

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

CITIZENS AGAINST CASINO)
GAMBLING, et al.,)
)
 Plaintiffs, and)
)
COUNTY OF ERIE, et al.,)
)
 Intervenor Plaintiffs,)
)
 v.)
)
NORTON, et al.,)
)
 Defendants.)

Civil Action No. 06 CV 0001

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

**PLAINTIFFS' AND INTERVENOR PLAINTIFFS' JOINT MEMORANDUM OF LAW
IN RESPONSE AND OPPOSITION TO THE SENECA NATION OF INDIANS' AMICUS
CURIAE BRIEF**

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PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Pursuant to this Court's Text Order of August 15, 2006 (Docket Document No. 46), Plaintiffs respectfully submit this Memorandum of Law in response and opposition to an "*amicus curiae*" application filed August 8, 2006, by the Seneca Nation of Indians ("SNI") (Docket Document No. 44). The SNI argues that this action must be dismissed pursuant to Rule 19 of the Federal Rules of Civil Procedure because, as parties to the Nation-State Gaming Compact ("Compact"), the SNI and the State of New York are necessary and indispensable parties whose joinder is barred by the doctrine of sovereign immunity. *See generally*, Brief *Amicus Curiae* of the Seneca Nation of Indians ("SNI Brief"), at p. 1.

The SNI's argument is procedurally and substantively infirm because it seeks to introduce an issue that has not been raised by any party to the lawsuit. A non-party granted *amicus curiae* status should be limited to addressing issues raised by the parties. The question of whether the Nation--or, indeed, the State--are necessary and indispensable to this action simply is not before the Court, nor should it be, given the nature of the Plaintiffs' claims.

The SNI's argument is substantively unsustainable because it is premised on a mischaracterization of the Plaintiffs' claims. The heart of Plaintiffs' Complaint--and indeed the focus of their summary judgment motion--is that the Defendants' actions and determinations permitting gambling on the 9± acres of land in the City of Buffalo acquired by the SNI (the "Buffalo Parcels") were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with federal law. Specifically, the Complaint alleges Defendants' actions violated: sections 4 and 11(d) of the Indian Gaming Regulatory Act (IGRA) (first claim); section 20 of IGRA (second claim); the National Environmental Policy Act (NEPA) (third claim); and the National Historic Preservation

Act (NHPA) (fourth claim).

Plaintiffs challenge *only* the legitimacy of the Defendants' actions under federal law. Neither the contractual interests of the compacting parties nor the property interests of the SNI in the Buffalo Parcels are at issue in this action. Plaintiffs contest neither: (a) the terms or validity of the Compact as negotiated and executed by and between the State of New York and the SNI; nor (b) the SNI's title to the Buffalo Parcels in restricted fee status. A judgment in Plaintiffs' favor would therefore have no effect on the terms or validity of the Compact or on the SNI's restricted fee title to the Buffalo Parcels.

While it is certainly true that a determination that the Defendants' actions were contrary to federal law would impact the SNI's ability to operate a legal gambling facility on the Buffalo Parcels, that impact is merely coextensive with the administrative determinations under review. The U.S. Department of the Interior ("DOI"), having decided in favor of permitting the SNI to conduct class III gambling under IGRA, is now defending its determination before this Court. As defendants in the legal action, the government's sole purpose is to defend and support the very determinations that embody the SNI's interest in opening a casino. Thus, the interest of the SNI in the outcome of this litigation is entirely protected and represented by the United States Government.

For that reason and on the strength of the authority discussed below, neither the SNI nor the State are necessary parties to this action. Accordingly, the SNI's request for status as *amicus curiae* and for dismissal should be denied.

FACTUAL STATEMENT

The relevant facts are in Plaintiffs' Statement of Undisputed Facts, submitted on their pending motion for Summary Judgment, and in their Complaint. In summary, Plaintiffs challenge

actions and determinations of the Defendants, including the Secretary of the Interior (“Secretary”) and the National Indian Gaming Commission (“NIGC”), that would allow the unlawful construction and operation of a gambling casino in Buffalo.

ARGUMENT

I. THE SNI’S REQUEST IS PROCEDURALLY INFIRM.

The SNI’s request for dismissal improperly seeks to introduce, through an *amicus curiae* brief, issues that have not been raised by any party to this action. An *amicus curiae* is limited to the issues before the Court as framed by the parties. *See, e.g., NGV Gaming, Ltd. v. Upstream Point Molate, LLC.*, 355 F.Supp.2d 1061, 1068 (N.D.Cal. 2005), citing, *United States v. Michigan*, 940 F.2d 143, 163-64 (6th Cir.1991) (noting the judicial disapproval of the “legal mutant characterized as ‘litigating amicus curiae’” and holding that “an amicus curiae is not a party and has no control over the litigation and no right to institute any proceedings in it, nor can it file any pleadings or motions in the case”); *see also, e.g., Artichoke Joe’s California Grand Casino v. Norton*, 353 F.3d 712, 719 at fn. 10 (9th Cir. 2003), *cert. denied*, 543 U.S. 815, 125 S.Ct. 51, 160 L.Ed.2d 20 (2004) (when *amicus curiae* California Nations Indian Gaming Association argued the complaint must be dismissed for failure to join California’s Indian tribes as indispensable parties, court noted that “[i]n the absence of exceptional circumstances, which are not present here, we do not address issues raised only in an amicus brief”).

