

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK**

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**CITIZENS AGAINST CASINO** )  
**GAMBLING, et al.,** )  
 )  
 **Plaintiffs,** )  
 **v.** )  
**NORTON, et al.,** )  
 **Defendants.** )

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**Civil Action No. 06 CV 0001**

**Hon. William M. Skretny, U.S.D.J.**

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**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFFS' AND INTERVENOR-PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT**

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## PRELIMINARY STATEMENT

Plaintiffs and Intervenor-Plaintiffs (collectively the “Plaintiffs”) submit this Memorandum of Law in support of their Motion for Summary Judgment on the first and second claims asserted in their Complaint pursuant to the Indian Gaming Regulatory Act (“IGRA”). Plaintiffs seek an Order of this Court declaring:

1. that lands purportedly acquired by the Seneca Nation of Indians (“SNI”) pursuant to the Seneca Nation Settlement Act of 1990 (“SNSA”) in the City of Buffalo (the “Buffalo Parcels”) are not “Indian Lands” within the meaning of IGRA;
2. that the Buffalo Parcels, purportedly acquired by the SNI pursuant to the SNSA, are not “Indian Country;”
3. that the Buffalo Parcels, purportedly acquired by the SNI pursuant to the SNSA, are exempt only from State and local property taxes;
4. that the SNI Tribal-State Gaming Compact (“Compact”) violates sections 11(d) and 20 of IGRA to the extent it permits gambling on the Buffalo Parcels;
5. that the determination of the Secretary of the Department of the Interior (“DOI”) to permit approval of the Compact is contrary to IGRA, and is arbitrary, capricious, an abuse of discretion, contrary to law, and violates procedures required by law;
6. that the DOI Secretary’s failure to disapprove the Compact is contrary to IGRA, and is arbitrary, capricious, an abuse of discretion, contrary to law and violates procedures required by law; and
7. that the National Indian Gaming Commission (“NIGC”) Chairman’s approval of the SNI Class III Gaming Ordinance is contrary to IGRA, and is arbitrary, capricious, an abuse of discretion, contrary to law, and violates procedures required by law.
8. that the Secretary and NIGC’s decision to allow casino gambling on the Buffalo Parcels was done without compliance with the National Environmental Policy Act (“NEPA”) and National Historic Preservation Act (“NHPA”), and therefore was arbitrary, capricious,

an abuse of discretion, contrary to law and violates procedures required by law.

As discussed more fully below, the property in the City of Buffalo on which the SNI intends to construct a gambling casino is not the SNI's sovereign land and, therefore, is not eligible for any of the Indian gambling activities regulated by IGRA. In any event, and even if there were a determination that the Buffalo Parcels are the sovereign land of the SNI, gambling still would be prohibited there under the express provisions of IGRA.

### **FACTUAL STATEMENT**

The relevant facts are set forth in Plaintiffs' Statement of Undisputed Facts, submitted pursuant to the Federal Rules of Civil Procedure, Local Rule 56.1, and in their Complaint. Review of the specific DOI and NIGC actions at issue is based on the evidentiary materials filed by Defendants as the Administrative Record, which is incorporated in support of Plaintiffs' motion.

### **PROCEDURAL HISTORY**

On September 20, 2002, officials of the SNI and the Governor of New York executed a Class III Tribal-State Gaming Compact relative to a prospective SNI gambling casino in Buffalo, New York. *See* Nation-State Gaming Compact Between the Seneca Nation of Indians and the State of New York as incorporated within the Bureau of Indian Affairs Administrative Record filed by Defendants May 1, 2005 ("BIA AR") at pp. 549-580 (Document 27, Part 17). The Compact (§ 11(a)(2)) identifies the proposed site of the casino as "in Erie County, at a location in the City of Buffalo to be determined by the Nation, or at such other site as may be determined by the Nation in the event a site in the City of Buffalo is rejected by the Nation for any reason..." *Id.*

On October 25, 2002, the Compact was deemed approved, pursuant to Section 11(d)(8)(C)

of IGRA (25 U.S.C. §2710(d)(8)(C)), because Gale A. Norton, the Secretary of the United States Department of the Interior (“Secretary”), neither specifically approved nor disapproved the Compact within 45 days of its submission. By letter dated November 12, 2002 to Governor George Pataki and then SNI President Cyrus Schindler, the Secretary explained her decision to “allow this Compact to take effect without Secretarial action.” BIA AR 397-404; 405-412, p. 1 (Document 27, Part 4).

By letter dated November 26, 2002, the NIGC approved the SNI Class III Gaming Ordinance of 2002 as Amended, with the stipulation that “the gaming ordinance is approved for gaming *only* on Indian lands, as defined in the IGRA, over which the Nation has jurisdiction.” BIA AR 583 (Document 27, Part 19) (emphasis added).

The Compact became effective December 9, 2002 on publication in the Federal Register of the DOI notice stating that the Compact “is considered approved, *but only to the extent the compact is consistent with the provisions of IGRA.*” (67 Fed. Reg. 72968) (emphasis added). BIA AR 396 (Document 27, Part 3)

Not until three years later, on or about October 3, 2005, did the Seneca Erie Gaming Corporation (“SEGC”), a wholly owned entity of the SNI, identify and purchase for the reported sum of \$4.6 million parcels of land in the City of Buffalo (the “Buffalo Parcels”). By Bargain and Sale Deed dated October 3, 2005, the SEGC conveyed the Buffalo Parcels to the SNI for the sum of \$4.00. *See* BIA AR 36-49 (Document 25, Part 6). On November 7, 2005, the SNI sent to the DOI, Bureau of Indian Affairs (“BIA”), a request to hold title to the Buffalo Parcels in restricted fee status. *See* BIA AR 1-12 (Document 25, Parts 1-2). The Secretary made no decision that the Buffalo Parcels should not be held by the SNI subject to a restriction against alienation pursuant to the Trade and Intercourse Act (25 U.S.C. §177). Therefore, the SNI hold title to the Buffalo Parcels in

“restricted fee status.”

The SNI has not requested, nor has the Secretary taken, any further action affecting the legal status of the Buffalo Parcels pursuant to the SNSA or any other law.

### SUMMARY OF ARGUMENT

Indian gambling is lawful only on “Indian Lands” as that term is defined by IGRA, 25 U.S.C. §2703(4). Because the Buffalo Parcels owned by the SNI are **not** “Indian Lands,” gambling is illegal on that property, plain and simple. The Buffalo Parcels cannot satisfy the definition of “Indian Lands” because they are not the sovereign land of the SNI, and it is fundamental that an Indian tribe may not engage in gambling activity on land that is not its sovereign land.

In this case, the United States Government took no action, legislative or otherwise, the legal effect of which would be to remove the Buffalo Parcels from the jurisdiction and sovereignty of the State of New York and transfer that sovereign authority to the SNI. As discussed below (*see* Argument at Point II, *infra*), the Secretary formed the erroneous conclusion that the Federal Government, by enactment of the Seneca Nation Settlement Act of 1990 (“SNSA”), **had** taken action, the legal effect of which would be the transfer of sovereignty.

Specifically, the Secretary misinterpreted the “Land acquisition” provision of the SNSA to mean that, by operation of law, **any land** purchased by the SNI with funds allocated by the SNSA and then held by the SNI in “restricted fee status” automatically would be subject to the sovereign authority and jurisdiction of the SNI. Because of the Secretary’s demonstrably erroneous interpretation of the SNSA, her action in reviewing the Gaming Compact effectively approved the Buffalo Parcels for gambling years before the SNI actually designated or purchased them--without a formal inquiry or affirmative determination, after fully considering the impacts of such a casino

as required by law, that the Buffalo Parcels are in fact “Indian Lands” for purposes of gambling eligibility under IGRA. Accordingly, Plaintiffs request judgment as a matter of law correcting the legal errors in, and resulting from, the Secretary’s disastrous foray into statutory interpretation and invalidating the Defendants’ consequently erroneous administrative actions.

Plaintiffs bring this motion on the additional and independent basis (*see* Argument at Point III, *infra*) that, even if the Buffalo Parcels were “Indian Lands,” gambling there nevertheless would be unlawful under section 20 of IGRA, 25 U.S.C. §2719, which prohibits gambling on Indian lands acquired after the enactment of IGRA in 1988. Here again, in reviewing the Compact, the Secretary misinterpreted the SNSA, as a result of which she determined that, whatever Buffalo land the SNI might elect to purchase, once acquired the land would come within the ambit of one of the exceptions under section 20, specifically the exception for “lands ... taken into trust as part of a settlement of a land claim.”

As discussed at length below, this exception does not apply to the Buffalo Parcels. The Buffalo Parcels were neither taken into trust nor received in settlement of a land claim. Accordingly, gambling on the Buffalo Parcels is prohibited under the express provisions of section 20 of IGRA, as well as established principles of analysis within the Department itself.

### **THE STANDARD OF REVIEW**

Summary judgment of a claim or defense will be granted when the moving party demonstrates that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a) and (b); *Celotex Corp. v. Catrett*, 477 U.S. 317, 331, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Rattner v. Netburn*, 930 F.2d 204, 209 (2d Cir.1991).

“[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of material fact.” *Anderson, supra*, at 247-48, 106 S.Ct. 2505, 2510.

