

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

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

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**Civil Action No. 06 CV 0001**  
**Hon. William M. Skretny, U.S.D.J.**

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**STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF  
PLAINTIFFS' AND INTERVENOR-PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT**

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Pursuant to the Federal Rules of Civil Procedure, Local Rule 56.1, Plaintiffs and Intervenor-Plaintiffs (collectively the “Plaintiffs”) respectfully submit this statement in conjunction with their accompanying Motion dated July 25, 2006, setting forth a separate statement of the material facts as to which Plaintiffs contend there is no genuine issue to be tried. Based on the pleadings and prior proceedings in this action and the accompanying Notice of Motion and supporting papers, there is no genuine issue to be tried concerning the following material facts:

***A. The Seneca Nation Settlement Act***

1. The Seneca Nation of Indians (“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” (the villages of Carrollton, Great Valley and Vandalia). *See* H. R. 5367, Seneca Nation Settlement Act of 1990 (“SNSA”), *Hearing before the Committee on Interior and Insular Affairs*, 101st Cong., 2nd Sess. (1990) at pp. 17-18. Following early challenges to the validity of some of the leases, Congress confirmed the existing leases, first for a twelve-year period in 1875, and then for a 99-year period in 1890. *Id.* at 18-19. The 99-year leases were due to expire on February 19, 1991.

2. The purpose of the Seneca Nation Settlement Act of 1990, 25 U.S.C. §§ 1774 *et seq.*, was primarily to avert a crisis by protecting public and private leases and facilitating the SNI’s execution of new leases:

[T]he original 99-year leases are due to expire on February 19, 1991. The approaching expiration of these leases has been the occasion of great alarm and concern on the part of the city and residents of Salamanca and among the residents of the congressional villages. While there is a general acceptance among the lessees that they have enjoyed the benefit of a Federally-conferred subsidy of their lease costs at the expense of the Seneca Nation for 99 years, there is no

question that a quantum jump in lease payments from that subsidized rate to the present-day fair market value rate will be a great financial shock to some of the lessees, particularly the elderly... It is clear that if major economic disaster is to be averted for the city of Salamanca and the congressional villages and for their residents, further legislation is needed. ...

*Id.*, at p. 20.

3. Under the terms of the SNSA, the SNI received cash payments totaling \$46,000,000. (\$30,000,000. from the United States and \$16,000,000. from the State of New York) plus additional payments and services for economic community development worth \$14,000,000. 25 U.S.C. § 1774d(b), (c). The SNSA placed no restriction on the use of those funds, which were to be spent “as determined by the Nation in accordance with the Constitution and laws of the Nation.” 25 U.S.C. § 1774d (b)(1), (c).

4. The SNSA contains no requirement that the SNI use the funds appropriated to acquire property. While some of the funds *may* be used, at the Nation’s option, to acquire lands, *see* 25 U.S.C. §1774f (c), the Act and the underlying legislative materials expressly provide that the majority of the funds will be used for other purposes. *See, e.g.*, 25 U.S.C. §1774d (b)(1), stating that 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 the Constitution and laws of the Nation.”

5. Dennis Lay, then-President of the SNI, represented to Congress that, instead of using the funds to acquire property, 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). 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; and the creation of substance abuse programs. *Id.*

6. The first part of 25 U.S.C. § 1774f (c), entitled "Land Acquisition," provides that "[l]and 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;" and "[s]tate and local governments shall have a period of 30 days after notification by the Secretary or the Seneca nation of the 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." Subsection 1774f(c) further provides that "[u]nless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of section 2116 of the Revised Statutes (25 U.S.C. 177), such lands shall be subject to the provisions of that Act and shall be held in restricted fee status by the Seneca Nation."

7. The second part of 25 U.S.C. § 1774f(c) states: "[b]ased on the proximity of the land acquired to the Seneca Nation's reservations, land acquired may become a part of and expand the boundaries of the Allegany Reservation, the Cattaraugus Reservation, or the Oil Spring Reservation in accordance with the procedures established by the Secretary for this purpose."