The cases cited by the SNI in support of their request (SNI Brief at p.3, fn. 1) do not address this procedural issue and are insufficient to overcome the procedural impediment inherent in the motion because in each of the cited cases--*Yashenko v. Harrah’s NC Casino Co.*, 446 F.3d 541 (4th Cir. 2006); *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002); and *Kickapoo*

Tribe of Indians v. Babbitt, 43 F.3d 1491 (D.C. Cir. 1995)--the issue of necessary and indispensable party was raised by a party to the litigation, not independently by *amicus curiae*. This is in direct contrast to the procedural posture of this case. Here, none of the parties has placed the issue of necessary and indispensable party before the Court.

Accordingly, the SNI's request should be rejected.

II. THE SNI'S REQUEST FOR DISMISSAL LACKS SUBSTANTIVE MERIT.

Even if the Court were to consider the merits of the SNI's request, it should be denied because it lacks substantive merit.

The analytical framework for determining whether a non-party is "necessary and indispensable" is well established. The first step in the inquiry--the examination of whether the non-party is necessary--is governed by Rule 19(a):

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed.R.Civ.P. 19(a). If the non-party is not "necessary," the court "need not inquire further." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990). Only if the absent party is "necessary" and cannot be joined must the court proceed to the second step in the inquiry and determine whether in "equity and good conscience" the court should allow the action to proceed among the parties before it or dismiss for failure to join an "indispensable" party. *Id.*

The factors for determining whether a “necessary” non-party is also “indispensable” are:

[F]irst, to what extent a judgment rendered in the person’s absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person’s absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed.R.Civ.P. 19(b).

This two-step inquiry “is a practical one and fact specific, and is designed to avoid the harsh results of rigid application.” *Artichoke Joe’s California Grand Casino v. Norton*, 216 F.Supp.2d 1084, 1118 (E.D.Cal. 2003), *aff’d*, 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 543 U.S. 815, 125 S.Ct. 51, 160 L.Ed.2d 20 (2004). Moreover, the burden of persuasion lies with the party (or, in this case, the non-party) arguing for dismissal. *Id.*, citing, *Makah Indian Tribe*, 910 F.2d at 558.

The SNI is not even a necessary party (*see* Argument, Point II.A., *infra*), let alone an indispensable one (*see* Argument Point II.B., *infra*). The SNI’s request should therefore be denied.

A. The SNI is not a Necessary Party.

1. The parties can be accorded complete relief in the SNI’s absence.

The first consideration under the Rule 19(a) “necessary” analysis is whether complete relief can be accorded to the parties without the SNI. Fed.R.Civ.P. 19(a)(1). “[T]he term ‘complete relief’ refers only to relief ‘as between the persons already parties, and not as between a party and the absent person’” *Seneca Nation of Indians v. New York*, 213 F.R.D. 131, 137 (W.D.N.Y. 2003) (Curtin, J) (quoting *Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York*, 762 F.2d 205, 209 (2d Cir. 1985)). The SNI do not argue complete relief cannot be accorded among the current parties in the SNI’s absence and, in any event, courts addressing this issue in similar cases have made clear

such an argument would be futile:

The first consideration under Rule 19(a) is whether, in the absence of the Wyandotte Tribe, complete relief could be accorded among the persons already parties to the action. In our view, the answer is clearly “yes.” Because plaintiffs’ action focuses solely on the propriety of the Secretary’s determinations, the absence of the Wyandotte Tribe does not prevent the plaintiffs from receiving their requested declaratory relief (*i.e.*, a determination that the Secretary acted arbitrarily and capriciously (a) in taking the Shriner Tract into trust for the Wyandotte Tribe, (b) by failing to conduct an NEPA or NHPA review, (c) by failing to confirm that Pub.L. 98-602 funds were used, and (d) by concluding the Huron Cemetery was a “reservation” for purposes of IGRA). Moreover, we are not persuaded there is a likelihood of further lawsuits “involving essentially the same subject matter.”

Sac and Fox Nation of Missouri v. Norton, 240 F.3d 1250, 1258-1259 (10th Cir. 2001), *cert. denied sub nom, Wyandotte Nation v. Sac and Fox Nation of Missouri*, 534 U.S. 1078, 122 S.Ct. 807, 151 L.Ed.2d 693 (2002); *accord, Kansas v. United States and Norton, et al.*, 249 F.3d 1213, 1226-1227 (10th Cir. 2001), citing *Sac and Fox* (“the [plaintiff’s] claims in this case focus on the propriety of an agency decision that the tract qualifies for Indian gaming under IGRA. Thus, the absence of the Miami Tribe does not prevent the [plaintiff] from obtaining its requested relief or an adequate judgment. Nor do we believe the absence of the Tribe is likely to subject the parties to this action to multiple or inconsistent obligations.”).