In the context of an action brought pursuant to the Administrative Procedure Act (“APA”), the Supreme Court has stated that the proper standard of review is determined by §706 of the Administrative Procedure Act, 5 U.S.C. §706. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413, 91 S.Ct. 814, 822, 28 L.Ed.2d 136 (1971); *see also, Schicke v. Romney*, 474 F.2d 309, 314 (2d Cir. 1973). The APA authorizes the reviewing court to “compel agency action unlawfully withheld” and to “hold unlawful and set aside agency actions, findings, and conclusions” that the Court finds to be (as Defendants’ actions here) “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §706 (1), (2)(A); *Citizens to Preserve Overton Park, supra*, 401 U.S. at 413-414, 91 S.Ct. at 822; *Schicke, supra*, 474 F.2d at 315; *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1573-75 (10th Cir. 1994), *and compare*, Plaintiffs’ Complaint at ¶¶ 62, 63, 71, 72, 73.

An agency’s action is arbitrary and capricious or otherwise not in accordance with law “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.” *Public Citizen, Inc. v. Mineta*, 340 F.3d 39, 53 (2d. Cir. 2003), quoting *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).

In order to ascertain the propriety of an agency’s action, the reviewing court must have before

it the full administrative record which was before the agency and on which the agency determination was based. *Citizens to Preserve Overton Park*, 401 U.S. at 419, 91 S.Ct. 814; *see also*, *Colorado Wild, Heartwood v. United States Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006) (“...the grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record.”); *Olenhouse*, 42 F.3d at 1575 (“In addition to requiring a reasoned basis for agency action, the ‘arbitrary or capricious’ standard requires an agency’s action to be supported by the facts in the record.”). Agency decisions which are unsupported by substantial evidence are arbitrary and capricious. *Miller v. United Welfare Fund*, 72 F.3d 1066, 1070 (2d Cir.1995); *see also*, *Pennaco Energy, Inc. v. United States Dep’t of Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004) (agency action will be set aside as arbitrary unless it is supported by “substantial evidence” in the administrative record). “After-the-fact rationalization by counsel in briefs or argument will not cure noncompliance by the agency with these principles.” *Colorado Wild, Heartwood, supra*, 435 F.3d at 1213.

Although the APA’s “arbitrary and capricious or otherwise not in accordance with law” standard is sometimes considered to be a deferential one, *see, e.g.*, *Utahns for Better Transp. v. United States Dep’t of Transp.*, 305 F.3d 1152, 1164 (10th Cir. 2002), *modified*, 319 F.3d 1207 (10th Cir. 2003) such deference is “not unfettered nor always due,” *see Cherokee Nation of Okla. v. Norton*, 389 F.3d 1074, 1078 (10th Cir. 2004). To the contrary, the Court is required to “engage in ... a probing, in-depth review.” *Citizens to Preserve Overton Park*, 401 U.S. at 415, 91 S.Ct. at 823; *Merritt Parkway Conservancy v. Mineta*, 424 F.Supp.2d 396, 399 (D.Conn. 2006); *see also*, *Cliffs Synfuel Corp. v. Norton*, 291 F.3d 1250, 1257 (10th Cir. 2002) (“The duty of a court reviewing agency action under the ‘arbitrary or capricious’ standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the

decision made.”). However, no deference is due when an agency’s interpretation is plainly erroneous or inconsistent with the law. *See, e.g., South Dakota v. U.S. Dept. of Interior*, 423 F.3d 790, 799 (8th Cir. 2005), *rehearing and rehearing en banc denied* (2006).

In addition, when the issue is one of statutory interpretation, the court should review any such interpretation under a *de novo* standard. *See, e.g., Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 719 (9th Cir. 2003); *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Attorney for the Western District of Michigan*, 369 F.3d 960, 966 at fn. 3 (6th Cir. 2004); *see also, Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir.1997)(“IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court.”). The Court interprets a federal statute:

“...by ascertaining the intent of Congress and by giving effect to its legislative will.” *Ariz. Appetito’s Stores, Inc. v. Paradise Vill. Inv. Co.*, 893 F.2d 216, 219 (9th Cir.1990) ““We begin, as always, with the language of the statute.” *Navajo Nation v. Dep’t of Health & Human Servs.*, 325 F.3d 1133, 1136 (9th Cir.2003) (*en banc*) (quoting *Duncan v. Walker*, 533 U.S. 167, 172, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001)). “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) (internal quotation marks omitted). “Where the language is not dispositive, we look to the congressional intent revealed in the history and purposes of the statutory scheme.” *United States v. Buckland*, 289 F.3d 558, 565 (9th Cir.2002) (*en banc*) (internal quotation marks omitted).

*Artichoke Joe’s, supra*, 353 F.3d at 720.

Such considerations are of particular importance in this case as determination of issues on this motion will, to a large extent, revolve around the Secretary’s interpretation of the SNSA: in reviewing the Compact, the Secretary, among other things, interpreted the SNSA as providing that lands acquired and held merely in “restricted fee status” under the provisions of the SNSA would

be “Indian Country” and, therefore, gambling eligible. As set forth below, in addition to the Secretary’s decision being arbitrary, capricious and otherwise not in accordance with law, her statutory interpretation is plainly erroneous.

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## **ARGUMENT**

### **I. LEGAL AND STATUTORY FRAMEWORK**

The legal analysis attendant on the disposition of Plaintiffs’ claims in this case involves several interdependent legal terms of art (discussed below), which either have been defined by statute or developed conceptually over centuries by the United States Supreme Court.

#### ***The Indian Gaming Regulatory Act***

In enacting the Indian Gaming Regulatory Act of 1988 (“IGRA”), 25 U.S.C. §§2701-2721; 18 U.S.C. §§1166-1168, Congress deemed necessary 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” to address concerns regarding widespread Indian gambling. 25 U.S.C. §2702(3).

IGRA “does not authorize gambling on Indian reservations, but, rather, establishes regulatory schemes for gaming which is otherwise legal under existing law.” 134th Cong. Rec., 100th Cong., 2nd Sess.-1988; September 26, 1988, House consideration of S. 555, p. H8146, 8153.

This act should not be construed as a departure from established principles of the legal relationship between the tribes and the United States. Instead, this law should be considered within the line of developed case law extending over a century and a half by the Supreme Court, including the basic principles set forth in the *Cabazon* decision.<sup>1</sup>

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<sup>1</sup> In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209, 107 S.Ct. (continued...)

134th Cong. Rec., 100th Cong., 2nd Sess.-1988; September 15, 1988, Senate consideration and passage of of S. 555, p. S12643, 12654.

IGRA allocates jurisdiction among the tribes, the federal government, and the states by creating three classes of Indian gaming, each of which is subject to a different degree of regulation. *See* 25 U.S.C. §2710. Class III gaming, including Casino gambling, receives the highest level of regulation.<sup>2</sup> The statute provides:

- (d)(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) [including all of the requirements for class II gaming] 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.

25 U.S.C. §2710(d). By instituting the ordinance and compact requirements, IGRA balances the interests of sovereign Indian Nations and sovereign states, which would otherwise have jurisdiction

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<sup>1</sup>(...continued)

1083, 94 L.Ed.2d 244 (1987), the court held that individual states could not exercise jurisdiction over Indian gambling on a Federally recognized tribe's reservation or sovereign tribal territory, "if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal and public policy, prohibit such gaming activity." 25 U.S.C. §2701(5).

<sup>2</sup> Examples of Class III gaming, set forth at 25 C.F.R. §502.4, include house banking games like blackjack, slot machines, roulette, and sports betting. It is this activity, among others, the SNI proposes to conduct on the Buffalo Parcels.

over gambling activities. *See Artichoke Joe’s California Grand Casino v. Norton*, 353 F.3d 712, 716 (9th Cir. 2003), *cert. denied*, 543 U.S. 815, 125 S.Ct. 51, 160 L.Ed.2d 20 (2004).

25 U.S.C. §2710(d)(1)(A)(iii) requires the submission of a tribal gaming ordinance for approval by the Chairman of the National Indian Gaming Commission (“NIGC”). Class III gambling also must be conducted in conformance with a gaming compact that is “in effect.” 25 U.S.C. §2710(d)(1)(C).

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.

25 U.S.C. §2710(d)(3)(A) (Emphasis added). The Secretary of the Interior “is authorized to approve a Tribal-State Compact entered into between an Indian tribe and a state governing gaming *on Indian lands* of such Indian tribe.” 25 U.S.C. §2710(d)(8)(A) (emphasis added).<sup>3</sup> If the Secretary neither approves nor disapproves a compact within 45 days after it is submitted, it is deemed approved by the Secretary, “but only to the extent the compact is consistent with the provisions of this chapter.” 25 U.S.C. §2710(d)(8)(C).

### **“Indian Lands” Defined**

Class III gambling pursuant to 25 U.S.C. §2710(d) is lawful only on “Indian lands” as defined

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<sup>3</sup> These provisions presuppose the existence of Indian lands over which the tribe has jurisdiction. *See Match-E-Be-Nash-She-Wish Band of Pattawatomis Indians v. Engler*, 304 F.3d 616, 618 (6th Cir. 2002) (“[h]aving jurisdiction over land for the casino is a condition precedent to negotiations and federal jurisdiction.... The Act thus establishes a jurisdictional prerequisite to federal court relief—that the tribe own “Indian lands” and that it plan to conduct the gaming on those lands.” Here, the Secretary approved the SNI Compact before a Buffalo gambling site was ever identified. The compacting parties and their attorneys attempted to accomplish this by urging and exploiting a misreading of the Seneca Settlement Act. *See* BIA AR 174-175 (Document 26, Part 2), BIA AR 191-193 (Document 26, Part 8), BIA AR 431-456 (Document 27, Part 8).

in Section 4 of IGRA, 25 U.S.C. §2703(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.*

(Emphasis added.) As used in this section, lands “held in trust by the United States” and lands held in “restricted fee” by an Indian Tribe are defined under DOI regulations (25 C.F.R. §151.2) as follows:

(d) Trust land or land in trust status means land the title to which is held in trust by the United States for an individual Indian or a tribe.

