

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

CITIZENS AGAINST CASINO GAMBLING IN
ERIE COUNTY, et al.,

Plaintiffs,

- v -

09-CV-0291-WMS

PHILIP N. HOGEN, et al.,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF THE UNITED STATES' MOTION FOR
PARTIAL DISMISSAL**

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendants, Philip N. Hogen, in his official capacity as Chairman (“Chairman”) of the National Indian Gaming Commission; the National Indian Gaming Commission (“NIGC”); the United States Department of the Interior; Ken Salazar, in his official capacity as Secretary of the Interior (“Secretary”); and Barack Obama, in his official capacity as President of the United States (collectively, “United States”), by undersigned counsel, submit this Memorandum in Support of their Partial Motion to Dismiss. For the reasons described below, the United States respectfully requests that the Court dismiss the First Claim of the Complaint because this Court lacks subject matter jurisdiction and Plaintiffs fail to state a claim upon which relief can be granted.

INTRODUCTION

As Plaintiffs’ Complaint indicates, the ultimate goal is to bar the Seneca Nation of Indians (“Nation”) from operating a lawful gaming facility in Erie County, New York, as a means of economic development. Compl. ¶ 1. In pursuit of this goal, Plaintiffs challenge under

the Administrative Procedure Act (“APA”), 5 U.S.C. §702, decisions and actions of various federal officials authorizing the Nation to operate a gaming facility pursuant to the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. §§ 2701-2721. Plaintiffs’ First Claim asserts that approximately nine acres of land in the City of Buffalo, Erie County, New York (“the Parcel”) held by the Nation in restricted fee is not Indian land. Specifically, they allege that the Seneca Nation Land Claims Settlement Act (“Settlement Act”), 25 U.S.C. §§ 1774-1774h, is unconstitutional, Compl. ¶¶ 95-98, 108; the Nation’s Class III gaming compact with New York does not apply to the Parcel, Compl. ¶¶ 61-64, 99-102^{1/}; and restricted fee land is neither Indian land under IGRA nor Indian country pursuant to 18 U.S.C. § 1151, Compl. ¶¶ 103-109.

However, Plaintiffs failed to file within the applicable statute of limitations and lack standing to bring these claims. Collateral estoppel and res judicata prohibit them from relitigating the Indian lands status of the Parcel, and their claims do not fall within the APA’s waiver of the United States’ sovereign immunity. Therefore, this court lacks jurisdiction and Plaintiffs’ First Claim should be dismissed. This Court can determine the validity of the challenged claims as a matter of law without review of the administrative records supporting the National Indian Gaming Commission’s and the Department of the Interior’s determinations.

I. STATUTORY BACKGROUND

A. The Seneca Nation Settlement Act

In 1990, Congress passed the Settlement Act in settlement of the Nation’s claims to lands

^{1/}The Tribal-State Compact went into effect as a matter of law. Compl. ¶¶ 63, 100.

in the City of Salamanca.^{2/} The funds appropriated under the Act are to be used by the Nation to acquire property to increase its land base. S. Rep. No. 101-511 at 24; H.R. Rep. No. 101-832 at 21. This statute provides that the Nation may acquire land located either “within its aboriginal area in the State [of New York] or situated within or near proximity to former reservation land” with funds appropriated by the Act. 25 U.S.C. § 1774f(c). The title of restricted fee land is held by the Indian tribe with specific federally-imposed restrictions on its use and/or disposition, which prevent transfer of the land without congressional approval. 25 U.S.C. § 177.^{3/} When land assumes restricted fee status, the United States in effect acquires a real property interest in the land. Congress mandated that these newly acquired lands would assume restricted fee status unless the Secretary precluded such a federal restriction within a short time frame. Specifically, the Settlement Act provides:

Land within its aboriginal area in the State or situated within or near proximity to former reservation land may be acquired by the Seneca Nation with funds appropriated pursuant to this subchapter. State and local governments shall have a period of 30 days after notification by the Secretary or the Seneca Nation of acquisition of, or intent to acquire lands to comment on the impact of the removal of such lands from real property tax rolls of State political subdivisions. Unless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of section 2116 of the Revised Statutes (25 U.S.C. 177 [the Indian Non-Intercourse Act]), such lands shall be subject to the provisions of that Act and *shall* be held in restricted fee status by the Seneca Nation.

^{2/}The Settlement Act resolved the disputes over non-Indian occupation of Nation lands by providing the Nation - a federally recognized tribe - with compensation for use of its land and for the economic impact of prior lease arrangements within the City of Salamanca, New York. 25 U.S.C. §§ 1774(b), 1774f(c)

^{3/} In the original 13 States, Indian lands are typically held in restricted fee, not trust. See City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 203 n.1 (2005).

25 U.S.C. § 1774f(c) (emphasis added). This provision sets forth the criteria that govern the acquisition and placement of land into restricted fee for the benefit of the Nation. Only three conditions must be met for the land to be eligible for restricted fee status:

- 1) it must be within the aboriginal territory of the Seneca Nation or situated within or near proximity to former reservation land;
- 2) it must be purchased with funds appropriated under the Settlement Act; and
- 3) the State and local governments must be given notice of the acquisition or of the Nation's intent to acquire the land, and 30 days within which "to comment on the impact of the removal of such lands from real property tax rolls of State political subdivisions."

