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

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY, *et al.*,	)	**Civil Action No. 07-CV-0451**
Plaintiffs,	)	**Hon. William M. Skretny, U.S.D.J.**
v.	)	
HOGEN, *et al.*,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted on behalf of Plaintiffs in support of their Motion for Summary Judgment. It should also be read to supplement the arguments made in a separate Memorandum of Law by Plaintiffs submitted herewith in opposition to the Defendants' Motion to Dismiss and/or for Summary Judgment. This Memorandum will focus primarily on the merits, as distinguished from Defendants' jurisdictional arguments related to standing and the Quiet Title Act., which are the primary focus of Plaintiffs' other Memorandum of Law. The Court's familiarity with most of the facts and the statutory and regulatory framework is respectfully assumed given a closely related case it decided earlier this year. *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295 (W.D.N.Y. 2007) ("*CACGEC I*").

OVERVIEW OF THE ISSUES PRESENTED

In 1990, Congress enacted the Seneca Nation Settlement Act, Pub. L. 101-503, 25 U.S.C. §§ 1774-1774h ("SNSA"). It did so on the eve of the impending expiration of ancient leases between the Seneca Nation of Indians ("SNI"), as Landlord, and non-Native Americans, as Tenants, with respect to land owned by SNI in and around the City of Salamanca, New York, and nearby villages, situated approximately 60 miles from the City of Buffalo. Its purpose was to allay fears associated with the expiration of those leases, to provide some certainty and predictability to non-Native American populations living there, and to provide economic benefits to both Indians and non-Indians alike. 25 U.S.C. § 1774.

As part of that legislation, Congress appropriated a sum of money for SNI. 25 U.S.C. § 1774d. SNI was free to use most of the money as it saw fit in its sole discretion. It could, but was

not required to, buy land with the proceeds. 25 U.S.C. § 1774f(c). Some 15 years later, in 2005, SNI or its affiliates purchased land in the heart of downtown Buffalo (the "Buffalo Parcels") which, for purposes of this litigation, Plaintiffs will assume, without conceding, was purchased with proceeds from SNSA. The Government Defendants in this case now claim that via such acquisition that land became not just "restricted fee" land, as the statute expressly stated, but also sovereign "Indian land" within the meaning of the Indian Gaming Regulatory Act, Pub.L. 100-497, 25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166-1168. ("IGRA"). Defendants contend that this, in turn, gave them the basis for approving an Ordinance, adopted by SNI, thereby permitting the Tribe to operate a major commercial Las Vegas-style gambling casino at that site. The Chairman's approval of the Ordinance is one of the many prerequisites IGRA imposes before any such gambling can occur. 25 U.S.C. § 2710(d)(1)(A). Now that the Ordinance has been approved, SNI has quickly commenced gambling operations in a temporary facility at the site. Last Wednesday, October 3, 2007, SNI held a press conference and announced plans for a $330 million, 22 story hotel with a 90,000 square foot gambling casino, and a 2,500 vehicle parking garage at the site.[1] Given Defendants' theory that the property is now sovereign Indian land, SNI would be free to operate the hotel and casino in disregard of any zoning, setback or noise ordinances applicable to the rest of the area. The City of Buffalo has surrendered, for itself and its inhabitants, any control over what goes on there.

In this action brought by Plaintiffs pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701 et. seq. (APA"), the central issue to be resolved by this Court is whether the Defendants acted illegally in approving that Ordinance. Plaintiffs contend that they did, because, in enacting SNSA, Congress did not and never intended to establish a sovereign Indian enclave in the heart of

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[1] *See* "Senecas Raise Ante on Casino; Luxury Complex to Debut in 2010," *The Buffalo News*, Oct. 4, 2007; Affidavit of Cornelius D. Murray, sworn to October 9, 2007 (the "Murray Affidavit"), Exhibit "11".

downtown Buffalo, free from state and local law and regulation, in order to permit commercial gambling which is prohibited by New York State's Constitution and laws. *Dalton v. Pataki*, 5 N.Y.3d 243, 255 (2005), *cert denied sub nom. Karr v. Pataki*, 126 S.Ct. 739 (2005). *See* N.Y. Const., Article I, § 9; N.Y. Penal Law, §§ 225.00, *et seq.*[2] While SNSA did provide that land acquired with proceeds from that Act could become "restricted fee" land under 25 U.S.C. § 177 and, therefore, exempt from local taxation (*see* 25 U.S.C. § 1774f[c]) , that, by itself, did not create "Indian land." Indeed, if Congress had so intended, it could easily have done so by other more direct means rather than the circuitous route Defendants now say was taken.[3] Since under IGRA, Indian gambling can occur only on "Indian land" (*CACGEC I,* <u>supra</u> at 304), the Chairman could not approve an Ordinance for gambling on land that was not Indian land.

Indeed, the tortured, convoluted analysis employed by Defendants to rationalize the Chairman's decision only validates the testimony last year before Congress of Earl Devaney, Inspector General of the U.S. Department of the Interior, who sharply criticized the decision-making process within the Department of the Interior. He said: "[N]umerous OIG reports … chronicled … intricate deviations from statutory, regulatory and policy requirements to reach a predetermined end…" (Murray Affidavit, Exhibit "14").

Even assuming, *arguendo*, that in enacting SNSA, Congress, albeit perhaps inadvertently, paved the way for an Indian tribe to establish sovereign "Indian land" within the City of Buffalo, that

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[2] Section 23 of IGRA (18 U.S.C. § 1166) makes "all" state laws prohibiting gambling applicable to Indian lands unless conducted in conformity with a tribal-state Compact entered into pursuant to § 11(d)(1)(C) of IGRA. 25 U.S.C. § 2710(d)(1)(C).

[3] *See also* letter dated September 3, 2002 from then-Congressman John LaFalce, a co-sponsor of SNSA, to Gale Norton, then-Secretary of the U.S. Department of the Interior. Murray Affidavit, Exhibit "12".

by itself was insufficient to authorize gambling under IGRA because § 20, as interpreted by the Secretary of the Interior, prohibits gambling on all Indian lands acquired after October 17, 1988, the effective date of IGRA. Defendants claim, however, that the land here in question qualifies as an exception to that prohibition pursuant to § 20(b)(1)(B)(i) which allows such land to be gambling-eligible if it was "taken into trust as part of a settlement of a land claim." 25 U.S.C. § 2719(b)(1)(B). In this case, however, there is no dispute that the Buffalo Parcels were never taken into trust, and even if they were, it was not part of the settlement of a land claim. Indeed, there is no dispute that the land was purchased as a matter of discretion by SNI from SNSA funds that it could have used for any other purpose. Whether SNI chose to purchase the Buffalo Parcels or not had no effect on - and was irrelevant to - the "settlement" embodied in SNSA.

Defendants, representing our own Federal Government, are asking this Court to establish a precedent that would have profound ramifications not only for the City of Buffalo, but for local governments throughout Western New York. Under their theory, any land purchased there by SNI from SNSA proceeds could become "restricted fee" land and, therefore, "sovereign Indian land" wrested from local jurisdiction and control by the simple, unilateral actions of the Tribe in erecting a fence and proclaiming the property sovereign Indian soil. Who would have thought our land could be taken so easily? This, Defendants claim, is precisely what Congress intended.

For all the reasons set forth in this Memorandum, they are wrong.

INTRODUCTION

On June 9, 2007, the Seneca Nation of Indians ("SNI") submitted an amended gambling ordinance (the "2007 Ordinance") to the National Indian Gaming Commission ("NIGC") for approval pursuant to the provisions of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA"). On July 2, 2007, NIGC Chairman Philip N. Hogen ("Chairman" or "Defendant Hogen")

approved the 2007 Ordinance. A copy of the approval letter is part of the Administrative Record ("AR") filed by the Defendants (Doc. No. 27-2, pp.8-12). In his letter of approval, Defendant Hogen, expressly relied on a prior November 12, 2002 letter from the Secretary of the Department of the Interior ("Secretary"), opining that certain property in the City of Buffalo on which the SNI intended to construct a permanent gambling casino (the "Buffalo Parcels") was gambling eligible "Indian lands" under the IGRA (the "Secretary's Letter") (AR-00239). Defendant Hogen also opined that the Buffalo Parcels, purchased by the SNI in 2005, were acquired as part of a "settlement of a land claim" and thus are not subject to the IGRA's Section 20 general prohibition against gambling on lands acquired after October 17, 1988. *Id.* This letter and the conclusions therein were challenged in *CACGEC I*.

Pursuant to the APA, Plaintiffs instituted this action on July 12, 2007, challenging the Chairman's approval of the 2007 Ordinance. Specifically, Plaintiffs allege:

- the Chairman's approval of the 2007 Ordinance is "final agency action" for purposes of APA review (*see, e.g.,* Complaint at ¶41);

- included within the scope of judicial review of the Chairman's approval of the 2007 Ordinance are any intermediate determinations, including but not limited to the Secretary's determinations that the Buffalo Parcels are "Indian lands" as defined in the IGRA and that the lands are otherwise gambling-eligible under Section 20 of the IGRA (*see, e.g.,* Complaint at ¶41);

- the Buffalo Parcels are not "Indian lands" (*see generally* Complaint at ¶¶ 42-55 ("First Claim")); therefore, the Chairman's approval of the 2007 Ordinance is arbitrary, capricious, an abuse of discretion and not in accordance with law (*see* Complaint at ¶56); and

- gambling on the Buffalo Parcels is prohibited under Section 20 (*see generally* Complaint at ¶¶ 57-70 ("Second Claim")), therefore, the Chairman's approval of the 2007 Ordinance is arbitrary, capricious, an abuse of discretion and not in accordance with law (*see* Complaint at ¶71).

FACTUAL STATEMENT, BACKGROUND AND PROCEDURAL HISTORY

The relevant facts are set forth more fully 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 administrative action at issue is based on the evidentiary materials filed by Defendants as the Administrative Record, which is incorporated in support of Plaintiffs' motion.

On September 20, 2002, officials of the SNI and the Governor of New York executed a Class III Tribal-State Gaming Compact for a prospective SNI gambling casino in Buffalo, New York. Murray Affidavit, Exhibit "15". Paragraph 11(a)(2) of the Compact 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, following its submission to the Secretary, the Compact was considered approved pursuant to Section 11(d)(8)(C) of the IGRA. In her letter dated November 12, 2002 addressed to then SNI President Cyrus Schindler, the Secretary explained her decision to allow the Compact to take effect. She stated that she was permitting the Compact to take effect because the lands described in the Compact would be "Indian lands" within the meaning defined by the IGRA.[4] She opined that since the lands were to be acquired with funds derived from the Seneca Nation Settlement Act of 1990, 25 U.S.C. §1774 ("SNSA") and held by the SNI in restricted fee pursuant to the SNSA, the lands so acquired would be sovereign SNI lands and therefore gambling eligible (AR-00238). The Secretary further opined that the lands described in the Compact would be acquired as

[4] The decision by the Secretary to approve - or allow to be approved - a Compact prior to the time that the land where such gambling was to occur had acquired "Indian land" status contradicts the policy enunciated by the Department of the Interior in a May 20, 2005 letter to Oregon Gov. Theodore Kulongoski (Murray Affidavit, Exhibit "13").

part of a "settlement of a land claim" and thus were not subject to the IGRA's Section 20 general prohibition against gambling on lands acquired after October 17, 1988. *Id.* The Compact took effect on December 9, 2002, following the Department of the Interior's publication of the Notice of Approval in the Federal Register. 67 Fed. Reg. 72968; BIA AR 396 (Document 27, Part 3).

