

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

CITIZENS AGAINST CASINO)	
GAMBLING IN ERIE COUNTY, <i>et al.</i>,)	Civil Action No. 09-CV-0291
)	
Plaintiffs,)	Hon. William M. Skretny, U.S.D.J.
)	
v.)	
)	
HOGEN, <i>et al.</i>,)	
)	
Defendants.)	

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
THE MOTION OF THE SENECA NATION OF INDIANS TO INTERVENE**

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PRELIMINARY STATEMENT

Plaintiffs respectfully submit this Memorandum of Law in opposition to the motion of the Seneca Nation of Indians (the “SNI”), pursuant to Fed. R. Civ. P. 24(b), to intervene as a party.

This is not an appropriate case for permissive intervention. This case challenges the actions of the United States Government. The SNI possesses neither a conditional statutory right to intervene nor a “claim or defense” in this action “that shares with the main action a common question of law or fact,” as Fed. R. Civ. P. 24(b) requires. The U.S. Government, which is a party, has the same interest as the SNI in defending and upholding the propriety of the actions of the federal agencies and officials at issue in this case. As this Court previously held in *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295 (W.D.N.Y. 2007) (“*CACGEC I*”), in the context of a Rule 19 dismissal motion, the U.S. Government, as trustee for Indian tribes, is an adequate representative of the SNI’s interests, and this conclusion applies here with full force. The proposed intervention would inject collateral issues into the litigation, lead to further, interminable delay, and unduly prejudice the rights of the original parties. Accordingly, the SNI’s motion should be denied.

BACKGROUND OF THIS MOTION

We do not write against a blank slate. This is *CACGEC III*, not *CACGEC I* or *CACGEC II*. Much water has passed beneath the bridge, and through the Buffalo Creek, since October 3, 2005, when the SNI acquired the 9-acre parcel that has come to be known as the Buffalo Parcel, to July 3, 2007, when the SNI rolled in the slot machines and started gambling, to today. Coincidentally, it was on this same date, July 8, one year ago in 2008, that the Court issued its opinion in *Citizens Against Casino Gambling in Erie County v. Hogen*, 2008 U.S. Dist. LEXIS 52395 (W.D.N.Y. July 8, 2008) (“*CACGEC II*”). In that Decision, the Court vacated the July 2,

2007 administrative decision of the National Indian Gaming Commission (“NIGC”) Chairman approving the SNI’s Class III gaming ordinance (the “2007 Ordinance”) for the Buffalo Parcel. On August 26, 2008, when the Defendants refused to bring the gambling to an end, the Court directed the NIGC and its Chairman to enforce the requirements of the IGRA “forthwith.” Nevertheless, one year later, the gambling continues unabated.

There is a long history here, and there is an important reason for summarizing it at the outset. The history demonstrates not only the protracted course this case has followed to date, but also how staunch an advocate the U.S. Government has been in representing and advancing the SNI’s interests. These facts¹ are highly relevant to the Court’s exercise of discretion here.

The Statutory Framework

In 1990, Congress enacted the Seneca Nation Settlement Act, 25 U.S.C. § 1774 (the “SNSA”). One of the SNSA’s primary purposes was to provide compensation for past unfair below-market leases and to permit non-Indian lessees to extend their existing leases on SNI territory in the City of Salamanca and nearby villages. In exchange for relinquishing potential legal claims for lease payments, the SNI received, among other things, a payment in the amount of \$30 million from the Secretary of the Department of the Interior (“DOI”). *Id.*, § 1774f(c). A miscellaneous provision allowed the SNI to use the funds to buy land “within its aboriginal area in the State [of New York] or situated within or near proximity to former reservation land” and, upon 30 days notice to State and local governments, to hold the land in “restricted fee status.”

Id.

¹ The facts are drawn from this Court’s opinions in *CACGEC I*, 471 F. Supp. 2d 295 (W.D.N.Y. 2007), and *CACGEC II*, U.S. Dist. LEXIS 52395 (W.D.N.Y. July 8, 2008), and 2008 U.S. Dist. LEXIS 67743 (W.D.N.Y. Aug. 26, 2008) (motion to enforce).

Two years earlier, in 1988, Congress had enacted the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (the “IGRA”). Its purpose was to establish a comprehensive statutory scheme to regulate gambling on Indian lands. Toward that end, the IGRA provides for three classes of gambling, and it limits Class III gambling, the category at issue here, to Indian lands within the tribe’s jurisdiction, in conformance with a “tribal-state compact” that regulates such gambling and an “ordinance,” which the tribe adopts and the NIGC approves. Section 20 of IGRA, 25 U.S.C. § 2719, the “after-acquired lands prohibition,” expressly prohibits gambling on “Indian lands” acquired after 1988, unless a specific statutory exception applies. One exception, and the one at issue here, is the “settlement of a land claim” exception under 25 U.S.C. § 2719(b)(1)(B)(i).