Id. Lands acquired by the Nation with Settlement Act funds become "restricted fee" Indian lands, unless the Secretary specifically determines otherwise within 30 days of the close of the State and local government comment period. Id.

B. The Indian Gaming Regulatory Act

IGRA was enacted "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1); see also Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Attorney for W. Dist. of Mich., 369 F.3d 960, 971 (6th Cir. 2004). IGRA applies only to federally recognized tribes, 25 U.S.C. § 2703(5), and governs gaming on "Indian lands," which are defined as "all lands within the limits of any Indian reservation" and "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 an Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." Id. § 2703(4).

In general, IGRA prohibits gaming activities on land acquired into trust after October 17,

1988. Id. § 2719(a). There are several exceptions to this general prohibition, including when:

- (A) the Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, determines that gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or
- (B) lands are taken into trust as part of -
 - (I) a settlement of a land claim

Id. § 2719(b)(1) (emphasis added).

1. Class III Gaming

IGRA divides gaming into three classes, each subject to differing levels of state, tribal and federal regulation. Class III gaming is any form of gaming that is not class I or class II.^{4/} Id. § 2703(8). Slot machines are Class III games, as are casino games (such as baccarat, blackjack, roulette, and craps) and sports betting, parimutuel wagering and lotteries. 25 C.F.R. § 502.4. A tribe may engage in Class III gaming only if (1) it has a governing ordinance approved by the NIGC; (2) the state “permits such gaming for any purpose by any person, organization, or entity;” and (3) the tribe and the state enter into a compact approved by the Secretary of the Interior to

^{4/}Class I gaming consists of social games with prizes of minimal value and traditional Indian games that are part of tribal ceremonies or celebrations. 25 U.S.C. § 2703(6). Indian tribes are given exclusive authority to regulate these activities. Id. § 2710(a)(1). Class II gaming consists of two basic categories: (1) bingo and variants thereof, and (2) card games that are explicitly authorized by state law or are not explicitly prohibited by state law and are played in the state. Tribes may conduct Class II gaming in any state that “permits such gaming for any purpose by any person, organization or entity,” so long as the particular gaming activity is not otherwise specifically prohibited on Indian lands by federal law. Id. § 2710(b)(1)(A). Class II gaming is subject to tribal regulation, id. § 2710(a)(2), and to federal oversight by the NIGC. Id. §§ 2710(b) & (c).

govern the conduct of such gaming. 25 U.S.C. § 2710(d). Class III gaming is regulated by the tribe, the state, and the federal government. Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 721-22 (9th Cir. 2003).

2. Class III Compacts

A tribe desiring to conduct a Class III gaming operation may initiate the compacting process by requesting the state to enter into negotiations. 25 U.S.C. § 2710(d)(3)(A). Thereafter, the state is to “negotiate with the Indian tribe in good faith to enter into such a compact.” Id. If a state and tribe reach agreement on a compact, it is submitted to the Secretary. If the Secretary neither approves nor disapproves the compact within 45 days, it “shall be considered to have been approved by the Secretary, but only to the extent [it] is consistent” with IGRA. Id. § 2710(d)(8)(c). The Secretary may specifically disapprove a compact only if it violates IGRA, other provisions of federal law, or the United States’ trust obligations to Indians. Id. § 2710(d)(8)(B). A gaming compact, if approved or deemed approved by Secretarial inaction, takes effect when notice is published in the *Federal Register* pursuant to Section 2710(d)(3)(B).

3. Gaming Ordinances

Pursuant to Sections 2710(d)(1)(A)-(2)(A), a tribe desiring to conduct Class III gaming must also adopt, enact, and submit to the Chairman of the NIGC for his approval a gaming ordinance. Unless the Chairman determines that the ordinance does not meet the content and submission requirements, that it was not adopted in compliance with the governing documents of the Indian tribe, or that the governing body of the tribe was unduly influenced in its adoption of the ordinance, the Chairman “shall approve such ordinance.” 25 U.S.C. §§ 2710(d)(2)(B); 2710(e). If the ordinance is not acted upon by the Chairman within a 90-day period, it “shall be

considered to have been approved by the Chairman” to the extent it is consistent with IGRA. *Id.* § 2710(e). When an ordinance is approved or deemed approved, notice is published in the *Federal Register* pursuant to Section 2710(d)(2)(B).

II. FACTUAL BACKGROUND

A. The Tribal-State Compact

On June 20, 2001, New York State Governor George Pataki and the Seneca Nation entered into a Memorandum of Understanding (“MOU”) which established the terms for a Tribal-State Compact to authorize the Seneca Nation to develop three Class III gaming facilities on Nation lands in the State of New York. *Ex.*;^{5/} Huron Group, Inc. v. Pataki, 785 N.Y.S.2d 827, 830 (2004). The New York State Legislature subsequently enacted legislation enabling the establishment and operation of the gaming facilities by the Seneca Nation. Huron Group, 785 N.Y.S.2d at 830; N.Y. Executive Law § 12 (McKinney’s). The legislation provided the Governor with the authority to execute a Tribal-State Compact with the Seneca Nation pursuant to IGRA, consistent with the June 20, 2001 MOU. *Id.*

On August 18, 2002, the Nation and the State executed a Tribal-State Gaming Compact for the conduct of Class III gaming. *Ex.* Subsections 11(b)(4) and (c) integrate terms of the Settlement Act into the Compact by providing that Settlement Act funds be used to acquire parcels in the Cities of Niagara Falls and Buffalo for the purpose of gaming. *Ex.* at ¶¶ 11(b)(4), 11(c); BIA_AR_00564. Thereafter, the Nation forwarded the fully-executed and validly-entered

