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United States Court of Appeals *for the* Second Circuit

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

Plaintiffs – Appellants – Cross-Appellees,

v.

PHILIP N. HOGEN, *et al.*,

Defendants – Appellees – Cross-Appellants.

(*FULL CASE CAPTION ON INSIDE COVER*)

On Appeal from the United States District Court
for the Western District of New York

PAGE PROOF BRIEF *AMICUS CURIAE*
of the SENECA NATION of INDIANS in SUPPORT OF FEDERAL APPELLEES and AFFIRMANCE in *CACGEC III*

Christopher Karns
General Counsel
SENECA NATION OF INDIANS
Post Office Box 231, Seneca Nation
Salamanca, NY 14779
Ph: (716) 945-1790

Carol E. Heckman
HARTER, SECREST & EMERY, LLP
Twelve Fountain Plaza, Suite 400
Buffalo, NY 14202-2293
Ph: (716) 845-4220
checkman@hselaw.com

/s/ Riyaz A. Kanji
Riyaz A. Kanji
David A. Giampetroni
Lucy Wells Braun
Philip H. Tinker
KANJI & KATZEN, PLLC
303 Detroit Street, Suite 400
Ann Arbor, Michigan 48104
Ph: (734) 769-5400
rkanji@kanjikatzen.com

Counsel for the Seneca Nation of Indians

Citizens Against Casino Gambling in Erie County, Joel Rose and Robert Heffern, as Co-Chairpersons, D. Min. G. Stanford Bratton, Reverend, Executive Director of the Network of Religious Communities, Network of Religious Communities, National Coalition Against Gambling Expansion, Preservation Coalition of Erie County, Incorporated, Coalition Against Gambling in New York-Action, Incorporated, Campaign for Buffalo-History Architecture & Culture, Sam Hoyt, Assemblyman, Maria Whyte, John McKendry, Shelley McKendry, Dominic J. Carbone, Geoffrey D. Butler, Elizabeth F. Barrett, Julie Cleary, Erin C. Davison, Alice E. Patton, Maureen C. Schaeffer, Joel A. Giambra, Individually and as Erie County Executive, Keith H. Scott, Sr., Pastor, Dora Richardson, Josephine Rush,

Plaintiffs - Appellants - Cross-Appellees,

v.

Philip N. Hogen, in his official capacity as Chairman of the National Indian Gaming Commission, National Indian Gaming Commission, United States Department of the Interior,

Defendants - Appellees - Cross-Appellants.

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INTRODUCTION AND STATEMENT OF INTEREST

With the concurrence of the United States Department of the Interior ("Department"), the National Indian Gaming Commission ("NIGC"), the State of New York ("State") and the City of Buffalo ("City"), and pursuant to the requirements and policy of the Seneca Nation Settlement Act of 1990 ("SNSA"), 25 U.S.C. §§ 1774-1774h, and the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, the Seneca Nation of Indians ("Nation")—a federally recognized Indian nation, *see* 79 Fed. Reg. 4748, 4751—operates a gaming facility on its Buffalo Creek Territory ("Territory") that benefits both the Seneca and Western New York economies.[1] Having failed to convince the federal, State or local governments that a valid legal or policy basis exists for opposing the Nation's activities, the plaintiffs-appellants (collectively, "CACGEC") commenced this litigation. At every turn, the vehemence of CACGEC's arguments has been matched only by the utter lack of support for them in the plain text of the governing statutes and well-established principles of administrative and federal Indian law.

This case raises three issues, each going to the heart of the Nation's interests. In Issue One, CACGEC seeks to extinguish the Nation's sovereignty over its

[1] No counsel for any party authored this brief in whole or in part. No one other than the Seneca Nation contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of the brief, as attested to in the accompanying Motion filed pursuant to Federal Rule of Appellate Procedure 29.

Buffalo Creek Territory by arguing, contrary to a century's worth of federal Indian law, that the Nation does not enjoy governmental jurisdiction over the restricted fee lands that constitute the Territory.

In Issue Two, CACGEC takes aim at the Nation's efforts—in furtherance of the policies underpinning IGRA—to enhance its governmental, economic and social infrastructure when it argues that, contrary to the plain language of the statute, IGRA prohibits gaming on the Territory because it was acquired after the Act's effective date.

In Issue Three, CACGEC seeks to whitewash the Nation's history by arguing—notwithstanding Congress's express findings—that the SNSA did not settle land claims of the Nation against the United States arising out of the federal government's imposition of grossly unfair leases on the Nation, leases that deprived the Nation of the use of over a third of its Allegany Territory for more than a century.

Accordingly, it is no exaggeration to say that the Nation's interests in this matter are acute. For this reason, the Nation has pending before this Court a Motion to Intervene, Doc. 131. If that Motion is denied, the Nation seeks leave to address its critical interests through this brief *amicus curiae*.

STATEMENT OF THE CASE

I. Factual and Legal Background

A. The Seneca Nation and the Loss of Its Land.

The Seneca Nation of Indians is one of the historic Six Nations of the Iroquois Confederacy, or Haudenosaunee, who historically governed nearly thirty-five million acres of land east of the Mississippi River. *Banner v. United States*, 238 F.3d 1348, 1350 (Fed. Cir. 2001) ("*Banner II*"). Following the Revolutionary War, the Iroquois ceded vast swaths of their territory, "greatly diminishing the land base retained by the Six Nations, and particularly the [Seneca Nation]." *Citizens Against Casino Gambling in Erie County v. Hogen*, 2008 WL 2746566, at *5 (W.D.N.Y. July 8, 2008) ("*CACGEC II*"); Treaty of Fort Stanwix art. 3, Oct. 22, 1784, 7 Stat. 15, 15-16.

In 1790, the newly formed federal government passed the first Indian Trade and Intercourse Act, 1 Stat. 137 ("Non-Intercourse Act") (current version codified at 25 U.S.C. § 177), which required federal approval of all land transactions with Indian nations. President Washington promised the Seneca chiefs that the United States would protect the Nation's lands against further encroachment:

> [T]he case is now entirely altered; the General Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding.
>
> Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government

> will never consent to your being defrauded, but it will protect you in all your just rights.

I American State Papers: Indian Affairs 142 (1832). Shortly thereafter, the United States and the Six Nations entered into the 1794 Treaty of Canandaigua, which provided that the Seneca lands were "the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka Nation . . . in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." Treaty of Canandaigua art. 3, Nov. 11, 1794, 7 Stat. 44, 45.

The Treaty thus recognized the Nation's title to its lands, but that fee title was "restricted" by virtue of the United States' control over alienation, thereby establishing the pattern by which the Nation holds title to its lands in what has come to be known as "restricted fee" status. *See, e.g.*, *Huron Group, Inc. v. Pataki*, 785 N.Y.S.2d 827, 832 (N.Y. Sup. Ct. 2004) ("[T]he United States normally does not hold Indian lands in [New York] State in trust for a Tribe; rather, such land may be held in restricted fee." (footnote omitted)), *aff'd*, 803 N.Y.S.2d 465 (N.Y. App. Div. 2005).[2]

[2] In 1934, Congress enacted the Indian Reorganization Act, 25 U.S.C. §§ 461-494a, which provided modern-day authority for the United States to take land into trust for Indian nations, *id.* at § 465. The Nation "overwhelmingly rejected the IRA due to concerns over maintaining [its] sovereignty and [its] remaining land base." *CACGEC II*, 2008 WL 2746566, at *9; *see also* 25 U.S.C. § 478 (IRA opt-

Despite President Washington's eloquent promise, by the mid-nineteenth century the Nation had been divested of the vast majority of its remaining lands through coercion and fraud, and without federal approval. *See Banner II*, 238 F.3d at 1351; *CACGEC II*, 2008 WL 2746566, at *6 (the Nation's lands were "largely lost due to the government's shift away from a policy protective of Indian land rights"); *id.* at *6-*7 (describing various cessions). Federal courts later determined the cessions to be illegal. *See Seneca Nation of Indians v. United States*, 28 Indian Cl. Comm'n 12, at 13, 32, 37, 40 (May 3, 1972).

After the Civil War, non-Indians began settling in the town of Salamanca on the Allegany Reservation. *Banner II*, 238 F.3d at 1351. These settlers then crafted property leases with the Nation in order to remain on the land. *Id.*; *CACGEC II*, 2008 WL 2746566, at *7-*8. State courts concluded that the leases, containing terms patently unfair to the Nation, were void for want of federal approval. *See Banner II*, 238 F.3d at 1351; H.R. Rep. No. 101-832, *CACGEC II*, Doc. 34-9 ("House Report"), at 3-4 (1990). The State and non-Indian lessees then vigorously lobbied Congress for its retroactive blessing.

In 1875 and 1890, Congress ratified the leases and then extended them for an additional 99 years, 18 Stat. 330; 26 Stat. 558, in spite of the Nation's vigorous protests over the injustice of "compel[ling] [the Nation] to carry [the leases] into

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out provision). Accordingly, the United States has never held land in trust for the Nation.

effect, and to that extent deprive said Nation of their lands, in violation of treaty stipulations," S. Rep. No. 101-511, *CACGEC II*, Doc. 34-8 ("Senate Report"), at 10-11 (1990) (Statement of Seneca leaders and citizens). *See Banner II*, 238 F.3d at 1351. Thus began a period of more than a century during which the Nation lost the use of approximately one-third of its restricted fee Allegany Territory for a monetary return that was unconscionably low even by the standards of the day. *See* Senate Report at 1-2; House Report at 4-5.

