 86 AMERICAN ANTHROPOLOGIST 279, 286 (June 1984).

J. The Indian Claims Commission and the SNI's Claims for Damages

It was not long before federal policy once again did an about face and turned to tribal termination and the relocation of individual Indians. COHEN'S at 89-92 (period lasting 1943-1961). Advocates of termination sought to, among other things, bring finality to tribal complaints about the erosion of their land bases. *Id.* at 92. In 1946, Congress passed the Indian Claims Commission Act, which established the Indian Claims Commission (the "Commission") to hear and resolve certain claims by Indian tribes against the federal government. Act of August 13, 1946, ch. 959, 60 Stat. 1049. Specifically, the Commission was given jurisdiction over:

> (1) claims in law or equity arising under the Constitution, laws, treaties of the United States and Executive orders of the President; (2) all other claims in law or equity, including

> those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

60 Stat 1049, 1050, § 2. The Commission was authorized to hear only claims that accrued prior to enactment of the statute and were filed within five years thereafter—no later than August 13, 1951. *Id.* at § 12 (claims falling outside those parameters could not "thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress"). The only redress available in a Commission proceeding was a monetary award, and the Commission's orders were appealable to the Court of Claims.[17] *Seneca Nation of Indians*, 206 F. Supp. 2d

17. The Court of Claims was succeeded by the United States Claims Court in 1982, and the United States Court of Federal Claims in 1992.

at 499. The Commission was originally intended to exist for ten years, but Congress authorized extensions until September 30, 1978. *Id.* At that time, all remaining cases were transferred to the Court of Claims. *Id.*; Act of July 20, 1977, Pub. L. No. 95-69, 91 Stat. 273.

On August 11, 1951, the SNI filed a petition with the Commission seeking an award for damages for the United States' alleged failure to ensure that the SNI received conscionable consideration in the sale and leasing of its land under various treaties, agreements and statutes. *See Seneca Nation of Indians v. United States*, 39 Ind. CI. Comm. 355, 355 (1977). The SNI sought redress for, among other things, the 1788 Phelps Gorham purchase, the 1797 Morris purchase, the cessions to the Ogden Land Company in 1823, 1826 and 1838, and the Allegany Reservation land leases validated by the Act of 1875 and extended pursuant to the Act of 1890. On January 20, 1958, the Commission directed the SNI to file separate petitions for a number of their claims. *Id.* at 355.

In *Seneca Nation of Indians v. United States*, 12 Ind. Cl. Comm. 780 (1963), the Commission considered several of the SNI's land cession claims and determined that the United States was not liable for injuries the SNI purportedly suffered from the sales to Phelps and Gorham in 1788, Morris in 1797, and the Ogden Land Company in 1826 and 1838. In the Commission's view, the United States could not be responsible for the allegedly unlawful taking of SNI land because it has never held title to Indian land in New York State. *Id.* at 782. The Commission found that no treaty imposed a duty on the United States that

would render it liable for the alleged injuries, nor did the Nonintercourse Act. *Id.* 783-93. The SNI appealed.

The Court of Claims affirmed the Commission as to the Phelps Gorham purchase, but reversed as to all others. *Seneca Nation of Indians*, 173 Ct. Cl. 917. With respect to the Phelps Gorham purchase, the Court of Claims agreed that the Continental Congress had not assumed any fiduciary role toward the SNI under the Articles of Confederation, which then controlled. *Id.* at 920-21. However, the Court found a compelling distinction between the sale of land to Phelps and Gorham and all later sales—to wit, Congress's adoption of the Nonintercourse Act in 1790. *Id.* at 922. By that Act, the United States assumed a special fiduciary responsibility to protect and guard Indians against unfair treatment in transactions with respect to the disposition of their lands. *Id.* at 925. The Court held that wherever the Nonintercourse Act applies, it necessarily follows that "the United States is liable, under the Indian Claims Commission Act, for the 'receipt by the Indians of an unconscionably low consideration." *Id.* at 925-26. On remand, the Commission awarded the SNI $ 5,649,585.04 for various claims relating to its post-1790 land cessions. *Seneca Nation of Indians*, 28 Ind. CI. Comm. at 41 (Docket Nos. 342-A, B, C, E, F, I, 368 and 368-A).

On November 20, 1958, the SNI refiled its claim relating to the Allegany leases (which had been the Tenth Claim of its original petition) as Docket No. 342-G. *Seneca Nation of Indians*, 39 Ind. Cl. Comm. at 356. The Commission did not make a determination on liability with

respect to the SNI's claim for damages from its leases to non-Indians during the period 1870 to 1951. *Id.* at 358 (Docket No. 342-G). Instead, that claim was settled in 1977 by stipulation for entry of final judgment in the amount of $ 600,000. *Id.* at 358, 360, 364. The stipulation was "by way of compromise and settlement," and the United States did not admit liability. *Id.* at 357, 364. The final judgment disposed of all claims the SNI "asserted, or could have asserted in Docket No. 342-G, including, but not limited to, all claims for the leasing of [its] reservation lands for any purpose." *Id.* at 364.

In the 1960s, during the pendency of the SNI's claims, national Indian policy was once again in the process of reversal—this time returning to the goals of tribal self-determination, self-governance, and the federal-Indian trust relationship that are hallmarks of the IRA. This policy era continues to date. COHEN'S at 97-113.

K. The Salamanca Indian Lease Authority ("SILA")

The SNI's 99-year land leases to non-Indians, which were the subject of Commission Docket No. 342-G, were set to expire on February 19, 1991. In 1969, while the SNI's claim was still pending, the New York State legislature created the Salamanca Indian Lease Authority ("SILA") as a public benefit corporation authorized to negotiate and enter into a new "master lease" with the SNI for all reservation lands underlying the city of Salamanca ("the city"). N.Y. PUB. AUTH. LAW §§ 1790-99. Nearly twenty years of lease negotiations ensued, and during the latter course of negotiations, the "master lease" concept was

rejected. *Fluent v. Salamanca Indian Lease Authority*, 847 F. Supp. 1046, 1049 (W.D.N.Y. 1994). SILA then received authorization from an overwhelming majority of lessees to negotiate for the terms and provisions of a renewal of their individual leases. *Id.* SILA explained to the lessees, in September 1987, that individual lessees were each required to affirmatively renew their "99-year leases;" SILA would negotiate the renewal terms and each lessee would then decide whether to sign the lease. *Id.*

By letter dated May 21, 1990, SILA notified lessees that lease negotiations had concluded. *Id.* at *1050*. The renewal agreement between the city of Salamanca and the SNI offered new leases for a term of 40 years, with the right to renew for an additional 40 years. Annual rents would be based on the fair market value of the land, without improvements. *Id.* A total of $ 800,000 was to be collected by the city from lessees and paid to the SNI, subject to adjustment based on yearly reappraisal. *Id.* One of the conditions of the renewal agreement was that the federal and state governments agree to pay to the SNI a total of $ 60 million, an amount believed to approximate the difference between the rents the SNI had actually received over the previous 99 years and the fair market rental value of the leased land over that same time period. The federal government was to pay $ 35 million, and the state government $ 25 million. *Id.; see also*, S. REP. No. 101-511, at 23 (1990).

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L. The Seneca Nation Settlement Act of 1990 ("SNSA")

In 1990, Congress considered the city and SNI's request that it implicitly ratify the lease renewal agreement and went on to enact the Seneca Nation Settlement Act of 1990, PUB. L. 101-503, 104 Stat. 1292 (codified in 25 U.S.C. §§ 1774-1774h).

The SNSA's background is set forth in committee reports to the Senate and House.[18] The Select Committee on Indian Affairs ("Committee") reported that the SNI had lost the use of "significant portions of its Allegany Reservation" during a 99-year lease period with terms that were "grossly unfair." S. REP. No. 101-511, at 4-5. As for the non-Indian lessees, the Committee noted that an increase in lease payments to a fair market rate would be "a great financial shock" in a community that has been in severe economic decline, and that "if a major disaster is to be averted for the city of Salamanca . . . further congressional legislation is needed." *Id.* at 5-6. The Committee was of the opinion that passage of the SNSA, by which the renewal agreement would become effective, would provide stability to the lessees, fair rents to the SNI going forward, and compensation for a past unfairness. *Id.* at 6, 33.

The Executive Branch, by the DOI, strongly opposed passage of the SNSA, in part because it would commit the United States to pay $ 35 million to address past

18. Because the reports do not differ in any relevant respect, citations are to the Senate Report only.

inequities when "it is not clear whether the United States could be held legally liable for the low rental rates for the use of tribal property." *Id.* at 39. As previously noted, there had been no determination of liability by the Claims Commission on this issue, nor had the United States conceded liability. While acknowledging the DOT's objection, the Committee was of the opinion that "the $ 60 million which is to be paid to the [SNI] is a fair and equitable compensation for the losses sustained by [it]." *Id.* at 32 (combined federal and state payments). The Committee recommended passage of the bill "to permit a renewal of the leases at fair market value and provide[ ] compensation to the [SNI] from the United States and the State for the loss of the fair market value of their lands during the last 99 years due to the action of the United States." *Id.* at 6, 31.

In enacting the SNSA,[19] Congress found that:

> An analysis of historic land values indicates that the payments made under the original [99-year] lease agreement and under the [Claims Commission] settlement described in paragraph (2)(E) were well below the actual lease value of the property.

25 U.S.C. § 1774(a)(3) (alterations added). Congress further found that the federal government had "a moral

19. The "Seneca Nation Settlement Act of 1990" is the short title for Public Law 101-503, entitled "An Act to provide for the renegotiation of certain leases of the Seneca Nation, and for other purposes." 104 Stat. 1292 (1990).

responsibility . . . to help secure a fair and equitable settlement for past inequities." *Id.* § 1774(a)(6). To assist in resolving inequities relating to the 1892 leases, the SNSA provided that the United States would pay the SNI $ 35 million. *Id.* §§ 1774(b)(2), 1774d(b).[20] The United States sought "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).

Also among SNSA's purposes was the promotion of stability and security for city residents, economic growth of the city, economic self-sufficiency of the SNI, and cooperative economic and community development efforts between them. *Id.* § 1774(b)(4)-(7). To that end, $ 5 million of the $ 35 million paid to the SNI was earmarked for "economic and community development of the Seneca Nation, including the city of Salamanca, which is an integral part of the Seneca Nation's Allegany Reservation." *Id.* § 1774(a)(2)(A). Use of the remaining $ 30 million was to be determined by the SNI in accordance with its constitution and laws. *Id.* § 1774d(b)(1).

One of the SNSA's miscellaneous provisions permits the SNI, in its discretion, to acquire land with funds received under the SNSA:

> Land within its aboriginal area in the State or situated within or near proximity to former reservation land may be acquired by the Seneca

20. New York passed legislation in July 1991, in which it agreed to pay the SNI $ 25 million. *See Fluent*, 847 F. Supp. at 1050.

> Nation with funds appropriated pursuant to this subchapter. State and local governments shall have a period of 30 days after notification by the Secretary or the Seneca Nation of acquisition of, or intent to acquire such lands to comment on the impact of the removal of such lands from real property tax rolls of State political subdivisions. Unless the Secretary determines within 30 days after the comment period that such lands shall not be subject to the provisions of section 2116 of the Revised Statutes (25 U.S.C. 177), such lands shall be subject to the provisions of that Act [the Nonintercourse Act] and shall be held in restricted fee status by the Seneca Nation. Based on the proximity of the land acquired to the Seneca Nation's reservations, land acquired may become a part of and expand the boundaries of the Allegany Reservation, the Cattaraugus Reservation, or the Oil Spring Reservation in accordance with the procedures established by the Secretary for this purpose.

Id. § 1774f(c) (alteration added). The intent of the SNSA generally, and this land acquisition provision in particular, are in dispute here.

M. The Indian Gaming Regulatory Act ("IGRA")

Two years prior to passing the SNSA, on October 17, 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721.

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Games of chance have a historic connection to tribal ceremonies and celebrations. Such gaming was not a subject of government scrutiny until 1979, when the Seminole Tribe of Florida opened a "high stakes" bingo hall on its reservation lands. The State of Florida, expressing concerns over the possible infiltration of Indian gaming by "criminal elements," attempted to shut down the tribe's bingo hall and the Seminoles sought injunctive relief. In *Seminole Tribe of Florida v. Butterworth,* the Fifth Circuit affirmed the district court's grant of relief to the tribe, concluding that the State of Florida did not prohibit bingo games as against public policy and the state's civil statute regulating bingo could not be enforced on tribal sovereign land. 658 F.2d 310, 313-16 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020, 102 S. Ct. 1717, 72 L. Ed. 2d 138 (1982). The reasoning of *Seminole v. Butterworth* and other circuit court cases that followed was affirmed by the Supreme Court in *Calfornia v. Cabazon Band of Mission Indians*, which upheld the sovereign right of Indians to engage in gaming on tribal lands. 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987). Underlying the Court's ruling is the long-standing principle that a state has no jurisdiction over Indian lands unless Congress has expressly ceded that jurisdiction. *Id.* at 207. In short, states had no means of restricting or regulating gaming on Indian lands within their borders.

After *Cabazon*, Congress sought to address the increasing prevalence of bingo and other high stakes gaming on Indian land. Some members advocated for gaming as a means to tribal economic self-reliance, while others expressed concerns over the unregulated operation

of activities that were not otherwise permitted in most states.

These concerns are reflected in the IGRA's various purposes:

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
>
> (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702.

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The IGRA provides for three classes of gaming, and each is subject to a different level of regulation. 25 U.S.C. § 2710. With respect to each class, the IGRA "seeks to balance the competing sovereign interests of the federal government, state governments and Indian tribes, by giving each a role in the regulatory scheme." *Artichoke Joe's v. Norton,* 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002), *aff'd*, 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 543 U.S. 815, 125 S. Ct. 51, 160 L. Ed. 2d 20 (2004).

Class I gaming is not subject to any type of regulation and includes "social games solely for prizes of minimal value or traditional forms of Indian gaming [associated] with tribal ceremonies or celebrations." 25 U.S.C. § 2703(6), 2710(a)(1) (alteration added).

Class II gaming includes bingo, pull-tabs, punch boards and other similar games, as well as card games not prohibited by state law. *Id.* § 2703(7)(A). Class II games are authorized if conducted under a gaming ordinance approved by the NIGC Chairman and located in a state that permits such gaming for any purpose by any entity. *Id.* § 2710(a)(2), (b)(1)(A) and (B). The federal government regulates, monitors and audits class II gaming. *Id.* § 2706.

Class III gaming, the category at issue in this case, is the "most heavily regulated and most controversial form of gambling" under the IGRA. *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003). It is comprised of all forms of gaming not in classes I or II, including slot machines, games such as baccarat, blackjack, roulette, and craps, and sport betting,

parimutuel wagering and lotteries. 25 U.S.C. § 2703(8) and (7)(B); 25 C.F.R. § 502.4. Class III gaming is lawful only if: (1) the governing body of the tribe having jurisdiction over the Indian land on which gaming is to take place authorizes class III gaming by adopting an ordinance or resolution that is then approved by the NIGC Chairman; (2) the gaming is located in a state that permits such gaming; and (3) the gaming is conducted in conformance with a "tribal-state compact" that regulates such gaming. 25 U.S.C. § 2710(d)(1).

An IGRA requirement applicable to all three classes is that the gaming operation be sited on Indian land within the tribe's jurisdiction. 25 U.S.C. § 2710(a)(1), (b)(1), (d)(1)(A)(i) and (d)(2)(A). For purposes of the IGRA, "Indian lands" include:

> (A) all lands within the limit of any Indian reservation; and
>
> (B) 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 tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

Id. § 2703(4); *see also*, 25 C.F.R. § 502.12.[21]

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21. Section 502.12 of Title 25 of the Code of Federal Regulations defines Indian lands as follows:

> (a) Land within the limits of an Indian reservation; or

However, the IGRA expressly prohibits gaming on land "acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988"[22] unless a defined statutory exception applies. 25 U.S.C. § 2719. Among the exceptions are where:

> lands are taken into trust as part of—
>
> (i) a settlement of a land claim,
>
> (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or
>
> (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

Id. § 2719(b)(1)(B). If none of these exceptions apply, gaming can occur on after-acquired lands only if:

> (A) the Secretary, after consultation with the Indian tribe and appropriate State, and local

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> (b) Land over which an Indian tribe exercises governmental power and that is either—
>
> (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
>
> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

22. This provision is often referred to as the "after-acquired lands prohibition on gaming."

> officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination[.]

Id. § 2719(b)(1)(A).

N. The SNI's Pursuit of Class III Gaming

In 2002, the SNI sought and obtained the state and federal approvals required by the IGRA for a class III gaming operation.

On August 18, 2002, the SNI and the State of New York executed a Tribal-State Gaming Compact (the "Compact") for the conduct of class III gaming at three sites in New York State, one of which was a then-unidentified area to be purchased within the City of Buffalo. AR00233;[23] Murray Aff., Ex. 15 at ¶ 11(a)(2). The Compact reflects the SNI's intent to use funds it received under the SNSA to purchase land in Buffalo. AR00237; Murray Aff., Ex. 15 at ¶ 11(b)(4) and (c).

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23. Citations to "AR __ " are to the Government's Administrative Record relative to the NIGC's July 2, 2007 approval of the SNI's Class III Gaming Ordinance. Docket No. 27.

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The Tribal-State Compact was forwarded to the DOI and received on September 10, 2002. AR00233. Within 45 days thereafter, the Secretary of the Interior[24] did not affirmatively approve or disapprove the Compact, thereby allowing it to be deemed approved as of October 25, 2002, pursuant to section 11(d)(8)(C) of the IGRA, 25 U.S.C. § 2710(d)(8)(C).[25] The Secretary explained her reasons for taking no action on the Compact in a subsequent letter, dated November 12, 2002. AR00233-240. In that letter, the Secretary opined that land the SNI intended to purchase with SNSA funds would be "Indian lands" within the meaning of the IGRA and would fall within the "settlement of a land claim" exception to the IGRA's general prohibition on gaming on lands acquired after 1988. *Id.* On December 9, 2002, the DOI published a notice in the Federal Register stating that the Compact "is considered approved, but only to the extent the compact is consistent with the provisions of IGRA." 67 Fed. Reg. 72,968.

On August 1, 2002, the SNI adopted the "Seneca Nation of Indians Class III Gaming Ordinance of 2002" and submitted the ordinance to the NIGC for review and approval. AR00050. Following the NIGC's initial review,

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24. Gale A. Norton was Secretary of the Interior when the Compact was submitted to the DOI for approval. She was replaced by Dirk Kempthorne following his confirmation by the Senate on May 26, 2006.

25. The IGRA equates 45 days of silence with approval, so the Secretary's nonaction results in a compact taking effect by operation of law.

the SNI amended its ordinance and submitted its "Seneca Nation of Indians Class III Gaming Ordinance of 2002, as Amended" to the NIGC on November 25, 2002. The NIGC Chairman approved the amended ordinance on November 26, 2002. AR00050, Docket No. 28-4 ¶ 10; Docket No. 37-8 Colo. 286, 7 ¶ 10. Notice of the ordinance approval was published in the Federal Register. 68 Fed. Reg. 70048 (Dec. 16, 2003).

Almost three years later, on October 3, 2005, the SNI purchased approximately nine (9) acres of land in the City of Buffalo (the Buffalo Parcel) and notified the State of New York and local governments of its acquisition. AR00025, 28, 77-78 and 228; Docket No. 28-4 ¶ 13; Docket No. 37-7 ¶ 13. Under the SNSA, state and local governments had thirty (30) days after receiving such notice to comment on the impact of the removal of the land from real property tax rolls. 25 U.S.C. § 1774f(c). The Secretary had 30 days after the expiration of the comment period to decide that the land should not be subject to the Nonintercourse Act's restrictions on alienation. *Id.* and AR00025. The Secretary did not make such a finding and the Buffalo Parcel assumed restricted fee status by operation of law on December 2, 2005. 25 U.S.C. § 1774f(c) and AR00025, 54.

On January 3, 2006, Citizens against Casino Gambling in Erie County and other plaintiffs commenced an action challenging the Government's decisions and actions permitting the construction and operation of a gambling casino on the Buffalo Parcel. *Citizens Against Casino Gambling in Erie County v. Norton*, 471 F. Supp. 2d 295 (W.D.N.Y.) ("*CACGEC I*"), *amended in part on*

reconsideration, 2007 U.S. Dist. LEXIS 29561, 2007 WL 1200473 (2007). On January 12, 2007, this Court found no evidence in the administrative record that the NIGC Chairman was aware of and relied on the Secretary's November 12, 2002 "Indian lands" opinion letter, or that he independently considered the threshold jurisdictional question of whether the SNI was proposing to engage in gaming in Buffalo on gaming-eligible Indian lands. *Id.* Absent consideration of this jurisdictional issue, the Court found the NIGC's approval of the SNI's ordinance was arbitrary and capricious, and the ordinance approval was vacated and remanded to the extent it pertained to gaming on land to be acquired in the City of Buffalo. *Id.*

Following the remand, on June 9, 2007, the SNI enacted an amended Seneca Nation of Indians Class III Gaming Ordinance (the "Ordinance") that modified the definition of "Nation Lands" to include a site-specific legal description of the Buffalo Parcel. AR00131, 179-80. NIGC Chairman Hogen approved the Ordinance on July 2, 2007. AR00009-13. In his approval letter, Hogen concluded that the Buffalo Parcel meets the IGRA's "Indian lands" definition, and is exempt from the general prohibition on gaming on land acquired after October 17, 1988 because it was acquired "as part of the settlement of a land claim." *Id.* Hogen cited certain authority on which he relied and stated that, in regard to both issues, he "defer[red] to the Secretary's existing interpretation." AR00012.

This action, challenging Chairman Hogen's conclusions, was commenced ten days after the Ordinance was approved. Plaintiffs allege that Hogen's decision to

approve the SNI's Ordinance violates the IGRA because: (1) the Buffalo Parcel is not "Indian lands" within the meaning of the IGRA; and (2) the SNSA did not "settle a land claim" such that the Buffalo Parcel would fall within that exception to the IGRA's prohibition on gaming on lands acquired after October 17, 1988. Plaintiffs further allege that, even assuming the Buffalo Parcel is Indian lands, the only exception to the IGRA's prohibition on gaming potentially applicable to the Parcel is section 20(b)(1)(A), 25 U.S.C. § 2719(b)(1)(A), which requires a finding by the Secretary that a casino on the Buffalo Parcel would not be detrimental to the surrounding community. Am. Compl. ¶¶ 71-2. They allege that there was no attempt by the Secretary or the NIGC to comply with this provision and they now seek its enforcement. *Id.* at ¶ 72 and Prayer for Relief ¶ 5.

On July 3, 2007, one day after the Ordinance was approved, the SNI opened its Seneca Buffalo Creek Casino on the Buffalo Parcel in a temporary, 5,000-square-foot facility housing 124 slot machines. David Staba & Ken Belson, *Temporary Casino Opens in Downtown Buffalo*, N.Y. TIMES, July 4, 2007; Press Release, Seneca Gaming Corporation, *Seneca Buffalo Creek Casino Opens for Business* (July 3, 2007), *http://vvww.senecagamingcorporation.com/SBCC/press.cfm*. The SNI plans to open permanent structures on the Buffalo Parcel in Spring 2010, including a 90,000-square-foot casino housing 2,000 slot machines and 45 table games, and a 22-story hotel. Sharon Linstedt, *Work starts on Senecas' $ 333 million casino-hotel complex in Buffalo*, BUFFALO NEWS, Feb. 8, 2008; *So Much To Offer*,

Seneca Gaming Corporation homepage, *http://www.senecagamingcorporation.com/SBCC/press.cfm*, Feb. 19, 2008.

III. THE GOVERNMENT'S JURISDICTIONAL CHALLENGES

Defendants contend, in their motion to dismiss, that the Court lacks jurisdiction to consider the merits of Plaintiffs' claims because Plaintiffs lack standing to sue and, furthermore, the Government has not waived its immunity to suit.

A. Standard of Review

Defendants' arguments relative to the Court's jurisdiction are appropriately reviewed under the Rule 12(b)(1) standard. A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). The plaintiff bears the burden of establishing the existence of federal jurisdiction. *Lujan v. Defenders of Wildlif*e, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Where, as here, the jurisdictional challenges are raised at the pleading stage, the court accepts as true all factual allegations in the complaint. It is "presume[d] that general [fact] allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889, 110 S. Ct. 3177, 111

L. Ed. 2d 695 (1990) (alterations added). The court also may consider affidavits and other evidence outside the pleadings to resolve the jurisdictional issue, but it may not rely on conclusory or hearsay statements contained in affidavits. *J.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004), *cert. denied*, 544 U.S. 968, 125 S. Ct. 1727, 161 L. Ed. 2d 616 (2005).

B. Plaintiffs' Standing to Sue

1. *Constitutional and Prudential Standing*

Standing is an essential component of the case or controversy requirement of Article III, section 2 of the United States Constitution. The Supreme Court has articulated the following "irreducible constitutional minimum" for standing: 1) the plaintiff must have suffered an "injury in fact;" 2) the injury must be fairly traceable to the defendant; and 3) it must be "likely," rather than "speculative," that the injury will be redressable by the court. *Defenders of Wildlife*, 504 U.S. at 560-61; *see also*, *Hein v. Freedom from Religion Found., Inc.*, __ *U.S.* __, 127 S. Ct. 2553, 2562, 168 L. Ed. 2d 424 (2007) (confirming well-established requisite elements of Article III standing). An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Defenders of Wildlife*, 504 U.S. at 560 (internal citations, footnote and quotation marks omitted). These requirements "tend[ ] to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete

factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1981) (alteration added). The party invoking federal jurisdiction bears the burden of establishing its existence. *Defenders of Wildlife,* 504 U.S. at 561 (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990)).

In addition to the constitutional limitations on federal court jurisdiction, the prudential doctrine of standing encompasses judicially-imposed limits on its exercise. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996). Among the prudential considerations is "the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984).

Defendants contend that Plaintiffs cannot meet their burden of establishing the constitutional elements of standing, and do not fall within the zone of interests necessary for prudential standing. For purposes of the standing analysis, Plaintiffs fall into three general categories: individual citizens, associations, and legislators. For the reasons discussed below, the Court concludes that at least some of these plaintiffs have standing to assert claims that the NIGC's Ordinance approval violates the IGRA. To reach the merits of Plaintiffs' claims, the Court need only find that one plaintiff has constitutional and

prudential standing to bring them. *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 52 n.2, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006); *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160, 102 S. Ct. 205, 70 L. Ed. 2d 309 (1981); *Animal Legal Def. Fund v. Glickman*, 332 U.S. App. D.C. 104, 154 F.3d 426, 429 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1064, 119 S. Ct. 1454, 143 L. Ed. 2d 541 (1999).

2. *The Individual Plaintiffs*

Ten of the fourteen individual plaintiffs allege that they either reside or operate businesses within the Buffalo Parcel neighborhood, and that a gambling facility will negatively impact them by causing blight, increased crime, lack of parking, and increased traffic, air pollution, and noise. Am. Compl. ¶¶ 13, 14, 16-20, 22. One of these plaintiffs attests that he and his employees are already negatively impacted by traffic and parking issues when events are scheduled at a nearby arena, and that the operation of a gambling casino will compound parking problems, traffic delays, and the difficulty to customers in reaching his company. Docket No. 35-5, Affidavit of John McKendry. Plaintiffs Richardson and Rush allege that they live directly to the east of the Buffalo Parcel and already have been impacted by construction dust and the threat of asbestos from the SNI's demolition work at the site, as well as the blockage of streets and sidewalks relating to the site's redevelopment. Am. Compl. ¶ 22.

To allege an injury in fact sufficient for constitutional standing, a plaintiff must first have a legally protected

interest that is threatened by Defendants' actions. *Defenders of Wildlife,* 504 U.S. at 572-73 nn.7-8. The IGRA, under which Plaintiffs bring their claims, provides that in certain circumstances the Secretary must make a determination that a gambling facility will not be detrimental to the surrounding community before gaming can lawfully occur. 25 U.S.C. § 2719(b)(1)(A); *TOMAC v. Norton*, 193 F. Supp. 2d 182, 190 (D.D.C. 2002), *aff'd in relevant part*, 369 U.S. App. D.C. 85, 433 F.3d 852 (D.C. Cir. 2006). Plaintiffs contend that the Secretary was required to make such a determination in this case,[26] but failed to do so. Am. Compl. ¶¶ 71-72; Docket No. 35 at 13-14. Thus, Plaintiffs have identified a legally protected interest that involves a procedural right.

The identified interest is "concrete and particularized" to these ten plaintiffs—*i.e.*, it affects them in a personal and individual way, as opposed to having a generalized impact on all members of the public. *Defenders of Wildlife*, 504 U.S. at 560 n.1. All ten allege that they live, work and/or own property in the immediate vicinity of the Buffalo Parcel and that a gambling facility will cause a distinct risk to the physical integrity, safety, and environmental quality of their neighborhood. Their close, day-to-day proximity to the site makes the alleged injury—the Secretary's failure to make the requisite determination

26. The Secretary is required to make such a determination for lands acquired after October 17, 1988, if the land does not fall within one of the three statutory exceptions in 25 U.S.C. § 2719(b)(1)(B). Plaintiffs argue that the settlement of a land claim exception does not apply to the Buffalo Parcel, thereby requiring this "no detriment" determination by the Secretary.

regarding possible detriment to their neighborhood—particular to these plaintiffs for purposes of standing. *See, e.g.*, *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 157-58 (D.D.C. 2002) (organization plaintiff sufficiently alleged standing to bring claim under IGRA where its members lived in close proximity to proposed gaming site and claimed the facility would negatively impact their health and security), *aff'd*, 358 U.S. App. D.C. 282, 348 F.3d 1020 (D.C. Cir. 2003), *cert. denied,* 541 U.S. 974, 124 S.Ct. 1888, 158 L. Ed. 2d 470 (2004); *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 27 (1st Cir. 2007) (tribe members had particularized and concrete interest in Bureau of Indian Affairs' purported failure to follow requisite statutory procedures before approving lease of tribal land to developer where members lived and worked near the lease site and used the land and surrounding waters for ceremonial and community purposes); *TOMAC*, 193 F. Supp. 2d at 186, 187-88 n.1 (plaintiffs living adjacent to a proposed casino project that would "significantly and permanently alter the physical environment of their neighborhood" alleged sufficiently personal, individual injury to meet standing requirements for IGRA and other claims); *Committee for Auto Responsibility v. Solomon*, 195 U.S. App. D.C. 410, 603 F.2d 992, 997-98 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 915, 100 S. Ct. 1274, 63 L. Ed. 2d 599 (1980) (plaintiffs had standing to challenge government's lease of property for use as parking facility as violative of the National Environmental Policy Act where they alleged that they lived and/or regularly traveled in the immediate vicinity of the facility and were affected by noise, air pollution and congestion from vehicles using it).

Where, as here, a plaintiff's legally protected interest involves a procedural right, the plaintiff need not meet "all the normal standards for redressibility and immediacy;" the focus is on whether a plaintiff who has suffered personal and particularized injury has sued a defendant who has caused that injury. *Defenders of Wildlife*, 504 U.S. at 572 n.7. For example, under Supreme Court case law:

> [O]ne living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Id. In the instant case, these ten plaintiffs need not show that the alleged harm to their neighborhood is imminent,[27] and they have otherwise sufficiently alleged an injury in fact.

To demonstrate the causation element of constitutional standing, Plaintiffs must show that their alleged injury from the SNI's construction and operation of a gaming facility is fairly traceable to Defendants. That causal link is readily identified here. NIGC approval of a tribal

27. Even were these plaintiffs required to make this showing, certain of them have alleged or attested that some harm has occurred already.

gaming ordinance is a necessary, final prerequisite to the operation of a class III gaming facility. Plaintiffs allege Defendants acted contrary to law in permitting gaming on the Buffalo Parcel because the Parcel is not Indian lands, it was acquired after October 17, 1988, none of the three land exceptions of 25 U.S.C. § 2719(b)(1)(B) apply, and the Secretary did not make the determination of no detriment required by 25 U.S.C. § 2719(b)(1)(A). Plaintiffs' allegations of injury from a gambling facility that could not lawfully operate absent Defendants' purportedly erroneous approval are sufficient to satisfy the causation element. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (a plaintiff satisfies the causation prong by alleging that the challenged agency action authorizes the conduct that caused or will cause the plaintiff's injuries, when that conduct would be illegal without such authorization).

As already noted, these ten neighborhood plaintiffs need not show the redressibility element of constitutional standing—*i.e.*, that the Secretary would ultimately make a determination of detrimental impact, thereby preventing the NIGC's approval of gaming on the Buffalo Parcel. Even were the plaintiffs required to make that showing, their challenge to the Ordinance approval would be sufficient to establish that a decision in their favor would likely redress their injury. Specifically, were the Court to agree that the Buffalo Parcel is not "Indian lands" within the meaning of the IGRA, no SNI gaming can lawfully occur on that restricted fee land. 25 U.S.C. §§ 2703(4), 2710(d)(1). If the Buffalo Parcel is "Indian lands" but the "settlement of a land claim" exception does not apply, the Secretary will be

required to make a determination that a gaming facility "would not be detrimental to the surrounding community" before gaming can occur. 25 U.S.C. § 2719(b)(1)(A). The Court presumes, at this juncture, that the Secretary would make a supportable decision in that regard.

For the reasons stated, the Court concludes that these ten neighborhood plaintiffs have sufficiently alleged the existence of constitutional standing.

For essentially the same reasons as support constitutional standing, the Court finds that the claims in the Amended Complaint are within the "zone of interest" protected by the IGRA such that these plaintiffs have prudential standing, as well.

> The "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular there need be no indication of congressional purpose to benefit the would-be plaintiff.

Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399-400, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987) (citation and footnotes omitted); *see also*, *Bennett v. Spear*, 520 U.S. 154, 163, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (zone of interest test applies to suits under the APA involving review of administrative action, unless expressly negated by statute). The focus of the test is "'not on those who Congress intended to benefit, but on those who in practice can be expected to police the interest that the statute protects.'" *TOMAC*, 193 F. Supp. 2d at 188 (quoting *Mova Pharm. Corp. v. Shalala*, 329 U.S. App. D.C. 341, 140 F.3d 1060, 1075 (D.C. Cir. 1998)). Here, nearby residents, businesses, and property owners are precisely the type of plaintiffs who could be expected to police whether a particular section 20 exception applies to the Buffalo Parcel and whether procedural requirements for an exception have been met. *See Citizens Exposing Truth about Casinos v. Kempthorne*, 377 U.S. App. D.C. 161, 492 F.3d 460, 464-65 (D.C. Cir. 2007) (plaintiff's challenge to Secretary's interpretation of IGRA's "initial reservation" exception was sufficiently congruent with congressional purpose to place it within IGRA's "zone of interest" where claim sought to enforce provision requiring determination regarding affected communities).

The Court has considered Defendants' arguments challenging standing and finds them unpersuasive. In their principal and reply memoranda, Defendants rely on *Defenders of Wildlife*, 504 U.S. at 562, for the proposition that where a plaintiff is not the object of the challenged agency action or inaction, it is substantially more difficult to establish standing. Docket Nos. 28-2 at 15-16, and

44 at 8-9. Justice Scalia's comments focused on the difficulty a plaintiff may have establishing causation and redressability in such a circumstance. *Id.* But Defendants' reliance on this general principal ignores Justice Scalia's further acknowledgment that where, as here, a plaintiff is accorded a procedural right to protect his or her interests, the normal standards for redressability need not be met. 504 U.S. at 572 n.7. That leaves causation. Defendants have not articulated any basis from which the Court can conclude that causation is not sufficiently alleged here, particularly where the activity Plaintiffs complain of cannot lawfully occur absent the challenged agency action.

In their reply memorandum, Defendants urge that Plaintiffs have not established an injury in fact because they have "asserted no actual harm," the alleged injuries are "not supported by any evidence," and Plaintiffs fail to offer any support that "the injuries are imminent." Docket No. 44 at 8-9. Evidence of harm is not required here. The question for the Court at the pleading stage is whether Plaintiffs have sufficiently alleged injury caused by Defendants' conduct; it is not whether they ultimately can make an evidentiary showing on each element of standing. *Bennett*, 520 U.S. at 168 (citing *Defenders of Wildlife*, 504 U.S. at 561 (quoting *Nat'l Wildlife Fed'n*, 497 U.S. at 889)). Defendants' remaining contentions—that the alleged harm is too speculative to support standing and Plaintiffs have not shown that the injuries are imminent—misunderstand the injury-in-fact showing applicable to this case, where the alleged harm arises from Defendants' purported failure to follow required procedures. *Defenders of Wildlife*, 504 U.S. at

572 n.7. Defendants do not explain how the harm identified here differs from that alleged in *City of Roseville* (anticipated harm from proposed casino), *TOMAC* (same), or *Nulankeyutmonen Nkihtaqmikon* (anticipated harm from proposed construction of terminal), where standing was found to exist.

Defendants attempt to distinguish the instant action from the cases on which Plaintiffs rely by stating that none of the cited cases involved a challenge to the NIGC's approval of a tribal gaming ordinance. Defendants do not explain why the substance of the final agency action challenged here would alter the standing analysis articulated in analogous cases or require a different result, and the Court can discern no such reason.

For the reasons stated, the Court finds that these ten individual plaintiffs have both constitutional and prudential standing to assert the claims set forth in the Amended Complaint.

3. *The Remaining Plaintiffs*

There are four individual plaintiffs in this case who were not included in the above discussion. One alleges concern over the impact of a casino on all the poor and vulnerable residents of Erie County, one alleges that he moved out of the Buffalo Parcel neighborhood to remove himself from the anticipated future effects of a casino, one alleges that he ministers to the spiritual and social needs of persons residing close to the Buffalo Parcel but does not describe any effect the casino will have on his ministry,

and one expresses concern as an Erie County resident and taxpayer that a casino will result in increased county government costs and decreased sales tax revenues. Am. Comps. ¶¶ 5, 15, 21, 24; Docket No. 36-6, Affidavit of Joel A. Giambra. Based on the standard articulated above, the Court concludes that none of these four has alleged an injury that is sufficiently particularized and personal to support constitutional standing.

As previously noted, however, the Court need only find that one plaintiff has both constitutional and prudential standing to reach the merits of Plaintiffs' claims. *See, e.g.*, *Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. at 52 n.2. Having determined that ten of the individual plaintiffs do have standing, it does not matter that four do not. There also is no need to determine whether the association and legislator plaintiffs have standing as they are asserting precisely the same claims as the individual plaintiffs.

C. The Quiet Title Act and Sovereign Immunity

Relying on the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, Defendants next contend that the Court does not have jurisdiction over this action because the United States has not waived its sovereign immunity from suit. The Government made the same arguments it presents here in the *CACGEC I* action. Those arguments were rejected on a motion to dismiss and again on a motion for reconsideration. Nevertheless, the Court will address them here in the interest of finality in this action.[28]

28. Defendants acknowledge the Court's prior rejection of these arguments, but raise them again to preserve the issue for

Appendix E

The QTA provides, in pertinent part, as follows:

§ 2409a. Real property quiet title actions

> (a) The United States may be named as a party defendant in a civil action under this section *to adjudicate a disputed title* to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands . . . .

(emphasis supplied).

The Buffalo Parcel is owned by the SNI and is held in restricted fee status, which means that the SNI cannot sell, lease or otherwise convey the Parcel to another without the federal government's approval.[29] Plaintiffs expressly state that they "do not challenge the SNI's restricted fee title to the Buffalo Parcel[ ]." Am. Compl ¶ 33. Despite this disclaimer, Defendants contend that if Plaintiffs prevail on their claims, the Buffalo Parcel will lose its restricted fee status. Docket No. 28-2 at 17. They urge that the QTA bars challenges to the status of trust or restricted fee land even where there is no dispute over title. The Court disagrees.

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appeal. Docket No. 28-2 at 17 fn. 5.

29. The Buffalo Parcel is held in restricted fee status because it was acquired with SNSA funds, 25 U.S.C. § 1774f(c), and the Secretary did not determine that the land should not be subject to the Nonintercourse Act, 25 U.S.C. § 177.

The QTA operates as a limited waiver of sovereign immunity in cases where a party seeks "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). However, this limited waiver does not apply where the dispute is over ownership of "trust or restricted Indian lands." *Id.* As is clear from the plain language of the statute, for the QTA to provide a jurisdictional basis for suit: "(1) the United States must claim an interest in the property at issue, and (2) there must be a disputed title to real property. If either condition is absent, the [QTA] in terms does not apply . . . ." *Leisnoi, Inc. v. United States*, 170 F.3d 1188, 1191 (9th Cir. 1999) (alteration added); *see also*, *CACGEC I*, 2007 U.S. Dist. LEXIS 29561, 2007 WL 1200473, at *6 (quoting *Lesnoi* and citing additional cases). Here, Defendants are attempting to assert the QTA's shield against suit in an action for which the QTA does not provide a jurisdictional basis in the first place because, as the parties agree, Plaintiffs' claims do not give rise to any express or implied dispute over title to the Buffalo Parcel.[30]

Defendants urge, as they did in *CACGEC I*, that courts of appeal routinely have applied the QTA to

30. Plaintiffs bring suit under the IGRA and the APA. 25 U.S.C. §§ 2701 *et seq.* and 5 U.S.C. §§ 701-706. Section 702 of the APA waives sovereign immunity for suits against federal agencies or officers in which the plaintiff seeks nonmonetary relief. However, the APA waiver does not apply if "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. Thus, if the subject matter of this suit requires that it be brought under the QTA, the QTA's prohibitions would also apply.

preclude review of the *status* of Indian lands, even when the plaintiff is not seeking to quiet title. Docket No. 44 at 2; see also, *CACGEC I*, 2007 U.S. Dist. LEXIS 29561, 2007 WL 1200473, at *5 (quoting Government's brief on motion for reconsideration). They now cite to additional cases they claim support that argument. The Court has reviewed each of Defendants' cases and finds that none stand for the proposition advanced.

Defendants once again rely on *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004). The plaintiffs in *Neighbors* sought a judgment declaring the United States' trust acquisition of real property null and void. 379 F.3d at 961. The Circuit Court held that "to the extent Neighbors['] requested relief would *divest the United States of title to the property* the [QTA] precludes Neighbors' suit." *Id.* at 958 (alterations and emphasis added).[31]

31. There is an important distinction between trust and restricted fee land to be noted here. Trust land is acquired by the United States for the purpose of providing land for Indians and is held by the government in trust for the benefit of a tribe. Status and ownership are intertwined and a challenge to trust status calls into question the government's acquisition of title for that very purpose. In Neighbors, the United States held fee title, so a challenge to its trust acquisition, if successful, could have divested the United States of its title. Not so with restricted fee land. Title to the land is held by a tribe or individual Indian in fee and restricted status is offered by the government as a means of protecting the land. Title and status are separate. While a successful challenge to the land's restricted status could remove governmental restrictions, lifting those restrictions would not have the effect of divesting the tribe of its fee title.

Next, Defendants cite to *Shawnee Trail Conservancy v. United States Dep't of Agric.*, which does not involve trust or restricted Indian lands and does not discuss land status at all. 222 F.3d 383 (7th Cir. 2000), *cert. denied*, 531 U.S. 1074, 121 S. Ct. 768, 148 L. Ed. 2d 668 (2001). The Seventh Circuit affirmed dismissal of that suit for lack of jurisdiction because the plaintiffs' constitutional claim challenged the United States' *ownership* of the land in question, and suits that require *resolution of a disputed claim to real property* in which the United States claims an interest must be brought under the QTA. *Id. a*t 386-88. In short, the plaintiffs did not allege a proper jurisdictional basis for suit.

In *Metropolitan Water Dist. of S. Cal. v. United States*, the plaintiffs challenged a tribe's acreage-based right to increased water from the Colorado River after the government corrected the tribe's reservation boundaries, thereby increasing its land base by 3,500 acres. 830 F.2d 139, 140 (9th Cir. 1987), *aff'd sub nom. California v. United States,* 490 U.S. 920, 109 S. Ct. 2273, 104 L. Ed. 2d 981 (1989). The Ninth Circuit determined that the case should be dismissed for lack of jurisdiction because plaintiffs were seeking a *determination of the boundaries* of the reservation, and the effect of a successful challenge would be to *quiet title* in others than the tribe. *Id.* at 143.

The plaintiffs' suit in *Florida Dep't of Bus. Regulation v. United States Dep't of Interior* was barred by sovereign immunity under the QTA where they sought "an order *divesting the United States of its title to land* held [in trust] for the benefit of an Indian tribe." 768 F.2d 1248,

1254 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011, 106 S. Ct. 1186, 89 L. Ed. 2d 302 (1986) (emphasis and alteration added).

Likewise, the defendants' claim against third-party defendant United States in *Shivwits Band of Paiute Indians v. Utah* was barred by the Indian lands exception to the QTA because "underlying the [defendants'] claim is a *challenge to the government's title to the land*." 185 F. Supp. 2d 1245, 1251 (D. Utah 2002), *aff'd*, 428 F.3d 966 (10th Cir. 2005), cert. denied, ___ *U.S.* ___, 127 S. Ct. 38, 166 L. Ed. 2d 17 (2006) (emphasis and alteration added). The district court held that while the defendants could not challenge the *title* to property held in trust, they could challenge the procedures the government followed or failed to follow in reaching the decision to hold land in trust. *Id.* at 1252.

This Court finds that the QTA applied in each of the cited cases because each involved an express or implied dispute over the title to real property. Contrary to Defendants' assertion, none stands for the proposition that the QTA shields the government from suit when there is no underlying dispute over the right to or ownership of land.

Defendants next urge that "[i]n an Indian law context, jurisdiction and title are not separate concepts," and that to hold otherwise would undermine the Settlement Act (SNSA) process. Docket No. 44 at 3. This assertion is presented without analysis or supporting authority, as it was in *CACGEC I,* 2007 U.S. Dist. LEXIS 29561, 2007 WL 1200473, at *5. While Defendants' declaration may

have validity with regard to a challenge to trust status, it does not apply to restricted fee status. *See* fn. 31, *supra*. The SNI purchased the Buffalo Parcel in 2005 with funds appropriated pursuant to the SNSA.[32] Thereafter, the property attained restricted fee status, which prevents the SNI from selling, leasing or otherwise conveying the Parcel without the federal government's approval. 25 U.S.C. § 177. Even were the Court to assume, solely for purposes of this argument, that Plaintiffs' success on their IGRA claims would remove these restrictions, Defendants' have not explained, nor can the Court discern, how such a decision would quiet title to the Buffalo Parcel in anyone other than the SNI. Regardless of the outcome of this action, the SNI will retain title to the Parcel, and its ownership is not challenged here.

> [A]djudicating the question of whether a tract of land constitutes "Indian lands" for Indian gaming purposes is conceptually quite distinct from adjudicating title to the land. One inquiry has little to do with the other as land status and land title are not congruent concepts in Indian law. A determination that a tract of land does or does not qualify as "Indian lands" within the meaning of IGRA in no way affects title to the land. Such a determination would merely clarify sovereignty over the land in question.

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32. Plaintiffs' suit does not question whether the Buffalo Parcel was purchased with SNSA funds.

Kansas v. United States, 249 F.3d 1213, 1225 (10th Cir. 2001) (internal citations and quotation marks omitted) (finding that regardless of court's determination on status of land leased by tribe, title would remain vested in current property owners).

For the reasons stated here and in *CACGEC I*, the Court finds that the QTA does not apply and the Court has jurisdiction over this action under the APA.

IV. DISCUSSION

A. Standards of Review

1. *Defendants' Motion to Dismiss*

As previously noted, Defendants have moved to dismiss the Amended Complaint, and seek summary judgment only to the extent the Court believes their motion should be converted. "[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law." *Am. Bioscience, Inc. v. Thompson,* 348 U.S. App. D.C. 77, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (citations omitted). More specifically, "[t]he question whether an agency's decision is arbitrary and capricious . . . is a legal issue." *Connecticut v. United States DOC*, 04cv1271, 2007 U.S. Dist. LEXIS 59320, at *2 (D. Conn. Aug. 15, 2007). Thus, in the agency review context, Plaintiffs' claims that Defendants acted in an arbitrary and capricious manner, or made determinations that are contrary to law, are legal questions that can be resolved on review of the

agency record and/or the governing statutes, regardless of whether the questions are presented in the context of a motion to dismiss or in a motion for summary judgment. *University Med. Ctr. v. Shalala*, 335 U.S. App. D.C. 322, 173 F.3d 438, 441 n.3 (D.C. Cir. 1999) (citing *Marshall County Health Care Auth. v. Shalala*, 300 U.S. App. D.C. 263, 988 F.2d 1221, 1225-26 (D.C. Cir. 1993) (holding that in agency review context there is no real distinction between questions presented in motion to dismiss and motion for summary judgment)). Accordingly, the Court finds there is no reason to convert Defendants' motion to one for summary judgment. *See City of Roseville*, 219 F. Supp. 2d at 138 (treating parties' filings as motions to dismiss where issues raised were questions of law).

In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court must liberally construe the claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *See Roth v. Jennings*, 489 F.3d 499, 510 (2d Cir. 2007). However, to withstand a motion to dismiss, a plaintiff's "allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (May 21, 2007) (internal quotation marks, citations, and alterations omitted). "[C] onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Joblove v. Barr Labs., Inc.,* 466 F.3d 187, 204 n.17 (2d Cir. 2006*), cert. denied*, ___ U.S. ___, 127 S. Ct. 3001, 168 L. Ed. 2d 726 (2007) (internal quotation marks and citation omitted).

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When determining the sufficiency of a plaintiff's claim for Rule 12(b)(6) purposes, courts may consider the factual allegations in the plaintiff's complaint, documents attached to the complaint as an exhibit or incorporated in it by reference, matters of which judicial notice may be taken, or documents that were either in plaintiff's possession or of which plaintiff had knowledge and relied on in bringing suit. *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993); *see also*, *Cortec Ind., Inc. v. Sum Holding L.P.,* 949 F.2d 42, 47-48 (2d Cir. 1991), *cert. denied*, 503 U.S. 960, 112 S. Ct. 1561, 118 L. Ed. 2d 208 (1992) (documents must be integral to the complaint).

2. *Plaintiffs' Motion for Summary Judgment*

When deciding a motion for summary judgment under Rule 56, the court must draw all justifiable inferences from the record in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Vann v. City of New York*, 72 F.3d 1040, 1048-49 (2d Cir. 1995). Summary judgment will be granted when the moving party demonstrates that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. FED. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 330, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). While a material question of fact is to be reserved for a jury, questions of law are appropriately decided on a motion for summary judgment. *Scott v. Harris,* 550 U.S. 372, 127 S. Ct. 1769, 1776 n.8, 167 L. Ed. 2d 686 (Apr. 30, 2007).

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3. ***APA Review of Agency Action***

Plaintiffs bring their claims primarily under the APA, and request that the Court review statutory interpretations and determinations by the NIGC and the Secretary that they claim are deficient or erroneous. The APA provides that a reviewing court must "set aside agency action" that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

Where the agency decisions at issue involve interpretations of federal statutes the agency administers, the court's review is guided by the principles announced in *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *Chevron* confirmed that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9. Thus, courts are to look first to "whether Congress has directly spoken to the precise question at issue." *Id.* at 842.

> If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative

> interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

Where an agency has been delegated authority to elucidate the statute by regulation, its "regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. However, the *Chevron* deference that is accorded to regulations adopted by formal rule-making does not apply to all forms of agency interpretations. *Schneider*, 345 F.3d at 142 (citing *Christensen v. Harris County,* 529 U.S. 576, 586-87, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000)). Interpretations such as opinion letters, policy statements, agency manuals and enforcement guidelines lack the force of law and do not warrant *Chevron*-style deference. *Christensen,* 529 U.S. at 587. Rather, interpretations contained in such formats are entitled to respect under the Supreme Court's decision in *Skidmore v. Swift & Co.,* 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944), but only to the extent that, through the writer's thoroughness, logic, expertise, consideration of prior interpretations and the like, the interpretation at issue has the power to persuade. *United States v. Mead Corp.,* 533 U.S. 218, 235, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001).

Although the APA's arbitrary and capricious standard is ordinarily a deferential one, such deference is "not

unfettered nor always due." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977). When a court is asked to review the reasonableness of an agency's decision-making action, its inquiry is governed by *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*:

> The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action . . . . Normally, an agency [action] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (citations and quotation marks omitted) (alteration added). Additionally, "courts may not accept . . . counsel's *post hoc* rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id.* at 50 (citations omitted).

B. Plaintiffs' First Claim for Relief: The "Indian Lands" Question

In approving the SNI's Ordinance, NIGC Chairman Hogen acknowledged that the Secretary of the Interior is charged with administering the SNSA. AR00010. He therefore accepted the Secretary's verification that the Buffalo Parcel was acquired by the SNI and taken into restricted fee status pursuant to the SNSA. AR00010, AR00025-37. The Buffalo Parcel's status as restricted fee land is not in dispute.

Hogen went on to find that, by virtue of the federal government's restrictions against alienation, the Parcel is "Indian country" over which the SNI has inherent jurisdiction. He also found that the SNI has exercised governmental authority over the Parcel since acquiring it in 2005.[33] AR00010-12. In sum, Chairman Hogen concluded that the IGRA's "Indian lands" criteria has been met. 25 U.S.C. § 2703(4)(B) (title is "held by an Indian tribe . . . subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power"). In reaching this conclusion, Hogen

33. After acknowledging that there is no statutory or regulatory criteria for determining how a tribe demonstrates the exercise of governmental authority, Hogen concluded that the SNI had manifested sufficient indicia of same because its Marshal's office patrols the Parcel, and it has fenced the site, posted signs indicating the site is subject to the SNI's jurisdiction, and enacted ordinances and resolutions applying its laws to the Parcel. AR00012.

considered and deferred to the Secretary's November 12, 2002 opinion letter to the SNI.[34] AR00011-12, AR00233-40.

Plaintiffs' sole assertion, in their first claim for relief, is that property purchased with SNSA funds and held in restricted fee is not "Indian country." They contend that Hogen did not consider all relevant aspects of this inquiry

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34. The Secretary's letter states, in relevant part:

IGRA permits a tribe to conduct gaming activities on Indian lands if the tribe has jurisdiction over those lands, and only if the tribe uses that jurisdiction to exercise governmental power over the lands. There is no question that the Settlement Act (the SNSA) requires the parcels to be placed in "restricted fee" status. As such, these parcels will come within the definition of "Indian lands" if the Nation exercises governmental power over them. The Department assumes that the Nation will exercise governmental powers over these lands when they are acquired in restricted fee. It is our opinion that the Nation will have jurisdiction over these parcels because they meet the definition of "Indian country" under 18 U.S.C. § 1151. Historically, Indian country is land that, generally speaking, is subject to the primary jurisdiction of the Federal Government and the tribe inhabiting it. As interpreted by the courts, Indian country includes lands which have been set aside by the Federal Government for the use of Indians and subject to federal superintendence. In this regard, it is clear that lands placed in restricted status under the Settlement Act are set aside for the use of the Nation and that such restricted status contemplated federal superintendence over these lands. Finally, the Settlement Act authorizes land held in restricted status to expand the Nations' [sic] reservation boundaries, or become part of the Nation's reservation. Accordingly, we believe that the Settlement Act contemplates that lands placed in restricted status be held in the same legal manner as existing Nation's lands are held and thus, subject to the Nation's jurisdiction. AR00238.

and that his determination that the SNI can exercise sovereign jurisdiction over the Buffalo Parcel is arbitrary, capricious, an abuse of discretion, and not in accordance with law. Am. Compl. ¶¶ 49, 53-58.[35]

Both sides seek judgment in their favor as a matter of law and their arguments are summarized as follows. Defendants urge, in their motion to dismiss, that the Buffalo Parcel qualifies as "Indian country" because it was acquired and placed in restricted fee status pursuant to a process established by Congress. According to Defendants, Indian tribes have inherent sovereignty over Indian country and there is nothing in the SNSA's land acquisition provision that limits the SNI's sovereignty over land held in restricted fee status. Plaintiffs, in their motion for summary judgment, contend that "Indian country" can be created only by an express act of Congress. They argue that the SNSA is not such an act; it merely allowed the SNI to purchase the Buffalo Parcel as a protected economic asset, exempt from property taxes but with no other indicia of sovereignty. The SNI, in its *amicus* brief, urges that land held in restricted fee status is the jurisdictional equivalent of land held in trust status, which has long been understood to be "Indian country."

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35. "For the purposes of this lawsuit and without prejudice, Plaintiffs are not challenging the Government's assertion that the SNI complied with the procedures for holding of title to the Buffalo Parcel[] in restricted fee." Docket No. 36-2 at 25. Likewise, Plaintiffs do not challenge the adequacy of the SNI's efforts to exercise governmental power. Their sole argument in claim one is that the SNI does not have sovereign authority to do so.

There is one point of commonality here: Chairman Hogen, the parties, and *amicus* agree that to qualify as "Indian lands" within the meaning of the IGRA, the Buffalo Parcel must be "Indian country." So, the Court starts with the meaning of that term.

1. *The Meaning of Indian Country*

Indian country is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. On its face, § 1151 is concerned only with criminal jurisdiction. Nonetheless, the Supreme Court has "recognized that it also generally applies to questions of civil jurisdiction." *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527, 118 S. Ct. 948, 140 L. Ed. 2d 30 (1998) (citing *Decoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975)); *see also*, *Cabazon*

Band of Mission Indians, 480 U.S. at 208. "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, not with the States." *Native Village of Venetie,* 522 U.S. at 527 n.1 (citation omitted); *see also*, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 509, 511, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) (tribes are "domestic dependent nations" that have inherent sovereign authority over their members and the Indian country that is validly set apart for their use).

Prior to § 1151's enactment, the question of sovereignty over land occupied by Indians was a frequent subject of litigation. Section 1151 codified three categories of land—reservations, dependent Indian communities, and Indian allotments—that the Supreme Court had determined were embraced by the term Indian country.

a. Reservations

The first category, reservations, was at issue in *Donnelly v. United States*, 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913). A white man had been convicted under a federal statute for the murder of an Indian on a reservation. Among other things, it was argued that the federal court was without jurisdiction over the crime because the term "Indian country" is limited to lands to which Indians retain their original right of possession; it does not extend to land set apart out of the public domain that was not previously occupied by the tribe. *Id.* at 268.

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The Supreme Court noted that numerous statutes relating to Indians use the term Indian country without providing a definition for it. *Id.* In fact, the Court could identify only one historical definition of the term that had appeared in the Indian Intercourse Act of June 30, 1834, but was thereafter repealed:

> That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and not within any state to which the Indian title has not been extinguished, for purposes of this act, be taken and deemed to be the Indian country.

Id. at 268-69; 4 Stat. 729. The Supreme Court found that absent subsequent guidance from Congress, that historical definition "may be considered in connection with changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes." *Id.* at 269. The changes in federal-Indian relations were deemed to be "so numerous and so material, that the term cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished." *Id.* Accordingly, the Supreme Court held that Indian country includes any "tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation."

b. Indian Allotments

In *United States v. Pelican*, a murder occurred on an individual Indian allotment which was held in trust by the United States and located on former reservation land that had since been "diminished"—*i.e.*, Congress had placed a portion of the reservation in the public domain in order to open it to non-Indian settlement. 232 U.S. 442, 444-46, 34 S. Ct. 396, 58 L. Ed. 676 (1914). Each Indian who resided on the former reservation land received an 80-acre parcel that was held in trust for 25 years for the allottee's sole benefit, after which it was to be conveyed to the allottee, or his heirs, in fee simple. *Id.* The question for the Supreme Court was whether a statute extending the federal government's criminal jurisdiction to "Indian county" applied to a crime occurring on a non-reservation trust allotment. *Id.* at 449. In holding that it did, the Supreme Court found no distinction between reservation land and non-reservation trust allotments; both had been "set apart for the use of the Indians as such, under the superintendence of the Government." *Id.*

Some twelve years later, the Supreme Court was again faced with the question of whether a crime had occurred in "Indian country." This time, the murder took place on an allotment carved out of a reservation and conveyed in fee to the allottee, subject to a 25-year restriction against alienation. *United States v. Ramsey*, 271 U.S. 467, 470, 46 S. Ct. 559, 70 L. Ed. 1039 (1926). The court below found there was a sufficient difference between trust allotments and restricted allotments that the latter was not embraced within the term "Indian country." *Id.* at 470. The Supreme

Court reversed, reasoning that until the end of the trust or restricted period, the government possessed supervisory control over the land and could take measures to ensure that it inured to the sole use and benefit of the allottee. *Id.* at 471. "[I]t would be quite unreasonable to attribute to Congress an intention to extend the protection of the criminal law to an Indian upon a trust allotment and withhold it from one upon a restricted allotment." *Id.* at 471-72. Accordingly, the term Indian country applied to both.

These cases are codified in 25 U.S.C. § 1151(c), which makes no distinction between trust and restricted allotments.

c. Dependent Indian Communities

The case of *United States v. Sandoval* involved land owned by the Pueblo Indians in fee simple. 231 U.S. 28, 39, 34 S. Ct. 1, 58 L. Ed. 107 (1913). The question before the Supreme Court was whether that land was Indian country such that Congress could prohibit the introduction of intoxicating liquor there. *Id.* at *38*. The Court found that the tribe's title was not fee simple, as that term is commonly understood, because Congress had recognized the Pueblos' title to ancestral lands by statute and declared the Pueblos' fee property exempt from taxation, and the United States had continuously assumed a protective role with respect to the Pueblo people. *Id.* at 39-40 n.1, 47-48.[36]

36. In a later decision, the Supreme Court also found the Nonintercourse Act's restriction on alienation to be applicable to

Based on these findings, the Supreme Court held that Congress could exercise federal jurisdiction over Pueblo lands under its general power over "all dependent Indian communities within its borders." *Id.* at 46, 48.

In 1938, the Supreme Court decided *United States v. McGowan*, which involved a forfeiture proceeding relating to the introduction of intoxicants into the Reno Indian Colony. 302 U.S. 535, 536, 58 S. Ct. 286, 82 L. Ed. 410 (1938). The Colony was situated on lands owned by the United States and held in trust for the benefit of the Indians residing there, who had no reservation land. *Id.* at 537 and n.4. Recognizing that there was little historic consistency in the way the government had afforded protection to Indians, the Court noted that "Congress alone has the right [at any particular time] to determine the manner in which this country's guardianship over the Indians shall be carried out." *Id.* at 538. After finding that the Reno Colony had been validly set apart for the use of the Indians and was under federal superintendence, the Supreme Court held it was immaterial whether Congress chose to designate the parcel a "reservation" or a "colony"; the land was Indian country. *Id.* at 538-39.

The "dependent Indian communities" category, 25 U.S.C. § 1151(b), codified the Supreme Court's decisions in *Sandoval* and *McGowan*. The parties and the SNI agree that the Buffalo Parcel is neither a reservation nor an allotment. Therefore, whether the SNI has sovereignty

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the Pueblos. *United States v. Candelaria*, 271 U.S. 432, 441-42, 46 S. Ct. 561, 70 L. Ed. 1023 (1926).

turns on whether the Buffalo Parcel is a dependent Indian community.

d. The Requirements for Finding a Dependent Indian Community

Although 25 U.S.C. § 1151 was enacted in 1948, the Supreme Court did not interpret the term "dependent Indian communities" until some fifty years later. In *Native Village of Venetie*, the Court considered whether land in northern Alaska was "Indian country," such that the tribe could tax a contractor conducting business activities on it. 522 U.S. at 523. The land at issue was not within the limits of an Indian reservation and did not involve any Indian allotments. *Id.* at 527. Rather, the tribal government owned the land in fee simple, with no federal restrictions on land transfers. *Id.* at 524. The Ninth Circuit held that the land was a dependent Indian community. The Supreme Court reversed.

After reviewing its prior Indian country decisions, the Supreme Court noted that in both the allotment and non-reservation cases (regardless of whether land was held in trust or restricted fee), it had concluded that lands are "Indian country" only if they satisfy two requirements: (1) they are set aside by the Federal Government for the use of the Indians as Indian land, and (2) they are under federal superintendence. *Id.* at 527. Congress, in enacting section 1151, did not alter this definition of Indian country, "but merely list[ed] the three different categories of Indian country mentioned in [the Court's] prior cases." *Id.* at 530 (alterations added and citations

omitted). Therefore, the Court reasoned, land can be found to be a "dependent Indian community" only if the same two requirements are satisfied. *Id.* "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 the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." *Id.* at 531.

The Supreme Court concluded that land held in fee simple by the Venetie tribal government did not meet either requirement. *Id.* at 532. Among the factors it found significant were: the absence of any restrictions on alienation, the tribe's freedom to use the land for non-Indian purposes, the intent of the statute[37] that permitted the tribe to take title to the land—a primary goal of which was to avoid "permanent racially defined institutions, rights, privileges or obligations, without creating a reservation system or lengthy wardship," *id.* at 524 (citing 43 U.S.C. § 1601(b)) (alteration in original deleted), and the absence of explicit congressional action to create Indian

37. Congress enacted the Alaska Native Claims Settlement Act ("ANCSA") in 1971. 43 U.S.C. §§ 1601 *et seq.* ANSCA revoked the various reserves set aside for Native use and completely extinguished all aboriginal claims to Alaska Land. *Id.* §§ 1603, 1618(a). It transferred 44 million acres of Alaska land to state-chartered private business corporations, all shareholders of which were required to be Alaska Natives. *Id.* §§ 1605, 1607, 1613. The corporations received title in unrestricted fee simple.

country.[38] 522 U.S. at 532-33. The Supreme Court also emphasized the tribe's own view of the Alaska Native Claims Settlement Act's purpose as effecting Native self-determination and ending paternalism in federal Indian relations. *Id.* at 534.

The countervailing factors—the land's exemption from adverse possession claims, property taxes and certain judgments only for so long as the land was not developed, leased, or sold—did not, in the Court's view, approach the level of superintendence over Indian lands that existed in cases where it had found land to be Indian country. *Id.* at 533 (citing 43 U.S.C. § 1601(b)).

Although the Buffalo Parcel is held in restricted fee status, not in fee simple, Plaintiffs urge that the land is not a dependent Indian community for many of the same reasons given by the Supreme Court in *Native Village of Venetie*.

38. "The federal set-aside requirement ... reflects the fact that because Congress has plenary power over Indian affairs, ... some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country." *Native Village of Venetie,* 522 U.S. at 531 n.6. The most recent Congressional action with respect to the Venetie land had been to revoke its reservation status.

2. *Plaintiffs' Arguments*[39]

Plaintiffs' various arguments fall into four main categories. First, Plaintiffs maintain that the SNSA's language does not reflect an intent to create Indian country, and that a comparison of the SNSA with other statutes codified in Title 25, Chapter 19 of the United States Code ("Indian Land Claims Settlements"), support this conclusion. Docket No. 36-2 at 40. Second, they urge that the characteristics of restricted fee land are distinguishable from those of Indian country generally, and trust land in particular. *Id.* at 30-32. Third, Plaintiffs claim that the Buffalo Parcel does not meet either of the dependent Indian community requirements. The SNSA is not a federal set-aside, Plaintiffs contend, because the SNI can acquire restricted fee title "with no federal input." *Id.* at 41. Also, the SNSA's restriction on alienation is of such limited effect that it cannot support a finding of federal superintendence. *Id.* at 30-33. Fourth and finally, Plaintiffs urge that the SNSA's goals of tribal economic self-sufficiency preclude a finding that the SNI is a "dependent." Docket No. 52 at 6-8. Each of these contentions is addressed, in turn.

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39. The discussions that follow are framed primarily in terms of Plaintiffs' arguments on summary Judgment. An analysis of Plaintiffs' arguments will necessarily take into account the countervailing arguments set forth in Defendants' motion to dismiss.

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a. Congressional Drafting and the Significance of Other Settlement Acts

Chapter 19 of Title 25 of the United States Code contains fourteen subchapters, one being the SNSA, and each of the others a congressional act relating to a different Indian tribe or nation. Plaintiffs contend that eight of the thirteen other acts qualify as purposeful federal "set-asides" of land for the use of a tribe because they either identify a specific parcel of land to be taken for Indian use or earmark funds for land acquisition. Plaintiffs maintain that the SNSA does not meet the federal set-aside requirement due to the absence of like provisions.