^{5/}The Tribal-State Compact and the MOU were submitted to this Court as part of the administrative record in Citizens Against Casino Gambling in Erie County v. Norton, 471 F. Supp. 2d 295 (W.D.N.Y. 2007) (“CACGEC I”). For the convenience of the Court, the documents are attached as an exhibit. Plaintiffs’ complaint also incorporates the Tribal-State Compact by reference therein.

compact to the Secretary for her approval. Under IGRA, the Secretary had 45 days from the submission of the Compact to act affirmatively. Absent Secretarial approval or disapproval within the statutory time frame, IGRA provides that compacts take effect by operation of law. 25 U.S.C. § 2710(d)(8)(C). Rather than act on the Compact, the Secretary exercised her discretion to take no action, which resulted in the Compact being deemed approved to the extent it is consistent with IGRA. In identical letters dated November 12, 2002, sent to the Nation President and to the Governor of New York, the Secretary explained the policy reasons behind her decision to neither approve or disapprove the Compact.⁶⁷ Citizens Against Casino Gambling in Erie County v. Norton, 471 F. Supp. 2d 295, 307-09 (W.D.N.Y. 2007) (“CACGEC I”). As required by IGRA, on December 9, 2002, the Secretary published notice of the approved status of the Compact in the *Federal Register*. 67 Fed. Reg. 72968 (Dec. 9, 2002).

The Compact entered into by the Nation and the State authorizes the Nation to conduct Class III gaming at three sites: an identified area within the City of Niagara Falls, or an alternative location within the County of Niagara; an unidentified parcel within the City of Buffalo; and an on-reservation site.⁷⁷ Ex. ¶ 11(a); BIA_AR_00563. Under the terms of the

⁶⁷The Secretary’s November 12, 2002 letter can be found on the NIGC website at <http://www.nigc.gov/ReadingRoom/Compacts/tabid/760/Default.aspx#S>, under “Seneca Nation of New York.”

⁷⁷While the Compact authorizes gaming in the City of Buffalo, “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,” Ex. ¶ 11(a)(2), the MOU authorizes gaming “in Erie County in the City of Buffalo,” Ex. at BIA_AR_000574. On May 3, 2004, the City of Buffalo sued the State of New York and its governor, alleging that this portion of the Tribal-State Compact was unconstitutional pursuant to the New York State Constitution, article III, § 1. Huron Group, 785 N.Y.S.2d at 837. The City prevailed and was granted a permanent injunction against the Governor and the State to prevent the development of a gaming facility anywhere in Erie County other than the City of Buffalo. Id. at 858-59.

Compact, the Nation agreed to purchase these sites with the funds provided by the Settlement Act, reserving five million dollars for housing adjacent to the sites. Id. ¶ 11(b)(4); BIA_AR_000564.

In 2002 the Seneca Nation also submitted a Class III gaming ordinance to the NIGC for approval. That ordinance was approved on November 26, 2002. CACGEC I, 471 F. Supp. 2d at 309. It was not a site specific ordinance, but an ordinance authorizing gaming on Indian lands within the Nation's jurisdiction.^{8/}

B. The Buffalo Parcel

In November 2005, approximately three years after the approval of the Tribal-State Compact, the Nation submitted documentation to the Bureau of Indian Affairs, Office of Indian Gaming Management, indicating its compliance with the requirements of the Settlement Act for the Parcel to go into restricted fee status. CACGEC I, 471 F. Supp. 2d at 310. The Nation notified the State and local governments of the acquisition of the Parcel on October 3, 2005. Id. at 309. The State and local governments had thirty days to comment on the acquisition. Id. Once the comment period ended, the Secretary had thirty days to determine whether the Parcel should not be subject to 25 U.S.C. § 177, or the land would automatically assume restricted fee status. 25 U.S.C. § 1774f(c). Because the Secretary made no such determination, the Parcel assumed restricted fee status on December 2, 2005. CACGEC II, 2008 WL 2746566, at *16.

^{8/}The Seneca Nation's first and second gaming ordinances were the subject of litigation before this Court in Citizens Against Casino Gambling in Erie County v. Norton, 471 F. Supp. 2d 295 (W.D.N.Y. 2007) ("CACGEC I"), and Citizens Against Casino Gambling in Erie County v. Hogen, 2008 WL 2746566 (W.D.N.Y. July 8, 2008) ("CACGEC II"), so the United States will assume that the Court is familiar with those issues and not repeat the factual background for the prior ordinances.

C. The Prior Litigation

In January 2006, Plaintiffs filed suit in this Court against the United States, alleging that the Secretary's inaction in allowing the Tribal-State Gaming Compact to go into effect, the Secretary's letter explaining the decision, and the Secretary's inaction allowing the Buffalo Parcel to become restricted fee Indian lands were arbitrary, capricious or otherwise not in accordance with law, violating the APA. Compl. ¶ 70; CACGEC I, 471 F. Supp. 2d at 309. Plaintiffs also argued that the Chairman's approval of the Seneca Nation's gaming ordinance without rendering an Indian land determination was arbitrary and capricious.⁹ Id.