The Grand Island Case

In 1993, the SNI commenced a lawsuit that surprised the world by attempting to claim Grand Island and part of Niagara Falls as “Indian land.” If the SNI had won, this would have provided an avenue for it to claim a “settlement of a land claim.” On June 21, 2002, however, Chief Judge Richard Arcara ruled against the SNI and decisively rejected the argument that Grand Island was ever its sovereign land. *See Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448 (W.D.N.Y. 2002), *aff’d*, 2004 U.S. App. LEXIS 19005 (2d Cir. Sept. 9, 2004).

Two months later, on August 18, 2002, the SNI and the State of New York, under Governor George Pataki, entered into a tribal-state compact (the “Compact”) for the conduct of Class III gambling on three sites in New York: (i) Niagara Falls; (ii) the SNI Reservation in Allegany County; and (iii) an unspecified location to be determined in Buffalo or elsewhere in Erie County. Under IGRA, the Secretary of the DOI, at that time Gale Norton, had 45 days to

act on the Compact or it would be “deemed approved.” The 45 days passed, Secretary Norton did not act, and on October 25, 2002, the Compact passed into effect by operation of law.

On November 12, 2002, after the 45 days expired (and Governor Pataki won reelection), Secretary Norton sent letters to the SNI President and the New York State Governor explaining her “non-decision decision” that had allowed the Compact to go into effect. Secretary Norton stated (incorrectly, Plaintiffs here contend),² that lands placed in restricted status under the SNSA are set aside for the use of the SNI under federal superintendence, and thus meet the definition of sovereign Indian country. She went on to opine, appropriately, that lands held in “restricted fee status” are subject to the IGRA restrictions on gambling and then concluded, incorrectly Plaintiffs contend, that the land under the Compact would qualify for the “settlement of a land claim” exception to IGRA’s “after-acquired lands prohibition,” citing the SNSA more than a decade after its enactment.

On October 29, 2002, shortly after the “non-decision decision,” the SNI submitted an ordinance to the NIGC for Class III gambling “on Nation lands.” The SNI resubmitted the ordinance (the “2002 Ordinance”) on November 25, 2002 to correct a technical defect, and the following day, November 26, 2002, the NIGC approved the 2002 Ordinance for gambling on Indian lands over which the SNI has jurisdiction.

The Acquisition of the Buffalo Parcel

Almost three years later, on October 3, 2005, the SNI acquired two tracts of land totaling approximately nine acres in downtown Buffalo. The SNI notified the State, the County, and the

² Although this Court ruled otherwise in *CACGEC II*, Plaintiffs continue to challenge this assumption on numerous grounds, not the least of which is that Congress cannot grant sovereignty over sovereign state land without the consent of the State in which the land is located. As the Complaint alleges (Dkt No. 1 at ¶¶ 3-5, 95-98), New York State has had sovereignty over land within its borders since the Revolutionary War, and the New York State Legislature never ceded sovereignty over the land at issue. Assuming *arguendo* that Congress could grant such sovereignty, which it cannot, the SNI did not meet any of the exceptions to IGRA’s restrictions on gambling.

City that they had 30 days to comment on the removal of the land from the tax rolls. On November 7, 2005, after the 30 days expired, the SNI asked the DOI to place the land in restricted fee. The Secretary did not decide within 30 days that the land should not be subject to the provisions of 25 U.S.C. § 177, and the land passed into “restricted fee” by operation of law.

The CACGEC I Litigation

On January 3, 2006, the Citizens Against Casing Gambling in Erie County (“CACGEC”) and other plaintiffs filed *CACGEC I* in this Court to challenge the U.S. Government’s decisions and actions. Plaintiffs argued that: (i) the Buffalo Parcel is not “Indian lands”; and (ii) even if it is, it is not gambling-eligible because the federal government did not take it “into trust as part of a settlement of a land claim.”

The SNI submitted an *amicus* brief arguing for dismissal under Fed. R. Civ. P. 19 on the ground that the Tribe had “significant governmental and economic interests” in the subject matter but could not be joined as a party on sovereign immunity grounds. In a Decision dated January 12, 2007, this Court rejected the SNI’s argument. *CACGEC I*, 471 F. Supp. 2d at 314. While recognizing the SNI’s interest in the subject matter, the Court noted that the Tribe “is not a necessary party unless that interest will, as a practical matter, be impaired or impeded by this suit.” *Id.* at 315. Here, it would not. “As trustee for Indian tribes,” the Court stated, the DOI “has an interest in Indian self-government . . . that makes it uniquely qualified to represent a tribe’s interests,” and the U.S. Government’s interest in defending its actions is “substantially similar, if not identical,” to the SNI’s interest in gambling on the Parcel. *Id.* at 315-16. Thus, even if the Government did not make every argument that the SNI would make as a party, as the SNI contended, the Tribe’s interests were sufficiently aligned with the SNI’s to provide adequate representation of the SNI’s interests. *Id.* at 316.

