

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

CITIZENS AGAINST CASINO)
 GAMBLING IN ERIE COUNTY, *et al.*,)
)
 Plaintiffs,)
)
 v.)
)
 PHILIP N. HOGEN, in his Official Capacity)
 as Chairman of the NATIONAL INDIAN)
 GAMING COMMISSION, *et al.*,)
)
 Defendants,)

Civil Action No. 09-CV-0291
Hon. William M. Skretny, U.S.D.J.

**DECLARATION OF CORNELIUS D. MURRAY IN
SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER COMPELLING
THE PRODUCTION OF ADMINISTRATIVE RECORD DOCUMENTS
AND AUTHORIZING DISCOVERY
TO SUPPLEMENT THE ADMINISTRATIVE RECORD**

I, CORNELIUS D. MURRAY, ESQ., hereby declare under penalty of perjury as follows:

1. I am a member of the law firm of O'Connell and Aronowitz, P.C., and am admitted to practice before this Court. I submit this Declaration in support of the Plaintiffs' motion for an Order compelling the Defendants to produce administrative record documents and authorizing discovery to supplement the administrative record.

2. In this action, Plaintiffs challenge the approval by the Defendant Chairman of the National Indian Gaming Commission (the "NIGC") of an ordinance authorizing the Seneca Nation of Indians (the "SNI") to conduct Class III gambling on a 9-1/2 acre parcel of land in downtown Buffalo (the "Buffalo Parcel"). Plaintiffs also challenge regulations issued by the U.S. Department of the Interior (the "DOI") implementing the prohibition against gambling on land acquired after October 17, 1988, under Section 20 of the Indian Gaming Regulatory Act

(“IGRA”), to the extent that the regulations reinterpret the prohibition as applicable only to land held in trust, and not in restricted fee.

The Prior Litigation: CACGEC I and CACGEC II

3. This is Plaintiffs’ third challenge to the NIGC’s approval of an ordinance authorizing Class III gambling on the Buffalo Parcel. Previously, in *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295, 396 (W.D.N.Y. 2007) (“*CACGEC I*”), this Court held that the NIGC’s approval of the SNI’s first ordinance, without first determining whether the land at issue was gambling-eligible Indian land, was not the result of reasoned decision-making.

4. In *Citizens Against Casino Gambling in Erie County v. Hogen*, 2008 WL 2746566 (July 8, 2008) (“*CACGEC II*”), this Court ruled that the Buffalo Parcel is “Indian lands” (a conclusion with which Plaintiffs disagree), but that the Seneca Nation Settlement Act (“SNSA”) did not settle a land claim, because the SNI did not have an enforceable right to relief and, therefore, the “settlement of a land claim” exception to the IGRA Section 20 prohibition did not apply. Therefore, the Court vacated the ordinance which the Chairman of the NIGC had approved on July 2, 2007, and which had been the purported legal predicate for the conduct of Class III gambling at the Buffalo Parcel site.

5. On July 9, 2008, the day after the Court’s original ruling in *CACGEC II*, the SNI issued a press release (*CACGEC II*, Dkt. No. 63-3), characterizing the ruling as “procedural” and stating that, insofar as gambling was concerned, it was “business as usual,” and the SNI had no intention of ceasing Class III gambling on the Buffalo Parcel. According to the press release, the SNI, “*in consultation with federal officials of the National Indian Gaming*

Commission, has found no reason in Tuesday's court decision to consider any alternatives." *Id.* (emphasis supplied).

6. In view of the NIGC's abject failure to bring the gambling to a halt, on July 14, 2008, Plaintiffs filed a motion with this Court for an order enforcing the judgment. (*CACGEC II*, Dkt No. 63) Two days later, on July 16, 2008, the SNI submitted a new gambling ordinance to the NIGC for approval (*CACGEC II*, Dkt. No. 65-2), and then cited the pendency of that ordinance as an excuse to defer enforcement proceedings until after the 90-day period for NIGC approval (under Section 11(e) of IGRA) had elapsed. (*CACGEC II*, Dkt. No. 66-2 at 12). On July 22, 2008, Defendants used the new submission as the pretext for a motion to remand the case to the NIGC for reconsideration. (*CACGEC II*, Dkt No. 65) It was in that July 22, 2008 submission that the DOI revealed for the first time that, in final Part 292 regulations issued May 20, 2008, it had reversed its prior longstanding position on the applicability of the Section 20 prohibition to restricted fee lands.

7. Previously, the U.S. Government had consistently taken the position that IGRA's Section 20 prohibition against gambling on after-acquired land applied not only to lands held in trust, but also to lands held in restricted fee pursuant to an Act of Congress. For example, on November 12, 2002, in letters to the SNI President (Exhibit A hereto) and the Governor of New York explaining her "reluctant" non-approval approval of the Tribal-State Compact between the SNI and New York, DOI Secretary Gale Norton stated that "lands held in restricted fee status pursuant to an Act of Congress," such as lands acquired with funds from the SNSA, "must be subject to the requirements of Section 20 of IGRA." "To conclude otherwise," she concluded, "would arguably create unintended exceptions to the Section 20 prohibitions and undermine the regulatory regime prescribed by IGRA."

