

NATIONAL INDIAN GAMING COMMISSION

IN THE MATTER OF:

NOTICE OF VIOLATION TO THE SENECA NATION OF INDIANS, NOV-08-20

SENECA NATION OF INDIANS' SUPPLEMENTAL STATEMENT

Introduction

On September 3, 2008, the Chairman of the National Indian Gaming Commission ("NIGC") issued a Notice of Violation ("NOV") to the Seneca Nation of Indians (the "Nation"). The NOV states that, as a consequence of the July 8, 2008 decision issued by Judge Skretny in *Citizens Against Casino Gambling in Erie County v. Hogen*, No. 07-CV-0451S, 2008 U.S. Dist. LEXIS 52395 (W.D.N.Y. 2008) ("*CACGEC II*"), the Nation is currently considered to be in violation of the Indian Gaming Regulatory Act ("IGRA") and its implementing regulations by (i) conducting gaming activities in the Buffalo Creek Territory Casino without an approved gaming ordinance authorizing gaming on the site, and (ii) conducting gaming activities on a site that is ineligible for gaming under 25 U.S.C. § 2719 (referred to hereafter as either "section 2719" or "section 20"). The NOV expressly notes that the *CACGEC II* litigation is on-going, that the July 8, 2008 Decision and Order is appealable, and that the Chairman may determine that the situation has changed at the conclusion of the litigation or if the Nation's 2008 site-specific ordinance is approved.

On the day after the NOV was issued, the Nation submitted a Notice of Appeal to the NIGC and requested a hearing on the matter.

In this Supplemental Statement, submitted pursuant to 25 C.F.R. § 577.3, the Nation specifically requests that the Presiding Official defer any hearing in this matter until a reasonable time after October 15, 2008. That is the date by which the Chairman is statutorily required to take action on the Nation's gaming ordinance amendments, which were submitted on July 17, 2008. 25 C.F.R. § 523.4.¹ The Chairman's decision on the ordinance amendments will potentially be of controlling relevance to this proceeding. If the Chairman concludes, in keeping with notice-and-comment regulations recently issued by the Department of the Interior, *see* 25 C.F.R. § 292.1-292.6 (but contrary to the position taken by the federal defendants in the *CACGEC I* and *II* litigation and accepted by Judge Skretny as a permissible, though not mandatory, construction of the statute) that section 20's prohibition on after-acquired gaming pertains only to trust, and not to restricted fee, lands, then the legal basis for the issuance of the

¹ If the Chairman does not act upon the ordinance amendments within the statutory timeframe, the ordinance amendments become approved by operation of law. 25 C.F.R. § 523.4(c).

NOV will have evaporated entirely. Proceeding with a hearing while a decision from the Chairman of such potential importance is pending would not serve any valuable purpose.

The Nation challenges the NOV on the merits. The Nation further requests the opportunity to file an additional brief on the merits if warranted by subsequent developments in the ordinance approval process or in the CACGEC litigation.

Statement of Facts

In January 2006, various plaintiffs brought suit in the United States District Court for the Western District of New York against the U.S. Department of the Interior, this Commission, and individual governmental defendants, challenging gaming in the Buffalo Creek Territory (the "Territory"). See *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295 (W.D.N.Y. Jan. 12, 2007)(No. 06-CV-0001S)("CACGEC I"), amended on reconsideration by 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007). In relevant part, plaintiffs alleged that gaming in the Territory was not lawful because the Territory did not fall under IGRA's definition of "Indian lands" and because gaming in the Territory is proscribed by Section 20 of the statute. On January 12, 2007, Judge Skretny denied defendants' motion to dismiss the suit and vacated the Chairman's approval of the Seneca Nation Gaming Ordinance as to the Buffalo Creek Territory. Judge Skretny remanded the matter to the NIGC so that the Chairman could determine whether the Buffalo Creek Territory qualifies as "Indian lands" under IGRA and, if so, whether Section 20 or any of its exceptions apply to the Territory.