B. The Seneca Nation Settlement Act.

Against this historical backdrop, Congress passed the SNSA to resolve the Nation's longstanding grievances over the coerced leasing that had deprived the Nation of the use of substantial portions of its Allegany lands for several generations without just compensation. In the years preceding the Act, the Nation "asserted claims for back rent and threatened litigation against the resident lessees, the City of Salamanca, the State of New York, and the United States." *Banner v. United States*, 44 Fed. Cl. 568, 570 (1999) ("*Banner I*"). Accordingly, the purposes underlying the SNSA included "provid[ing] the Nation with fair compensation for the use of its land," Senate Report at 4, providing for the renewal of the leases at fair market value, House Report at 5, and releasing the United States and others from liability arising out of their role in the imposition of the

leases, *see* 25 U.S.C. § 1774(b)(8) ("It is the purpose of this [Act] . . . to avoid . . . potential legal liability on the part of the United States.").

In Section 8(c), Congress provided a mechanism for the Nation to restore a small fraction of its land base and to hold the reacquired lands in the same "restricted fee status" as it has long held its communal lands:

> Land within its aboriginal area in the State . . . 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 such 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 Non-Intercourse Act,[3]] such lands shall be subject to the provisions of that Act *and* shall be held in restricted fee status by the Seneca Nation. Based on the proximity of the land acquired to the Seneca Nation's reservations, land acquired may become a part of and expand the boundaries of the Allegany Reservation, the Cattaraugus Reservation, or the Oil Spring Reservation in accordance with the procedures established by the Secretary for this purpose.

25 U.S.C. § 1774f(c) (emphasis added). In addition to this land acquisition provision, the Act contains other measures "to promote economic self-sufficiency for the Seneca Nation and its members," 25 U.S.C. § 1774(b)(6); *see also id.* §§ 1774(b)(7), 1774d(b)(2)(A) and 1774d(c).

[3] At the time of the SNSA's passage, the Non-Intercourse Act provided in relevant part, as it does today, that: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177.

C. The Nation's Economic Development Activities Under IGRA.

Two years before the SNSA, Congress enacted IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). In August of 2002, in furtherance of these policies, the State and the Nation entered into a Gaming Compact authorizing the Nation to operate off-reservation gaming facilities in Niagara Falls and Buffalo, as well as one on its Allegany Territory. *See CACGEC III*, Doc. 58-14, ¶ 11(a)(1)-(2). The Compact expressly contemplated that the Nation would acquire the Niagara Falls and Buffalo sites with SNSA funds and that, because the SNSA provided that such lands would be held in restricted fee status, they would be gaming-eligible. *Id.* at ¶ 11(b)(3). The Compact was deemed approved by the Secretary of the Interior ("Secretary") when notice to that effect was published in the Federal Register on December 9, 2002. 67 Fed. Reg. 72,968-01.

The Nation subsequently acquired lands in Niagara Falls using SNSA funds, and these assumed restricted fee status after undergoing Secretarial review. *See* 25 U.S.C. § 1774f(c). The Nation operates the Seneca Niagara Casino and Hotel and related facilities on these parcels.

In November 2005, the Nation notified the Department that it had acquired approximately nine acres in downtown Buffalo pursuant to the SNSA. The

Secretary did not object to restricted fee status for these lands, and they accordingly obtained such status on December 2, 2005. *See* 25 U.S.C. § 1774f(c). These lands, as supplemented by an additional restricted fee acquisition in 2010, constitute the Nation's Buffalo Creek Territory. *CACGEC II*, Doc. 27, at 25. As discussed below, since acquiring its Niagara Falls and Buffalo Creek Territories, the Nation has consistently exercised governmental power over them.

As Congress intended, the Nation's gaming-related economic development activities have injected hundreds of millions of dollars into the Western New York economy and created thousands of full-time jobs for Nation members and nonmembers alike. Last year alone, the Seneca Gaming Corporation spent more than $41.5 million with local suppliers, vendors and contractors. *Buffalo Business First*, March 7-13, 2014, at 21. It is one of Western New York's largest employers, with 4,000 full-time employees, and has paid New York State over one billion dollars in exclusivity payments since 2002, a quarter of which are returned to the local host communities. *Rochester Business Journal*, March 14, 2014, at 32.

These activities are vital to fulfilling the congressional purposes underpinning the SNSA and IGRA. CACGEC asks this Court to stymie those goals. The Court should reject CACGEC's attempt to elevate its singular policy desires, already rejected by all relevant federal, state and local government

decisionmakers, over the will of Congress and a century's worth of law, as set forth in detail below.

II. Proceedings Below

The Nation adopts the statements of the federal appellees regarding the proceedings below, the basis for jurisdiction in the District Court and this Court, and the Standard of Review. *See* Doc. 147 ("U.S. Br."), at 1-2, 17-26.

ARGUMENT

ISSUE ONE: THE BUFFALO CREEK TERRITORY—HELD BY THE NATION IN RESTRICTED FEE STATUS—CONSTITUTES INDIAN LANDS UNDER IGRA.

I. The Territory's Status as Indian Lands Turns on Whether the Nation Enjoys Governmental Jurisdiction Over It.

The District Court—twice, and after thoroughly considering CACGEC's myriad arguments—concluded that the Buffalo Creek Territory qualifies as gaming-eligible "Indian lands" under IGRA. A century's worth of settled law underpins this conclusion.

IGRA authorizes gaming by an Indian nation only on "Indian lands," a term defined to include lands "held by any Indian tribe . . . subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4). CACGEC does not dispute that the Territory is subject to a federal restriction on alienation, Doc. 119 ("Br."), at 13, because the SNSA renders the Non-Intercourse Act applicable to the property, 25

U.S.C. § 1774f(c). Nor does CACGEC contest "the NIGC's finding that . . . the [Nation] has exercised its tribal governmental authority over the land." *Citizens Against Casino Gambling in Erie County v. Stevens*, 945 F. Supp. 2d 391, 405 (W.D.N.Y. 2013) ("*CACGEC III*").[4] Rather, it challenges the Nation's jurisdiction to assert such authority in the first instance. *Cf. Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) (Indian nation must enjoy jurisdiction over property in order to exercise governmental power).

The SNSA's plain language defeats CACGEC's contention. Congress did not simply make SNSA lands subject to the restraint against alienation found in the Non-Intercourse Act. *See* Br. at 43-45. Rather, it made clear that such lands are to be held in restricted fee status:

> Unless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of [the 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.

25 U.S.C. § 1774f(c) (emphasis added).

CACGEC's claims that Congress nowhere expressed an intention to convey jurisdiction to the Nation over SNSA lands, Br. at 33-35, ignore this congressional edict entirely. For, as the District Court painstakingly explained, lands endowed

[4] The Nation applies a host of its laws to the Territory, including those pertaining to public safety; the provision of water, sewer and electric services; construction and fire safety; employment rights; and gaming and liquor regulation. To this end, it maintains an active police and regulatory presence on the Territory. *See CACGEC II*, Doc. 27, at 2, 12, 14-16, 19-24, and 61-62.

by the United States with restricted fee status have long been understood as a core component of the Indian country over which Indian nations and the federal government enjoy governmental authority. CACGEC's arguments founder on their failure to acknowledge this fundamental tenet of federal Indian law.

II. Indian Nations Enjoy Governmental Authority Over Their Indian Country.

"Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998); *Indian Country, U.S.A., Inc. v. Okla. Tax Comm'n*, 829 F.2d 967, 973 (10th Cir. 1987) ("[T]he Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority.").[5] Accordingly, in *CACGEC II*, the jurisdictional arguments focused on the Indian country status of the Territory. "There is one point of commonality here: Chairman Hogen, the parties, and [the Nation] agree that to qualify as 'Indian lands' within the meaning of the IGRA, the Buffalo Parcel must be 'Indian country.'" *CACGEC II*, 2008 WL 2746566, at *28.

[5] Although CACGEC suggests otherwise, *see* Br. at 53-54, it is clearly established that in the exercise of its plenary power over Indian affairs, Congress has the authority to create Indian country. *Venetie*, 522 U.S. at 531 n.6 ("Congress has plenary power over Indian affairs," which includes the power "to create or to recognize Indian country"); *United States v. Ramsey*, 271 U.S. 467, 471 (1926) ("the question presented is not one of power but wholly one of statutory construction.").

In a curious effort to gain distance from the *CACGEC II* decision, CACGEC argued in *CACGEC III*, and repeats here (almost as an afterthought), that the Indian country status of the Territory is "irrelevant." Br. at 48-49. CACGEC correctly notes that the definitions of "Indian lands" and "Indian country" are "not synonymous," Br. at 49, but not in any way that helps CACGEC. As noted above, IGRA's "Indian lands" definition requires that an Indian nation be engaged in the concrete assertion of governmental power on restricted fee or trust lands, but CACGEC does not dispute that the Nation is so engaged here. If CACGEC is instead now arguing that "Indian country" is not the benchmark by which the Nation's jurisdiction over the Territory should be judged, that argument runs counter to the Supreme Court's teachings in *Venetie* and numerous other decisions discussed below. CACGEC invokes various statements by Interior and Justice Department officials, but as the District Court pointedly held, its "argument mischaracterizes the administrative record. . . . [T]he statements Plaintiffs[] point to are unrelated to the subject of jurisdiction." *CACGEC III*, 945 F. Supp. 2d at 402. CACGEC has identified no appropriate substitute for Indian country analysis in determining whether the Nation enjoys jurisdiction over the Territory, and none exists.

