

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY (JOEL ROSE and ROBERT HEFFERN, as Co-Chairpersons), REV. G. STANFORD BRATTON, D. MIN., Executive Director of the Network of Religious Communities, NETWORK OF RELIGIOUS COMMUNITIES, NATIONAL COALITION AGAINST GAMBLING EXPANSION, PRESERVATION COALITION OF ERIE COUNTY, INC., COALITION AGAINST GAMBLING IN NEW YORK—ACTION, INC., THE CAMPAIGN FOR BUFFALO—HISTORY ARCHITECTURE AND CULTURE, ASSEMBLYMAN SAM HOYT, 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, PASTOR KEITH H. SCOTT, SR., DORA RICHARDSON, and JOSEPHINE RUSH,

Plaintiffs,

v.

**DECISION AND ORDER**  
07-CV-0451S

PHILIP N. HOGEN, in his Official Capacity as Chairman of the National Indian Gaming Commission, the NATIONAL INDIAN GAMING COMMISSION, the UNITED STATES DEPARTMENT OF THE INTERIOR, and DIRK KEMPTHORNE, in his Official Capacity as the Secretary of the Interior,

Defendants.

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1. Currently pending before the Court is Plaintiffs' second Motion for Order to Enforce, filed on October 21, 2008. (Docket No. 78.) Plaintiffs ask that the Court direct the National Indian Gaming Commission (the "NIGC") to terminate immediately all Class III gaming operated by the SNI at its Buffalo Parcel, and hold the NIGC in contempt of Court.

2. On July 8, 2008, the Court issued a Decision and Order vacating the July 2, 2007 ordinance approval by NIGC Chairman, Philip N. Hogen, to the extent it permitted Class III gaming to occur on land owned by the Seneca Nation of Indians (the "SNI") in the city of Buffalo (the "Buffalo Parcel"). While the Court found that the SNI's Buffalo Parcel is "Indian lands" within the meaning of the Indian Gaming Regulatory Act (the "IGRA"), it determined that the land had not been acquired as part of the settlement of a land claim such that it would fall outside the IGRA's prohibition against gaming on land acquired after October 17, 1988. The parties had agreed, throughout the litigation, that the Buffalo Parcel was subject to that prohibition and that gaming could not occur unless the land met one of the exceptions set forth in the IGRA.

3. Following the Court's July 8, 2008 Decision and Order and the closing of this case, the SNI continued to operate its Class III gambling facility in Buffalo. Six days later, on July 14, 2008, Plaintiffs filed a Motion for an Order Enforcing the Judgment. The Motion was granted in part, and denied in part, by Decision and Order dated August 26, 2008.

4. On September 3, 2008, in response to the Court's Decision on Plaintiffs' first enforcement motion, the NIGC served a Notice of Violation ("NOV") on the SNI. Among other things, the NOV charged that the SNI "violated IGRA by operating a Class III gaming operation without an approved Class III gaming ordinance and by gaming on Indian Lands ineligible for gaming." (Docket No. 77-2 at 2.)

5. The NOV went on to note that the SNI had submitted an amended ordinance to the NIGC on July 17, 2008, and that new regulations interpreting the IGRA had since gone into effect. (*Id.* at 4-5.) Both of these events occurred after the Court issued its July 8, 2008 Decision and Order. Moreover, while confirming that the SNI was currently operating in violation of the IGRA and NIGC regulations, the NOV stated that the NIGC Chairman could

determine that the situation was changed should the NIGC successfully appeal the Court's Decisions or upon his consideration of the SNI's amended ordinance. (*Id.* at 5-6.)

6. The SNI contested the charges in the NOV (Docket No. 78-3, Ex. B), and the Department of the Interior ("DOI") assigned a hearing officer to preside over the SNI's administrative appeal (Docket No. 83-2). On October 14, 2008, the NIGC Chairman moved for a stay of the administrative appeal based on the NIGC's intent to file a Notice of Appeal with the United States Court of Appeals for the Second Circuit on or before October 27, 2008. (Docket Nos. 78-3, Ex. G.) On October 14, 2008, the SNI also withdrew the gaming ordinance it had submitted to the NIGC on July 17, 2008. (Docket No. 78-3, Ex. E.)

7. While the Chairman's stay motion was pending, Plaintiffs filed their second Motion for Order to Enforce. A few days thereafter, the NIGC filed its Notice of Appeal with the Second Circuit. (Docket No. 80.) The DOI hearing officer subsequently granted the Chairman's motion for a stay of the administrative appeal, subject to the submission of status reports every 60 days beginning January 12, 2009. (Docket No. 83-3.)

8. One day after Plaintiffs filed their second enforcement motion, on October 22, 2008, the SNI again submitted an amended Class III gaming ordinance to the NIGC. (Docket No. 89-2 at 1.) NIGC Chairman Hogen approved the SNI's amended ordinance on January 20, 2009.

9. Among other issues addressed in his 22-page approval letter, Chairman Hogen considered whether he was bound by his previous determination that the SNI's Buffalo Parcel is subject to the IGRA's general prohibition against gaming on land acquired after October 17, 1988, or whether he could alter his former interpretation based on new DOI regulations which became effective on August 25, 2008, seven weeks after the Court

issued its Decision vacating the prior ordinance. (*Id.* at 10-16.) He determined that the NIGC is not bound by its prior interpretation, and went on to conclude that the SNI's Buffalo Parcel is not subject to the IGRA's general prohibition.

10. Upon review, it appears that the Chairman's recent approval of Class III gaming on the SNI's Buffalo Parcel is not based on a reaffirmance of positions or conclusions previously rejected by the Court. Rather, it is predicated on an analysis different from any previously put in issue by the parties. This new analysis is presumed valid unless and until it becomes the subject of a successful legal challenge. As such, the Chairman's January 20, 2009 ordinance approval renders moot Plaintiffs' motion to enforce the Court's vacatur of the July 2, 2007 ordinance approval.

11. Accordingly, Plaintiffs' second Motion for Order to Enforce (Docket No. 78) is DENIED.

SO ORDERED.

Dated: January 30, 2009  
Buffalo, New York

/s/William M. Skretny  
WILLIAM M. SKRETNY  
United States District Judge