2. Any valid interest the SNI claims relating to the subject of the suit will be adequately protected by the Defendants.

The second factor is whether the non-party can claim an interest relating to the subject of the action. Fed.R.Civ.P. 19(a)(2). If such an interest exists, then the reviewing court must determine whether the non-party is so situated that the disposition of the action in the non-party’s absence will either impair or impede the non-party’s ability to protect that interest or will otherwise leave any of

the already present parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.¹ *Id.*

In this case, the SNI has “an interest relating to the subject of the action” only in the sense that the SNI’s ability to run a casino legally on the Buffalo Parcels depends on the legitimacy of the actions and determinations of the Defendants which purportedly authorized gambling there. This “interest” does not make the SNI “necessary” under Rule 19(a)(2), however, because the presence of the federal defendants ensures the SNI’s interest will not be impaired by its absence. This well-settled legal principal, conveniently ignored by the SNI, has been applied consistently in actions like this one challenging Secretarial determinations and other agency actions permitting gambling under IGRA. *See, e.g., Sac and Fox Nation of Missouri v. Norton, supra; Kansas v. United States and Norton, et al, supra; Artichoke Joe’s California Grand Casino v. Norton, supra.*

In *Sac and Fox*, the plaintiffs (the Sac and Fox Nation of Missouri and other tribes, as well as the Governor of Kansas): (a) sought to prevent the Secretary from taking a tract of land in downtown Kansas City, Kansas, into trust for the Wyandotte Tribe of Oklahoma; and (b) challenged the Secretary’s conclusion that that the Wyandotte could lawfully conduct gambling on the tract under IGRA. 240 F.3d at 1256-1257. The Wyandotte intervened, and the District Court dismissed the

¹ This second factor is clearly the focus of the SNI’s argument that it is “necessary:” “[a]lmost as a matter of definition, the parties to a compact or contract being challenged have an ‘interest relating to the subject of the action’ which ‘as a practical matter’ may be ‘impair[ed] or impede[d]’ by the disposition of the action in their absence, rendering them ‘necessary’ to the action under Rule 19(a).” SNI Brief at p. 11; *see generally*, SNI Brief at pp. 11-14. This argument is fatally flawed because this action does not challenge the terms or validity of the SNI’s Compact with the State. Rather, the heart of Plaintiffs’ Complaint and the focus of Plaintiffs’ summary judgment motion is that the Buffalo Parcels are not “Indian Lands,” “Indian Country” or otherwise gambling-eligible territory under federal law and that the Defendants’ actions and determinations to the contrary are therefore arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

action on the premise that the Wyandotte Tribe was necessary and indispensable. *Id.* at 1257.

The Tenth Circuit reversed. On the issue of whether the Wyandotte Tribe's absence would impair its ability to protect its interests, the Court specifically rejected the Wyandotte Tribe's arguments, holding:

It is undisputed the Wyandotte Tribe has an economic interest in the outcome of this action. More specifically, the Wyandotte Tribe's ability to conduct gaming activities on the Shriner Tract will survive only if all of the Secretary's determinations regarding the Shriner Tract are upheld. The potential of prejudice to the Wyandotte Tribe's interests is greatly reduced, however, by the presence of the Secretary as a party defendant. As a practical matter, the Secretary's interest in defending his determinations is "virtually identical" to the interests of the Wyandotte Tribe.

240 F.3d at 1259.

The Court reached the same substantive result in *Kansas v. United States, supra*. In *Kansas*, the State sued the Secretary, the NIGC and others, challenging a decision that a tract of land held in restricted fee by individual members of the Miami Tribe of Oklahoma and leased to the Tribe constituted "Indian lands" for the purposes of IGRA. 249 F.3d at 1220. The Miami Tribe intervened as defendant for the limited purposes of challenging subject matter jurisdiction, asserting the action should be dismissed because the Tribe was necessary and indispensable, yet immune from suit. *Id.* at 1220-1221. The Tenth Circuit held that, despite its undeniable economic interest in the outcome of the State's suit, the Miami Tribe was not necessary. *Id.* at 1227. The Court explained that "our Rule 19 analysis in *Sac and Fox Nation* controls our resolution of the Miami Tribe's Rule 19 argument here" because "[l]ike its claims in *Sac and Fox Nation*, the State of Kansas' claims in this case focus on the propriety of an agency decision that the tract qualifies for Indian gaming under IGRA." *Id.* at 1226. As in *Sac and Fox*, the determining factor in *Kansas* was the greatly reduced

potential for prejudice to the Miami Tribe as a result of the presence of federal defendants² whose interests in defending their determinations were virtually identical to those of the absent Tribe. *Id.* at 1227; *Sac and Fox*, 240 F.3d at 1259.

The District Court in *Artichoke Joe's California Grand Casino v. Norton*, *supra*, reached a similar result. In *Artichoke Joe's*, the plaintiffs--a group of California card clubs and charities prohibited under state law from offering casino-style gambling--sued the Secretary and Governor (and others), challenging the validity of compacts between various Indian tribes and the State and approved by the Secretary pursuant to IGRA. 216 F.Supp.2d at 1090. As *amicus curiae*, the California Nations Indian Gaming Association argued on behalf of California's sixty-one Indian tribes that the complaint must be dismissed in its entirety under Fed.R.Civ.P. 19. *Id.* at 1118. The District Court squarely rejected this argument, holding that "although the tribes can claim a legal interest in this lawsuit, they are not necessary parties because their legal interest can be adequately represented by the Secretary." *Id.* In doing so, the Court explained its rationale in detail:

In general, the United States' trust obligations to the Indian tribes, which the Secretary has a statutory duty to protect, 25 U.S.C. § 2710(d)(8)(B)(Secretary may disapprove compact if it violates trust obligations of the United States to Indians), *United States v. Eberhardt*, 789 F.2d 1354, 1360 (9th Cir.1986) ("We hold that the general trust statutes in Title 25 do furnish Interior with broad authority to supervise and manage Indian affairs and property