The Nation then submitted to the Chairman amendments to its ordinance that specified the precise location of the Buffalo Creek Territory—something that the original ordinance, which was submitted before the acquisition of the parcel, had not done. The site-specific amendments were approved on July 2, 2007, by letter opinion in which the Chairman concluded that the Buffalo Creek Territory constituted "Indian lands" as defined by IGRA and that the Territory met the "settlement of a land claim" exception to Section 20's general prohibition against gaming on trust lands acquired after the passage of IGRA.

In a new action filed in the Western District of New York, the *CACGEC I* plaintiffs (along with additional plaintiffs) then challenged this second approval on the same grounds that they had advanced in their first suit. The parties filed dispositive motions, and on July 8, 2008, Judge Skretny issued an opinion vacating this Commission's July 2, 2007 approval of the gaming ordinance amendments. See generally *CACGEC II*. The court held, in agreement with the NIGC and the Department, that the Nation properly enjoys jurisdiction over the Buffalo Creek Territory, and that the Territory hence satisfies IGRA's requirement that Indian nations may conduct gaming only on "Indian lands." However, Judge Skretny also held that Section 20's prohibition against gaming on lands taken into trust after the Act's effective date applies to the Territory even though it is comprised of restricted fee rather than trust lands. In so holding, the court concluded that the Chairman's position (articulated in both the ordinance approval and in the litigation) that Section 20 of IGRA applied to restricted fee land was "a permissible construction" of IGRA. He further held that the Section 20 "settlement of a land claim" exception does not apply, declaring the NIGC's conclusion on the latter issue to be "arbitrary, capricious, and not in accordance with the law." *CACGEC II* at *63.

After the dispositive motions in *CACGEC II* were briefed for the Court, but before the issuance of the decision, the Department published final agency regulations construing and implementing Section 20 of IGRA. See 25 C.F.R. §§ 292.1-292.26 (73 Fed. Reg. 29354). The regulations define the “newly acquired lands” to which Section 20’s general prohibition applies to encompass only “land that has been taken, or will be taken, in trust for the benefit of an Indian tribe.” *Id.* at § 292.1 (73 Fed. Reg. at 29376). As it discussed in the preamble to the Final Rule, the Department considers “[t]he omission of restricted fee lands from [the Section 20 prohibition to be] purposeful, because Congress referred to restricted fee lands elsewhere in IGRA.” 73 Fed. Reg. 29354, 29355-56. More specifically, under the new Rule, the Department defines “newly acquired lands” as encompassing only “land that has been taken, or will be taken, *in trust* for the benefit of an Indian tribe.” 25 C.F.R. 292.1 (73 Fed. Reg. 29354, 29376) (emphasis added). The Department explains that its omission of restricted fee lands from this definition was no accident. The Preamble to the Final Rule states:

One comment regarded the applicability of section 2719 of IGRA to restricted fee lands[.]

Response: . . . [S]ection 2719(a) refers only to lands acquired in trust after October 17, 1988. The omission of restricted fee from section 2719(a) is considered purposeful, because Congress referred to restricted fee lands elsewhere in IGRA, including at sections 2719(a)(2)(A)(ii) and 2703(4)(B).

. . . .

Newly acquired lands:

Several comments inquired as to the applicability of section 2719 to restricted fee lands[.]

Response: In response to these inquiries, a definition of “newly acquired lands” was added to the regulations. It encompasses lands the Secretary takes in trust for the benefit of an Indian tribe after October 17, 1988. It does not encompass lands acquired by a tribe in restricted fee after October 17, 1988, as discussed above[.]

73 Fed. Reg. 29354, 29355-56. The new regulations also address what is meant by the “settlement of a land claim” as that term is used in Section 20.

On July 17, 2008, the Nation submitted amendments of its gaming ordinance to the NIGC for approval. The NIGC is statutorily required to act on the amendments by October 15, 2008. 25 C.F.R. § 523.4. The Nation believes that the Department’s new Rule marks an important change in the governing law, and that the NIGC should have the opportunity to consider in the first instance the gaming eligibility of the Buffalo Creek Territory in light of the Department’s new regulations and, in particular, the conclusion that the Section 20 prohibition does not apply to restricted fee lands. Those amendments make it clear that the Nation’s gaming in the Buffalo Creek Territory occurs only on Indian land as defined by the decision in *CACGEC II*, and that it occurs only on restricted fee lands that the Department has concluded are not subject to Section 20’s limitations.