(e) Restricted land or land in restricted status means 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.

#### ***“Exercises Governmental Power”***

As recognized in 25 U.S.C. §2710(d)(3)(C), quoted above, an Indian nation may “exercise[ ] governmental power” over lands within the meaning 25 U.S.C. §2703(4)(B) only if the Indian nation possesses legal jurisdiction over such lands:

“Tribal jurisdiction” is a threshold requirement to the exercise of governmental power. *See, e.g., Rhode Island v. Narragansett Indian Tribe*, 19 F. 3d 685, 701-703 (1st Cir. 1994), *cert. denied*, 513 U.S. 919 (1994), superseded by statute as stated in *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998) (In addition to having jurisdiction a tribe must exercise governmental power in order to trigger [IGRA]); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217-18 (D. Kan. 1998) (Miami II) (A tribe must have jurisdiction in order to be able to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) (Miami I) (the NIGC

implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land.); *State ex. rel. Graves v. United States*, 86 F. Supp 2d 1094 (D. Kan. 2000), *aff'd and remanded*, *Kansas v. United States*, 249 F. 3d 1213 (10th Cir. 2001). This interpretation is consistent with IGRA's language limiting the applicability of its key provisions to "[a]ny Indian tribe having jurisdiction over Indian lands," or to "Indian lands within such tribe's jurisdiction." 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1)), [2703(7)(D), and 2713(d)]; *see also Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701-703 (1st Cir. 1994), *cert. denied* 513 U.S. 919 (1994).

NIGC Office of General Counsel ("OGC"), November 15, 2005, Indian Lands determination, opinion regarding proposed gaming site, Kiowa Indian Tribe of Oklahoma. *See* Indian Land Opinions at <http://www.nigc.gov/ReadingRoom>.

### ***"Indian Country" Defined***

Jurisdiction is coextensive with the inherent sovereign authority that Indian tribes possess over their members and territories within the limits of "Indian Country." *Oklahoma Tap Comm. v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). As used in IGRA, "Indian Lands" is a legal designation that falls within the broader category of "Indian Country." 18 U.S.C. §1151, which is a codification of existing Supreme Court precedent, defines "Indian Country" as follows:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian Country", as used in this chapter, means (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.

“Primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.” *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527, fn. 1, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998) “Indian Country” status arises only through *specific* affirmative action by the Federal Government; it does not happen automatically, or by default, or through any unilateral action by an Indian tribe. *Buzzard v. Oklahoma Tax Comm.*, 992 F.2d 1073 (10th Cir. 1993), *cert. denied sub nom., United Keetoowah Band of Cherokee Indians v. Oklahoma Tax Comm.*, 510 U.S. 994, 114 S.Ct. 555, 126 L.Ed.2d 456 (1993).<sup>4</sup>

In sum, tribal jurisdiction over land is a prerequisite to the exercise of governmental power on that land. The source of tribal jurisdiction is the inherent sovereign authority that Indian tribes possess in Indian Country. Thus, since the exercise of governmental power is a component of the definition of “Indian Lands” under IGRA, then by definition Indian Country status--or sovereignty over the land--is an essential prerequisite for “Indian Lands.” Lands that do not have Indian Country status are therefore ineligible for Indian gambling activities regulated by IGRA.

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<sup>4</sup> Congress has the exclusive authority to create Indian Country. For example, land may be acquired for an Indian tribe by an Act of Congress, which may designate the legal status of such land as Indian Country, thereby divesting the state in which the land is located of jurisdiction. Congress has delegated limited authority to the Secretary of the Interior, pursuant to 25 U.S.C. §465, to acquire land and to hold such land in trust--in the name of the United States--for the purpose of providing land for Indians. Thus, subject to applicable regulations (*see* 25 C.F.R. §151.1 *et seq.*), the Secretary also can create Indian Country, but only according to established regulations promulgated pursuant to §465.

In the case at bar, the Secretary interpreted a provision of the SNSA as the Congressional creation of Indian Country. The Secretary did not purport to use the authority delegated by Congress to her office to create Indian Country and did not follow any established procedures under law and regulations necessary for a determination that the SNI’s land acquisition could attain Indian Country status. Indeed, the Secretary indicated that the Congressional mandate of the SNSA gave her no authority to make a Departmental decision in that regard.

### *The Seneca Nation Settlement Act of 1990*

The Seneca Nation began leasing its Cattaraugus County reservation lands in the mid-nineteenth century, a major part of which became the City of Salamanca and the “Congressional Villages.”<sup>5</sup> H. R. 5367, Seneca Nation Settlement Act of 1990, *Hearing before the Committee on Interior and Insular Affairs*, 101st Cong., 2nd Sess. (1990) at pp. 17-18. Following early challenges to the validity of some of the leases, Congress confirmed the existing leases, first for a twelve-year period in 1875, and then for a 99-year period in 1890. *Id.* at 18-19. The 99-year leases were due to expire on February 19, 1991. This held disastrous potential for both public and private lessees in Salamanca and the Congressional Villages. In order to facilitate the negotiation of new leases, Congress enacted the SNSA (*Id.* at 20-23). Under the SNSA, the SNI received a total of \$60 million from the United States and New York State (25 U.S.C. §1774d) that it could use after the SNI executed new leases. While some of the money was dedicated to specific purposes, such as governmental administration and housing, the SNI had discretion to use the bulk of the money as it saw fit. 25 U.S.C. §1774e. Although the SNI did have the option to purchase land, no land was designated for purchase under the SNSA, and the Nation was not required to spend it on real estate.<sup>6</sup>

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<sup>5</sup> “[T]he term ‘congressional villages’ means the villages of Carrollton, Great Valley, and Vandalia in the State of New York.” 25 U.S.C. §1774a(10).

<sup>6</sup> *See, e.g.*, 25 U.S.C. §1774d(b)(1) (the \$30,000,000 provided by the federal government is 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 its Constitution and laws). Dennis Lay, then-President of the SNI, represented to Congress that, the Nation anticipated “placement of the great majority of the Salamanca monies in a broadly diversified investment fund, specialized in holding funds for the long term benefit of the investor.” *See* Supplemental Statement of Dennis Lay, President, Seneca Nation concerning the Nation’s budget process and its planned use and management of settlement funds, as incorporated in S. Rept. 101-511, *Providing for the Renegotiation of Certain Leases of the Seneca Nation, and for Other Purposes*, 101st Congress (continued...)

Pursuant to 25 U.S.C. §1774f, “Miscellaneous provisions,” in the event the SNI did use SNSA funds to purchase land, the following provision, entitled “Land acquisition,” would govern:

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 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 should not be subject to the provisions of section 2116 of the Revised Statutes (25 U.S.C. 177),<sup>7</sup> such lands shall be subject to the provisions of that [section] and shall be held in restricted fee status by the Seneca Nation. *Based on the proximity of the land acquired to the Seneca Nation's reservations, land acquired may become a part of and expand the boundaries of the Allegany Reservation, the Cattaraugus Reservation, or the Oil Spring Reservation in accordance with the procedures established by the Secretary for this purpose.*

25 U.S.C. §1774f(c) (emphasis added). This section makes an explicit distinction between land acquisitions that may be held in “restricted fee status” and land that may be eligible “to become a part of and expand the boundaries of” existing SNI reservations; and it explicitly establishes distinct conditions precedent and processes by which land acquisitions will either remain in restricted fee status or might actually become reservation land.

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<sup>6</sup>(...continued)

(1990). Interest earned on the invested funds could then be used to further the long term objectives of the Nation, which included: providing care for the elderly; funding education and youth programs; economic development and job creation; environmental programs to protect the Nation’s land, water, and air; possible land acquisition and the creation of substance abuse programs. *Id.*

<sup>7</sup> 25 U.S.C. §177 (the “Trade and Intercourse Act”) provides that “[n]o 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.”

Specifically, section 1774f(c) provides that the SNI may use SNSA funds to buy land “**within its aboriginal area in the State or situated within or near proximity to former reservation land.**” This provision of the Act states only that such land “shall be held in restricted fee status” (a status that makes such lands merely inalienable without federal government approval and exempt from State and local property taxes, but not sovereign reservation land), provided certain other conditions are met: namely, that State and local governments be notified and given 30 days to “comment on the impact of the removal of such lands from real property tax rolls;” and that the Secretary does not (within 30 days), based on the impact of the property tax exemption, deny the SNI land the protection of the Trade and Intercourse Act. On its face, this provision does not confer jurisdiction or sovereignty.

Section 1774f(c) provides further that the SNI may acquire land eligible to be added to its existing reservations. The geographic condition precedent to reservation-eligibility, however, is far more restricted than for mere restricted fee-eligibility. The eligibility of such land depends on “**the proximity of the land acquired to the Seneca Nation's reservations.**” The ‘proximity’ condition here is keyed to the SNI’s present reservations and is limited by the express context of the purpose of the provision, namely, to “*expand* the boundaries” of its existing reservations. If the land is sufficiently proximate, only then may it become new reservation land, and only “**in accordance with the procedures established by the Secretary for that purpose.**”<sup>8</sup> If the land acquired becomes

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<sup>8</sup> The only procedures by which the Secretary may create Indian Country under the authority delegated to her office by Congress are set forth in the regulations promulgated by the Secretary under 25 U.S.C. §465 (*see* 25 C.F.R. §151.1 *et seq.*). The Buffalo Parcels are not sufficiently proximate to current reservation lands to qualify them for the SNSA reservation-expansion process. In any event, the SNI never sought--and the Secretary never employed--this reservation process with respect to the Buffalo Parcels, and the Secretary did not implement any (continued...)

reservation land, then it would be elevated to the status of “Indian Country” and jurisdiction over the land would become vested in the SNI.