By letter dated November 26, 2002 (Murray Affidavit, Exhibit "2"), the Chairman approved the SNI Class III Gaming Ordinance of 2002 as Amended ("2002 Ordinance"). In approving the 2002 Ordinance, the Chairman made no affirmative determination that the lands on which the gambling was to occur were "Indian lands," nor did he determine that the lands were otherwise gambling eligible under Section 20 of the IGRA. In approving the 2002 Ordinance, the Chairman did not indicate the extent, if any, to which he was relying on the Secretary's November 12, 2002 letter determination of those issues.

On January 3, 2006, following the SNI's acquisition of the Buffalo Parcels, Plaintiffs brought suit in this Court under the APA challenging the administrative actions undertaken by the federal defendants in approving the Compact and 2002 Ordinance. *See CACGEC* v. *Kempthorne et al.,* (Index No. 06-CV-0001, W.D.N.Y., Hon. William M. Skretny). On January 12, 2007, this Court dismissed Plaintiffs' claims against the Secretary for lack of subject matter jurisdiction, holding that "the Secretary is delegated only some duties under the IGRA, and none of those duties are identified in §2714 as final agency actions."[5] *CACGEC I* at 322. This Court held that the Secretary's substantive "Indian lands" and IGRA Section 20 determinations were intermediate opinions reviewable only in the context of final agency action. *Id.*

[5] Plaintiffs' appeal from the dismissal of their claims against the Secretary is currently pending before the Second Circuit. *See Citizens Against Casino Gambling, et al. v. Kempthorne, et al.*, Docket No. 07-2610-CV (2d. Cir., 2007).

Finding, however, that the Chairman's approval of the Ordinance was final agency action for purposes of APA review, this Court vacated the approval of the 2002 Ordinance as it pertained to the Buffalo Parcels as arbitrary and capricious, holding that a determination by the NIGC of whether the Buffalo Parcels met the definition of "Indian lands" was a "critical, threshold jurisdictional" prerequisite to approval of the 2002 ordinance. 471 F.Supp.2d at 324. While the approval of the Ordinance was final agency action for purposes of APA review (*see* 25 U.S.C. §2714; *see also* 471 F.Supp.2d at 321), this Court declined to review the Secretary's substantive determinations in the context of the 2002 Ordinance approval because "the NIGC's administrative record is devoid of any indication that the NIGC otherwise received notice of the Secretary's opinion that the real property the SNI intended to purchase with SNSA funds and hold in restricted fee pursuant to the SNSA would qualify as gambling-eligible Indian lands under the IGRA." 471 F.Supp.2d at 324-325. Instead, the Court remanded the matter to the NIGC, directing that:

> the NIGC Chairman is instructed to determine whether the Buffalo Parcel is "Indian lands" as defined in the IGRA; to consider, if necessary, the applicability of Section 20 of the IGRA, 25 U.S.C. §2719, to the Buffalo Parcel; and to provide an explanation of the bases for his determinations.

471 F.Supp.2d at 327.

On June 9, the SNI submitted the 2007 Ordinance to the NIGC for approval. Rather than reviewing the original Ordinance, as the Court had instructed (471 F.Supp.2d at 327), the Chairman focused instead on the 2007 Ordinance which SNI had adopted and submitted, undoubtedly in response to this Court's decision which indicated that the land here at issue had not yet been acquired when the Chairman approved the first Ordinance. *Id.* at 325. The new Ordinance was in all material respects identical to the former with the exception that it was now site-specific and made applicable to the Buffalo Parcels (AR 00179-181).

On July 2, Defendant Hogen approved the 2007 Ordinance, opining that the Buffalo Parcels were "Indian lands" and that they were not subject to the IGRA's Section 20 general prohibition against gambling on after-acquired lands because they had been acquired as part of a settlement of a land claim. In doing so, the Chairman expressly referred to and relied on the Secretary's letter of November 12, 2002. This lawsuit, and the instant motion, followed. In the meantime, now that this Court's vacatur of the prior Ordinance was no longer a bar, SNI commenced gambling operations at the site based on the presumed validity of the 2007 Ordinance, the approval of which the Court is now being asked to review.

While this Court previously denied Plaintiffs' request for expedited review, by order dated September 17, 2007 it has now established deadlines for the parties' submissions of dispositive motions. Given the SNI's October 3, 2007 press conference detailing a plan to expend massive sums of money to develop a huge gambling complex at the site (Murray Affidavit, Exhibit "11"), the expeditious resolution of the current dispositive motions before the Court becomes that much more compelling.

ARGUMENT

I. THE STANDARD OF REVIEW

Summary Judgment

Summary judgment of a claim or defense will be granted when the moving party demonstrates that there are no genuine issues of 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. Where the issues are primarily legal rather than factual, summary judgment is particularly appropriate. *Mansker v. TMG Life Insurance Co*., 54 F.3d 1322, 1326 (8th Cir. 1995) . In this case, there are no genuine issues of material fact precluding summary judgment. The determinative issues in this case, *i.e.*, the Indian lands and IGRA Section 20 issues, are questions of law involving statutory interpretation. *See, e.g.,* 471 F.Supp.2d at 303 ("This Court is asked to review the reasonableness of agency action, *including decisions involving statutory interpretation of both the IGRA and the SNSA*.") (emphasis added); 471 F.Supp.2d at 320 ("Plaintiffs bring their claims primarily under the APA, and request that this Court review various agency actions, alleged failures to act *and statutory interpretations by the NIGC and the Secretary that are claimed to be deficient or erroneous.*")(emphasis added).

APA Review and Deference

For claims brought pursuant to the APA, the standard of review is expressly set forth in §706 of the Act. *See 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) . Under §706, the reviewing court is authorized to "hold unlawful and set aside agency action, findings, and conclusions" that the Court finds to be "arbitrary, capricious, an abuse of discretion, *or otherwise not in accordance with law*." 5 U.S.C. §706(2)(A)(emphasis added). *See also*, *CACGEC I*, 471 F.Supp.2d at 320; *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 ¶¶ 2, 56 and 71.

Although this standard of review has sometimes been referred to as 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), it is clear that such deference is "not unfettered nor always due," *see Cherokee Nation of Okla. v. Norton*, 389 F.3d 1074, 1078 (10th Cir. 2004), *cert. denied*, 546 U.S. 812, 126 S.Ct. 333, 163 L.Ed.2d 46 (2005). In general, 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*, *cert. denied*, 127 S.Ct. 67, 166 L.Ed.2d 23 (2006).

Specifically, where the Chairman relies on a DOI Indian lands determination in which the DOI was requested to interpret statutes other than the IGRA to determine whether an Indian tribe has jurisdiction over the lands in question, review of the Indian lands determination is *de novo* and no deference is due:

> The question becomes how closely should a court scrutinize an agency's decision in order to determine if it is in accordance with law. Here, the agency's evaluation of whether or not [the Indian tribe] had jurisdiction does not draw upon any special expertise of the agency or involve an interpretation of the IGRA. Instead, the evaluation turns on the legal effect of various authorities, a question which is the everyday fodder of the courts. Accordingly, a deferential standard of review is not warranted. *Cf. Morris v. Commodity Futures Trading Comm'n*, 980 F.2d 1289, 1293 (9th Cir.1992) (directing the application of a *de novo* standard of review to an agency's application of law to a given set of facts where the issue in question falls within the court's expertise); *Maloley v. R.J. O'Brien & Assocs., Inc.*, 819 F.2d 1435, 1440-41 (8th Cir.1987) (same); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 915 (3d Cir.1981) (same).

Miami Tribe of Oklahoma v. United States of America, 927 F.Supp. 1419, 1422 at fn. 3 (D.Kan. 1996).

In *Miami Tribe of Oklahoma*, the Indian tribe sought review of an NIGC decision disapproving a gaming management contract. In disapproving the contract, the NIGC relied on the opinion of Department of Interior that the restricted fee lands on which the gambling facility was to be built were not "Indian lands." As in this case, the "Indian lands" determination in *Miami* turned

on the question of whether the Indian tribe had jurisdiction over the land, and resolution of that question depended not on an examination of the IGRA, but rather, on the examination and interpretation of other Congressional acts, treaties and Court of Claims decisions:

> The conclusion that plaintiff does not have jurisdiction, however, does not depend on an interpretation of a statute committed to the NIGC. Rather, the conclusion derives from the NIGC's evaluation of various treaties, United States Attorney General Opinions, House of Representative and Senate Committee Reports and court decisions, most dating from a century before the existence of the NIGC. As both parties agree, whether or not those combined authorities confer jurisdiction on [the Indian tribe] over [the land at issue] is a question of law. Legal determinations of this type are subject to *de novo* review.

927 F.Supp. at 1422. As this Court is aware, in order to determine whether the SNI has jurisdiction over the Buffalo Parcels, this Court will similarly have to go beyond the IGRA and engage in a *de novo* examination and interpretation of the SNSA.[6]

Deference is also not required where agency actions are arbitrary, capricious, or manifestly contrary to the statute, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2783, 81 L.Ed.2d 694 (1984), "[i]nterpretations such as opinion letters, policy statements, agency manuals and enforcement guidelines lack the force of law and do not warrant *Chevron*-style deference." *CACGEC v. Kempthorne*, *supra*, 471 F.Supp.2d at 321, citing *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L. Ed.2d 621 (2000). This is

[6] It is well settled that the *de novo* interpretation of a federal statute is a matter for the Court. *See, e.g., Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 719 (9th Cir. 2003), *cert. denied*, 543 U.S. 815, 125 S.Ct. 51, 160 L.Ed.2d 20 (2004); *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), *cert. denied*, 522 U.S. 807, 118 S.Ct. 45, 139 L.Ed.2d 11 (1997) ("IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court."). As the Court held in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, fn. 9, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 693 (1984), "[t]he judiciary is the final authority on issues of statutory construction … ."

particularly important in this case for two reasons.

First, as this Court has observed, the Secretary's November 12, 2002 letter and the "Indian lands" and IGRA Section 20 views expressed therein "do not represent the final product of agency deliberation as to whether the Buffalo Parcel is gaming-eligible Indian lands."[7] *See CACGEC v. Kempthorne*, *supra*, 471 F.Supp.2d at 322, citing *Miami Tribe of Oklahoma v. United States*, 198 Fed. Appx. 686 (10th Cir., 2006). Rather, the November 12, 2002 letter is an "intermediate" "opinion letter."[8] 471 F.Supp.2d at 322. Accordingly, as an intermediate opinion letter, the Secretary's November 12, 2002 letter and the interpretations contained therein "lack the force of law and do not warrant *Chevron*-style deference." (*Id.* at 321.)

Second, the only regulations relevant to this case are the Proposed Rules published by Defendant Department of the Interior (published in the Federal Register October 5, 2006 (*see* Murray Affidavit, Exhibit "9"), as corrected December 4, 2006 (*see* Murray Affidavit, Exhibit "10"), to be added to 25 C.F.R. Part 292), for determining whether a parcel of land qualifies for the 'settlement of a land claim' exception under 25 U.S.C. § 2719(b)(1)(B)(i). While Plaintiffs recognize that proposed regulations do not have the force of law, it does represent the Department's current position. These Proposed Rules do not support the Defendants' conclusions regarding the application of the IGRA Section 20 "settlement of a land claim" exception to the Buffalo Parcels. *See* Argument at Point IV, *infra*. Rather, they support Plaintiffs' argument that the Buffalo Parcels are not gambling-eligible because the Buffalo Parcels manifestly do NOT meet the criteria specified

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[7] By contrast, the Chairman's July 2, 2007 approval of the 2007 Ordinance, made pursuant to 25 U.S.C. §2710(d), is "final agency action" for purposes of APA review (*see* 25 U.S.C. §2714 ("Decisions made by the Commission pursuant to sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5.").