Defendants have chosen not to address the individual acts cited by Plaintiffs. Instead, they take the position that the SNSA is more appropriately compared to the IRA's trust acquisition provision, 25 U.S.C. § 465, which leaves the location and amount of land to be acquired for any particular tribe to the Secretary's discretion. Docket Nos. 44 at 13-15; 45 at 17-18. The parties' positions relative to restricted fee versus trust acquisitions are discussed fully *infra*. Here, the focus is on the language of other settlement acts.

The Court has examined the eight acts cited by Plaintiffs[40] and first concludes that their reliance on

40. Although Defendants have declined to address these acts, the Court must do so in order to determine whether Plaintiffs are entitled to judgment as a matter of law on the ground that the Buffalo Parcel does not meet the dependent Indian community requirements.

comparative congressional drafting is based on a faulty assumption—*i.e.*, that the primary intent of the cited acts is to create Indian country. In fact, just like the SNSA, six of the eight acts were passed primarily for the purpose of effectuating agreements to which the United States was not a party, but whose terms would become effective only upon passage of implementing federal legislation.[41] The SNSA and these six other acts were each crafted to give effect to specific provisions in discrete agreements, making the value of their comparison dubious at best. Even assuming there is value to such a comparison, the Court finds that the SNSA is not so different from the other acts as Plaintiffs contend.

In the six acts involving third-party agreements, and in one other involving a claim against the United States, the underlying agreement or related state legislation either specified land that would be transferred to the United States in trust or identified geographic areas in which land would be purchased.[42] Thus, the ensuing federal legislation simply gave effect to terms and conditions for land acquisition that already had been agreed to or legislated by others. In contrast, the "Agreement between the Seneca Nation of Indians and the City of Salamanca" did not identify any specific parcels or impose geographic

41. *Compare* 25 U.S.C. § 1774(b)(1) (SNSA) *and* §§ 1701(d) (Rhode Island), 1741(4) (Florida (Miccosukee)), 1751(d) (Connecticut), 1771(4) (Massachusetts), 1772(4) (Florida (Seminole)), 1775(a)(8) (Mohegan (Connecticut)).

42. 25 U.S.C. §§ 1702(d) and (e) (Rhode Island); 1724(d) (Maine); 1747(a) (Florida (Miccosukee)); 1752(3) and 1754(b)(7) (connecticut); 1771c(a)(1)(A) and 1771d(a) (Massachusetts); 1772d(a) and (c) (Florida) (Seminole)); and 1775c (Mohegan (Connecticut)).

limits for land acquisition (other than a discrete exclusion). There, the parties agreed that:

> The funds appropriated under Section VI.C. above (payments from the United States and the State of New York required for the Agreement to become effective) may be used at the Nation's option, to acquire lands to increase the land base of the Seneca Nation, provided that such lands shall be outside of that portion of the City of Salamanca that is within the Allegany Reservation (which land was already owned by the SNI).

S. REP. No. 101-511 at 24 (parentheticals added). Section 1774f(c) of the SNSA does not give wholesale effect to this provision.[43] Rather, Congress chose to limit such acquisitions to "land within [the SNI's] aboriginal area in the State or situated within or near proximity to former reservation land," 25 U.S.C. § 1774f(c), thereby paralleling provisions appearing in other acts on which Plaintiffs rely.[44]

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43. It is difficult to imagine how the city of Salamanca, much of which is located within the Allegany Reservation, could have identified land over which it has no jurisdiction as appropriate for purchase by the SNI. In the other acts on which Plaintiffs rely, it was the state government that either transferred land or identified lands within its borders for purchase. In this regard, the SNSA is unique, and any geographic restriction on the SNI's ability to increase its land base would, of necessity, have had to come from the state or federal government.

44. Contrary to Plaintiffs' assertion, not all other acts precisely define all tracts of land to be acquired or set meager

Plaintiffs' reliance on the eighth settlement act, not yet discussed, is also somewhat curious. In the Cherokee, Chocktaw, and Chickasaw Nations Claims Settlement, 25 U.S.C. §§ 1779 *et seq.*, three tribes brought lawsuits against the federal government which were resolved by monetary settlements. As with the SNSA, each tribe could use settlement funds to purchase land, but was not required to do so. *Id.* § 1779d(b)(1)(A). Like the SNSA, the Secretary had discretion to take land into trust or not.[45] *Id.* Except for Plaintiffs' argument that there is a fundamental difference between trust and restricted fee status, discussed *infra*, it is difficult to fathom why Plaintiffs contend that this act evidences the creation of Indian country, while the SNSA does not.

Based on these and other similarities among the various settlement acts, the Court disagrees with Plaintiffs' contention that a comparison of § 1774f(c) to other land acquisition provisions compels the conclusion that Congress did *not* intend to create Indian country in the SNSA.

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geographic limits. Some, like the SNSA, establish broad geographic bounds within which lands may be transferred or purchased. *See, e.g.*, 25 U.S.C. §§1772d(a) and (c) (Florida Seminole) (providing for transfer of specific tracts of land into trust with possibility for transfer of additional land located anywhere within State of Florida).

45. Under the SNSA, the Secretary has discretion to deny restricted fee status.

Appendix E

b. The Treatment of Trust and Restricted Fee Lands

Plaintiffs urge that restricted fee land is not Indian country and is distinguishable from all types of Indian country, including trust lands. Therefore, some discussion of the historical treatment of trust and restricted lands is warranted before discussing the Buffalo Parcel in particular.

i. The Trust Acquisition Statute and Related Cases

The IRA's trust provision states, in relevant part, that:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift exchange, or assignment, any interest in lands, water rights, or surface right to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> * * * *
>
> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465.

Courts have long held that non-reservation trust lands are Indian country even though they are not specifically referenced in 25 U.S.C. § 1151 because they are validly set apart for the use of Indians and are under federal superintendence. In *Potawatomi Indian Tribe*, the state of Oklahoma argued that it had authority to tax all sales made at a tribal convenience store located on non-reservation trust land. 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed. 2d 1112. Then-Chief Justice Rehnquist, writing for a unanimous Court, stated that:

> [no] precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. In *United States v. John*, . . . we stated that the test fot determining whether lands is Indian country does not turn upon whether that land is trust land or reservation. Rather, we ask whether the area has been validly set apart for the use of the Indians as such, under the superintendence of the Government.

Id. at 511 (quoting *John,* 437 U.S. 634, 648-48, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978)) (internal quotation marks omitted). The Supreme Court went on to find that "this trust land is 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes." *Potawatomi Tribe*, 498 U.S. at 511 (citation omitted). *See also*, *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123, 113 S. Ct. 1985, 124 L. Ed. 2d 30 (1993) (rejecting

state's contention that it had complete taxing jurisdiction over non-reservation trust land, noting the deeply rooted policy in our Nation's history of leaving Indians free from state jurisdiction and control, and finding the land at issue to be Indian country); *McGowan*, 302 U.S. at 538-39 (holding that non-reservation trust land was Indian country; it was validly set apart for the use of Indians under federal superintendence); *United States v. Roberts*, 185 F.3d 1125, 1129, 1133 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108, 120 S. Ct. 1960, 146 L. Ed. 2d 792 (2000) (rejecting tribal chief's argument that trust status alone is not sufficient to establish Indian country and finding that the non-reservation trust land at issue met the two requirements articulated in *Native Village of Venetie and Potawatomi Indian Tribe*); *Langley v. Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985) (land the Secretary accepted in trust for the tribe was Indian country, despite the fact that it had not been proclaimed a reservation); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 666 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038, 97 S. Ct. 731, 50 L. Ed. 2d 748 (1977) ("We are confident that when Congress in 1934 authorized the Secretary to purchase and hold title to lands for the purpose of providing land for Indians, it understood and intended such lands to be held in the legal manner and condition in which trust lands were held under applicable [Supreme Court] decisions—free of state regulation.").

Some Circuit Courts have sought to articulate a rationale for what the Supreme Court generally considers self-evident. In *Buzzard v. Oklahoma Tax Comm'n*, the Tenth Circuit reasoned that trust land is validly set apart

for the use of Indians by the federal government because it can be obtained only by filing a request with the Secretary of the Interior, who weighs a number of factors relative to the land and has discretion to approve or reject the request. 992 F.2d 1073, 1076 (10th Cir.) (citing *25 C.F.R. §§ 151.9-.10*), *cert. denied*, 510 U.S. 994, 114 S. Ct. 555, 126 L. Ed. 2d 456 (1993). "Thus, land is 'validly set apart for the use of Indians as such' only if the federal government takes some action indicating that the land is designated for use by Indians." *Id.* Likewise, federal superintendence is shown by some action indicating that the government is prepared to exert jurisdiction. *Id.* Relying on *Buzzard*, the First Circuit held that the taking of land into trust meets the Indian country requirements because it is an affirmative action by the Secretary that involves considered evaluation and the government's acceptance of responsibility. *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.,* 89 F.3d 908, 920-21 (1st Cir. 1996) (tribal fee land did not constitute dependent Indian community where tribe's trust application was pending, but status had not yet been granted; "[w]ere the land placed in trust with the United States, this factor would have been met.").

ii. Restricted Fee Land Cases

Plaintiffs concede that trust land is Indian country, but have declined to acknowledge the cases Defendants and the SNI rely on for the proposition that restricted fee land is the jurisdictional equivalent of trust land and therefore Indian country, as well.

Sandoval, a seminal case discussed fully above, stands for the proposition that even fee simple land can be Indian country if there is sufficient indicia of a federal set-aside and federal superintendence. In *Sandoval*, the Supreme Court found that congressional legislation prohibiting taxation of the Pueblo people's real and personal property was one such indicator, and went on to hold that the Pueblo people and their lands were under the power of Congress, not the state. 231 U.S. at 40, 48-49.

More recently, in *Indian Country, U.S.A., Inc. v. State of Oklahoma*, the Tenth Circuit was presented with a similar case. 829 F.2d 967 (10th Cir. 1987). The United States had granted property to the Creek Nation in fee simple and, by treaty, had recognized tribal title and guaranteed the tribe quiet possession. *Id.* at 974; *see also*, *United States v. Creek Nation,* 295 U.S. 103, 109, 55 S. Ct. 681, 79 L. Ed. 1331, 81 Ct. Cl. 973 (1935). The State maintained that it could tax and regulate the tribe's bingo operations because its land was not a reservation and title was not held in trust by the federal government. *Indian Country,* U.S.A., 829 F.2d at 973. The Tenth Circuit found that Indian fee title and reservation status are not inconsistent concepts, and that the fee land at issue was Indian country:

> Patented fee title is likewise not an obstacle to either reservation or Indian country status of Creek Nation lands. The federal government's role as guardian and protector of Creek lands was recognized by the Supreme Court long after Oklahoma became a state. Indeed, it

> would be anomalous to adopt the State's position suggesting that the treaties conferring upon the Creek Nation a title *stronger* than the right of occupancy have left the tribal land base with *less* protection, simply because fee title is not formally held by the United States in trust for the Tribe.

Id. at 975-76 (internal citation omitted) (emphasis in original). In sum, the land was Indian country because it had been validly set apart under federal superintendence.

The restricted allotment cases have held likewise. In *Ramsey*, the Supreme Court rejected a purported jurisdictional distinction between trust allotments—where title is held by the government, and restricted allotments—where title is held by a tribe or individual Indian subject to restrictions on alienation:

> [I]n one class [of allotment] as much as the other the United States possesses a supervisory control over the land and may take appropriate measure to make sure that it inures to the sole use and benefit of the allottee . . . throughout the original or any extended period of restriction. In practical effect, the control of Congress, until the expiration of the trust or the restricted period, is the same.

271 U.S. at 471 (internal citation and quotation marks omitted) (alternation added).

Numerous cases since *Ramsey* have stated that trust and restricted allotments have the same jurisdictional status for a variety of purposes. *See, e.g.*, *West v. Oklahoma Tax Comm'n,* 334 U.S. 717, 726-27, 68 S. Ct. 1223, 92 L. Ed. 1676 (1948) ("We fail to see any substantial difference for estate tax purposes between restricted property and trust property. The power of Congress over both types of property is the same . . . . Congress has given no indication whatever that trust properties in general are to be given any greater tax exemption than restricted properties."); *Board of County Comm'rs of Creek County v. Seber,* 318 U.S. 705, 717-18, 63 S. Ct. 920, 87 L. Ed. 1094 & n.21, 318 U.S. 705, 63 S. Ct. 920, 87 L. Ed. 1094 (1943) (The power of Congress over both trust and restricted allotments is the same. Congressional acts "intended to protect the Indians in their land purchases ... are appropriate means by which the federal government protects its guardianship . . . . The fact that the [a]cts withdraw lands from the tax rolls and may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress, not the courts."); *Yankton Sioux Tribe v. Gaffey,* 188 F.3d 1010, 1022 (8th Cir. 1999) (both trust and restricted allotments are Indian country regardless of whether they are on or off an Indian reservation).

iii. Congressional and Agency Treatment of Trust and Restricted Fee Land

Congress has treated trust land and restricted fee land as jurisdictional equivalents in a number of Indian

statutes of general applicability.[46] For example, Section 323 of Title 25 involves rights-of-way across "any Indian lands" and provides that:

> The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes . . . over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes . . . or any lands now or hereafter owned, *subject to restrictions against alienation*, by individual Indians or Indian tribes . . . . including the lands belonging to the Pueblo Indians of New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

25 U.S.C. § 323 (emphasis added).

In another statute relating to Indian lands, Congress authorizes the Secretary

> to charge purchasers of timber on *Indian lands* that are held by the United States in trust, or that are *subject to restrictions against alienation or encumbrance imposed by the United States*, for special services requested by the purchasers in connection with . . . activities

46. Many statutes relating to Indians are tribe specific and those will not be discussed here. The Court simply notes that similar definitions and descriptions appear in the tribe-specific legislation, as well.

> under the contract of purchase that are in addition to the services otherwise provided by the Secretary . . . .

25 U.S.C. § 407d (emphasis added).

Likewise, in statutes permitting states, with the Indian tribe's consent, to assume criminal and civil jurisdiction over offenses committed on, or private actions arising in, *Indian country*, Congress states that:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property . . . belonging to any Indian or any Indian tribe . . . that is held in trust by the United States or is *subject to a restriction against alienation imposed by the United States* . . . .

25 U.S.C. §§ 1321-1322 (emphasis added). The import of these statutes is that where land is held in trust or is subject to a restriction on alienation imposed by law, a state is without jurisdiction over the land except as permitted by the federal government.

In a chapter relating to Indian energy, the term "tribal land" is defined as "any land or interest in land owned by any Indian tribe, title to which is held in trust by the United States, or is *subject to a restriction against alienation under laws of the United States*." 25 U.S.C. § 3501(12) (emphasis added). Likewise, a chapter relating to Indian agricultural resource management defines "Indian land" as "land that is —(A) held in trust by the United

States for an Indian tribe; or (B) owned by an Indian or Indian tribe and is *subject to restrictions against alienation*." 25 U.S.C. § 3703 (emphasis added).

Of course, central to this action is the IGRA's jurisdictional provision defining "Indian lands"[47] as including trust or restricted fee lands "over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4). Here, too, trust and restricted fee status are treated equivalently.

The understanding that both trust lands and congressionally-designated restricted fee lands are subject to federal control is also reflected in regulations promulgated by the Secretary of the Interior. For example, 25 C.F.R. § 1.4 states that:

> (a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased

47. Congress appears to use the terms "Indian country" and "Indian lands" interchangeably. Indeed, this is consistent with the parties' assertions that to qualify as "Indian lands" within the meaning of the IGRA, the Buffalo Parcel must be "Indian country." The Supreme Court has also used these terms interchangeably. *See, e.g.*, *Venetie,* 522 U.S. at 520-21 (a dependent Indian community is one category of "Indian lands")

> from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or *is subject to a restriction against alienation imposed by the United States.*
>
> (b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate.

(emphasis added).

Plaintiffs arguments relative to the SNSA and the Buffalo Parcel are considered against this backdrop of Supreme Court decisions, congressional action, and agency interpretation. As previously indicated, Plaintiffs suggest that the process Congress defined in the SNSA

is different from the methods by which reservations are created, lands are acquired in trust, and allotments are made. The differences, Plaintiffs contend, are significant enough to compel the conclusion that the Buffalo Parcel does not meet the requirements for Indian country.

c. The Buffalo Parcel and the Dependent Indian Community Requirements

i. The Set-Aside Requirement

Plaintiffs urge that the Buffalo Parcel does not meet the federal set-aside requirement because "[t]he SNI [simply] purchased the Buffalo Parcel[] in fee simple, but subject to the restraint on alienation in 25 U.S.C. § 177." Docket No. 52 at 9. This and other of Plaintiffs' statements[48] imply that land the SNI purchases with SNSA funds attains restricted fee status automatically or by the SNI's unilateral action. In response, Defendants maintain that when Congress authorized the taking of land purchased with SNSA funds into restricted fee status, it affirmatively acted to establish a mechanism for

48. Plaintiffs also state that land purchased by the SNI with SNSA proceeds can be "wrested from local jurisdiction and control by the simple, unilateral actions of the Tribe in erecting a fence and proclaiming the property sovereign Indian soil," Docket No. 36-2 at 4, that the SNI can acquire restricted fee title "with no federal input," *Id.* at 41, and that reading a set-aside intent into the SNSA would permit the SNI "almost at will to transform any land it chose across literally thousands of square miles of New York State into Indian country, divesting New York State and its municipalities of their jurisdiction," *Id.* at 39.

setting land apart for the SNI's use that otherwise did not exist. Docket No. 45 at 11.

Both the text of the SNSA and the decisional authority support Defendants' position that the SNSA sets land apart for the SNI.

A. The SNSA's Text and Structure

The first sentence of 25 U.S.C. § 1774f(c) permits the SNI to purchase land with SNSA funds, within a specified geographic region. The second sentence requires that either the SNI or the Secretary notify state and local governments of such a land acquisition, or of the SNI's intent to acquire particular land, and provide the governments 30 days in which to comment on the impact of removing such lands from real property tax rolls of state political subdivisions. The third sentence provides the Secretary a period of 30 days after the comment period to determine that the land "should not be subject to the provisions of section 2116 of the Revised Statutes (25 U.S.C. 177)." If the Secretary does not so conclude, "such lands shall be subject to the provisions of [the Nonintercourse] Act and shall be held in restricted fee status by the Seneca Nation."

Contrary to Plaintiffs' assertion, land acquired by the SNI with SNSA funds is not purchased subject to restrictions on alienation. Qualifying acquisitions become subject to the Nonintercourse Act and are held in restricted fee status only after impacted governments have been given the opportunity to comment and only if the Secretary does not determine that such status

is inappropriate. If the Secretary decides that the Nonintercourse Act should not apply, the SNI can hold title in unrestricted fee simple only. There is no other mechanism, outside the SNSA, by which the SNI can hold fee simple purchases in restricted fee status.[49]

In enacting the SNSA, Congress expressly determined that restricted fee status is generally appropriate for *all* land purchased with SNSA funds and located within the SNI's "aboriginal area in [New York] State or situated within or near proximity to former reservation land." Once a purchase is made, the Secretary is required to consider the impact of restricted fee status and has discretion to deny that status for any particular parcel. This tribe-specific legislation is an affirmative act by Congress that first defines geographic boundaries for land acquisition and then provides for the Secretary's considered evaluation of specific purchases made within those bounds. In short, the SNSA includes the precise elements for a valid federal set-aside that were identified by both the *Buzzard* and *Narragansett Indian Tribe* courts. The Court considers the text of the SNSA alone sufficient to compel the conclusion that a valid set-aside exists, but notes that the SNSA's structure also evidences Congress's intent to set land apart for the SNI.

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49. The SNI states that, to its knowledge, the SNSA "is the only modern statute authorizing the acquisition of congressionally designated restricted fee lands." Docket No. 58 at 53 fn. 29. The Court, in its review of Title 25, agrees. In 1990, the Secretary clearly had authority under the IRA to acquire new land for Indians in trust status. 25 U.S.C. § 465. However, there appears to be no other statute then in effect or since enacted that contemplates taking land into restricted fee status.

Appendix E

What is readily apparent from a plain reading of the SNSA's land acquisition provision is that, in drafting 25 U.S.C. § 1774f(c), Congress adhered closely to the language of the IRA's trust provision and its related regulations. The IRA and the SNSA permit unrestricted fee land owned by a tribe to be taken into, respectively, trust status and restricted fee status. 25 U.S.C. § 465; 25 C.F.R. § 151.4; 25 U.S.C. § 1774f(c). The Secretary has discretion, under both the IRA and the SNSA, to deny a tribe's request in this regard. The procedure the Secretary follows for trust acquisitions starts with a request from a tribe, 25 C.F.R. § 151.9, requires notification to the state and local governments then having jurisdiction over the land, *Id.* §§ 151.10-151.11, and provides those governments 30 days to comment on the potential impacts, *Id.* This same procedure was incorporated in the SNSA.[50] In sum, Congress appears to have taken particular care to ensure that land accorded restricted fee status be recognized, in the same manner as land acquired by the United States and held in trust status, as having been validly set apart for the SNI's use. When the SNI seeks restricted fee status, it signals its desire to give up the freedom of unfettered ownership in exchange for the tax exemptions and governmental protections the restriction provides.

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50. The SNSA does not expressly require that the SNI notify the Secretary of its desire to have land taken into restricted fee status, but this requirement is clearly implicit. Without notification, there would be no means for triggering the Secretary's duties and the requisite time periods for comment and consideration.

B. The Judicial Decisions

Plaintiffs point to numerous decisions, including recent Supreme Court authority, holding that land cannot be validly set apart as Indian country by a tribe's unilateral actions. They urge that the SNI's acquisition of the Buffalo Parcel is just such a unilateral act. The Court already has determined that Plaintiffs' assertion is contrary to the SNSA's plain text and, for the reasons discussed below, also rejects the contention that caselaw supports a finding of no federal set-aside here.

Because Plaintiffs maintain that the "distinction between lands held in restricted fee and Indian Country was squarely addressed in *Buzzard*," Docket No. 36-2 at 30, a detailed discussion of that case is warranted. While focused on the set-aside requirement, this discussion necessarily foreshadows the federal superintendence issue, as well.

In *Buzzard*, the United Keetoowah Band (the "UKB") held title to land in fee simple on which it operated smokeshops. 922 F.2d at 1076. Its tribal charter prohibits the disposition of fee simple land without the Secretary's approval. *Id.* at 1075. The UKB also asserted that its fee simple purchases are subject to the Nonintercourse Act. *Id.* Based on these purported restrictions, the tribe urged that its smokeshops were located in Indian country and were not subject to state taxing jurisdiction. *Id.* Oklahoma argued that the Nonintercourse Act does not apply to the tribe's fee simple purchases and, in any event, fee simple land is not Indian country. The Tenth Circuit found that

the UKB's land was not Indian country and affirmed the district court's grant of summary judgment to the state.

The Circuit Court first noted the requirements for finding Indian country—the federal government must have set aside the land for the UKB and agreed to serve as superintendent of the land. *Id.* It went on to determine that neither requirement had been met. The land had not been set aside because the UKB acquired the land unilaterally, it held title in fee simple, and "[n]o action has been taken by the federal government indicating that it set aside the land for use by the UKB." *Id.* at 1076. Likewise, federal superintendence was absent because the government did not take any action indicating it was prepared to exert jurisdiction over the land. *Id.*

The Tenth Circuit found it unnecessary to resolve the parties' dispute over the applicability of the Nonintercourse Act. It held that the tribe's self-imposed restriction was not sufficient to create Indian country, and absent some affirmative action by the federal government, a purported automatic restriction under the Nonintercourse Act was insufficient as well. *Id.* at 1077. If an automatic restriction were enough to turn fee simple purchases into Indian country, tribes "could remove land from state jurisdiction and force the federal government to exert jurisdiction over the land without either sovereign having any voice in the matter." *Id.* The Tenth Circuit found that nothing in the Supreme Court's cases indicates an intent that Indian tribes have unilateral power to create Indian country. *Id.* In short, the absence of state input and federal involvement was fatal to the UKB's claim of sovereignty.

See also, *City of Sherrill,* 544 U.S. at 219-20 (holding that the tribe's unilateral reacquisition of former reservation land in fee simple did not revive tribal sovereignty; "[a] checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at [the tribe's] behest—would seriously burde[n] the administration of state and local governments" (citation and internal quotation marks omitted)); *Cass County v. Leech Lake Band of Chippewa Indians,* 524 U.S. 103, 114, 118 S. Ct. 1904, 141 L. Ed. 2d 90 (1998) (Tribe's unilateral fee simple purchase of former reservation land did not render land nontaxable; act of repurchase did not manifest congressional intent to reassume federal protection of the land. Were the Court to hold otherwise, the IRA's trust provision, which specifically authorizes the Secretary to place land in trust for the benefit of a tribe and exempt from taxation, would be partially superfluous.); *Native Village of Venetie,* 522 U.S. at 532-33 (no federal set aside existed where tribe held title in unrestricted fee simple and Congress had expressly extinguished the land's reservation status); *Oneida Tribe of Indians of Wisconsin,* 542 F. Supp. 2d 908, 2008 U.S. Dist. LEXIS 25169, at *35, 81 (land purchased by tribe in fee simple was subject to state condemnation law; federal protection was not restored by tribe's fee simple purchase of former reservation land); *Kansas v. United States,* 249 F.3d 1213, 1218-19, 1229 (10th Cir. 2001) (Where Congress had expressly abrogated tribe's jurisdiction over former reservation land, the tribe's unilateral actions—adopting current property owners into tribe and then leasing and developing their land—did not restore sovereignty. "Congress . . . has the power to create tribal rights within

a State without the State's consent. Thus, an Indian tribe may not unilaterally create sovereign rights in itself that do not otherwise exist.").

While the *Buzzard* court did not reach the issue of whether the Nonintercourse Act attaches automatically to a tribe's fee simple land purchases, the Supreme Court implicitly answered that question in the negative in *Cass County* when it held that the IRA did not automatically attach to a tribe's unilateral fee simple purchases so as to render the land nontaxable. 524 U.S. at 114. That holding is consistent with the Supreme Court's observation, just a few months earlier, that "because Congress has plenary power over Indian affairs, see U.S. CONST., art. I, § 8, cl. 3, some explicit action by Congress (or the executive, acting under delegated authority) must be taken to create or to recognize Indian country." *Native Village of Venetie,* 522 U.S. at 531 n.6 (discussing the federal set-aside requirement). Prior to both of these Supreme Court decisions, one district court had directly addressed the Nonintercourse Act question and found that the Act did not automatically attach to a tribe's fee simple purchases of former reservation land to return the land to restricted status. *United States v. Saginaw Chippewa Indian Tribe of Michigan,* 882 F. Supp. 659, 665-66 (E.D. Mich.), *rev'd on other grounds*, 106 F.3d 130 (6th Cir. 1995). The *Saginaw Chippewa* court held that restricted status exists only if Congress creates it or delegates authority to the Secretary to do so. *Id.*

Like the tribes in many of the foregoing cases, the SNI acquired the Buffalo Parcel in fee simple. That is where the similarity ends. Unlike each of those cases, the SNI

does not purport to have obtained restricted fee status for the Parcel through the unilateral act of repurchase or by some automatic occurrence. That status exists only because Congress affirmatively created it and set forth specific criteria to be met, the SNI's purchase met that criteria,[51] and the Secretary, after receiving comments from state and local governments, did not conclude that the Nonintercourse Act should not apply to the Buffalo Parcel. Once the time for the Secretary's determination expired, restrictions on alienation were imposed on the Parcel by the express will of Congress.

Plaintiffs' insistence that federal input was absent and that the SNSA permits the SNI to create Indian country at will appears to arise from their contention, discussed at Point IV.B.2, *supra*, that to create Indian country, Congress must identify in advance each parcel of land to be acquired or require that the tribe purchase land. As already determined, that assertion is not borne out by the other congressional acts on which Plaintiffs rely and Plaintiffs have cited no decisional authority in support of that proposition. In any event, Congress predetermined, in 1990, that restricted status is appropriate for *all* land meeting the requirements set forth in the SNSA unless the Secretary concludes otherwise.

For the reasons stated, the Court finds that both the text of the SNSA and relevant judicial decisions support

51. Pursuant to the SNSA, restricted fee status is available only for land that is acquired with SNSA funds and located within the geographic area described in the SNSA, and only where state and local governments have been afforded an opportunity to comment on the property's removal from the tax rolls.

the conclusion that Congress validly set the Buffalo Parcel apart for the SNI's use. Congress's application of the Nonintercourse Act to land purchased with SNSA funds is a sufficient statement of its intent that the land be used by the SNI for Indian purposes. *See Heckman v. United States*, 224 U.S. 413, 438, 32 S. Ct. 424, 56 L. Ed. 820 (1912) (Congress intends that when land is held by Indians subject to restrictions on alienation, they should be secure in their possession and actually hold and enjoy the lands); *Ramsey,* 271 U.S. at 471 (where land is subject to restrictions on alienation, the government possesses a supervisory control over the land and may take measures to ensure that it inures to the sole use and benefit of Indians). Accordingly, the first requirement for a dependent Indian community is met for the Buffalo Parcel.

ii. Federal Superintendence

Plaintiffs next urge that Chairman Hogen failed to consider the final sentence of the SNSA's land acquisition provision, and that reading § 1774f(c) in its entirety compels the conclusion that Congress did not intend to assume federal superintendence over restricted fee land. The sentence states that "[b]ased on the proximity of the land acquired to the Seneca Nation's reservations, land acquired may become a part of and expand the boundaries of the Allegany Reservation, the Cattaraugus Reservation, or the Oil Spring Reservation in accordance with the procedures established by the Secretary for this purpose." It is Plaintiffs' position that the SNSA's land acquisition provision contemplates two discrete and unrelated processes. In the first, fee simple land can

acquire restricted fee status and this process requires "little or no federal government involvement." Docket No. 36-2 at 34. In the second, fee simple land can acquire reservation status and this process requires "active and affirmative input and oversight by the Secretary." *Id.* at 35. Plaintiffs then declare that only land that becomes part of a SNI reservation is under the level of federal superintendence necessary for a finding of Indian country. They base their conclusion on the SNSA's text, which purportedly "juxtaposes" the terms "restricted fee status" and "reservation land." They also cite generally to three-hundred and eleven pages of SNSA and IGRA legislative history as proof of congressional intent to "preserve[] the distinction between land that is merely subject to a restraint against alienation and land that is "Indian country."[52] Finally, according to Plaintiffs, a determination that restricted fee status is Indian country would necessarily render the reservation process superfluous—a result disfavored under principles of statutory interpretation.

Defendants maintain that the SNSA provides but one process for land acquisition. The last sentence of the at-issue provision simply provides that if land acquired by the SNI and held in restricted fee status pursuant to the SNSA "is in close proximity to the Nation's reservations, the Nation may request that the Secretary declare

52. The Court notes that it has reviewed the bulk of the SNSA history as specifically referenced in the legal briefing, and has not found support for Plaintiffs' assertion. The relevance of the IGRA's legislative history to the Indian lands question is doubtful since that statute does not concern the creation of Indian country.

the acquired land to be a part of and expand existing reservation boundaries." Docket No. 45 at 14. In response to Plaintiffs' argument that finding restricted fee land to be Indian country would render the SNSA's reservation language superfluous, Defendants point to the IRA and the Supreme Court cases holding non-reservation trust land to be Indian country. Docket No. 45 at 15-16 and fn. 7 (citing, *inter alia*, *Potawatomi Indian Trib*e, 498 U.S. at 511). According to Defendants, the distinction the SNSA preserves is that between non-reservation and reservation land; precisely the distinction set out in the IRA. Again, the statutory text and the decisional authority support Defendants' position.

A. The SNSA's Text

1. The restricted fee process

The SNSA provides that land placed in restricted fee status is removed "from real property tax rolls of State political subdivisions." 25 U.S.C. § 1774f(c). Plaintiffs view this reference to taxation only as a limitation on federal superintendence, and contend that if Congress intended restricted fee status to divest the state and localities of control over zoning, land use and other incidents of jurisdiction, it would have expressly stated its intent that the federal government exert superintendence in those areas. The problem with this reasoning is that trust status repeatedly has been held to divest states and localities of primary jurisdiction on substantially similar language. Like the SNSA, the IRA's trust provision simply states that land placed in trust "shall be exempt from state and

local taxation." 25 U.S.C. § 465.

The trust provision was at issue in *Santa Rosa Band*, where a county sought to enforce its zoning ordinances on trust land. 532 F.2d 655. The Ninth Circuit expressly considered the purportedly "limiting" jurisdictional language of the trust statute. The Court first noted that:

> the immunity of Indian use of trust property from state regulation, based on the notion that trust lands are a Federal instrumentality held to effect the Federal policy of Indian advancement and may not therefore be burdened or interfered with by the state, is a product of judicial decision. Each of these judicially defined characteristics of Indian trust property remained implicit in subsequent congressional enactments dealing with trust property. The language used in *§ 465* must be read against this backdrop, which provides the implicit substance of what the language signifies.

532 F.2d at 666. (internal citation omitted). The Ninth Circuit went on to state that:

> Section 465 explicitly exempted the lands acquired from state taxation. Rather than reading the omission of a provision exempting the lands from state regulation as evidencing a congressional intent to allow state regulation, we read the omission as indicating 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.

Id. at 666 n.17. *See also City of Sault Ste. Marie, Mich. v. Andrus,* 532 F. Supp. 157, 166 (D.D.C. 1980) (rejecting city's argument that "section 465's express exemption of tribal trust land from state and local taxation yields a negative implication that no additional exemption—for example—exemption from land use regulations—was intended by Congress"); *Chase v. McMasters*, 573 F.2d 1011, 1018 (8th Cir.), *cert. denied*, 439 U.S. 965, 99 S. Ct. 453, 58 L. Ed. 2d 423 (1978) ("At the time § 465 was enacted, judicial decisions had established that lands held in trust by the United States for Indians were exempt from local taxation as federal instrumentalities and that federal jurisdiction over tribal trust lands was exclusive and precluded assertion of state or local control. When Congress provided in § 465 for the legal condition in which land acquired for Indians would be held, it doubtless intended and understood that the Indians for whom the land was acquired would be able to use the land free from state or local regulation or interference as well as free from taxation.") (internal citations omitted).