### *Secretarial Review of the Tribal-State Gaming Compact*

In her letter, dated November 12, 2002, the Secretary stated with respect to the proposed SNI Gaming Compact: “I have decided to allow this compact to take effect without Secretarial action.”<sup>9</sup>

The Secretary “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 [SNSA].” As such, this Compact “fall[s] outside of the limited reasons in IGRA for Secretarial disapproval.” *See* BIA AR 16-17 (Document 25, Part 3).

The Secretary’s conclusion was based on her particular interpretation of the SNSA, as follows: (1) the SNSA “requires the parcels to be placed in ‘restricted fee’ status;” (2) because of their restricted fee status, “these parcels will come within the definition of ‘Indian lands’ in IGRA if the Nation exercises governmental power over them;” (3) assuming the Nation exercises such

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<sup>8</sup>(...continued)

procedures applicable to administrative creation of Indian Country. Indeed, the only geographic condition precedent the Secretary invoked in her 2002 letter was the less exacting restricted fee criteria. The Secretary stated that, “[i]n reviewing whether the proposed gaming parcels meet the Settlement Act’s requirements that the lands are ‘*situated within or near proximity to former reservation lands,*’ the Nation has provided sufficient documentation demonstrating that the exterior boundaries of the Nation’s former Buffalo Creek Reservation overlap a portion of the present day boundary of the City of Buffalo...” BIA AR 21 (Document 25, Part 3).

<sup>9</sup> The Secretary stated that she “could not affirmatively approve the compact because of the effect it is likely to have on future compacts.” The effect with which she was concerned is the proliferation of off-reservation Indian casinos: “IGRA does not envision that off-reservation gaming would become pervasive.” *See* BIA AR 17 (Document 25, Part 3).

governmental power, “the Nation will have jurisdiction over these parcels because they meet the definition of ‘Indian country’ under 18 U.S.C. §1151.”

The Secretary stated further that, based on the SNSA, “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.”<sup>10</sup> *Id.* at 21. Finally, the Secretary inferred that, because the Act contemplates the possible expansion of existing reservation lands, title to which is held by the SNI in restricted fee,<sup>11</sup> ***any newly acquired land title to which is held by the SNI in restricted fee must be accorded the same legal status as existing SNI reservation lands.***

As discussed below, the Secretary’s reasoning and interpretation of the SNSA is contrary to the plain language of the statute, is devoid of any legal rational basis, is contrary to law, and can only be characterized as subjective supposition in the extreme.

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<sup>10</sup> This is a reference to the criteria for “dependent Indian communities” (*see* p. 13, *supra*)--one of the enumerated types of Indian Country under 18 U.S.C. §1151(b)--lands that have been set aside by the Federal Government for the use of the Indians as Indian land and that are under federal superintendence. *See* Argument at Point II, *infra*. Indeed, this is the basis for Defendants’ assertion in this case that the Buffalo Parcels are Indian Country. *See* Memorandum of Points and Authorities in Support of the United States’ Motion to Dismiss (“Defendants’ Memorandum of Law”) at p. 21.

<sup>11</sup> It is not the form of title that determines whether the land is sovereign; it is the expressed intent of Congress.

By ignoring the distinction expressed by Congress in the SNSA between acquisition in restricted fee, on one hand, and the creation of reservation land, *i.e.*, sovereign Indian Country, on the other hand, the Secretary erred.

The SNI, like many other tribes in the original thirteen colonies and, for example, the Pueblos of the southwest, holds title to its original land base subject to a restraint on alienation. At issue in the SNSA, however, is the jurisdictional status of lands that may be acquired in the future.

## II. THE BUFFALO PARCELS ARE NOT “INDIAN LANDS” AND THEREFORE ARE INELIGIBLE FOR GAMBLING UNDER IGRA

The Buffalo Parcels are not part of a reservation. They are “lands title to which is held by [the SNI] subject to restriction by the United States against alienation.” Whether the Buffalo Parcels are “Indian Lands” for purposes of IGRA depends on whether the Buffalo Parcels are “lands over which [the SNI] exercises governmental power.” 25 U.S.C. §2703(4)(B). Since legal jurisdiction over the land is a prerequisite for the exercise of governmental power, and the possession of jurisdiction depends on the legal status of the land being “Indian Country,” the issue ultimately is whether the Buffalo Parcels are Indian Country.<sup>12</sup> As Plaintiffs will demonstrate, the Buffalo Parcels do not satisfy the criteria for Indian Country. Thus, the Buffalo Parcels are not land eligible as a location for gambling activities in the first instance.

Accordingly, as asserted in Plaintiffs’ first claim for violation of Sections 4 and 11(d) of IGRA, 25 U.S.C. §§2703 and 2710(d), because the Defendants’ interpretation of the SNSA as conferring “Indian Country” status automatically on the acquisition of the Buffalo Parcels by the SNI in restricted fee status is indefensible as a matter of law, and because there is no other legally cognizable basis for Defendants’ determination that the Buffalo Parcels are “Indian Country,” the

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<sup>12</sup> The Secretary herself reasoned that “the Nation will have jurisdiction over these parcels because they meet the definition of ‘Indian country’ under 18 U.S.C. §1151.” *See* BIA AR 21 (Document 25, Part 3). The Secretary stated, however, that the Buffalo Parcels, once acquired, would meet the definition of “Indian Country” **because** “it is clear that lands placed in restricted status under the [“Land acquisition” provision of the SNSA] are set aside for the use of the Nation, and that such restricted status contemplated federal superintendence over these lands,” thereby meeting the criteria for a “dependent Indian community.” 18 U.S.C. §1151(b). *Id.* Plaintiffs will show that the Buffalo Parcels are not a “dependent Indian community” (*see, infra*, at pp. 27-32) and, of course, the SNSA on its face does not equate “restricted fee” land with “reservation” land or Indian Country. On the contrary, by separating these two provisions and providing separate procedures for their determination, Congressional intent is clear that the mere “restricted fee status” of the land does not give it legal status of “reservation” land.

Buffalo Parcels are **not** “Indian lands” within the meaning of IGRA. Therefore, Plaintiffs are entitled to summary judgment on their first claim against Defendants.

**A. The “Land Acquisition” Provision of the SNSA Merely Conferred on the Buffalo Parcels Restricted Fee Status, Not “Indian Country” Status<sup>13</sup>**

In the event the SNI choose to purchase land with SNSA funds, the “land acquisition” provision of 25 U.S.C. §1774f (c) governs.<sup>14</sup> This section consists of two parts, referred to herein as the “Restricted Fee Provision” and the “Reservation Provision.”

Pursuant to the Restricted Fee Provision, once certain conditions are met, the legal status of the acquired land is determined by operation of law according to the express terms of the statute: “such lands...shall be held in restricted fee status by the Nation.” *Id.*

Pursuant to the Reservation Provision, and because its expressed premise is ‘expansion’ of current reservations, the eligibility of acquired land to become reservation land is based on its proximity to existing SNI reservations. The ultimate legal status of such land is to be determined by the Secretary “in accordance with the procedures established by the Secretary for this purpose.”

In other words, if the SNI purchases land with SNSA funds for the purpose of “expand[ing] the boundaries” of its existing reservations, the process by which such land may become sovereign

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<sup>13</sup> Plaintiffs assume for the sake of argument that the Buffalo Parcels were in fact acquired using funds the SNI received through the SNSA and that the “restricted fee status” of the land attached pursuant to the land acquisition provision of the SNSA.

<sup>14</sup> As already mentioned, the “Land acquisition” provision of the SNSA is expressly permissive, that is, land acquisition is optional. No specific land is identified by the SNSA for purchase or potential purchase; and no title to land was acquired, traded, substituted or otherwise transferred under the Act. Indeed, the legislative history shows that no particular purchases were even contemplated by the SNI at the time of enactment.

Indian Country is not automatic under the SNSA. Rather, Congress directed that the Reservation Provision process be conducted through the Department of the Interior using “procedures established by the Secretary for this purpose,” and the only established procedures are the regulations promulgated under 25 U.S.C. §465. Thus, any potential creation of Indian Country must take place through the Secretary.<sup>15</sup>

Congress did not issue a directive for the automatic creation of Indian Country under the Restricted Fee Provision. On the contrary, the statute explicitly dictates the legal status of land acquired through that Provision: “restricted fee status.” As demonstrated below, under Federal law, the legal status of land held by an Indian tribe in restricted fee does not rise to the level of Indian Country, without “some explicit action by Congress (or the Executive, acting under delegated authority).” *See Alaska v. Native Village of Venetie*, 522 U.S. at 531, fn. 6. Nothing in the SNSA or the circumstances of its enactment suggest that Congress did not intend to preserve and follow this established legal principle when drafting the statute. Indeed, both its expressed language--juxtaposing ‘restricted fee status’ and ‘reservation land’--and its legislative history<sup>16</sup> demonstrate the opposite: Congress preserved the distinction. Contrary to the Secretary’s interpretation, the Restricted Fee Provision of the SNSA simply does not constitute “explicit action” by Congress to create Indian Country.

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<sup>15</sup> There is no dispute that Defendants’ determination (in the context of reviewing the Compact) that the Buffalo Parcels are “Indian Country” and therefore “Indian lands” for purposes of IGRA was based merely on the Restricted Fee Provision process--not the Reservation Provision process--of the SNSA. Indeed, Defendants barely acknowledge the Reservation Provision exists. They make no mention of it in their discussion of the SNSA in the “Statutory Background” section of their Memorandum of Law (pp.3-6) and omit it entirely from the otherwise complete quotation of the SNSA land acquisition provision. *See* Defendants’ Memorandum of Law at pp. 3-4.