² In *Kansas*, various tribal officials and a gaming management company were named as defendants along with the federal defendants. While the *Kansas* Court noted that the effect of the presence of the additional defendants was to reduce even further the potential for prejudice to the absent Miami Tribe, 249 F.3d at 1227 (potential for prejudice given the plethora of defendants with similar interests described as "largely non-existent"), there is no indication that the outcome of the Rule 19 analysis would have been any different in their absence. In fact, the *Kansas* Court's emphasis of *Sac and Fox* (in which the Secretary was the only defendant) as the controlling authority indicates just the opposite. *See, Id.* at 1227, fn. 8 ("*Sac and Fox Nation* is 'on all fours' with this case for purposes of resolving the Rule 19 issue").

commensurate with the trust obligations of the United States.”), satisfies the representation criteria and allows it to adequately represent the absent tribes “unless there exists a conflict of interest between the United States and the tribe.” *Southwest Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir.1998). However, for a conflict of interest to preclude a tribe’s representation by the Secretary, there must be a “clear potential for inconsistency between the Secretary’s obligations to the Tribes and its [other] obligations” that arises “in the context of th[e pending] case.” *Washington v. Daley*, 173 F.3d at 1168-69 (holding that United States could adequately represent tribes’ interests because there was no direct conflict between tribes and the United States, or between the tribes themselves).

Amicus curiae CNIGA has not carried its burden of demonstrating an actual conflict of interest in the pending litigation that would prevent the United States from adequately representing California’s Indian tribes. “In fact, the Secretary and the Tribes have virtually identical interests in this regard.” *Id.* at 1167-1168.

Artichoke Joe’s, *supra*, 216 F.Supp.2d at 1118-1119. *Cf.*, *Seneca Nation*, 213 F.R.D. at 137 (recognition by this Court (Curtin, J.) that “in the unique context of enforcing restrictions on the alienation of Indian lands, the United States is best situated to provide complete representation of tribal interests, and no other party is necessary”) (citing *Heckman v. United States*, 224 U.S. 413, 444-45, 32 S.Ct. 424, 56 L.Ed. 820 (1912)).

In this case, the SNI has made no effort to carry “its burden of demonstrating an actual conflict of interest in the pending litigation that would prevent the United States from adequately representing [the SNI],” and “[i]n fact, the Secretary and the [SNI] have virtually identical interests in this regard.” This failure is fatal to the SNI application.

The reasoning of *Kansas, Sac and Fox* and *Artichoke Joe’s*, *supra*, is conclusive of the substantive issues the SNI attempts to assert as *amicus*. Therefore, this Court should reject the SNI’s myopic argument that it is “necessary” to this action and deny the request for dismissal. *See*,

Artichoke Joe's, 216 F. Supp. 2d at 1120, fn. 47 (“Because the court finds that the tribes are not necessary parties, it does not consider whether they are indispensable parties under Fed.R.Civ.P. 19(b)); *Washington v. Daley*, 173 F.3d 1158, 1169 (9th Cir. 1999) (“indispensable” analysis obviated after determining absent party not necessary).

3. The arguments advanced by the SNI in support of its contention it is “necessary” are without merit.

The SNI’s argument that it is necessary is predicated on a mischaracterization of the nature of this action and of the SNI’s “interests.”

The SNI characterizes the Plaintiffs’ action against the Secretary and the other federal defendants as impacting two very different SNI “interests.” SNI Brief at pp. 1-2. The first is the SNI’s interest in the legitimacy of the determinations of the federal defendants that the Buffalo Parcels are gambling-eligible “Indian lands” within IGRA. That the SNI has an interest in these determinations is plain but, as discussed at length above, it is equally plain that that interest is more than adequately protected and represented by the federal defendants. This first interest therefore provides no basis for finding the SNI is a necessary party.

The second “interest” is one any party to a contract has in its terms and validity. That the SNI has such an interest in its Compact with New York is undeniable. However, *that* interest is not the subject of *this* action.³ No determination by this Court on the issues presented by the parties will

³ In arguing that the “validity of the Compact” is somehow implicated in this action in a way that would raise “necessary party” concerns, the SNI apparently relies on allegations in the Complaint that provisions of the Compact “violate” Sections 11(d) and 20 of IGRA, 25 U.S.C. §§ 2710(d) and 2719. The description of a compact as “violating” IGRA comes directly from Section 11(d) itself. Section 11(d) permits the Secretary to disapprove a Tribal State Class III Gaming Compact only in specified circumstances, including when “such compact violates—(i) any provision of this chapter.” 25 U.S.C. § 2710 (d)(8)(B)(i). As is clear from both the structure and purpose of IGRA and from a fair reading of the entire Complaint (*see*, particularly, Paragraph 2, describing the

change the contract between the SNI and the State. If this Court invalidates the actions of the Defendants, then perhaps a condition precedent to legal gambling will not occur, but that outcome would affect neither the validity nor the terms of the Compact itself (nor for that matter its enforceability and performance, were the condition precedent to be fulfilled at some point). This distinction appears lost on the SNI but it should not be lost on this Court. As the SNI's own cases demonstrate, this precise distinction is determinative of whether an Indian nation (or a State) is "necessary" in an action involving a Tribal-State Compact.