On January 12, 2007, this Court vacated the NIGC's approval of the ordinance as it pertained to the Buffalo Parcel because the Chairman failed to determine whether the land was "Indian land" as defined in IGRA and whether Section 20 of IGRA, 25 U.S.C. § 2719, applies to the Buffalo Parcel. CACGEC I, 471 F. Supp. 2d at 327. The Court remanded the case to the NIGC, instructing the Chairman to make the appropriate determinations. Id. Plaintiffs appealed to the Second Circuit for review of this Court's decision. Compl. ¶ 71.

On June 9, 2007, the Seneca Nation submitted a site-specific gaming ordinance for the Buffalo Parcel to the NIGC for approval. CACGEC II, 2008 WL 2746566, at *16. On July 2, 2007, the Chairman approved the site-specific ordinance, determining that the Buffalo Parcel fits within the definition of "Indian lands" under IGRA and because it was acquired as part of the settlement of a land claim, it was not subject to Section 20 of IGRA's general prohibition on gaming on lands acquired after October 17, 1988. Id. Shortly thereafter, Plaintiffs filed a second

⁹Plaintiffs made additional claims against the United States, none of which are relevant to the present case.

lawsuit alleging that the Chairman's ordinance approval was arbitrary, capricious or otherwise not in accordance with law because the Parcel was neither Indian lands under IGRA, nor land acquired in settlement of a land claim. Compl. ¶ 79; CACGEC II, 2008 WL 2746566, at *16.

On July 8, 2008, this Court vacated the Chairman's approval of the site-specific ordinance. CACGEC II, 2008 WL 2746566, at *63. The Court agreed with the United States that the Buffalo Parcel fit within the definition of Indian lands in IGRA, id. at *51, and that restricted fee Indian lands were subject to Section 20 of IGRA's general prohibition on gaming on lands acquired after October 17, 1988, id. at *54. However, the Court also determined that the Buffalo Parcel was not acquired pursuant to the settlement of a land claim and therefore, could not fit within any of the exceptions to Section 20's prohibition. Id. at *61. Both Plaintiffs and the United States appealed to the Second Circuit for review of this decision. Compl. ¶ 83.

D. The Third Gaming Ordinance

On August 25, 2008, the Department of the Interior's new Regulations for Gaming on Trust Lands Acquired After October 17, 1988 became effective. 73 Fed. Reg. 29354 (May 20, 2008), 73 Fed. Reg. 35579 (June 24, 2008). Pursuant to the new regulations, restricted fee Indian lands are no longer subject to IGRA's prohibition against gaming on lands acquired after October 17, 1988. 73 Fed. Reg. 29354, 29355. In response to this new interpretation of 25 U.S.C. § 2719, on October 22, 2008, the Seneca Nation submitted a new site-specific class III gaming ordinance for the Parcel. Compl. ¶ 87. Under IGRA, the Chairman of the NIGC had 90 days within which to approve or disapprove the new ordinance. 25 U.S.C. § 2710(e). The Chairman

approved the ordinance on the final day of the statutory time frame, January 20, 2009.^{10/}

Plaintiffs subsequently filed the instant lawsuit alleging that the Seneca Nation Settlement Act is unconstitutional, the Tribal-State Compact does not apply to the Buffalo Parcel, restricted fee land does not qualify as Indian land under IGRA or as Indian Country pursuant to 18 U.S.C. § 1151, restricted fee Indian lands are subject to IGRA's prohibitions against gaming on lands acquired after October 17, 1988, and land purchased by funds provided under the Seneca Nation Settlement Act do not fit within the settlement of a land claim exception to the prohibition.^{11/}

III. STANDARD FOR DISMISSAL

Federal Rule of Civil Procedure 12(b)(1) provides that a defendant may move for dismissal based upon "lack of jurisdiction over the subject matter" when the district court lacks the statutory or constitutional authority to adjudicate a case. Fed. R. Civ. P. 12(b)(1). In resolving a such a motion, a court is not confined to allegations in the complaint because "[o]n a motion under [Rule] 12(b)(1) challenging the district court's subject matter jurisdiction, the court may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits." Antares Aircraft, L.P. v. Fed. Republic of Nigeria, 948 F.2d 90, 96 (2d Cir. 1991), vacated on other grounds, 505 U.S. 1215 (1992). The plaintiff has the burden of proving, by a preponderance of the evidence, subject matter jurisdiction. See Makarova v. United States,

^{10/}The Chairman's January 20, 2009 ordinance approval letter can be found on the NIGC website at <http://www.nigc.gov/ReadingRoom/ApprovedGamingOrdinances/tabid/122/Default.aspx#S>, under "Seneca Nation of New York."

^{11/}Plaintiffs' Complaint contains three claims for relief, organized by the arguments set forth, not by the agency actions challenged. The first claim for relief contains three separate claims. Compl. ¶¶ 94-109. For purposes of this Motion, the United States is seeking to dismiss the first claim and all of the sub-claims set forth therein.

201 F.3d 110, 113 (2d Cir. 2000) (citing Malik v. Meissner, 82 F.3d 560, 562 (2d Cir. 1996)).

Rule 12(b)(6) provides that a dismissal motion may be based upon a failure “to state a claim upon which relief can be granted.” When ruling upon a motion pursuant to the rule, a court must accept as true the material facts alleged in the complaint. Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir. 1994). A court may not dismiss an action unless “it appears beyond doubt that the plaintiff can provide no set of facts in support of his claim which would entitle him to relief.” Id. (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

For purposes of a Rule 12(b)(6) motion, the complaint is deemed to include “any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.” Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991). If the plaintiff does not attach or incorporate by reference documents that are integral to the complaint, the defendant may produce them and the court may consider them without converting the motion to one seeking summary judgment. Id. The court may also take judicial notice with regard to prior proceedings involving one or both of the parties. See Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384, 1388 (2d Cir. 1992).