<sup>16</sup> *See* Exhibits C, D and E to the Finnerty Affidavit.

**1. “Restricted Fee Status” Is Not “Indian Country” Status**

The distinction between lands that are held by an Indian nation subject to a restraint on alienation, on one hand, and sovereign “Indian Country,” on the other hand, cannot be overstated. The sole *legal effect* of restricted fee status is that title can be transferred only with federal approval, and the land itself is not subject to State or local property taxation. *See, e.g., Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 at 114, 118 S.Ct. 1904, 141 L.Ed.2d 90 (1998).

In contrast, the *legal effect* of “Indian Country” status is that the State is divested of *all* inherent sovereignty over the lands in question (not just its authority to levy property taxes) and the lands become subject to the primary jurisdiction of the federal and Indian governments. *See, e.g., Buzzard v. Oklahoma Tax Comm’n, supra*, 992 F.2d at 1077, citing *Indian Country, U.S.A., Inc. v. State of Okl. ex rel. Oklahoma Tax Comm’n*, 829 F.2d 967, 973 (10th Cir. 1987) (“[w]ithin Indian country the federal and tribal governments have exclusive jurisdiction over the conduct of Indians and interests in Indian property.”)

As previously indicated, “Indian Country” status arises only through specific affirmative action by the Federal Government (either directly by Congress or through the authority delegated to the Secretary under 25 U.S.C. §465); it does not happen automatically, or by default, or through any unilateral action by an Indian tribe. *Buzzard v. Oklahoma Tax Comm.*, 992 F.2d 1073;<sup>17</sup> *see Alaska*

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<sup>17</sup> The NIGC Office of General Counsel (“OGC”) issued an opinion letter regarding the lands involved in the *Buzzard* case to the United Keetoowah Band of Cherokee Indians of Oklahoma on September 29, 2000. The OGC agreed with the Tenth Circuit that the tribe lacked lawful jurisdiction over the lands, which were held in fee by the tribe, regardless of the activities in which the tribe engaged there and, therefore, that the lands were not Indian Country and not eligible  
(continued...)

*v. Native Village of Venetie, supra*, 522 U.S. at 531, fn. 5. (the argument that “Indian country exists wherever land is owned by a federally recognized tribe ... ignores our Indian country precedents, which indicate both that the Federal Government must take some action setting apart the land for the use of the Indians ‘as such,’ and that it is *the land in question*, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government”).

**2.     *The “Land Acquisition” Provision of the  
SNSA Recognizes and Preserves this  
Distinction***

The Restricted Fee Provision of the SNSA allows the SNI to buy land anywhere “**within its aboriginal area in the State or situated within or near proximity to former reservation land.**” This description covers an extensive geographic area of New York State. Provided the Secretary does not find the exemption from State and local property taxes overly burdensome on the affected municipalities, the acquired land “shall be held in restricted fee status.”<sup>18</sup>

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<sup>17</sup>(...continued)  
for gaming under IGRA.

<sup>18</sup> In fact, as originally drafted, section 8(c) of the SNSA contained a different Restricted Fee Provision, which stated, “[a]ny land acquired by the Seneca Nation with funds appropriated pursuant to this Act shall be held in restricted fee status by the Seneca Nation, and shall be subject to section 2116 of the revised statutes. (25 U.S.C. 177).” (Emphasis added.) *See To Provide for the Renegotiation of Certain Leases of the Seneca Nation: Hearing before the Committee on Insular and Interior Affairs, House of Representatives on H.R. 5367, Seneca Nation Settlement Act of 1990*, 101st Congress, 2nd Session (101-63), at p. 14. This provision met with strong opposition from members of the community, local governmental entities, and even the Governor’s office, for the obvious reason that, as worded, **any** land purchased with SNSA funds, regardless of its proximity to the Seneca reservations, would be exempt from local and state taxes. *Id.* at pp. 48, 53.

In response, Congress imposed a geographic limitation, afforded State and local governments an opportunity to comment on the economic effect of the property tax exemption for restricted fee lands, and reserved to the Secretary the ability to obviate the impact of the tax exemption, thereby expressly **narrowing** the effect of the provision. Against this background, the Secretary’s  
(continued...)

In contrast, land eligible under the Reservation Provision is extremely limited both by **“the proximity of the land acquired to the Seneca Nation's reservations”** within the context of current reservation expansion and by requiring compliance with the **“procedures established by the Secretary”** that determine whether the land will ultimately attain the legal status of sovereign reservation land.<sup>19</sup>

This section thus recognizes and preserves the distinction between “restricted fee status” and “Indian Country” status. The Restricted Fee Provision’s liberal geographic eligibility standard is consistent with and indicative of this Provision’s express narrow focus on property tax effects and is appropriate to the legal reality that property tax rolls are the only State and local government interest impacted by the acquisition of lands in restricted fee status. This limited effect contrasts sharply with the potential effect of the Reservation Provision, which would extinguish the power, authority and jurisdiction of one sovereign--the State of New York and its affected political subdivisions (here, Erie County and Buffalo)--and replace it with a new sovereign, the SNI. The Reservation Provision process requires the Secretary to consider the same panoply of issues as required by land into trust applications under 25 U.S.C. §465, which include consideration of the multiple impacts that may result from a transfer of jurisdiction from one sovereign to another and

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<sup>18</sup>(...continued)

interpretation of the Restricted Fee Provision as not only making the land tax-exempt but also as automatically divesting New York State of its sovereign jurisdiction and transferring that sovereign authority to the SNI, without any administrative process whatsoever, is patently outrageous and insupportable. It expands what was clearly intended to be a restrictive provision.

<sup>19</sup> Thus, on its face by contextualizing its proximity test to current reservations in the sense of *expanding* them, the SNSA contemplates a geographic requirement far closer to contiguity with current reservations than the more liberal geographic qualification for lands to be held, not as reservation land, but in mere restricted fee.

the uses to which such sovereignty-divested lands might be put under its new “government.”<sup>20</sup> This divestment of state sovereignty and jurisdiction is a momentous transformation traditionally attended only by the most laborious, studious and exacting inquiries and procedures.

In both the Restricted Fee and the Reservation Provisions, then, the scope of the inquiry contemplated by the statute is commensurate with the legal effect of each provision. The same is true with respect to the nature of the Secretarial action required under each provision. The Restricted Fee Provision process requires only a “non-action” on the part of the Secretary to effect restricted fee status for the lands, which is subject to a 30-day time limit. The Reservation Provision process, on the other hand, requires the affirmative administrative action necessary for the creation of Indian Country, which would include compliance with both National Environmental Policy Act (“NEPA”) and National Historic Preservation Act (“NHPA”) (25 C.F.R. §§151.10(h); 151.11(a)), and is not subject to a time limitation.

In short, the Restricted Fee Provision is entirely consistent with a Congressional intent merely to create and protect a property interest as an economic asset, while the conditions precedent and processes required by the Reservation Provision are entirely consistent with a transfer of sovereignty. Only the latter can create “Indian Country” and thereby “Indian lands” for purposes of IGRA.

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<sup>20</sup> 25 C.F.R. §151.10 requires consideration of such things as the tribe’s need for additional land, the purpose for which the land will be used, the impact of removal of the land from property tax rolls, jurisdictional problems and potential conflicts of land use, the additional burdens and responsibilities to be assumed by the Bureau of Indian Affairs, and the Secretary’s compliance with NEPA. Off-reservation acquisitions (25 C.F.R. §151.11) require not only consideration of all the criteria in section 151.10 (except subsection (d), which pertains only to acquisition of land by individual Indians) but also require greater scrutiny of the “tribe’s justification of anticipated benefits from the acquisition” and the concerns of state and local governments with respect to potential impact of regulatory jurisdiction, real property taxes and special assessments as the distance from the land to the boundaries of the tribe’s reservation increases.

**B. The Restricted Fee Provision of the SNSA Did Not Create A Dependent Indian Community, thus Defendants' Determination that the Restricted Fee Status of the Buffalo Parcels Automatically Conferred "Indian Country" Status is Erroneous**

The core error underlying the Secretary's decision to allow the Compact to be approved is the assertion that "Indian Country" status would attach automatically, by operation of law, to any lands acquired by the SNI under the Restricted Fee Provision of the SNSA, because the lands were intended by Congress to constitute a "dependent Indian community." BIA AR 21 (Document 25, Part 3). There is no rational basis in either the SNSA or the law governing the creation and recognition of "Indian Country" for that interpretation of the Restricted Fee Provision.<sup>21</sup> Indeed, it is contrary to all established law and incompatible with a legitimate construction of the SNSA.

The statutory definition of "Indian Country" includes reservations, dependent Indian communities, and allotments. 18 U.S.C. §1151. It is undisputed that the Buffalo Parcels are neither "within the limits of any Indian reservation" nor "Indian allotments," thus whether they are "Indian Country" depends on whether they fall within the "dependent Indian communities" component of the statute. *Alaska v. Native Village of Venetie*, 522 U.S. at 527. The Secretary identified this as the basis for her determination when she stated that, under the terms of the SNSA, "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." In their Motion to Dismiss, Defendants concede that this is the definitive question for the "Indian lands" issue. *See* Defendants' Memorandum of Law at p. 21 (proper inquiry in this case is "whether the lands

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<sup>21</sup> As already indicated, there is no dispute that the Secretary's decision that the Buffalo Parcels are "Indian Country" and therefore "Indian lands" for purposes of IGRA was not predicated on any purported compliance with the Reservation Provision process of the SNSA.

constitute a dependent Indian community or an ‘informal reservation.’”)<sup>22</sup> As discussed below, the Buffalo Parcels do not satisfy the criteria for a “dependent Indian community” under 18 U.S.C. §1151.