[8] This determination has been appealed to the U.S. Court of Appeals for the Second Circuit.

in the Proposed Rules for lands taken into trust as part of a settlement of a land claim. *Id.*

Statutory Interpretation

It is well settled that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803); *See also*, *Chevron v. Natural Resources Defense,* 467 U.S. 837, 843 fn. 9, 104 S.Ct. 2778, 2781 fn. 9, 81 L.Ed.2d 694 (1984), "[t]he judiciary is the final authority on issues of statutory construction . . . ." Even where an agency's interpretation of a statute is entitled to deference, no deference is due if the administrative interpretation is contrary to the intent of Congress. *Chevron U.S.A., Inc.*, 467 U.S. at 843, fn. 9, 104 S.Ct. 2782, 81 L.Ed.2d 693 (1984), "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent;" *accord*, *I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 447-48, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987) .

In discerning Congressional intent, the court must afford the words "'their ordinary, contemporary, common meaning,' absent an indication Congress intended them to bear some different import." *Williams v. Taylor*, 529 U.S. 420, 431, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000); *Murakami v. United States*, 398 F.3d 1342, 1352 (Fed. Cir. 2005). The Court must also look at "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997); *see also*, *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 582, 124 S.Ct. 1236, 1246, 157 L.Ed.2d 1094 (2004) ("[s]tatutory language must be read in context since a phrase gathers meaning from the words around it"). Every clause and word of a statute must be given effect, and the Court must strive to avoid an interpretation of a clause or word of a statute which would render another provision inconsistent, meaningless, or superfluous: "It is our duty to give effect, if possible, to every clause

and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 2125, 150 L.Ed.2d 251 (2001); *see also*, *Williams v. Taylor*, 529 U.S. 362, 404, 120 S.Ct. 1495, 1519, 146 L.Ed.2d 389 (2000) (describing rule against surplusage as a "cardinal principle of statutory construction"); *State Street Bank and Trust Co. v. Salovaara*, 326 F.3d 130, 139 (2nd Cir. 2003); *In re Surface Min. Regulation Litigation*, 627 F.2d 1346, 1362 (D.C. Cir. 1980) ("It is . . . a fundamental principle of statutory construction that '"effect must be given, if possible, to every word, clause and sentence of a statute"' . . . so that no part will be inoperative or superfluous, void or insignificant.").

Applying these principles to the SNSA leads to the unavoidable conclusion that the Defendants' interpretation of the Act was contrary to clear Congressional intent and therefore arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. As discussed more fully below, Defendants' interpretation of the SNSA as a Congressional grant of sovereignty over the Buffalo Parcels, a grant which would carry with it a whole panoply of effects including termination of New York jurisdiction and exemption of the land and activities thereon from all "state and local taxation, local zoning and regulatory requirements, and state criminal and civil jurisdiction," (*see* Defendants' Memorandum of Law, September 10, 2007, Document 28-2 at p. 22) is clearly erroneous because it is at odds with the plain language of the statute itself, which merely provides that qualifying property purchased with SNSA funds and held in restricted fee is entitled to the limited benefit of property tax relief.

In addition, Defendants' interpretation is flawed because it renders a portion of the SNSA superfluous, void or insignificant. There is no question that the SNSA allows for the expansion of the boundaries of the SNI's current Reservations, provided that the land is sufficiently proximate to the existing Reservations and the proper processes and procedures are followed, resulting in the creation of sovereign Indian Country. The Defendants' interpretation of the SNSA renders this

significant outcome entirely superfluous and insignificant because, according to the Defendants, Congress intended that sovereignty attach automatically to *any* lands purchased with SNSA funds and held in restricted fee regardless of the proximity of the lands to the SNI's existing Reservation.

Defendants' interpretation of the SNSA is plainly at odds with the intent of Congress and is therefore arbitrary, capricious and not in accordance with law. Accordingly, the Chairman's approval of the 2007 Ordinance was unlawful and should be set aside pursuant to Section 706 of the APA.

The Indian Canon of Construction

> "A canon of construction is not a license to disregard clear expressions of . . . congressional intent . . . ."

DeCoteau v. District County Court, 420 U.S. 425, 447, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975)

Statutory interpretation is central to this case. In this context, Defendants argue that the Court must apply the "Indian canon of construction" in interpreting the SNSA and the IGRA. *See* Memorandum of Points and Authorities in Support of the United States' Motion to Dismiss or in the Alternative for Summary Judgment, Docket Document No. 28-2 at pp. 12-13. The Indian canon of construction requires that "[s]tatutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *See* Defendants' Memorandum of Law in Opposition to Summary Judgment at p. 8. The Indian canon of construction is inapplicable to this case for three reasons.

First, as the Defendants themselves previously recognized, the Indian canon of construction is applicable only when ambiguity exists concerning the meaning of a statute. *See* Defendants' Memorandum of Law in Opposition to Summary Judgment at p. 25. In this case, there is no ambiguity with respect to the plain language of the SNSA. *Id.* Thus, the Indian canon of construction should not apply to the SNSA.

Second, the Indian canon of construction does not apply in this case because the canon "does not permit a construction that contradicts express statutory language or legislative history." *Red Lake Band v. United States*, 17 Cl. Ct. 362, 381 (Cl. Ct. 1989), citing *DeCoteau v. District Court*, 420 U.S. 425, 445, 95 S.Ct. 1082, 1094, 43 L.Ed.2d 300, *reh'g denied*, 421 U.S. 939, 95 S.Ct. 1667, 44 L.Ed.2d 95 (1975) (holding that "'the face of the Act,' and its 'surrounding circumstances' and 'legislative history,' all point unmistakably" to a conclusion that was decidedly against the interests of the tribe). In this case, both the express statutory language and legislative history clearly serve to limit the scope and effect of the land acquisition provision of the SNSA. Applying the Indian canon of construction to obtain a different result is clearly improper. Nor is there any ambiguity with respect to that part of IGRA which limits the exception to the prohibition of gambling on after-acquired lands to lands taken into trust as part of a land claim settlement. 25 U.S.C. § 2719(b)(1)(B)(i). No party contends that the Buffalo Parcels were taken into trust. *See* Defendants' Memorandum of Law (Doc. No. 28-2, at p. 19).

Third, "[o]ne must also be careful in addressing the applicability of the canon of construction that construes legislation benefiting Indians where the legislation has dual purposes and is intended to both benefit and limit tribes." *See Wyandotte Nation v. National Indian Gaming Commission*, Case 2:05-cv-02210-JAR-JPO (D. Kan. 2005), Defendants' Brief in Support of Agency Action (Docket Document No. 26-1, filed October 19, 2005) at pp. 7-8. In this case, it is clear that neither the SNSA nor the IGRA were intended solely to benefit Indians. Rather, both Acts served to balance the competing interests of Indians and Indian sovereignty against non-Indians and State sovereignty.

It is clear, for instance, that in addition to benefiting the SNI, the SNSA was enacted to preserve and protect the rights of non-Indians. The Act itself (25 U.S.C §1774) provides, among other things:

(a) City of Salamanca and Congressional Villages

The Congress finds and declares that:

> (1) Disputes concerning leases of tribal lands within the city of Salamanca and the Congressional Villages, New York, have strained relations between the Indian and non-Indian communities and have resulted in adverse economic impacts affecting both communities.
>
> ***
>
> (4) The approaching expiration of the Salamanca and congressional village leases on February 19, 1991, has created significant uncertainty and concern on the part of the city of Salamanca and Salamanca residents, and among the residents of the congressional villages, many of whose families have resided on leased lands for generations.
>
> (5) The future economic success of the Seneca Nation, city, and congressional villages is tied to the securing of a future lease agreement.

(b) Purpose.

It is the purpose of this subchapter

> (1) to effectuate and support the Agreement between the city and the Seneca Nation, and facilitate the negotiation of new leases with lessees in the congressional villages;
>
> ***
>
> (4) to provide stability and security to the city and the congressional villages, their residents, and businesses;
> (5) to promote the economic growth of the city and the congressional villages . . .

Thus, it is clear that the SNSA "has dual purposes and is intended to both benefit and limit tribes,"[9]

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[9] As originally drafted, Section 8(c) of the SNSA (25 U.S.C §1774f(c)) provided that "*[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." (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), Murray Affidavit, Exhibit "6" 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 location, would *automatically* be exempt from local and state property taxes without any input whatsoever from state or local government. *Id*. at pp. 48, 53. In response, Congress imposed a geographic limitation, afforded

and the Indian canon of construction should not apply.

Likewise, IGRA "was designed as well to serve and benefit the interests of states who sought to limit gaming in the compromise legislation." See *Wyandotte Nation*, *supra*, Defendants' Brief in Support of Agency Action at p. 8. To that end, the Act not only prohibits class III gambling activities on Indian lands in the absence of a valid tribal-State compact (25 U.S.C. §2710(d)(1)(C)), but also expressly limits a tribe's right to conduct gambling activities on off-reservation, after-acquired property (25 U.S.C. §2719).

Accordingly, any argument that this Court should interpret the IGRA[10] and the SNSA liberally and in favor of the SNI lacks merit.

State and local governments an opportunity to comment on the economic effect of the property tax exemption for restricted fee lands, and provided that the Secretary could deny the tax exemption. Accordingly, there is no question that the SNSA was intended to "both benefit and limit" the SNI.

[10] In *Chickasaw Nation v. U.S.* 534 U.S. 84, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001), the Supreme Court rejected the tribe's attempt to apply the Indian canon of construction to a provision of the IGRA concerning taxation.

II. THE STATUTORY FRAMEWORK

The Indian Gaming Regulatory Act: "Indian lands," and the Section 20 Prohibition against Gambling on After-Acquired Lands

In enacting the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. §§2701-2721; 18 U.S.C. §§1166-1168, Congress' explicit intent was 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 unregulated widespread Indian gambling. 25 U.S.C. §2702(3); *United States v. Spokane Tribe of Indians,* 139 F.3d 1297, 1301 (9th Cir.1998)(Congress struck a "finely-tuned balance between the interests of the states and the tribes" to remedy the *Cabazon Band* prohibition on state regulation of Indian gaming.).

The IGRA allocates jurisdiction over Indian gambling 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, is subject to the highest level of regulation,[11] including the requirement that Indian tribes submit a tribal gaming ordinance for approval by the Chairman of the National Indian Gaming Commission ("NIGC"):

> (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), and

[11] Examples of Class III gaming, set forth at 25 C.F.R. §502.4, include the operation of slot machines. It is this type of activity that the SNI is now conducting on a temporary, limited-scale basis on the Buffalo Parcels.

(iii) is approved by the Chairman,

25 U.S.C. §2710(d)(emphasis added).

Regardless of the class of gambling activities sought to be conducted, the IGRA requires that such activities occur on "Indian lands." *See, e.g.,* 25 U.S.C. §2710(d)(1)(A)(iii)("Class III gaming activities shall be lawful on *Indian lands* only if such activities are…authorized by an ordinance or resolution that…is approved by the Chairman…")(emphasis added); 25 U.S.C. §2710(d)(2)(A)("If any Indian tribe proposes to engage in…a class III gaming activity on the *Indian lands* of the Indian tribe…")(emphasis added).