4. The authorities cited by the SNI in support of its contention that it is "necessary" are wholly inapposite.

Each of the SNI cases (*see* SNI Brief at pp. 11-14) is materially distinguishable from the present case on several grounds, and *all* are inapposite in that the issue of necessary and/or indispensable party arises in each in the context of a direct challenge to the contractual rights of an Indian nation (or, in some cases, a State) that would clearly go unprotected in the absence of the Indian nation as a party. In *no* case cited by the SNI, however, does the court find an Indian nation (or a State) to be a necessary or indispensable party to an action in which the only challenge is to the legitimacy of Secretarial or other agency action (even when those actions impact the Indian nation's ability to conduct gambling operations), and in *no* cited SNI case does the deciding court even mention the critical issue--present in the instant case--of the ability of the Secretary or other federal

purpose of the action), the import of the "violation" language is the delineation of the limits of the Secretary's discretion to disapprove a Compact. It does *not* signify a "frontal assault" on the Compact itself. Indeed, carried to its logical extreme, the result of the SNI assertions, if adopted, would render federal courts incapable of reviewing federal actions under IGRA and otherwise concerning gambling when a Compact has been negotiated. This clearly is not the lesson of the applicable jurisprudence. *See* discussion *supra*.

defendant to protect the interests of an absent Indian nation.⁴

Fluent v. Salamanca Indian Lease Authority, 928 F.2d 542 (2d Cir. 1991)(SNI Brief at pp. 12, 14, 16-17, 18), was an action by non-Indian lessees of tribal land against the SNI to compel 99-year lease renewals. The action also challenged the constitutionality of the Seneca Nation Settlement Act of 1990 as it pertained to their leases. The case had nothing to do with Indian lands determinations, approval of gambling compacts or any other action or determination by or on behalf of the Secretary or the NIGC (neither was a party in *Fluent*). By contrast, the Plaintiffs in this action challenge neither the validity of the SNI's contractual obligations nor the constitutionality of the Seneca Nation Settlement Act.⁵

The SNI's reliance on *Seneca Nation of Indians v. New York*, 383 F.3d. 45 (2d Cir. 2004), *cert. denied*, 126 S.Ct. 2351, 165 L.Ed.2d 278 (2006) (*see* SNI Brief at pp. 17-18) is equally misplaced. In *SNI v. New York*, the SNI in 1993 sued to void a 1954 agreement granting the State a "permanent easement" through the Cattaraugus Reservation. The SNI had been compensated for this easement. The Second Circuit dismissed, holding that, because the easement was in the name of the State, the State itself was both necessary and indispensable, yet immune from suit. Once again, the facts of the instant case are distinguishable: the Plaintiffs are *not* seeking to invalidate the terms

⁴ This last deficiency may perhaps be excused for the simple reason that in most of the SNI's cases there *are* no federal defendants precisely because the interests at stake really *are* the contractual interests of the absent Indian nation and/or State and not, as in the present case, the federal agency's interest in the legitimacy of its own actions and determinations.

⁵ Contrary to the assertions of counsel for the SNI, neither the District Court (Arcara, J.) nor the Second Circuit dismissed the *Fluent* action in its entirety. Rather, the District Court dismissed, and the Second Circuit affirmed the dismissal of, only the one cause of action (out of ten) brought directly against the SNI and two additional causes of action that the court found "should not be adjudicated in the absence of the Nation." 928 F.2d at 548.

of a contract (the Compact) between the SNI and the State. Thus, the issue of State sovereign immunity (which was the only issue decided in *SNI v. New York*) is simply irrelevant to this action.

Yashenko v. Harrah's NC Casino Company, LLC, 446 F.3d 541 (4th Cir. 2006), fares no better. In *Yashenko*, a former employee sued a casino management company, claiming a tribal preference policy in a management agreement between the defendant and the Eastern Band of Cherokee Indians ("Tribe") violated plaintiff's rights under 42 U.S.C. § 1981, which prohibits discrimination in employment on the basis of race. 446 F.3d at 551-52. The court found the Tribe both necessary and indispensable because, among other things, any judgment would threaten to impair the Tribe's contractual right to require the defendant to implement the preference policy. *Id.* at 552-53. As in both *Fluent* and *SNI v. New York*, the contractual rights of the absent Tribe against another contracting party, *not* the validity of federal agency determinations, were at issue.

American Greyhound Racing, Inc. v. Hull, 305 F.3d 1015 (9th Cir.2002), *Dewberry v. Kulongoski*, 406 F.Supp.2d 1136 (D.Or. 2005) and *State ex rel. Coll v. Johnson*, 990 P.2d 1277, 128 N.M. 154 (1999) (SNI Brief at pp. 13, 14), while they do involve Indian gambling, are nonetheless also clearly distinguishable. *American Greyhound*, *Dewberry* and *State ex rel. Coll v. Johnson* each challenged the validity of a Tribal-State compact under state law, whereas the present case challenges the propriety of a determination of the Secretary or of the NIGC under federal law.⁶

⁶ *American Greyhound* was an action by non-Indian racetrack owners and operators against the Governor of Arizona challenging the validity (under Arizona law) of gambling compacts negotiated by the Governor with a number of Indian nations. The plaintiffs sought not only to prevent the Governor from negotiating new casino gambling compacts with the Indians, but also to void a provision within these compacts for automatic renewal. 305 F.3d at 1020. No Secretarial action was involved, and there were no federal parties to the suit.