**1. *The Creation of “Indian Country” Requires an Explicit Act of Congress Placing Land under the Jurisdiction of the Federal Government and of the Indian Nation for Which it Is “Set Aside”***

In *Alaska v. Native Village of Venetie, supra*, 522 U.S. 520, 188 S.Ct. 948, 140 L.Ed.2d 30 (1998), the Supreme Court had its first opportunity to interpret the term “dependent Indian communities” as it appears in the statutory definition of “Indian Country” (18 U.S.C. §1151). Noting that the statute codified existing Supreme Court precedent, the court held that the term “dependent Indian Communities” refers to “a limited category of Indian lands<sup>23</sup> 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.” *Id.* at 520-521 (emphasis added) (“[o]ur holding is based on our conclusion that in enacting §1151, Congress codified these two requirements, which previously we had held necessary for a finding of ‘Indian country’ generally”). *Id.* at 527.

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<sup>22</sup> This argument is transparently inimical to the spirit and the plain language of Congress’ action in the SNSA. As a matter of law, Defendants should not be allowed to blatantly misread and effectively violate a Congressional Act in this way. The SNSA contemplates two options, restricted fee status or reservation land. The SNI chose one and rejected the other. To assert, as has the Secretary and now her counsel, that the land assumed the status of Indian Country as an “informal reservation” writes Congress’ expressed intent out of its legislation. Neither the Secretary nor the SNI had the right or the authority to in effect legislate a third option.

<sup>23</sup> It should be noted that the phrase “Indian lands” as used here by the *Venetie* Court does not mean the same as the defined term “Indian lands” for purposes of IGRA.

The federal set-aside requirement both reflects the fact that “some *explicit* action by Congress (or the Executive, acting under delegated authority) must be taken to create or recognize Indian country” and “ensures that the land in question is occupied by an Indian Community.” *Id.* at 531 (emphasis added). The federal superintendence requirement “guarantees that the Indian community is sufficiently ‘dependent’ on the Federal Government and that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question.” *Id.*

A dependent “community” is sometimes referred to as an “informal reservation” because it is inhabited by Indian tribal members. Relying on *U.S. v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938), the seminal precedent regarding the status of dependent Indian communities, the *Venetie* Court noted that an Indian community, similar to an Indian reservation generally, is set aside for the use of the Indians “as such,” and “it is *the land in question*, and not merely the Indian tribe inhabiting it that must be under the superintendence of the federal government.” *Id.* at 529, 531 fn. 5 (emphasis in original). The *Venetie* court emphasized that “the federal set-aside requirement ensures that the land in question is occupied by an ‘Indian community’”. *Id.* at 531.

Nothing in the SNSA Restricted Fee Provision reflects a specific intent to set aside land for the SNI’s use as an “informal reservation.” Congress merely allowed that, subject to a simple process, the SNI could acquire land as a protected economic asset, exempt from property taxes by virtue of a restraint on alienation. Nothing more was authorized by the statute. Congress was silent as to the SNI’s use of such lands as “Indian lands,” as a place upon which to locate an Indian **community**--a place where people live. In contrast, the Reservation Provision offered a vehicle for the SNI to expand the area in which its community of people resides, a means to create new Indian

Country, if the SNI elected to pursue that goal. Clearly, the SNI did not purchase the Buffalo Parcels with that goal in mind. That land was purchased for one reason only, to build a casino, not to enlarge the Seneca Nation community.

**2. *The Restricted Fee Status of the Buffalo Parcels Does Not, Without More, Make Them “Set Aside” or “Under the Superintendence of the Federal Government”***

There is no legal authority for the proposition that land held by an Indian tribe in restricted fee status is, by definition, “set aside” by the federal government under its “superintendence” and thus “Indian Country.” In fact, the law is to the contrary. As the court held in *Buzzard*, 992 F.2d at 1076, while a restriction against alienation may indicate the government’s “desire to protect [a tribe] from unfair dispositions of its land,” it does not indicate that the federal government either set aside the land for use by Indians or placed the land under federal superintendence. Moreover, whether the restriction against alienation arises by operation of law or otherwise is irrelevant and in no way alters the fact that such a restriction does not satisfy the criteria for Indian Country. *Id.* at 1077.

In *Buzzard*, the court explained why restricted fee status, without more, lacks the “explicit action” of the Federal government indicative of an intention to set aside land and create Indian Country by contrasting the manner in which land is acquired by the Secretary for tribes and held in trust by the United States for the benefit of Indian tribes:

[T]rust land is 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, 25 C.F.R. §151.9 (1992), who must consider, among other things, the Indian’s need for the land, and the purposes for which the land will be used, *id.* §151.10(c). ... In addition, before agreeing to acquire trust land, the Secretary must consider several factors including the authority for the transactions, *id.* §151.10(a), the impact on the state resulting from the removal of

the land from the tax rolls, *id.* §151.10(3), and jurisdictional problems that might arise, *id.* §151.10(f). These requirements show that, when the federal government agrees to hold land in trust, it is prepared to exert jurisdiction over the land.

*Id.*, citing *U.S. v. McGowan*, 302 U.S. 535.

Congress delegated its authority to create Indian Country to the Secretary of the Interior in 25 U.S.C. §465, under which the Secretary may take lands into trust and, under § 467, proclaim new Indian reservation lands. No such general delegation of Congressional authority exists for lands acquired through direct purchase by Indians and held in restricted fee status. Unlike lands that are subject to the Secretary’s Indian Country-creating review process, lands in restricted fee status generally are not subject to any process of review. Individual Indians or tribes can freely purchase land like anyone else--but regardless of whether the land is then freely alienable or subject to a restriction,<sup>24</sup> the acquisition itself is a unilateral action that in no way involves any explicit action on the part of Congress or the Secretary, and no unilateral action of an Indian or tribe can transform that land into Indian Country. *Buzzard, supra*, 992 F.2d at 1076. The creation of Indian Country requires “explicit action” evincing an intent by the United States to impose new sovereign authority over the land.

There is simply no factual or legal basis for the assertion that the Buffalo Parcels constitute a “dependent Indian community.” Nothing in the SNSA suggests Congressional action setting aside those lands for the use of the SNI as Indian land or placing the land under the superintendence of the Federal government. The restricted fee status of the land in itself demonstrates neither that the

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<sup>24</sup> As indicated above, by definition (25 C.F.R. §151.2(e)), the restriction against alienation of Indian-owned land arises either “because of limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations.”

lands have been “set aside” by the Federal government for the use of the SNI as Indian land nor that they have been placed under federal superintendence. *Id.* Thus, there is no basis for the assertion that the Buffalo Parcels were set aside by the Federal government for the use of the SNI as Indian land and placed under Federal superintendence.

**3. *Because the Restricted Fee Provision of the SNSA Evinces No Congressional Intent to Create “Indian Country,” Defendants’ Determination That Acquisition of the Buffalo Parcels Resulted in the Automatic Transfer of Jurisdiction from the State of New York to the SNI Is Without Any Rational Basis And Is Contrary to Law***

To the extent that the Defendants’ misinterpretation of the SNSA is the result of attempting to ascertain the intent of Congress, it is plain that the intent of the “Land acquisition” provision of the SNSA is to establish two distinct processes, each requiring distinct conditions precedent, and each resulting in land having a distinct legal status. Any other construction—including the Secretary’s construction in this case—renders the Reservation Provision entirely superfluous and violates a cardinal principle of statutory construction. As the Supreme Court noted in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979), “[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used,” citing *United States v. Menasche*, 348 U.S. 528, 538-539, 75 S.Ct. 513, 519-520, 99 L.Ed. 615 (1955). If sovereignty attached automatically to any land acquired under the Restricted Fee Provision, the Reservation Provision, which is specifically designed to provide a mechanism for the creation of Indian Country, would serve no purpose. Congressional intent cannot be ascertained by ignoring the law or, as the Secretary did, by reading Congress’ expressed language out of the statute.

Moreover, as explained in detail at Point II.A. above, the Restricted Fee Provision itself is devoid of any express intention to create (or to authorize the creation of) “Indian Country.” There is no mention of “Indian Country,” or of sovereignty, or of the SNI assuming jurisdiction over the lands, or of divesting the State and its political subdivisions of *their* jurisdiction in the context of a restricted fee acquisition, or of a right of these sovereigns to comment on or object to the divestiture of their power and authority. Second, the Restricted Fee Provision contains no mention of procedures, provisions or considerations from which the intent to *create Indian Country automatically upon the acquisition of lands in restricted fee* could reasonably be inferred. There is no opportunity, for example, for State and local officials to comment on the impacts of the removal of the lands in question from State and local jurisdiction. Third, the Reservation Provision, which includes both the explicit statement that the lands may expand reservation boundaries and references procedures that are consistent with that purpose, establishes how Congress intended to create Indian Country on land acquired with SNSA funds. The expression of two separate land-treatment processes and effects manifested Congress’ intent that mere restricted fee status would not have the Indian Country effect the Defendants now assert and to which the SNI pretends in their current activities on the Buffalo Parcels, and the Reservation Process has never been requested or undertaken.