"Indian lands" is defined by Section 4 of IGRA, 25 U.S.C. §2703(4). This Section provides:

> 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.) It is undisputed[12] that the Buffalo Parcels are not within the limits of the SNI's reservations and that title to those lands is not held in trust by the United States for the benefit of the SNI. Title to the Buffalo Parcels is held by the SNI "subject to restriction by the United States against alienation" by the SNI. The issue, therefore, is whether the SNI properly "exercises governmental power" over the Buffalo Parcels. Fundamental to the resolution of this question is whether the SNI has jurisdiction over the Buffalo Parcels (referred to hereafter as the "Indian lands" determination). It is Plaintiffs' position that the SNI does not have jurisdiction over the Buffalo

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[12] *See* Chairman's July 2, 2007 letter at p. 2: "The parcels described in the Ordinance are not within the limits of the Nation's reservation land nor have they been taken into trust be the Secretary of the Interior on behalf of the Nation" (Murray Affidavit, Exhibit "1" at p. 2).

Parcels and, therefore, that the Buffalo Parcels are not "Indian lands." *See* Argument at Point III, *infra*.

Furthermore, even if (and regardless of whether) the Buffalo Parcels are "Indian lands," Section 20(a) of the IGRA, prohibits gambling on all lands acquired after October 17, 1988 unless a statutory exception is met. 25 U.S.C. §2719. Section 20 provides, in pertinent part,[13] that gambling is prohibited on after-acquired lands unless:

- "such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988" (25 U.S.C. §2719(a)(1));

- "the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination" (25 U.S.C. §2719(b)(1)(A)); or

- the "lands are taken into trust as part of . . . a settlement of a land claim" (25 U.S.C. §2719(b)(1)(B)(i)).

Again, it is undisputed that the Buffalo Parcels were not "located within or contiguous to the boundaries of" the SNI's Allegany, Cattaraugus or Oil Spring Reservations. It is equally clear that the Secretary did not engage in or render the "best interest" determination required by 25 U.S.C. §2719(b)(1)(A). Thus, the second issue in this case is whether the Buffalo Parcels meet the definition of "lands taken into trust as part of a settlement of a land claim" ("the IGRA Section 20 determination"). As will be shown later, this land was neither taken into trust nor was it taken as part of a land claim settlement. *See* Argument at Point IV, *infra*.

[13] While the statute includes additional exceptions to the after-acquired lands prohibition, none of these exceptions is relevant to this case.

The Seneca Nation Settlement Act of 1990

The resolution of these issues, *i.e.,* whether the SNI have jurisdiction over the Buffalo Parcels and whether the Buffalo Parcels meet the definition of "lands taken into trust as part of a settlement of a land claim," requires the analysis of the Seneca Nation Settlement Act of 1990, 25 U.S.C. §1774 ("SNSA"). The SNSA is central to the case because it is the vehicle used and relied on by the Defendants in making their Indian lands and IGRA Section 20 determinations.

By way of background, the SNI 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."[14] 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 (Murray Affidavit, Exhibit "7"). Following early challenges to the validity of some of the leases, Congress confirmed the existing leases, first for a twelve-year period in 1875 (18 Stat. 330),[15] and then for a 99-year period in 1890 (26 Stat. 558). *Id*. at 18-19. Annual rental rates averaged ten dollars per lease and there were no provisions for the escalation of rents. *Id* at 19.

The 99-year leases were due to expire on February 19, 1991. *Id* at 20. As this date neared, "great alarm and concern" arose on the part of the City of Salamanca, its non-native residents, and the non-native residents of the Congressional Villages because an increase in lease payments to fair market value would be a "great financial shock" to the lessees, particularly the elderly. *Id*.

In order to avoid that result and 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

[14] "[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).

[15] Section 3 of 18 Stat. 330 confirmed the leases for an initial period of 5 years and further provided "said leases shall be renewable for periods not exceeding twelve years…."

States and New York State (25 U.S.C. §1774d) that it could access after execution of the 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.[16] 25 U.S.C. §1774e. The SNI was not required to spend any SNSA funds on land , though it was, of course, free to use unrestricted SNSA funds to purchase land if it chose to do so.

Pursuant to Section 1774f of the SNSA ("Miscellaneous Provisions"), in the event the SNI *did* use SNSA funds to purchase land, the following would apply:

> 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), 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

[16] *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 (1990) (Murray Affidavit, Exhibit "5"). 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.*

Secretary for this purpose.

25 U.S.C. §1774f(c).

It is undisputed that the Buffalo Parcels have not become a part of or expanded the boundaries of the SNI's Reservations. For the purposes of this lawsuit and without prejudice, Plaintiffs are not challenging the Government's assertion that the SNI complied with the procedures for holding of title to the Buffalo Parcels in restricted fee. Thus, the issues for this Court to resolve are: (1) the effect, if any, on jurisdiction where land is purchased with SNSA funds and held in restricted fee; and (2) whether land purchased using SNSA funds and held in restricted fee qualify as "lands taken into trust as part of a settlement of a land claim."

SNSA does not effect a transfer of jurisdiction over lands held in restricted fee from the local and New York State governments to the SNI. Rather, the restricted fee title merely protects such lands from alienation without federal government approval (and, as a necessary corollary, renders such lands exempt from State and local property taxes).[17] *See* Argument at Point III, *infra*. Plaintiffs further contend that land purchased using SNSA funds and held in restricted fee does not qualify as "lands taken into trust as part of a settlement of a land claim:" the SNSA did not settle a "land claim" or any other claim; the Buffalo Parcels were not taken into trust; the Buffalo Parcels were not acquired "as part of" the settlement of a land claim; the SNSA did not provide for the receipt of, and the SNI in fact did not receive, any land under the SNSA; and the SNSA did not direct the SNI to use

[17] Restricted fee lands are not subject to State and local property taxes because the authority to impose such taxes includes the authority to sell the land in the event of non-payment, which would have the effect of rendering the restriction itself a nullity. This tax exemption has no significance to the resolution of the sovereignty issue. In fact, the express inclusion of this limited exemption with respect to lands held in restricted fee indicates that sovereignty was *not* intended: present claims that the Buffalo Parcels enjoy exemption from all other taxes, including sales taxes on commercial enterprises, as well as exemption from labor laws, criminal laws, etc., is a blatant departure from the plain meaning of this provision and the nature of the limited restricted fee as granted.

any settlement funds to purchase land. *See* Argument at Point IV, *infra*.

III. THE BUFFALO PARCELS ARE NOT "INDIAN LANDS" AND THEREFORE ARE INELIGIBLE FOR GAMBLING UNDER IGRA

The Relationship Between "Indian Lands," "Governmental Power," "Jurisdiction" and "Indian Country"

As defined in the IGRA, 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*.

25 U.S.C. §2703(4)(emphasis added).

The Chairman determined that the Buffalo Parcels are not part of a reservation, nor is title to the lands held in trust by the United States for the benefit of the SNI (Murray Affidavit, Exhibit "1" at p. 2). They are "lands title to which is held by [the SNI] subject to restriction by the United States against alienation." The issue, then, is whether the SNI properly "exercises governmental power" over the Buffalo Parcels.

The fundamental prerequisite to the legitimate exercise of "governmental power" is that the SNI, not the State and local governments, have jurisdiction over the 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. *See also*, July 2, 2007 opinion letter of Chairman Hogen at p. 3 ("in order to exercise governmental power, a tribe must have jurisdiction to do so.") (Murray Affidavit, Exhibit "1").

Jurisdiction is coextensive with the inherent sovereign authority that Indian tribes possess over their members and territories within the limits of "Indian Country," *Oklahoma Tax Comm. v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), and "Indian Country," in turn, arises only through *specific* affirmative action by the Federal Government evidencing clear intent to confer governmental jurisdiction over land. 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).

The authority to create Indian Country lies with Congress. 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 also 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.[18] This begs the question why, if Congress had really intended to create "Indian land" it would take such a circuitous route to get there, when it could have done so far more directly.

In sum, tribal jurisdiction over land is a prerequisite to the legitimate exercise of governmental power on that land. And in order for an Indian tribe to have jurisdiction over the land, the land must be Indian Country. Thus, whether the Buffalo Parcels are "Indian lands" for purposes of IGRA depends on whether the Buffalo Parcels are "Indian Country."

The term "Indian Country," is defined in 18 U.S.C. §1151, a codification of prior Supreme Court precedent, 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.

The Buffalo Parcels are not "land within the limits of any Indian reservation under the jurisdiction of

[18] In the case at bar, the Secretary, whose opinion was relied on by the Chairman in approving the 2007 Ordinance, 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, nor did she follow any established procedures under law and regulations necessary (either under the land into trust provisions or under the Reservation Process of the SNSA) 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 United States Government," nor do they qualify as "Indian allotments."[19] Thus, the issue for this Court to decide is whether the Buffalo Parcels qualify as a "dependent Indian community."

The Buffalo Parcels are not a "dependent Indian community" and therefore are not Indian Country. *See* Point III-B, *infra*. Because the Buffalo Parcels are not Indian Country, the SNI has no jurisdiction over the land and therefore cannot legitimately exercise governmental authority over the land. The Chairman's allusion to the erection of fence by SNI around the Buffalo Parcels, accompanied by a sign unilaterally declaring the land "sovereign" land of the Nation, as examples of the exercise of governmental power are, therefore, totally specious. Even more ludicrous is the Chairman's reliance on the enactment by the Tribe of ordinances to regulate gambling at the site. This reliance on a "bootstrapping" exercise of power by SNI is a classic example of circular reasoning. It seems that the Tribe can conduct a gambling casino on the land, merely because it says it can.

Since the Buffalo Parcels do not meet the definition of "Indian lands" under IGRA, and the Defendants' findings to the contrary are arbitrary, capricious and not in accordance with law. Plaintiffs are, therefore, entitled to summary judgment on their first claim against Defendants.

A. The Buffalo Parcels are not "Indian Country" Simply Because the SNI Hold Them in Restricted Fee: Restricted Fee Land is Distinct from "Indian Country," and the SNSA Preserves this Distinction

1. "Restricted Fee" Land Is Not "Indian Country"

In making his Indian lands determination and approving the 2007 Ordinance, Defendant Hogen, citing *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999), *cert. denied*, 530 U.S.

[19] Indian allotments are "parcels of land created out of a diminished Indian reservation and held in trust by the Federal Government for the benefit of individual Indians…." *Alaska v. Native Village of Venetie*, 522 U.S. 520, 529, 188 S.Ct. 948, 953 (1998).

1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000), stated that "Indian Country includes land held by an Indian tribe in fee subject to a restriction on alienation in favor of the United States." July 2, 2007 letter at p.3.

This is a gross mischaracterization of the law in general, and of *Yankton* in particular. The sole effect of a restriction on alienation is that title to the land can be transferred only with federal approval, and that the land itself is therefore not subject to State or local property taxation. As a matter of law it is not determinative (or even necessarily relevant) to the issue of whether the land is sovereign Indian Country.

In contrast to the limited effect of a restraint against alienation of title, the 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,* 992 F.2d 1073, 1077 (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), 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.")[20]

This distinction between lands held in restricted fee and Indian Country was squarely addressed in *Buzzard v. Oklahoma Tax Comm.*, *supra*. In *Buzzard*, the United Keetoowah Band of

[20] Under no circumstances can it be argued that the Senecas would possess *exclusive* jurisdiction over the land given the unique provision in federal law, 25 U.S.C. § 233, giving New York State courts jurisdiction over civil actions between Indians or between Indians and non-Indians. *See generally*, Porter, "The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233; 27 Harvard Journal on Legislation, 496, 533 *et seq.* (1990). *See also*, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 680-681, fn 14 (1974).