On July 14, 2008, the *CACGEC II* Plaintiffs filed a Motion to Enforce Judgment, seeking an order compelling the NIGC to close the Nation's temporary gaming facility in the Buffalo Creek Territory immediately. On July 22, 2008, the federal defendants filed a Motion for Remand pursuant to Fed. R. Civ. P. 59(e), requesting that the court amend its judgment and remand the case so that the NIGC could consider the impact of the new Rule on the gaming-eligibility of the Buffalo Creek Territory. The Nation also filed an amicus brief in opposition to Plaintiffs' Motion to Enforce Judgment and in support of the Defendants' Motion for Remand.

On August 26, 2008, Judge Skretny denied the Motion for Remand and granted in part Plaintiffs' Motion to Enforce Judgment. The court issued an order compelling the NIGC to issue a Notice of Violation for the continued operation of the Buffalo Creek facility. Slip Op. at 7-8, 21. However, the court denied CACGEC's request that it order the NIGC to close the Buffalo Creek operation, as such an order would trench impermissibly on the Commission's discretionary enforcement authority. "Congress did give the Chairman and the Commission discretion, within the IGRA's mandatory remedial framework, to determine what type of enforcement action is appropriate to the circumstances of a particular violation or substantial violation. *Thus, Plaintiffs' request that the Court give effect to its July 8, 2008 Decision by direction to the Chairman to take a specific enforcement action is not in accord with the IGRA's remedial scheme.*" Opinion at 5 (emphasis added). In response, the NIGC issued a Notice of Violation pursuant to 25 U.S.C. § 2713(a)(3) and its regulations on September 3, 2008 (NOV-08-20), explaining that, under the court's July 8, 2008 decision, the Nation is currently considered to be in violation of the IGRA by operating a Class III gaming operation without an approved gaming ordinance relative to the Buffalo Creek Territory.²

Argument

I. The Presiding Official should order the hearing to commence only after the 90-day period in which the Chairman is required to take action on the pending gaming ordinance amendments has concluded.

The Nation requests that the Presiding Official order the hearing in this matter to commence at a reasonable time after October 15, 2008, the date by which the Chairman is statutorily required either to take action on the Nation's recently submitted gaming ordinance amendments or to allow the ordinance go into effect by operation of law. Postponing the hearing would enable the Chairman to review the continuing need for the NOV in light of the agency's considered and developed views regarding whether Section 20 applies to restricted fee land – and thus to the Buffalo Creek Territory at issue in the NOV – given the Department's new Rule that Section 20 does not apply to such land. As set forth above, the Department has concluded as a matter of law and agency policy that restricted fee lands are *not* subject to the Section 20

² Paragraph 4(R) of the NOV states imprecisely that "at this point in time, the Nation has no approved Class III ordinance." The "Seneca Nation of Indians Class III Gaming Ordinance of 2002", as amended, remains in effect relative to the Nation's other gaming establishments as it has never been challenged and the *CACGEC I* and *II* decisions are limited to the Buffalo Creek Territory and the subsequent amendment to the pre-existing ordinance. See 25 C.F.R. § 523.4 (Review of an amendment).

prohibition – a new position that departs from the one that the federal defendants took in the *CACGEC* litigation that led to Judge Skretny’s order that the NIGC issue the NOV. The Department has also developed a new, and potentially significant, definition of a “settlement of a land claim.” As the Supreme Court has made clear, “a court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency’s governing act.” *NLRB. v. Food Store Employees Union*, 417 U.S. 1, 10 n.10 (1974). The same principle applies here, where a coordinate agency has ordained a change in law that bears directly on the NIGC’s own actions. See *Nat’l Fuel Gas Supply Corp. v. FERC*, 899 F.2d 1244, 1249-50 (D.C. Cir. 1990) (remanding case to agency because “the legal background against which the [agency] rendered its interpretation has been . . . altered. Remand under these circumstances also comports with the general principle that an agency should be afforded the first word on how an intervening change in law affects an agency decision pending review”).