IV. ARGUMENT

A. Plaintiffs Cannot Challenge the Constitutionality of the Seneca Nation Settlement Act

Plaintiffs allege that the Settlement Act is unconstitutional because it violates the Tenth Amendment. Compl. ¶¶ 94-98. For the following reasons, this claim should be dismissed.^{12/}

^{12/}Plaintiffs also state that Congress cannot “delegate to an unelected sovereign entity that exists outside of the Executive and Legislative branches of the U.S. Government the power to create sovereign ‘Indian land’ thereby removing it from the jurisdiction of a state and its taxing authorities.” Compl. ¶ 97. It is unclear what authority Plaintiffs are claiming was delegated or

1. A Challenge to the constitutionality of the Settlement Act is time barred.

Section 1774g of the Seneca Nation Settlement Act expressly states:

Notwithstanding any other provision of law, any action to contest the constitutionality or validity under law of this subchapter shall be barred unless the action is filed on or before the date which is 180 days after November 3, 1990.

25 U.S.C. § 1774g. Pursuant to this section, any challenge to the constitutionality or validity of the Settlement Act and its provisions had to be filed before Thursday, May 2, 1991. Plaintiffs waited until 2009 to file their lawsuit challenging the constitutionality of the Act, which is clearly outside the statutory time limit and therefore, Plaintiffs' claim that the Settlement Act is unconstitutional is barred and should be dismissed. See Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 292 (1983) ("A constitutional claim can become time-barred just as any other claim can. Nothing in the Constitution requires otherwise.") (citations omitted).

2. Plaintiffs lack standing to challenge the constitutionality of the Settlement Act.

Plaintiffs claim that the Settlement Act violates the Tenth Amendment because Congress cannot "create new sovereign Indian land via the restricted fee process by enabling the SNI to purchase land anywhere in the vast territory of Western New York without specifically identifying land and absent the consent of the State" Compl. ¶ 98. However, the law of the Supreme Court and the Second Circuit is clear: private parties like Plaintiffs have no standing to allege a violation of the Tenth Amendment because such a claim belongs to the States. Tenn.

whether Plaintiffs intend to argue that the Settlement Act violates the non-delegation doctrine as well as the Tenth Amendment. Regardless, it is Congress that created Indian land pursuant to the terms of the Settlement Act by setting forth specific steps that the Seneca Nation must follow to acquire restricted fee Indian lands within its aboriginal territory. 25 U.S.C. § 1774f(c).

Elec. Power Co. v. TVA, 306 U.S. 118, 144 (1939) (private parties “have no standing . . . to raise any question under the” Tenth Amendment). As explained by the Second Circuit, where “the requisite representation by the states or their officers is notably absent” in the context of a Tenth Amendment claim, the “Supreme Court’s determination [in Tennessee] that the plaintiffs under these circumstances have no standing ends our inquiry.” Brooklyn Legal Serv. Corp. v. Legal Serv. Corp., 462 F.3d 219, 234 (2d Cir. 2006); see also City of Roseville v. Norton, 219 F. Supp. 2d 130, 148 (D.D.C. 2002) (holding that individuals and organizations challenging trust acquisition for a tribe had no standing to bring a Tenth Amendment action because “Rights under the Tenth Amendment are . . . properly raised by the states and their officers, and by them alone”).

Accordingly, Plaintiffs cannot satisfy the requirements of constitutional and prudential standing; they fail the “threshold question whether [the plaintiffs] have standing to raise the rights of others.” Kowalski v. Tesmer, 543 U.S. 125, 129 (2004). The requirement that a party assert only its rights and interests represents a “healthy concern that if the claim is brought by someone other than the one at whom the constitutional protection is aimed , the courts might be called upon to decide abstract questions.” Id. (internal quotations and citations omitted). Plaintiffs essentially seek to argue an unconstitutional divestiture of the State of New York’s sovereignty and jurisdiction. While the claim lacks merit, Plaintiffs lack standing to assert it in any event. The interests asserted are not their own, but the State’s, which has declined to challenge this decision and raise that argument itself. In fact, the State entered into a compact with the Nation regarding the operation of the gaming facility on the Buffalo Parcel and the State did not object to the setting aside of the Parcel as Indian lands. Compl. ¶¶ 61-64.