8. The Secretary made no decision that the land the SNI acquired at issue in the City of Buffalo (the "Buffalo Parcels") should not be held by the SNI in restricted fee status.

9. The SNI has not requested, nor has the Secretary taken, any further action affecting the legal status of the Buffalo Parcels pursuant to the SNSA or any other law. Specifically, there has been no request by the SNI, nor any finding by the Secretary, that the Buffalo Parcels become a part of and expand the boundaries of the Allegany Reservation, the Cattaraugus Reservation, or the Oil Spring Reservation.

***B. Approval of the Tribal-State Class III Gaming Compact and Gaming Ordinance***

10. On August 18, 2002, officials of the Seneca Nation and the Governor of New York entered into a Class III Gaming Compact (“Compact”) designed to facilitate the construction and operation of gambling casinos by the SNI in the cities of Niagara Falls and Buffalo, New York. *See* “Nation-State Gaming Compact between the Seneca Nation of Indians and the State of New York,” as incorporated within the Administrative Record produced by the Bureau of Indian Affairs and filed by Defendants with this Court May 1, 2005 (“BIA AR”), at 549-580 (Document No. 27, Part 17); *see also*, BIA AR 531 (Document No. 27, Part 16).

11. By their terms, the Compact and underlying Memorandum of Understanding were executed pursuant to and subject to the terms and provisions of the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. §2701 *et. seq.* *See* BIA AR 552, 574 (Document No. 27, Part 17).

12. Sub-paragraph 11(a)(1) of the Compact provides that the Nation may establish a gambling facility “in Niagara County, at the location in the City of Niagara Falls indicated on the map of downtown Niagara Falls attached as Appendix I, or at such other site as may be determined by the SNI in the event the foregoing site is unavailable to the Nation for any reason...” BIA AR 563 (Document No. 27, Part 17).

13. Sub-paragraph 11(a)(2) of the Compact provides that the SNI may establish a

gambling facility “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...” BIA AR 563 (Document No. 27, Part 17).

14. Sub-paragraph 11(b)(3) of the Compact provides that, with respect to the sites referenced in Sub-paragraphs 11(a)(1) and 11(a)(2):

[t]he State shall support the Nation in its use of the procedure set forth in the Seneca Settlement Act, 25 U.S.C. §1774f (c), to acquire restricted fee status for the site described in Appendix I and any other site chosen by the Nation pursuant to Paragraphs 11(a)(1) and 11(a)(2), to which the State has agreed, such agreement not to be unreasonably withheld.

BIA AR 564 (Document No. 27, Part 17).

15. Pursuant to the provisions of IGRA, 25 U.S.C. §2701 *et. seq.*, on September 10, 2002, the Compact was submitted to the Secretary of the Interior (“Secretary”) for approval. BIA AR 16 (Document No. 25, Part 3).

16. The Secretary failed to disapprove the Compact, thereby allowing the Compact to be deemed approved as of October 25, 2002, pursuant to Section 11(d)(8)(C) of IGRA, 25 U.S.C. § 2710(d)(8)(C). BIA AR 22-23 (Document No. 25, Part 3); *see also*, BIA AR 2 (Document No. 25, Part 1).

17. On November 12, 2002, the Secretary sent a letter to Governor George Pataki of New York and SNI President Cyrus Schindler for the purpose of explaining her decision to “allow this Compact to take effect without Secretarial action” (BIA AR 16)(Document No. 25, Part 3), “but only to the extent the compact is consistent with the provisions of IGRA” BIA AR 23 (Document No. 25, Part 3). *See also*, BIA AR 397, 404 at 397 (Document No. 27, Part 4). The Secretary withheld

affirmative approval due to certain concerns, including the proliferation of off-reservation gambling. BIA AR 17 (Document No. 25, Part 3).