In the January 12, 2007 Decision, the Court also ruled on the merits of the Plaintiffs' challenge to the 2002 Ordinance. Among other things, the Court held that the NIGC Chairman should have, but had not, made an "Indian lands" determination for the proposed gambling sites before acting on the Ordinance and provided a reasoned explanation for the conclusions. *Id.* at 327. Because the 2002 Ordinance did not even identify the Buffalo Parcel (which the SNI had not yet acquired at the time), the Court vacated the 2002 Ordinance as arbitrary and capricious and sent the matter back to the NIGC for reconsideration. *Id.* at 329.

Following remand, on June 9, 2007, the SNI enacted an amended ordinance (the "2007 Ordinance"), specifying the Buffalo Parcel. On July 2, 2007, the NIGC Chairman stated that the Buffalo parcel is "Indian lands" and is "subject to the Federal Government's restrictions against alienation, thus making it Indian country." Repeating and endorsing Secretary Norton's position in the November 12, 2002 letter that IGRA regulates gambling on restricted fee land, the NIGC Chairman asserted (in a statement that he would later completely reverse on January 20, 2009), that the IGRA after-acquired lands prohibition "can only sensibly be read to include trust land and restricted fee land." Nevertheless, he opined, the SNI met the "settlement of a land claim" exception and thus could operate a Class III casino on the Buffalo Parcel.

The following day, July 3, 2007, without notice to the Court or to the Plaintiffs, the SNI rolled in slot machines and opened a temporary gambling facility on the Buffalo Parcel. Several months later, it announced plans for a 90,000 square foot casino housing 2,000 slot machines, 45 game tables, and a 22-story hotel.

The CACGEC II Litigation

On July 12, 2007, CACGEC and the other plaintiffs filed *CACGEC II* to challenge the U.S. Government's approval of the 2007 ordinance. Plaintiffs advanced the same arguments that they had made in *CACGEC I*, that is, that (i) the Buffalo Parcel is not "Indian lands"; and (ii) if it is, it is not gambling-eligible because the federal government did not take it into trust part of a "settlement of a land claim." The Court allowed the SNI to participate in the briefing and submissions as *amicus curiae* at every stage of the litigation.

On May 20, 2008, while *CACGEC II* was pending, the DOI published final regulations (the "Revised After-Acquired Land Regulations"), with an effective date of August 25, 2008. The Revised After-Acquired Land Regulations address the land-into-trust process under 25 U.S.C. § 465, which is not at issue here, through which the U.S. Government can acquire land in trust for an Indian tribe. In the Notice of Final Rulemaking, 72 Fed. Reg. 29,354, the DOI precipitously reversed its longstanding position on the applicability of IGRA's after-acquired lands prohibition to "restricted fee" land, such as that at issue here. Specifically, in the Preamble to the revised regulations, the DOI stated that IGRA's after-acquired lands prohibition applies only to lands held "in trust," and not in "restricted fee." In making this statement -- which represented a 180-degree shift in the position it had taken in the prior version of the regulation and throughout the course of the *CACGEC* litigation -- the U.S. Government failed to comply with the requirements under the Administrative Procedure Act for notice and public comment prior to significant regulatory changes. It also disregarded the congressional intent underlying IGRA, which was to regulate, not promote, gambling on Indian reservations and with rare exception to prohibit it off-reservation.

At the time that the DOI made this change, the parties' cross-motions for summary judgment in *CACGEC II* were fully briefed and pending before this Court. The Defendants

never gave the slightest indication to the Court, or to the Plaintiffs, that the publication of a final regulation reversing the DOI's position on the meaning and applicability of the after-acquired lands prohibition was imminent.

On July 8, 2008, the Court issued the decision in *CACGEC II*. The Court ruled, among other things, that the Buffalo Parcel is "Indian country" over which the SNI has jurisdiction. 2008 U.S. Dist. LEXIS 52395, at *209. Nevertheless, the Court ruled that the NIGC's July 2, 2007 determination that the Buffalo Parcel is gambling-eligible land pursuant to IGRA's settlement of a land claim exception was arbitrary, capricious, and not in accordance with the law. *Id.* Accordingly, the Court vacated the NIGC's approval of the SNI's 2007 Ordinance. *Id.* at *210. Without such approval, Las Vegas-style gambling, such as that the SNI is presently operating on the Buffalo Parcel, is illegal in New York State. N.Y. Const. Art. I, § 9.

The Post-Decision Shenanigans

After the Court's opinion, the U.S. Government failed to take any action to bring the illegal gambling on the Buffalo Parcel to an end. The Defendants' inaction prompted the Plaintiffs, on July 14, 2008, to move to enforce the Court's July 8, 2008 Decision. (*CACGEC II*, Dkt No. 63.)