3. Even if Plaintiffs had standing, their Tenth Amendment claim fails to state a claim for which relief can be granted.

Even if Plaintiffs had standing, the Tenth Amendment does not bar the federal government from acquiring state land and holding title for various federal purposes. Kohl v. United States, 91 U.S. 367, 368 (1875). The Tenth Amendment reserves to the States all powers not granted to the federal government by the Constitution. See U.S. Const. amend. X. “If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.” New York v. United States, 505 U.S. 144, 156 (1992). The United States constitutionally has the authority to regulate the affairs of Indians, even where such regulation may preempt conflicting state laws. Regulation of Indian tribes is not one of the integral governmental functions essential to the separate and independent existence of the States. The Supreme Court has recognized the “plenary power of Congress to deal with the special problems of Indians . . . drawn both explicitly and implicitly from the Constitution itself.” Morton v. Mancari, 417 U.S. 535, 551-52 (1974). Explicitly, the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, “provides Congress with the power to ‘regulate Commerce . . . with the Indian Tribes,’ and thus, to this extent, singles Indians out as a proper subject for separate legislation.” Morton, 417 U.S. at 552 (quoting U.S. Const. art. I, § 8, cl. 3). The Treaty Clause and Supremacy Clause of the Constitution have also been cited as the source of federal legislative authority over Indians. Cohen’s Handbook of Federal Indian Law § 5.01[1] (2005 ed.). Because the power to regulate Indian affairs has been delegated to Congress by the Constitution, the

Settlement Act does not violate the Tenth Amendment. See Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (“The central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.”); see also New York, 505 U.S. at 156 (“If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States . . .”).^{13/}

Plaintiffs also have a high burden with respect to their constitutional claims as federal statutes are accorded a presumption of constitutionality. Walters v. Nat’l Ass’n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (invoking the “presumption of constitutionality which attaches to every Act of Congress”); F.C.C. v. Beach Commc’ns, Inc., 508 U.S. 307, 314 (1993) (“Where there are ‘plausible reasons’ for Congress’ action, ‘our inquiry is at an end.’ This standard of review is a paradigm of judicial restraint.”) (citation omitted). When Congress legislates in the special area of Indian affairs the presumption of constitutionality is even stronger. See Morton, 417 U.S. at 551-52. Here, Plaintiffs cannot establish standing to challenge the Settlement Act’s constitutionality and cannot meet this heavy burden in showing that the Settlement Act is unconstitutional.

^{13/}In Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 543-47 (1985), the Supreme Court rejected a reading of the Tenth Amendment under which courts were charged with identifying distinctive State functions with which Congress was not permitted to interfere. The Court concluded that the States did not require judicial protection for such distinctive functions because the Constitution’s structure already provides political safeguards to protect the interests of the States. Id. at 552-54. At most, the Tenth Amendment might compensate for “extraordinary defects in the national political process,” such as might occur if a State “was deprived of any right to participate in the national political process or . . . was singled out in a way that left it politically isolated and powerless.” South Carolina v. Baker, 485 U.S. 505, 512-13 (1988). Plaintiffs’ complaint does not identify any such failings in the national political process, and to the United States’ knowledge, the State of New York was represented equally with other States in the process by which the Settlement Act was adopted. That representation is sufficient to dispose of any Tenth Amendment claim here.

B. Plaintiffs Are Barred by Collateral Estoppel and Res Judicata from Relitigating the Issue of Whether the Buffalo Parcel is Indian lands or Indian Country

Plaintiffs are attempting to reargue the Indian country and Indian land status of the Buffalo Parcel, despite the fact that these issues were argued and decided in prior litigation involving the same parties. CACGEC II, 2008 WL 2746566, at *51. Collateral estoppel “preclude[s] relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action.” United States v. Stauffer Chem. Co., 464 U.S. 165, 170-71 (1984); Wilder v. Thomas, 854 F.2d 605, 616 (2d Cir. 1988), cert. denied, 489 U.S. 1053 (1989). “[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation.” United States v. Mendoza, 464 U.S. 154, 158 (1984). The test for collateral estoppel is whether an issue “was (a) raised, (b) litigated, and (c) actually decided by a judgment in their prior proceeding, regardless of whether the two suits are based on the same cause of action.” Prime Mgmt. Co., Inc. v. Steinegger, 904 F.2d 811, 816 (2d Cir. 1990). Under these standards, it is clear that the question of whether the Buffalo Parcel fits within the definition of Indian land for purposes of IGRA and Indian country pursuant to 18 U.S.C. § 1151 was raised, litigated, and actually decided by the court in CACGEC II. 2008 WL 2746566, at *32-51. Plaintiffs should be precluded from presenting arguments which seek to relitigate this issue.

While collateral estoppel bars relitigation of previously decided issues (regardless of the claim to which the issues relate), res judicata bars relitigation of the same claim between the same parties (regardless of the issues raised in support of the claim). Accordingly, “[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues

that were or could have been raised in that action.” SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1463 (2d Cir.1996) (quoting Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981)).

As discussed above, the Indian land “issues” Plaintiffs are attempting to litigate are indistinguishable, for collateral estoppel purposes, from those raised in the prior litigation. Even if this were not the case, it is clear that both cases involve the same “claims” by Plaintiffs, so as to be barred by res judicata.

C. Plaintiffs’ Tribal-State Compact Claim Does Not Fall Within the APA’s Waiver of Sovereign Immunity and the Associated Statute of Limitations

A plaintiff can sue the United States, including its agencies and officials, only if there is an applicable waiver of sovereign immunity. United States v. Mitchell, 463 U.S. 206, 212 (1983). The complaint identifies the waiver of sovereign immunity in the APA. Compl. ¶ 37 (citing 5 U.S.C. § 702). That waiver is not unlimited, however.¹⁴ It allows courts to review “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704; Darby v. Cisneros, 509 U.S. 137, 146 (1993). An agency action is not “final” unless it marks the consummation of the agency's decisionmaking process and determines legal rights or obligations. Bennett v. Spear, 520 U.S. 154, 177-78 (1997). As part of the waiver of sovereign immunity, the terms of the statute of limitations must be strictly construed in favor of the United States and may “not [be] ‘enlarge[d] . . . beyond what the language requires.’” Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983) (quoting E. Transp. Co. v. United States, 272 U.S. 675, 686 (1927)). A statute of limitations is “more than a