III. Indian Country Includes All Lands Set Apart for an Indian Nation's Use Under Federal Superintendence.

Indian country is defined to include:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States . . ., (b) all dependent Indian communities within the borders of the United States . . ., and (c) all Indian allotments, the Indian titles to which have not been extinguished.

18 U.S.C. § 1151. While this definition appears in the federal criminal code, it is also frequently used to demarcate the bounds of civil jursidiction. *See DeCoteau v. Dist. Cnty. Court for Tenth Jud. Dist.*, 420 U.S. 425, 427 n.2 (1975); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1006-07 (8th Cir. 2010).

The Supreme Court has made clear, however, that the statutory criteria should not be applied mechanistically. Instead, *Venetie* held that Section 1151 codifies "two requirements, which previously we had held necessary for a finding of 'Indian country' generally." 522 U.S. at 527. First, the lands "must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Id.* at 521. The Court first set forth these same requirements a century ago, *see, e.g.*, *United States v. Pelican*, 232 U.S. 442, 449 (1914) (finding land to be "Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government"), and it underscored in *Venetie* that "Section 1151 does not

purport to alter this definition of Indian country, but merely lists the three different categories of Indian country mentioned in our prior cases," 522 U.S. at 530.

Accordingly, the Court has emphasized that lands need not fit neatly into one of Section 1151's three categories to qualify as Indian country. For example, the Court has long held that off-reservation trust lands are Indian country, even though such lands are not referenced in Section 1151. As then-Chief Justice Rehnquist wrote for a unanimous Court in *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991):

> Oklahoma argues that the tribal convenience store should be held subject to state tax laws because it does not operate on a formally designated "reservation," but on land held in trust for the Potawatomis. . . . [No] precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. In *United States v. John*, 437 U.S. 634 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation." *Rather, we ask whether the area has been "'validly set apart for the use of the Indians as such, under the superintendence of the Government.'"*

Id. at 511 (citations omitted and emphasis added). *See also, e.g., Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993) ("[W]e have never drawn the distinction [between reservation and trust land that] Oklahoma urge[s]. Instead, we ask only whether the land is Indian country."); *United States v. Roberts*, 185 F.3d 1125, 1133 (10th Cir. 1999) (same). Given this extensive precedent addressing off-reservation trust lands, CACGEC is forced to concede that such lands are Indian country. *See* Br. at 28-29.

IV. When Congress Provided that SNSA Lands Shall Be Held in "Restricted Fee Status," It Designated Them as Indian Country.

While CACGEC acknowledges the Indian country status of trust lands, it refuses to do so for lands held in restricted fee status. But the two forms of property rest on the same jurisdictional footing. In both instances, the lands are set aside under federal superintendence. As the leading treatise on federal Indian law puts it, "absent contrary congressional action, the restrictions on alienation *and other unique attributes of Indian trust land apply equally to lands held in trust for the tribes by the United States and to lands held in fee title by tribes with which the federal government maintains a trust relationship*." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 982 (2005) (emphasis added) (footnote omitted). Hence, as the District Court explored in great detail, *see CACGEC II*, 2008 WL 2746566, at *34-*38, *46, the jurisdictional equivalency of trust and restricted fee lands has been recognized repeatedly in foundational judicial decisions, and by the legislative and executive branches, including in the very provisions of the SNSA and IGRA at issue here. CACGEC's disregard of these precedents notwithstanding, it is undeniable that when Congress specified that SNSA lands are to be held in restricted fee status, the term carried with it a well-established jurisdictional meaning.

A. Judicial Decisions

The modern Indian country analysis traces to *United States v. Sandoval*, 231 U.S. 28 (1913). *See Venetie*, 522 U.S. at 530 (Section 1151 based on *Sandoval*, *Pelican*, 232 U.S. 442, and *United States v. McGowan*, 302 U.S. 535 (1938)). There, the Court considered whether a federal statute prohibiting the transport of liquor into Indian country applied to the New Mexico Pueblos. While the Pueblos held title to their land, it was "not fee simple title in the commonly understood sense of the term. Congress had recognized the Pueblos' title to their ancestral lands by statute, . . . [imposing] federal restrictions on the lands' alienation." *Venetie*, 522 U.S. at 528 (footnote omitted). This federal recognition of title and assertion of superintendence over it—the same features that characterize the Nation's restricted fee lands—underpinned the Court's holding that the Pueblo lands constituted Indian country. *See id*.

Soon thereafter, in *United States v. Ramsey*, 271 U.S. 467 (1926), the Court again held that congressionally designated restricted fee lands (this time restricted fee allotments held by individual Indians) are set aside for Indian use and subject to federal control, and hence are Indian country. In doing so, the Court firmly rejected purported jurisdictional distinctions between trust and restricted fee lands:

> *[T]he difference between a trust allotment and a restricted allotment, so far as that difference may affect the status of the allotment as Indian country, was [in previous case law] not regarded as important. . . .* In practical

> effect, *the control of Congress*, until the expiration of the trust or the restricted period, *is the same*.

Id. at 470-71 (emphases added).[6] As the District Court catalogued, "[n]umerous cases since *Ramsey* have [likewise] stated that trust and restricted allotments have the same jurisdictional status for a variety of purposes." *CACGEC II*, 2008 WL 2746566, at *36 (citing cases). *See also United States v. City of Tacoma*, 332 F.3d 574, 580 (9th Cir. 2003) (same).

Thus, *Sandoval* and the allotment cases establish unequivocally that no jurisdictional distinction exists between restricted fee and trust lands, and as the foundation for the Indian country concept, those decisions retain their full force today. Indeed, as the Tenth Circuit explained more recently in a case involving lands held by the Creek Nation in restricted fee status pursuant to treaty, "it would be anomalous to [conclude] that the treaties conferring upon the Creek Nation a title *stronger* than the right of occupancy have left the tribal land base with *less* protection, simply because fee title is not formally held by the United States in trust for the Tribe." *Indian Country, U.S.A.*, 829 F.2d at 975-76 (footnote omitted).

[6] CACGEC is fundamentally mistaken when it asserts that "a restricted allotment retains its attributes as 'Indian country' during the period of allotment and prior to the issuance of fee title." Br. at 52. By definition, the individual or Indian nation holds the fee title to the restricted allotment or communal land; the parcel retains its "Indian country" attributes for however long it remains under federal superintendence. *See United States v. Bowling*, 256 U.S. 484, 486-87 (1921).

Yet this is precisely the anomalous position CACGEC invites this Court to adopt with respect to the SNSA.

B. Congressional Legislation

Congress too has long demonstrated its understanding that restricted fee and trust lands share the same jurisdictional status. Under the American Indian Agricultural Resource Management Act, for example, "'Indian land' means land that is (A) held in trust by the United States for an Indian tribe; or (B) owned by an Indian or Indian tribe and is subject to restrictions against alienation." 25 U.S.C. § 3703(9). On such land, the federal government must "comply with tribal laws and ordinances pertaining to Indian agricultural lands, including laws regulating the environment and historic or cultural preservation, and laws or ordinances adopted by the tribal government to regulate land use or other activities under tribal jurisdiction." 25 U.S.C. § 3712(b). *See also* 25 U.S.C. §§ 3115a(a)(2)(A) and 3108 (substantially similar provisions under the National Indian Forest Resource Management Act). These Acts well establish that Congress attributes jurisdictional significance to restricted fee status—indeed, Congress has specifically directed the federal government to "comply with tribal laws" on such lands. And numerous other statutes recognize the equivalent jurisdictional footing of trust and restricted fee lands as Indian country. *See CACGEC II*, 2008 WL 2746566, at *36-*37 (discussing additional examples).

Indeed, in the very jurisdictional provision of IGRA at issue in this case, Congress treated trust and restricted fee lands in like manner. *Id.* at *37. Thus, the "Indian lands" on which Indian nations may game include lands within reservation limits, *and* either trust or restricted lands "over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4). This identical treatment of trust and restricted fee lands in the very jurisdictional provision at issue here is powerful evidence that Congress intended both categories of land to enjoy the same jurisdictional footing.

C. Executive Branch Regulations

The executive branch has likewise consistently recognized that lands held in congressionally designated restricted fee status are not subject to state and local regulatory authority, but instead are subject to federal and tribal control. *CACGEC II*, 2008 WL 2746566, at *38. For example, the Secretary codified this understanding in a regulation providing (subject to certain non-relevant exceptions) that:

> [N]one of the laws, ordinances, . . . rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe . . . that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

25 C.F.R. § 1.4(a). This regulation, adopted in 1965, was upheld by the Ninth Circuit in 1975. *See Santa Rosa Band of Indians v. Kings Cnty.*, 532 F.2d 655, 665-67 (9th Cir. 1975). *See also, e.g.*, 25 C.F.R. § 162.219(a).

It was against this legal landscape—one in which the judicial, legislative and executive branches have long deemed congressionally designated restricted fee lands to be Indian country—that Congress enacted the SNSA and declared that lands acquired by the Nation pursuant to it would be held in "restricted fee status." Given this backdrop, CACGEC's protestations that Congress did not use "**any** words," Br. at 35, signifying an intent to convey jursidiction over SNSA lands to the Nation ring hollow. The Supreme Court and this Court have repeatedly affirmed the "presum[ption] that Congress is aware of existing law when it passes legislation." *Mississippi v. AU Optronics Corp.*, 134 S. Ct. 736, 742 (2014) (internal quotation marks omitted); *see also Hall v. United States*, 132 S. Ct. 1882, 1889 (2012) (same); *In re Nw. Airlines Corp.*, 483 F.3d 160, 169 (2d Cir. 2007) ("We also assume that Congress passed each subsequent law with full knowledge of the existing legal landscape."). Here, Congress specified that SNSA lands would enjoy a status clearly understood to constitute Indian country. CACGEC

would have this Court ignore that plain statutory text. The District Court rejected CACGEC's invitation, and so should this Court.[7]

V. The SNSA Provisions by Which the Buffalo Creek Territory Was Placed in Restricted Fee Status Amply Demonstrate Federal Set-Aside and Superintendence.