Two days later, on July 16, 2008, the SNI adopted and submitted to the NIGC yet another Class III gaming ordinance (the "2008-1 Ordinance") for gambling at the Buffalo Parcel site. (*CACGEC II*, Dkt No. 70-5.) On July 22, 2008, the Defendants used that submission as the pretext for a motion to remand the case to the NIGC for reconsideration. It was in that submission that the Defendants first revealed that the DOI, in the Revised After-Acquired Land Regulations, had reversed its prior position on the application of the after-acquired lands prohibition to restricted fee land. The SNI submitted an *amicus* brief (*CACGEC II*, Dkt No. 70),

supporting the Government's motion for remand and opposing the Plaintiffs' motion to enforce. In their papers, both the U.S. Government and the SNI took the extraordinary position that an agency's decision not to enforce the IGRA was "immune from judicial review" and that this Federal Court is powerless to enforce its own order by directing the NIGC to require the gambling to stop.

On August 26, 2008, the Court issued its decision on the Plaintiffs' motion to enforce and the Defendants' motion to remand. 2008 U.S. Dist. LEXIS 67743 (W.D.N.Y. Aug. 26, 2008). In granting the Plaintiffs' motion to enforce, the Court found "particularly egregious" the Defendants' approach of first publishing a proposed rule in 2000, which lay dormant for several years, then amending it in 2006, but arguing against its applicability when the Plaintiffs sought to rely upon it in this litigation, and then amending it again while the summary judgment motions were pending, but without ever giving the slightest indication to the Court that the publication of a final rule was imminent. *Id.* at *27-28. The Court directed the NIGC and its Chairman "to comply forthwith with Congress's mandate as set forth in 25 U.S.C. § 2713(a)(3)," which requires the NIGC to provide a written notice of a violation that may result in a fine or closure of a gaming operation, and with NIGC regulations. "Upon issuance of the notice(s) of violation," the Court directed, "the Chairman is directed to take such action as is consistent with the Court's July 8, 2008 Decision, the IGRA's mandates and intent, and NIGC regulations." *Id.* at *14-15.

On September 3, 2008, in a superficial move to comply with the August 26 Decision, the NIGC served a Notice of Violation (*CACGEC II*, Dkt No. 77-2) (the "NOV") on the SNI. Among other things, the NOV charged that the SNI "violated IGRA by operating a Class III gaming operation without an approved Class III gaming ordinance and by gaming on Indian Lands ineligible for gaming." (*CACGEC II*, Dkt No. 77-2 at 2.) It stated that the SNI could cure

the violation by ceasing the gambling within five days. The NOV noted, however, that the SNI had submitted an amended ordinance to the NIGC on July 17, 2008, and that new regulations interpreting the IGRA had since gone into effect. While confirming that the SNI was operating in violation of the IGRA and NIGC regulations, the NOV stated that the NIGC Chairman could determine otherwise should the NIGC successfully appeal the Court's Decisions or upon consideration of the SNI's amended ordinance.

The SNI contested the charges, and the DOI assigned a hearing officer to the case. Shortly thereafter, the hearing officer stayed the enforcement proceedings at the NIGC's request. This had the effect of staying the implementation of the Court's July 8 and August 26 Decisions. The SNI did not close the gambling facility within the five days specified in the NOV. The gambling continued, and to this day continues, on the Buffalo Parcel.

On October 14, 2008, just prior to the end of the 90-day period in which the NIGC would have had to act, the SNI withdrew the 2008-1 Ordinance. Then, on October 22, 2008, the SNI submitted a new ordinance (the "2008-2 Ordinance"), virtually identical to the ordinance that the Court had held invalid in *CACGEC II* and the one the SNI had just withdrawn. This commenced the running of a new 90-day period for NIGC review, timed to expire on Inauguration Day, January 20, 2009.

In the meantime, on October 21, 2008, Plaintiffs filed a second motion to enforce and/or to hold the NIGC and Chairman Hogen in contempt of court for failure to comply with the July 8 and August 26 Decisions. On October 24, 2008, Defendants appealed the July 8 Decision to the Second Circuit. The Defendants then opposed the contempt motion on the specious grounds that the appeal divested the Court of jurisdiction and that the NIGC has unreviewable discretion over

whether to issue a closure order. The SNI submitted an *amicus* brief supporting these positions and arguing that the Court lacks power to “intrude” on the agency’s discretion.

On January 18, 2009, the Sunday before Inauguration Day, the Solicitor of the DOI issued a memorandum stating that IGRA’s after-acquired lands prohibition does not apply to “restricted fee” land, but only to “trust” land. In reaching this conclusion, the Solicitor relied on the Preamble to the final land-into-trust regulations and the U.S. Government’s 180-degree reversal in position on the meaning and applicability of the after-acquired lands prohibition. While acknowledging the DOI’s prior position, the DOI Solicitor said that the DOI Secretary -- and, it would appear, the NIGC Chairman and the U.S. Attorney General in this case -- simply got it wrong. On January 20, 2009, the same day that President Obama took the oath of office, the NIGC used the new interpretation to approve the SNI’s resubmitted Ordinance.