Similarly, the plaintiffs in *Dewberry* claimed Oregon's compact was invalid under state law because it purportedly authorized casino-style gambling prohibited by the Oregon

This distinction is critical to the Rule 19(a) analysis for two reasons. First, when as in this case the propriety of Secretarial action is at issue, the interest of the Indian nation (or of the State) is necessarily more attenuated than when the validity of a compact itself is at stake. Second and as discussed above, to the extent the Indian nation has an interest in an action challenging the actions of the Secretary or other agency officials, the federal defendants themselves are particularly well-placed to protect this interest. This second point is conclusive of the “necessary party” issue, and therefore of the “indispensable party” issue as well. Indeed, in cases like the present one in which the Secretary is a party, the *American Greyhound* line of cases simply does not apply:

We note, however, that this case is distinguishable from an earlier challenge to the validity of gaming compacts entered into by the Governor of Arizona pursuant to IGRA. *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir.2002). We held there that the State of Arizona could not adequately represent the tribes because their interests were potentially adverse and because the state owed no trust responsibility to Indian tribes. *Id.* at 1024 n. 5. By contrast, the Secretary is a party to this case. The Secretary’s interests are not adverse to the tribes’ interests and the Department of Interior has the primary responsibility for carrying out the federal government’s trust obligation to Indian tribes.

Artichoke Joe’s California Grand Casino v. Norton, supra, 353 F.3d at 719, fn. 10.

Pueblo of Sandia v. Babbitt, 47 F.Supp.2d 49 (D.D.C. 1999) (SNI Brief at pp. 13-14) and *Kickapoo Tribe of Indians in Kansas v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995) are equally inapposite. In *Pueblo of Sandia*, the Tribe sought relief that unilaterally and significantly would have amended, without the consent of New Mexico, in their favor the terms of their gambling

Constitution, and argued the Governor had no authority to enter into the Compact. 406 F.Supp.2d at 1140. Again, no Secretarial action was involved, and there were no federal parties in the suit. *State ex rel. Coll v. Johnson* likewise concerned a direct challenge to the validity of a Tribal-State gambling compact against state defendants under state law. 990 P.2d at 1278, 128 N.M. at 155. The

compact. Not surprisingly, under these facts the court in *Sandia* felt compelled to dismiss the actions in the absence of the State. In *Kickapoo*, the Tribe sought to obtain the validation of a compact with the State of Kansas that the Kansas Supreme Court had held was invalid under state law. 43 F.3d at 1495. The action included a claim that the Secretary wrongfully had attempted to “toll” the forty-five day compact approval period pending resolution of the state law challenge to its validity. *Id.* at 1494. The court found the State to be necessary because “the State of Kansas has an interest in the validity of a compact to which it is a party.” *Id.* at 1495. Significantly, though, the court went on explain that its ruling would *not* prevent the Kickapoo from challenging the actions of the Secretary directly in the future in an action where the validity of the Compact itself was not also at issue:

[T]he district court’s concern that the instant lawsuit presented the only opportunity for the Tribe “to challenge the alleged wrongful acts of federal agents,” was misdirected; if the Secretary attempts to toll the forty-five-day period for his consideration of a properly entered Tribal-State compact, then his action can be challenged anew.

43 F.3d at 1499 (internal citation omitted).

The lesson is clear: the parties to a Tribal-State compact are necessary and indispensable when their contractual rights and obligations are actually at issue. Once those issues have been resolved and the only remaining question is the legitimacy of the actions of federal agents vis-à-vis an otherwise valid compact, the absence of the compacting parties presents no impediment to judicial review.

The “validity” of the SNI-New York Compact already has been adjudicated in the New York courts. *See, e.g., Dalton v. Pataki*, 5 N.Y.3d 243, 802 N.Y.S.2d 72 (2005), *cert. denied*, 126 S.Ct.

Plaintiffs seek no such relief in this action.

742, 163 L.Ed.2d 571 (2005). The subject of *this* case is the legitimacy of the actions of the federal defendants, not the contractual rights and obligations of the parties to the Compact.⁷ While the SNI has an interest in the legitimacy of the Secretary’s actions, this interest is protected by the federal defendants. On the authority above and, indeed, on the lack of any apposite authority cited by the SNI, this Court should determine that the SNI is not “necessary” and deny its application.

B. The SNI is not an Indispensable Party.

Absent a threshold finding that a non-party is “necessary,” the Court need not reach the issue of indispensability. *See, e.g., Associated Dry Goods Corp. v. Towers Fin. Corp.*, 920 F.2d 1121, 1123 (2d Cir.1990); *Seneca Nation of Indians v. New York*, 213 F.R.D. 131 (W.D.N.Y. 2003)(Curtin, J). This Court need not and should not reach the issue in the present case.

In the event the Court decides to address the issue, however, it is plain that “in equity and good conscience” this action should proceed in the absence of the SNI.

⁷ Indeed, while the SNI go to great lengths to argue on behalf of the rights and interests of New York, the undeniable fact is that, at least as of this submission, New York itself has not appeared to argue that it is either necessary or indispensable (not that this would be determinative; but its silence may be enlightening).

1. The SNI is not “indispensable” because the federal defendants are able to adequately protect any interest the SNI may have in the legitimacy of federal agency actions and determinations permitting gambling on the Buffalo Parcels.

The factors to be considered in determining whether an action may proceed “in equity and good conscience” when a necessary party cannot be joined are:

- the extent to which a judgment rendered in the [non-party’s] absence might be prejudicial to either the non-party or parties;
- the extent prejudice can be lessened or avoided by including protective provisions in the judgment, shaping the relief, or other measures;
- whether judgment in the [non-party’s] absence will be adequate; and
- whether the plaintiff will have an adequate remedy if the action is dismissed.