"In the SNSA, Congress chose to create a process for restricted fee status that parallels the language of the [Indian Reorganization Act, 25 U.S.C. §§ 461-479 ("IRA")]'s trust provision and other trust-related statutes." *CACGEC II*, 2008 WL 2746566, at *44. The District Court detailed the marked similarities between these two land acquisition processes:

> [I]n drafting 25 U.S.C. § 1774f(c), Congress adhered closely to the language of the IRA's trust provision and its related regulations. The IRA and the SNSA permit unrestricted fee land owned by a tribe to be taken into, respectively, trust status and restricted fee status. 25 U.S.C. § 465; 25 C.F.R. § 151.4; 25 C.F.R. § 1774f(c). The Secretary has discretion, under both the IRA and the SNSA, to deny a tribe's request in this regard. The procedure the Secretary follows for trust acquisitions starts with a request from a tribe, 25 C.F.R. § 151.9, requires notification to the state and local

[7] For these reasons, CACGEC's reliance on *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009), is misplaced. CACGEC characterizes *Hawaii* as standing for the proposition that "transfer of a sovereign's control of its land is far too important to be inferred from vague, apologetic language," and that there instead "must be an explicitly stated intent" to convey jurisdiction. Br. at 40-41. But as the District Court held, "the SNSA does precisely what [CACGEC] contend[s] is required; it expresses an intent to transfer sovereignty to the [Nation] in language mirroring that of other statutes that have been found to effect such transfers." *CACGEC III*, 945 F. Supp. 2d at 401.

Nor does CACGEC find any support for its arguments in the Enclave Clause, art. 1, § 8, cl. 17. The creation of Indian country "does not even implicate the Enclave Clause." *Carcieri v. Kempthorne*, 497 F.3d 15, 40 (1st Cir. 2007), *rev'd on other grounds*, *Carcieri v. Salazar*, 555 U.S. 379 (2009).

> governments then having jurisdiction over the land, *Id.* §§ 151.10-151.11, and provides those governments 30 days to comment on the potential impacts, *Id.* This same procedure was incorporated in the SNSA. In sum, Congress appears to have taken particular care to ensure that land accorded restricted fee status be recognized, in the same manner as land acquired by the United States and held in trust status, as having been validly set apart for the SNI's use. When the SNI seeks restricted fee status, it signals its desire to give up the freedom of unfettered ownership in exchange for the tax exemptions and governmental protections the restriction provides.

Id. at *39 (footnote omitted). While CACGEC claims that these parallel provisions should lead to radically different jurisdictional results, this Court has instead emphasized that when Congress incorporates a statutory scheme with a well-established meaning into subsequent legislation, it "bespeaks an intention to import the established . . . interpretation . . . into the new statute." *United States v. Johnson*, 14 F.3d 766, 770 (2d Cir. 1994); *see also United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 25 (2d Cir. 1989). And the placement of the Territory into restricted fee status pursuant to the SNSA's processes indeed reflected the same defining features of Indian country—a federal set-aside and federal superintendence, *see Venetie*, 522 U.S. at 530-31—that CACGEC concedes characterize trust acquisitions.

A. Both Congress and the Secretary Took Action to Set Aside the Territory for the Nation's Use.

Under the set-aside requirement, Indian country cannot be created unilaterally by an Indian nation. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 (2005); *Kansas*, 249 F.3d at 1229. Instead, the "requirement . . .

reflects the fact that because Congress has plenary power over Indian affairs, some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country." *Venetie*, 522 U.S. at 531 n.6 (citation omitted). Here, legislative and executive branch action clearly predicated the placement of the Territory into restricted fee status.

In the SNSA, Congress appropriated funds for the Nation to acquire certain lands in restricted fee status, 25 U.S.C. § 1774f(c), and the Nation used a portion of those funds to acquire the Territory. *CACGEC II*, Doc. 27, at 25, 29. The courts have consistently held that lands "purchased out of funds appropriated by Congress . . . to provide lands for needy Indians" are "set apart for the use of the Indians as such, under the superintendence of the government." *McGowan*, 302 U.S. at 537, 539 (internal quotation marks omitted); *see also HRI, Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2000).

In addition, the Territory attained restricted fee status only after undergoing the Secretarial review process detailed above, *see* 25 U.S.C. § 1774f(c), and this explicit provision for Secretarial determination again amply satisfies the set-aside requirement, *see, e.g.*, *Roberts*, 185 F.3d at 1132 ("[T]rust land [under Section 5 of the IRA] is set apart for the use of Indians by the federal government because it can be obtained only by filing a request with the Secretary."). Accordingly, the

Territory was set aside for the Nation by both an affirmative act of Congress and direct Secretarial engagement. As the District Court well put it:

> In enacting the SNSA, Congress expressly determined that restricted fee status is generally appropriate for *all* land purchased with SNSA funds and located within the SNI's "aboriginal area in [New York] State . . ." Once a purchase is made, the Secretary is required to consider the impact of restricted fee status and has discretion to deny that status for any particular parcel. This tribe-specific legislation is an affirmative act by Congress that first defines geographic boundaries for land acquisition and then provides for the Secretary's considered evaluation of specific purchases made within those bounds. In short, the SNSA includes the precise elements for a valid federal set-aside [identified by the courts].

CACGEC II, 2008 WL 2746566, at *39 (first brackets in original).[8]

B. The Territory Is Under Federal Superintendence.

For nearly a century, the Supreme Court has recognized that an Indian nation's congressionally designated restricted fee lands are subject to Congress's

[8] CACGEC suggests that the Supreme Court held in *City of Sherrill* that the placement of land into trust is the exclusive means by which property can be set aside for an Indian nation. Br. at 34, 39-40. But while that decision confirmed that an Indian nation cannot acquire sovereignty over territory through unilateral action, 544 U.S. at 203, and identified the IRA trust process as a vehicle for federal involvement, *id*. at 220-21, it nowhere suggested that it is the only such vehicle. "[I]n enacting the SNSA, Congress created an alternative mechanism specific to the SNI." *CACGEC II*, 2008 WL 2746566, at *49.

The District Court also correctly rejected CACGEC's argument that the SNSA cannot have effected a set-aside because it did not identify specific parcels of land to be acquired by the Nation. "[T]hat assertion is not borne out by the other congressional acts on which Plaintiffs rely and Plaintiffs have cited no decisional authority in support of that proposition. In any event, Congress predetermined, in 1990, that restricted status is appropriate for *all* land meeting the requirements set forth in the SNSA unless the Secretary concludes otherwise." *Id.* at *41.

control. *See Sandoval*, 231 U.S. at 46-49 (federal liquor laws applicable to the Pueblos); *Heckman v. United States*, 224 U.S. 413, 438 (1912). Indeed, as the District Court catalogued, the federal government superintends all restricted fee lands under a host of specific statutory programs relating to matters "including, as applicable, rights-of-way, 25 U.S.C. § 323; mining and storage leases, 25 U.S.C. §§ 396a and 396g; timber contracts, 25 U.S.C. § 407d; crimes, civil actions and related encumbrances on real and personal property, 25 U.S.C. §§ 1321-1322; energy resource development, 25 U.S.C. § 3501(12); agricultural resource management, 25 U.S.C. § 3703; and gaming regulation, 25 U.S.C. § 2703(4)." *CACGEC II*, 2008 WL 2746566, at *48. Thus, Congress and the Secretary fully understood that, in according restricted fee status to the Territory, the United States was displacing state and local regulation, and that the United States and the Nation would exercise primary jurisdiction over it.

VI. The SNSA and IGRA Provisions Identified by CACGEC Confirm, Rather Than Defeat, the Indian Country Status of SNSA Lands.

CACGEC identifies a number of statutory provisions that it claims preclude Indian country status for SNSA lands. CACGEC's arguments demonstrate a fundamental misunderstanding of the statutes and of the federal Indian law precepts underpinning them.

A. Real Property Taxation

As discussed above, the SNSA allows State and local governments a 30-day period to comment on the impact of the removal of Nation lands from the "real property tax rolls of State political subdivisions." 25 U.S.C. § 1774f(c). CACGEC argues that, by negative implication, this language precludes a conclusion that the SNSA conveys incidents of governmental power other than property taxation to the Nation. A glaring "problem with this reasoning is that trust status repeatedly has been held to divest states and localities of primary jurisdiction on substantially similar language." *CACGEC II*, 2008 WL 2746566, at *43.

The IRA provides that trust land "shall be exempt from State and local taxation." 25 U.S.C. § 465. The federal courts have consistently rejected arguments that this language impliedly preserves all other forms of state and local jurisdiction. *Podhradsky*, 606 F.3d at 1011; *Chase v. McMasters*, 573 F.2d 1011, 1018 (8th Cir. 1978); *Santa Rosa Band of Indians*, 532 F.2d at 666. Congress is presumed to have crafted the SNSA with this understanding of the law firmly in mind, *see Johnson*, 14 F.3d at 770, and had no reason to conclude that the similar SNSA and IRA language should produce the radically different results urged by CACGEC.