On March 31, 2009, the Plaintiffs filed *CACGEC III*. The SNI’s motion to intervene soon followed.

ARGUMENT

THE SNI’S MOTION FOR PERMISSIVE INTERVENTION SHOULD BE DENIED

As the foregoing summary reflects, the U.S. Government, acting in concert with the SNI, has taken every conceivable action to defend the determinations of the DOI Secretary and the NIGC Chairman and to support and advance the SNI’s interest in conducting its Class III gambling operation on the Buffalo Parcel. The U.S. Government has taken extreme positions, reversed course, and flouted the authority of this Court to the point, Plaintiffs have contended, of contempt of court. A stauncher advocate for the SNI would be difficult to imagine. Moreover, at every step of the way, the SNI has participated in the litigation as *amicus curiae*. Not satisfied, however, the SNI now says that it wants to intervene because “the litigation has taken

turns that have convinced the Nation that it would be better able to contribute to it as a party.” (Dkt No. 10-2 at 15.) It is time for the gamesmanship to stop. The motion should be denied.

Fed. R. Civ. P. 24(b) sets out the legal standard for permissive intervention. It states, in pertinent part:

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

* * *

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.

Fed. R. Civ. Proc. 24(b)(1) and (3). Whether to grant or to deny permissive intervention is wholly within the discretion of the trial court. *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978). The principal consideration in the rule is “whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” *Id.* The district court’s discretion is “very broad” and “a denial of permissive intervention has virtually never been reversed.” *H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc.*, 797 F.2d 85, 87 (2d Cir. 1986) (citations omitted).

A. The SNI’s Motion Should Be Denied Because the SNI Do Not Meet the Conditions for Permissive Intervention

As a threshold issue, a court may not grant permissive intervention under Rule 24(b) unless the applicant’s claim or defense and the main action have a question of law or fact in common. *See Cook v. Pan Am. World Airways, Inc.*, 636 F. Supp. 693, 698 (S.D.N.Y. 1986). In

this case, the SNI has not identified any a claim or defense that it possesses in this action that has a question of law or fact in common with the main action.

The SNI does not possess the requisite “claim or defense” because the Plaintiffs’ claims in the main action run against the U.S. Government, not the SNI. The Complaint challenges the actions of the U.S. Government in allowing the SNI to establish and operate a Class III gambling establishment in downtown Buffalo, in violation of the IGRA and other federal requirements. IGRA regulates the conduct of the U.S. Government. It follows that only the governmental agencies and officials who are responsible for complying with the federal requirements can be appropriate defendants to such an action.

In the analogous context of the National Environmental Policy Act (“NEPA”), courts have applied this rationale to deny private parties an opportunity to intervene permissively or as of right in the litigation. In *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982), for example, the Seventh Circuit refused to allow interested persons and entities to intervene in a lawsuit brought under the NEPA and other federal laws to challenge the use of federal funds for the construction of a bridge across the Illinois River. “In a suit such as this, brought to require compliance with federal statutes regulating governmental projects, the governmental bodies charged with compliance can be the only defendants.” *Id.* at 185. Similarly, in *Habitat Educ. Ctr., Inc. v. Bosworth*, 221 F.R.D. 488, 496-97 (E.D. Wis. 2004), the court refused to allow wildlife conservation groups to intervene as defendants in an action challenging the forest service’s approval of logging activities and timber sales in a national forest. “Although applicants agree with the forest service’s position,” they did not have a “defense in common with the forest service,” the court observed, “because plaintiffs make no claim against the applicants and because the statutes on which plaintiffs’ claims are based do not apply to applicants.” Likewise,

in *Pogliani v. U.S. Army Corps of Engineers*, 2004 U.S. Dist. LEXIS 30415 (N.D.N.Y. 2004), the court adopted this rationale in denying a private party's motion to intervene in a NEPA action, either as of right or by permission. *See id.* at *6-7 (rejecting conflicting authorities).

So too here, only the governmental agencies and official that can take action to comply with the IGRA and related federal requirements are the only proper defendants to this action. Significantly, while the SNI asserts that there is an "identity of issues between the Nation's defenses and the main action" (Dkt No. 10-3 at 5), and spends many pages describing the issues that create its claimed interest in this litigation, it fails to identify any "claim or defense" that it possesses and that shares a common question of law or fact with the main action. Moreover, each of the issues that it identifies flows from and relates to the claims against the governmental agencies and officials, not the SNI.

There is another reason why the SNI does not possess the requisite question of law or fact in common with the main action. This is because its primary defense to any action that could be levied against it -- including a motion to enforce the Court's final judgment -- would be sovereign immunity.