**C. Plaintiffs Are Entitled to Summary Judgment on Their First Cause of Action**

The sole basis articulated by the Defendants for their determination that the Buffalo Parcels are “Indian Country” is the mere restricted fee status of the land acquired pursuant to the SNSA. The Defendants’ determination relies entirely on a misinterpretation of the Restricted Fee Provision of the SNSA to mean that any lands acquired in restricted fee are automatically transformed into

sovereign “Indian Country.” Because, as demonstrated above, the restricted fee status of the Buffalo Parcels is insufficient as a matter of law to create Indian Country, Plaintiffs are entitled to Summary Judgment on their first claim.

The Secretary’s indefensible misreading of the SNSA thwarted, rather than executed, both: (a) the specific intent of Congress explicitly expressed in the SNSA by distinguishing the acquisition of land in mere restricted fee status, on one hand, and the creation of Indian Country, on the other; and (b) the intent of IGRA to limit the proliferation of off-reservation gambling casinos (and, indeed, the Secretary’s own concerns about such proliferation in Western New York). As such, it cannot be permitted to stand.

In summary, the SNSA, which the Defendants cited as the sole basis of the Secretary’s decision not to disapprove the Gaming Compact, does not even authorize, let alone require, the creation of “Indian lands” within the meaning of Section 4 of IGRA, 25 U.S.C. §2703, absent full compliance with the requirements the SNSA’s Reservation Provision and its processes. The October 24, 2002, decision of the Secretary to neither approve nor disapprove the Compact, purportedly allowing the Compact to be considered to have been approved as of October 25, 2002, was therefore arbitrary, capricious, an abuse of discretion, contrary to law, and in violation of procedures required by law. The expiration of 45 days from the date of submission of the Compact to the Secretary for approval does not authorize gambling on lands other than “Indian lands,” and therefore does not authorize gambling on any lands in the City of Buffalo or elsewhere in Erie County acquired pursuant to the SNSA.

For all of the same reasons, the November 26, 2002 decision of the Chairman of the NIGC, approving the SNI Class III gaming ordinance “for gaming *only on Indian lands, as defined in the*

*IGRA, over which the Nation has jurisdiction*” (emphasis added), and thereby purportedly authorizing the SNI to conduct casino gambling on lands in the City of Buffalo or elsewhere in Erie County acquired pursuant to the SNSA, is arbitrary, capricious, an abuse of discretion, contrary to law, and in violation of procedures required by law.

Because there are no material facts in dispute and the only legal basis for Defendants’ position that the Buffalo Parcels are “Indian lands” for purposes of IGRA is wholly without merit, Plaintiffs are entitled to summary judgment on their first cause of action against the Defendants as a matter of law.

**III. IN ANY EVENT, GAMBLING ON THE BUFFALO PARCELS IS PROHIBITED UNDER SECTION 20 OF IGRA (25 U.S.C. §2719)<sup>25</sup>**

As set forth in Point II, the Buffalo Parcels are not “Indian Lands” under IGRA and, therefore, are not eligible for Indian gambling in the first instance. In the event this Court finds that the Buffalo Parcels are “Indian Lands,” plaintiffs argue in the alternative that the Secretary erroneously applied 25 U.S.C. §2719(b)(1)(B)(i), and gambling on the Buffalo Parcels is therefore unlawful under section 20 of IGRA, 25 U.S.C. §2719, which prohibits gambling on lands acquired after the enactment of IGRA (October 17, 1988), subject to certain exceptions.

As discussed below, contrary to the Secretary’s conclusion, the Buffalo Parcels do not qualify for the exception under §2719 for “lands ... taken into trust as part of a settlement of a land claim.” The Buffalo Parcels were not taken into trust. The SNI did not receive any land under the SNSA. And the SNSA itself did not involve the “settlement of a land claim.” The SNSA simply facilitated

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<sup>25</sup> Solely for purposes of argument on this motion, Plaintiffs assume that the Buffalo Parcels were properly acquired pursuant to the SNSA and that 25 U.S.C. §2719 applies to land acquired under the SNSA.

the negotiation of certain new leases of Seneca reservation lands. There was no dispute over the tribe's title to the leased reservation lands or the validity of the leases then in effect.

The Secretary allowed the SNI Gaming Compact to be approved based on her determination that once the SNI purchased land in the City of Buffalo and held that land in restricted fee status pursuant to the terms of the SNSA, it would be subject to the 25 U.S.C. §2719 prohibition against gambling on lands acquired after October 17, 1988. The Secretary determined that such land would fall within one of the exceptions to that prohibition, specifically the exception under 25 U.S.C. §2719(b)(1)(B)(i) for lands "taken into trust as part of a settlement of a land claim," *i.e.*, as part of the settlement of a land claim under the SNSA. As the Secretary stated in her November 12, 2002 letter, "[t]his decision rests squarely on a Congressionally-approved settlement of a land claim." *See* BIA Admin. Rec. at 21. The Secretary's conclusion is erroneous and legally insupportable.

In pertinent part, 25 U.S.C. §2719, entitled "Gaming on Lands Acquired after Enactment of This Act," provides:

- (a) 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 --  
\*\*\*\*
- (b)(1) Subsection (a) will not apply when --  
\*\*\*\*
- (B) lands are taken into trust as part of --
  - (i) a settlement of a land claim...

The NIGC itself has held in an administrative decision that the language of this exception (25 U.S.C. §2719(b)(1)(B)(i)) is clear and unambiguous: "*This provision requires that there be a claim for land ... It is clear and unambiguous. It means a claim made by a Tribe for the return of land [emphasis added].*" *See* Final Decision and Order, dated September 10, 2004, at p.6, regarding the request for review and approval of the Wyandotte Nation Amended Gaming Ordinance ("*Wyandotte*"). In that

case, the NIGC “inquir[ed] into the nature of the claim brought by the Tribe and the resulting award to the Tribe.” *Id.* The Tribe had asserted claims “exclusively for money damages, not over title to land itself,” and “the Tribe’s award was limited to money damages.” *Id.* Ultimately, the NIGC concluded that the parcel in question had not been acquired as part of the settlement of a land claim.

With the benefit of NIGC administrative guidance in interpreting the meaning of “settlement of a land claim” under §2719(b)(1)(B)(i), the question then is whether the SNSA actually involved the “settlement of a land claim.” In 1890, Congress had confirmed existing leases for a 99-year term. Those leases were due to expire on February 19, 1991. Without new leases, leaseholders in the City of Salamanca and the “Congressional Villages,” including people whose families had lived there for generations, could have been dispossessed. The consequences could have been disastrous. To avoid that problem, Congress enacted the SNSA. Under the SNSA, the SNI received a total of \$60 million from the U.S. and New York State (25 U.S.C. §1774d) that, on execution of the new leases, the Tribe could spend however it wished. 25 U.S.C. §1774e. No part of those funds was designated for land acquisition, and no specific land was singled out for acquisition or transferred to the SNI. Indeed, title to the leased lands remained in the SNI.

To begin with, it is undisputed that neither the Buffalo Parcels nor any other land has been “taken into trust” for the benefit of the SNI. Thus, the Buffalo Parcels do not satisfy this criterion under section 2719(b)(1)(B)(i).

As is obvious from a plain reading of the statute, nowhere does the SNSA provide that the SNI are to receive any land. The SNI received a sum of money. However, nothing in the SNSA required the SNI to spend the money at all, let alone spend it to acquire land. The SNI did have the option to purchase land, if it chose to do so. However, no specific land was designated for purchase

under the SNSA. The receipt of money instead of land does not satisfy the plain meaning of the statutory exception to the prohibition under section 20 of IGRA. *A fortiori*, the Buffalo Parcels were not acquired as part of a “settlement.” Indeed, the SNI could have purchased the Buffalo Parcels on the open market with any funds available to them.

The SNSA did not involve a “land claim” at all for at least two reasons: (1) the SNI never asserted a “claim” of any kind--period; and (2) any potential claim would not have been a “land” claim.

First, as is evident from the text of the statute itself, as well as the legislative history, at no time prior to the enactment of the SNSA did the Seneca Nation commence a lawsuit or otherwise assert a “claim” against any of its lessees, the State, the United States or any other party. It is self-evident that, in order to have a “land claim,” there must have been a “claim.” The SNSA was not enacted to settle a “claim”--plain and simple.

Indeed, the Department of the Interior recognized this fact when it gave testimony in opposition to the SNSA, opining that the United States had not even *potential* liability to the SNI with respect to the leases. DOI representative, Walter Mills, testified before the Committee that “the Administration strongly opposes H.R. 5367” for the following reasons:

- (1) First and most fundamentally, the United States is being asked to commit \$35 million as compensation to the Seneca Nation for a lease arrangement approved 100 years ago by an Act of Congress.
- (2) It is not clear that the Federal government is liable under the terms of the lease arrangement. H.R. 5367 incorrectly states the Federal government is potentially liable for its action in this matter. (P. 58.)

H. R. 5367, Seneca Nation Settlement Act of 1990, *Hearing before the Committee on Interior and Insular Affairs*, 101st Cong., 2d Sess. (1990) (statement of Walter Mills, Deputy to the Assistant

Secretary-Indian Affairs, Department of the Interior). In the absence of a “claim,” there can be no “land claim.”

Second, any claim that the SNI could have asserted against the United States (or any other party) would not have been a “land claim” because there was no dispute regarding the Seneca’s title to or ownership of the land, nor was there any dispute over the validity of the 99-year leases. The SNSA facilitated the negotiation of certain new leases on SNI reservation lands, but there was never any issue asserted by anyone regarding the title to or ownership of those reservation lands.