Despite the IRA and SNSA's nearly identical language, Plaintiffs maintain that trust and restricted fee status are distinguishable because the Secretary has issued regulations relative to trust acquisitions which require that certain state and local jurisdictional issues

be taken into consideration, 25 C.F.R., §§ 151.10, 151.11, whereas the SNSA requires consideration of the impact on tax rolls only. The Court notes that while the IRA was enacted in 1934, the Secretary did not issue regulations for trust acquisitions until 1980. *Santa Rosa Band* was decided in 1975, and *McGowan* and other decisions holding trust land to be Indian country were decided even earlier. When those cases were decided, the courts were presented only with the IRA's statutory language which, like the SNSA, simply states that the land shall be exempt from taxation. On the basis of that language and the historical treatment of lands set apart for Indians, the courts consistently determined that trust lands were under federal superintendence and states did not have regulatory power over them. *See also*, *Roberts*, 185 F.3d at 1133-34 (finding that tribal trust land was Indian country even though it was acquired in 1976, prior to the Secretary's issuance of regulations for trust acquisitions).

Even after the Secretary issued trust regulations, Congress continued to enact legislation which, like the IRA, specifically notes the tax exempt status of trust lands, but is silent as to other aspects of state and local jurisdiction. *See, e.g.*, 25 U.S.C. §§ 2209-2210 (enacted 1983) (trust land shall be exempt from taxation); 25 U.S.C. § 566(d) (enacted 1986) (land transferred to Secretary in trust shall be exempt from all local, State and Federal taxation); 25 U.S.C. §§ 1750c-e (enacted 1997) (lands accepted in trust[53] as part of claim settlements not

53. The Florida Indian (Miccosukee) Land Claims Settlement Act discussed civil and criminal jurisdiction over land leased from the State of Florida for the tribe, 25 U.S.C. § 1746, but did not do

taxable under Federal or State law). It seems apparent that Congress understands a reference to taxation alone to be a sufficient statement of intent that trust land be under federal superintendence and subject to the primary jurisdiction of the federal government and the Indian tribe for which the land is acquired.

In light of the settled authority relative to trust status, Plaintiffs rhetorically ask why Congress did not simply provide for the taking of land into trust if it intended in the SNSA to create Indian country. Docket Nos. 36-2 at 27-28; 52 at 17. Congress has not explained, nor was it required to explain, its reasoning.[54] As Plaintiffs concede, Congress has the authority to set land apart for Indians under federal superintendence in whatever manner it chooses. Docket No. 36-2 at 27; U.S. CONST., art. I, § 8, cl. 3.

In the SNSA, Congress chose to create a process for restricted fee status that parallels the language of the IRA's trust provision and other trust-related statutes. The Court reads that choice as indicative of Congress's intent

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so with respect to trust land.

54. Though a response to this rhetorical question is itself conjecture, the SNI points to the fact that its lands historically have been held in restricted fee. Docket No. 58 at 20 fn. 9. "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." *Huron Group, Inc. v. Pataki,* 5 Misc. 3d 648, 785 N.Y.S.2d 827, 832 (Sup. Ct. 2004). The SNI also notes that it voted to opt out of the IRA and its trust provisions in the 1930s. Docket No. 58 at 20 fn. 9.

that use of the same language have the same effect—*i.e.*, that SNSA restricted fee land is subject to federal superintendence, and states and localities are without regulatory power over land set apart for the SNI. "It is generally presumed that Congress is (a) knowledgeable about existing laws pertinent to later-enacted legislation, (b) aware of judicial interpretations given to sections of an old law incorporated into a new one, and (c) familiar with previous interpretations of specific statutory language." *United States v. Bonanno Organized Crime Family of La Cosa Nostra,* 879 F.2d 20, 25 (2d Cir. 1989). Thus, when Congress chooses to adopt substantially identical language in a new statute, it "bespeaks an intention to import the established . . . interpretation . . . into the new statute." *United States v. Johnson,* 14 F.3d 766, 770 (2d Cir.), *cert. denied*, 512 U.S. 1240, 114 S. Ct. 2751, 129 L. Ed. 2d 868 (1994). Such an interpretation, applied to the SNSA, is entirely consistent with the historical treatment of all other land owned by the SNI and held in restricted fee.

2. The reservation process

The SNSA authorizes the Secretary to add certain land to the SNI's existing reservations "in accordance with the procedures established by the Secretary for this purpose." 25 U.S.C. § 1774f(c).

The Secretary's general authority to create reservations is found in the IRA, which provides that "[t]he Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by [the IRA], or to add such lands to existing reservations." 25 U.S.C. § 467 (alteration added).

The Secretary has not issued regulations setting forth procedures for the creation and expansion of reservations. Therefore, applicable procedures must be drawn from the text of the statute itself. What is clear from the plain language of § 467 is that only land that Congress or the Secretary has already deemed Indian country—by, for example, indefinitely extending allotments, § 462; restoring former reservation land in the public domain to tribal use, § 463; or acquiring land in trust for tribes, § 465—may become reservation land. Applying this procedure to the SNSA requires that, even where land purchased by the SNI is adjacent or in near proximity to an existing reservation such that it qualifies geographically for reservation status, the Secretary still must follow the specified notice and comment requirements and determine that it is not inappropriate for the land to be subject to the Nonintercourse Act before adding that land to an existing SNI reservation.

In a lengthy footnote, Plaintiffs suggest that the Secretary must actually follow the procedure in the IRA's trust acquisition regulations, rather than the procedure in the SNSA, before SNSA land can become part of a SNI reservation. Docket No. 36-2 at 35 fn. 23. This is an alternative means of arguing that the SNSA reservation process requires the consideration of additional jurisdictional factors which makes reservation land Indian country, while SNSA restricted fee land is not. The Court finds both the assertion and the conclusion to be without support and contrary to the plain text of the very regulations on which Plaintiffs rely:

Appendix E

> These regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. Acquisition of land by individual Indians and tribes in fee simple status is not covered by these regulations *even though such land may, by operation of law, be held in restricted status following acquisition*.

25 C.F.R. § 151.1 (emphasis supplied). The regulations are expressly limited to the acquisition of land by the United States in trust. They do not apply to tribal fee acquisitions, even where, as with the Buffalo Parcel, the land may attain restricted fee status under a law of the United States. In addition, the SNSA does not expressly or implicitly incorporate the trust regulations into the reservation process. Finally, this Court notes that application of the trust regulations to SNSA land acquisitions would, in large part, be meaningless. Among other things, the trust regulations require that the Secretary consider whether the tribe needs the land to facilitate tribal self-determination, economic development, or Indian housing, 25 C.F.R. §§ 151.3(a)(3) and 151.10(b), and scrutinize the location of the land relative to state boundaries and its distance from the boundaries of the tribe's existing reservation, *Id.* § 151.11(b). However, Congress expressly provided that it is appropriate for the SNI to increase its land base within the geographic area described in the SNSA, leaving nothing for the Secretary to determine in these regards.

As for Plaintiffs' "superfluous" argument, if one follows the argument to its logical end, then trust

land also cannot be Indian country or else the IRA's reservation provision will be rendered superfluous. As already discussed; it is well-settled that trust land is Indian country whether or not the land has been declared a reservation. The IRA does not "juxtapose" the terms "taken in trust" and "reservations." The distinction lies solely in whether land that is set apart as Indian country has, in addition, been declared a reservation. At least one Circuit Court has expressly rejected the argument that the reservation process becomes superfluous if trust or restricted fee lands are accorded Indian country status. In *Arizona Pub. Serv. Co. v. EPA*, the appellants challenged the EPA's treatment of off-reservation trust lands and restricted fee Pueblo lands[55] as indistinguishable from formal reservations, urging that such treatment would render the IRA's reservation provision superfluous. 341 U.S. App. D.C. 222, 211 F.3d 1280, 1292 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 970, 121 S. Ct. 1600, 149 L. Ed. 2d 467 (2001). The Circuit Court disagreed, concluding that there is no relevant distinction between tribal trust land and reservations for the purpose of tribal sovereignty. *Id.* at *1293-94*. Although the Circuit Court did not expressly hold the same for restricted fee land, that appears to have been a function of the appellants "concentrat[ing] their attack on EPA's interpretation of 'reservation' to include tribal trust land." *Id.* at 1292.

Plaintiffs have not offered any persuasive explanation

55. The Circuit Court referred to the Pueblos as fee simple land, a characterization having its genesis in *Sandoval*. However, as noted at fn. 36, *supra*, the Nonintercourse Act subsequently was found to apply to Pueblos. Therefore, the land is owned by the tribe in restricted fee.

why the SNSA's restricted fee and reservation process should be read differently than the trust and reservation process, particularly where Congress chose to model the SNSA's land acquisition provision on the IRA and to wholesale incorporate the IRA's reservation process into the SNSA, as well. Such a reading is not, as Plaintiffs contend, "counterinuitive."

For essentially the same reasons as stated above, the Court rejects Plaintiffs' further suggestion that Congress's bare use of the term "restricted fee status" does not sufficiently state an intent to create Indian country. Plaintiffs contend that Congress is required to expressly declare the land to be "Indian country," define the manner in which the land will be used, and specify that the state will no longer have primary jurisdiction over the land. Docket No. 36-2 at 38. Plaintiffs premise this argument on the SNSA's purported jurisdictional distinction between restricted fee land and reservation land. Having already rejected the premise, this Court is unmoved by Plaintiffs' argument that some "magic words" must be employed for the creation of Indian country. *See, e.g.*, *Santa Rosa Band,* 532 F.2d at 666 (trust land is Indian country and free from state and local regulation, notwithstanding Congress's failure to expressly say so). Plaintiffs' argument is further undermined by their acknowledgment that Congress creates "Indian country" when it simply declares that land shall be "held in trust," without specifying land use or jurisdiction. *See generally*, Docket No. 36-2 at 40 (citing settlement acts directing or permitting trust acquisitions). Finally, it is well-settled that Congress need not use express jurisdictional

language when it creates Indian lands unless it intends to preserve some aspects of state and local jurisdiction over the land. See *Oneida Tribe of Indians of Wisconsin*, 542 F. Supp. 2d 908, 2008 U.S. Dist. LEXIS 25169, at *46 (state laws may be applied on tribal lands if Congress has expressly so provided) (citation omitted); *Artichoke Joe's*, 353 F.3d at 721 (noting the long-standing general rule that a state has jurisdiction over Indian lands only where Congress explicitly cedes that jurisdiction).

B. The Judicial Decisions

In addition to arguing that the SNSA's text does not sufficiently indicate the existence of federal superintendence, Plaintiffs cite to several cases they claim support the conclusions that: (1) federal superintendence does not exist unless federal control over a tribe is "pervasive," (2) federal superintendence under the Nonintercourse Act is limited and does not meet the requisite level of control, and (3) the level of federal superintendence sufficient for Indian country status can be acquired only through a trust acquisition. This Court disagrees with each assertion for the reasons discussed below.

Plaintiffs point to *Narragansett Indian Tribe* for the proposition 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." 89 F.3d at 920 (quoting *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village*

of Venetie Tribal Gov't, F87-0051 CV (HRH), 1995 U.S. Dist. LEXIS 11039, 1995 WL 462232, at *14 (D. Alaska Aug. 2, 1995), *rev'd*, 101 F.3d 1286 (9th Cir. 1996), *rev'd*, 522 U.S. 520, 118 S. Ct. 948, 140 L. Ed. 2d 30 (1998)). This quote originates in the district court decision underlying *Native Village of Venetie,* 522 U.S. 520, 118 S. Ct. 948, 140 L. Ed. 2d 30. When that case ultimately reached the Supreme Court, the Court did not acknowledge or adopt the district court's "pervasive" standard,[56] nor did it find a restraint on alienation insufficient to invoke federal and tribal jurisdiction. Quite to the contrary, the Supreme Court expressly cited the Nonintercourse Act as the kind of congressional legislation "with respect to the lands 'in the exercise of the Government's guardianship over the [Indian] tribes and their affairs' that satisfies the federal superintendence requirement and permits the federal government to exercise primary jurisdiction under its general power over "all dependent communities." *Id.* at 528 and n.4 (quoting *Sandoval,* 231 U.S. at 46, 48).

The federal set-aside and superintendence requirements were found not to have been met in *Native*

56. This "pervasive" language also does not appear in any other Supreme Court decision reviewed in connection with this Decision and Order. Quite to the contrary, the Court stated in *United States v. John* that regardless of the facts that the state's jurisdiction over the tribe and its lands had gone unchallenged and that federal jurisdiction had not been continuous, federal jurisdiction remained. 437 U.S. at 652-53. In other words, the land was Indian country, subject to the primary jurisdiction of the federal government and the tribe, despite the lack of pervasive or continuous federal oversight.

Village of Venetie, in large part, because Congress had expressly revoked all existing reservations in Alaska and transferred former reservation lands to private, state-chartered Native corporations without any restraints on alienation. Absent those restraints, the Native corporations could immediately convey land to non-Natives without governmental approval and could use the lands for non-Native purposes. *Id.* at 532-33. According to the Supreme Court, "[i]n no clearer fashion could Congress have departed from its traditional practice of setting aside Indian lands." *Id.* at 532. The Court went on to note that in cases where federal superintendence has been found, "the Federal Government actively controlled the lands in question, effectively acting as a guardian for the Indians." *Id.* at 533 (citations omitted).

In the instant case, Congress affirmatively imposed the Nonintercourse Act's restrictions against alienation on land purchased with SNSA funds. Under *Native Village of Venetie*, subjecting land to the Nonintercourse Act's restrictions sufficiently demonstrates federal superintendence over the land. *Id.* at 528 and n.4.

Plaintiffs next focus on the Tenth Circuit's conclusion in *Buzzard* that "a restraint against alienation requiring the approval of the Secretary of the Interior is insufficient by itself to make land purchased by the [tribe] Indian country." 992 F.2d at 1077. Relying on this statement, Plaintiffs maintain that a restraint on alienation has the limited effect of requiring that the federal government approve land dispositions and, as a necessary corollary, exempts the land from state and local property taxes.

This level of oversight, they urge, is not sufficient to meet the federal superintendence requirement. Docket No. 36-2 at 31-32. The Court rejects Plaintiffs' contention for two reasons. First, the Tenth Circuit never reached the question of whether the Nonintercourse Act applied to the land at issue in that case; it simply assumed that the Act's restrictions automatically attached to the tribe's fee simple land purchase. However, as already discussed, subsequent courts consistently have held that the protections and tax exemptions of the IRA and the Nonintercourse Act do not attach to a tribe's unilateral fee simple purchases. There must be an affirmative act by Congress or the Secretary to set the land apart under federal superintendence. The SNI's Buffalo Parcel is readily distinguished from the fee simple land at issue in *Buzzard* precisely because Congress passed legislation declaring that lands purchased with SNSA funds and located within a specified geographic area are subject to the Nonintercourse Act's restraints against alienation (unless the Secretary, after receiving comments from the affected state and local governments, concludes that restricted fee status would be inappropriate). Second, to the extent the *Buzzard* holding is directed to the Nonintercourse Act, it has been implicitly overruled by the Supreme Court's subsequent statement to the contrary in *Native Village of Venetie*.

Plaintiffs have not identified any other support for their contention that congressionally-imposed restricted fee status requires "little or no federal government involvement." Docket No. 36-2 at 34. The numerous statutes treating trust and restricted fee land as jurisdictional equivalents counsel against such a conclusion. By imposing

restraints on alienation in the SNSA, Congress signaled its intent that the federal government supervise the land and ensure that it inures to the sole use and benefit of the SNI, *Ramsey,* 271 U.S. at 471, and that the federal government assume responsibility for a variety of matters relating to the land including, as applicable, rights-of-way, 25 U.S.C.§ 323; mining and storage leases, 25 U.S.C. §§ 396a and 396g; timber contracts, 25 U.S.C. § 407d; crimes, civil actions and related encumbrances on real and personal property, 25 U.S.C. §§ 1321-1322; energy resource development, 25 U.S.C. § 3501(12); agricultural resource management, 25 U.S.C. § 3703; and gaming regulation, 25 U.S.C. § 2703(4). *See Catawba Indian Tribe v. South Carolina,* 718 F.2d 1291, 1298-99 (4th Cir. 1983) ("The Nonintercourse Act creates a trust or fiduciary relationship between the federal government and the tribe somewhat akin to the relationship of guardian and ward."), *rev'd on other grounds*, 476 U.S. 498, 106 S. Ct. 2039, 90 L. Ed. 2d 490 (1986). Plaintiffs have identified no basis from which this Court can reasonably conclude that the federal government's guardianship obligations with respect to the Buffalo Parcel do not meet the federal superintendence requirement.

Finally, Plaintiffs rely on *City of Sherrill* to urge that Congress should have followed the procedures in 25 U.S.C. § 465 if it wanted to establish Indian land. They argue that the "creation of a discrete 9-1/2 acre island in the middle of downtown Buffalo" presents the very problems of piecemeal jurisdiction the Supreme Court was so concerned about in that case. Docket No. 52 at 17-18. Plaintiffs also maintain that "Congress could not have

intended" to grant the SNI the ability to "transfer any land it chose across literally thousands of square miles in New York State into Indian country." Docket No. 36-2 at 39. This Court already has determined that Congress is not required to utilize the IRA's trust acquisition provision to create Indian country, and the holding in *City of Sherrill* does not indicate otherwise.

City of Sherrill involved the question of sovereignty over parcels of land purchased in fee simple by the Oneida Indian Nation of New York (the "OIN"). 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386. The parcels, acquired in 1997 and 1998, were within the OIN's historic reservation land, but were last possessed by the tribe in 1805. The OIN had been dispossessed of the land in violation of federal law. *Id.* at 202. Despite the fact that Congress had not officially revoked or diminished its reservation, the Supreme Court held that the OIN could not unilaterally revive its dormant sovereignty by acquiring fee title to its former reservation land in open-market transactions. *Id.* at 202-03. The Court's determination rested on the intervening two centuries of state, county and local governance during which the properties were subject to taxation, the doctrine of laches, and the overwhelmingly non-Indian character of the area. *Id.* at 214-19. The Supreme Court found that the "unilateral reestablishment of present and future sovereign control, even over land purchased at the market price, would have disruptive practical consequences." *Id.* at 219. "Recognizing these practical concerns, Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the

area's governance and well-being. Title 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land in trust for Indians and provides that the land 'shall be exempt from State and local taxation.'" *Id.* at 220 (quoting *Cass County,* 524 U.S. at 114-15).

To the extent Plaintiffs suggest *City of Sherrill* stands for the proposition that, for all tribes in all circumstances, Indian country can be established only by a trust acquisition, the Court disagrees. The Supreme Court certainly confirmed that tribes cannot unilaterally or automatically acquire—or in the OIN's case, reacquire—sovereign control over their fee simple land purchases. Congress, or the Secretary acting on delegated authority, must take some action to set aside the land under federal superintendence. The Supreme Court also recognized that, absent tribe-specific legislation, the IRA's trust provision is the only mechanism available for that purpose. However, in enacting the SNSA, Congress created an alternative mechanism specific to the SNI. There is nothing inconsistent about finding the existence of Indian country here. The SNI has been provided an avenue other than the trust statute pursuant to which it can seek federal protection over certain land acquisitions.

d. The Import of the Term "Dependent"

In their final "Indian country" argument, Plaintiffs contend that the term "dependent Indian community" arose in conjunction with a paternalistic attitude toward Native Americans that has long since been abandoned. They urge that statutes designed to promote tribal economic

self-sufficiency, such as the SNSA, are not consistent with the concepts of wardship and governmental trust responsibilities inherent to that term. Docket No. 52 at 6-7. They suggest that finding the SNI to be a "dependent" here would perpetrate "paternalistic and anachronistic (if not overtly racist) notions of cultural superiority." *Id.* at 8.

Plaintiffs first point to the agricultural, educational and infrastructure assistance provided to the Pueblo people in *Sandoval*, and urge that the level of support and protection contemplated by the term dependent Indian community is not met unless the federal government insinuates itself into tribal everyday life. *Id.* at fn. 4. Plaintiffs plainly suggest that the SNI is not sufficiently "dependent," but have not explained how the SNI differs from the Pueblo in this regard. This Court takes judicial notice of the fact that, like the Pueblo of Santa Clara at issue in *Sandoval*, the SNI is recognized as a tribal entity by the federal government. 67 Fed. Reg. 46,328 (July 12, 2002).[57] By virtue of its government-to-government relationship with the United States, the SNI is eligible for the same funding and services from the Bureau of Indian Affairs and is entitled to the same sovereign immunities and privileges as the Pueblo. *Id.* To the extent Plaintiffs intend to imply, without evidentiary support, that the federal government's historical involvement with tribal welfare was greater than that existing today, this Court simply notes that the Supreme Court has never incorporated a "pervasive control" standard into the dependent Indian community requirements.

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57. *See generally*, Point II, *supra*, for a discussion of the United States' historical recognition of and dealings with the SNI as a sovereign entity.

Appendix E

In *Santa Rosa Band*, the Ninth Circuit was faced with a policy argument similar to the one advanced by Plaintiffs here. In that case, the county argued that a congressional act, P.L. 280, was written in an assimilationist tone that suggested an intent to grant state and local governments broad jurisdiction over trust lands. 532 F.2d at 661. However, the Ninth Circuit declined to read the statute as extending regulatory jurisdiction to the county "solely on the basis of general expressions of sentiment regarding the desirability of terminating Federal paternalistic supervision of tribes or the need for making Indians equal first class citizens." *Id.* There were a number of factors the Ninth Circuit found particularly relevant. First, regardless of whether the legislation reflected an assimilationist slant and an eye toward the eventual termination of federal supervision, it was not itself a termination statute and it did not end the tax exempt status of trust lands. *Id.* at 662. Here, the SNSA expressly confers federal protection and tax exemption with no provision whatsoever for their termination.

The Ninth Circuit went on to find that a statutory construction *denying* jurisdiction to local governments "comports with the present congressional Indian policy" of Indian autonomy, self-government, and economic self-development. *Id.* at 663.

> [T]ribal use and development of tribal trust property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life. * * * [S]ubjecting the [land] to local jurisdiction

> would dilute if not altogether eliminate Indian political control of the timing and scope of the development of [the land], subjecting Indian economic development to the veto power of potentially hostile local non-Indian majorities. * * * [T]hat there may inevitably be some abrasion between Indian communities and local neighbors . . . does not dictate eliminating Indian jurisdiction.

Id. at 664. Here, as in *Santa Rosa Band*, a federal policy that encourages tribal self-government and economic self-sufficiency supports an interpretation of the SNSA that excludes state and local jurisdiction over land set aside for the SNI's use.

To the extent Plaintiffs intend to suggest that the "dependent Indian community" is an archaic notion that has no place in present-day Indian policy or the creation of Indian country, that is an argument best presented to Congress, not the courts. This category of Indian country exists and Plaintiffs have not demonstrated that the Buffalo Parcel fails to meet its requirements.

3. *The Agency Action and APA Review*

In their first claim for relief, Plaintiffs allege that NIGC Chairman Hogen and then-Secretary Norton, to whom Hogen deferred, erred in finding that land purchased with SNSA funds and held in restricted fee is Indian country, subject to the SNI's jurisdiction.

Appendix E

The parties requested that this Court interpret the meaning and import of "restricted fee status" as that term is used in the SNSA. To ascertain the plain meaning of a statute, courts look "to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988). Having done so here, the Court finds that Congress, in enacting the SNSA, unambiguously intended that land purchased with SNSA funds and made subject to the Nonintercourse Act be set apart for the SNI's use and placed under federal superintendence. In short, such land is Indian country over which the federal government and the SNI exercise primary jurisdiction.

"If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron,* 467 U.S. at 843-43. The NIGC Chairman's determination—that the Buffalo Parcel, purchased with SNSA funds and held in restricted fee status, is Indian country over which the SNI has jurisdiction—is entirely consistent with and gives effect to Congress's expressed intent. Because the NIGC's "Indian country" determination is in accord with the statutes at issue, with other legislation relating to Indian lands, and with prior court decisions, the Court finds no basis to conclude that the Indian country determination is arbitrary, capricious, an abuse of discretion, or not in accordance with law.

C. Plaintiffs' Second Claim for Relief: Settlement of a Land Claim The Section 20 Gaming Prohibition and its Exceptions

In approving the SNI's Ordinance, NIGC Chairman Hogen first noted that Section 20 of the IGRA, 25 U.S.C. § 2719, generally prohibits gaming on lands acquired in trust after October 17, 1988, and went on to conclude that the Buffalo Parcel (acquired in 2005) is not gaming-eligible land unless it meets one of the statutory exceptions to the prohibition. AR00012.

Hogen then determined that the Buffalo Parcel satisfies the IGRA's "settlement of a land claim exception." AR00012-13. He expressly relied on the opinion given by the Secretary in her November 12, 2002 letter to the SNI. AR00012. The entirety of the Secretary's analysis relative to the "settlement of a land claim" exception is as follows:

> The legislative history to the Settlement Act [SNSA] makes clear that one of its purposes was to settle some of the Nation's land claim issues. Thus, the Nation's parcels to be acquired pursuant to the Compact and the Settlement Act will be exempt from the prohibition on gaming contained in Section 20 because they are lands acquired as part of the settlement of a land claim, and thus, fall within the exception in 25 U.S.C. § 2719(b)(1)(B)(I).

AR00239 (alteration added). The Secretary did not identify the "land claims" purportedly settled or cite

to the legislative history she relied on, nor does Hogen appear to have reviewed legislative history, which is not included in the administrative record. Neither Hogen nor the Secretary explained or interpreted the IGRA's "settlement of a land claim" provision. Likewise, neither analyzed the text of the SNSA.

In addition to relying on the Secretary's one-sentence analysis, Hogen opined that the SNSA's title evinces Congress's intent to enact the settlement of a land claim, a land claim includes the assertion of any existing right to land, and "[t]he existing right that gave rise to the SNSA was the Nation's property right to control and define the terms of leases and the use of the land." AR00013.

1. *Land Taken Into Trust*

Section 20 of the I*GRA* prohibits gaming "on lands acquired *by the Secretary in trust* for the benefit of an Indian tribe after October 17, 1988, unless" an exception applies. 25 U.S.C. § 2719 (emphasis supplied). The parties agree with Chairman Hogen's conclusion that this general prohibition also applies to the Buffalo Parcel, even though the Parcel was acquired by the SNI and is held in restricted fee status. Docket Nos. 28-2 at 25; 36-2 at 42. As Hogen explained in his letter approving the SNI's Ordinance:

> Although section 2719 of IGRA refers only to trust land, the NIGC interprets this section to include land held by an Indian tribe in restricted fee. * * * *The section can only sensibly be read to include trust land and

> restricted fee lands. IGRA permits tribes to game on restricted fee land over which the tribe exerts governmental power. 25 U.S.C. § 2703(4)(B). If section 2719 only applied to trust lands, Tribes could avoid the prohibition against gaming on lands acquired after October 17, 1988, by taking land into restricted fee rather than having the United States take it into trust. It is unlikely that Congress intended to create such an exception.

AR00012 (citing Secretary's November 12, 2002 opinion letter).

While the parties do not challenge Chairman Hogen's conclusion in this regard, the SNI does. In its *amicus brief*, the SNI argues that a plain reading of section 20 compels the conclusion that the IGRA does not prohibit gaming on after-acquired restricted fee land. Rather, the statute's plain terms unambiguously limit the section 20 prohibition to trust land. Docket No. 58 at 51-52 (citing, *inter alia*, *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) (when the words of a statute are unambiguous, courts must presume that a legislature says in a statute what it means); *United States v. Monsanto,* 491 U.S. 600, 610, 109 S. Ct. 2657, 105 L. Ed. 2d 512 (1989), (Congress's intent is best determined by looking to the statutory language that it chooses); *Keweenaw Bay Indian Cmty. v. United States,* 136 F.3d 469, 474 (6th Cir.), *cert. denied*, 525 U.S. 929, 119 S. Ct. 335, 142 L. Ed. 2d 277 (1998) ("Absent an ambiguity or a result at odds with a statute's purposes, we

must interpret a statutory provision according to its plain meaning.") (citing *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)).

Were the Court to start and end with the ordinary and common meaning of the terms employed in section 20, devoid of statutory and historical context, it might arrive at the reading advanced by the SNI. However, as the SNI has urged throughout its brief, issues relating to Indian law cannot be considered without historical context. *See Sac & Fox Tribe v. Licklider,* 576 F.2d 145, 147 (8th Cir.), *cert. denied*, 439 U.S. 955, 99 S. Ct. 353, 58 L. Ed. 2d 346 (1978) ("Federal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored.") (quotations omitted). Moreover, statutory interpretation requires consideration of the entire statute, not an isolated provision or phrase. Statutory language should be given a meaning that is most in accord with context and ordinary usage, and also most compatible with the surrounding body of law. *Green v. Bock Laundry Mach. Co.,* 490 U.S. 504, 528, 109 S. Ct. 1981, 104 L. Ed. 2d 557 (1989) (Scalia, J., concurring).

As the historical discussion at Point II, *supra*, makes clear, during the almost two centuries of federal-Indian relations prior to the IGRA's enactment, lands were set aside for or held by Indians in a number of ways, including reservations, non-reservation trust land, non-reservation restricted fee land, and allotments. However, well before the IGRA's enactment, federal Indian policy had stabilized. By 1988, there remained a single statutory mechanism for the acquisition of new land for Indians; the

IRA's trust provision, enacted in 1934. 25 U.S.C. § 465. There was no statutory mechanism in 1988 for taking land into restricted fee status.

Courts "assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990) (citation omitted). As the IRA's trust provision was the only legally recognized manner in which new land could be acquired for Indians when the IGRA was enacted, the section 20 prohibition was all-inclusive on its face. After setting out what was then an all-inclusive prohibition, Congress carefully defined specific exceptions thereto. Given the existing state of the law and Congress's careful construction, the Court finds that Congress intended to prohibit gaming on *all* after-acquired land, unless one of the section 20 exceptions applies. The alternative interpretation suggested by the SNI—Congress intended that if there were a subsequent change in the law regarding the manner in which lands could be set aside for Indians, section 20 would be inapplicable and newly acquired Indian land automatically would be gaming-eligible, without restriction—is clearly at odds with section 20's purpose. Where "the literal application of a statute will produce a result demonstrably at odds with the intent of the drafters... the intention of the drafters, rather than the strict language, controls." *Ron Pair Enters.*, 489 U.S. at 242 (internal citation and quotation marks omitted).

The Court also rejects the SNI's contention that Congress's use of the phrase "trust or restricted status" within section 20 is dispositive of congressional intent to

limit the prohibition to trust land only. The provision on which the SNI relies states, in relevant part, that:

> (a) [G]aming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—
>
> * * * *
>
> (2) the Indian tribe has no reservation on October 17, 1988, and—
>
> (A) such lands are located in Oklahoma and—
>
> * * * *
>
> (ii) are contiguous to other land held in *trust or restricted status* by the United States for the Indian tribe in Oklahoma;
> . . . .

25 U.S.C. § 2719(a)(2)(A) (emphasis supplied). Stated another way, section 20 does not apply to the Secretary's future acquisition of trust land in Oklahoma if, at the time of the IGRA's enactment, the Indian tribe had no reservation land but did have non-reservation trust or restricted fee land in Oklahoma, and if the newly-acquired trust land is contiguous to that existing non-

reservation trust or restricted fee land. The use of the term "restricted fee" in this context expresses nothing more than Congress's understanding of history and the law. The IRA's trust provision was the only existing mechanism for post-1988 acquisitions of land for Indians in Oklahoma, while prior set-asides or acquisitions for a tribe may have been accorded non-reservation, restricted fee status. Congress's acknowledgment of this historical and legal reality does not suggest an intent to exclude future acquisitions of land held in restricted fee status from section 20's global prohibition. As the SNI itself points out, there was no statutory mechanism for the creation of restricted fee land in 1988. Docket No. 58 at 53, fn. 29. It is highly unlikely that a future restricted fee acquisition would have been contemplated by Congress at all, much less been the subject of intentional statutory drafting.

For the reasons stated, the Court rejects the SNI's argument that the section 20 gaming prohibition does not apply to "Indian lands" created in a manner that was not statutorily available in 1988. Such a result would be at odds with section 20's clear purpose. Therefore, the Court is in full agreement with the parties' united position on this point. Chairman Hogen's conclusion that Congress intended the section 20 prohibition to apply to *all* after-acquired land is a permissible construction of the statute.

For essentially the same reasons, the Court rejects Plaintiffs' argument that while the term "trust" includes restricted fee land for purposes of the prohibition against gaming, that same term, when employed in the section 20 exceptions, applies to trust land only.

2. *The Settlement of a Land Claim Exception*

Plaintiffs contend that Chairman Hogen's determination that the Buffalo Parcel falls within the "settlement of a land claim" exception is arbitrary, capricious, an abuse of discretion and not in accordance with law because the Chairman proceeded from two erroneous and insupportable conclusions: (1) that Congress titled the SNSA a "land claims" settlement; and (2) that the SNSA was passed, in part, to settle land claims.

a. The Significance of Titles and Headings

Chairman Hogen relied on the SNSA's title as printed in the United States Code - "Seneca Nation (New York) Land Claims Settlement" - as evincing congressional intent. Plaintiffs are correct in noting that this is not the title given the Act by Congress. As stated at footnote 19, *supra*, Congress's title for the SNSA is an Act "To provide for the renegotiation of certain leases of the Seneca Nation, and for other purposes." Pub. L. No. 101-503, 104 Stat. 1292. Congress gave the Act the short title "Seneca Nation Settlement Act of 1990." *Id.* § 1. Congress did not include the term "claim," much less "land claim," in the SNSA's long or short titles.