18. Despite her concerns, the Secretary allowed the Compact to go into effect because she believed that any land acquired by the SNI pursuant to the SNSA would have “Indian Country” status (BIA AR 21 (Document No. 25, Part 3)) (“the Settlement Act contemplates that lands placed in restricted status be held in the same legal manner as existing Nation’s lands are held and thus, subject to the Nation’s jurisdiction”).

19. The Secretary also stated that, while lands acquired pursuant to the SNSA “must be subject to the requirements of Section 20 of IGRA,” she believed that such lands were “exempt from the prohibition on gaming contained in Section 20 because they are lands acquired as part of the settlement of a land claim” (BIA AR 22 (Document No. 25, Part 3)). *See also* BIA AR 21 (Document No. 25, Part 3) (“This decision rests squarely on a Congressionally-approved settlement of a land claim.”)

20. By letter dated November 26, 2002, the National Indian Gaming Commission (“NIGC”) approved the SNI Class III Gaming Ordinance of 2002 as Amended. BIA AR 583 (Document No. 27, Part 19). The Ordinance itself was not site-specific. *See* BIA AR 584-603 (Document No. 27, Part 19). Among other things, the letter stated: “It is important to note that the gaming ordinance is approved for gaming only on Indian lands, as defined in the IGRA, over which the Nation has jurisdiction.” BIA AR 583 (Document No. 27, Part 19).

21. On December 9, 2002, the Federal Register published a U.S. Department of the Interior notice stating that the Compact “is considered approved, but only to the extent the compact is consistent with the provisions of IGRA.” BIA AR 396 (Document No. 27, Part 3).

### *C. Acquisition of the Buffalo Parcels*

22. Pursuant to Paragraphs 11(a)(2) and 11 (b)(3) of the Compact, the SNI was granted the exclusive right, subject only to “reasonable” objection by the State, to determine the location of the Buffalo casino. *See* BIA AR 563-564 (Document No. 27, Part 17)(providing in Paragraph 11(a)(2) that the casino location in the City of Buffalo is to be “determined by the Nation” and in Paragraph 11(b)(3) that the State could not unreasonably withhold agreement to the selection of “any” site chosen by the SNI). The Compact did not provide any role for either the City of Buffalo or County of Erie (or, indeed, any citizen thereof) in the site selection process.

23. On October 3, 2005, nearly three years after the approval of the Compact and Gaming Ordinance, a Special Session of Council of the SNI identified the site or “Buffalo Footprint” for its Erie County gambling facility as being “bounded to the North by Perry Street, to the East by Chicago Street, to the South by Ohio Street, and to the West by Main Street.” BIA AR 33 (Document No. 25, Part 5). This massive footprint includes, among other notable landmarks, Buffalo’s HSBC Arena and the National Historic Register-eligible DL & W Terminal.

24. At about this time, “the Seneca Erie Gaming Corporation, a tribally chartered corporation formed for the purposes of developing, financing and operating” the SNI’s Buffalo casino (BIA AR 33 (Document No. 25, Part 5)), identified and, at a cost of approximately \$4.6 Million, purchased certain parcels of land located in the City of Buffalo and within the Buffalo Footprint. By Bargain and Sale Deed dated October 3, 2005, the Seneca Erie Gaming Corporation conveyed the Buffalo Parcels to the SNI for the sum of Four Dollars (\$4.00). BIA AR 36-49 (Document No. 25, Part 6).

25. Prior to the 2005 purchase by the Seneca Erie Gaming Corporation, the Buffalo

Parcels were privately held, non-Indian owned lands. The SNI, as a Nation, have not had a formal presence in the City of Buffalo for nearly 170 years: in 1838, by treaty ratified by the United States Senate and signed by then-President Martin Van Buren, the Seneca relinquished their rights to the Buffalo Creek Reservation. *See* TREATY OF BUFFALO CREEK WITH THE NEW YORK INDIANS, 1838, January 15, 1838. 7 Stat. 550. Their current reservation lands (Allegany, Cattaraugus and Oil Spring) are all located well outside the City of Buffalo.