A brief postponement here will ensure that any agency action on the NOV is fully informed by the completed and considered decision of the agency on the proper scope of section 20 in light of the new Department Rule and the Nation’s arguments as to why the NIGC should adopt the conclusions embodied in that Rule as its own. By contrast, administrative review prior to that time could deprive the agency of the time it needs to consider those important questions of agency law, and could result in internally contradictory agency proceedings, and in inefficiencies in and the unnecessary waste of administrative and party resources.

When the NIGC reviewed the Nation’s previous gaming ordinance amendments, the NIGC relied in part on the Department’s informal 2002 construction of the scope of the Section 20 prohibition in arriving at its own interpretation that Section 20’s prohibition includes restricted fee lands. See Docket No. 34-5 (July 2, 2007 Letter of NIGC to the Nation (citing Secretary’s November 12, 2002 opinion letter)) at 4 n.2. It is certainly plausible that the NIGC might amend its position in light of the Department’s present interpretation, particularly where that interpretation – unlike the Department’s former position and that of the NIGC – is embodied in a formal rule promulgated after public notice and comment and fully adheres to the plain statutory text.³

If the NIGC were in fact to concur in the construction of the Section 20 prohibition embodied in the new Department Rule, the considered determination of both agencies would warrant *Chevron* deference from the Court. In its Decision and Order, the Court held that the NIGC’s present interpretation of Section 20’s scope is “a permissible construction of the statute.” Docket No. 61 at 103. The Court never held, however, that NIGC’s present interpretation is correct or that an interpretation that the Section 20 prohibition extends only to trust lands would not likewise be permissible. If such an interpretation is permissible, then the Court would be bound to defer to it, even if it thinks it is not the better reading of the statute. “[Where an agency] construction is reasonable, *Chevron* requires a federal court to accept the agency’s

³ In addition, the new Final Rule sets forth the circumstances under which gaming may occur on newly acquired lands under a settlement of a land claim. 25 C.F.R. § 292.5 (73 Fed. Reg. 29354-01, 29376-77). These changes may provide an alternative independent basis for a reconsidered decision by the agency.

construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Crocker v. Piedmont Aviation, Inc.*, 933 F.2d 1024, 1027-28 (D.C. Cir. 1991) (reversing district court's grant of summary judgment where interpretation of statute relied on by district court was "permissible [but] not the only" interpretation and contrary agency interpretation of statute issued *after* district court issued its decision was not inconsistent with the statutory language and therefore "entitled to deference"). And compelling circumstances exist here in favor of the reasonableness of the Department's position.

First, the plain language of IGRA's Section 20 unequivocally supports the Department's interpretation. Section 20 of IGRA prohibits gaming "on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988." 25 U.S.C. 2719. That straightforward statutory text does not include land held in restricted fee status and thus, by its plain language, does not unambiguously dictate Section 20's application to restricted fee lands.

Second, that natural reading is strengthened by the fact that, elsewhere in IGRA, Congress used the phrase "restricted fee" when it wished to refer to restricted fee lands. *See, e.g.* 25 U.S.C. 2703(4)(B) (defining "Indian lands" to include "lands title to which is *either* held in trust by the United States for the benefit of an Indian tribe or individual *or* held by any Indian tribe or individual subject to restriction by the United States against alienation.") (emphasis added). The selective inclusion and exclusion of restricted fee land within IGRA, and indeed within Section 20 itself, *see* 25 U.S.C. 2719(a)(2)(A) (section 20 prohibition does not apply to Oklahoma lands belonging to a tribe that had no reservation when IGRA was passed if the lands are "contiguous to other land *held in trust or restricted status* by the United States for the Indian tribe) (emphasis added), must be respected. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Lopez v. Gonzales*, 127 S. Ct. 625, 631 (2006) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Riverkeeper, Inc. v. United States Environmental Protection Agency*, 475 F.3d 83, 102, 125 (2d Cir. 2007) (a selective "omission is * * * significant.").