¹⁴The APA waiver does not apply to the President of the United States. Franklin v. Massachusetts, 505 U.S. 788, 801 (1992) (“As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements.”).

technical obstacle to be circumvented if possible.” Board of Regents v. Tomanio, 446 U.S. 478, 484 (1980). Here, the relevant statute of limitations allows review only within six years of the challenged final agency action. 28 U.S.C. § 2401(a); Polanco v. U.S. Drug Enforcement Admin., 158 F.3d 647, 654 (2d Cir. 1998) (applying 28 U.S.C. § 2401(a) to APA claims).

Any waiver of sovereign immunity and consent to suit by the federal government is conditioned upon filing within the applicable statute of limitations, and Plaintiffs’ Tribal-State Compact claim against the Secretary of the Interior does not satisfy this requirement. The complaint alleges that the Tribal-State Compact cannot apply to the Buffalo Parcel because the land had not been acquired at the time the Compact went into effect. Compl. ¶¶ 99-102. Because the Compact went into effect on November 12, 2002, the relevant date for purposes of the statute of limitations is November, 12, 2008. Plaintiffs’ complaint was filed after that date.

Plaintiffs’ allegations also do not identify any final agency action taken by the Secretary. The Compact became effective as a matter of law, and the Secretary’s decision to take no action on the Compact was committed to discretion by law and thus not subject to review under the APA. Final agency action is not reviewable if “(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a). If “the governing statute or regulations ‘[are] drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion[,]’” there is no jurisdiction. Schneider v. Feinberg, 345 F.3d 135, 148 (2d Cir. 2003) (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)). “Therefore ‘§ 701(a)(2) requires careful examination of the statute on which the claim of agency illegality is based,’ and requires dismissal when there is ‘no law to apply.’” Lunney v. United States, 319 F.3d 550, 558 (2d Cir. 2003) (citing Webster v. Doe, 486 U.S. 592, 600

(1988); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971)).

IGRA allows compacts to become effective by inaction. In this situation there is no law to apply. Even if the decision to take no action on a gaming compact is “final agency action,” it is committed to agency discretion by law and is not reviewable under the APA. IGRA broadly authorizes the Secretary to approve gaming compacts, 25 U.S.C. § 2710(d)(8)(A) (“The Secretary is authorized to approve any Tribal-State compact . . .”), and provides that the Secretary “may disapprove a compact” only if it violates IGRA, another federal law, or the United States’ trust obligations to Indians, id. § 2710(d)(8)(B). However, the statute does not require the Secretary to approve or disapprove a compact. If, for example, the Secretary has policy or legal issues concerning a compact that she wishes to reserve, or he simply does not take action within 45 days, IGRA provides that “the compact shall be considered to have been approved” to the extent it is consistent with the statute. Id. § 2710(d)(8)(C). In other words, IGRA grants the Secretary discretion to take no action on gaming compacts while providing no standard by which the Secretary or a court can measure her conduct in exercising that discretion. Thus, the statute did not “guide or limit” the Secretary’s discretion to act as she did and there is no law to apply. Schneider, 345 F.3d at 148-49. This statutory and regulatory absence of an applicable legal standard for review is entirely appropriate, and allows the Secretary the flexibility to accommodate the myriad issues with which she is presented. There is no standard in IGRA to govern the reasonableness of Secretarial inaction and this is not an instance in which the Secretary can be alleged to have had a nondiscretionary duty to affirmatively act.

Considering the brief 45-day period to review compacts, it is clear that Congress’s intent was not to embroil the Secretary in lengthy investigations into whether a compact violates federal

law, IGRA, or trust obligations. Rather, as the court in Kickapoo Tribe of Indians v. Babbitt, 827 F. Supp. 37 (D.D.C. 1993), observed “Congress was greatly concerned that the Secretary might not pass on the compacts quickly” and therefore allowed for the compact to be deemed approved if the Secretary took no action in 45 days.^{15/} 827 F. Supp. at 43 (later reversed for separate procedural issue of failure to join an indispensable party under Fed. R. Civ. P. 19). In addition, IGRA preserves the ability of *parties to the compact* to challenge subsequent agency action related to Indian gaming, when a compact approved by operation of law violates IGRA. By stating that the compact will be approved, “only to the extent the compact is consistent with the provisions of this chapter,” IGRA provides a check on compacts that are effectively approved by the Secretary through non-action but that are inconsistent with the statute. 25 U.S.C. § 2710(d)(8)(C). The Secretary, however, has no duty to disapprove a compact in such an instance.

The court in Pueblo of Sandia v. Babbitt, 47 F. Supp. 2d 49 (D.D.C. 1999), also recognized that the Secretary is under no obligation to disapprove a compact, even though it may violate IGRA. In dismissing a challenge to the Secretary’s approval on other grounds (failure to join an indispensable party), the Court noted that the Secretary, “declined to disapprove the compacts,” despite an apparent violation of IGRA. Id. at 56-57. While the Court expressed disagreement with the Secretary’s inaction, which resulted in the compacts being deemed

^{15/}The sole congressional report in IGRA’s legislative history does no more than describe the provisions of section 2710(d)(8). S. Rep. No. 100-446 at 19 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3089. However, the report shows that Congress “concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises.” Id. at 13. “The legislative history thus shows that Congress looked to the compacting process primarily as a means of balancing state and tribal interests.” Artichoke Joe’s Cal. Grand Casino v. Norton, 353 F.3d 712, 726 (9th Cir. 2003). Therefore, the Secretary’s role in the compact process is limited.

approved, it described the approval by inaction as “unreviewable” given the Secretary’s statutorily-provided discretion to avoid taking action altogether. Id.