26. By letters dated October 3, 2005, the SNI notified the State of New York, the City of Buffalo and the County of Erie that the SNI had acquired the Buffalo Parcels and that State and local governments had 30 days to comment on the impact of the removal of those Parcels from the real property tax rolls of State political subdivisions. BIA AR 156-158 (Document No. 25, Part 14); BIA AR 162-164 (Document No. 25, Part 16); BIA AR 159-161 (Document No. 25, Part 15).

27. On November 1, 2005, the County of Erie, by and through its Law Department (Laurence K. Rubin, County Attorney), opposed the removal of the Buffalo Parcels from the tax rolls citing a potential “significant negative impact on County real property and sales tax revenues currently and within the foreseeable future.” BIA AR 169-170 (Document No. 25, Part 19).

28. On November 7, 2005, the SNI sent to the DOI, Bureau of Indian Affairs (“BIA”), documents purportedly in compliance with the SNSA to hold the Buffalo Parcels in restricted fee status. BIA AR 1-12 (Document No. 25, Part 1), with annexed Exhibits 1-18 attached at BIA AR 13-170 (Document No. 25, Parts 2-19).

29. In its submission, the SNI discounted the concerns expressed by the County of Erie about the potential effect of the Buffalo Parcels’ restricted fee status on County sales tax revenue, emphasizing that “the Settlement Act’s focus is on the ‘real property tax rolls’ impacts and does not

extend to impacts on sales tax or other taxing revenues.” BIA AR 1-12, at p. 7, fn. 39 (Document No. 25, Part 1).

30. The Secretary made no decision that the Buffalo Parcels should not be subject to a restriction against alienation pursuant to the Trade and Intercourse Act (25 U.S.C. §177), thereby ostensibly allowing the SNI to hold the lands in restricted fee status by operation of law under the SNSA.

***D. IGRA and “Indian lands”***

31. Section 11(D) of IGRA, 25 U.S.C. §2710(d), authorizes Class III gambling only on “Indian lands” as defined in the Act. “Indian lands” is defined in Section 4 of the IGRA, 25 U.S.C. §2703, as:

(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

32. The Buffalo Parcels are not reservation lands. BIA AR 451 at fn. 81 (Document No. 27, Part 8).

33. The Buffalo Parcels are not “held in trust by the United States.” BIA AR 411 (Document No.27, Part 5).

34. As the Defendants and the parties to the Compact have acknowledged at all times, in order to be able to exercise “governmental power” over the land, the Indian tribe must have legal “jurisdiction” over the land. BIA AR 410 (Document No.27, Part 5); BIA AR 447-448 (Document No. 27, Part 8); *See also* 25 U.S.C. §2710(b).

35. As Defendants have acknowledged (*see* BIA AR 410 (Document No.27, Part 5)), in

order to have legal “jurisdiction,” the lands at issue must be “Indian Country,” defined in 18 U.S.C. §1151 as:

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

36. The Buffalo Parcels are not within the limits of any Indian reservation under the jurisdiction of the United States Government. BIA AR 451 at fn. 81 (Document No. 27, Part 8).

37. The Buffalo Parcels do not qualify as Indian allotments.

***E. IGRA and “After-Acquired” Lands***

38. Section 20(a) of the IGRA, 25 U.S.C. §2719(a) generally prohibits the operation of gambling casinos on trust lands acquired after October 17, 1988.

39. The Secretary has determined that this general prohibition against gambling on after-acquired trust lands applies equally to lands owned by the SNI in restricted fee status. BIA AR 22 (Document No. 25, Part 3).

40. Section 20(b), 25 U.S.C. § 2719(b)(1)(B)(i), on which the Secretary expressly relied in her determination not to disapprove the Compact (*see* BIA AR 22 (Document No. 25, Part 3)), sets forth an exception to this general prohibition, providing, in pertinent part:

“Subsection (a) of this section shall not apply when lands are taken into trust as part of a settlement of land claim ...”