B. Reservation Process

CACGEC further argues that because Section 8(c) contains a separate process for adding SNSA lands to the Nation's reservations, those lands cannot become Indian country unless they go through that process. Br. at 34-35 n.3. CACGEC provides no support for this proposition, which again runs headlong into the fact that the IRA likewise contains a separate provision (Section 7) for according reservation status to Section 5 trust lands—which concededly are already Indian country. 25 U.S.C. § 467.

CACGEC does not appear to understand that formal reservation status carries with it non-jurisdictional advantages over other forms of Indian country. The reservation processes provided for by Section 8(c) of the SNSA and Section 7 of the IRA accordingly are far from superfluous, even absent jurisdictional ramifications.[9] Indeed, the D.C. Circuit has flatly rejected an argument grounded in this purported redundancy. *See Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1293-94 (D.C. Cir. 2000).

[9] For example, a host of federal programs and services are available only on formal "reservation" lands. *See, e.g.*, 25 C.F.R. §§ 20.100, 20.300, 20.303, 20.324, 20.400, and 20.500 (eligibility for Direct Assistance, General Assistance, Burial Assistance, Services to Children, Elderly, and Families, and Child Assistance tied to residence on or near reservation); 25 U.S.C. § 1613a(b)(3)(C)(i) (eligibility for Indian Health Scholarships); 25 U.S.C. § 2007(f) (eligibility for monetary allotments to BIA-funded schools).

C. Preexisting Lands

CACGEC asserts that IGRA's definition of Indian lands is limited to lands over which the Tribe exercised *preexisting* governmental power. Br. at 48. This argument is meritless. First, Indian lands as defined by IGRA include "*any* lands title to which is" held in trust or restricted fee. 25 U.S.C. § 2703(4)(A) (emphasis added). There is no plausible way to read the provision to exclude a substantial category of trust and fee lands, when the language used is patently inclusive.

Second, CACGEC's interpretation renders entirely superfluous IGRA's Section 20, which presumptively bars gaming on trust lands acquired after the Act's effective date. *See* 25 U.S.C. § 2719(a). That provision is rendered meaningless (and its exceptions illusory) if, as CACGEC contends, gaming on lands acquired after the Act's effective date is per se precluded.

Third, this argument runs flatly counter to the seminal Supreme Court decision in *Donnelly v. United States*, which held unequivocally that "the term [Indian country] cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished." 228 U.S. 243, 269 (1913).

Fourth, and finally, CACGEC's attempt to support its argument by reference to the IRA is to no avail. *See* Br. at 47. Congress believed that "the most common application" of Section 5 would be "giving land to *landless* Indians." *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 798 (8th Cir. 2005) (citing the

House and Senate committee reports) (emphasis added); *see also* H. R. Rep. No. 73-1804, at 7 (1934) (same).

Accordingly, the District Court properly rejected the pre-existing lands argument, which finds no support in law or history. *CACGEC III*, 945 F. Supp. 2d at 404-05.

VII. CACGEC's Speculation About Congressional Intent Cannot Overcome Congress's Clear Textual Expression of That Intent.

CACGEC's most strident arguments reduce to the notion that, regardless of the words it chose, Congress simply could not have intended to convey jurisdiction to the Nation over SNSA lands. *See* Br. at 33-35. But "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). CACGEC's arguments invite this Court to speculate as to what Congress "intended," Br. at 34—with that determination made according to CACGEC's own policy preferences—rather than to rely on the words Congress used. This is not an accepted approach to statutory construction.

Scraping the bottom of the barrel in search of textual support for its arguments, CACGEC notes that SNSA's Section 8(c) is found under a "Miscellaneous" heading and suggests that it accordingly cannot have the significant effect of creating Indian country. But statutory headings play only a "limited role" in "textual interpretation." *United States v. Baldwin*, 186 F.3d 99,

101 (2d Cir. 1999). And in this instance there is no warrant for attributing significance to the "Miscellaneous" heading. The entirety of the IRA, including Section 5's land-into-trust authority, is housed within the "Miscellaneous" section of Title 25 of the U.S. Code, and yet CACGEC has fully acknowledged that Section 5 has the very effect of creating Indian country.

Even if a basis existed for examining the SNSA's legislative history, *but see Virgilio v. City of N.Y.*, 407 F.3d 105, 115 n.10 (2d Cir. 2005) (where "the language of the statute is clear and unambiguous . . . we see no need to examine the statute's legislative history"), CACGEC's discussion of that history misses the mark. Nothing in the legislative record supports CACGEC's speculation that Congress did not anticipate that the Nation would exercise governmental power over its restricted fee lands—to the contrary, Congress was counting on it. Congressman Amo Houghton, a sponsor and the most dedicated proponent of the Act, responded to the argument that tax-exempt Seneca Nation lands would burden local governments by explaining that "the Seneca Nation provides, as I am told, government services, police, and water and libraries, so any tax base [loss] should be equaled by a subsequent reduction in service costs." H.R. Hrg. No. 101-63, *CACGEC III*, Doc. 58-33, at 163. *See also* S. Hrg. No. 101-1186, at 44 (same). This clear recognition that the Nation would exercise governmental authority over

the SNSA lands created none of the "storm of controversy . . . debated contentiously," that CACGEC supposes should have occurred. Br. at 37.[10]

Nor is it true, as CACGEC contends, that the Nation's "leadership was on record as opposing Indian gambling" when the SNSA was enacted. Br. at 38. The Nation opposed IGRA on the grounds that it provided too great a role for states in Indian gaming, not because it opposed gaming itself. To the contrary, Nation President Dennis Lay explained to Congress during the SNSA hearings that "Bingo is a primary although not exclusive source of Nation revenues." Senate Report at 14-15. CACGEC's only authority for its statement is a newspaper article post-dating the SNSA by three years and reporting that the Nation's elected leaders *supported* expanding the Nation's gaming operations, but that the Nation's voters had rejected the details of their proposal to do so. Br. at 38 n.5. CACGEC's conspiratorial theories are as tiresome as they are unfounded.

Finally, CACGEC appeals to rank prejudice in arguing that adherence to the law "could open the land to unregulated gasoline stations, cigarette manufacturing facilities, payday loans and other noxious consequences." Br. at 34. This argument betrays an unfortunate misunderstanding of both the law and history.

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[10] While CACGEC posits that Congress did not intend that the Nation would enjoy primary authority for "local zoning, environmental impact, and public health and safety" laws on the SNSA lands, Br. at 34, tribal restricted fee lands are, as discussed above, *per se* subject to such tribal regulation. *See*, *e.g.*, *supra* at 19-20. Congress is presumed to have acted on this accepted law, *supra* at 21-22, and Congressman Houghton's statements confirm the wisdom of that presumption.

With respect to the law, as discussed above, "primary jurisdiction over land that is Indian country *rests with the Federal Government and the Indian tribe* inhabiting it." *Venetie*, 522 U.S. at 527 n.1 (emphasis added). The notion that Indian nations have unfettered discretion to engage in whatever activities they choose on their lands is simply fanciful. Substantial federal (as well as Nation) regulation exists in the areas identified by CACGEC. And, of course, the Nation's gaming activities at issue here, while disliked by CACGEC, are firmly in step with federal Indian policy. *See* IGRA, 25 U.S.C. § 2701(4).

As for history, the Seneca Nation has endured more than two centuries' worth of the loss of its lands and unrelenting assaults on its governmental, economic and cultural structure. The Seneca people have suffered severe deprivations with the greatest of dignity, even in the face of withering discrimination. In the SNSA, Congress sought to provide the Nation with some small measure of redress for the terrible wrongs inflicted on it, often at the hands of the federal government. While CACGEC is entitled to its opinions, Congress has taken a broader view (as have the State and local governments), and it is the law as enacted by Congress that counts.

ISSUE TWO: THE BUFFALO CREEK TERRITORY IS GAMING-ELIGIBLE AS THE SECTION 20 PROHIBITION DOES NOT APPLY TO RESTRICTED FEE LANDS.

I. The NIGC Ordinance Approval Is the Relevant Administrative Action Under Review.

To lawfully conduct Class III (casino-style) gaming on the Territory under IGRA, the Nation must have in place a gaming compact with the State—which it does, *see CACGEC III*, Doc. 58-14—and a duly enacted ordinance approved by the NIGC. 25 U.S.C. § 2710(d)(1). CACGEC argues that, even if the Territory constitutes Indian lands, the NIGC should not have approved the Nation's ordinance because it violates IGRA's Section 20, 25 U.S.C. § 2719. *See* Complaint, *CACGEC III*, Doc. 01, at 35; Br. at 26. But perhaps because, as shown below, that approval was plainly lawful, CACGEC focuses on the Department, alleging (often in highly inflammatory terms) that its regulations interpreting Section 20 are procedurally and substantively defective. Br. at 55. While the United States convincingly demonstrates that CACGEC's attacks are misguided, *see* U.S. Br. at 59-64, the central point is that those attacks are irrelevant to the proper disposition of this matter. As the District Court correctly explained:

> The final agency action here . . . is the NIGC's approval of the SNI's gaming ordinance. Thus, it is the validity of the NIGC's interpretation and application of section 20 that is determinative of Plaintiffs' challenge to [Nation] gaming on the Buffalo Parcel.

CACGEC III, 945 F. Supp. 2d at 407.[11]

II. The NIGC's Interpretation of IGRA in Approving the Gaming Ordinance Is Reviewed Under *Chevron*.

Section 20 prohibits gaming on "lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988 [the effective date of the statute]" unless one of a number of exceptions is satisfied. 25 U.S.C. § 2719. In approving the Nation's ordinance, the NIGC interpreted this prohibition to apply—in accordance with its plain terms—only to lands acquired by the United States in trust for an Indian nation, and not to lands held by a nation in restricted fee status. CACGEC challenges this interpretation as "'arbitrary, capricious, [and] manifestly contrary to the statute.'" Br. at 67.