Therefore, IGRA’s mechanism for compacts taking effect by operation of law provides no meaningful standard to review the Secretary’s inaction and the decision to take no action on the Compact is not subject to review under the APA.

D. The Quiet Title Act Bars Plaintiffs’ Indian lands Claim

Finally, although this Court has previously ruled that the Quiet Title Act (“QTA”), 28 U.S.C. § 2409a, does not bar Plaintiffs’ action, CACGEC I, 471 F. Supp. 2d at 302-03; CACGEC II, 2008 WL 2746566, at *24-25, for purposes of preserving the argument, the United States maintains that the Quiet Title Act (“QTA”), 28 U.S.C. § 2409a, applies to any action challenging the status of Indian lands and, therefore, the United States has not waived its sovereign immunity. Plaintiffs seek a declaration that the Parcel does not fit within the definition of Indian lands under IGRA and that it is not Indian country, Compl. ¶¶ 101-02, 104-09, Prayer for Relief ¶¶ 2, 4. These claims are barred by the QTA because the United States set aside the Parcel as restricted fee Indian lands for the benefit of the Nation. The QTA expressly applies to restricted fee Indian lands and preserves the United States’ immunity to such a challenge. 28 U.S.C. § 2409a(a) (QTA waiver “does not apply to trust or restricted Indian lands”).

Even if Plaintiffs are not directly challenging the Nation’s actual title to the property, the relief they seek would limit the use of the Buffalo Parcel if granted. A declaration that the parcel is not Indian land would impose a limitation on the Nation’s intended use of the land. Their effort to strip the Parcel of its Indian country status is also strictly precluded by the QTA. United States v. Mottaz, 476 U.S. 834, 843 (1986) (“When the United States claims an interest in real

property based on that property's *status* as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity.") (emphasis added). As the Tenth Circuit stated in Shivwits Band of Paiute Indians v. Utah, "[i]t is well settled law [that] . . . a reviewing court 'must focus on the relief . . . request[ed],' rather than on the party's characterization of the claim." 428 F.3d 966, 974-75 (10th Cir. 2005), cert. denied, 549 U.S. 809 (2006) (quoting Neighbors for Rational Dev. v. Norton, 379 F.3d 956, 961 (10th Cir. 2004)). The fact that Plaintiffs do not seek to quiet title for their benefit is irrelevant. United States v. Mottaz, 476 U.S. 834, 843 (1986). If the remedy sought by a plaintiff would alter the *status* of the land as restricted Indian lands by placing restrictions on how it can be used by its owner, sovereign immunity precludes the case from going forward. Id. at 843.

Plaintiffs claim that the Buffalo Parcel does not constitute Indian lands under IGRA or Indian country under 18 U.S.C. § 1151. Whether they couch that challenge in terms of IGRA, the Indian country statute, or the APA is irrelevant because it is the effect of the challenge or the remedy sought that is the ultimate issue.^{16/} If Plaintiffs prevail, the land will lose its restricted fee Indian land and Indian country status, any benefit that may accrue to the Tribe from a favorable Indian lands determination will be lost, and the United States will be effectively stripped of its restricted fee interest in the land because it will not be able to regulate use of the land in the manner clearly endorsed by Congress in the Settlement Act.^{17/} Therefore, this suit

^{16/}Courts have repeatedly emphasized that plaintiffs cannot avoid the QTA's impact by characterizing their claim as falling under the APA. Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 286 n.22 (1983).

^{17/}The fact that Plaintiffs do not challenge the *Nation's* title to the property is irrelevant to the QTA analysis. The issue is the *United States'* interest in the property and the *United States'* sovereign immunity. Although the United States never holds the actual title to restricted fee

necessarily challenges the status of the land and the interests of the United States.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that Plaintiffs' First Claim be dismissed.

DATED: June 15, 2009

Respectfully submitted,

John C. Cruden
Acting Assistant Attorney General
Environment and Natural Resources Division

MARY E. FLEMING
United States Attorney's Office
Western District of New York

/s/

GINA L. ALLERY
Trial Attorney
United States Department of Justice
Environment and Natural Resources Division
Indian Resources Section
P.O. Box 44378
L'Enfant Plaza Station
Washington, D.C. 20026-4378
(202) 305-0261
gina.allery@usdoj.gov

OF COUNSEL:

Candace Beck
Andrew Caulum
Department of the Interior
Office of the Solicitor
1849 C Street
Washington, DC 20240

Michael Hoenig
Staff Attorney
National Indian Gaming Commission

Indian lands, the QTA nevertheless precludes Plaintiffs' lawsuit because the United States has an interest in the land that would be affected by the relief sought. Plaintiffs have failed to meet their burden of establishing that the United States has waived its sovereign immunity for this lawsuit, which effectively challenges the United States' interest in the Buffalo Parcel. Therefore, this case should be dismissed.