Third, because "in trust" is an established term of art in Indian legislation, federal agencies such as the NIGC and the Department must presume that Congress intended to carry forward that specialized meaning. *See, e.g., Wilkie v. Robbins*, 127 S. Ct. 2588, 2605 (2007) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken") (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *Neder v. United States*, 527 U.S. 1, 21 (1999) (where terms have "accumulated settled meaning," a "court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (internal quotation marks omitted); *Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974).⁴

⁴ Additional reasons in support of the reasonableness of the Department's position are elaborated upon in the Nation's submission to the NIGC in support of its ordinance amendments, which is incorporated herein by reference.

Given these established canons of statutory construction and the plain language of Section 20, the recent regulations cement the view that Section 20 has no application to the restricted fee lands at issue here and thus that gaming remains appropriate on those lands. Because all of the other applicable requirements of the IGRA are met with respect to the Buffalo Creek Territory,⁵ it is certainly plausible that the NIGC could approve the gaming ordinance amendments to permit gaming on the Buffalo Creek Territory on or before the statutory deadline of October 15, 2008. Processing the NOV before that decision has been made thus could disrupt the NIGC's important deliberations on a question of law with wide-ranging importance.

Significantly, there is nothing in the district court's recent orders that would preclude the NIGC from adopting the Department's interpretation of Section 20 in approving the Gaming Ordinance. A district court decision will only foreclose a contrary agency construction if the court's construction of the statute is "the *only permissible* reading of the statute." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984 (2005) (emphasis in original). In other words, "[b]efore a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction." *Id.* at 985. See also *id.* at 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the *unambiguous terms of a statute* and thus *leaves no room for agency discretion.*") (emphasis added). Accordingly, under *Brand X*, the district court's decision would only foreclose a contrary agency interpretation if its decision rested on the "unambiguous terms" of IGRA section 20, if the decision concluded that the statute "leaves no room for agency discretion," and if the decision held that its reading of Section 20 was "the only permissible reading of the statute."

The district court's orders in *CACGEC II* plainly do not meet this description. Throughout its July 2008 decision, the court spoke in terms that are consistent with preserving agency discretion under *Chevron* step two and that are irreconcilable with a ruling under *Chevron* step one. Nowhere does the district court hold that the federal defendants' litigation position that Section 20 applies to restricted fee lands is the "only permissible" reading of IGRA, let alone unambiguously compelled by the statutory text. In fact, the district court explains, "[w]ere the Court to start and end with the ordinary and common meaning of the terms employed in section 20, devoid of statutory and historical context, it might arrive at the reading advanced by the SNI" that Section 20 does not apply to restricted fee lands. July 8, 2008, Decision at 100. Under *Brand X*, an admission like that is wholly incompatible with a *Chevron* step one ruling that deprives the agency of discretion. The same is true of Judge Skretny's statement that he does not rely on "unambiguous" statutory text to support the NIGC position, but on "historical context," "historical discussion," and statutory "purpose," *id.* at 100, 101; this is clearly not the language of a *Chevron* step one decision. The district court's decision thus leaves the door open

⁵ As explained above, the CACGEC plaintiffs grounded their attack on the Buffalo Creek casino on two theories: (1) that Section 20's prohibition against gaming on trust lands acquired after the passage of IGRA applied to the Buffalo Creek Territory and the Territory could not meet any of the exceptions to this prohibition; and (2) that the Buffalo Creek Territory was not "Indian lands." Judge Skretny has rejected the latter argument, holding (in agreement with the Secretary and NIGC) that the Nation properly enjoys jurisdiction over the Territory and that it hence satisfies IGRA's requirement that Indian nations conduct gaming only on "Indian lands."

for the NIGC to follow the Department's interpretation of Section 20 as embodied in its new Rule.