Judicial review of an agency's construction of a statute that it administers is governed by the two-step analysis set forth in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), as CACGEC acknowledges. Br. at 31. In addition to

[11] The Department's Section 20 interpretation was among the many factors the NIGC considered in rendering its own construction of that provision. *See* 2009 Ordinance Approval, *CACGEC III*, Doc. 24, at 11-12, 16. So long as the NIGC conducted "an independent inquiry into the requirements of its own statute," *N.Y. Shipping Ass'n v. Fed. Maritime Comm'n*, 854 F.2d 1338, 1364 (D.C. Cir. 1988), the agency was free to consider the Department's reasoning. That the NIGC ultimately agreed with a sister agency's reasoning in no way diminishes the force of its own interpretation. *See, e.g., Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991). To the contrary, "[i]n exercising delegated authority to resolve statutory ambiguities, agencies can and should consider policy input from a wide variety of sources." *PDK Labs. Inc. v. DEA*, 438 F.3d 1184, 1192 (D.C. Cir. 2006).

explicit rule-making powers, *see* 25 U.S.C. § 2706(b)(10), Congress gave the NIGC authority to administer IGRA through, inter alia, the approval or rejection of tribal gaming ordinances on a case-by-case adjudicatory basis. *Id*. § 2710(b)(2). The NIGC's ordinance approval here accordingly falls within *Chevron*'s purview. *Sac and Fox Nation v. Norton*, 240 F.3d 1250, 1265 (10th Cir. 2001); *Miami Tribe of Okla. v. United States*, 5 F. Supp. 2d 1213, 1216 (D. Kan. 1998) (stating, in context of NIGC review of management contracts, that *Chevron* applies "whether the agency interpretation is performed through rulemaking or, as here, informal adjudication") (internal quotation marks omitted); 2009 Ordinance Approval, *CACGEC III*, Doc. 24 ("Approval"), at 11.

Under *Chevron*, a court first determines "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If it has, "that is the end of the matter" as both court and agency are bound by Congress's plainly expressed intent. *Id*. But "if the statute is silent or ambiguous with respect to the specific issue," courts must defer to a reasonable agency interpretation. *Id*. at 843-44. The NIGC's construction of Section 20 readily satisfies both steps of *Chevron*.

III. Under *Chevron* Step One, the NIGC's Interpretation Reflects the Unambiguous Intent of Congress.

The "precise question at issue" is whether Congress intended the Section 20 prohibition to encompass lands held in restricted fee. Under Step One, the answer to this question "begin[s] with the statutory text; if its language is unambiguous, no

further inquiry is necessary." *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 279 (2d Cir. 2012). In making that determination, courts may employ "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9; *see also Li v. Renaud*, 654 F.3d 376, 382-83 (2d Cir. 2011) (same). Here, the plain meaning of the statutory text, both on its face and when considered in light of traditional tools of construction, demonstrates that Congress unambiguously intended the Section 20 prohibition to apply only to trust lands.

A. The NIGC Interpretation Accords with the Plain Statutory Text.

The language at issue in this case is simple, direct and clear. Section 20 states in pertinent part: "[G]aming regulated by this chapter shall not be conducted on lands *acquired by the Secretary in trust* for the benefit of an Indian tribe after October 17, 1988." 25 U.S.C. § 2719(a) (emphasis added). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank*, 503 U.S. at 253-54; *see also Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1172 (2013) (same); *In re Barnet*, 737 F.3d 238, 246-47 (2d Cir. 2013) (same). Accordingly, the NIGC was correct in concluding that "[w]e must presume that by specifying lands acquired 'in trust,' [Congress] meant lands acquired 'in trust' and nothing more." Approval at 16 (footnote omitted).

B. Cardinal Principles of Statutory Construction Confirm the Meaning of the Plain Statutory Text.

"It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Vincent v. The Money Store*, 736 F.3d 88, 109 (2d Cir. 2013); *see also United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (statutory text will be applied according to its literal meaning except "in the *rare cases* in which the literal application of a statute will produce a result *demonstrably at odds* with the intentions of its drafters" (emphasis added) (internal quotation marks omitted)). And the burden of persuading courts that the plain text should be disregarded as at odds with Congress's intent is "exceptionally heavy." *Union Bank v. Wolas*, 502 U.S. 151, 155-56 (1991). CACGEC does not come close to carrying that burden here.

First, "in trust" is a term of art with a well-known meaning in federal Indian law. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 480 (2003) (Ginsburg, J., concurring). While, as discussed above, trust and restricted fee lands stand on the same jurisdictional footing, they are understood as distinct forms of landholding. As the NIGC noted, Approval at 17, longstanding Department regulations in place at the time of IGRA's enactment specifically defined and distinguished between the two on the grounds that when Indian land is held "in trust," the United States holds the title for the benefit of the Indian nation.

By contrast, when land is held restricted fee, the title is held by the Indian nation, but subject to a restriction against alienation. *See* 25 C.F.R. §§ 151.2(d) and (e); *see also* 45 Fed. Reg. 62,034, 62,036 (Sept. 18, 1980) (noting adoption of the regulations). "'[I]t is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken.'" *Air Wis. Airlines v. Hoeper*, 134 S. Ct. 852, 861-62 (2014). As the NIGC correctly reasoned, this counsels against a conclusion that Congress carelessly used the term "in trust" while contemplating a broader scope for the Section 20 prohibition. *See* Approval at 16-17. Congress, moreover, is presumed to have been fully aware of the regulatory distinction between "in trust" and "restricted fee" when it enacted IGRA. *See AU Optronics Corp.*, 134 S. Ct. at 742; *In re Nw. Airlines Corp.*, 483 F.3d at 169. The NIGC thus correctly adhered to that distinction in interpreting Section 20 according to its literal terms.

Second, there exists far more than a presumption that the IGRA Congress was aware of the distinction between trust and restricted fee land. In interpreting statutory language, courts properly consider "nearby provision[s] of the statute." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). At a number of critical junctures, the IGRA Congress explicitly referred to trust *and* to restricted fee lands when it intended to include both in the operation of a provision. Perhaps most tellingly,

IGRA's definition of "Indian lands" on which tribes can game expressly references both. 25 U.S.C. § 2703(4)(B). *See also, e.g.*, *id.* § 2719(a)(2)(A)(ii). "'[W]here 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.'" *Russello v. United States*, 464 U.S. 16, 23 (1983). Accordingly, the NIGC correctly concluded that "the use of the term *restricted* in some provisions of IGRA and not in others evinces Congressional intent to exclude it from the [Section 20] prohibition." Approval at 18. *Accord Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (refusing to add term to one section of a statute where "two of the Act's other [sections] specifically reference" the term and thus "it is clear that Congress knew how to specify [the term] when it wanted to").

Third, the Supreme Court and this Court have consistently held that "exception[s] to a general statement of policy [are] sensibly read narrowly in order to preserve the primary operation of the policy." *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995) (internal quotation marks omitted); *see also New York v. Beretta*, 524 F.3d 384, 403 (2d Cir. 2008) (same). Congress's primary purpose in enacting IGRA was to authorize gaming on Indian lands "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The NIGC correctly concluded that "as

section [20] is an exception to IGRA's stated policy, it must be interpreted narrowly." Approval at 18 (citation omitted).

In sum, the plain text and accepted principles of construction emphatically confirm the NIGC's conclusion that Congress intended the Section 20 prohibition to encompass lands acquired by the Secretary in trust for Indian nations and nothing more. If CACGEC prefers that Section 20 extend to restricted fee lands, its proper recourse is with Congress, rather than to rail against adherence to the law as written as a "sham." Br. at 68.

C. CACGEC's Arguments Do Not Remotely Warrant Disregarding the Plain Meaning of Section 20.

CACGEC posits that Congress may not have drafted the Section 20 prohibition to purposefully exclude restricted fee land because a statutory mechanism for creating such land "did not exist at the time of the statute's enactment." Br. at 69-70. Congress was clearly well aware of restricted fee lands, as detailed above. And even if it had no reason to think that it might ordain the establishment of additional such lands in the future (a possibility that the statutory language nowhere rules out), CACGEC's argument is simply that circumstances have arisen that Congress did not foresee. In that case, CACGEC's recourse is again with Congress, not the courts. *See Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 459 (2007) (circumstances unforeseen when statute enacted should be addressed legislatively, "not by the Judiciary forecasting Congress' likely

disposition"); *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1202 (D.C. Cir. 1984) (holding that clear statutory language is "the final expression of the meaning intended" even "[w]hen confronted with a problem unforeseeable by the enacting Congress"). "Only Congress can amend the statute to respond to . . . unforeseen events." *Terrell v. United States*, 564 F.3d 442, 450 (6th Cir. 2009).

Furthermore, that no general statutory mechanism existed in 1988 to create restricted fee land emphatically *supports* the NIGC's determination. As the NIGC observed, "there was no need for [Congress] to include [restricted fee] in the section [20] prohibition" because the only way an Indian nation could acquire restricted fee lands was pursuant to *specific* legislation. Approval at 20. And in any subsequent legislation, Congress could prohibit gaming as it saw fit. *Id*. Hence, any congressional concerns about a proliferation of gaming on after-acquired trust lands simply did not extend to restricted fee lands, where Congress would have the opportunity to bar gaming if it so chose.