41. Defendant NIGC has stated that the language of the §2719(b)(1)(B)(i) exception is

clear and unambiguous, requiring “there be a claim for land...[i]t means a claim made by a Tribe for the return of land.” *See, In Re Wyandotte Nation Amended Gaming Ordinance*, National Indian Gaming Commission Final Decision and Order, September 10, 2004 at p. 6.

42. The Department of the Interior’s Bureau of Indian Affairs has recently published regulations, promulgated March 15, 2006, stating that in order to meet the requirements of the “settlement of a land claim” exception, gaming may be conducted only when:

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

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

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

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

43. At no time prior to the enactment of the SNSA had the SNI asserted a claim relating to or affecting the return of or the title to any land that was the subject of the 99-year Salamanca leases approved by Congress; and the validity of the 99-year leases was not in dispute at the time of the settlement.

44. Prior to and at the time of enactment of the SNSA, no SNI claim affecting title to its Cattaraugus County reservations had been filed or was pending in federal or any other court.

45. The Buffalo Parcels have never been “taken into trust” by the United States. BIA AR 411 (Document No.27, Part 5).

46. The SNI did not receive the Buffalo Parcels nor any other specific parcel of land under the express terms of the SNSA.

***F. National Environmental Policy Act***

47. On or about October 25, 2002, the SNI acquired approximately 12.8 acres of land in downtown Niagara Falls, New York, known as the Niagara Falls Convention and Civic Center Property, from the New York State Urban Development Corporation for a purchase price of \$1.00. These lands (“the Niagara Site”) were among the lands identified in the Compact as the “Sites for Gaming Facilities.” BIA AR 563 (Document No. 27, Part 17).

48. On the same day the SNI leased the Niagara Site to the Seneca Niagara Falls Gaming Corporation. Also on the same day, the Seneca Niagara Falls Gaming Corporation subleased the Niagara Site to the New York State Urban Development Corporation, d/b/a Empire State Development Corporation, and the New York State Urban Development Corporation sub-subleased the Niagara Site back to the Seneca Niagara Falls Gaming Corporation. BIA AR 000180-183 (Document No. 26, Part 5); BIA AR 000184-186 (Document No.26, Part 6); BIA AR 000187-190 (Document No. 26, Part 7).

49. On October 29, 2002, the SNI requested the Secretary of the Interior to have the Niagara Site placed into restricted fee status pursuant to Section 8(c) of the Seneca Nation Settlement Act of 1990, 25 U.S.C. § 1774f(c). BIA AR 149-155 (Document No. 25, Part 13).

50. An Environmental Assessment (EA) was prepared to evaluate the environmental effects of the acquisition of the Niagara Site. After officials of the Bureau of Indian Affairs (BIA) commented on the EA, a revised EA, dated November 27, 2002, was prepared. A Finding of No Significant Impact (FONSI) was prepared by BIA officials, and signed by the Assistant Secretary –

Indian Affairs on November 29, 2002. *See* Document No. 23, Part 2.

51. George Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development for Indian Affairs, has testified to the general applicability of NEPA to casino gambling before the Senate Committee on Indian Affairs, stating:

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

*See*, S. Hrg. 109-298, *Off Reservation Gaming: Oversight Hearing for the Process for Considering Gaming Applications Before the Committee on Indian Affairs*, 109th Congress, 2nd Session, Part 1, (February 1, 2006) at p. 11.

52. In contrast to the steps taken with respect to the Niagara Falls site, no efforts were made to prepare an Environmental Assessment with respect to the Buffalo Parcels.

53. In taking the actions which purported to authorize the operation of a gambling casino on the Buffalo Parcels, neither the Secretary nor the Chairman of the National Indian Gaming Commission made any effort to comply with the requirements of the National Environmental Policy Act (NEPA) or the National Historic Preservation Act (NHPA).

Dated: Buffalo, New York  
July 25, 2006

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