To the extent Defendants, in their motion to dismiss, suggest that it was reasonable for Chairman Hogen to rely on a title printed in the United States Code as determinative of Congress's intent, the Court disagrees. First, Title 25 of the Code does not yet appear to have been enacted into positive law. Thus, while the Code is

prima facie evidence of laws relating to Indians, the Statutes at Large remain the official source of the law. *See* 1 U.S.C. § 204(a) and Title 25, Preface XIII (2001 and 2007 Supplement); 104 Stat. 1292. Accordingly, Chairman Hogen did not rely on the correct title in support for his conclusion.

Moreover, as this District recently noted, "'[f]or interpretative purposes, [headings and titles] are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain." *Scope, Inc. v. Pataki,* 386 F. Supp. 2d 184, 193 (W.D.N.Y. 2005) (quoting *Brotherhood of R.R. Trainmen v. Baltimore & O. R. Co.,* 331 U.S. 519, 528-29, 67 S. Ct. 1387, 91 L. Ed. 1646 (1947)); *see also*, *Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior,* 228 F.3d 82, 89 (2d Cir. 2000), *cert. denied*, 532 U.S. 1007, 121 S. Ct. 1732, 149 L. Ed. 2d 657 (2001) ("our reliance is not on the title . . ., but on the structure of the statute"). It is only if ambiguity exists that the given title or heading takes on some significance. Chairman Hogen did not discuss the text of the SNSA at all, much less identify any ambiguity that would justify resort to a title or heading as an interpretive tool.

b. The Text of the SNSA

Here, as with the Indian lands question, Plaintiffs compare the SNSA to other settlement acts codified at Title 25. They correctly point out that in each act, except the SNSA, Congress expressly acknowledged that the

subject tribe(s) had filed or asserted claims alleging the wrongful dispossession of their land.[58] In contrast, the SNSA does not refer to any pending or asserted claim by the SNI, nor is there any reference to a dispute over the ownership of SNI land.

In the SNSA's statement of findings, Congress notes only the existence of "[d]isputes concerning leases of tribal

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58. *See* 25 U.S.C. § 1701(a) (Rhode Island - two consolidated actions pending involving claims to land in the town of Charlestown); § 1721(a)(1) (Maine - claims asserted by tribe for possession of lands allegedly transferred in violation of Nonintercourse Act); § 1741(1) (Florida (Miccosukee) - lawsuit pending concerning claim to certain lands); § 1751(a) (Connecticut - tribe had civil action pending in which it claimed lands within the town of Ledyard); § 1771(1) (Massachusetts - pending lawsuit claiming certain lands within the town of Gay Head); § 1772(1) (Florida (Seminole) - pending lawsuit and other claims asserted but not yet filed involving claims to lands); § 1773(2) (Washington - tribe claimed right to ownership of specific tracts of land and rights-of-way, and disputed intended reservation boundaries); § 1775(a)(5) (Mohegan (Connecticut) - pending lawsuit by tribe relating to ownership of land); § 1776(b) (Crow Boundary - settling a dispute over the tribe's unfavorable reservation boundary resulting from an erroneous survey by the federal government); § 1777(a)(1) (Santo Domingo Pueblo) (pending claims by tribe to lands within its aboriginal use area); § 1778(a) (Torres-Martinez Desert - lawsuits brought by U.S. on behalf of tribe, and by tribe directly, claiming trespass by water districts that had permanently flooded reservation land); §§ 1779(8), (12), (14)-(15) (Cherokee, Choktaw and Chickasaw - tribes filed lawsuits against United States challenging the settlement and use of tribal trust land by non-Indians due to federal government's mistaken belief that land belonged to the state; settlement required that tribes forever disclaim all right, title to and interest in certain lands).

lands within the city of Salamanca and the Congressional Villages,[59] New York." 25 U.S.C. § 1774(a)(1). These disputes were between the SNI and its non-Indian lessees, who were parties to land leases that were set to expire on February 19, 1991. *Id.* § 1774(a)(4). The approaching expiration date "created significant uncertainty and concern" on the part of the non-Indian lessees. *Id.* Nonetheless, the SNSA quite clearly states that the United States would not be involved in lease renegotiation, nor would it serve in the capacity to approve lease renewals. *Id.* § 1774c.

While disclaiming any federal involvement in the current "disputes," Congress did find that the United States had "a moral responsibility" to help secure a fair and equitable settlement for past inequities, *Id.* § 1774(a)(6), "involving the 1890 leases"[60] which were about to expire, *Id.* § 1774(b)(2). Congress found that the payments made under those leases "were well below the actual

59. The Congressional Villages include the villages of Carrollton, Great Valley, and Vandalia. These villages are located on the Allegany Reservation and the residents there lease land from the SNI. Though the majority of those leases were also due to expire on February 19, 1991, they were not part of the lease negotiations between the SNI and the city of Salamanca.

60. Congress was referring to the 99-year leases authorized by the Act of September 30, 1890, 26 Stat. 558. *See* 25 U.S.C. § 1774a(4) (defining "lessee" as the holder of an 1890 lease which expires in 1991). Those leases actually would have commenced in 1892, following the 5-year lease term and subsequent 12-year lease term authorized by the Act of February 19, 1875, 18 Stat. 330. The 99-year leases were set to expire on February 19, 1991.

lease value of the property." *Id.* § 1774(a)(3). The SNSA is the only settlement act to employ the term "moral responsibility" and, notably, Congress did not "find" the existence of any legal claim or liability.

Although Congress did not acknowledge any pending or asserted legal claim, it went on to state that one of the SNSA's purposes was 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.* at 1774(b)(8) (emphasis added). Congress then directed that the United States provide the SNI with settlement funds "[i]n recognition of the findings and purposes specified in section 1774 of this title." *Id.* § 1774d(a) (emphasis added).

Plaintiffs argue that because the SNI had no legal claim pending at the time of the SNSA's enactment, the SNSA did not settle a claim. Docket No. 36-2 at 45-46. Defendants, relying on BLACK'S LAW DICTIONARY'S definition of "claim,"[61] urge that Congress's decision to enter into a settlement prior to the commencement of suit does not negate the existence of a claim; the definition

61. claim, n. 1. The aggregate of operative facts giving rise to a right enforceable by a court <<the plaintiff's short, plain statement about the crash established the claim>>. — Also termed claim for relief. 2. The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional <<the spouse's claim to half the lottery winnings>>. 3. A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for. BLACK'S LAW DICTIONARY (8th ed. 2004)

encompasses any enforceable right to relief, whether or not that right has yet been asserted. Docket Nos. 28-2 at 27-28; 45 at 23. The SNI agrees with Defendants and contends that a formal complaint need not be lodged for a "claim" to exist; it is enough that the SNI possessed a legal claim. Docket No. 58 at 55. Of course, the proper focus here is on the agency's interpretation.

Chairman Hogen stated that "the plain meaning of 'land claim' is an *assertion* of an existing right to the land." AR00013 (emphasis supplied). Because the SNSA, alone among all the settlement acts, does not acknowledge the existence of a pending or asserted claim, accepting Chairman Hogen's definition of "claim" compels the conclusion that there was no claim and, therefore, no settlement of a claim. Nevertheless, for purposes of this analysis, the Court will proceed from the assumption that if, at the time of the SNSA's enactment, the SNI possessed an enforceable right to relief against the United States that Congress purported to settle, then the SNSA settled a claim. The Court has no trouble concluding that this is the minimum definition Congress would have contemplated by its use of the term "claim" when it enacted the IGRA. Applying this most minimal of standards leads to the same conclusion—there was no claim and no settlement of a claim.

c. The Nature and Existence of an Enforceable Claim

Plaintiffs and the SNI contend that the claim Congress settled when it passed the SNSA was for damages relating

to the below-market-rate rents the SNI received under its 99-year leases. Docket Nos. 36-2 at 47; 58 at 55-56. In contrast, Defendants urge that the SNSA settled the SNI's claim for "unlawful possession of Nation lands by non-Indians."[62] They maintain that if Congress had not enacted the SNSA, the SNI would have had an enforceable right to eject hold-over lessees who remained on reservation land. Docket Nos. 28-2 at 27-28; 45 at 23-24. In other words, Defendants appear to be talking about what was then the SNI's prospective right to eject tenants who might unlawfully remain on reservation land after their 99-year leases expired in 1991.

i. The Right to Eject Lessees

The SNSA is predicated on an agreement between the SNI and the city of Salamanca. The purposes of the SNI-city agreement were to: "(1) provide[ ] City residents with new leases of Nation land; and (2) provide[ ] the Nation with fair compensation . . . for the impacts on the Nation of the prior lease arrangement" which involved "extremely inadequate rental payments." S. REP. No. 101-511 at 16. The SNI-city agreement states that the prior leases had been obtained "without Federal authorization and . . . on terms adverse to the Nation." *Id.* The agreement's effectuation was conditioned upon Congress's authorization of a $ 35 million payment to the SNI. In effectuating the SNI-city agreement,

62. Again, Defendants' characterization differs from that of Chairman Hogen, who describes the claim as one involving "the Nation's property right to control and define the terms of leases and the use of the land." AR00013.

Congress necessarily acknowledged the agreement's purpose of compensating the SNI for the below-market rents paid under the prior lease arrangement. The SNSA's "settlement" language is entirely consistent with that purpose. The only "inequity" for which Congress acknowledges "responsibility" involves the 1890 leases. Likewise, the only "claim" that Congress required the SNI to relinquish against the United States, and thus the only potential liability that was settled, was "for payment of annual rents prior to February 20, 1991."[63] *Id.* § 1774b(b).

Defendants' characterization of the SNI's purported claim suggests that the United States agreed to provide a monetary settlement in exchange for the SNI's agreement to relinquish its common law right to eject hold-over lessees. There is no SNSA provision that supports the conclusion that the SNI gave up this or any other of its property rights as owner and lessor. In fact, it is abundantly clear that no such relinquishment occurred. Following the SNSA's enactment and the expiration of the 99-year leases, the SNI, assisted by the United States, successfully ejected hold-over lessees who declined to enter into new leases predicated on the agreement between the SNI and the city. *Banner II,* 238 F.3d at 1353 (citing *United States v. Fluent*, 95-CV-0356A(H), slip. op. (W.D.N.Y. Feb. 18, 1997) (adopting Magistrate Report and Recommendation, July 9, 1996)).

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63. Again, Congress was referring to the 99-year leases entered into in 1892.

Accordingly, the Court finds that Plaintiffs and the SNI have properly characterized the SNI's purported claim as one for damages relating to the below-market-rate rents the SNI received under its 99-year leases.

ii. The Right to Damages for Inadequate Rental Rates

There is one point on which the parties agree—to the extent the SNI had an enforceable right against the United States when the SNSA was enacted, it would have arisen from the Nonintercourse Act. Docket Nos. 45 at 24; 52 at 46. However, Plaintiffs contend that Congress expressly confirmed the SNI's 99-year leases by the Act of 1890, thereby satisfying any duty the United States had under the Nonintercourse Act. *Id.* at 46. They urge that absent a legal duty, no enforceable claim existed.

As the Court of Claims held when ruling on prior claims brought by the SNI, the Nonintercourse Act gives rise to a special fiduciary responsibility to protect and guard Indians against unfair treatment in transactions with respect to the disposition of their lands.[64] *Seneca*

64. The Court of Claims expressly rejected the possibility that any course of dealing or treaty with the SNI prior to the Nonintercourse Act's enactment gave rise to a fiduciary or supervisory duty on the part of the United States. *Seneca Nation of Indians,* 173 Ct. Cl. at 920. Specifically, the Court of Claims found the enemy status of the Senecas, Cayugas, Mohawks and Onondagas during the Revolutionary War precluded the inference of a fiduciary relationship with those nations. *United States v. Oneida Nation of New York,* 217 Ct. Cl. 45, 58-59, 576

Nation of Indians, 173 Ct. Cl. at 925. Where the Nonintercourse Act applies, it necessarily follows that "the United States is liable . . . for the receipt by the Indians of an unconscionably low consideration." *Id.* at 925-26. This fiduciary responsibility is predicated on the unique trust relationship that arises when the United States enters into treaties or agreements with tribes, or passes legislation relating to Indians. *Banner II,* 238 F.3d at 1352. It has long been recognized that in carrying out its agreements and promises, the United States is to "be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 296-97, 62 S. Ct. 1049, 86 L. Ed. 1480, 96 Ct. Cl. 561 (1942). Thus, the Court rejects Plaintiffs' suggestion that the United States' duty under the Nonintercourse Act is complete once it approves or confirms a land transaction. If the Nonintercourse Act applies, the United States must also ensure that the transaction is a fair one. *See Joint Tribal Council of Passamaquoddy Tribe v. Morton,* 388 F. Supp. 649, 660 (D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975) ("the Nonintercourse Act imposes a trust or fiduciary obligation on the United States to protect land owned by all Indian tribes covered by the statute").

F.2d 870 (1978). In contrast, express promises were made to the Oneidas and Tuscaroras, who had remained at peace with the United States during the War, which gave rise to a fiduciary relationship regarding their land. *Id.* at 55-59. In sum, the parties have identified the Nonintercourse Act as the sole source of an enforceable right and the Court finds no indication of any other rule of law or equity that would provide a basis for a claim against the United States.

It is for an entirely different reason, then, that the Court finds the SNI could not have asserted an enforceable right to relief against the United States when the SNSA was enacted. Specifically, this District and other courts repeatedly have held that "Congress . . . authorized the [SNI] to negotiate for the leasing of its land without the need for formal treaty or convention, thereby 'taking Seneca leasing out of 25 U.S.C. § 177 . . . .'" *Fluent,* 847 F. Supp. 1046, 1052 (W.D.N.Y. 1994) (quoting *United States v. Devonian Gas and Oil Co.,* 424 F.2d 464, 467 n.3 (2d Cir. 1970)). Neither Defendants nor the SNI have identified any basis for imputing a fiduciary duty to the United States with respect to the 99-year leases, outside of the Nonintercourse Act, and the Court can ascertain none.

Congress first permitted the SNI to lease land within its Allegany and Cattaraugus reservations without federal oversight and restriction by the Act of 1875. As noted at Point II(H), *supra*, prior to 1875, the SNI had leased Allegany reservation land to non-Indians without the federal government's consent. Congress remedied that legal deficiency by adopting the Act of 1875 which, among other things, validated the SNI's existing land leases for a five-year period. 18 Stat. 330, § 3. Congress also expressly confirmed that when that five-year period expired, the SNI had title to the leased reservation lands and the power to lease the same for a subsequent period not to exceed twelve years. *Id.* While persons who had erected improvements on leased land were entitled to a lease renewal, no such right was accorded to lessees who had not erected improvements. *Id.* The terms of subsequent leases were left solely to the parties, and

Congress specified a method for dispute resolution that did not involve the federal government. *Id.*

The state courts were the first to consider the import of the Act of 1875. In *Shongo v. Miller*, an individual Indian claimed title to a parcel of land on the Allegany reservation that had been leased to a non-Indian. 45 A.D. 339, 61 N.Y.S. 281 (4th Dep't 1899). The question before the court was whether the Indian plaintiff could assert a right to possession over a non-Indian lessee who had received a 99-year lease from the SNI's council. The Fourth Department first acknowledged the purpose of the Nonintercourse Act as inhibiting the conveyance of Indian lands to whites. In the Fourth Department's view, however, the SNI had disregarded the protections of the Act when it voluntarily entered into leases of its Allegany reservation land. *Id.* at 343. By the time Congress was confronted with the leasing situation, whites had established villages on the reservation and made substantial improvements on the land. As the Fourth Department noted, the Act of 1875 "did not create any leases. It [simply] gave vitality by congressional approval to what had already received the indorsement of the Seneca Nation." *Id.* at 344 (alteration added). *See also*, *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 546 (1991) ("[The 1875 Act] simply proposes that the leases which have been made by these Indians themselves, by their own consent, shall be ratified and confirmed, and held to be valid and binding upon the parties who have voluntarily made these contracts.") (quoting Senator Ingalls, a proponent of the bill, 3 Cong. Rec. 909-10 (1875)).

After carefully examining each section of the Act, the Fourth Department found that "[t]he act is very specific in providing that the title [to reservation land] is to vest in the nation," not in individual Senecas. 45 A.D. at 345. The court went on to uphold the validity of the SNI council's issuance of a lease over the individual Indian's claim to possession. *Id.* at 348. In reaching its determination, the Fourth Department also rejected the plaintiff's argument that the at-issue lease was invalid because the Act of 1875 required lease renewals to be made at the expiration of an original lease, and there had been more than a one-month lapse between expiration of the at-issue lease and the council's issuance of a renewal. *Id.* The Fourth Department found that if the SNI had the power to lease, it could also waive this provision, and "a fair construction of the act requires that the conduct of the parties in making the renewal be upheld by the court." *Id.* In short, the state court recognized the SNI's power to enter into leases and establish lease terms without the federal oversight contemplated by the Nonintercourse Act's "treaty or convention" language.

Congress's intent that the SNI be solely responsible for the leasing it had voluntarily entered into is confirmed in the Act of 1875's legislative history. That history was briefly recounted in the Committee Report to the Senate recommending passage of the SNSA. The Committee noted that Congress had rejected a proposed amendment to the Act of 1875 that would have required the review and approval of leases by the Secretary of the Interior. S. REP. No. 101-511 at 10. And when "a question was raised whether the bill contained any requirement for an

escalation clause in the leases[,] [t]he answer was that it did not, but inclusion of such a provision should be left to the contracting parties." *Id.*

It is equally clear that no federal oversight was contemplated by the subsequent Act of 1890. That Act extended the term of lease renewals to 99 years, but incorporated all other terms and conditions of the Act of 1875. 26 Stat. 558. When the SNI's right to enforce its 99-year leases was challenged by a lessee, the Second Circuit upheld the SNI's unilateral right to cancel leases for nonpayment. *United States v. Forness,* 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694, 62 S. Ct. 1293, 86 L. Ed. 1764 (1942). While only one cancelled lease was then before the *Forness* court, the SNI had contemporaneously cancelled hundreds of leases in arrears and the case had broad implications. *Id.* at 930-31. By rejecting the defaulting lessee's argument that the federal government's Indian Agent could waive the SNI's lease cancellation, the Second Circuit implicitly recognized the SNI's independent power to make and cancel leases. *Id.* at 932-33. The Second Circuit was not at all troubled by the fact that the SNI, after cancelling the lease at issue, offered to enter into a new lease with the defaulting party for almost thirty times the annual rent due under the defaulted lease, and found that the SNI was well within its right to do so. *Id.* at 941.

Sixty years after the Act of 1890, Congress again addressed the leasing of SNI land. In enacting the Seneca Leasing Act of 1950, Congress provided, in relevant part, that:

Appendix E

> In addition to the authority now conferred by law on the Seneca Nation of Indians to lease lands within the Cattaraugus, Allegany, and Oil Springs Reservations to railroads and to lease lands within the limits of the villages established under authority of the Act of February 19, 1875 (18 Stat. 330), the Seneca Nation of Indians, through its council, is authorized to lease lands within the Cattaraugus, Allegany, and Oil Springs Reservations, outside the limits of such villages, for such purposes and such periods as may be permitted by the laws of the State of New York.

660 Stat. 442, ch. 707, § 5. The express language of § 5 indicates that Congress granted the SNI the same authority to lease reservation lands outside the city of Salamanca and Congressional Villages that it had previously granted by the Acts of 1875 and 1890 for lands within city and village limits—*i.e.*, the right to lease land unhindered by the strictures of the Nonintercourse Act.

Section 5 was the subject of the Second Circuit's decision in *Devonian Gas*, a case involving oil and gas leases the defendants and the SNI entered into in 1955. 424 F.2d at 466. The United States filed suit, in 1963, for the taking of property for the Allegany River Reservoir (Kinzua Dam) project and sought to invalidate the defendants' leases on the ground that § 5 required specific permission from New York State by way of implementing legislation as a condition precedent to leasing. *Id.* at 466-67, 470. The district court granted the government's

motion for summary judgment and the defendants appealed. *Id.* at 466.

The Second Circuit reversed, finding that the purpose of the 1950 Act was to expand upon the Nation's existing authority to lease its land without federal control, although not to such a degree that the SNI would be placed in a better position than other New York citizens. *Id.* at 467, 470. In other words, while leases were not subject to federal oversight, the 1950 act permitted New York control over SNI leasing to the same extent the state regulated leasing for its citizenry generally. *Id.* at 471. In reaching its decision, the Circuit Court engaged in statutory interpretation, reviewed legislative history, and considered the Bureau of Indian Affairs' construction of the 1950 Act. The Second Circuit noted two instances where the BIA had "disclaimed any power with respect to leases by the Senecas and said that these were handled directly by representatives of the Nation." *Id.* at 468. The Circuit Court found it was completely clear that "federal control of leasing was withdrawn." *Id.* at 467.

Finally, there is the SNSA. In a case brought in 1990 to challenge the validity of the agreement between the SNI and the city of Salamanca, and SILA's role in facilitating the negotiations, this District held as follows: "it is apparent that the Acts of 1875, 1890, 1950 and 1990 [the SNSA] specifically address and progressively recognize the authority of the Seneca Nation to lease its land without Congressional approval." *Fluent,* 847 F. Supp. at 1053 (alteration added). The *Fluent* plaintiffs, representing hundreds of Allegany reservation lessees,

declined to execute leases under the terms agreed to between the SNI and the city and, purporting to rely on provisions in the Acts of 1875 and 1890, sought to compel the SNI to renew leases for up to 99 years. *Id.* at 1048, 1050. This District found that the clear purpose of the Acts of 1875, 1890 and 1950 "was to allow the [SNI] to lease its land without concern for the strictures of the 'treaty or convention' requirements of the Nonintercourse Act." *Id.* at 1052. In holding that this was also the clear purpose of the SNSA, the District Court noted that Congress: expressly recognized the validity of the SNI-city agreement, 25 U.S.C. § 1774(b)(1), confirmed that the SNI was solely responsible "for the negotiation of the leases" in its own interest, § 1774c(a), found there was no impediment to lessees negotiating directly with the SNI, § 1774c(b)(2), and stated that there was no requirement for "approval of any such lease by the United States," § 1774c(a). 847 F. Supp. at 1053. This District concluded that the Nonintercourse Act did not supersede or preclude SILA's authority to facilitate the renegotiation of leases between the SNI and the city because the Nonintercourse Act did not apply to the leases at all. *Id.* at 1053. The Acts of 1875, 1890, 1950 and 1990, which took SNI leasing out of the Nonintercourse Act and reaffirmed the withdrawal of federal oversight over the course of more than a century, were found to be express and controlling. *Id.*

Based on the foregoing, this Court finds that the United States took SNI leasing out of the Nonintercourse Act in 1875 and never reassumed any obligations in that regard. Because the United States did not have a trust or fiduciary duty relative to the 99-year leases the Nation

entered into in 1892, the SNI had no enforceable right against the United States based on its agreements to lease reservation land for amounts "well below the actual lease value of the property." 25 U.S.C. § 1774(a)(3). Thus, while the SNSA clearly succeeded in effectuating the SNI-city agreement, it did not settle any existing or potential enforceable claim against the United States.[65] The most that can be said is that the agreement, as effectuated by the SNSA, remedied an acknowledged unfairness.

The parties dispute a number of additional points in their respective memoranda, including whether a claim/ for insufficient rental rates is a "land claim" and whether the Buffalo Parcel was acquired "as part of a settlement" by virtue of the use of SNSA funds.[66] However, in light of the Court's determination that the SNSA did not settle

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65. The Court resolves this question on the basis of considerations not expressly raised in the parties' or the SNI's briefs. But the question of the existence of a claim against the United States is inextricably linked to the issue of whether the United States resolved "legal liability on the part of the United States that could be a direct consequence of not reaching a settlement," 25 U.S.C. § 1774(b)(8), thereby settling a "claim" for purposes of the section 20 exception, 25 U.S.C. § 2719(b)(1)(B)(i). Thus, the issue is necessarily included within the question presented. *See City of Sherrill*, 544 U.S. at 214 n.8. Moreover, where the parties have each requested a determination as a matter of law, the Court cannot ignore a century's worth of congressional and decisional law directly relevant to the question presented.

66. The Court reviewed them in their entirety, and acknowledges the significant time and effort the parties and *amicus* put into briefing these issues.

a claim against the United States because the SNI did not posses an enforceable right to relief relative to the matter purportedly settled, there is no need to proceed to a determination on those additional points.

3. *The Agency Action and APA Review*

In determining that land purchased with SNSA funds is acquired as part of the settlement of a land claim and is therefore gaming-eligible, the Secretary and the NIGC Chairman make no reference whatsoever to the IGRA's or the SNSA's text. Neither discussed the meaning of the phrase "as part of a settlement of a land claim," which is not defined in the IGRA.[67] Neither looked to the SNSA's text to ascertain whether it purported to settle a claim at all, nor whether any such claim could properly be characterized as a "land claim." The Secretary engaged in a one-sentence analysis that makes an uncited reference to legislative history. That history includes the DOI's strong opposition to the SNSA on the ground that "the bill incorrectly states that the U.S. risks liability if [the SNSA] is not enacted" and "it is not clear that the Federal government is liable under the terms of the lease arrangement." S. REP. No. 101-511 at 39. In her opinion letter, the Secretary made no attempt to explain her departure from the agency's prior position that the United States had no potential liability with regard to SNI leases.

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67. No interpretive regulations have been issued relative to the section 20 exceptions, either.

Despite the Secretary's dearth of explanation or consistency, the NIGC Chairman accepted the one-sentence analysis and found "[t]he Secretary's interpretation is reasonable." AR00013. To buttress the Secretary's analysis, Chairman Hogen relied on an incorrect recitation of the SNSA's title as evincing congressional intent. Though the Chairman did cite to one district court decision for an interpretation of the term "land claim," he went on to incorrectly identify the claim purportedly settled by the SNSA.

The NIGC Chairman's deference to the Secretary's opinion that the SNSA settled unspecified "land claim issues" is entitled to respect only to the extent that through thoroughness, logic, expertise, consideration of prior interpretations and the like, the combined documents have the power to persuade. *Mead Corp.*, 533 U.S. at 235. They do not. Because Chairman Hogen and the Secretary failed to consider factors relevant to the settlement of a land claim determination, and failed to provide any statutory interpretation or explanation in support of their conclusions, the determination is arbitrary and capricious.

In addition, both the NIGC's determination and the Secretary's opinion are at odds with the text of four successive congressional acts relating to SNI leasing, a significant body of decisional authority relative to those four acts, and the DOI's own stated objections to the SNSA. In other words, they are contrary to more than a century of law and agency action.

D. Defendants' Motion to Dismiss all Claims against the DOI and its Secretary

Defendants seek dismissal of all claims against the DOI and its Secretary on the ground that the Secretary did not take any final agency action relating to the SNI's gaming ordinance that is subject to review in this case.

There is no dispute that Chairman Hogen's Ordinance approval is a reviewable final agency action. 25 U.S.C. §§ 2710, 2714. As is alleged in the Amended Complaint and evidenced in Chairman Hogen's approval letter, the Chairman relied on then-Secretary Norton's November 12, 2002 opinion letter to find that land purchased with SNSA funds and held in restricted fee is "Indian lands" within the meaning of the IGRA and is gaming-eligible land under the settlement of a land claim exception to the general prohibition against gaming on after-acquired lands. Am. Compl. ¶¶ 37, 42, 57, 72; AR00009-13. This Court noted in *CACGEC I* that the Secretary's opinion letter was an intermediate step in a process that ultimately would result in final agency action. Now that final agency action has occurred, the Secretary's letter is reviewable under the APA. 471 F. Supp. 2d at 322 (citing *5 U.S.C. § 704* and *Miami Tribe of Oklahoma v. United States*, 198 Fed. Appx. 686, 690 (10th Cir. 2006) (unpublished opinion)). Accordingly, Defendants' motion to dismiss the DOI and the Secretary of the Interior is denied.

Appendix E

E. Plaintiffs' Motion to Supplement the Record

On January 10, 2008, Plaintiffs moved to supplement the record to include a DOI Memorandum to Bureau of Indian Affairs Regional Directors, dated January 3, 2008, and a DOI letter to the St. Regis Mohawk Tribe, dated January 4, 2008. The purpose of the memorandum is to provide guidance for the taking of off-reservation land into trust, pursuant to 25 C.F.R. § 151.11, particularly where the land will be used for gaming. The letter applies that guidance to a trust acquisition application submitted to the Bureau of Indian Affairs by the St. Regis Mohawk Tribe. According to Plaintiffs, these documents are significant "because they reflect the 'policy' of the Interior Department, and that policy is antagonistic to off-reservation gambling." Docket No. 56-2 at 4.

Plaintiffs' motion to supplement the record with these documents is denied for two reasons. The first and most obvious is that the agency action challenged here—the NIGC's ordinance approval—was taken on July 2, 2007. Plaintiffs have not attempted to explain how any document that post-dates Chairman Hogen's determination by six months could have been relevant to that challenged decisionmaking process. Second, the DOI's guidance relates to the IRA's off-reservation trust acquisition regulations. This Court has determined that those regulations do not apply to the Secretary's consideration of whether land purchased with SNSA funds should be subject to the provisions of the Nonintercourse Act and held in restricted fee status. Furthermore, the guidance itself is directed only toward pending and future

applications to take off-reservation land into trust for gaming purposes as part of the 25 U.S.C. § 2719(b)(1)(A) two-part determination.[68] Docket No. 56-3, Ex. A at 1-2. The instant case does not involve trust land or a decision made pursuant to 25 U.S.C. § 2719(b)(1)(A). Accordingly, Plaintiffs' motion to supplement the record is denied.

V. CONCLUSION

For the reasons fully stated above, the Court finds that, as a matter of law, the NIGC's determination that the Buffalo Parcel is "Indian country" over which the Seneca Nation of Indians has jurisdiction is in accord with Congress's intent in enacting the SNSA. Therefore, Plaintiffs' motion for summary judgment on its first claim for relief is denied and Defendants' motion to dismiss the first claim is granted.

However, the Court finds that the NIGC's July 2, 2007 determination that the Buffalo Parcel is gaming-eligible land pursuant to the IGRA's settlement of a land claim

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68. Plaintiffs' only assertion with respect to 25 U.S.C. § 2719(b)(1)(A) relates to their argument that the "settlement of a land claim" exception does not apply to exempt the Buffalo Parcel from the general prohibition against gaming on land acquired after October 17, 1988. Plaintiffs allege that § 2719(b)(1)(A) is the only exception potentially applicable to the Buffalo Parcel and that "[n] either the Secretary nor the NIGC . . . attempt[ed] in any way to comply with the provisions of that section." Am. Compl. ¶¶ 71-72. In short, Plaintiffs allegations relate to the failure to make this decision at all, not to any purported failure to follow requisite guidelines or procedures in the decisionmaking process.

exception is arbitrary, capricious, and not in accordance with the law. When the SNSA was enacted, the SNI did not possess an enforceable claim against the United States relating to its 99-year leases. Because no claim existed, no claim was settled. Accordingly, the Court grants Plaintiffs' motion for summary judgment as to its second claim, and denies Defendants' motion to dismiss the second claim. Because gaming cannot lawfully occur on the Buffalo Parcel under the settlement of a land claim exception, the Court vacates the NIGC's approval of the SNI's Class III Gaming Ordinance which was based on that exception.

And last, Defendants' motion to dismiss the DOI and its Secretary is denied, and Plaintiffs' motion to supplement the record is denied.

V. ORDERS

IT HEREBY IS ORDERED, that the National Indian Gaming Commission Chairman's July 2, 2007 administrative decision approving the Seneca Nation of Indians Class III Gaming Ordinance is VACATED.

FURTHER, that Defendants' Motion to Dismiss (Docket No. 28) is GRANTED in part, and DENIED in part, consistent with the foregoing Decision.

FURTHER, that Plaintiffs' Motion for Summary Judgment (Docket No. 36) is GRANTED in part and DENIED in part, consistent with the foregoing Decision.

FURTHER, that Plaintiffs' Motion to Supplement the Record (Docket No. 56) is DENIED.

FURTHER, that the Clerk of the Court is directed to take the necessary steps to close this case.

SO ORDERED.

Dated: July 8, 2008
Buffalo, New York

/s/ William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

APPENDIX F — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK, FILED JANUARY 12, 2007

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

06-CV-0001S

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY, REV. G. STANFORD BRATTON, D. MIN., EXECUTIVE DIRECTOR OF THE NETWORK OF RELIGIOUS COMMUNITIES, NATIONAL COALITION AGAINST GAMBLING EXPANSION, PRESERVATION COALITION OF ERIE COUNTY, INC., COALITION AGAINST CASINO GAMBLING IN NEW YORK—ACTION, INC., THE CAMPAIGN FOR BUFFALO—HISTORY ARCHITECTURE AND CULTURE, ASSEMBLYMAN SAM HOYT, MARIA WHYTE, JOHN MCKENDRY, SHELLY MCKENDRY, DOMINIC J. CARBONE, GEOFFREY D. BUTLER, ELIZABETH F. BARRETT, JULIE CLEARLY, ERIN C. DAVISON, ALICE E. PATTON, and MAUREEN C. SCHAEFFER,

Plaintiffs,

and

COUNTY OF ERIE and JOEL A. GIAMBRA,

Intervenor-Plaintiffs,

Appendix F

v.

DIRK KEMPTHORNE,[1] in his Official Capacity as the Secretary of the Interior, JAMES CASON, in his Official Capacity as the Acting Assistant Secretary of the Interior for Indian Affairs, UNITED STATES DEPARTMENT OF THE INTERIOR, PHILIP N. HOGEN, in his Capacity as Chairman of the National Indian Gaming Commission, and NATIONAL INDIAN GAMING COMMISSION,

Defendants.

January 12, 2007, Decided
January 12, 2007, Filed

TABLES INTENTIONALLY OMITTED

ABBREVIATIONS AND ACRONYMS

The following abbreviations and acronyms are used in this decision:

1. Former Secretary of the Interior, Gale A. Norton, was the first named defendant when this action was filed. Dirk Kempthorne, who replaced Norton as Secretary following his confirmation by the Senate on May 26, 2006, was later substituted. Because Norton was the Secretary during the time period relevant to Plaintiffs' claims, all discussions relating to the Secretary will continue to refer to Norton and will use the pronoun "her."