Congress, of course, soon enacted legislation authorizing the acquisition and designation of restricted fee lands for the Nation, but did not prohibit gaming on those lands. *See id.* at 12-13; *CACGEC II*, 2008 WL 2746566, at *39 n.49. By contrast, in the years before and after the SNSA's passage, Congress amply demonstrated its ability to prohibit gaming in legislation specific to other Indian nations. *See, e.g.*, Rhode Island Indian Claims Settlement, 25 U.S.C. § 1708(b) (as

amended 1996) ("For purposes of [IGRA], settlement lands shall not be treated as Indian lands."); Alabama Coushatta Restoration Act, 25 U.S.C. § 737(a) (1987) ("All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe."); Ysleta Del Sur Pueblo Restoration Act, 25 U.S.C. § 1300g-6(a) (1987) (same). These statutes demonstrate that Congress could readily prohibit gaming on Indian lands in nation-specific legislation such as the SNSA and did so expressly when that was its intention.[12]

In fact, had Congress intended to enact a sweeping ban in IGRA, it had a statutorily defined term readily available to accomplish that end—"Indian lands." 25 U.S.C. § 2703(4). As the NIGC observed, that term expressly includes trust and restricted fee lands and in fact encompasses *all* lands potentially eligible for gaming under IGRA. *See* Approval at 6; 25 U.S.C. § 2703(4). Congress used the term "Indian lands" pervasively (34 times) throughout the statute when it intended to capture all such lands.[13] Had Congress meant for the Section 20 prohibition to

[12] CACGEC asserts that two of the SNSA's twenty-nine sponsors "have publicly stated that Congress did not intend SNSA to enable the SNI [to] acquire land for casinos." Br. at 38 n.4. However, those statements were made 16 years after the passage of the Act and accordingly merit no weight. *See Graham Cnty. Soil and Water Conservation Dist. v. United States*, 559 U.S. 280, 297-98 (2010) (letter drafted by "the primary sponsors of" legislation 13 years after the provisions' enactment did "not qualify as legislative 'history'" and was "of scant or no [interpretive] value").

[13] *See, e.g.*, 25 U.S.C. § 2710 (23 times).

likewise sweep in all potentially gaming-eligible lands, it could simply have followed the consistent pattern of the statute and drafted the section as follows: "Gaming regulated by this chapter shall not be conducted on **Indian** lands acquired ~~**by the Secretary in trust for the benefit of an Indian tribe**~~ after October 17, 1988." A rationale grounded in the concept of a comprehensive ban falls far short of satisfying the extraordinarily high bar for departing from the plain language of the statute.

In the ordinance approval at issue in *CACGEC II*, the NIGC proffered a different policy rationale for disregarding Section 20's plain text. "If section [20] only applied to trust lands, Tribes could avoid the prohibition against [after-acquired gaming] *by taking land into restricted fee* rather than having the United States take it into trust." *CACGEC II*, 2008 WL 2746566, at *52 (quoting 2007 approval, *CACGEC II*, Doc. 27, at 12) (emphasis added). But in the ordinance approval underpinning *CACGEC III*, the NIGC (which, as discussed in greater detail below, was "free to change course after reweighing the competing statutory policies," *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 80 (2d Cir. 2006) (internal quotation marks omitted)), appropriately concluded that this loophole concern was flatly inconsistent with the nature and status of restricted fee Indian lands. As discussed above, Indian nations cannot unilaterally create Indian country simply by purchasing lands and declaring them to be restricted. *Supra* at 23-25;

see also U.S. Br. at 53-54. Having considered the implications of that fact, the NIGC appropriately concluded that "there will be no sudden dramatic increase in gaming eligible land if section [20] applies only to trust land and Congress's intent in drafting section [20] may be implemented without taking an overly-restrictive view of the provision." Approval at 15-16.

In sum, both the plain language of the statute and traditional tools of statutory construction confirm that Congress had a clear "intention on the precise question at issue." *Chevron*, 467 U.S. at 843 n.9. Under *Chevron*'s framework, "that is the end of the matter." *Id*. at 842. This Court should accordingly affirm the District Court and uphold the NIGC's interpretation of Section 20 under *Chevron* Step One.

IV. Under *Chevron* Step Two, the NIGC Interpretation Is Reasonable and Therefore Entitled to Deference.

If the Court nevertheless deems the statute to be ambiguous, *Chevron* requires it to uphold the NIGC's interpretation provided that it is reasonable. *See Chevron*, 467 U.S. at 843-44; *Mei Juan Zheng v. Holder*, 672 F.3d 178, 183 (2d Cir. 2012). This is so even if this Court disagrees with the NIGC's interpretation. *See United Airlines, Inc. v. Brien*, 588 F.3d 158, 172 (2d Cir. 2009).

The factors discussed above establish that the NIGC's interpretation of the Section 20 prohibition is, at the very least, a reasonable construction of the statute. The NIGC's interpretation adheres to the plain statutory text and to widely

accepted canons of textual interpretation that confirm the clear meaning of that text. And the policy reasons that CACGEC has proffered to override that plain meaning fall far short of establishing that adherence to the statutory text will produce absurd results.

Additionally, both the Supreme Court and this Court have held that statutes enacted for the benefit of Indians are "to be construed liberally in favor of the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Connecticut v. U.S. Dep't of Interior*, 228 F.3d 82, 92 (2d Cir. 2000) (same). The NIGC properly concluded that this Indian canon requires the resolution of any ambiguity about Section 20 in favor of excluding restricted fee lands from its prohibitory scope. Approval at 19.

V. The NIGC's Change in Position Does Not Lessen the Deference Owed its New Interpretation.

If Section 20 is ambiguous, *Chevron* deference applies to the NIGC's interpretation even though it differs from the agency's previous interpretation, so long as the NIGC "forthrightly acknowledged that its recent actions have broken new ground"; "provided reasoned explanation for its action"; and "show[ed] that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 517 (2009); *see also id.* at 515 (agency need not "demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one."); *Leavitt*, 470 F.3d at 80 ("an agency is free to change

course after reweighing the competing statutory policies" (internal quotation marks omitted)).

In its 22-page ordinance approval, the NIGC amply satisfied the *Fox* criteria:

- The NIGC explicitly acknowledged its change of position. *See* Approval at 2 ("[T]he NIGC's analyses regarding Indian lands generally and lands held in restricted status in particular has undergone significant review, rethinking, and revisions. . . . [T]he agency has concluded that its former understanding of restricted lands in the context of IGRA requires modification.").

- The NIGC forthrightly explained the shortcomings of its prior interpretation. *See*, *e.g.*, *id*. at 13-16 (stating that the prior interpretation erroneously assumed that off-reservation land purchased in fee would be automatically eligible for gaming, and failed to recognize that the United States must take affirmative action to set aside land for an Indian nation before it can qualify as restricted fee land).

- The NIGC provided numerous additional reasons as to why it had determined its revised opinion to be "superior," *id.* at 18, including that it "adheres to the explicit language of the statute," *id*. at 16; "has a very limited effect," *id*. at 13; and is consistent with Congress's use of "in trust" as a term of art and separate use of the terms "trust" and "restricted status" in IGRA, *id*. at 16-17.

In sum, the NIGC clearly satisfied the "latitudinarian standards of *Fox*," *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183, 188 (D.C. Cir. 2013), by explicitly acknowledging and thoroughly explaining its change of position.

VI. Neither the NIGC nor the District Court Was Precluded by *CACGEC II* from Interpreting Section 20 According to its Plain Language.

In *CACGEC II*, the District Court upheld the NIGC's prior interpretation of Section 20 as encompassing both trust and restricted fee land. *See* 2008 WL

2746566, at *54. CACGEC asserts that in *CACGEC III* the court erred in "departing from its prior holding without the slightest showing that its prior analysis in *CACGEC II* was erroneous or misguided in any way." Br. at 57. This assertion is patently meritless. The District Court discussed at considerable length its reasons for upholding the ordinance approval at issue in *CACGEC III*. 945 F. Supp. 2d at 407-10. And CACGEC's charge is ultimately irrelevant, as this Court reviews questions of statutory interpretation de novo. *See Belleview Hosp. Ctr. v. Leavitt*, 443 F.3d 163, 173-74 (2d Cir. 2006).

CACGEC argues that, under the doctrine of *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), the NIGC likewise was precluded by *CACGEC II* from arriving at its revised interpretation of the Section 20 prohibition. Br. at 58. CACGEC's argument fails in the first instance because *Brand X* only applies to "judicial interpretations contained in *precedents*," *Brand X*, 545 U.S. at 982 (emphasis added), and the Supreme Court has made clear that "[a] decision of a federal district court judge is not binding precedent . . . *even upon the same judge in a different case*," *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) (emphasis added) (internal quotation marks omitted). Both the *Brand X* majority and Justice Scalia in dissent recognized that it is "not logically necessary" for a higher court to consider a lower court's prior application of the *Chevron* framework, *Brand X*, 545

U.S. at 985 (Justice Thomas, writing for the Court), because "[w]hatever the stare decisis effect of [the lower court decision], it certainly does not govern" the decision of a higher court, *id.* at 1019 (Scalia, J., dissenting). CACGEC's reliance on *Brand X* is accordingly misplaced.