Cherokee Indians in Oklahoma ("UKB") operated "smokeshops" on land subject to a restriction against alienation. 992 F.2d at 1075. While the tribe had the unilateral right to determine whether to acquire land, sale of the land required the approval of the U.S. Secretary of the Interior. *Id.* Contending that its restricted fee lands were sovereign Indian Country, UKB sought injunctive relief prohibiting the State from enforcing tobacco taxing statutes against the tribal smokeshops. *Id*. The district court held that the restriction against alienation was insufficient to make the UKB's land Indian Country and granted summary judgment to Oklahoma. *Id*.

On appeal, the Eighth Circuit affirmed. Examining the statutory definition of Indian Country (18 U.S.C. §1151(a), it unequivocally concluded that, regardless of the source of the restraint, the mere restriction against alienation of title did not indicate that the federal government has set aside the land for use by Indians or placed the land under federal superintendence:

> The UKB has not shown that its smokeshops are located on land validly set apart for the UKB's use by the federal government. . . . No action has been taken by the federal government indicating that it set aside the land for use by the UKB. A restriction against alienation requiring government approval may show a desire to protect the UKB from unfair dispositions of its land, *see Federal Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99, 119, 80 S.Ct. 543, 555, 4 L.Ed.2d 584 (1960), but does not of itself indicate that the federal government intended the land to be set aside for the UKB's use.
>
> Nor has the UKB shown that its smokeshops are located on land superintended by the federal government. The federal government has not retained title to this land or indicated that it is prepared to exert jurisdiction over the land. At most it has agreed to approve transactions disposing the land. But the ability to veto a sale does not require the sort of active involvement that can be described as superintendence of the land. Because the UKB cannot show that its lands were validly set apart for its use under the superintendence of the government, we hold that the UKB's smokeshops are not located in Indian country.
>
> * * *
>
> Our conclusion that a restraint against alienation requiring the

> approval of the Secretary of the Interior is insufficient by itself to make land purchased by the UKB Indian country does not depend on the source of that restraint. . . . Whether the restraint against alienation stems from the UKB's tribal charter or 25 U.S.C. § 177, it is insufficient by itself to establish that land purchased by the UKB has been set apart for the UKB's use under the superintendence of the government.

992 F.2d at 1076-77.[21] As a matter of law, then, restricted fee land is NOT the same as Indian Country. Accordingly, restricted fee lands are not, without more, "Indian lands" for purposes of IGRA. *See also*, *Miami Tribe of Oklahoma*, *supra*, 927 F.Supp. 1419 and subsequent decisions at 5 F. Supp. 2d 1213 (D. Kan. 1998), 249 F.3d 1215 (10th Cir. 2001)(holding that the restricted fee lands were not "Indian lands" because of a lack of tribal jurisdiction); *and see*, *Alaska v. Native Village of Venetie*, 522 U.S. 520, 531, fn. 5, 188 S.Ct. 948, 140 L.Ed.2d 30 (1998)(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

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[21] The Court contrasted the UKB restricted fee land with land 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, *id.* §151.10(b) 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.

992 F.2d at 1076, citing *U.S. v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938).

tribe inhabiting it, that must be under the superintendence of the Federal Government")..

The decision of the Court in *Yankton, supra*, does NOT hold otherwise. The Court in *Yankton* correctly held that in order to determine whether the land at issue was Indian Country, it was required to apply the term as defined in 18 U.S.C. §1151, which defines Indian Country as:

- reservation land;
- dependent Indian communities; and
- Indian allotments.

188 F.3d 1021-22. Contrary to Defendant Hogen's statement, the Court did NOT identify restricted fee lands as a separate category of Indian Country. Rather, the Court merely recognized that some *Indian allotments* are held subject to a restriction on alienation (restricted allotments), as opposed to being held in trust (trust allotments). *Id* at 1022. It is the status of the land as an Indian allotment that makes it Indian Country, however, not the mere restriction against alienation.

2. The "Land Acquisition" Provision of the SNSA Recognizes and Preserves this Distinction

The discretionary use of SNSA funds to purchase land is governed by a "Miscellaneous Provision" of the SNSA, 25 U.S.C. §1774f (c). By its express terms, this provision contemplates two different land acquisition scenarios, two different processes to be followed, and two vastly different outcomes. The first, referred to hereafter as the "Restricted Fee Process," is readily discernable as the more generally applicable of the two:

> 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), such lands shall be subject to the provisions of that [section] and shall be held in restricted fee status by the Seneca Nation.

This process applies to land purchased anywhere within an extremely broad geographic area[22] and requires little or no federal government involvement. State and local government input is expressly limited to comments on the effect of removing the land from the property tax rolls (as opposed to the effects of the loss of sovereignty, such as control over zoning, land use, environmental regulation and, of course, casino gambling). Once the brief comment period is over and unless the Secretary objects, the land is subject to a restriction against alienation by operation of law. One may safely assume that if the effect of placing the land into restrictive fee status would have also resulted in the loss of sovereignty by State and local governments, Congress would have invited comment on those far more important consequences as well.

By contrast, the second process, hereafter referred to as the "Reservation Process," applies to a geographically limited subset of acquirable lands and is much more dramatic in effect:

> 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). Consistent with the significant impacts of Indian Country creation and Congress' clear intent that such status attach only to land acquisitions that had the practical effect of expanding the boundaries of existing SNI reservations, this process applies to a narrow geographic

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[22] Land with the SNI's "aboriginal area in the State or situated within or near proximity to former reservation land" arguably encompasses, for all intents and purposes, practically all of New York State west of the Genessee River Valley, an area of thousands of square miles. *See*, *e.g.*, Treaty of Canandaigua of 1794, Stat. 44; H.R. 5367, Seneca Nation Settlement Act of 1990, *To Provide for the Renegotiation of Certain Leases of the Seneca Nation: Hearing Before the Committee on Interior and Insular Affairs*, 101st Cong., 2nd Sess. (1990) at p. 16.

area (proximate to the SNI's current reservations) and requires active and affirmative input and oversight by the Secretary.[23] Presumably, in this context, the Secretary would consider not only the effect of removing the land from the property tax rolls, but also the tribe's need for additional land, the purpose for which the land will be used, jurisdictional problems, potential conflicts of land use, environmental impacts, and the additional burdens and responsibilities to be assumed by the Bureau of Indian Affairs. In contrast to the Restricted Fee Process, Congress did not impose any restrictive comment period under the Reservation Process or provide that the land would become a part of and expand the boundaries of the SNI's Reservations by operation of law.

Just as the two processes are distinct, so too are the outcomes. It is only the second process - the Reservation Process - that results in the creation of Indian Country. There is nothing in the SNSA or the circumstances of its enactment to suggest that Congress intended the Restricted Fee Process to result in the creation of Indian Country. Indeed, both its expressed language--juxtaposing 'restricted fee status' and 'reservation land'--and its legislative history[24] demonstrate the opposite:

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[23] It is unclear whether the Secretary has, in fact, ever established specific procedures for expanding the SNI's reservations. Regardless, pursuant to 25 U.S.C §465, regulations governing the taking of land into trust lands *do* exist and, presumably, these regulations are instructive concerning the criteria Congress expected the Secretary to consider when creating Indian Country pursuant to the SNSA. These regulations, codified at 25 C.F.R. §151.10, require the 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. Neither the Secretary's 2002 analysis nor the Chairman's 2007 determination addresses any of these considerations and, of course, there were no formal proceedings convened, or public and local government input sought, regarding them for this purpose.

[24] *See* Exhibits "4"-"7" to the Murray Affidavit.

Congress preserved the distinction between land that is merely subject to a restraint against alienation and land that is "Indian Country."

Any other construction–including the Chairman's construction in this case--renders the Reservation Process 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, as Defendants assert, sovereignty and jurisdiction (*i.e.*, Indian Country) attached automatically to any land acquired under the Restricted Fee Process, the Reservation Process, 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.

In short, the Restricted Fee Provision is entirely consistent with a Congressional intent merely to protect property interests acquired with SNSA funds as economic assets, 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.

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 error underlying the approval of the 2007 Ordinance is the Chairman's conclusion that the Buffalo Parcels have been "validly set apart for the use of the Indians as such, under the superintendence of the Government." *See,* Chairman Hogen's July 2, 2007 letter at p. 3; *see also*,

Secretarial opinion of November 12, 2002 at p.6.[25] This, of course, is nothing more than a desperate attempt to shoehorn the Buffalo Parcels into the definition of Indian Country.

As already established, Indian Country includes reservations, dependent Indian communities, and allotments. 18 U.S.C. §1151. Again, the Chairman himself agrees 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 definition. In *Alaska v. Native Village of Venetie*, *supra*, the Supreme Court defined "dependent Indian communities" as referring to "a limited category of Indian lands[26] that are neither reservations nor allotments,…and that satisfy two requirements–first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." 522 U.S. at 520-521. The Court explained that "in enacting §1151, Congress codified these two requirements, which previously we had held necessary for a finding of 'Indian country' generally." 522 U.S. at 527. Relying on *U.S. v. McGowan*, 302 U.S. 535, 58 S.Ct.

[25] The Commissioner in his letter of July 2, 2007 stated:

> Tribes are presumed to have jurisdiction within "Indian Country." Indian Country includes lands that have been "validly set apart for the use of the Indians as such, under the superintendence of the Government." Indian Country includes land held by an Indian tribe in fee subject to a restriction against alienation in favor of the United States.

Similarly, the Secretary in her letter of November 12, 2002 stated that "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 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.*

[26] It should be noted that the phrase "Indian lands" as used here by the *Venetie* Court does not mean the same thing as the defined term "Indian lands" for purposes of IGRA.

286, 82 L.Ed. 410 (1938), the seminal precedent regarding the status of dependent Indian communities, the Court in *Venetie* noted that a dependent Indian community, like 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 federal set aside requirement of the *Venetie* Court's definition of "dependent Indian communities" 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" *Venetie, supra*, 522 U.S. at 531, fn. 6 (emphasis added) and "ensures that the land in question is occupied by an Indian Community." *Id.* at 521. The federal superintendence requirement "guarantees that [the Indian] community is sufficiently 'dependent' on the Federal Government and that the Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." *Id.*

Nothing in the SNSA Restricted Fee Process reflects a Congressional intent to create a dependent Indian community. Congress was silent as to the SNI's use of acquired lands, and there is certainly no indication in this part of the SNSA land acquisition provision of an intention to create an Indian community--a place where people live. Nor is there any indication that Congress intended to strip the State of New York of jurisdiction over any lands acquired under this process and assume a federal supervisory role over the land in the State's place. The Reservation Process, by contrast, expressly reflects the specific intent of Congress to provide the SNI with a vehicle for the expansion of its Reservations: Congress was unequivocal that land acquired pursuant to the Reservation Process would be set aside for the use of the SNI as such. It is counterintuitive that Congress would go to the trouble to expressly provide in the SNSA a process for formally expanding the SNI's

reservation lands, and then create, in effect and by default, an "informal reservation" via the Restricted Fee Process.

There simply is no legal authority for Defendants' conclusion that Congress intended that land acquired by the SNI pursuant to the Restricted Fee Process be "set aside" by the federal government under its "superintendence" and thus become "Indian Country." Such a reading would require the conclusion that Congress, in effect delegated for all time (or at least for however long the recipients could stretch out the SNSA settlement money) to the SNI the power almost at will to transform any land it chose across literally thousands of square miles of New York State into Indian Country, divesting New York State and its municipalities of their jurisdiction and substituting the sovereignty of the SNI and the Federal government.