Furthermore, the court acknowledges that Congress was only concerned with "trust" land because "the IRA's trust provision was the only legally recognized manner in which new land could be acquired for Indians when the IGRA was enacted," *id.* at 101, and that "there was no statutory mechanism for the creation of restricted fee land in 1988," *id.* at 103. From that basis, the court reasons that Congress "intended" to cover all after-acquired land, and thus that "*the intention of the drafters, rather than the strict language, controls.*" *Id.* at 102. One can certainly debate whether judicially filling in explicit statutory gaps that Congress failed to anticipate is a proper mode of statutory construction. See, e.g., *Keene Corp. v. United States*, 508 U.S. 200, 217 (1993) (policy arguments about statute's intended operation were directed to the "wrong forum" because court is not at "liberty to add an exception"). But there is no sound basis for debating that such an acknowledged gap constitutes the very type of ambiguity that triggers agency discretion and forecloses any ruling as a matter of law under *Chevron* step one. See *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2345-2346 (2007) ("We have previously pointed out that the 'power of an administrative agency to administer a congressionally created * * * program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' When an agency fills such a 'gap' reasonably, and in accordance with other applicable (e.g., procedural) requirements, the courts accept the result as legally binding.") (citing, *inter alia*, *Chevron*). Quite the opposite, the district court concluded that, given the statutory "purpose," "Chairman Hogen's conclusion that Congress intended the section 20 prohibition to apply to *all* after-acquired land is a permissible construction of the statute." July 8, 2008, Decision at 103 (latter emphasis added). That is indisputably *Chevron* step two language. See *Chevron*, 467 U.S. at 843 ("[I]f the statute is silent or ambiguous * * * the question * * * is whether the agency's answer is based on a permissible construction of the statute.").

Significantly, the district court's denial of the federal defendants' remand motion was partially predicated on the fact that the Nation had already filed gaming ordinance amendments with the NIGC "which the Chairman will have the opportunity to act upon if he so chooses." Slip op. at 19. Proper consideration of the recently submitted gaming ordinance amendments is thus wholly consistent with the district court's recent order.

Lastly, a short postponement of the hearing would not unduly prejudice the Chairman since his issuance of the NOV was in response to the Court's August 26, 2008, decision. All other aspects of the Chairman's enforcement regulatory discretion remain intact and would not be impacted by continuance of the hearing until a reasonable time after October 15, 2008.

II. The Presiding Official should allow the Nation to file an additional brief on the merits, if necessary, once the Chairman takes action on the pending gaming ordinance amendments or the United States takes action to appeal the decision in *CACGEC II*.

As discussed throughout this submission, the Chairman's consideration and expected decision on the pending gaming ordinance amendments has a direct bearing on the instant appeal. Moreover, the United States is currently assessing its position in the ongoing *CACGEC*

II litigation and must decide within 60 days of August 26, 2008, whether to appeal the decision and order in that case. In either case, there could exist a need to file an additional brief regarding the Nation's appeal of the NOV based upon these events.

In the interest of justice and providing the Nation a full and fair opportunity to present all of the legal and factual circumstances that have a bearing on the instant appeal, the Nation respectfully requests leave to file an additional brief in support of this appeal in the event that the Chairman issues a decision on the Nation's pending gaming ordinance amendments and/or the United States appeals the *CACGEC II* decision. Granting the Nation leave to file an additional brief will not prejudice the Chairman for the reasons stated above and will, in fact, promote the administrative judicial economy of this proceeding by ensuring all relevant legal arguments and factual circumstances are presented to the Presiding Official.

III. In any event, the NOV should be dissolved since the Chairman had no reasonable basis to conclude that a substantial violation of IGRA is occurring at the Nation's Buffalo facility notwithstanding the recent decision in *CACGEC II*.

As thoroughly demonstrated above, there has been a significant change in the law regarding the application of Section 20 to restricted fee land that has a direct bearing on the underlying controversy here. However, the Department's new Section 20 regulations, developed in conjunction with the NIGC, make plain that Section 20 does not apply to restricted fee land. Thus, the Nation does not even need to satisfy Section 20 since it has no application here.