In its motion, the SNI purports to waive sovereign immunity "for the limited purpose of intervening as a defendant" in this action. (*CACGEC III*, Dkt No. 10-4 at 4.) The purported waiver, however, is completely illusory. It applies only to the existing claims in the Complaint, that is, that the Buffalo Parcel: (i) is not "Indian lands" under IGRA; (ii) is subject to the IGRA's after-acquired lands prohibition, and (iii) it does not fit within any of the statutory exceptions to the statutory prohibition. *Id.* As the SNI acknowledges, these claims challenge "federal agency actions and litigation of them will be on the relevant agency records." *Id.*

If the plaintiffs were to amend the action to include the SNI as a defendant, the waiver of sovereign immunity would not apply. This is because the purported waiver, by its terms, it “does not extend to any amendment or supplement to the Complaint, or to any cross-claim, counterclaim, third-party claim, or claim of any other nature that may be filed by any present or future party in *CACGEC III*.” *Id.* It also “does not extend to Plaintiffs’ request for unspecified ‘other further and different relief’ contained in the Complaint.” *Id.* Moreover, the SNI expressly declined to waive “immunity from civil discovery or subpoena in *CACGEC III* or in any other action.” *Id.* Further, if “this waiver, or any portion of it, is determined to be invalid or ineffective, the Nation re-asserts its full sovereign immunity as a defense to all claims until further action by this Council.” *Id.* at 5.

Taking these limitations at face value, if Plaintiffs were to sue the SNI as a defendant in the action, the SNI could -- and presumably would -- claim sovereign immunity. If Plaintiffs were to seek an order against the SNI requiring them to stop gambling on the Buffalo Parcel, the SNI could -- and presumably would -- claim sovereign immunity. If Plaintiffs were to seek discovery from the SNI, for example, about its participation in the Revised After-Acquired Land Regulations, the SNI could -- and presumably would -- claim sovereign immunity.

If, due to sovereign immunity, the Plaintiffs cannot bring a claim against the SNI or seek relief against the SNI or obtain discovery from the SNI, then the SNI is really not defendant at all, in any meaningful sense of the word. Instead, it is more akin to an *amicus*.

For these reasons, this is not an appropriate case for permissive intervention.

B. The SNI’s Motion Should Be Denied Because the U.S. Government is an Adequate Representative of the SNI’s Interests

Even if the SNI could identify a “claim or defense” in common with the main action, this would not end the analysis. Fed. R. Civ. P. 24(b)(3) requires that “[i]n exercising its discretion,

the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." In this case, the Court should deny the motion because it would unduly burden the Plaintiffs and lead to additional delay in a case that has already extended for much too long.

In exercising this discretion, an important consideration is the extent to which other parties to the litigation adequately represent the applicant's interests. *H.L. Hayden Co. of N.Y., Inc. v. New York*, 797 F.2d 85, 89 (2d Cir. 1986). The movant has the burden to demonstrate inadequacy, and while in some cases the burden may be "minimal," the Second Circuit demands "a more rigorous showing of inadequacy in cases where the putative intervenor and a named party have the same ultimate objective." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001) (citations omitted). "The applicant must at least overcome the presumption of adequate representation that arises when it has the same ultimate objective as a party to the existing suit." *Brennan*, 579 F.2d at 191.

Where the applicant's interest is identical to that of an existing party, or there is a party charged by law with representing the applicant's interest, representation is presumed adequate unless the movant can show special circumstances. *See United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 984 (2d Cir. 1984) (where governmental entity acts in *parens patriae* capacity, "minimal showing that the representation may be inadequate is not sufficient"); *see also Env'tl. Def. Fund v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979). This principle applies here. "More specifically, the United States may adequately represent an Indian tribe unless there is a conflict between the United States and the tribe." *CACGEC I*, 471 F. Supp. 2d at 315 (citations omitted). In such a case, the applicant must demonstrate that its interest is in fact different from the other party and that the other party will not adequately represent its

interests. *Hooker*, 749 F.2d at 984-85; *see South Dakota v. U.S. Dep't of the Interior*, 317 F.3d 783 (8th Cir. 2003) (citations omitted). In this case, the SNI does not and cannot make the required showing.

This is not the first time the SNI has argued that it has such an important interest relating to the subject matter of this action that its presence as a party is necessary. In *CACGEC I*, the SNI argued under Rule 19 that the case should be dismissed because, the Tribe argued, it has “significant governmental and economic interests” in the subject matter of the action but cannot be joined as a party on sovereign immunity grounds. The Court rejected the argument. The DOI, the Court noted, “has an interest in Indian self-government, including tribal self-sufficiency and economic development, that makes it uniquely qualified to represent a tribe’s interests.” *Id.* at 315 (citing *Artichoke Joe’s v. Norton*, 216 F. Supp. 2d 1084, 1118-19 (E.D. Cal. 2002); *Seneca Nation of Indians v. New York*, 213 F.R.D. 131, 137 (W.D.N.Y. 2003)). The U.S. Government’s interest in defending its actions, the Court held, is “substantially similar, if not identical,” to the SNI’s interest in gambling on the Parcel. *Id.* at 315-16. Thus, the U.S. Government is an adequate representative of the SNI’s interests. *Id.* at 316.