Merely to state this logical extension of the Defendants' argument is to establish that Congress could not have intended it. There has never been an instance in the history of United States/Native American relations of such a sweeping--indeed breathtaking--"mandate"[27] for the creation of Indian Country.[28] The geographic area within which the Restricted Fee Process permits the SNI to acquire land in restricted fee includes thousands of square miles in Western New York. *See*, *e.g.*, Treaty of Canandaigua (1794); H.R. 5367, Seneca Nation Settlement Act of 1990, *To*

[27] Defendants insist that "[t]he Settlement Act mandates that lands acquired by the Nation with Settlement Act funds 'shall' become 'restricted fee' Indian lands . . . ." (Defendants' memorandum at p.14 [emphasis added]). Again, this assertion merely begs the question by equating "restricted fee" with Indian Country. Nothing in the statute or the legal authority justifies this leap of logic.

[28] A major Congressional motive in enacting the SNSA was to prevent the ouster of non-Native American communities (Salamanca and the Congressional Villages) from the SNI's Allegeny reservation and in Cattaraugus County. *See* Statement of Congressional purpose expressly included in the SNSA and quoted at p. 15, *supra*. Now Defendants advance the incredible proposition that Congress intended to purchase the avoidance of this imminent "eviction" from the SNI reservation lands in Cattaraugus County in 1990 only to simultaneously expose thousands of square miles of New York sovereign territory to the imposition of SNI jurisdiction via "restricted fee" land purchases. Exactly where would be at the sole discretion of SNI.

Provide for the Renegotiation of Certain Leases of the Seneca Nation: Hearing before the Committee on Interior and Insular Affairs, 101st Cong., 2nd Sess. (1990) at p. 16. Defendants' interpretation thus produces an absurd result that cannot be attributed to the intent of Congress.[29]

The Congressional settlement acts codified under Title 25 U.S.C., Chapter 19, show that where Congress does intend to "set aside" land for the use of an Indian tribe as such, it has done so, as it did in the SNSA Reservation Process, explicitly and purposefully (for a summary of the Acts, *see* Murray Affidavit, Exhibit "3"). Whether Congress creates new Indian Country directly in the statute (*see, e.g.*, 25 U.S.C. §§1747(a), 1750(b), (d) (Florida - Miccosukee); 25 U.S.C. §1754(b)(7), (8) (Connecticut); 25 U.S.C. §1771d (Massachusetts); 25 U.S.C. §1772(d)(a) (Florida - Seminole)) or delegates its power to create Indian Country to the Secretary of the Interior (*see*, *e.g.*, 25 U.S.C. §§1707, 1708 (Rhode Island); 25 U.S.C. §1724 (Maine); 25 U.S.C. §1775(a)(9), (10), (b) (Connecticut Mohegan Nation); 25 U.S.C. §1779 (Cherokee, Choctaw and Chickasaw)) Indian tribes either receive specific parcels of land or are provided with settlement funds specifically earmarked for the purchase of identified settlement lands. In each instance, Congress explicitly provides for the setting aside of the lands under federal superintendence. Given that Congressional intent is so clearly expressed in the other settlement acts, one must conclude that, had Congress intended to create Indian Country in the Restricted Fee Process of the SNSA, that intent would be as carefully and precisely articulated, particularly when Congress contrasted it--in the same provision--with the

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[29] What makes this logical consequence of the Defendants' interpretation even more troubling is that an SNI-chartered corporation bought the Buffalo Parcels for $4.7 million dollars (*see* Plaintiffs' Statement of Undisputed Facts at ¶24) and then "re-sold" it to the SNI, who "purchased" the 9± acres of land in the City of Buffalo for only $4, which is all that apparently was debited from the corpus of SNSA settlement cash. *See* BIA AR 0003. Suffice it to say that, with between $30 million and $46 million available to the SNI in SNSA funds, at these rates the potential exists for the SNI to acquire an extraordinary amount of land which, under the Defendants' interpretation of the SNSA, would become the sovereign land of the SNI.

Reservation Process.

Defendants' reading of the Restricted Fee Process is also at odds both with general Congressional policy and practice in creating Indian Country and with the United States Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 125 S.Ct. 1478, 161 L. Ed. 2d 386, *reh'g denied*, 544 U.S. 1057, 125 S.Ct. 2290, 161 L.Ed.2d 1003 (2005).

In *Sherrill*, *supra*, the Supreme Court clearly rejected the jurisdictional nightmare that would follow from the piecemeal accretion of Indian sovereignty that Defendants would now have this Court embrace:

> A checkerboard of alternating state and tribal jurisdiction in New York State----created unilaterally at OIN's behest----would "seriously burde[n] the administration of state and local governments" and would adversely affect landowners neighboring the tribal patches. *Hagen,* 510 U.S. 399, 421, 114 S. Ct. 958, 127 L. Ed. 2d 252, (quoting *Solem v. Bartlett,* 465 U.S. 463, 471-472, n. 12, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984)).

City of Sherrill, 544 U.S. at 219-220.

In summary, nothing in the SNSA suggests that Congress, by merely allowing for a restriction against alienation of title, intended that any lands acquired in such a manner be characterized as "set aside" by the Federal government for the use of the SNI as Indian land and placed under Federal superintendence. Defendants cannot escape the significance of the distinction Congress makes in SNSA, § 1774f(c) between the wide geographic-eligibility standard for acquiring "restricted fee" title under the Restricted Fee Process, with no federal input, on the one hand, and the precise virtual-contiguity geographic-eligibility standard for creating Indian Country under the Reservation Process with active federal oversight, on the other hand. There is only one rational explanation for this Congressional distinction: the restriction on the *title* to land resulting from the Restricted Fee Process is qualitatively different from the change in the *sovereign status* of land

resulting from the Reservation Process.

For all the foregoing reasons, Plaintiffs are entitled to summary judgment on their First Cause of Action.

IV. GAMBLING ON THE BUFFALO PARCELS IS PROHIBITED UNDER SECTION 20 OF THE IGRA (25 U.S.C. §2719)

Even assuming, *arguendo,* that the Buffalo Parcels are "Indian Lands," gambling on the Buffalo Parcels is still unlawful under Section 20 of IGRA, 25 U.S.C. §2719, which generally prohibits gambling on lands acquired after the enactment of IGRA (October 17, 1988). The Chairman's interpretation of the SNSA as qualifying for the "settlement of a land claim" exception was contrary to law. Accordingly, the Chairman's approval of the 2007 Ordinance should be set aside.

In approving the 2007 Ordinance, the Chairman, relying in large part on the Secretary's November 12, 2002, letter, determined that the Buffalo Parcels were subject to the 25 U.S.C. §2719 prohibition against gambling on lands acquired after October 17, 1988. *See* July 2, 2007 letter at p. 4 (Murray Affidavit, Exhibit "1"). However, the Chairman, like the Secretary, also 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." *Id* at p. 5. Specifically, the Chairman asserted that "one of the purposes of the SNSA was to 'settle some of the Nation's land claim issues'" and "[t]he Act is entitled the 'Seneca Nation (New York) *Land Claims Settlement*,' evincing Congress's intent to enact the settlement of a land claim." (Emphasis by the Chairman). *Id.* at p. 5. Because these conclusions are erroneous and legally insupportable, the Chairman's approval of the 2007 Ordinance is arbitrary, capricious, and contrary to law and must be set aside.

A. The Chairman's Reliance on the U.S. Code Title of the SNSA was Erroneous and a Mistake of Law.

In support of his theory that SNSA was a "land claim" settlement, the Chairman stated: "The Act is entitled the 'Seneca Nation (New York) ***Land Claims Settlement***,' evincing Congress's intent to enact the settlement of a land claim." Murray Affidavit, Exhibit "1" at p. 5. This was a classic exaltation of form over substance. Assigning that much significance to what he mistakenly thought was the title reflects just how little genuine authority he had to rely on in the first place.

Even if he were correct with respect to the title, title of legislation does not govern its interpretation. As this Court (Siragusa, J.) recently has reaffirmed, titles and section headings "are of use only when they shed light on some ambiguous word or phrase. "They are but tools available for resolution of a doubt. But they cannot undo or limit that which the text makes plain." *Scope, Inc. v. Pataki*, 386 F.Supp.2d 184, 193 (W.D.N.Y. 2005)(quoting *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 529, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947)). In this case, the language of the SNSA is clear and unambiguous. Therefore, the Chairman's resort to and reliance on the purported title of the statute is plainly improper as a matter of law.

Even if there were some ambiguity in the SNSA such that reliance on the title of the statute was appropriate to determine Congressional intent, the Chairman's reliance in this case was plainly improper because he relied on the wrong title. In this case, the Chairman relied on the title of the SNSA as published in the United States Code. But the United States Code is not the official source of the law. The official source of United States law is the Statutes at Large. *Royer's, Inc. v. United States*, 265 F.2d 615 (3d Cir. 1959); *Murrell v. W.U. Telegraph Co.*, 160 F.2d 787 (5th Cir. 1947); *Richey v. Indiana Department of State Revenue*, 634 N.E.2d 1375 (Ind.Tax 1994). If there is an inconsistency between the United States Code and the Statutes at Large, the Statutes at Large control.

United States v. Welden, 377 U.S. 95, 84 S.Ct. 1082, 12 L.Ed.2d 152 (1964); *Preston v. Heckler*, 734 F.2d 1359 (9th Cir. 1984); *Peart v. Motor Vessel Bering Explorer*, 373 F.Supp 927 (D.C.Alaska 1974).

The title Defendants cite ("Seneca Nation (New York) Land Claims Settlement") is *not* Congress' title for the SNSA. Rather, Congress' title for the SNSA is an Act "To provide for the renegotiation of certain leases of the Seneca Nation, and for other purposes." P.L. 101-503, United States Statutes at Large, Vol. 104, Part 2, 104 Stat. 1292 (1990). There is no mention of "land claims" in the title that Congress gave to the Act. Moreover, the short title of the SNSA, found in the *text* of the Act, Section 1 of P.L. 101-503, reads "[t]his Act may be cited as the Seneca Nation Settlement Act of 1990" … There is no mention of "land claims" there either.

This is perfectly consistent with the legislative history of the statute:

- the Act, as presented to and passed by the Senate, was a bill "Providing for the Renegotiation of Certain Leases of the Seneca Nation, and for Other Purposes" and states that "[t]his Act may be cited as the Seneca Nation Settlement Act of 1990." *See* S. Rept. 101-511*, Providing for the Renegotiation of Certain Leases of the Seneca Nation, and for Other Purposes,* 101st Congress (1990);

- as presented to and passed by the House of Representatives, the legislation was titled as a bill "To Provide for the Renegotiation of Certain Leases of the Seneca Nation, and for other purposes" and also provided that "[t]his Act may be cited as the Seneca Nation Settlement Act of 1990." *See* H. R. 5367, *Hearing before the Committee on Interior and Insular Affairs, House of Representatives, To Provide for the Renegotiation of Certain Leases of the Seneca Nation*, 101st Cong., 2nd Sess. (1990); and

- at the Hearing before the Committee on Interior and Affairs, the bill was introduced as "the Seneca Nation Settlement Act of 1990," *Id* at p. 1.

The Chairman's reliance on the title of the Act as published in the United States Code is the

extent of his stated analysis of the SNSA. It was, therefore, arbitrary and capricious.[30]

B. The SNSA is Not a "Settlement of a Land Claim"

Putting aside the unwarranted significance the Defendants ascribe to the title of the Act as published in the U.S. Code, the fact is that Buffalo Parcels are simply not "lands . . . taken into trust as part of a settlement of a land claim." The SNSA did not affect the transfer nor alter the SNI's unchallenged interests in the land. There was no question as to who had the possessory rights to the land either under the leases or afterward. There is no question that SNI had title to the land, and there were no challenges either to title or possessory rights. The SNSA itself did not settle a "land claim" or any other claim; the Buffalo Parcels were not taken into trust; the Buffalo Parcels were not acquired "as part of" the settlement of a land claim; and the SNSA did not provide for the receipt of land or earmark any funds for the purchase of land.