Appendix F

STATUTES

APA	Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*
IGRA	Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*
NEPA	National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*
NHPA	National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.*
SNSA	Seneca Nation Settlement Act of 1990, 25 U.S.C. §§ 1774 *et seq.*
QTA	Quiet Title Act, 28 U.S.C. § 2409a

AGENCIES AND ENTITIES

Chairman	Chairman of the National Indian Gaming Commission
NIGC	National Indian Gaming Commission
Secretary	Secretary of the United States Department of the Interior
SEGC	Seneca Erie Gaming Corporation
SNI	Seneca Nation of Indians

Appendix F

DOCUMENTS

Compact	"Nation-State Gaming Compact between the Seneca Nation of Indians and the State of New York," deemed approved by the Secretary as of October 25, 2002
Ordinance	"Seneca Nation of Indians Class III Gaming Ordinance of 2002 as Amended," approved by the Chairman on November 26, 2002

I. INTRODUCTION

On January 3, 2006, Plaintiffs Citizens against Casino Gambling in Erie County, *et al.,* commenced this action for declaratory and injunctive relief under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706; the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*; the National Environmental Policy Act ("NEPA"), as amended, 42 U.S.C. §§ 4321 *et seq.*; and the National Historic Preservation Act ("NHPA"), as amended, 16 U.S.C. §§ 470 *et seq.* Plaintiffs allege that former Secretary of the Interior Gale A. Norton; Acting Assistant Secretary of the Interior for Indian Affairs James Cason; the United States Department of the Interior; Chairman of the National Indian Gaming Commission Philip N. Hogen; and the National Indian Gaming Commission ("NIGC") (collectively, "Defendants" or "the Government") violated the laws of the United States when, by their decisions and actions, they permitted the Seneca Nation of Indians ("SNI") to construct a gambling casino on land it purchased in the City of Buffalo with funds appropriated pursuant to the Seneca Nation Settlement Act of 1990 ("SNSA").

Appendix F

There are four motions presently before this Court. First is the Government's Motion to Dismiss the Complaint in its entirety for lack of subject matter jurisdiction and failure to state a claim, filed on April 26, 2006.[2] (Docket No. 22.) On July 25, 2006, Plaintiffs filed a joint Motion for Summary Judgment as to all claims. (Docket No. 39.) On August 8, 2006, the SNI moved for leave to file an *amicus* brief seeking dismissal of the Complaint in its entirety pursuant to Rule 19 of the Federal Rules of Civil Procedure. (Docket No. 44.) Each of these motions has been fully briefed, was the subject of extensive oral argument on November 1, 2006, and is now pending for disposition. In addition, the Government moved to strike Plaintiffs' exhibits and portions of their Memorandum of Law in Support of Summary Judgment. (Docket No. 54.) The Motion to Strike was taken under advisement without oral argument.

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2. Approximately one week after the Government filed its motion, the County of Erie and County Executive Joel A. Giambra moved to intervene in this action pursuant to Federal Rule of Civil Procedure 24(a)(2) or 24(b)(2). The unopposed motion was granted and an Intervenor Complaint was filed on June 6, 2006. The claims for relief in the Intervenor Complaint, ¶¶ 63-101 are identical to the claims for relief in the original Complaint, ¶¶ 49-86 (except for the Intervenor-Plaintiffs' addition of its allegation at ¶ 94 relating to anticipated lost sales tax revenue and increased taxpayer expenditures relating to criminal activity). Therefore, this Decision will refer to these pleadings, collectively, as "the Complaint," and determinations on Defendants' Motion to Dismiss will be applicable to both the Plaintiffs and Intervenor-Plaintiffs (collectively, "Plaintiffs").

Appendix F

As discussed more fully below, this Court will grant the SNI's motion for leave to file an *amicus* brief. However, after fully considering the SNI's position and the arguments set forth in its brief, this Court finds that neither the SNI nor the State of New York is a necessary and indispensable party to this action such that dismissal of the case is required under Rule 19 of the Federal Rules of Civil Procedure. Specifically, this Court finds that the SNI's interest in operating a gambling casino in the City of Buffalo is adequately represented by the Defendants in this action, who are vigorously defending their decisions to permit that very activity. Furthermore, the State does not have an interest in the subject matter of this litigation that will be impaired by a judgment in Plaintiffs' favor.

Defendants have moved to dismiss this action in its entirety on the grounds that: 1) the Quiet Title Act applies to this case and the Defendants are therefore immune from suit, 2) the Secretary of the Interior's ("the Secretary") "Indian lands" opinion is not a reviewable final agency action under the APA and therefore the Court lacks jurisdiction to consider Plaintiffs' claims, 3) the NIGC Chairman is not required to make an Indian lands determination and he fully carried out his statutory duties, and 4) Plaintiffs otherwise fail to state any claim against any Defendant.

This Court finds that Plaintiffs are not challenging the SNI's title to real property it purchased in the City of Buffalo and therefore rejects Defendants' argument that the Quiet Title Act renders Defendants immune from suit. However, this Court does agree with Defendants

that the Secretary's "Indian lands" opinion was not a final agency action and, further, that no final agency action has occurred with respect to that determination. As such, the Secretary's opinion and related statutory interpretations are not yet reviewable under the APA, and this Court is without jurisdiction to review the IGRA claims against the Secretary. Accordingly, this Court will grant Defendants' motion to dismiss claims One and Two against the Secretary for lack of subject matter jurisdiction.

Having fully considered the purpose and structure of the IGRA, and the authority delegated to the NIGC by Congress, this Court rejects Defendants' contention that the NIGC Chairman is not required to make "Indian lands" determinations when he acts on a tribal gaming ordinance. To the contrary, whether Indian gaming will occur on Indian lands is a threshold jurisdictional question that the NIGC must address on ordinance review to establish that: 1) gaming is permitted on the land in question under the IGRA, and 2) the NIGC will have regulatory and enforcement power over the gaming activities occurring on that land. In this case, both the general location in which the SNI intended to purchase land and the manner in which it intended to acquire and hold that land were made known to the NIGC Chairman in 2002. However, there is no indication in the record that he considered that information or made any Indian lands determination when he affirmatively approved the SNI's class III gaming ordinance in 2002. Therefore, this Court will deny Defendants' motion to dismiss the IGRA claims against the NIGC.

As a result of this Court's conclusion that the NIGC failed to consider this threshold jurisdictional issue, this Court can not find that the NIGC's approval of a tribal gaming ordinance permitting the SNI to conduct gambling on newly acquired land in the City of Buffalo was the result of reasoned decision-making. Because the Indian lands determination is one that Congress placed in the NIGC's hands, the NIGC's 2002 ordinance approval is vacated as arbitrary and capricious insofar as it permits gaming on land to be acquired thereafter in the City of Buffalo. The SNI's ordinance will be remanded to the NIGC for an Indian lands determination with respect to the Buffalo Parcel.

As explained more fully below, the remand to the NIGC moots Plaintiffs' remaining claims and, consequently, Plaintiffs' Motion for Summary Judgment, Defendants' Motion to Strike and the remainder of Defendants' Motion to Dismiss are also rendered moot.

II. BACKGROUND

This Court is asked to review the reasonableness of agency action, including decisions involving statutory interpretation of both the IGRA and the SNSA. Therefore, a recitation of the legal and factual background of this case is helpful in understanding the issues presented in the pending dispositive motions, particularly with respect to certain statutory terms such as "Indian lands," "restricted fee," "governmental power," "tribal-state compact," "gaming ordinance," and "land claim." Some of these same terms also are central to consideration of the SNI's motion for leave to file an *amicus* brief.

Appendix F

A. Legal Background

1. The Relevant Provisions of the IGRA

Congress enacted the IGRA in 1988 to establish a comprehensive statutory scheme governing gambling on Indian lands. 25 U.S.C. §§ 2701-2721. The IGRA "seeks to balance the competing sovereign interests of the federal government, state governments and Indian tribes, by giving each a role in the regulatory scheme." *Artichoke Joe's v. Norton,* 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002), *aff'd*, 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 543 U.S. 815, 125 S. Ct. 51, 160 L. Ed. 2d 20 (2004).

The IGRA provides for three classes of gaming, each of which is subject to a different level of regulation. 25 U.S.C. § 2710. Class I gaming is not subject to any type of regulation and includes "social games solely for prizes of minimal value or traditional forms of Indian gaming [associated] with tribal ceremonies or celebrations." *Id.* § 2703(6), 2710(a)(1) (alteration added).

Class II gaming includes bingo, pull-tabs, punch boards and other similar games, as well as card games not prohibited by state law. *Id.* § 2703(7)(A). Class II games are authorized if conducted under a gaming ordinance approved by the NIGC Chairman and located in a state that permits such gaming for any purpose by any entity. *Id.* § 2710(a)(2), (b)(1)(A) and (B). The Federal government regulates, monitors and audits class II gaming. *Id.* § 2706.

Appendix F

Class III gaming, the category at issue in this case, is the "most heavily regulated and most controversial form of gambling" under the IGRA. *Artichoke Joe's Cal. Grand Casino v. Norton,* 353 F.3d 712, 715 (9th Cir. 2003). It is comprised of all forms of gaming not in classes I or II, including slot machines, games such as baccarat, blackjack, roulette, and craps, and sport betting, parimutuel wagering and lotteries. *Id.* § 2703(8) and (7)(B); 25 C.F.R. § 502.4. Class III gaming is lawful only if: (1) the governing body of the tribe having jurisdiction over the "Indian land" on which gaming is to take place authorizes class III gaming by adopting an "ordinance" or resolution that is then approved by the NIGC Chairman; (2) the gaming is located in a state that permits such gaming; and (3) the gaming is conducted in conformance with a "tribal-state compact" that regulates such gaming. *Id.* § 2710(d)(1).

a. Indian Lands

The consistent and overarching requirement common to each class of gaming is that it be sited on Indian land within the tribe's jurisdiction. *Id.* § 2710(a)(1), (b)(1), (d)(1)(A)(i) and (d)(2)(A). For purposes of the IGRA, "Indian lands" include:

> (A) all lands within the limit of any Indian reservation; and
>
> (B) 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*

> *tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.*

Id. § 2703(4) (emphasis supplied). The land in the City of Buffalo at issue in this case was purchased by the SNI in 2005 and is held in "restricted fee"—*i.e.,* it is subject to restriction by the United States against alienation. The parties disagree as to whether the SNI can exercise governmental power over that land.

Another IGRA provision at issue here, § 2719, expressly prohibits gaming on land "acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988" unless a defined statutory exception applies.[3] Included among the exceptions are when:

> (A) the Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

3. This provision is often referred to as the "after-acquired lands prohibition on gaming."

(B) *lands are taken into trust as part of—*

(i) *a settlement of a land claim,*

Id. § 2719(b)(1) (emphasis supplied). The applicability of the "settlement of a land claim" exception to land acquired in Buffalo after October 17, 1988, is in dispute here.

b. Tribal-State Gaming Compacts

An Indian tribe wishing to conduct class III gaming must first request that the state in which its lands are located engage in negotiations for a tribal-state compact to govern the conduct of gaming activities. *Id.* § 2710(d)(3)(A). Compacts may include provisions relating to regulatory and jurisdictional issues, state assessments on gaming activities, taxation by the Indian tribe, other subjects relating to the operation of gaming activities, and remedies for breach of contract. *Id.* § 2710(d)(3)(C).

If an agreement is reached, the compact is submitted to the Secretary of the Interior, who may approve, disapprove or take no action on it. *Id.* § 2710(d)(8). "If the Secretary does not approve or disapprove a compact [within] 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with [the IGRA]." *Id.* § 2710(d)(8)(C).

Consistent with the foregoing provision, the Secretary is permitted to disapprove a compact only if it violates

IGRA, any other provision of federal law, or the United States' trust obligations to Indians. *Id.* § 2710(d)(8)(B). A compact that is either affirmatively approved or considered approved by virtue of the Secretary's non-action takes effect when notice of the approval is published in the Federal Register. *Id.* § 2710(d)(3)(B).

c. Tribal Gaming Ordinances

An Indian tribe wishing to conduct class III gaming must also, through its governing body, adopt an ordinance or resolution authorizing class III gaming. That ordinance or resolution must be submitted to the NIGC Chairman along with, among other things, a copy of the tribal-state compact for class III gaming. *Id.* § 2710(d)(2)(A); 25 C.F.R. § 522.2. The Chairman is required, no later than 90 days after the ordinance or resolution is submitted, to approve a submission that: 1) proposes class III gaming on Indian lands of the Indian tribe, and 2) meets the articulated statutory requirements, unless the Chairman determines that the ordinance was not adopted in compliance with the tribe's governing documents, or that the tribal governing body was significantly and unduly influenced in its adoption. 25 U.S.C. § 2710(d)(2)(B) and (e). Thereafter, Class III gaming activity may commence upon publication of the ordinance or resolution and the Chairman's order of approval in the Federal Register, in conformance with the terms of a tribal-state compact that has been approved by the Secretary. *Id.* § 2710(d)(1)(C), (2)(B) and (C).

If the Chairman does not act on an ordinance or resolution within 90 days after its submission, it "shall

be considered to have been approved by the Chairman, but only to the extent [it] is consistent with [the IGRA]." *Id.* § 2710(e).

2. The Seneca Nation Settlement Act of 1990

For more than a century prior to the SNSA's enactment, the SNI leased land on its Allegany Reservation[4] to non-Indians. 25 U.S.C. § 1774(a)(2)(A) and (B). The leases were primarily concentrated in the City of Salamanca and the nearby villages of Carrollton, Great Valley and Vandalia. *Id.* §§ 1774(a)(1) and 1774a(10). The bulk of the leases, first confirmed or authorized by Congress in 1875 (18 Stat. 330), were for a term of ninety-nine years that was set to expire on February 19, 1991. *Id.* §§ 1774(a)(2)(C) and (4). Over the years, the leases strained relations between the Indian and non-Indian communities. *Id.* § 1774(a)(1).

One of the SNSA's primary purposes was to facilitate the SNI's negotiated extension of the existing land leases with its non-Indian tenants. 25 U.S.C. §§ 1774(b)(1) and (3). Although the SNI had no legal claims pending at the time of the SNSA's enactment, it had filed a claim over the value of its leases in 1952 that eventually was settled in 1977. *Id.* §§ 1774(a)(2)(E), (b)(8). In light of the impending lease expiration date, Congress undertook an analysis of historic land values and found that payments made to the SNI under the original lease agreement and also in the 1977 settlement "were well below the actual lease value of the property." *Id.* § 1774(a)(3).

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4. The SNI has three reservation areas in New York State, Allegany, Cattaraugus and Oil Spring. 25 U.S.C. § 1774a(7).

By enacting the SNSA, Congress sought to assist in resolving the past inequities to the SNI, to provide stability and security to the non-Indian lessees, to promote economic growth and community development for both the SNI and the non-Indian communities established on reservation land, and to avoid the potential legal liability on the part of the United States that could result if a settlement was not reached.[5] *Id.* §§ 1774(b)(2) and (4)-(8).

In exchange for relinquishing all potential legal claims for lease payments through February 19, 1991, the SNI received, among other things, a payment from the Secretary of the Interior of $ 30,000,000. *Id.* §§ 1774b(b) and 1774d(b)(1). The SNSA permits the SNI to use those funds to acquire land that is "within its aboriginal area in the State [of New York] or situated within or near proximity to former reservation land." *Id.* § 1774f(c) (alternation added). Under the SNSA, the State and local governments are to be notified of such an acquisition and are afforded 30 days in which to submit comments to the Secretary on the impact of the removal of the land from real property tax rolls. *Id.*

> Unless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of section 2116 of the Revised Statutes (25 U.S.C. 177), such

5. Though not expressly articulated in the SNSA, the potential liability of concern to the United States presumably involved a possible violation of its trust obligation to the SNI by authorizing contractual agreements and/or a settlement for significantly less than fair market value.

> lands shall be subject to the provisions of that Act and shall be held in restricted fee status by the Seneca Nation. Based on the proximity of the land acquired to the Seneca Nation's reservations, land acquired may become a part of and expand the boundaries of the Allegany Reservation, the Cattaraugus Reservation, or the Oil Spring Reservation in accordance with the procedures established by the Secretary for this purpose.

Id. Once the land attains restricted fee status, it cannot be sold, leased or otherwise conveyed by the SNI without the approval of the federal government. 25 U.S.C. § 177.

B. Factual Background

The facts set forth below are either undisputed or drawn from the administrative records.[6] Any controverted allegations in the Complaint that must be accepted as true for purposes of Defendants' Motion to Dismiss will be discussed further herein, as necessary.

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6. On April 4, 2006, the NIGC filed a Certified Copy of the Administrative Record relating to its November 26, 2002 approval of the SNIs' Class III Gaming Ordinance of 2002, as amended. (Docket No. 17.) On May 2, 2006, the Department of Interior filed its Administrative Record relating to the placement of land in the City of Buffalo in restricted fee status pursuant to the SNSA and its determination regarding the tribal-state gaming compact between the SNI and the State of New York. (Docket Nos. 25-27.)

Appendix F

1. The SNI's Tribal-State Compact

On August 18, 2002, the SNI and the State of New York ("the State") executed a tribal-state compact[7] ("the Compact") for the conduct of class III gaming activities. (Docket No. 1 (Complaint) ¶ 27; Docket Nos. 27-16 (the Compact); 25-2 at 1; 39-9 ¶¶ 10, 15; 53-2 ¶¶ 10, 15.) The Compact authorizes the SNI to establish three Gaming Facilities: 1) at a selected site in the City of Niagara Falls, 2) at a location to be determined in the City of Buffalo or elsewhere in Erie County, and 3) on current SNI reservation territory. (Complaint ¶¶ 28-29; Compact ¶ 11.) The Compact reflects the parties' understanding that both the Niagara Falls and Buffalo sites would be purchased with SNSA funds. (Compact ¶ 11(b)(2) and (3).) In anticipation of the use of SNSA funds, the State agreed to support the SNI in its efforts to obtain restricted fee status for both sites. *Id.* ¶ 11(b)(3).

In addition to circumscribing the geographic sites for gaming and identifying the manner in which new land for gaming will be acquired, the Compact grants the SNI total exclusivity to operate gaming devices within a 10,500 square mile area in western New York State. *Id.* ¶ 12(a); Docket No. 25-2 at 1.

The executed Compact was forwarded to the Department of the Interior and received on September

7. The full title of the executed compact is "Nation-State Gaming Compact between the Seneca Nation of Indians and the State of New York."

10, 2002. Within 45 days thereafter, the Secretary did not affirmatively approve or disapprove the Compact, thereby allowing it to be deemed approved as of October 25, 2002, pursuant to Section 11(d)(8)(C) of the IGRA, 25 U.S.C. § 2710(d)(8)(C). (Complaint ¶¶ 27, 30; Docket Nos. 39-9 ¶ 16; 53-2 ¶ 16.)

In letters to the SNI President and the Governor of New York, dated November 12, 2002, then-Secretary Norton explained her decision not to affirmatively act on the Compact, but to allow it to go into effect by operation of law. (Docket No. 25-2.) Excerpted below are several of the Secretary's observations and determinations:

- Under IGRA the Department must determine whether the Compact violates IGRA, any other provision of Federal law . . . or the trust obligations of the United States to Indians. *Id.* at 1.

- I have decided to allow this Compact to take effect without Secretarial action. In enacting IGRA, Congress provided limited reasons for Secretarial . . . disapproval. [I have] important policy concerns regarding the Compact . . . that fall outside of the limited reasons in IGRA for Secretarial disapproval. *Id.* at 1-2.

- The choice to specifically deny other tribes gaming opportunities [by granting the SNI geographic exclusivity] is the primary reason I have chosen not to affirmatively approve this Compact. *Id.* at 4 (alteration added).

- Lands Acquired through the Seneca Nation Settlement Act

  I have concluded that this Compact appropriately permits gaming on the subject lands because Congress has expressly provided for the Nation to acquire certain lands pursuant to the Settlement Act. *Id.* at 2.

  [I]t is our opinion that the two cities of Niagara Falls and Buffalo are "situated within or near proximity to" the Nation's former Buffalo Creek and Tonawanda reservations for purposes of the Settlement Act. *Id.* at 6.

  This decision rests squarely on a Congressionally-approved settlement of a land claim. *Id.*

- Indian Lands under IGRA

  IGRA permits a tribe to conduct gaming activities on Indian lands if the tribe has jurisdiction over those lands, and only if the tribe uses that jurisdiction to exercise governmental power over the lands. There is no question that the Settlement Act requires the parcels to be placed in "restricted fee" status. As such, these parcels will come within the definition of "Indian lands" in IGRA if the Nation exercises governmental power over them. The Department assumes that the Nation will exercise governmental powers over these lands when they are acquired in restricted fee. It is our opinion that the Nation will have jurisdiction over these parcels because they meet the definition

of "Indian country" under 18 U.S.C. § 1151. Historically, Indian country is land that, generally speaking, is subject to the primary jurisdiction of the Federal Government and the tribe inhabiting it. As interpreted by the courts, Indian country includes lands which have been set aside by the Federal Government for the use of Indians and subject to federal superintendence. In this regard, it is clear that lands placed in restricted status under the Settlement Act are set aside for the use of the Nation, and that such restricted status contemplated federal superintendence over these lands. Finally, the Settlement Act authorizes lands held in restricted status to expand the Nations' [sic] reservation boundaries, or become part of the Nation's reservation. Accordingly, we believe that the Settlement Act contemplates that lands placed in restricted status be held in the same legal manner as existing Nation's lands are held and thus, subject to the Nation's jurisdiction. *Id.*

- Application of Section 20 of IGRA
  Section 20 of IGRA, 25 U.S.C. § 2719[,] contains a general prohibition on gaming on lands acquired in trust by the Secretary for the benefit of an Indian tribe after October 17, 1988, unless one of several statutory exceptions is applicable to the land. [T]he Nation plans to use the provisions of the Settlement Act to acquire the land in restricted fee, rather than in trust. . . . I believe that lands held in restricted fee status pursuant to an Act of Congress such as is presented within this Compact

> must be subject to the requirements of Section 20 of IGRA. *Id.* at 6-7.
>
> The legislative history to the Settlement Act makes clear that one of its purposes was to settle some of the Nation's land claim issues. Thus, the Nation's parcels to be acquired pursuant to the Compact and the Settlement Act will be exempt from the prohibition on gaming contained in Section 20 because they are lands acquired as part of the settlement of a land claim, and thus fall within the exception in 25 U.S.C. § 2719(b)(1)(B)(i). *Id.* at 7.

In sum, the then-Secretary acknowledged an affirmative duty to determine whether a compact should be disapproved and decided that there was no basis for disapproval in this case. She further concluded that gaming could take place at sites in Niagara Falls and Buffalo purchased after October 17, 1988 with SNSA funds because the lands would be acquired as part of the settlement of a land claim, and would be held in restricted fee and subject to the SNI's jurisdiction and governmental authority, thereby meeting the IGRA definition of Indian lands.

On December 9, 2002, the Department of the Interior published a notice in the Federal Register stating that the Compact "is considered approved, but only to the extent the compact is consistent with the provisions of IGRA." 67 Fed. Reg. 72,968.

2. The SNI's Class III Gaming Ordinance

On August 29, 2002, the SNI submitted a Class III Gaming Ordinance and related material, including the Compact, to the NIGC. (Docket No. 17-1, -2 and -10.) This was prior to the SNI's submission of the Compact to the Secretary.

Early in November 2002, the NIGC informed the SNI of certain technical deficiencies in its submission package that required amendment. (Docket No. 17-5.) As a result, the SNI submitted a "Class III Gaming Ordinance of 2002 as Amended" ("Ordinance") on November 25, 2002, which the NIGC Chairman affirmatively approved on November 26, 2002. (*Id.* and Docket No. 17-10.) This was one day after the (amended) Ordinance's submission and within 90 days of submission of the original ordinance. The NIGC Chairman's letter to the SNI President confirming his approval advised that "the gaming ordinance is approved for gaming only on Indian lands, as defined in the IGRA, over which the Nation has jurisdiction." (Docket No. 17-10.)

3. The SNI's Land Acquisitions

The SNI purchased the Niagara Falls site identified in the Compact on or about October 25, 2002, the same date the Compact was deemed approved by the Secretary. (Complaint ¶ 34.) Therefore, that site was owned by the SNI prior to the Chairman's approval of the Ordinance.

Almost three years after the Ordinance approval, on October 3, 2005, the Tribal Council of the SNI designated

a Buffalo Footprint, "bounded to the North by Perry Street, to the East by Chicago Street, to the South by Ohio Street, and to the West by Main Street," as the site for its Buffalo gaming facility. (Docket No. 25-4.) At about the same time, "the Seneca Erie Gaming Corporation ("SEGC"), a tribally chartered corporation formed for the purposes of developing, financing and operating the Nation's Class III Gaming Facility to be established on Nation territory in Erie County," purchased certain parcels of land within the Buffalo Footprint. *Id.; see also,* Docket Nos. 39-9 ¶ 24; 53-2 ¶ 24. The SEGC conveyed those parcels (hereinafter, "the Buffalo Parcel") to the SNI on October 3, 2005. (Docket No. 25-7.)

By letters dated October 3, 2005, the SNI notified the State of New York, County of Erie and City of Buffalo that it had acquired the Buffalo Parcel and advised them of the 30-day comment period available under the SNSA. (Docket Nos. 25-13, -14 and -15.) Following the 30-day comment period, on November 7, 2005, the SNI sent to the Department of the Interior documents supporting its request that the Buffalo Parcel be placed in restricted fee status. (Docket No. 26.) The Secretary did not determine within 30 days after the comment period that the Buffalo Parcel "should not be subject to the provisions of section 2116 of the Revised Statutes (25 U.S.C. 177)." Thus, the Buffalo Parcel assumed restricted fee status by operation of law under the SNSA. (Docket Nos. 39-9 ¶ 30; 53-2 ¶ 30.)

C. The Lawsuit

Plaintiffs commenced this action on January 3, 2006, and were joined by Intervenor-Plaintiffs on June 2, 2006. As previously noted, the Plaintiffs and Intervenor-Plaintiffs make identical claims which are set forth in four counts in their respective complaints. They take issue with agency statutory interpretation and decision-making on a number of fronts, alleging that:

- land acquired with SNSA funds and held in restricted fee is not subject to the governmental jurisdiction of the SNI and, therefore, cannot be "Indian lands" within the meaning of the IGRA (Complaint ¶¶ 54, 57-58)

- land acquired with SNSA funds is not acquired as part of the "settlement of a land claim" because: 1) the lease dispute between the SNI and its non-Indian tenants was not a "land claim" within the meaning of the IGRA, and 2) the SNSA settlement was final upon the receipt of funds; no land was acquired (¶¶ 55, 56, 68)

- the IGRA's "settlement of a land claim" exception does not apply to the Buffalo Parcel because the Parcel is not held in trust by the United States, as specified in the exception, but in restricted fee (¶¶ 46, 48, 53, 66-67)

- the only possible exception to the after-acquired lands prohibition that might apply to the Buffalo

> Parcel requires that the Secretary determine whether a gaming establishment on newly acquired lands would be detrimental to the surrounding community, 25 U.S.C. § 2719(b)(1)(A), and she did not perform this duty (¶ 69).

Based on these allegations, Plaintiffs assert in their first claim that the NIGC Chairman acted arbitrarily and capriciously by failing to consider whether the SNI's proposed class III gaming would occur on "Indian lands," 25 U.S.C. § 2703(4), when he approved the Ordinance, and that the Secretary acted arbitrarily and capriciously when she declined to disapprove the Compact based on her erroneous interpretations of the IGRA and the SNSA. (Complaint ¶¶ 31, 33, 59, 62.)

In their second claim, Plaintiffs allege arbitrary and capricious action by the NIGC Chairman for failing to consider whether the SNI's proposed gaming would occur on after-acquired lands, 25 U.S.C. § 2719, and by the Secretary for her failure to make required determinations under the IGRA's after-acquired lands provision and its exceptions. (*Id.* ¶¶ 31, 33, 70, 72.)

Plaintiffs assert in their third claim that an Environmental Impact Statement was required prior to placement of the Buffalo Parcel in restricted fee and that the Secretary and the NIGC Chairman have failed to comply with the NEPA. (*Id.* ¶¶ 75, 81-82.)

Finally, Plaintiffs' fourth claim alleges that Defendants were required to comply with the NHPA prior to

permitting the Buffalo Parcel to attain restricted fee status, but failed to do so. (*Id.* ¶ 86.)

Before considering the substance of these claims, the Court will consider those motions and arguments challenging the Court's subject matter jurisdiction.

III. DISCUSSION

In its Motion for Leave to File an *Amicus* Brief, the SNI argues that this action must be dismissed in its entirety pursuant to Federal Rule of Civil Procedure 19 because its presence is necessary and indispensable to a just adjudication of this action, but it cannot be joined as a party because of its sovereign immunity. The Government argues, as its first ground for dismissal, that the Quiet Title Act is applicable to this action and it therefore must be dismissed in its entirety for lack of subject matter jurisdiction. Because both of these arguments may be dispositive of all or some of the claims presented, they are considered first.

A. SNI'S Motion for Leave to File an *Amicus* Brief

1. Standard for Consideration of *Amicus Curiae* Participation

A district court has broad discretion to grant or deny an appearance as *amicus curiae* in a given case. *United States v. Ahmed,* 788 F. Supp. 196, 198 n.1 (S.D.N.Y. 1992), *aff'd*, 980 F.2d 161 (2d Cir. 1992). "'The usual rationale for *amicus curiae* submissions is that they are of aid to the

court and offer insights not available from the parties.'" *Onondaga Indian Nation v. State of New York,* 97-CV-445, 1997 U.S. Dist. LEXIS 9168 at *7 (N.D.N.Y. June 25, 1997) (quoting *United States v. El-Gabrowny,* 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994)). Judge Posner concisely described the circumstances under which an *amicus* brief is desirable in *Ryan v. Commodity Futures Trading Comm'n*:

> An *amicus* brief should normally be allowed when a party is not represented competently or is not represented at all, when the *amicus* has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the *amicus* to intervene and become a party in the present case), or when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an *amicus curiae* brief should be denied.

125 F.3d 1062, 1063 (7th Cir. 1997) (citations omitted).

Amicus participation goes beyond its proper role if the submission is used to present wholly new issues not raised by the parties. *Onondaga Indian Nation,* 1997 U.S. Dist. LEXIS 9168 at *8-9 (quoting *Concerned Area Residents for the Env't v. Southview Farm,* 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993)); *Wiggins Bros., Inc. v. Department of Energy*, 667 F.2d 77, 83 (Em. App. 1981) (absent exceptional circumstances, *amicus curiae*

cannot implicate issues not presented by the parties). Furthermore, "an *amicus curiae* is not a party and has no control over the litigation and no right to institute any proceedings in it, nor can it file any pleadings or motions in the case." *NGV Gaming, Ltd. v. Upstream Point Molate, LLC,* 355 F. Supp. 2d 1061, 1068 (N.D. Cal. 2005) (citing *United States v. Michigan,* 940 F.2d 143, 163-4 (6th Cir. 1991)).

2. The Propriety of SNI's Proposed Submission

The SNI seeks to participate as *amicus curiae* on the grounds that both it and the State of New York are necessary and indispensable parties to this action, they cannot be subject to compulsory joinder because of their sovereign immunity and, therefore, this action must be dismissed in its entirety pursuant to Rule 19. Rule 19 dismissal is the sole subject of the *amicus* brief the SNI seeks to file.

As Plaintiffs[8] correctly observe, no party has raised the issue of Rule 19 dismissal and, absent exceptional circumstances, courts typically decline to consider issues raised only in an *amicus* brief. Plaintiffs urge that this procedural infirmity alone is a sufficient basis to reject the SNI's request.

This Court finds it is appropriate to accept the SNI's brief and consider its position for two reasons. First,

8. Plaintiffs and Intervenor-Plaintiffs filed joint opposition to the SNI's Motion for Leave and Defendants' Motion to Dismiss.

the issue of indispensability is one that courts have an independent duty to consider *sua sponte,* if there is reason to believe dismissal on such grounds may be warranted. *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel,* 883 F.2d 890, 892-3 (10th Cir. 1989); *see also, Havana Club Holding, S.A. v. Galleon S.A.,* 974 F. Supp. 302, 311 (S.D.N.Y. 1997) ("when a court believes that an absentee may be needed for a just adjudication, it may raise compulsory party joinder on its own motion"). In light of the Court's independent duty, the SNI's brief may be helpful in ascertaining whether the SNI is necessary and indispensable such that, in equity and good conscience, the case should be dismissed.

Second, the SNI urges that were this Court to deny its motion and decline to consider its argument, the only avenue the SNI would have to raise the Rule 19 issue would be to move to intervene in this action.[9] It would then risk waiving the very basis for its argument—that the SNI is an independent sovereign that cannot be joined in this action.

In this Court's view, the SNI had another option available to it. As other tribes have done, it could have moved to intervene for the sole purpose of seeking Rule

9. The SNI does acknowledge that it could attempt to convince an existing party to raise the Rule 19 argument on its behalf. This Court notes that, on August 16, 2006, it provided "any Party wishing to file a response in support of or in opposition to the [SNI's] Motion" an opportunity to do so. (Docket No. 46.) Plaintiffs opposed the motion. Defendants did not file a response and have not otherwise attempted to adopt the SNI's argument.

19 dismissal. *See Lebeau v. United States,* 115 F. Supp. 2d 1172 (D.S.D. 2000); *see also, Kansas v. United States,* 249 F.3d 11213, 1220 (10th Cir. 2001) (tribe reserved right to claim sovereign immunity and intervened only for purposes of joining Government's jurisdictional challenge and raising Rule 19 indispensability issue). Nevertheless, as a practical matter, requiring the SNI to resubmit its motion in a form Plaintiffs might consider procedurally correct would not alter the posture of this case. Were the SNI to move to intervene solely to seek Rule 19 dismissal, that issue still would be presented to this Court by an entity claiming sovereign immunity with respect to the underlying claims.