As the NIGC held in *Wyandotte*, “land claim,” as that term is used in 25 U.S.C. §2719(b)(1)(B)(i), is clear and unambiguous: it “requires that there be a claim for land.... It means a claim made by a Tribe for the return of land.” See *Wyandotte* at p. 6. The SNI did not ask for the return of land--title to their reservation lands had not been alienated to begin with--and the SNSA did not return land. While Congress provided a cash payment to the SNI, the fact remains that the 99-year leases had been approved by Congress and their validity could not be disputed.<sup>26</sup>

Accordingly, even if the Buffalo Parcels were somehow accorded Indian Country status, gambling is nevertheless prohibited there pursuant to 25 U.S.C. §2719.

Further illumination of the meaning of the “land claim” exception under section 2719 can be gleaned from the DOI’s recently published draft regulations (to be added as 25 C.F.R. Part 292), that include criteria for determining whether a parcel of land qualifies for the exception for land acquired as part of the settlement of a land claim under 25 U.S.C. §2719(b)(1)(B)(i). The proposed regulations (which codify preexisting policies and practices) provide, in pertinent part:

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<sup>26</sup> Under the plenary power doctrine, the Federal Government has unfettered power to dispose of Indian property. See U.S. Const., Art. I, §8, cl. 3.

## **SUBPART B – EXCEPTIONS TO PROHIBITION ON GAMING ON AFTER-ACQUIRED TRUST LANDS**

### **§ 292.5 What must be demonstrated to meet the “settlement of a land claim” exception?**

(a) To meet the requirements of IGRA Section 20(b)(1)(B)(i), which allows an Indian tribe to conduct gaming on lands acquired after October 17, 1988 if the lands have been “taken into trust as part of a settlement of a land claim,” gaming may be conducted only when:

(1) it is conducted on land that has been acquired in trust as part of the settlement of a land claim that either:

(i) has been filed in federal court and has not been dismissed on substantive grounds; or

(ii) has been identified by the Department of the Interior on its list of potential pre-1966 claims published pursuant to the requirements of Section 3(a) of the Indian Claims Limitation Act of 1982 (Pub. L. 97-394, 28 U.S.C. § 2415);

(2) and either:

(i) in cases where the Indian tribe is relinquishing its legal claim to some or all of the lands as part of the settlement, such that the settlement will result in the alienation or transfer of title to tribal lands within the meaning of 25 U.S.C. § 177, the settlement of the land claim has been enacted into law by the United States Congress; or,

(ii) in cases where the lands claimed by the Indian tribe are identical to the lands returned by the settlement, such that there is no alienation or transfer of title to tribal lands without Federal consent that would be prohibited under 25 U.S.C. § 177,

(A) the settlement of the land claim has been duly executed by the parties and entered as a final order of a federal court of competent jurisdiction, or

(B) the State has executed an agreement settling the claim.

*See* Draft of Part 292 Regulations concerning Gaming on Trust Lands Acquired After October 17, 1988, §292.5, as published at [http://www.doi.gov/bia/gaming\\_management.html](http://www.doi.gov/bia/gaming_management.html).

In this case, the SNSA certainly did not involve a claim either “filed in federal court” or “identified by the Department of the Interior on its list....” Nor was there a return of land under the SNSA or the relinquishment of title to land. Thus, once again, nothing in the SNSA suggests that the Buffalo Parcels were acquired as part of a settlement of a land claim.

Similarly, the policy determinations of the agency as it relates to the requirement that a claim for *land* be at issue to fall within the “land claims” exception is totally consistent with Congressional practice in settling land claims.

For example, of the twelve Congressional settlements of land claims codified at 25 U.S.C. Chapter 19, in every one the tribe made an affirmative claim for land, title to which was at issue and thereby clouded.<sup>27</sup> *See* accompanying Finnerty Affidavit, Exhibit B, for a summary compendium of these settlement statutes.

For all these reasons, the exception under 25 U.S.C. §2719(b)(1)(B)(i) does not apply, and it is unlawful to gamble on the Buffalo Parcels.

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<sup>27</sup> In the Torrez-Martínez claim, the issue involved the loss of Indian lands from permanent improper flooding. The claim was settled through a specific plan for land acquisition to replace the flooded lands. *See* Finnerty Affidavit, Exhibit B, 25 U.S.C. Chapter 19, Subchapter XII.

#### **IV. THE SECRETARY HAS VIOLATED THE NATIONAL ENVIRONMENTAL PROTECTION POLICY ACT AND THE NATIONAL HISTORIC PRESERVATION ACT**

Unless the lands at issue qualify under a narrow list of specific exceptions<sup>28</sup>, IGRA itself expressly prohibits casino gambling on *any* lands (including “Indian lands”) acquired after 1988 (*see* 25 U.S.C. §2719(a)), unless the Secretary makes an affirmative determination that a gambling casino “would not be detrimental to the surrounding community.” 25 U.S.C. §2719(b)(1)(A). In making such a determination, the Secretary must consider:

1. Evidence of environmental impacts and plans for mitigating adverse impacts.
2. Reasonably anticipated impact on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community.
3. Impact on the economic development, income, and employment of the surrounding community.
4. Costs of impacts to the surrounding community and sources of revenue to accommodate them.
5. Proposed programs, if any, for compulsive gamblers and the source of funding.
6. Any other information which may provide a basis for a Secretarial determination that the gaming establishment is not detrimental to the surrounding community.

*See*, Office of Indian Gaming Management’s “Check-list for Gaming Acquisitions, Gaming-Related Acquisitions and IGRA §20 Determinations,” Part 2, Subs. II, as annexed to S. Hrg. 109-298, *Off Reservation Gaming: Oversight Hearing for the Process for Considering Gaming Applications Before the Committee on Indian Affairs*, 109th Congress, 2nd Session, Part 1, at pp. 137-149. Of course, such a determination triggers NEPA:

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<sup>28</sup> Such as the exception for lands taken into trust as part of settlement of a land claim (*see* 25 U.S.C. §2719(b)(1)(B)(i)), which, as Plaintiffs have demonstrated above, *see* Point III *supra*, does *not* apply in this case.

Proposals for large and/or potentially controversial gaming establishments should require the preparation of an EIS, especially if mitigation measures are required to reduce significant impacts. The EIS should discuss the purpose of, and need for, the action; the alternatives; the affected environment; the environmental consequences of the proposed action; mitigation measures; list of preparers, agencies, organizations and persons to whom the statement is sent; an index; an appendix (if any).

*Id* at p. 147).

Indeed, the validity, vitality and general applicability of NEPA to casino gambling has been underscored in recent (*i.e.*, February 1, 2006) testimony before the Senate Committee on Indian Affairs by the Acting Deputy Assistant Secretary for Policy and Economic Development for Indian Affairs, George Skibine, who assured the Committee that casino gambling applications would be subject to environmental review pursuant to NEPA:

We have a checklist that we have had since 1994, internal guidance, but under that checklist we have revised it to require local agreements to be included as part of the recommendation of the regional office, if they exist. We have pretty much decided that if a gaming establishment is off-reservation, and is going to be of a certain size, and if it is controversial, that we would require an environmental impact statement rather than an environmental assessment, which will include extensive public participation.

*Id* at p. 11)(testimony of George Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development for Indian Affairs, Department of the Interior). In light of these clear regulations and statements of policy, it is surprising and disingenuous that the Secretary would now take the position – contrary to the Assistant Secretary’s testimony before Congress – that Congress wholly exempted NEPA from her decision making.<sup>29</sup>

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<sup>29</sup> Indeed, this is even more surprising given the fact that when considering whether or not to approve the Compact for allowing gambling on the Niagara Falls site, the Secretary in fact (continued...)

The Defendants' decisions to allow casino gambling on the Buffalo Site were major federal actions significantly affecting the quality of the human environment and thereby triggered NEPA. The construction and operation of a gambling casino will have a significant impact on the environment and on the historic nature of the surrounding community and buildings. The Defendants in fact failed to consider the environmental effects of casino gambling on the Buffalo site and otherwise comply with the requirements of NEPA and the NHPA.

Defendants deny neither that, without the sixty-day limitation, NEPA and NHPA would be triggered, nor do they deny that they have not applied NEPA and NHPA. Defendants' sole basis for claiming that NEPA and NHPA compliance was unnecessary is their claim that the sixty-day time limitation to decide whether to accord restricted fee status for the Buffalo Parcels evidenced a Congressional intent to exempt the Defendants from NEPA and NHPA requirements. They do not deny that NEPA and NHPA would be triggered in the absence of the sixty-day limitation.

However, Plaintiffs have shown in their response to Defendants' Motion to Dismiss (*see* Memorandum, Point II.D.) that the sixty-day time limitation simply does not apply to the decisions of the Defendants to allow casino gambling on the Buffalo Parcels, and those are the only decisions plaintiffs challenge in this action. Therefore, NEPA and NHPA have been violated and the Defendants' decisions should be voided.

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<sup>29</sup>(...continued)  
applied NEPA and prepared an Environmental Assessment, ultimately determining that there would be no significant adverse environmental consequences, and that therefore an Environmental Impact Statement did not need to be drafted. While Plaintiffs do not agree with the conclusion reached by the Secretary (*i.e.*, that no adverse environmental consequences would ensue if the Niagara Falls casino were built), the fact remains that by preparing an Environmental Assessment and attempting to comply with NEPA, the Secretary's prior conduct has already acknowledged NEPA's application to the same decision making process that applies to the Buffalo Parcels and undercuts her counsel's facile but incorrect argument in this case.

## CONCLUSION

For the foregoing reasons, Plaintiffs' and Intervenor-Plaintiffs' motion for summary judgment should be granted.

Dated: Buffalo, New York  
July 25, 2006

STENGER & FINNERTY

s/ Joseph M. Finnerty

Joseph M. Finnerty

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