1. No SNI "Claims," Let Alone "Land Claims."

First, the SNSA did not settle any claims, either for land or otherwise. As this Court noted in its decision in *CACGEC* v. *Kempthorne*, 471 F.Supp.2d at 306, the SNI had no legal claims pending at the time of the SNSA's enactment. While the SNI had in 1952 filed a claim over the value of its leases in 1952, these claims were settled in 1977, more than a decade prior to enactment of the SNSA. 471 F.Supp.2d at 306. It is self-evident that, in order to have a "land claim," there must have

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[30] Equally unpersuasive would be any argument that the placement of the Act in the United States Code (under Chapter 19 of Title 25: "Indian Land Claims Settlements") should determine its meaning. As a matter of law, such post-enactment decisions made outside the approval of Congress and during the course of codification do not affect the meaning of the law as passed by Congress and published in the Statutes at Large. *See, e.g.*, *Warner v. Goltra*, 293 U.S. 155, 55 S.Ct. 46, 79 L.Ed. 254 (1934)(No change in the meaning of a statute results from its being placed in the United States Code in juxtaposition to other statutes enacted at different times.) Therefore, the placement of the SNSA alongside other settlement acts (all of which did, unlike the SNSA, involve some claim of title to or ownership of land -- *see* Argument at Point IV.B., *infra*), is plainly irrelevant. If anything, a comparison of these other land claim settlement legislation (*see, infra*, at pp. 49-51; *see also* Murray Affidavit , Exhibit "3"), demonstrates exactly why it is improper to call the SNSA a 'land claim' act.

been a "claim." The SNSA therefore did not involve the "settlement of a land claim."

Second, any claim that the SNI could have asserted would not have been a "land claim." Defendants themselves have defined a "land claim" as: "a claim for land by a tribe on the basis that the land was alienated without the express approval of Congress as required by 25 USC 177 (the Indian Non-Intercourse Act)." *See* Internal Department of the Interior Memorandum, dated November 18, 1998, AR00110; *see also* June 15, 2007 correspondence from SNI counsel to Defendant Hogen, AR00063. It is not disputed that the SNI leases were expressly approved by Congress not only once, but twice: Congress first confirmed the existing leases in 1875 (18 Stat. 330), and again in 1890 (26 Stat. 558). There simply could not have been (nor was there) any claim for land by the SNI on the basis of an alienation without the express approval of Congress. Defendants' conclusion that the SNSA settled a "land claim" is therefore arbitrary and capricious on its face because it contravenes the Defendants own well-settled (and SNI accepted) definition of what a "land claim" is.

Fundamental to the concept of a "land claim" is a dispute concerning title, possession, or ownership of land: "the plain meaning of 'land claim' . . . includes an assertion of an existing right to the land." *Wyandotte Nation v. NIGC*, 437 F. Supp. 2d 1193, 1208. In *Wyandotte*, the Court found that the tribe's claims were "land claims" because they involved a dispute regarding title to land. 437 F.Supp.2d at 1198 ("During the 1950's, the Wyandotte filed several actions against the United States with the Indian Claims Commission (the "ICC") involving title determination of the Tribe's claims to land."). In this case, by contrast, there was no dispute regarding the SNI's title to or ownership of the leased lands, nor was there any dispute over possession of the lands that were leased pursuant to valid, Congressionally-approved leases. It was also clear that if the leases were not successfully renegotiated, non-Natives would have been evicted from the SNI's lands. Thus, any

potential "claims" by the SNI would not have been "land claims."

Indeed, the text of the SNSA itself specifies precisely what sort of hypothetical claims Congress had in mind when drafting the Act. Section 1774b(b) of the SNSA ("Extinguishment of Claims") provides:

> The Seneca Nation shall execute appropriate documents relinquishing all claims against the United States, the State, the city, the congressional villages and all prior lessees *for payment of annual rents* prior to February 20, 1991, with respect to all prior and existing leases.

(emphasis added). Plainly, the only potential "claims" that Congress had in mind were for rents under the leases that were about to expire. Claims of this sort would be either contract claims for the non-payment of rents specified in the leases (*see, e.g., New Haven Place v. Beaufort*, 9 Misc.3d 1130(A)(Dist.Ct., Nassau Co., 2005)) or claims for "breach of trust" arising from the federal government's failure to require more favorable lease terms in the first place (*see, e.g., United States v. Navajo Nation*, 537 U.S. 488, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003)). In either event, they would not be "land claims."

The Proposed Rules published by Defendant Department of the Interior (published in the Federal Register October 5, 2006 (*see* Murray Affidavit, Exhibit "9"), as corrected December 4, 2006 (*see* Murray Affidavit, Exhibit 10), to be added as 25 C.F.R. Part 292) specify criteria for determining whether a parcel of land qualifies for the 'settlement of a land claim' exception under 25 U.S.C. §2719(b)(1)(B)(i). The Proposed Rules provide, in pertinent part:

> PART 292--GAMING ON TRUST LANDS ACQUIRED AFTER OCTOBER 17, 1988
>
> *****
>
> Sec. 292.5 What must be demonstrated to meet the "settlement of a land claim" exception?
> This section contains criteria for meeting the requirements of IGRA

Section 20(b)(1)(B)(i).

> (a) Gaming may be conducted on lands covered by this section only when the land has been acquired in trust as part of the settlement of a land claim that either:
>
> > (1) Has been filed in Federal court and has not been dismissed on substantive grounds; or
> > (2) Is included on the Department's list of potential pre-1966 claims published under the Indian Claims Limitation Act of 1982 (Pub. L. 97-394, 28 U.S.C. 2415).
>
> (b) To be eligible under this section, land must be covered by a settlement that either:
>
> > (1) States that the tribe is relinquishing its legal claim to some or all of the lands as part of the settlement, results in the alienation or transfer of title to tribal lands within the meaning of 25 U.S.C. 177, and has been enacted into law by the United States Congress; or,
> > (2) Returns to the tribe lands identical to the lands claimed by the tribe, does not involve an alienation or transfer of title to tribal lands that is prohibited under 25 U.S.C. 177, and is either:
> >
> > > (i) Duly executed by the parties and entered as a final order of a Federal court of competent jurisdiction; or
> > > (ii) Settled by an agreement executed by the State in which the lands claimed by the tribe are located

At the time of the SNSA, the SNI did not have pending in federal court any claims concerning their Reservation lands. The SNSA did not even purport to settle any SNI claims pending in federal court. In addition, there is no evidence to suggest that, at the time of the SNSA, the SNI had any claims identified on the Department of the Interior's list of potential pre-1966 claims published under the Indian Claims Limitation Act of 1982 (Pub. L. 97-394, 28 U.S.C. 2415), and it is indisputable that the SNSA did not involve the return of land or the relinquishment of title to land. Plainly, the Buffalo Parcels would not qualify for the "settlement of a land claim" exception under the Proposed Rules.[31] The Chairman's conclusion--which directly conflicts with the Proposed Rules--is thus

[31] Plaintiffs recognize that the Proposed Rules do not have the force of law. Nonetheless, the Proposed Rules, which have been fully vetted and which have been subject to a number of public

arbitrary and capricious.

Comparison of the terms of the SNSA with all of the other Settlement Acts under Chapter 19 of Title 25 clearly distinguishes the SNSA from Congressional Acts which, unlike the SNSA, did involve some claim of title to or ownership of land (and, therefore, truly are settlements of "land claims"):

- The Rhode Island Indian Claims Settlement, 25 U.S.C. §§1701-1716, expressly refers to lawsuits pending in the district court concerning claims to public and private lands (25 U.S.C. §1701(a)) and the clouds on title resulting from those lawsuits (25 U.S.C. §1701(b));

- The Maine Indian Claims Settlement, 25 U.S.C. §§1721-1735, expressly refers to tribal claims for possession of lands (25. U.S.C. §1721(a)(1)), the threat of lawsuits (25. U.S.C. §1721(a)(7)), and the need to remove the clouds on title as resulting from the tribe's claims (25. U.S.C. §1721(b)(1));

- The Florida Indian (Miccosukee) Land Claims Settlement, 25 U.S.C. §§1741-1750(e) expressly refers to lawsuits pending in the district court concerning claims to lands (25 U.S.C. §1741(1)) and the clouds on title resulting from those lawsuits (25 U.S.C. §1741(2));

- The Connecticut Indian Land Claims Settlement, 25 U.S.C. §§1751-1760, expressly refers to lawsuits pending in the district court concerning claims to public and private lands (25 U.S.C. §1751(a)), the clouds on title resulting from those lawsuits (25 U.S.C. §1751(b)), and the desire to remove the clouds on title (25 U.S.C. §1751(c));

- The Massachusetts Indian Land Claims Settlement, 25 U.S.C. §§1771-1771(i), expressly refers to lawsuits pending in the district court concerning claims to public lands (25 U.S.C. §1771(1)), the clouds on title resulting from those lawsuits (25 U.S.C. §1771(2)), and the desire to remove the clouds on title (25

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hearings, comment periods and revisions, clearly evidence the Defendants' interpretation of, and the criteria that Defendants themselves deem necessary to qualify for, the "settlement of a land claim" exception.

U.S.C. §1771(3));

- The Florida Indian (Seminole) Land Claims Settlement, 25 U.S.C. §§1772-1772g, expressly refers to lawsuits pending in the district court concerning claims to lands (25 U.S.C. §1772(1)), the clouds on title resulting from those lawsuits (25 U.S.C. §1772(2)), and the clouds on easement right resulting from the lawsuits (25 U.S.C. §1772(3));

- The Washington Indian (Puyallup) Land Claims Settlement, 25 U.S.C. §§1773-1773j, expressly to disputes and land claims including ownership of lands and reservation boundaries (25 U.S.C. §1773(a)(2));

- The Mohegan Nation (Connecticut) Land Claims Settlement, 25 U.S.C. §§1775-1775h, expressly refers to lawsuits pending in the district court concerning claims of ownership of certain lands (25 U.S.C. §1775(a)(5)) and the desire to remove the encumbrances on title resulting from the lawsuits (25 U.S.C. §1775(b)(2));

- The Crow Boundary Settlement, 25 U.S.C. §§1776-1776k, expressly refers to the purpose of the act as settling a dispute regarding the eastern boundary of the Crow Indian reservation resulting from an erroneous survey by the federal government (25 U.S.C. §1776(b));

- The Santo Domingo Pueblo Claims Settlement, 25 U.S.C. §§1777-1777e, expressly refers to lawsuits in the district court concerning claims to lands (25 U.S.C. §1777(a)(1)), the clouds on title resulting from those lawsuits (25 U.S.C. §1777(a)(5)), and the desire to remove the clouds on title (25 U.S.C. §1777(b)(1));

- The Torres-Martinez Desert Cahuilla Indian Claims Settlement, 25 U.S.C. §§1778-1778h, expressly refers to lawsuits concerning the permanent flooding of the tribe's reservation lands (25 U.S.C. §1778(a)(2)-(8));

- The Cherokee, Choktaw and Chickasaw Nations Claims Settlement, 25 U.S.C. §§1779-1779g, expressly refers to lawsuits concerning the title to and use of tribal lands (25 U.S.C. §1779(1)-(17)), and, as part of settlement, disclaimer by the Cherokee, Choktaw and Chickasaw Nations of any claim to right, title or other interest in the lands (25 U.S.C. §1779(a)); and

- The Pueblo De San Ildefonso Claims Settlement, 25 U.S.C. §§1780-1780p, expressly refers to pending litigation (25 U.S.C. §1780(a)(6)) concerning certain lands and the extinguishment of claims of title by the tribe (25 U.S.C. §1780c).