In light of the Court's independent duty to consider possible Rule 19 issues, the inefficiencies attendant to elevating form over substance, and the Court's broad discretion to grant or deny *amicus* motions, this Court finds it appropriate to accept the SNI's brief and consider whether its or the State's joinder is needed for a just adjudication, thereby necessitating dismissal of this action or certain of the claims therein. This result is not unprecedented. *See NGV Gaming, Ltd.,* 355 F. Supp. 2d at 1067-69 (after reminding Indian tribe of the limits of *amicus* participation, court considered Rule 19 issue raised solely in *amicus* brief); *Artichoke Joe's Cal. Grand Casino,* 353 F.3d at 719 at n.10 (after stating that there were no exceptional circumstances warranting consideration of a Rule 19 argument raised only in *amicus* brief, the Ninth Circuit went on to consider whether non-party tribes' interests were adequately represented in the case).

3. The Analytical Framework

It is well-settled that a determination of whether a non-party is needed for just adjudication of a dispute involves a two-part inquiry. Here, this Court must first decide whether the SNI and/or the State is a "necessary" party that should be joined under Rule 19(a).

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest.

FED. R. CIV. P. 19(a).

If it is determined that neither sovereign is necessary, this Court need go no further. However, if either or both are "necessary," sovereign immunity will prevent the compulsory joinder contemplated in Rule 19(a). This Court must then determine "whether in equity and good conscience the action should proceed among the parties

before it, or should be dismissed, the absent person being thus regarded as indispensable." FED. R. CIV. P. 19(b).

> Rule 19(b) sets forth four factors to consider in determining indispensability:
>
> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

"[T]he question whether a party is indispensable 'can only be determined in the context of particular litigation.'" *American Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015, 1018 (9th Cir. 2002) (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 118, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)). "Such a determination rests in the discretion of the trial judge applying 'equity in [sic] good conscience' to the facts at hand." *Fluent v. Salamanca Indian Lease Auth.*, Civ. 90-1229A at 10 (W.D.N.Y. filed Jan. 25, 1991), *aff'd,* 928 F.2d 542 (2d Cir. 1991)).

For the reasons stated below, this Court finds that neither the SNI nor the State of New York is necessary to a just adjudication of Plaintiffs' claims.

4. The Necessary Party Determination

With respect to the first consideration under Rule 19(a), it is clear from a review of the Complaint that complete relief can be accorded among the persons already parties to this action in the absence of the SNI and the State. The absence of either or both would not prevent Plaintiffs from receiving the declaratory and injunctive relief requested relative to the Secretary's and the NIGC's actions. *See Sac and Fox Nation of Missouri v. Norton,* 240 F.3d 1250, 1258-59 (10th Cir. 2001), *cert. denied sub nom, Wyandotte Nation v. Sac and Fox Nation of Missouri,* 534 U.S. 1078, 122 S. Ct. 807, 151 L. Ed. 2d 693 (2002). The SNI does not argue otherwise.

What the SNI does contend is that it has three significant interests "relating to the subject of the action" which makes it a necessary party. First, it asserts an interest in "the validity of the gaming compact that [the SNI and the State] duly negotiated and executed." (Docket No. 44 at 14.) According to the SNI, a key feature of the Compact is its authorization of gaming on lands in Buffalo and the SNI has an interest in the continued viability and operation of that provision.[10] *Id.* Second, the SNI claims an "interest in vindicating its rights under the [SNSA]." *Id.* at 15. The SNI states that Plaintiffs are challenging its sovereign authority over the Buffalo Creek Territory and that "this challenge . . . goes to the core of the Settlement Act, which expressly contemplates that

10. The SNI also argues that the State, as a party to the Compact, has governmental and economic interests in its validity. The State's purported interests will be addressed separately.

the [SNI] will enjoy governmental authority over lands acquired pursuant to it . . . ." *Id.* at 14-15. Finally, the SNI argues that the Plaintiffs' allegation that the Chairman's approval of the Ordinance violates the IGRA implicates its "governmental interest in the validity of its own laws." *Id.* at 15.

Contrary to the SNI's characterization, this action does not lie in contract. Plaintiffs' challenge to the Secretary's approval of the Compact does not call into question the sovereign capacity of the SNI and the State to contract, or the adequacy and validity of their negotiated agreement under state contract law principles.[11] Similarly, Plaintiffs do not challenge the SNI's right to acquire land in Buffalo and have it placed in restricted fee status under the SNSA, nor do they allege that the SNI was

11. The SNI specifically seeks to preserve the validity of the provision of the Compact "authorizing" gaming on lands in Buffalo. This Court notes that the operation of class III gaming on Indian lands is "authorized" by the IGRA and merely regulated by compacts. 25 U.S.C. §§ 2702(1) and 2710(d)(3)(B). The Compact here simply reflects the parties' agreement that sites for SNI gaming will be limited to Indian lands in certain geographic locales and is premised on the assumption that property purchased with SNSA funds will qualify as gaming-eligible Indian lands. (Compact ¶ 11 and attached Memorandum of Understanding at 1-2.) The actual creation of gaming-eligible Indian land is not among the issues that parties to a tribal-state compact have authority to negotiate. 25 U.S.C. § 2710(d)(3)(C). Thus, while the SNI's and State's mutual assumption may be impacted by the outcome of this litigation, their agreement that class III gaming can occur in the City of Buffalo if and when gaming-eligible Indian lands are acquired there will not.

without authority to adopt a gaming ordinance or that it failed to comply with its own laws when it did so. Rather, Plaintiffs are squarely challenging first, the Secretary's determination that the Buffalo Parcel purchased with SNSA funds is gaming-eligible Indian lands, and second, the NIGC's approval of the Ordinance, which allegedly did not include any determination on that issue.[12]

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12. In its *amicus* brief, the SNI focuses primarily on its argument that Plaintiffs ultimately are attacking the validity of the Compact and cites numerous cases holding that all parties to a contract are necessary in an action challenging its validity or interpretation. *See, e.g., American Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015 (9th Cir. 2002) (tribe necessary to action seeking to extinguish compact right to automatic renewal); *United States ex rel. Hall v. Tribal Dev. Corp,* 100 F.3d 476 (7th Cir. 1996) (tribes necessary to action seeking rescission of contracts to which they were parties); *Kickapoo Tribe of Indians v. Babbitt,* 310 U.S. App. D.C. 66, 43 F.3d 1491 (D.C. Cir. 1995) (state necessary to action seeking federal validation of compact that state court had held was invalid); *Fluent v. Salamanca Indian Lease Auth.,* 928 F.2d 542 (2d Cir. 1991) (tribe necessary to action seeking to invalidate leases to which it was party and negotiated settlement agreement under which it was to receive payment); *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel,* 883 F.2d 890 (10th Cir. 1989) (tribe necessary to action seeking to validate contract which tribe, in separate action, sought to have declared void); *Pueblo of Sandia v. Babbitt,* 47 F. Supp. 2d 49 (D.D.C. 1999) (state necessary to suit challenging validity of revenue-sharing provision of compact). However, the nature of this action is quite different from the direct challenges to contractual rights at issue in the SNI's cited authority, and those cases simply are not applicable here.

This Court notes that the only language the SNI points to in the Complaint that makes specific reference to the Compact's

This does not mean the SNI does not have an interest relating to the subject matter of this action. In this Court's view, the SNI certainly has an interest in its ability to use property that it owns in the City of Buffalo in the manner it wishes; namely to construct and operate a class III gambling casino.[13] However, the SNI is not a necessary party unless that interest will, as a practical matter, be impaired or impeded by this suit.

It is well-settled that potential impairment may be minimized if the absent person is adequately represented by a party to the action. *Makah Indian Tribe v. Verity,* 910 F.2d 555, 558 (9th Cir. 1990) (citing *Wichita and Affiliated Tribes of Oklahoma v. Hodel,* 252 U.S. App. D.C. 140, 788 F.2d 765, 774 (D.C. Cir. 1986)). More specifically, the United States may adequately represent an Indian tribe

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viability is found at paragraph 2 of the Prayer for Relief, which seeks a declaration that "the Compact violates Sections 11(d) and 20 of the IGRA." (Complaint ¶ 24.) Plaintiffs' belief that the requested relief is an appropriate remedy should they prevail does not alter the nature of the claims as stated in the body of the Complaint. The claims themselves do not allege that any Compact term is unlawful, nor do they seek to nullify any contractual benefits for which the SNI could lawfully bargain. Indeed, Plaintiffs state in their opposing memorandum that "[n]o determination . . . on the issues presented by the parties will change the contract between the SNI and the State." (Docket No. 52-1 at 11-12). Plaintiffs again confirmed at oral argument that "[t]here is no problem . . . with the compact itself or the gaming ordinance" and, if Plaintiffs prevail, the Compact will remain valid and effective as to class III gaming occurring on Indian lands. (Tr. at 90:24-91:17.)

13. The strength of this interest obviously hinges on whether the Buffalo Parcel is gaming-eligible Indian land.

unless there is a conflict between the United States and the tribe. *Wichita,* 788 F.2d at 774-75. The Department of the Interior, as trustee for Indian tribes, has an interest in Indian self-government, including tribal self-sufficiency and economic development, that makes it uniquely qualified to represent a tribe's interests unless there is the clear potential for inconsistency between the government's obligations to the tribe and its other obligations in the context of the pending case. *Artichoke Joe's,* 216 F. Supp. 2d at 1118-19 (citations omitted); *see also, Seneca Nation of Indians v. New York,* 213 F.R.D. 131, 137 (W.D.N.Y. 2003) ("in the unique context of enforcing restrictions on the alienation of Indian lands, the United States is best situated to provide complete representation of tribal interests and no other party is necessary") (citing *Heckman v. United States,* 224 U.S. 413, 444-45, 32 S. Ct. 424, 56 L. Ed. 820 (1912)).

In light of the arguments presented in Defendants' Motion to Dismiss and in their vigorous defense against Plaintiffs' Motion for Summary Judgment, it is evident that the Government's interest in defending the propriety of the Secretary's conclusion that the Buffalo Parcel is gaming-eligible Indian lands and the NIGC Chairman's Ordinance approval is substantially similar, if not identical, to the SNI's interest in conducting class III gaming on that Parcel. *See Sac and Fox Nation,* 240 F.3d at 1259 (Secretary's interest in defending decision to acquire tract in trust for tribe and its conclusion that tract was gaming-eligible was virtually identical to tribe's interest in conducting gaming; thus any potential impediment or prejudice to tribe was greatly reduced); *Kansas,* 249 F.3d

1213 (10th Cir. 2001) (government's interest in defending NIGC's Indian lands determination sufficiently similar to tribe's interest in conducting gaming on land to provide adequate representation). *See also, Artichoke Joe's,* 216 F. Supp. 2d at 1118 (while tribes could claim a legal interest in lawsuit challenging validity of compacts between tribes and State, they were not necessary parties where their legal interest could be adequately represented by the Secretary); *Southwest Ctr. for Biological Diversity v. Babbitt,* 150 F.3d 1152 (9th Cir. 1998) (tribe was not a necessary party to suit seeking to halt flooding of area where it had right to store water because Secretary and municipal defendants could adequately represent tribe's interest).

The SNI points to no conflict of interest here, but does allege that it is unclear whether the Government will make each and every argument it would make were it a party in the case. Specifically, the SNI states that it disagrees with the Government's interpretation of the IGRA's after-acquired lands prohibition, 25 U.S.C. § 2719(a) ("gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988"). (Docket No. 56 at 8-9.) While that may be, all parties to this lawsuit are in accord as to the meaning of the cited provision; its interpretation is not in dispute. Thus, this Court concludes that the interests of the Government and the SNI are so aligned as to the matters actually in dispute that any concern about impairment to the tribe's ability to protect

its interest in this litigation is alleviated.[14] *See Southwest Ctr. for Biological Diversity,* 150 F.3d at 1154 (fact that municipal defendants and non-party tribe disagreed as to interpretation of a settlement agreement had no bearing on defendants' ability to represent tribe's interests on the merits of the action where interpretation of settlement agreement was not in dispute).

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14. The SNI urges that the Second Circuit has never accepted the view that a tribe's interests can be adequately represented by a named party. In *Fluent,* the case on which the SNI most heavily relies, the Secretary was not a party to the action, nor was it asserted that any other party was so positioned that its interest was aligned with the SNI's. Similarly, in *Seneca Nation of Indians v. New York,* 383 F.3d 45 (2d Cir. 2004), the Court was not presented with the question of whether any existing party could adequately represent the interests of the People of the State of New York. There is a clear difference between not having been presented with the question and rejecting the premise. This, of course, is in addition to the distinction drawn above between cases challenging a non-party sovereign's contractual rights and those challenging federal agency action. At least one other district in this circuit has implicitly recognized that distinction and found that the Secretary could adequately represent a tribe's interest in a challenge to the Secretary's decision relative to trust land. *State of Conn. ex rel. Blumenthal v. Babbitt,* 899 F. Supp. 80 (D. Conn. 1995) (alleging violations of IGRA, a settlement act, and NEPA). Moreover, though speaking to the matter in *dicta,* the Second Circuit stated, in a case challenging government decisions relating to the development of a casino, that it was "not certain that dismissing plaintiffs' complaint on Rule 19 grounds would be consistent with our duty to review such agency determinations." *Shenandoah v. United States DOI,* 159 F.3d 708, 715 (2d Cir. 1998).

Of course, the foregoing analysis does not dispose of the question of the State's interest. The SNI asserts that it is common for a movant to identify, describe and mount arguments based on the interests of an absent sovereign. (Docket No. 44-2 at 3, n.1.) However, it then goes on to state that it does not purport to speak for the State here and merely suggests, in conclusory terms, that the State has an "interest" in its anticipated contractual benefits of revenue-sharing and regulatory input. *Id.* at n.1 and p. 14.

As has already been determined, this action does not question the validity of or seek to nullify the Compact. Moreover, the SNI has not sought to explain, nor can this Court fathom, how this litigation would invalidate any of the Compact's revenue-sharing or regulatory provisions. Although the State's anticipated revenue likely would be diminished should it ultimately be determined that the Buffalo Parcel is not gaming-eligible Indian lands,[15] it is well-settled that "the prejudice to an absent party must be more than merely financial to weigh in favor of dismissal under Rule 19(b)." *Pueblo of Sandia v. Babbitt,* 47 F. Supp. 2d 49, 53 (D.D.C. 1999) (citing *Makah,* 910 F.2d at 558 (9th Cir. 1990)). In this Court's view, where a contract term remains unaltered, but the monetary benefit is less than anticipated, the consequence is merely financial.

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15. This Court notes that the State's revenue would be similarly diminished if the SNI simply chose not to operate three class III gaming facilities. The Compact provides that the SNI *may* establish facilities in three locales; it does not require that the SNI do so. (Compact ¶ 11.)

This Court also has considered what interest the State may have as this action is properly framed; as a challenge to agency action under the APA and the IGRA with respect to the Buffalo Parcel. The IGRA's legislative history notes that its enactment was prompted, in part, by states' concerns over the potential for criminal elements to infiltrate Indian gaming activities and their desire to regulate such activities consistent with their own public policy, safety, law enforcement and regulatory interests. S. Rep. No. 100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075-76, 3083. Assuming New York State has the same interests and concerns identified by Congress in 1988, there is no aspect of Plaintiffs' challenge to federal agency action that will impair the State's ability to regulate, by tribal-state compact, the conduct of class III gaming activities on gaming-eligible Indian lands. Accordingly, this Court finds that the State is not necessary to a just adjudication of this suit.

Finally, the SNI has not argued, and this Court is not otherwise convinced, that any party to this suit would be subjected to a substantial risk of multiple or inconsistent obligations in the absence of the SNI or the State.

For the reasons stated, this Court finds that neither the SNI nor the State of New York is a necessary party to this action. In light of this determination, there is no need to conduct the Rule 19(b) four factor indispensability analysis. *See Mastercard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.,* Docket Nos. 06-4433-cv(L), 06-4947-cv(CON), 471 F.3d 377, 2006 U.S. App. LEXIS 31248, at *32-33 (2d Cir. Dec. 18, 2006) (citing *Viacom Int'l, Inc. v. Kearney,* 212

F.3d 721, 724 (2d Cir. 2000) ("If a party does not qualify as necessary under Rule 19(a), then the court need not decide whether its absence warrants dismissal under Rule 19(b)."); *NGV Gaming, Ltd.*, 355 F. Supp. 2d at 1069, n.8 (tribe was not a necessary party and, therefore, court declined to proceed to question of indispensability); *Artichoke Joe's,* 216 F. Supp. 2d at 1120, n.47 (because court found that tribes were not necessary parties, it declined to consider whether they were indispensable under Rule 19(b)).

B. Subject Matter Jurisdiction

In its Motion to Dismiss, the Government urges that this Court lacks subject matter jurisdiction over this action because, based on the nature of the claims presented, the United States has not waived its sovereign immunity to suit. Defendants rely on the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, which provides, in pertinent part, that:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a *disputed title* to real property in which the United States claims an interest, other than a security interest or water rights. *This section does not apply to trust or restricted Indian lands* ....

28 U.S.C. § 2409a(a) (emphasis supplied); *see United States v. Mottaz,* 476 U.S. 834, 843, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (1986) (when U.S. claims interest in real property based on its status as trust or restricted Indian land, the QTA does not waive government's immunity).

According to the Government, the QTA applies because Plaintiffs are seeking a determination that would remove the Buffalo Parcel from restricted fee status. (Docket No. 22-2 at 11, 14, 16.) The Government does acknowledge that Plaintiffs are not explicitly seeking to quiet title to the Buffalo Parcel and are not claiming any adverse ownership interest in the property. But it contends, nevertheless, that this case falls within the QTA's reservation of immunity. (*Id.* at 11.)

As the Government correctly notes, this Court must focus on the nature of the relief requested in considering the QTA's applicability. *Mottaz,* 476 U.S. at 843. If the true purpose of the litigation is to challenge title, then the QTA applies no matter how the claims are characterized. *See Ducheneaux v. Sec'y of Interior,* 837 F.2d 340 (8th Cir. 1988) (suit brought under APA in which individual claimed an adverse ownership interest in land held in trust by United States was barred by QTA); *Florida Dep't of Bus. Regulation v. United States DOI,* 768 F.2d 1248 (11th Cir. 1985) (suit brought under APA which sought to divest United States of title to land it had taken into trust was barred by QTA).

In reviewing Plaintiffs' Complaint here, this Court finds that there is no challenge to the title to the Buffalo Parcel, express or implied, in the claims or the requested relief. As Defendants appear to concede, the claims brought under the IGRA challenging the Secretary's and NIGC Chairman's decisions to approve the Compact and Ordinance (claims One and Two) have nothing to do with the SNI's acquisition of title to the Buffalo Parcel some

three years afterward and its placement in restricted fee status. (Docket No. 22-2 at 13.) Even were this Court to determine that the NIGC's or Secretary's actions were arbitrary and capricious, the SNI would retain title to the Buffalo Parcel in restricted fee.[16]

In their NEPA and NHPA claims (Three and Four), Plaintiffs allege that "the actions of the defendants which placed the Buffalo [Parcel] in restricted fee . . . required the preparation of an Environmental Impact Statement" and that "Defendants violated the NHPA by failing to consult with the Advisory Council for Historic Preservation" prior to permitting the Buffalo Parcel to attain restricted fee status. (Complaint at ¶¶ 75, 86.) Though not expressly requested in Plaintiffs' prayer for relief, this Court notes that a finding that the Government was required to comply with NEPA and NHPA prior to placing the Buffalo Parcel in restricted fee status could result in the reversal or vacatur of that agency action.[17]

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16. Plaintiffs IGRA claims are challenging the determinations that the Parcel's restricted fee status qualifies it as "Indian lands," and that the Parcel falls within the settlement of a land claim exception to the IGRA's after-acquired lands prohibition on gaming. While these challenges certainly have implications for the property's lawful uses, they have no potential to divest the SNI of title to the Buffalo Parcel or to alter the restricted fee status of the property.

17. Defendants conceded at oral argument that placement of the Buffalo Parcel in restricted fee is a final agency action for purposes of the APA. (Tr. 24:21-24.)

Nevertheless, as set forth in the undisputed Factual Background, *supra* at 12-13, the SNI acquired the Buffalo Parcel on October 3, 2005, and only *afterward* requested that the Parcel be placed in restricted fee status. A determination on the validity of the latter action in no way divests the SNI of its earlier-acquired title to the property.[18] Whether the property is held in fee simple or restricted fee, this lawsuit does not challenge the SNI's ownership of the Buffalo Parcel and the SNI will retain title regardless of the outcome of this action.[19]

Although the Government attempts to distinguish this case on its facts from *Kansas v. United States,* 249 F.3d 1213 (10th Cir. 2001), this Court finds the reasoning of that case applicable here. In *Kansas*, the plaintiffs challenged the NIGC Chairman's decision that a tract

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18. The Buffalo Parcel is held in restricted fee status because it was acquired with SNSA funds, 25 U.S.C. § 1774f(c), and the Secretary did not determine that the land should not be subject to the Nonintercourse Act, 25 U.S.C. § 177. "The obvious purpose of the Nonintercourse Act is to prevent unfair, improvident, or improper disposition by Indians of lands *owned or possessed by them* to other parties . . . [by enabling the Government] to vacate any disposition of their lands made without its consent." *Federal Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99, 119, 80 S. Ct. 543, 4 L. Ed. 2d 584 (1960) (citations omitted) (emphasis supplied). Thus, removing the restriction on fee would merely permit the SNI to dispose of property it owns at any time and in any manner it chooses.

19. While restricting fee on property is an act that allows the United States to claim an interest in the real property for purposes of the QTA in the first place, the QTA applies only if the dispute is one that seeks to adjudicate title. No such dispute exists here.

of non-reservation land was "Indian lands" within the meaning of the IGRA. The Tenth Circuit first noted that "only disputes pertaining to the United States' ownership of real property fall within the parameters of the QTA." *Id.* at 1224 (*citing Dunbar Corp. v. Lindsey,* 905 F.2d 754, 759 (4th Cir. 1990) ("Any challenge to a non-ownership interest in real property is not precluded by the QTA.")). The Court went on to hold that:

> [A]djudicating the question of whether a tract of land constitutes "Indian lands" for Indian gaming purposes is conceptually quite distinct from adjudicating title to the land. One inquiry has little to do with the other as land status and land title are not congruent concepts in Indian law. A determination that a tract of land does or does not qualify as "Indian lands" within the meaning of IGRA in no way affects title to the land. Such a determination would merely clarify sovereignty over the land in question.

Id. at 1225 (internal citations and quotation marks omitted). *See also, Neighbors for Rational Dev., Inc. v. Norton,* 379 F.3d 956, 965 (10th Cir. 2004) (QTA precluded plaintiffs' suit to the extent it sought to nullify the United States' acquisition of trust land, but request for injunction preventing development of property until the Secretary complied with NEPA would not be precluded).

So, too, the question of fee simple versus restricted fee is one of sovereignty, rather than ownership. Assuming that the Buffalo Parcel is restricted Indian land such

that the United States claims an interest, the Parcel's title is not in danger of divestiture as a consequence of this lawsuit and, therefore, the QTA is not applicable. Accordingly, Defendants' motion to dismiss this action in its entirety for lack of subject matter jurisdiction is denied.

C. APA Review

Plaintiffs bring their claims primarily under the APA, and request that this Court review various agency actions, alleged failures to act and statutory interpretations by the NIGC and the Secretary that are claimed to be deficient or erroneous. The APA provides that a reviewing court must "set aside agency action" that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(a).

Among their opposing arguments, Defendants urge that the NIGC's failure to make an Indian lands determination is unreviewable because the NIGC is not statutorily required to make such a determination in the first place; the NIGC's approval of tribal gaming ordinances is subject to only limited review; the Secretary's November 12, 2002 opinion letter is not a final agency action and is therefore unreviewable; and even if reviewable, the Secretary's statutory interpretation is entitled to deference.

In light of the centrality of the APA to the allegations in the Complaint and the issues and arguments raised in the parties' respective motions, this Court must first consider its role when confronted with such challenges to agency action.

Appendix F

1. Standard of Review

Where the agency decisions at issue involve interpretations of federal statutes the agency administers, the court's review is guided by the principles announced in *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.,* 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *Chevron* confirmed that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9. Thus, courts are to look first to "whether Congress has directly spoken to the precise question at issue." *Id.* at 842.

> If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

Where an agency has been delegated authority to elucidate the statute by regulation, its "regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. However, the *Chevron* deference that is accorded to regulations adopted by formal rule-making does not apply to all forms of agency interpretations. *Schneider,* 345 F.3d at 142 (*citing Christensen v. Harris County,* 529 U.S. 576, 586-87, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000)). Interpretations such as opinion letters, policy statements, agency manuals and enforcement guidelines lack the force of law and do not warrant *Chevron*-style deference. *Christensen,* 529 U.S. at 587. Rather, interpretations contained in such formats are entitled to respect under the Supreme Court's decision in *Skidmore v. Swift & Co.,* 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944), but only to the extent that, through the writer's thoroughness, logic, expertise, consideration of prior interpretations and the like, the interpretation at issue has the power to persuade. *United States v. Mead Corp.,* 533 U.S. 218, 235, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001).

When a court is asked to review the reasonableness of an agency's decision-making action, its inquiry is governed by *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983):

> The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine

> the relevant data and articulate a satisfactory explanation for its action . . . . Normally, an agency [action] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43 (citations and quotation marks omitted) (alteration added).

2. Review of Final Agency Action under the IGRA

It is first to be noted that Section 704 of the APA provides for review as follows:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

Significantly, the IGRA expressly provides for APA review:

Appendix F

> Decisions made by the [NIGC] pursuant to sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5.

25 U.S.C. § 2714. Thus, the NIGC Chairman's approval of the SNI's Ordinance pursuant to 25 U.S.C. § 2710(d) is a final agency action for purposes of reviewing both the reasonableness of the Chairman's decision-making and the permissibility of any statutory construction he may have undertaken in this case.

In enacting the IGRA, Congress established the NIGC as an independent agency charged with exclusive regulatory authority for Indian gaming on Indian lands. *Id.* §§ 2702(3), 2704; *Sac and Fox Nation,* 240 F.3d at 1265 (though nominally under the Department of the Interior, NIGC functions as an independent entity); NIGC website (*www.nigc.gov/AboutUs/tabid/56/Default.aspx*) (NIGC is "an independent federal regulatory agency of the United States"). NIGC is charged with, among other things, "promulgating such regulations and guidelines as it deems appropriate to implement the provisions" of IGRA and, by implication, has primary authority to interpret any ambiguous phrases or terms contained in the IGRA. 25 U.S.C. § 2706(b)(10). Since the NIGC is the agency expressly charged by Congress with administering the IGRA, this Court finds that a NIGC interpretation of IGRA provisions is properly afforded *Chevron* deference.

On the other hand, the Secretary is delegated only some duties under the IGRA, and none of those duties are identified in § 2714 as final agency actions. As such, the views set forth in the Secretary's November 12, 2002 opinion letter do not represent the final product of agency deliberation as to whether the Buffalo Parcel is gaming-eligible Indian lands. *Miami Tribe of Oklahoma v. United States,* No. 05-3085, 198 Fed. Appx. 686, 2006 U.S. App. LEXIS 21524, at *10-12 (10th Cir. Aug. 21, 2006) (DOI opinion letter on tribe's sovereignty over land for purposes of the IGRA was not final agency action). However, the Secretary's opinion letter does represent an intermediate step in a process that eventually should result in a final action.[20] 2006 U.S. App. LEXIS 21524 at *11.

Where final agency action has occurred, the Secretary's letter is reviewable under the APA. 5 U.S.C. § 704. There is no deference owed to the Secretary's interpretation of the IGRA's terms on such review, however, because neither the Secretary nor the Department of the Interior is charged with that statute's administration. *Sac and Fox Nation,* 240 F.3d at 1265-66 (Secretary's decision to acquire land in trust pursuant to 25 U.S.C. § 465 was final agency action within his purview, but court declined to give any deference to Secretary's related opinion that the land was gaming eligible "Indian lands" for purposes of the IGRA where he does not administer that statute).

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20. The letter was issued in connection with the Secretary's consideration of the Compact which, in turn, had to be submitted to the NIGC Chairman in connection with his consideration of the Ordinance.

D. The NIGC'S Approval of the SNI's Tribal Gaming Ordinance

It is Plaintiffs' position in this lawsuit that land acquired with SNSA funds, as the Buffalo Parcel was,[21] is not subject to the SNI's governmental jurisdiction and, therefore, does not fall within the IGRA's definition of "Indian lands." (Complaint ¶¶ 54, 59.) Moreover, even if it did, Plaintiffs argue the Buffalo Parcel is not gaming-eligible Indian land because it was not "taken into trust as part of a settlement of a land claim" and, therefore, is not excepted from the prohibition on gaming on lands acquired after October 17, 1988. (*Id.* ¶¶ 67-68.) Given those deficiencies, according to Plaintiffs, the NIGC Chairman acted arbitrarily and capriciously when he approved the Ordinance without making an "Indian land" determination with respect to property the SNI intended to acquire for gaming purposes. (*Id.* ¶¶ 60, 62, 72.)

Here, the Government has moved to dismiss all claims against the NIGC and its Chairman pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. With respect to Plaintiffs' IGRA claims, the Government argues that the Chairman was presented with a tribal gaming ordinance that did not specify gaming sites,[22] and he therefore was

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21. The source of funds used to acquire the Buffalo Parcel is undisputed. (Tr. 27-28.)

22. The Ordinance states as follows: "The Tribal Council finds that—(a) Class III gaming may be conducted on *lands of the Nation* by reason of the fact that the Nation and the State of New York have entered into a gaming compact pursuant to the Indian

mandated to approve the Ordinance so long as: 1) it met all technical requirements for submission, and 2) neither of the statutorily specified reasons for disapproval were present. (Docket No. 22-2 at 32-34); *see generally,* 25 U.S.C. § 2710(d). In sum, the Government urges that because Plaintiffs do not allege any error with respect to those limited considerations, and for that reason alone, Plaintiffs' IGRA claims must be dismissed for failure to state a claim.

In addition, at oral argument, the Government argued that there is no provision of the IGRA that requires the Chairman to make an Indian lands determination. Thus, if a tribe proceeds to conduct gaming on non-Indian lands in violation of the IGRA, the NIGC is to deal with the issue on the enforcement side of the statute. (Tr. 34-35.)

Plaintiffs' response to the Government's arguments is cursory. It simply directs the Court to paragraph 60 of the Complaint (NIGC failed to make an Indian lands determination) and their Summary Judgment Motion (a concluding paragraph which states that approval of the Ordinance was "arbitrary, capricious, an abuse of discretion, contrary to law, and in violation of procedures required by law"). (Docket No. 39-10 at 34-35.)

Against this backdrop, this Court sought to ascertain at oral argument whether Plaintiffs had abandoned

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Gaming Regulatory Act . . . ." (Docket No. 17-5 ¶ 3.) (emphasis supplied). The Ordinance does not expressly identify the three sites specified in the Compact.

their claims against the NIGC Defendants. Plaintiffs disclaimed abandonment and urged that an Indian lands determination is "an overarching requirement of IGRA." (Tr. 82-83.) They also argued, generally, that "there's never been a proper determination" on whether the Buffalo Parcel is gaming-eligible Indian lands. (*Id.* 33.) Because Plaintiffs have disclaimed abandonment, this Court necessarily turns to an examination of the sufficiency of the Government's arguments for dismissal.

The first issue that must be addressed is the Government's contention that the IGRA does not require the NIGC to make "Indian lands" determinations in connection with ordinance reviews. It is evident from a plain reading of the IGRA that the NIGC's jurisdiction extends only to Indian gaming that occurs *on Indian lands*. 25 U.S.C. §§ 2701(3), 2702(3) (Congress notes absence of, and finds need for, establishment of independent regulatory authority for gaming *on Indian lands*) (emphasis supplied). Class III gaming is lawful only "*on Indian lands*" and only if an ordinance authorizing such gaming "is adopted by the governing body of the Indian tribe *having jurisdiction over such lands*." *Id.* § 2710(d)(1) (emphasis supplied).

When the Chairman is presented with an ordinance, the statute directs that he act on it within 90 days. *Id.* § 2710(e). He must approve an ordinance where the tribe's submission comports with § 2710(d)(2)(A). *Id.* § 2710(d)(2)(B). The requirements are that: 1) the tribe is proposing to engage in class III gaming activity *on Indian lands of the Indian tribe*, and 2) its governing body has adopted an

ordinance that meets the requirements of § 2710(b). The first requirement clearly necessitates a determination that gaming is proposed to be sited on Indian lands over which the tribe has jurisdiction.

Beyond that, the findings, purpose and language of the IGRA relative to the NIGC's jurisdiction implicitly require such a determination. Whether proposed gaming will be conducted *on Indian lands* is a critical, threshold jurisdictional determination of the NIGC. Prior to approving an ordinance, the NIGC Chairman must confirm that the situs of proposed gaming is Indian lands. If gaming is proposed to occur on non-Indian lands, the Chairman is without jurisdiction to approve the ordinance.

The Court also expressly rejects the Government's "no harm, no foul" approach at oral argument. There, the Government urged that if a tribe is "violating IGRA in that they're gaming on lands acquired after 1988, or lands that are not Indian lands," the NIGC can conceivably go in "and say, you know, we've changed our minds, we don't think this parcel is [Indian lands] and have an enforcement action . . . ." (Tr. 25-26; *also,* 34-35.)

This Court disagrees. In fact, such an enforcement action appears to be an impossibility. Because the NIGC's jurisdiction is limited to oversight of gaming *on Indian lands*, its civil enforcement powers can not extend to gaming on non-Indian lands. This jurisdictional limitation is reflected in the NIGC's own regulations, which provide for closure orders and fines in a number of circumstances involving violations of the IGRA, such as where a tribe fails

to pay required fees; operates a gaming facility without an approved tribal ordinance, tribal-state compact or management contract, where required; operates a Class II gaming machine without a license from a tribe in violation of 25 C.F.R. § 558; fails to have proper background investigations or licenses pursuant to 25 C.F.R. § 558.3; or where there is evidence of fraud. 25 C.F.R. §§ 573 and 575. Conspicuously absent from the NIGC's own list is any reference to enforcement relative to the conduct of Indian gaming on non-Indian lands.

