UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SENECA NATION OF INDIANS,

Plaintiff,

v. Index No. _____

STATE OF NEW YORK,

Defendant.

PETITION TO VACATE FINAL ARBITRATION AWARD

The Seneca Nation of Indians hereby seeks an order vacating the Final Arbitration Award ("Final Award") dated April 12, 2019, in American Arbitration Association Case Number 01-17-0005-3636. Copies of the Final and Partial Final Awards are attached as Exhibits A and B.[1] Also attached as Exhibit C is Arbitrator Washburn's dissent. The Nation so petitions with a full understanding of the limited scope of review applicable to arbitration decisions. The Final Award orders the Nation to continue making revenue-sharing payments to the State of New York that have never been approved by the Secretary of the Interior. Because such approval is a bedrock requirement of federal law, and because the Award was issued in manifest disregard of that requirement, vacatur is called for under these highly unusual circumstances.

[1] All exhibit references are to documents attached as exhibits to the Declaration of Carol E. Heckman, dated June 6, 2019, in support of the Nation's Notice of Motion and Motion to Vacate Final Arbitration Award, filed simultaneously herewith.

PARTIES

1. The parties in this matter are the Seneca Nation of Indians ("Nation"), a federally recognized sovereign Indian nation located in Western New York, and the State of New York ("State").

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, because the Nation seeks relief under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10; the Panel majority issued its Final Award in manifest disregard of federal law; and the underlying dispute involves the interpretation and implementation of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA").

3. Venue is proper in this district pursuant to the venue provisions of the FAA, 9 U.S.C. §§ 9, 10; the general venue statute, 28 U.S.C. § 1391(b); and the forum-selection clause of the Nation-State Gaming Compact Between the Seneca Nation of Indians and the State of New York ("Compact"), ¶ 14(i). A copy of the Compact is attached as Exhibit D.

BACKGROUND

The Indian Gaming Regulatory Act

4. IGRA provides the statutory framework under which Indian nations conduct casino-style gaming on their lands. 25 U.S.C. §§ 2701-2721.

5. IGRA authorizes a state and an Indian nation to negotiate a compact setting forth the terms under which the nation may offer casino-style gaming within the state's boundaries. *Id.* § 2710(d).

6. IGRA and its implementing regulations provide that a gaming compact, or any amendment to a compact, may not go into effect unless its terms, including any revenue-sharing

terms, have been reviewed and approved by the Secretary of the Interior to ensure their consistency with IGRA and the trust obligations of the United States to Indian nations. *Id.*; 25 C.F.R. Part 293. Specifically, the Secretary has an obligation to ensure that any revenue-sharing obligations do not constitute a tax on Indian gaming revenues. *See* 25 U.S.C. § 2710(d)(4).

The Compact

7. In 2002, the Nation and the State entered into the Compact pursuant to IGRA. Its effective date was December 9, 2002.

8. The Compact provided for an initial term of fourteen years. It also provided that, absent objection by either party, "the term of this compact shall be renewed automatically for an additional period of seven (7) years." Ex. D ¶ 4(c). Because neither party objected, the Compact renewed on December 9, 2016.

9. The Compact included a revenue-sharing arrangement under which the Nation would make payments to the State over a defined, fourteen-year schedule in exchange for a limited form of gaming exclusivity. *Id.* ¶ 12. It contained no provision for additional revenue-sharing beyond that fourteen-year period. The revenue-sharing schedule ran from the Nation's commencement of gaming operations, rather than from the effective date of the Compact, and therefore extended beyond the initial Compact term. *See id.* ¶ 12(b)(1).

10. As required by IGRA and its implementing regulations, the Compact was submitted to the Secretary for approval. In her response, the Secretary expressed her understanding of the Nation's revenue-sharing obligation as defined by the Compact's fourteen-year schedule, anticipated that the State would receive "less than one billion dollars" in payments from the Nation, and concluded that "*this* revenue-sharing arrangement is consistent with IGRA." DOI Decision Letter (Ex. E) at 3, 5 (emphasis added).

11. The Secretary deemed the Compact approved, and it went into effect when that approval was published in the Federal Register on December 9, 2002. 67 Fed. Reg. 72,968.

The Underlying Dispute

12. The Nation fulfilled its fourteen-year revenue-sharing obligation, making its final payment to the State in the spring of 2017. In total, the Nation paid more than $1.4 billion to the State. After the Nation made its final payment, the State contended that the Nation's payment obligation continues past the fourteen-year schedule set forth in the Compact to the end of the renewal period in 2023. After attempts to resolve the dispute failed, the State initiated the arbitration in September 2017. *See* Demand for Arbitration (Ex. N).

