

Indian casino gambling is controversial, especially in Congress

By the Hon. John J. LaFalce

On June 25, 2008, a gigantic struggle took place on the floor of the U.S. House of Representatives involving casino gambling in the State of Michigan. That controversy and struggle is highly instructive on the question of the legality of casino gambling in Buffalo.

Two titans of the House, John Dingell (D-Mich), Chairman of the House Energy and Commerce Committee, and John Conyers (D-Mich), Chairman of the House Judiciary Committee, stood in opposing corners and came out fighting.

Rep. Dingell wants a casino in Port Huron, and doesn't want the issue to go to the U.S. Department of Interior for its review. So he is trying to "legislatively" bypass Interior review, and permit casino gambling in Port Huron by mandating that the Secretary of the Interior "shall" take into trust certain land as part of a land claim settlement. The bill at least recognized that the land had to be taken into trust.

Rep. Conyers says he opposes gambling in principle, but also doesn't want another casino in Michigan, which would compete with the casino that already exists in his city of Detroit. Conyers also argued it would be wrong to bypass the Interior Department's review as to whether it should take it into trust, especially since he is confident Interior will render a negative opinion. An overwhelming majority of the House agreed with Conyers, and defeated the attempted bypass by a vote of 121 to 298.

So how is this relevant to Buffalo?

First, and very importantly, the 1990 Seneca Nation Settlement Act passed by VOICE VOTE in both the House and Senate in 1990. Everyone must realize that there was and is STRONG opposition to casino gambling in Congress; and there was and is STRONG opposition to the concept of legislatively bypassing Interior Department consideration. The present Michigan controversy is illustrative of the disagreement that

exists now and also existed in 1990 within the Congress. The chief sponsor of the 1990 Act stated repeatedly that no one at that time ever contemplated casino gambling as “part of” any settlement. If there were even a “suspicion” of gambling, there would have been vigorous debate and dissent, and, I assure you, a recorded vote in both houses, not “voice” approval.

Second, the 1990 Settlement Act was not a “land claim”. Title to the Indian land was NEVER in question. Congress simply wanted to protect the rights of non-Indians to continue renting Indian property in Salamanca, and also to give the Senecas fair rents, prospectively and retroactively. Proponents of casino gambling call the 1990 Law the Seneca Nation “Land Claim” Settlement Act. But, the words “Land Claim” were not in the title of the bill that was introduced in either the House or the Senate, nor when it was considered in committee, nor on the floor of the House or Senate when it was passed by VOICE VOTE, nor was it in the bill that was signed into law by President George H.W. Bush. When the chairman of the National Indian Gaming Commission cited the words “Land Claim” in the title as an indication of congressional intent, when those words were simply not there, he evidenced the baselessness of their case.

Third, the word “gambling” NEVER came up – not in House or Senate Committee Hearings, nor in floor discussion in either body. In short, it was never contemplated, much less legislatively intended.

Fourth, the Senecas at that time overwhelmingly opposed gambling as contrary to their mores and culture. A Seneca referendum in the early 90’s was overwhelmingly, about 2 to 1, against gambling. That did change by the late 1990’s, and the concept of gambling was very narrowly approved by the Senecas. (It should also be noted that under Indian Law it is NOT ILLEGAL TO BUY VOTES in an Indian referendum, and no U.S. or New York Law can change that.) It is therefore ludicrous to even suggest that

casino gambling was “part of” any settlement. How could it be? For at that time, an overwhelming majority of the Senecas opposed gambling.

To be sure, a certain number, in my judgment, did see an opportunity for gambling, because while the 1988 Indian Gaming Regulatory Act does prohibit casino gambling off reservation, it does permit certain narrow exceptions, i.e., if land is placed into trust as part of the settlement of a land claim. So, this group did bring a lawsuit in 1993 claiming title to all the land on Grand Island and a significant portion of the land in the City of Niagara Falls, hoping for a settlement permitting gambling. This was their “first bite” at the apple of their eye --- casino gambling.

It took a long time to resolve that lawsuit, for the State of New York, under the governorship of Mario Cuomo, strongly opposed the claim and did not wish to settle. The Attorney General was requested to oppose the claim vigorously, and not engage in settlement negotiations. The Senecas, I believe, would have settled, gladly, for the right to gamble on either Grand Island, Niagara Falls or both. But the State wouldn’t go along, and in 2002, Judge Richard Arcara figuratively threw their case out of court. But the Senecas were plotting that year for a “second bite” at the apple. If a new land claim wouldn’t work, they concocted the argument that the 1990 Settlement Act, passed TWELVE years earlier, dealing basically with Salamanca, permitted gambling in my Congressional District. When I first heard of this, I considered that notion preposterous. I still do.

But I was not aware of how influential the strong lobbying forces for it would be - both for Governor Pataki in an election year, and for the Senecas, and how closely the Bush Administration would “cooperate”.

If the Secretary of the Interior, Gale Norton, could be persuaded to do “NOTHING” on the Seneca’s application, the law said that it would be deemed approved.

How could she do nothing, I thought; and how could she, in 2002, in all good conscience, say that casino gambling in my district was “part of” the 1990 Settlement Act dealing basically with Salamanca, that passed both houses by a Voice Vote, did not have the words “land claim” in its title or in any portion of the bill, and had never even remotely contemplated “casino gambling”.

The words of the Inspector General of the Department of the Interior, Earl E. Devaney, in his testimony, on a different subject, before Congress in September 2006 might be instructive. He testified:

Simply stated, short of a crime, anything goes at the highest levels of the Department of the Interior. Ethics failures on the part of senior Department officials – taking the form of appearances of impropriety, favoritism, and bias – have been routinely dismissed with a promise “not to do it again.” Numerous OIG reports,...have chronicled such things as complex efforts to hide the true nature of agreements with outside parties; *intricate deviations from statutory, regulatory and policy requirements to reach a predetermined end....[emphasis added]*

The 2002 “non-decision decision”, being such, can be reviewed de novo in court. A non-decision decision is entitled to no deference. To say that the 1990 law permits casino gambling in Buffalo would be a pernicious distortion of the law. It would validate the “non-decision decision” of the Secretary of the Interior that deviated “from statutory, regulatory and policy requirements to reach a predetermined end.” There are a multitude of other issues, to be sure. But the overriding issue must be preserving the integrity of the law, rather than its perversion. That is even more important than the issue of casino gambling.

If, arguendo, casino gambling is to exist in Buffalo, let it be permitted after appropriate regulatory review by the Secretary of the Interior as called for by the Indian Gaming Regulatory Act; or, let it be decided by a new law, after appropriate debate and a transparent and knowing recorded vote in Congress, not by making a mockery of the law by distorting it to reach a predetermined end.