In sum, the NIGC is the gatekeeper for gaming on Indian lands and, when acting on a tribal gaming ordinance, it has a duty to make a threshold jurisdictional determination. If, by the Chairman's action or inaction, a tribe establishes a gaming operation on non-Indian lands, it follows that the NIGC has no jurisdiction thereafter to fine or close that unlawful operation. Accordingly, the Court determines that the Government's motion to dismiss on the ground that the IGRA does not require the NIGC Chairman to make an Indian lands determination when acting on a gaming ordinance must be denied.

Having found that the NIGC Chairman has a duty to determine whether a tribe's proposed gaming will occur on Indian lands before affirmatively approving an ordinance, this Court now turns to the question of the reasonableness of the Chairman's decision-making in this case. According to the Government, the Chairman acted appropriately and in conformance with the law when he approved the Ordinance here because the SNI proposed to game on "lands of the Nation" generally, and defined

"Nation lands" as having the meaning found in the IGRA, 25 U.S.C. § 2703(4). (Docket No. 17-5 ¶¶ 3, 4.) This Court has reviewed the NIGC's administrative record as a whole, and concludes that it does not support a finding of reasonableness as to the Chairman's actions.

The NIGC Chairman approved the SNI's Ordinance on November 26, 2002. This Court first notes that the Secretary did not forward a copy of her November 12, 2002 opinion letter to the NIGC. (Docket No. 25-2.) Moreover, the NIGC's administrative record is devoid of any indication that the NIGC otherwise received notice of the Secretary's opinion that real property the SNI intended to purchase with SNSA funds and hold in restricted fee pursuant to the SNSA would qualify as gaming-eligible Indian lands under the IGRA. (Docket No. 17, *generally.*) Thus, the record fails to support or even suggest that the NIGC considered and adopted the Secretary's opinion.

The Government argues, however, that the Chairman's role here was limited to considering what appeared on the face of the SNI's duly adopted gaming ordinance, which proposed gaming on "Nation lands" meeting the IGRA's Indian lands definition. (Docket No. 22-2 at 34.)

But, as the Government also notes, a tribe's ordinance will not pass muster unless it meets numerous content, submission, authenticity and reliability requirements. *Id.* at 32-33; 25 U.S.C. § 2710(b)(2)-(3); 25 C.F.R. §§ 522.2, 522.6. The tribal-state compact is one of the requisite submissions. In this case, the Compact specifically sets forth the SNI's intent to acquire new land for gaming, circumscribes the locations in which such purchases can

be made, and defines both the manner in which the land will be acquired and the status in which it will be held.[23]

The Government suggests in its argument that the Chairman has discharged his duty by simply ascertaining that a tribe and state have entered into a compact under 25 U.S.C. § 2710(d)(3); he is not obliged to actually review the compact. This Court expresses no view on whether such limited review, as a general principle, may sometimes be sufficient. What is clear from the record here, though, is that the Ordinance and Compact were submitted to the Chairman as an integrated document, thereby necessitating the Chairman's review of the Compact in this case. In a memorandum to the NIGC Chairman,[24] the SNI's counsel stated:

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23. As noted previously, the Compact reflects the SNI and State's agreement that class III gaming facilities will be limited to the three locales identified therein: a location in the City of Niagara Falls identified on an appended map, a location in Erie County yet to be determined, and a location on the SNI's current reservation territory. (Compact ¶ 11). The Compact also states that both the City of Niagara Falls and Erie County sites would be purchased with SNSA funds, pursuant to the procedure set forth in 25 U.S.C. § 1774f(c), and that the SNI would apply for their placement in restricted fee status. The Niagara Falls site identified in the Compact was so purchased by the SNI on October 25, 2002, prior to the SNI's submission of its amended Ordinance to the NIGC, and gaming has been in operation there for some time.

24. The memorandum was submitted with the SNI's original ordinance. The record indicates that only "minor technical revisions" relating to certain procedures were made in the amended ordinance. (Docket No. 17-5 at 24). Thus, at least in large measure, the memorandum appears to relate to the amended ordinance, as well.

Appendix F

> Th[is] memorandum has been prepared to simplify and expedite the review and approval of the Seneca Nation of Indians Class III Gaming Ordinance of 2002 (Ordinance). While the Ordinance itself addresses the majority of those requirements found in IGRA and the National Indian Gaming Commission's (NIGC) implementing regulations, *some required items and provisions are found in the "Nation-State Gaming Compact Between The Seneca Nation of Indians and the State of New York" (Compact), executed on August 18, 2002, and its related Appendices.* Because the Appendices to the Compact are extremely long and technical, we have prepared the attached memorandum identifying where each statutory and regulatory requirement is satisfied and/or addressed in the Ordinance and/or the Compact and its Appendices.

(Docket No. 17-1 at 1.) (emphasis supplied).

Here, the Chairman could not have ascertained that all statutory and regulatory submission and content requirements had been met without reviewing the Compact. That review would necessarily have brought the anticipated land purchases, their status as post-1988 land acquisitions, their locales, their method of purchase and their anticipated restricted fee status to the Chairman's attention. In light of these circumstances, there are only two conclusions reasonably to be drawn; either the Chairman did not review the Compact and therefore did

not adequately ascertain that all prerequisites to ordinance approval were met,[25] or he did review the Compact and failed to consider whether the NIGC had jurisdiction to approve an ordinance for gaming on the after-acquired properties identified for purchase therein. The fact that no Indian lands or gaming eligibility determinations were made with regard to the to-be-acquired Compact sites is apparent from the Chairman's one-page approval letter, which merely states, without discussion, that "[i]t is important to note that the gaming ordinance is approved for gaming only on Indian lands, as defined in the IGRA, over which the Nation has jurisdiction." (Docket No. 17-10.)

For the reasons stated, the Government's motion to dismiss Plaintiffs' IGRA claims for failure to state a claim against the NIGC and its Chairman is denied. Beyond that, based on this record, this Court must conclude that the information presented to the NIGC Chairman and the manner in which it was presented was sufficient to require that he: 1) make an Indian lands determination regarding the to-be-purchased sites identified in the Compact before acting on the Ordinance, and 2) provide a reasoned explanation for his conclusions. Absent the Chairman's consideration and explanation of this critical jurisdictional issue, this Court has no basis upon which it can conclude that the Chairman's approval of the Ordinance was the result of reasoned decision-making. Accordingly, this Court is compelled to find that the

25. This conclusion appears unlikely, however, in light of the NIGC's apparent communication with the SNI in early 2002 regarding technical deficiencies in its submission package and the SNI's related ordinance amendment. (*See* Docket No. 17-5.)

Ordinance approval with respect to the Buffalo Parcel was arbitrary and capricious.

The foregoing conclusions, necessarily reached in considering the Government's arguments on its Motion to Dismiss, also require that this Court take some further action. It is noted that Plaintiffs' requested relief is not in accord with the conclusions reached herein.

For example, Plaintiffs request that this Court set aside the decision of "the Chairman of the [NIGC], approving the Seneca Nation Class III Gaming Ordinance." (Complaint, Prayer for Relief ¶ 7(b).) This request is far too broad, particularly in light of Plaintiffs' statements at oral argument that the SNI is lawfully gaming on its Allegany Reservation and that Plaintiffs are challenging the ordinance "just to the extent that [it is] applied to th[e Buffalo] parcel." (Tr. 91:12-17.)

Furthermore, this Court understands that its proper role on APA review is to consider the decision-making and/or statutory interpretation involved in a final agency action. Absent any evident consideration of the "Indian lands" issue or any statutory interpretation of the IGRA by the NIGC in this case, it would be premature to cede to Plaintiffs' request that this Court interpret the IGRA and declare that lands acquired by the SNI pursuant to the SNSA are not "Indian lands" within the meaning of the statute. (Prayer for Relief ¶ 1.) This is a determination that the NIGC must have an opportunity to make in the first instance, in that it is charged with administering and interpreting the statute.

Appendix F

In keeping with the proper allocation of responsibilities between federal agencies and the courts, this Court finds it is appropriate to vacate only that portion of the NIGC Chairman's approval of the Seneca Nation of Indians Class III Gaming Ordinance of 2002 as Amended that permits gaming on land "in Erie County, at a location in the City of Buffalo to be determined by the Nation" (Compact ¶ 11(a)(2)), and to remand the matter to the NIGC for further consideration consistent with this opinion.[26] *See Immigration and Naturalization Serv. v. Ventura,* 537 U.S. 12, 16-17, 123 S. Ct. 353, 154 L. Ed. 2d 272 (2002) (generally, court should remand case to agency for decision on a matter that statutes place primarily in agency hands; agency can bring expertise to bear upon matter and can, through informed discussion and analysis, "help a court later determine whether its decision exceeds the leeway the law provides"); *Grand Traverse Band of Ottowa and Chippewa Indians v. United States,* 46 F. Supp. 2d 689, 706-707 (W.D. Mi. 1999) (district court applied primary jurisdiction doctrine to seek NIGC determination on whether casino was sited on gaming-eligible Indian lands in light of the NIGC's special competence and its charge to interpret and apply the IGRA); *Miami Tribe of Oklahoma v. United States,* 5 F. Supp. 2d 1213, 1217-19 (D. Kan. 1998) (reversing and remanding NIGC decision to disapprove management contract because parcel was not Indian lands

26. This Court considered whether it could remand this matter without vacating the Chairman's Ordinance approval as to the Buffalo Parcel. However, this Court concluded that vacatur is necessary in order to afford the NIGC an opportunity to complete its review on remand before the SNI actually commences gaming on the Buffalo Parcel.

where NIGC failed to provide a reasoned explanation for its decision).

On remand, the NIGC Chairman is instructed to determine whether the Buffalo Parcel is "Indian lands" as defined in the IGRA; to consider, if necessary, the applicability of section 20 of the IGRA, 25 U.S.C. § 2719, to the Buffalo Parcel; and to provide an explanation of the bases for his determinations. The Chairman's Ordinance approval remains in effect as to all other sites identified in the Compact.[27]

E. The Remaining Claims and Motions

The Government repeatedly has urged, and this Court agrees, that the Secretary's November 12, 2002 letter is merely a legal opinion that does not constitute final agency action under the IGRA for purposes of APA review. There is no basis in the record from which this Court can conclude that the NIGC considered any of the opinions expressed in the Secretary's letter or took any other action with respect to an Indian lands determination. Because there has been no final agency determination as to whether land purchased in the City of Buffalo with

27. This Court is well-aware that there is a site the SNI may have purchased in the same manner as the Buffalo Parcel on which it presently is conducting gaming operations. However, this litigation relates solely to the Buffalo Parcel and relief is appropriately tailored to the site in dispute. Moreover, the Buffalo Parcel is the only site for which the NIGC may still determine whether *proposed* gaming will occur on Indian lands. On all other sites, gaming already is a reality.

SNSA funds is gaming-eligible Indian lands, Plaintiffs' challenge to the Secretary's intermediate statutory interpretations is premature and this Court is without jurisdiction to review her opinions at this juncture. *Miami Tribe v. United States,* 198 Fed. Appx. 686, 2006 U.S. App. LEXIS 21524. Accordingly, Plaintiff's IGRA claims (One and Two) against the Secretary are dismissed for lack of subject matter jurisdiction.

Plaintiffs' NEPA and NHPA claims against all Defendants, and their IGRA claims against Defendant James Cason, are predicated on agency actions that permitted the SNI to construct and operate an Indian gambling casino on the Buffalo Parcel. Having vacated and remanded the Chairman's Ordinance approval to the extent it authorizes gaming on land "in Erie County, at a location in the City of Buffalo," these claims are now moot and are dismissed in their entirety. Given this dismissal, Plaintiffs' Motion for Summary Judgment is denied as moot. Finally, because this Court had no need to consider Plaintiffs' extra-record exhibits or its Memorandum in Support of Summary Judgment in reaching its determinations herein, the Government's Motion to Strike is denied as moot.

IV. CONCLUSION

For the reasons stated, the Seneca Nation of Indians' Motion for Leave to File an *Amicus* Brief is granted. However, the SNI's request for Rule 19 dismissal is denied based on this Court's determination that neither the SNI nor the State of New York are necessary to a just

adjudication of this action. While the SNI clearly has an interest in operating a gambling casino on property it purchased in the City of Buffalo, its interest is adequately represented here by the Defendants, who are defending their decisions to permit such gaming. The State does not have an interest that will be impaired, as a practical matter, by this litigation.

That portion of Defendants' motion to dismiss which claims immunity from suit under the QTA is denied. The Plaintiffs are not challenging the SNI's title to the Buffalo Parcel and, therefore, QTA immunity does not apply. That portion of Defendants' motion to dismiss which seeks dismissal of claims One and Two (the IGRA claims) against the Secretary for lack of subject matter jurisdiction is granted. Because the Secretary's "Indian lands" determination is not final agency action, and no final agency action has yet occurred with respect to that determination, this Court lacks jurisdiction to review the Secretary's challenged statutory interpretations. Finally, that portion of Defendants' motion seeking dismissal of claims One and Two against the NIGC Chairman for failure to state a claim is denied. The NIGC is the agency expressly charged with administering the IGRA. Before approving a tribal gaming ordinance, the NIGC Chairman must necessarily establish, as a threshold jurisdictional matter, that gaming is permitted on the land in question—*i.e.,* that the land is "Indian lands" within the meaning of the IGRA. Plaintiffs' allegation that the NIGC did not make an "Indian lands" determination with respect to land the SNI intended to purchase in the City of Buffalo sufficiently states a claim for relief. In sum, Defendants' Motion to Dismiss is granted in part, and denied in part.

Based on its review of the administrative record, this Court finds that the NIGC should have, but did not, make an Indian lands determination in this case. Accordingly, this Court concludes that the Chairman's 2002 approval of a gaming ordinance permitting the SNI to conduct gambling on lands to be acquired in Erie County in the City of Buffalo was not the result of reasoned decision-making. Thus, the 2002 ordinance approval is vacated insofar as it permitted gaming on land to be acquired by the SNI in Erie County, at a location in the City of Buffalo. Because the "Indian lands" determination is one that Congress squarely placed in the NIGC's hands, the Ordinance is remanded to the NIGC for an "Indian lands" determination and further proceedings consistent with this Decision.

The remand to the NIGC renders Plaintiffs' remaining claims moot and, as discussed above, all motions not expressly decided herein are denied as moot.

V. ORDERS

IT HEREBY IS ORDERED, that the Seneca Nation of Indians' Motion for Leave to File an *Amicus* Brief (Docket No. 44) is GRANTED, but its request for Rule 19 Dismissal is DENIED.

FURTHER, that Defendants' Motion to Dismiss (Docket No. 22) is GRANTED in part, and DENIED in part consistent with the foregoing Decision.

FURTHER, that the National Indian Gaming Commission Chairman's administrative decision approving the "Seneca Nation of Indians Class III Gaming Ordinance of 2002 as Amended" is VACATED and REMANDED insofar as it authorized gaming on what is described herein as the Buffalo Parcel.

FURTHER, that, in light of the remand, Plaintiffs' Motion for Summary Judgment (Docket No. 39) is DENIED as moot.

FURTHER, that Defendants' Motion to Strike exhibits and portions of Plaintiffs' Memorandum in Support of Summary Judgment (Docket No. 54) is DENIED as moot.

FURTHER, that, in light of the remand, the remainder of Plaintiffs' and Intervenor-Plaintiffs' claims are moot and the Complaint and Intervenor-Complaint are Dismissed in their entirety.

FURTHER, that the Clerk of the Court is directed to take the necessary steps to close this case.

SO ORDERED.

Dated: January 12, 2007
Buffalo, New York

/s/ William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

APPENDIX G — PERTINENT PROVISIONS OF THE SENECA NATION SETTLEMENT ACT OF 1990, 25 U.S.C. § 1774, *ET SEQ.*

25 U.S.C. § 1774

§ 1774. Findings and purposes

(a) City of Salamanca and congressional villages. The Congress finds and declares that:

(1) Disputes concerning leases of tribal lands within the city of Salamanca and the congressional villages, New York, have strained relations between the Indian and non-Indian communities and have resulted in adverse economic impacts affecting both communities.

(2) Some of the significant historical events which have led to the present situation include—

(A) beginning in the mid-nineteenth century, several railroads obtained grants or leases of rights of way through the Allegany Reservation without Federal authorization or approval and on terms which did not adequately protect the interests of the Seneca Nation;

(B) after construction of these railroads, Allegany Reservation lands were leased to railroad employees, persons associated with the railroads, residents of the city and farmers without Federal authorization or approval and

on terms which did not adequately protect the interests of the Seneca Nation;

(C) none of these leases had Federal authorization or approval and, after the courts ruled these leases invalid, Congress enacted the Act of February 19, 1875 (18 Stat. 330), confirming existing leases of Allegany Reservation lands, authorizing further leasing by the Seneca Nation, and making the confirmed leases renewable for a twelve year period;

(D) the Act of September 30, 1890 (26 Stat. 558), amended the 1875 Act by substituting a renewal term of "not exceeding ninety-nine years" for the original renewal term of twelve years; and

(E) in 1952 the Seneca Nation filed a claim with the Indian Claims Commission against the United States for use of improper lease fees, and in 1977 a settlement was reached regarding such claim, providing for the payment of $600,000 to the Seneca Nation covering the period beginning in 1870 to the end of 1946.

(3) An analysis of historic land values indicates that the payments made under the original lease agreement and under the settlement described in paragraph (2)(E) were well below the actual lease value of the property.

(4) The approaching expiration of the Salamanca and congressional village leases on February 19, 1991, has created significant uncertainty and concern on the part of the city of Salamanca and Salamanca residents, and among the residents of the congressional villages, many of whose families have resided on leased lands for generations.

(5) The future economic success of the Seneca Nation, city, and congressional villages is tied to the securing of a future lease agreement.

(6) The Federal and State governments have agreed that there is a moral responsibility on the part of both governments to help secure a fair and equitable settlement for past inequities.

(b) Purpose. It is the purpose of this Act —

(1) to effectuate and support the Agreement between the city and the Seneca Nation, and facilitate the negotiation of new leases with lessees in the congressional villages;

(2) to assist in resolving the past inequities involving the 1890 leases and to secure fair and equitable compensation for the Seneca Nation based on the impact of these leases on the economy and culture of the Seneca Nation;

(3) to provide a productive environment between the Seneca Nation and lessees for negotiating the leases provided for under the Agreement;

(4) to provide stability and security to the city and the congressional villages, their residents, and businesses;

(5) to promote the economic growth of the city and the congressional villages;

(6) to promote economic self-sufficiency for the Seneca Nation and its members;

(7) to promote cooperative economic and community development efforts on the part of the Seneca Nation and the city; and

(8) to avoid the potential legal liability on the part of the United States that could be a direct consequence of not reaching a settlement.

Appendix G

25 U.S.C. § 1774d

§ 1774d. Settlement Funds

(a) In general. In recognition of the findings and purposes specified in section 2, the settlement funds provided pursuant to this Act shall be provided by the United States and the State. The Secretary may not obligate or expend funds provided under subsection (b) until the Secretary determines that there is an agreed upon and signed memorandum of understanding.

(b) Funds provided by United States.

(1) Cash payment. The Secretary shall pay to the Seneca Nation the amount of $30,000,000, which is the Federal share of the cash payment to be managed, invested, and used by the Nation to further specific objectives of the Nation and its members, all as determined by the Nation in accordance with the Constitution and laws of the Nation.

(2) Economic development.

(A) In addition to the amount provided under paragraph (1), the Secretary shall pay to the Seneca Nation the amount of $5,000,000 to be used for the economic and community development of the Seneca Nation, including the city of Salamanca, which is an integral part of the Seneca Nation's Allegany Reservation. Such

amount shall be deposited by the Secretary, administered, and disbursed in accordance with subparagraph (B).

(B)

(i) The sum of $2,000,000 shall be deposited in a separate interest bearing account of the Seneca Nation. The account shall be administered, and the principal and interest thereon disbursed, by the Seneca Nation in accordance with a plan approved by the Council of the Seneca Nation to promote the economic and community development of the Seneca Nation. Until the principal is expended pursuant to such plan, the income accruing from such sum shall be disbursed to the treasurer of the Seneca Nation on a quarterly basis to fund tribal government operations and to provide for the general welfare of the Seneca Nation and its members. The Seneca Nation may in its discretion add the accrued income to the principal.

(ii) The sum of $3,000,000 shall be deposited in an escrow account which shall be owned by the Seneca Nation. The escrow agent shall be selected by agreement of the Seneca Nation and the city. The escrow account shall remain in existence for a period of ten years from the date on which the principal

is deposited or until all payments provided for under section V.D. of the Agreement have been made. The escrow account shall be held and disbursed for economic and community development as set forth in section V.D. of the Agreement. Upon the expiration of the ten-year period, the $3,000,000 principal shall be disbursed in accordance with a plan approved by the Council of the Seneca Nation to promote the economic and community development of the Seneca Nation.

(c) Funds to be provided by State. The State, in accordance with its laws and regulations, shall provide the sum of $16,000,000 in cash payments and $9,000,000 for economic or community development subject to the provisions of the memorandum of understanding.

(d) Time of payments. The payments required by this section on the part of the United States shall be made within 30 days of the Secretary's determination that the Seneca Nation has complied with section 4, or upon the availability of the amounts necessary to carry out this Act, if such determination has previously been made. If the Secretary determines that the Seneca Nation has not complied with section 4, he shall advise the Seneca Nation in writing of all steps it must take to comply.

(e) Limitation. The only amounts available to carry out this Act shall be those amounts specifically appropriated by the Congress or the legislature of the State to carry out this Act.

Appendix G

25 U.S.C. § 1774f

§ 1774f. Miscellaneous provisions

(a) Liens and forfeitures, etc. Subject to subsection (b), the provisions of section 7 of the Indian Tribal Judgment Funds Use and Distribution Act (25 U.S.C. 1407) shall apply to any payment of funds authorized to be appropriated under this Act and made to individual members of the Seneca Nation. None of the payments, funds, or distributions authorized, established, or directed by this Act, and none of the income derived therefrom, which may be received under this Act by the Seneca Nation or individual members of the Seneca Nation, shall be subject to levy, execution, forfeiture, garnishment, lien, encumbrance, seizure, or State or local taxation.

(b) Eligibility for Government programs. None of the payments, funds or distributions authorized, established, or directed by this Act, and none of the income derived therefrom, shall affect the eligibility of the Seneca Nation or its members for, or be used as a basis for denying or reducing funds under, any Federal program.

(c) Land acquisition. Land within its aboriginal area in the State or situated within or near proximity to former reservation land may be acquired by the Seneca Nation with funds appropriated pursuant to this Act. State and local governments shall

have a period of 30 days after notification by the Secretary or the Seneca Nation of acquisition of, or intent to acquire such lands to comment on the impact of the removal of such lands from real property tax rolls of State political subdivisions. Unless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of section 2116 of the Revised Statutes (25 U.S.C. 177), such lands shall be subject to the provisions of that Act and shall be held in restricted fee status by the Seneca Nation. Based on the proximity of the land acquired to the Seneca Nation's reservations, land acquired may become a part of and expand the boundaries of the Allegany Reservation, the Cattaraugus Reservation, or the Oil Spring Reservation in accordance with the procedures established by the Secretary for this purpose.

APPENDIX H — PERTINENT PROVISIONS OF THE INDIAN GAMING REGULATORY ACT OF 1988, 25 U.S.C. § 2701, *ET SEQ.*

25 U.S.C. § 2703

§ 2703. Definitions

For purposes of this Act—

(1) The term "Attorney General" means the Attorney General of the United States.

(2) The term "Chairman" means the Chairman of the National Indian Gaming Commission.

(3) The term "Commission" means the National Indian Gaming Commission established pursuant to section 5 of this Act.

(4) The term "Indian lands" means—

(A) all lands within the limits of any Indian reservation; and

(B) 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 tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which—

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7) (A) The term "class II gaming" means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn

or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on the date of enactment of this Act, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after the date of enactment of this Act, to negotiate a Tribal-State compact under section 11(d)(3).

(E) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on the date of enactment of this subparagraph, any gaming described

in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 11(d)(3) of the Indian Gaming Regulatory Act (25 U.S.C. 2710(d)(3)).

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

(9) The term "net revenues" means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

(10) The term "Secretary" means the Secretary of the Interior.

Appendix H

25 U.S.C. § 2704

§ 2704. National Indian Gaming Commission

(a) Establishment. There is established within the Department of the Interior a Commission to be known as the National Indian Gaming Commission.

(b) Composition; investigation; term of office; removal.

(1) The Commission shall be composed of three full-time members who shall be appointed as follows:

(A) a Chairman, who shall be appointed by the President with the advice and consent of the Senate; and

(B) two associate members who shall be appointed by the Secretary of the Interior.

(2) (A) The Attorney General shall conduct a background investigation on any person considered for appointment to the Commission.

(B) The Secretary shall publish in the Federal Register the name and other information the Secretary deems pertinent regarding a nominee for membership on the Commission and shall allow a period of not less than thirty days for receipt of public comment.

(3) Not more than two members of the Commission shall be of the same political party. At least two members of the Commission shall be enrolled members of any Indian tribe.

(4) (A) Except as provided in subparagraph (B), the term of office of the members of the Commission shall be three years.

(B) Of the initial members of the Commission—

(i) two members, including the Chairman, shall have a term of office of three years; and

(ii) one member shall have a term of office of one year.

(5) No individual shall be eligible for any appointment to, or to continue service on, the Commission, who—

(A) has been convicted of a felony or gaming offense;

(B) has any financial interest in, or management responsibility for, any gaming activity; or

(C) has a financial interest in, or management responsibility for, any management contract approved pursuant to section 12 of this Act.

(6) A Commissioner may only be removed from office before the expiration of the term of office of the member by the President (or, in the case of associate member, by the Secretary) for neglect of duty, or malfeasance in office, or for other good cause shown.

(c) Vacancies. Vacancies occurring on the Commission shall be filled in the same manner as the original appointment. A member may serve after the expiration of his term of office until his successor has been appointed, unless the member has been removed for cause under subsection (b)(6).

(d) Quorum. Two member s of the Commission, at least one of which is the Chairman or Vice Chairman, shall constitute a quorum.

(e) Vice Chairman. The Commission shall select, by majority vote, one of the members of the Commission to serve as Vice Chairman. The Vice Chairman shall serve as Chairman during meetings of the Commission in the absence of the Chairman.

(f) Meetings. The Commission shall meet at the call of the Chairman or a majority of its members, but shall meet at least once every 4 months.

(g) Compensation.

(1) The Chairman of the Commission shall be paid at a rate equal to that of level IV of the Executive

Schedule under section 5315 of title 5, United States Code.

(2) The associate members of the Commission shall each be paid at a rate equal to that of level V of the Executive Schedule under section 5316 of title 5, United States Code.

(3) All members of the Commission shall be reimbursed in accordance with title 5, United States Code, for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

Appendix H

25 U.S.C. § 2705

§ 2705. Powers of the Chairman

(a) The Chairman, on behalf of the Commission, shall have power, subject to an appeal to the Commission, to—

(1) issue orders of temporary closure of gaming activities as provided in section 14(b);

(2) levy and collect civil fines as provided in section 14(a);

(3) approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 11; and

(4) approve management contracts for class II gaming and class III gaming as provided in sections 11(d)(9) and 12.

(b) The Chairman shall have such other powers as may be delegated by the Commission.

Appendix H

25 U.S.C. § 2706

§ 2706. Powers of the Commission

(a) Budget approval; civil fines; fees; subpoenas; permanent orders. The Commission shall have the power, not subject to delegation—

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 18;

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 14(a);

(3) by an affirmative vote of not less than 2 members, to establish the rate of fees as provided in section 18;

(4) by an affirmative vote of not less than 2 members, to authorize the Chairman to issue subpoenas as provided in section 16; and

(5) by an affirmative vote of not less than 2 members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 14(b)(2).

(b) Monitoring; inspection of premises; investigations; access to records; mail; contracts; hearings; oaths; regulations. The Commission—

(1) shall monitor class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;

(3) shall conduct or cause to be conducted such background investigations as may be necessary;

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this Act;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission›s regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this Act.

(c) [Omitted]

(d) Application of Government Performance and Results Act.

(1) In general. In carrying out any action under this Act, the Commission shall be subject to the Government Performance and Results Act of 1993 (Public Law 103-62; 107 Stat. 285).

(2) Plans. In addition to any plan required under the Government Performance and Results Act of 1993 (Public Law 103-62; 107 Stat. 285), the Commission shall submit a plan to provide technical assistance to tribal gaming operations in accordance with that Act.

Appendix H

25 U.S.C. § 2707

§ 2707. Commission Staffing

(a) General Counsel. The Chairman shall appoint a General Counsel to the Commission who shall be paid at the annual rate of basic pay payable for GS-18 of the General Schedule under section 5332 of title 5, United States Code.

(b) Staff. The Chairman shall appoint and supervise other staff of the Commission without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. Such staff shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-17 of the General Schedule under section 5332 of that title.

(c) Temporary services. The Chairman may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the maximum annual rate of basic pay payable for GS-18 of the General Schedule.

(d) Federal agency personnel. Upon the request of the Chairman, the head of any Federal agency is authorized to detail any of the personnel of such

agency to the Commission to assist the Commission in carrying out its duties under this Act, unless otherwise prohibited by law.

(e) Administrative support services. The Secretary or Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services as the Commission may request.

Appendix H

25 U.S.C. § 2708

§ 2708. Commission; access to information

The Commission may secure from any department or agency of the United States information necessary to enable it to carry out this Act. Upon the request of the Chairman, the head of such department or agency shall furnish such information to the Commission, unless otherwise prohibited by law.

Appendix H

25 U.S.C. § 2709

§ 2709. Interim authority to regulate gaming

Notwithstanding any other provision of this Act, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before the date of enactment of this Act relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. The Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

Appendix H

25 U.S.C. § 2710

§ 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity.

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this Act.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this Act.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts.

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe›s jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman. A separate license

issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe›s jurisdiction if such ordinance or resolution provides that—

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than—

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $ 25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes—

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt

notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4) (A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B) (i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if—

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 13 of the Act,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 18(a)(1) for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming

activity remains within the same nature and scope as operated on the date of enactment of this Act.

(iii) Within sixty days of the date of enactment of this Act, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation.

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II), the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which—

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after the date of the enactment of this Act; and

(B) has otherwise complied with the provisions of this section may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has—

(A) conducted its gaming activity in a manner which—

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for—

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation—

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 7(b);

(B) the tribe shall continue to submit an annual independent audit as required by section 11(b)(2)(C) and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 18 in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

Appendix H

(d) Class III gaming activities; authorization; revocation; Tribal-State compact.

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2) (A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an

ordinance or resolution that meets the requirements of subsection (b).

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 12(e)(1)(D). Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)

(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning

on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3) (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under

subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 5 of the Act of January 2, 1951 (64 Stat. 1135) shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7) (A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)

(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the

introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality,

financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this Act, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8) (A) The Secretary is authorized to approve any Tribal-State compact entered into between

an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this Act,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this Act.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming

activity if such contract has been submitted to, and approved by, the Chairman. The Chairman›s review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 12.

(e) Approval of ordinances. For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this Act.

Appendix H

25 U.S.C. § 2711

§ 2711. Management contracts

(a) Class II gaming activity; information on operators.

(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 11(b)(1), but, before approving such contract, the Chairman shall require and obtain the following information:

(A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

(B) a description of any previous experience that each person listed pursuant to subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency

with which such person has had a contract relating to gaming; and

(C) a complete financial statement of each person listed pursuant to subparagraph (A).

(2) Any person listed pursuant to paragraph (1)(A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

(3) For purposes of this Act, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

(b) Approval. The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least—

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;

(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and

(6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission.

(c) Fee based on percentage of net revenues.

(1) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such tribal gaming activity require the additional fee requested by the Indian tribe.

(d) Period for approval; extension. By no later than the date that is 180 days after the date on which a management contract is submitted to the Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reason for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection.

(e) Disapproval. The Chairman shall not approve any contract if the Chairman determines that—

(1) any person listed pursuant to subsection (a)(1)(A) of this section—

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this Act or has refused to respond to questions propounded pursuant to subsection (a)(2); or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this Act; or

(4) a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract.

(f) Modification or voiding. The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) Interest in land. No management contract for the operation and management of a gaming activity regulated by this Act shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.

(h) Authority. The authority of the Secretary under section 2103 of the Revised Statutes (25 U.S.C. 81), relating to management contracts regulated pursuant to this Act, is hereby transferred to the Commission.

(i) Investigation fee. The Commission shall require a potential contractor to pay a fee to cover the cost of the investigation necessary to reach a determination required in subsection (e) of this section.

Appendix H

25 U.S.C. § 2713

§ 2713. Civil penalties

(a) Authority; amount; appeal; written complaint.

(1) Subject to such regulations as may be prescribe Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $ 25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this Act, any regulation prescribed by the Commission pursuant to this Act, or tribal regulations, ordinances, or resolutions approved under section 11 or 13.

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(3) Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this Act, by regulations prescribed under this Act, or by tribal regulations, ordinances, or resolutions, approved under section 11 or 13, that may result in the imposition of a fine under subsection (a)(1), the permanent closure of such game, or the modification or termination of any

management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission. The allegation shall be set forth in common and concise language and must specify the statutory or regulatory provisions alleged to have been violated, but may not consist merely of allegations stated in statutory or regulatory language.

(b) Temporary closure; hearing.

(1) The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this Act, of regulations prescribed by the Commission pursuant to this Act, or of tribal regulations, ordinances, or resolutions approved under section 11 or 13 of this Act.

(2) Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. Not later than sixty days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation.

(c) Appeal from final decision. A decision of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code.

(d) Regulatory authority under tribal law. Nothing in this Act precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe›s jurisdiction if such regulation is not inconsistent with this Act or with any rules or regulations adopted by the Commission.

Appendix H

25 U.S.C. § 2719

§ 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary. Except as provided in subsection (b), 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 the date of enactment of this Act unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on the date of enactment of this Act; or

(2) the Indian tribe has no reservation on the date of enactment of this Act and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe›s former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe›s last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions.

(1) Subsection (a) will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary›s determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) shall not apply to—

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District

Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

> (3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 5 and 7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465, 467), subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected. Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Application of Internal Revenue Code.

(1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this Act, or under a Tribal-State compact entered into under section 11(d)(3) that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after the date of enactment of this Act unless such other provision of law specifically cites this subsection.