The Arbitration Award

13. The three-member arbitration panel divided sharply. The majority issued its Final Award on April 12, 2019, requiring the Nation to make payments to the conclusion of the Compact in 2023. The majority could not locate such an obligation in the text of the Compact, which it deemed ambiguous, and relied instead on extrinsic evidence in reaching its conclusion. It projected the Nation's additional obligation to approach $1 billion, rendering the State's total receipts under the Compact more than double the amount expressly anticipated by the Secretary when she approved the Compact's fourteen-year revenue-sharing arrangement in 2002.

14. The dissent, drafted by former Assistant Secretary of Indian Affairs at the Department of the Interior Kevin Washburn, took the opposite view, concluding that neither the text nor the extrinsic evidence reviewed by the Panel supported the position that the Nation's revenue-sharing obligation continued past the fourteen-year payment schedule laid out in the Compact. Of particular relevance here, the dissent also highlighted that the majority's imposition of that additional payment obligation absent Secretarial approval contravenes clear federal law and

policy: "[T]he Panel's decision has the effect of enforcing an agreement that goes beyond what was approved by DOI, thus potentially undermining DOI's important regulatory role." Ex. C at 20.

The Arbitration Award Was Issued in Manifest Disregard of Federal Law.

15. The Nation strongly disagrees with the Panel majority's interpretation of the Parties' intent in entering the Compact but does not challenge that interpretation here given the limited scope of review applicable to arbitration decisions. The Nation instead challenges the Panel's Final Award because it was issued in manifest disregard of IGRA's requirement that compact obligations may not lawfully be imposed absent approval by the Secretary of the Interior.

16. The Nation made the Panel fully aware that the Secretary never reviewed and approved any revenue-sharing arrangement between the Nation and the State beyond the fourteen-year arrangement in the Compact. It also made the Panel aware that IGRA absolutely prohibits the enforcement of revenue-sharing provisions absent such approval. And the Panel majority was further alerted to IGRA's Secretarial-approval requirement by the dissent, authored by a former Assistant Secretary of Indian Affairs with principal responsibility for Compact review and approval while in office.

17. The Panel majority nevertheless chose not to abide by IGRA's clear statutory mandate. It made no finding that the Secretary considered and approved any payment obligation beyond the 14-year schedule specified in the Compact. It instead supplied a patently invalid rationale for forging ahead with the imposition of the payment obligation on the Nation rather than requiring Secretarial approval of the same.

18. The majority thus issued its Final Award in manifest disregard of IGRA's mandate that enforcement of compact terms, including revenue-sharing terms, is unlawful absent review and approval by the Secretary.

19. The Secretarial review requirement is well-defined, explicit, and clearly applicable, outlined in both the statutory text and the governing regulations of IGRA – indeed, there is no Class III compact revenue-sharing provision in effect in the United States today that was not approved (or deemed approved) by the Secretary under IGRA.

20. Because the majority issued its Final Award in manifest disregard of a controlling federal law and its implementing regulations, the award must be vacated.

The Court Could Refer This Matter to the Department of the Interior Under the Primary Jurisdiction Doctrine.

21. In the alternative, in the event the Court, after hearing the Parties' arguments, is uncertain whether the Secretary reviewed and approved the revenue-sharing obligation imposed by the majority, it should stay this matter and refer that question to the Department of the Interior under the primary jurisdiction doctrine, given the Department's special competence to address that question. As discussed in the Nation's Memorandum of Law, the Department has very recently reiterated its willingness to weigh in on the issue given a proper request that it do so.

PRAYER FOR RELIEF

22. This petition is properly before this Court pursuant to the FAA, which authorizes the Court to enter an order vacating the Final Award. *See* 9 U.S.C. § 10.

23. The law of the Second Circuit authorizes this Court to vacate an arbitration award if it is in manifest disregard of the law. *N.Y. Tel. Co. v. Commc'ns Workers Local 1100*, 256 F.3d 89, 91 (2d Cir. 2001).

THEREFORE, the Nation requests that the Court enter an order vacating the Final Award and awarding the Nation such other and further relief as the Court may deem just and proper.

In the alternative, the Nation requests that the Court stay this matter, including enforcement of the Final Award, and refer to the Department of the Interior the question whether the Secretary approved the payment obligation imposed by the Panel such that it may be lawfully enforced consistent with IGRA.

Dated this 6th day of June, 2019

Respectfully submitted,

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