By contrast, the SNSA, 25 U.S.C. §§1774-1774h, does NOT refer to claims for title to or ownership of any interest in land. Rather, it generically refers to "disputes concerning leases." 25 U.S.C. §1774(a)(1). Instead of concerns over clouds on title, the SNSA references "strained relations between the Indian and non-Indian communities" and the "adverse economic impacts" arising from the lease disputes. 25 U.S.C. §1774(a)(1). Instead of references to the need to resolve current or pending legal claims, the SNSA refers to "a moral responsibility on the part of [Federal and State] governments to help secure a fair and equitable settlement for past inequities." 25 U.S.C. §1774(a)(6). Thus, the SNSA cannot reasonably be read as a settlement of a "land claim."

The best example of what does constitute a genuine land claim within the meaning of IGRA is the litigation initiated by SNI in this very court involving its claim to the so-called "Niagara River Islands" that was rejected in a learned and thorough opinion by Judge Arcara in 2002. *Seneca Nation of Indians v. New York*, 206 F.Supp.2d 448 (W.D.N.Y. 2002), *aff'd* 382 F.3d 245 (2d Cir. 2004).

2. Not "Taken into Trust" or Acquired "As Part Of" a Settlement of a Land Claim

Even if the SNSA had settled a "land claim," the Buffalo Parcels would not qualify for the Section 20 exception because the SNI received no *land* in settlement of the claim. In order to satisfy the "lands received" requirement of the exception, an Indian tribe must receive either land or, at the very least, funds earmarked by Congress for the purchase of land. *Wyandotte*, 437 F. Supp. 2d at 1210. It is undisputed that under the SNSA, the SNI received only money, none of which was earmarked for the purchase of land. Even under the *Wyandotte* court's generous reading of the

"lands received" requirement, then, *see* Point IV.C., *infra*, the Buffalo Parcels fail to qualify for the exception in that respect as well.

It is equally clear (and, indeed, undisputed) that the Buffalo Parcels have not been "taken into trust" for the benefit of the SNI. This is significant because the language of the statute is clear and unambiguous: in order to qualify for the exception to the general prohibition, the lands at issue must have been "***taken into trust*** as part of … a settlement of a land claim." (25 U.S.C. §2719(b)(1)(B)(i)(emphasis added).[32] The unambiguous nature of the language--and the application of the exception to only trust lands (as opposed to trust and restricted fee lands)--is supported by the Defendants' own "Memorandum of Agreement between the National Indian Gaming Commission and the Department of the Interior" (Murray Affidavit, Exhibit "8"), executed by the NIGC on February 26, 2007, and effective at the time of the Chairman's July 2, 2007 decision. This Memorandum Agreement states, in pertinent part:

> 16. It is the position of the Chairman ***not to approve*** tribal ordinances or management contracts that are site specific when they call for gaming on Indian lands that have not been acquired into trust.
> …

(Emphasis added). Accordingly, by the express language of not only the IGRA, but also by Defendants' own guidelines and proposed rules, the SNSA does not meet the exception under 2719(b)(1)(B)(i), and the Ordinance should not have been approved with respect to the Buffalo

[32] Defendants themselves argue that the Section 20(a) *prohibition* against gambling on after-acquired Indian lands applies to all such lands, regardless of how title is held. *See* Secretary's Letter dated November 12, 2002. Assuming Defendants are correct, it does not follow that Congress intended the §2719(b)(1)(B) *exceptions* to the prohibition to apply to all after-acquired lands. While interpreting the general prohibition as limited to trust lands would undoubtedly create a loophole that Congress never intended, the same cannot be said of the exceptions. Congress may well have intended to limit the exceptions to trust lands, and no "loophole" is created by doing so. In the absence of any compelling reason why Congress could not have meant precisely what it said in the exception--and Defendants have given no reason at all--it must be concluded that it did. Because the Buffalo Parcels were not "taken into trust," the "settlement of a land claim" exception does not apply.

Parcels.

Furthermore, it is clear that the Buffalo Parcels, purchased 15 years after passage of the SNSA, were not acquired "as part of" a settlement of a land claim. As is obvious from a plain reading of the statute, nowhere does the SNSA provide that the SNI are to receive any land. Indeed, by the terms of the SNSA, the SNI received only a sum of money, none of which was required to be spent on land acquisition. Defendants ignore this fact, but the absurdity of their position is patent: the SNI conceivably could in one hundred years' time purchase land using SNSA funds. Under the Chairman's interpretation, this land would automatically qualify as gambling eligible lands acquired "as part of" a settlement. Surely such an absurd result cannot be countenanced.

C. The Wyandotte Case Supports the Plaintiffs' Contention That Any Potential "Claims" at Issue in the SNSA Were Not "Land Claims"

In approving the 2007 Ordinance, the Chairman cites to--and then distorts--*Wyandotte Nation v. NIGC*, 437 F.Supp.2d 1193 (D. Kan. 2006) to support his conclusion that the Buffalo Parcels qualify as land acquired in "settlement of a land claim." *See* Murray Affidavit, Exhibit "1" at p. 5; AR00013. The Chairman's reliance on *Wyandotte* is misplaced, and his distortion of the holding should be rejected.

In *Wyandotte*, in the context of the tribe's request for approval of its Amended Gaming Ordinance, the NIGC found that the language of the settlement of a land claim exception (25 U.S.C. §2719(b)(1)(B)(i)) was 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."[33] *See* Final Decision and Order, dated September 10, 2004, at p.6. Noting that the relief sought by the

[33] Obviously, the SNSA would not qualify as a settlement of land claim under this definition because the SNI had not made a claim for the return of land.

Wyandotte tribe in its' claims before the Indian Claims Commission ("ICC") was "exclusively for money damages, not over title to land itself," and "the Tribe's award was limited to money damages," the NIGC concluded that the parcel in question had not been acquired as part of the settlement of a land claim. *Id.* Accordingly, the NIGC disapproved the Ordinance. *Id* at pp. 1, 14.

On review, noting that the *only* remedy available to tribes before the ICC was money damages, the district court in *Wyandotte* rejected the NIGC's overly restrictive interpretation of the exception, holding that whether a claim qualifies as "a land claim" for purposes of the exception does not depend on the particular relief sought but on the substance of the right asserted: "The plain meaning of 'land claim' does not limit such claim to one for the return of land, but rather, ***includes an assertion of an existing right to the land***." *Wyandotte Nation v. NIGC*, 437 F. Supp. 2d at 1208 (emphasis added).

Citing the *Wyandotte* decision, the Chairman in his letter of July 2 stretched the *Wyandotte* definition of "land claim" beyond all recognition to include practically any claim related to land whatsoever: "The existing right that gave rise to the SNSA was the Nation's property right to control and define the terms of the leases and the use of the land." *See* Murray Affidavit, Exhibit 1 at p. 5; AR00013. In essence, the Chairman distorted the *Wyandotte* court's holding to read that a land claim *includes any assertion of any existing* ***right in any way related to*** *land*. Defendants' attempted distortion must be rejected.

The Chairman's distortion of *Wyandotte* ignores that court's point, which is simply that where the underlying rights asserted by an Indian tribe would have supported a claim for the return of land had that relief been available, the mere fact that the tribe asked for and/or received a different from of relief does not alter the fundamental characterization of the claim as a "land claim." 437 F.Supp.2d at 1198. The Chairman further ignores the reality that, in this case, there were no such

claims. Neither the SNI's title to its lands, nor the validity of the leases, nor any other "assertion of an existing right ***to the land***" was at issue. It was also clear that if the leases were not successfully renegotiated, non-Natives would have been evicted from the lands. The SNI's existing right *to the land* was unquestioned.

The *Wyandotte* decision is also instructive on that portion of the exception requiring that the *lands at issue* be received as part of a settlement of a land claim. *See* 25 U.S.C. §2719(b)(1)(B). In considering specifically whether lands purchased with settlement funds qualify as lands received as part of the settlement, the *Wyandotte* court drew a critical distinction between lands acquired with earmarked settlement funds and lands acquired with unrestricted settlement funds. The court emphasized that the land acquisition in *Wyandotte* was *mandated* by Congress and ICC judgment funds were set aside for that purpose. *Wyandotte,* 437 F.Supp.2d at 1198 ("The ICC entered judgment for the Tribe. The judgments were compensation for lands in Ohio that the Wyandottes had ceded to the United States in the 1800's. To effectuate the judgment, Congress enacted Public Law 98-602 that, *inter alia,* mandated that a portion of the judgment funds be used for the purchase of real property, which the Secretary of the Interior was required to take into trust for the benefit of the Tribe."); *id* at 1212 ("Key among the directives, for purposes of this issue, was one providing that '[a] sum of $100,000 shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of such Tribe.'"); *see also*, Pub.L. 98-602 §105(b)(1), 98 Stat. 3149.

Significantly, the court even noted that had the Wyandotte Nation acquired the land in question with unrestricted funds (such as the SNSA funds in this case), the NIGC's argument that the land did not qualify as land acquired "as part of" the settlement of a land claim might pass muster:

> The NIGC's focus on the ICC money judgment might pass muster if the Tribe had merely purchased the Shriner Tract with money received from a claim brought before the ICC. That is not the case, however, because Congress mandated that $100,000 of the Tribe's

> ICC judgment funds be utilized to purchase land to be taken into trust for the benefit of the Tribe as a means of effectuating a judgment that resolved the Tribe's land claims.

437 F.Supp.2d at 1210.

By contrast, in the SNSA, Congress neither mandated an acquisition nor set aside funds for that purpose. Accordingly, under *Wyandotte*, because the SNSA did not mandate that any funds be used for the purchase of land, the SNI received no lands as part of a settlement of a claim and the Buffalo Parcels cannot qualify as gambling-eligible lands under the "settlement of a land claim" exception to the Section 20 prohibition .

The Chairman's reliance on *Wyandotte* is therefore wholly misplaced, and his distortion of the holding should be rejected. Read correctly, *Wyandotte* supports Plaintiffs' position.

CONCLUSION

The restricted fee status of the Buffalo Parcels is insufficient in and of itself to effect a transfer of jurisdiction of the Buffalo Parcels from the local and New York State governments to the SNI. Because the SNI lacks jurisdiction over the Buffalo Parcels, it cannot properly exercise governmental control over the property, and, accordingly, the Buffalo Parcels are not "Indian lands" as defined by the IGRA. The Chairman's approval of the 2007 Ordinance is therefore arbitrary, capricious and not in accordance with law and must be set aside, and for the same reasons stated herein with respect to the Chairman's decision, the determination and opinion of the Secretary of the Interior in her letter of November 12, 2002 was arbitrary, capricious and not in accordance with law..

It is equally clear that the Buffalo Parcels do not qualify as "lands taken into trust as part of a settlement of a land claim." The Buffalo Parcels fail as a matter of law to satisfy any of the requirements of the "settlement of land claim" exception to the Section 20 prohibition against gambling on after-acquired lands. For that reason as well, the Chairman's approval of the 2007

Ordinance is arbitrary, capricious and not in accordance with law.

Accordingly, Plaintiffs' motion for summary judgment declaring the 2007 Ordinance invalid should be granted.

Dated: Albany, New York
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Respectfully submitted,

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