Assuming for the sake of argument the SNI were “necessary,” an analysis of these factors demonstrates the SNI clearly is not “indispensable.” The Tenth Circuit in *Sac and Fox, supra*, rendered a thorough and well-reasoned decision on this issue that is particularly appropriate to the facts and issues presented in this action:

Applying these factors, we conclude the district court abused its discretion in finding the Wyandotte Tribe was an indispensable party. With respect to the first factor, it is true that the Wyandotte Tribe has an economic interest in proceeding with gaming activities on the Shriner Tract. As previously noted, however, the potential of prejudice to that interest is offset in large part by the fact that the Secretary’s interests in defending his decisions are substantially similar, if not virtually identical, to those of the Wyandotte Tribe. Further, we note that the Wyandotte Tribe has filed pleadings at virtually all stages of this litigation and has consistently offered its views regarding why the Secretary’s actions were appropriate. Because the potential for prejudice is minimal, “we need not be

concerned with the second factor, which addresses the availability of means for lessening or avoiding prejudice.” *Rishell*, 94 F.3d at 1412. With respect to the third factor, a judgment rendered in the Wyandottes’ absence would be adequate in our view because, regardless of the presence or absence of the Wyandottes, the claims in this action turn solely on the appropriateness of the Secretary’s actions, and the Secretary is clearly capable of defending those actions. Moreover, as noted above, the absence of the Wyandotte Tribe does not prevent the plaintiffs from obtaining the relief requested in their complaint. Finally, and perhaps most important, there does not appear to be any alternative forum in which plaintiffs’ claims can be heard. Although it is possible the Secretary might later require NEPA or NHPA compliance in order for the Wyandotte Tribe to take action with respect to the Shriner Tract, the instant action is the only opportunity for plaintiffs to challenge the remainder of the Secretary’s determinations. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir.1996)(noting that a court should be “extra cautious” before dismissing an action pursuant to Rule 19(b) if no alternative forum exists); *Rishell*, 94 F.3d at 1413 (noting that “[t]he absence of an alternative forum would weigh heavily, if not conclusively against dismissal”).

Sac and Fox, supra, 240 F.3d at 1259-1260.

These analytical factors are present in this case and compel the conclusion that the SNI is not “indispensable” to this lawsuit.

2. The SNI’s argument that sovereign immunity obviates the need to weigh the Rule 19(b) factors is without merit, particularly in the circumstances of this case.

The SNI argues immunity of an absent sovereign is “virtually dispositive” of the non-party’s indispensability, thus rendering any meaningful consideration of the four Rule 19(b) factors unnecessary. SNI Brief at pp. 16-18. The SNI cites as authority the Second Circuit’s 1991 decision in *Fluent*, 928 F.2d at 548 (citations omitted):

It has been held that when an indispensable party is immune from suit there is very little room for balancing of other factors set out in rule 19(b), because immunity may be viewed as one of those interests

compelling by themselves.

The SNI then erroneously concludes that “[u]nder *Fluent*, then, where necessary parties such as the Nation and the State are absent due to sovereign immunity, there is “very little room” for weighing the other considerations under Rule 19(b), and dismissal is required.” SNI Brief at p.17.

The SNI’s reading of *Fluent* and its asserted application to this case is simply wrong. First and foremost, the SNI cites no authority for application of the *Fluent* rule when federal defendants capable of representing the interests of the absent Indian nation are parties. The Secretary is a defendant in this case. There were no federal defendants in *Fluent*. This distinction is of critical importance. *Cf.* discussion at Point II.A.2, *supra*. In *State of Connecticut ex rel Blumenthal v. Babbitt*, 899 F.Supp. 80, 83 (D.C. Conn. 1995), the court stated that there is a “well recognized exception” to the standard Rule 19 indispensable party analysis “in light of the special relationship between the federal government and Indian nations:”

If a case raises issues in which the United States may adequately represent and protect the Indian tribe involved, then the Indian tribe is not an indispensable party to the action under Rule 19. *See Cheyenne River Sioux Tribe v. United States*, 338 F.2d 906 (8th Cir.), *cert. denied*, 382 U.S. 815, 86 S.Ct. 34, 15 L.Ed.2d 62 (1964); *City of Sault Ste. Marie v. Andrus*, 458 F.Supp. 465, 472-73 (D.D.C.1978) FN6; *Pan American Petroleum Corp. v. Udall*, 192 F.Supp. 626, 628 (D.D.C.1961).

In *State of Connecticut*, the plaintiffs sought to enjoin the defendants (including the Secretary) from accepting into trust approximately 245 acres of land from the Mashantucket Pequot Tribe. 899 F. Supp. at 81-82. As in the present action, there was no challenge to the Indian nation’s land purchase. Rather, the issue was the propriety of the Secretary’s administrative action in taking the property into trust. As in the present case, there was no question that the Indian tribe had an interest in the subject matter. *Id.* at 83.

The Secretary moved to dismiss for failure to join an indispensable party, arguing the Mashantucket Tribe was indispensable and could not be joined due to its sovereign immunity. *Id* at

82. The Court squarely rejected this argument stating:

Full resolution of the issues presented in this case will require this Court to decide whether the Secretary acted in accordance with law in deciding to accept the property into trust. The Court finds that the Secretary, as Trustee and guardian of the Mashantucket Tribe, will adequately represent the interest of the Mashantucket Tribe. The Court finds that on the present record there is no evidence that the Secretary has a conflict of interest. As such, the Mashantucket Tribe is not an indispensable party and this Court has jurisdiction over this action.