And even if *Brand X* were applicable, "[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 the statute and thus leaves no room for agency discretion." *Id.* at 984; *see also id*. at 982 (prior interpretation must be "the *only permissible* reading of the statute"). *CACGEC II* did not so hold. Instead, the Court explained that "the ordinary and common meaning of the terms employed in section 20" might support an interpretation different from the one it upheld, 2008 WL 2746566, at *53, and expressly found the NIGC's conclusion only to be "*a* permissible construction of the statute," *id*. at *54 (emphasis added). Such a finding plainly does not foreclose a subsequent contrary agency interpretation. *See Estate of Landers v. Leavitt*, 545 F.3d 98, 112 (2d Cir. 2008) (because the "statute does not unambiguously require the construction we have adopted," a subsequent different agency construction "would be eligible for *Chevron* deference notwithstanding our holding today") (citing *Brand X*, 545 U.S. at 982-86); *Mirzoyan v. Gonzales*, 457 F.3d 217, 223 n.5 (2d Cir. 2006) (same).

CACGEC argues that *CACGEC II* did in fact satisfy the *Brand X* standard by holding that the NIGC's current interpretation is "'clearly at odds with section 20's purpose.'" Br. at 56-57 (quoting *CACGEC II*, 2008 WL 2746566, at *53). But what the District Court found in *CACGEC II* to be "clearly at odds with section 20's purpose" was not the NIGC's present interpretation, which obviously was not before it, but the concern identified by the NIGC in *CACGEC II* that under a plain text reading of Section 20, "newly acquired Indian land *automatically would be gaming-eligible*." *CACGEC II*, 2008 WL 2746566, at *53 (emphasis added). As discussed above, the NIGC has now, in a reasoned and entirely permissible manner, reconsidered its view and explained that such a result does not follow from adhering to Section 20's text. The District Court has agreed, *CACGEC III*, 945 F.Supp.2d at 409 n.16 ("restricted fee status does not attach automatically to a tribe's fee purchases outside of Indian country"), and its assessment of the reasoning underpinning the NIGC's revised position has led it to conclude that the revised position "comports with Congress's clear intent," *id.* at 393. Nothing in *CACGEC II* precluded either the NIGC or the District Court from revisiting its interpretation of the Section 20 prohibition, or from conforming that interpretation to the law surrounding restricted fee lands and to the statutory text.

ISSUE THREE: THE BUFFALO CREEK TERRITORY IS GAMING-ELIGIBLE BECAUSE THE SNSA SETTLED A LAND CLAIM.

Even if the Section 20 prohibition applies to restricted fee lands, the Territory is nevertheless gaming-eligible because it falls into the exception to that prohibition for lands acquired as part of "a settlement of a land claim." 25 U.S.C. § 2719(b)(1)(B)(i).[14] *See* Approval at 20-21. In so concluding, the NIGC deferred to the Department's determination on this issue, as set forth in a January 18, 2009 Letter of the Solicitor, *CACGEC III*, Doc. 24 ("Solicitor Letter"), at 194-97. This was appropriate, as the Department is the agency charged with implementing the SNSA. *See* Approval at 21.

In *CACGEC II*, the District Court found that the two agencies' earlier conclusions that the SNSA settled a land claim lacked the power to persuade because they "failed to provide any statutory interpretation or explanation in support of th[ose] conclusions." 2008 WL 2746566, at *62. The Court rejected the Non-Intercourse Act as a potential basis for liability of the United States to the Nation—the only basis argued to it by the United States—because "the United States took SNI leasing out of the Nonintercourse Act in 1875 and never

[14] This and the other Section 20 exceptions found at Section 2719(b)(1)(B) apply only to "lands . . . taken into trust." This further confirms that Congress intended for the prohibition itself to apply only to trust lands. If, however, this Court were to determine that the term "trust" in the prohibition applies to restricted fee as well as to trust lands, it presumably will interpret the term "trust" in the exceptions in the same way. *See AIG v. Bank of Am. Corp.*, 712 F.3d 775, 783 (2d Cir. 2013) ("parallel statutory provisions should be read *in pari materia*").

reassumed any obligations in that regard." *Id*. at *61. Accordingly, the Court concluded, there were no land claims for the United States to settle.

In conducting its subsequent analysis, the Department looked to the SNSA text and legislative history, as the District Court had instructed it to do, and to the effect of its recent regulations interpreting the settlement exception. It concluded, and the NIGC concurred, that in enacting the SNSA, Congress considered itself to be resolving potentially significant liability of the United States that derived not from the Non-Intercourse Act, but from the United States' affirmative imposition of the lease transactions on the Nation. *See* Solicitor Letter.

The Department observed that the SNSA Congress expressly stated that a principal purpose of the statute was to extinguish potential liability of the United States. Solicitor Letter at 1 (citing 25 U.S.C. § 1774(b)(8)). Congress viewed this "potential liability" not merely in moral or gratuitous terms, but rather as a claim for breach of the United States' duties stemming from its imposition of the grossly one-sided leases on the Nation. Solicitor Letter at 1-2 and n.2 (internal quotation marks omitted). Indeed, Congress appropriated 35 million dollars as part of its effort to satisfy the Seneca claims. *See* 25 U.S.C. § 1774d(b).

The text of the SNSA amply supports these conclusions. Section 1774b(b) expressly provides that the Nation "shall . . . relinquish[] all *claims against the United States*" (emphasis added). Section 1774b(c) provides that the Nation's

"relinquishment of *claims against the United States* shall be effective upon" the payment of monies as provided for by Section 1774d (emphasis added).

The legislative history of the SNSA canvassed by the Department further confirms that Congress understood the Act to be resolving potentially significant liability of the United States. Solicitor Letter at 2 n.2. The Senate and House reports recount the history of the Salamanca leases discussed above, including the invalidation of the leases by the state courts for want of federal approval, and their subsequent ratification by Congress over the strenuous protests of the Nation:

> In 1875, *over the formal objection of the president, councilors, and people of the Seneca Nation*, the Congress of the United States enacted legislation withdrawing from the Seneca Nation the protective umbrella of Federal law; ratifying leases which had been found by the courts of New York to be void and of no effect.

Senate Report at 7 (emphasis added); *see also id.* at 10-11 (reprinting the Nation's Protest of 1875, declaring that "this bill proposes to . . . force upon this Nation these void, forbidden, and worthless leases, and compel them to carry them into effect, and to that extent deprive said Nation of their lands, in violation of treaty stipulations"); House Report at 4-5 (same). These reports make clear that there is simply no merit to the sterilized view of Seneca history proffered by CACGEC below, in which the Nation voluntarily agreed to lease the Salamanca lands at grossly inadequate rates for more than a century, without any involvement by the United States in this deprivation of Seneca land rights. Congress has expressly

determined to the contrary, and there is no warrant for upsetting its conclusions, solidly grounded as they are in the history of nineteenth-century federal-Seneca relations.

Accordingly, the Department had ample basis to conclude that the SNSA Congress understood itself to be settling a claim against the United States premised on legal obligations independent of the Non-Intercourse Act—namely, the United States' trust obligations to Indian nations, and its obligation not to take land without just compensation. *See, e.g.*, *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2328 (2011) (noting that the federal government has "a fiduciary obligation that is owed to *all* Indian tribes" (internal quotation marks omitted)). Indeed, in *Banner II*, the Federal Circuit reached precisely this conclusion:

> Congress enacted the Act of 1990 because it recognized that the United States had breached its fiduciary obligation arising from the unique trust relationship with Native American tribes. . . . *Acting as a fiduciary, the United States authorized monetary compensation to the SNI, not for gratuitous reasons, but to correct the breach of its trust responsibility when it unilaterally imposed the 99-year leases on SNI lands by the Act of 1890*.

238 F.3d. at 1352 (citations and internal quotation marks omitted) (emphasis added).

The Department further concluded that the claims settled by the SNSA are "land" claims. "While the claims against the United States would seek monetary relief rather than actual possession of the lands, the claims are founded on the

premise that the government unlawfully deprived the Seneca Nation of the possession of its land." Solicitor Letter at 3 (footnote omitted). The SNSA's legislative history again supports this view. *See* House Report at 3 (stating that one of the SNSA's principal purposes was "to provide the Nation with fair compensation *for the use of its land*" (emphasis added)). *See also* Senate Report at 4 (same); *Oneida Cnty. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 229 (1985) (repeatedly describing as a "land claim" a suit brought for "damages representing the fair rental value of . . . land" of which tribe had been unlawfully dispossessed).

In sum, the Department's conclusion—concurred in by the NIGC—that the SNSA was enacted to settle the Nation's land claims against the United States is appropriately grounded in the text and legislative history of the SNSA and in decisional law interpreting the Act. In enacting that statute, Congress understood that it was settling a land claim against the United States because of the extensive federal involvement in forcing the Salamanca leases on the Seneca Nation. As such, the Buffalo Creek Territory is still gaming-eligible even if the Section 20 prohibition applies to SNSA lands.

CONCLUSION

For the foregoing reasons, the Seneca Nation respectfully requests that this Court affirm the decision of the District Court in *CACGEC III*.

DATED this 25th day of March, 2014 Respectfully submitted,

/s/ Riyaz A. Kanji

Riyaz A. Kanji
David A. Giampetroni
Lucy W. Braun
Philip H. Tinker
KANJI & KATZEN, PLLC
303 Detroit Street
Suite 400
Ann Arbor, Michigan 48104
Ph: (734) 769-5400
rkanji@kanjikatzen.com

Carol E. Heckman
Harter, Secrest & Emery, LLP
Twelve Fountain Plaza, Suite 400
Buffalo, NY 14202-2293
Ph: (716) 845-4220
checkman@hselaw.com

Christopher Karns
Owen Herne
Seneca Nation of Indians
Post Office Box 231, Seneca Nation
Salamanca, NY 14779
Ph: (716) 945-1790
Fax: (716) 945-6869

Counsel for the Seneca Nation of Indians

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Attorney for Seneca Nation of Indians

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