But the court did not hold that was the only permissible construction of IGRA. In its post judgment motion to remand, and as set forth in the Nation's amicus curiae brief in support, the United States noted the change in law and asked the court to remand the case to the agency to explain why its new position is also a reasonable construction of the statute. The court denied the motion to remand on several grounds, including the fact that the United States acted "egregious[ly]" in failing to inform the court of the change in law after briefing of the case but before a decision was issued. The court also noted that the Nation had submitted another ordinance amendment that the Chairman can act upon, if he chooses, making remand of the July 2007 ordinance amendment unnecessary. The court did not conclude, however, in either the July 8 opinion or the August 26 opinion, that its ruling that Section 20 applied to restricted fee land was the only permissible construction of IGRA.

Accordingly, given the agencies' current view regarding the inapplicability of Section 20 to restricted fee lands, there was no reasonable basis for the Chairman to invoke his authority under 25 U.S.C. 2713 because the Chairman does not have "reason to believe that the tribal operator of an Indian game . . . is engaged in activities . . . that may result in the imposition of a fine under [IGRA]," 25 U.S.C. § 2713. Simply put, the Nation is gaming on restricted fee land that does not depend on any exception contained in Section 20. If there is no need to satisfy Section 20, then there is no basis for the Chairman to conclude that there is a violation of IGRA. And *CACGEC II* does not compel to the contrary because its ruling on the application of Section 20 to restricted fee land did not foreclose the federal agencies with expertise in this area of the

law from refining their position as they have now done. Therefore, the NOV should be dissolved.⁶

IV. Seneca Nation of Indians' Notice of Oral Testimony and Preliminary Witness List.

The Seneca Nation of Indians hereby gives notice that it intends to present oral testimony and anticipates calling some or all of the following witnesses at the hearing in this matter:

Maurice A. John, Sr., President, Seneca Nation of Indians

Kevin W. Seneca, Treasurer, Seneca Nation of Indians

Barry E. Snyder Sr., Chairman, Seneca Gaming Corporation

Brian Hansberry, President and Chief Executive Officer, Seneca Gaming Corporation

Each of the above-identified witnesses has information pertaining to the operations of the Seneca Nation or Seneca Gaming Corporation relative to the issues presented in the instant appeal.

Chris Collins, County Executive, Erie County, New York

Byron Brown, Mayor, City of Buffalo, New York

Each of the above-identified witnesses has information pertaining to the economic and other impacts the Seneca Buffalo Creek Casino has on Erie County and the City of Buffalo.

The Seneca Nation reserves the right to supplement or amend this preliminary witness list, to call any witness listed by the Chairman on his witness list as well as additional witnesses as necessary to rebut testimony or other evidence presented by the Chairman or any other hearing participant.

CONCLUSION

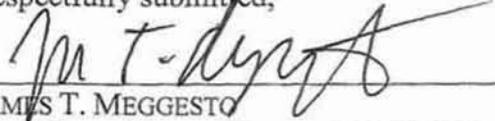
For the foregoing reasons, the Presiding Official should (i) set a hearing in this matter at a reasonable time after October 15, 2008, to enable the Chairman, pursuant to his statutory duties, to reconsider his position on the scope of section 20 in light of significant intervening legal developments and to ensure that any proceedings on the NOV are fully informed by that agency determination; and (ii) grant leave to the Nation to file an additional brief, if necessary, based on

⁶ In requesting that the Presiding Official defer the hearing in this matter, and allow the Nation to file a subsequent brief on the merits of its NOV appeal should subsequent developments warrant such a filing, the Nation does not intend in any way to waive its substantive arguments that an NOV should not have issued in this matter. The Nation's gaming activities in the Buffalo Creek Territory are in full compliance with the requirements of IGRA, including section 20, as the Department's recent Rule makes clear. However, in the interest of presenting its arguments based on a full record, and in the interest of efficiency, the Nation did not think it appropriate to present its substantive arguments in full at this juncture. Should the Presiding Official disagree the Nation will file a substantive brief forthwith.

expected developments with regard to pending gaming ordinance amendments and the United States' decisions in the *CACGEC II* litigation.

Dated: September 15, 2008

Respectfully submitted,



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