Although rendered in the Rule 19 context, the Court’s holding in *CACGEC I* is equally applicable to the SNI’s motion for permissive intervention under Rule 24(b). *See Habitat Educ. Ctr., Inc. v. Bosworth*, 221 F.R.D. 488, 496-97 (E.D. Wis. 2004) (“[W]hen intervention of right is denied because the government is likely to provide adequate representative, the case for permissive intervention is much weakened.”). Here, as in *CACGEC I*, the SNI and the U.S. Government have precisely the same objective -- to defend the propriety of the Secretary’s conclusion that the Buffalo Parcel is gaming-eligible Indian lands, and the NIGC Chairman’s ordinance approval. As in *CACGEC I*, their interests are “substantially similar, if not identical.”

CACGEC I, 471 F. Supp. 2d at 316. Where, as here, “there is an identity of interest between a putative intervenor and a party, adequate representation is assured.” *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 98 (2d Cir. 1990); *see also South Dakota v. U.S. Dep't of the Interior*, 317 F.3d 783, 784 (8th Cir. 2003) (upholding denial of Tribe’s motion for permissive intervention in action challenging land-into-trust determination because U.S. Government would adequately protect its interests).

Significantly, the SNI has not identified any specific interest that the U.S. Government could not or would not adequately protect. As is readily apparent from the background recited above, the U.S. Government has established a strong track record of upholding and defending the SNI’s interests, both in and out of the courtroom. There is no reason to believe that the Defendants would be any less vigilant and resourceful in this case than they were in *CACGEC I* and *CACGEC II*.

It is worth noting that if the SNI’s presence was not necessary in *CACGEC I* -- and it was not -- it is even less necessary now. Until recently, the U.S. Government and the SNI held opposite views on the applicability of the after-acquired lands prohibition to restricted fee land. With the Revised After-Acquired Land Regulations, however, their positions are now completely aligned. Thus, there is even less potential for inconsistency, correspondingly little reason to allow the SNI to intervene.

The SNI, citing *Arizona v. California*, 460 U.S. 605, 615 (1983), argues that “where interests critical to the welfare of an Indian nation are at stake, any presumption of adequate representation normally suggested by the involvement of the United States does not apply.” (*CACGEC III*, Dkt No. 2 at 13.) *Arizona* is completely inapposite. The case involved a dispute over rights to the waters of the Colorado River, and the interests of three states and various

federal establishments, including the reservations of five different Indian tribes, were at stake. The Indian tribes, which were asserting their direct rights to access to water, contended that the U.S. Government was not an adequate representative because it had a conflict of interests due to its interest in securing water rights for other federal property. *Id.* at 627. Here, in contrast, there is no conflict of interest, and the SNI is not seeking to assert its own direct rights, but to uphold the propriety of the federal government's actions. The U.S. Government has shown through its words and deeds that it is fully up to the task of representing the SNI's interests. Thus, the presumption of adequate representation applies here with full force.

Given the adequacy of representation provided to the SNI, the Court should exercise its discretion to deny the motion of the SNI for permissive intervention.

C. The Proposed Intervention Would Inject Collateral Issues into the Litigation and Cause Undue Delay and Prejudice

The SNI's participation as a party would necessarily expand and inject collateral issues into the litigation and otherwise render it more complex, to the prejudice of the Plaintiffs. *See Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 98 (2d Cir. 1990). For this reason, too, the motion should be denied.

"Additional parties always take more time." *FTC v. First Capital Consumer Membership Servs. Inc.*, 206 F.R.D. 358, 366 (W.D.N.Y. 2001) (Curtin, J.). Inevitably, "they are the source of additional questions, objections, briefs, arguments, motions and the like." *Id.* at 366 (citing *United States v. City of New York*, 198 F.3d 360, 367-68 (2d Cir. 1999) (citations omitted); 7C Wright, Miller & Kane, *Federal Practice & Procedure* § 1913 (3d ed. 2007) ("Additional parties always take additional time and may result in delay and that thus may support denial of intervention.")). If the proposed intervention would "clutter the action" without aiding the current

parties or issues, this factor weighs against the motion. *Arney v. Finney*, 967 F.2d 418, 421-22 (10th Cir. 1992). This would be the inevitable effect here.

In this case, the SNI's intervention as a party would not only expand the proceedings and clutter the action in this usual sense, but would also inject complex collateral and extraneous issues into the mix. This is because, as discussed above, the SNI seeks to intervene with the full rights of a party defendant but is not willing to submit itself in any meaningful sense to the jurisdiction of this Court.