899 F. Supp. at 83; *see, also, Sac and Fox, supra*, 240 F.3d at 1259-1260.

Fluent notwithstanding, then, the same result should obtain in the present case.

Second, the Second Circuit itself (in a post-*Fluent* decision) has questioned the propriety of relying on sovereign immunity to effectuate a Rule 19 dismissal in cases such as the present action involving review of a federal agency's administrative decision. *See, Shenandoah v. United States Department of the Interior*, 159 F.3d 708, 714-715 (2d.Cir.1998) (District Court's dismissal of action on basis of tribal sovereign immunity questionable as it conflicted with the presumption in favor of judicial review of agency action and the Court's duty to review agency determinations).

Third and in any event, the SNI has overstated the "dispositive" role of Indian sovereign immunity in Rule 19 analysis even when *Fluent* might otherwise apply. Simply, the SNI leaps too quickly (and without the supporting basis from the general principle) from when "necessary parties such as the Nation and the State are absent due to sovereign immunity, there is 'very little room' for weighing the other considerations under Rule 19(b)," to "dismissal is required." SNI Brief at p.17. Subsequent Second Circuit decisions clarify that, while sovereign immunity may play a significant

role in weighing the Rule 19(b) factors, it does not obviate the need to consider them.⁸ *Seneca Nation of Indians v. New York*, 383 F.3d 45, 48-49 (2d. Cir. 2004). It is this latter aspect of the *Seneca Nation* case that the SNI conveniently ignores here in urging this Court to find it indispensable to this action without even undertaking a Rule 19(b) analysis. SNI Brief at pp. 17-18.⁹

⁸ Indeed, in rendering its decision in *Fluent* the Second Circuit relied heavily on the Tenth Circuit's decision in *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir.1989). However, in *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999), rendered nearly a decade after its decision in *Enterprise Mgmt.* (and, indeed, eight years after *Fluent*), the Tenth Circuit, concerned with other courts' over-reliance on the "very little room" language, clarified its position and intent with respect to a Rule 19 analysis:

In their appellate brief, Defendants argue that we need not weigh the Rule 19(b) factors at all, quoting a comment made by this court that "there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." *Enterprise Management Consultants, Inc. v. United States ex. rel. Hodel*, 883 F.2d 890, 894 (10th Cir.1989)(quotations omitted); *see also Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 777 n. 13 (D.C.Cir.1986)(cited in *Enterprise Management*). **Defendants, however, read that comment far too categorically. Neither this court in *Enterprise Management* nor the D.C. Circuit in *Wichita & Affiliated Tribes* held that immunity is so compelling by itself as to eliminate the need to weigh the four Rule 19(b) factors. The comments to that effect were dicta because the Rule 19(b) factors were specifically analyzed in both opinions....**

Davis v. United States, 192 F.3d at 960 (emphasis added).

⁹ The SNI's misreading of the *Fluent* rule in the present case hardly appears an innocent one. In papers submitted in opposition to the State's motion for summary judgment dismissing the action on indispensable party grounds in *Seneca Nation of Indians v. New York*, in which it was the State of New York, *not* the SNI, asserting indispensable party status, the SNI castigated Magistrate Judge Heckman for an allegedly cursory analysis of the Rule 19(b), arguing that "the automatic application of *Fluent* has been rejected and a determination of the indispensability of the State must be determined in the specific context of the specific circumstances of this case." Reply Brief of Appellant Seneca Nation (Thruway Claim), 2003 WL 24300629 (Jan. 10, 2003), at p. 13, fn. 9. The SNI's vociferous arguments in favor of the automatic application of *Fluent* on its own (and--without standing to do so--on the State's) behalf in this case, are

The SNI's reliance on its status as a sovereign immune from suit is, in this action, unavailing on the issue of Rule 19 indispensability.

3. The SNI's analysis is fatally flawed because it ignores the presence of federal defendants capable of protecting the SNI's interest in operating a legal gambling facility on the Buffalo Parcels.

The SNI go on to devote nearly eight pages of their Brief to the analysis of the Rule 19(b) factors. This analysis perpetuates the infirmities of the SNI's "necessary party" argument because it is premised on a misapprehension of both the nature of the action and the character of the SNI's own interest therein, *see* discussion at Point II.A., *supra*, and because it persists in ignoring the most compelling dispositive element in this case: the presence of the federal defendants defending their own actions--the only actions in dispute. The analysis therefore has no bearing on the disposition of the SNI's request.

CONCLUSION

The SNI's *amicus curiae* request for dismissal on the basis of its argument that the Nation (and the State) are necessary and indispensable to this action is procedurally infirm and substantively

disingenuous at best in light of the SNI's own on-record rejection of the same proposition in *Seneca Nation*. In light of the discussion above and considering the SNI's own previously-asserted position in filed court papers that the four indispensibility factors should be balanced even in the face of a sovereign immunity claim, it is clear that this case should not be dismissed, particularly because of the presence of the federal defendants, but also on proper consideration of the fourth factor, which, at the very least, serves to counter the SNI's over-reliance on the immunity. *See Sac and Fox, supra*, 240 F.3d at 1260, citing *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (noting that a court should be "extra cautious" before dismissing an action pursuant to Rule 19(b) if no alternative forum exists); *Rishell*, 94 F.3d at 1413 (noting that "[t]he absence of an alternative forum would weigh heavily, if not conclusively against dismissal").

lacking in merit and, accordingly, should be denied.

Dated: Buffalo, New York
September 15, 2006

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