In general, Indian tribes in the United States enjoy the common-law immunity from suit traditionally afforded to sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Sovereign immunity bars suits against an Indian tribe absent congressional abrogation or a clear waiver by the tribe. *Id.*; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). Once the court approves an application for intervention, however, the intervenor "becomes a full participant in the lawsuit and is treated just as if it were an original party." *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985); *accord United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981) (intervenors enter suit with status of original parties and are fully bound by future court orders).

In an effort to avoid this Court's jurisdiction, the SNI's Council passed a Resolution effecting a "limited waiver" of its sovereign immunity "for the limited purpose of intervening as a defendant" in this action. (*CACGEC III*, Dkt No. 10-4 at 4.) The purported waiver is extremely restrictive and does not apply to any claim that the Plaintiffs might assert, or relief they might seek, against the SNI. This necessarily raises the issue whether the SNI's proposed entry into the litigation as a defendant constitutes a waiver of its sovereign immunity on any issue at all.

In its brief, the SNI cites *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989), *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987), and *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F. Supp. 2d 995, 1000 (W.D. Wis. 2004), for the propositions that a tribe may effect a limited waiver of sovereign immunity and that the terms of the waiver define the court's jurisdiction to entertain any suit against it. None of these cases supports the SNI's bid to intervene as a party without submitting to the Court's full jurisdiction.

McClendon involved two cases, with different parties but relating to the same land rights. *McClendon*, 885 F.2d at 628-29. In the first, the U.S. brought an ejectment action, as trustee for the Tribe, against the Clarks, McClendon's predecessor in interest, to establish permanent title to lands in California in trust for the Tribe. *Id.* at 628. The case settled, and the U.S. Government and the Tribe took title, with the Clarks receiving a long term lease. *Id.* The Tribe participated in the settlement. *Id.* Subsequently, the Clarks assigned the lease to McClendon, *id.* at 629, who then sued the Tribe to enforce the lease. The court held that the Tribe, by participating in the settlement, had not waived its sovereign immunity from future lawsuits involving similar claims. *Id.* at 632.

In *Jicarilla*, the Tribe sued the DOI to cancel oil and gas leases awarded to third parties on the Tribe's reservation lands. 821 F.2d at 538. A third-party lessee brought a separate action against the Tribe to enforce the leases. *Id.* The court dismissed the third-party lawsuit. While recognizing that the Tribe's litigation may have waived sovereign immunity if the third party had intervened in that lawsuit, "we cannot construe the act of filing that suit as a sufficiently unequivocal expression of waiver in subsequent actions relating to the same leases." *Id.* at 539.

In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, the Tribe intervened for the limited purpose of moving to dismiss the lawsuit for failure to join an

indispensable party. 327 F. Supp. 2d at 999. As this Court recognized in *CACGEC I*, 471 F. Supp. 2d at 312, however, an Indian Tribe can move to intervene in an action for the sole purpose of seeking Rule 19 dismissal without waiving the argument that the Tribe is an independent sovereign that cannot be joined in the action.

None of the SNI's authorities support the proposition that an Indian tribe can intervene in a lawsuit as a party defendant and yet continue to invoke its sovereign immunity in that very same lawsuit to shield itself from the jurisdiction of the Court. If the Court were to allow the intervention, however, it is inevitable that there would be additional litigation over the effectiveness of the purported waiver and the scope of the tribe's sovereign immunity. These are collateral issues that would complicate the proceedings and that, absent intervention, the parties would not otherwise need to address. *SEC v. Everest Management Corp.*, 475 F.2d 1236, 1240 (2d Cir. 1972) (complicating effect of additional issues and additional parties outweighed advantage of intervention); *Lipsett v. United States*, 359 F.2d 956, 959-60 (2d Cir. 1966) (likelihood of confusion due to the possibility of collateral issues is sufficient justification to deny intervention).

If the purpose of intervention is to promote the efficient and orderly use of judicial resources by allowing persons whose interests might otherwise be impaired by the litigation to join in an ongoing lawsuit to protect their rights, then permitting the SNI to intervene would not represent the "fairest and most efficient" means of handling this case. *Id.* at 699. The SNI argues that it "it can significantly contribute to full development of the underlying factual issues in the suit and to their accurate and just resolution." (Dkt No. 10-3 at 14.) Special knowledge or expertise alone is insufficient to support a motion to intervene and is more appropriately addressed through *amicus curiae* status. *Cook*, 636 F. Supp. at 698.

The proposed intervention will not contribute to the efficient and orderly disposition of this matter, but simply give the Tribe -- which is already well represented -- an opportunity to control the defense, introduce collateral issues and cause further interminable delay. To allow the SNI's participation as a party would be to invite more gamesmanship. Accordingly, the motion to intervene should be denied.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the SNI's motion for permission to intervene as a defendant in this action should be denied.

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Respectfully submitted,

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