8. Similarly, on July 2, 2007, in a letter to the SNI President approving the SNI's second ordinance for gambling on the Buffalo Parcel (Exhibit B hereto), NIGC Chairman Philip Hogen agreed that Section 20 "can only sensibly be read to include trust lands and restricted fee lands." If the prohibition applied only to trust lands, he reasoned, then "[t]ribes could avoid the prohibition . . . by taking land into restricted fee rather than having the United States take it into trust." Chairman Hogen recognized that "[i]t is unlikely that Congress intended to create such an exception."

9. The Department of Justice, at every step of the *CACGEC II* litigation, likewise agreed that IGRA Section 20 "is intended to apply to restricted fee Indian lands," as well as trust lands, because otherwise, "a loophole would be created." (*CACGEC II*, Dkt. No. 59 at 8, citing Dkt. 28-2 at 26-27.) This Court, in *CACGEC II* had agreed, and expressly rejected the alternative interpretation, which the SNI had advanced, as "at odds with section 20's clear purpose." (*CACGEC II*, 2008 WL 2746566 at *53).

10. On May 20, 2008, however, in the midst of the *CACGEC II* litigation, the DOI completely reversed its prior interpretation and stated that IGRA's after-acquired lands prohibition applies only to lands "acquired by the Secretary in trust" for Indian tribes, and not to lands owned by an Indian tribe and held in restricted fee. *Gaming on Trust Lands Acquired after October 17, 1988*, 73 Fed. Reg. 29354 (May 20, 2008). According to the Preamble to the final regulations, "the omission of restricted fee from section 2719(a) [*i.e.*, IGRA Section 20] is considered purposeful, because Congress referred to restricted fee lands elsewhere in IGRA, including at sections 2719(a)(2)(A)(ii) and 2703(4)(B)." 73 Fed. Reg. at 29355. The final regulations also purported to expand the definition of a "land claim" to bring the SNSA within

the exemption in IGRA allowing for gambling on after-acquired lands obtained as part of a settlement of a land claim.

11. On January 20, 2009, the Defendant NIGC Chairman followed the reinterpretation of the IGRA Section 20 prohibition in approving the SNI's amended ordinance to conduct Class III gambling on the Buffalo Parcel (Exhibit C hereto). In reaching this conclusion, the NIGC Chairman also relied on an opinion letter, dated January 18, 2009, from DOI Solicitor David L. Bernhardt, addressing the "Applicability of 25 U.S.C. § 2719 to Restricted Fee Lands" (Solicitor's Opinion M-37023) (Exhibit D hereto) and purporting to explain the reasons for the change.

The Complaint in this Action

12. On March 31, 2009, Plaintiffs commenced this Action to challenge the decision and process by which the DOI adopted the Part 292 regulations and the NIGC approved the SNI's resubmitted third ordinance to gamble on the Buffalo Parcel. The Complaint alleges that during the *CACGEC II* litigation, one or more individuals on behalf of the SNI "lobbied" officials within the DOI and/or the NIGC to change their position on the applicability of IGRA Section 20 to restricted fee land, so that the Buffalo Parcel could qualify for Class III gambling, regardless of this Court's determination in the pending *CACGEC II* litigation. *Id.* ¶ 91. It further alleges that the DOI adopted the Part 292 reinterpretation in a last-second, desperate attempt to accommodate the SNI's ability to operate a casino at the Buffalo Parcel and to head off an anticipated ruling from this Court which, in fact, materialized in July 2008. *Compl.* ¶ 11.

13. The Complaint challenges the actions of the agencies and officials as illegal, arbitrary, capricious and not otherwise in accordance with the law. It also challenges the reinterpretation in the Part 292 regulations as contrary to existing policy and congressional intent

and implemented without an opportunity for public comment, in violation of the Administrative Procedure Act. *Id.*, ¶¶ 90-92.

The Administrative Record

14. On May 11, 2010 and August 27, 2010, respectively, the NIGC and the DOI filed their administrative records and privilege logs with respect to the approval of the resubmitted ordinance. (*CACGEC III*, Dkt No. 24, 31.) In producing the administrative record, Defendants redacted or withheld over 1,500 pages on deliberative process privilege grounds.

15. Notwithstanding the extensive redactions and omissions, the documents provided reveal that Edith Blackwell, a highly placed lawyer in the DOI Division of Indian Affairs, was directly involved in the reversal of the DOI's prior position on the applicability of the IGRA Section 20 prohibition to restricted fee lands and that she also played a pivotal role in drafting the post hoc rationalization, Solicitor's Opinion M-37023 (Murray Decl. Ex. D), in response to the NIGC's request for an explanation of the change.

16. As the exhibits accompanying this Declaration reflect, from publicly available information it appears that Edith Blackwell has a close personal relationship and shares a residence with Michael Rossetti, a partner with Akin Gump Strauss Hauer & Feld, LLP (Exhibits R-AA). Akin Gump, in turn, provides legal representation to the SNI and during the period 2001 through at least 2008, received hundreds of thousands of dollars from the SNI for that legal representation and for lobbying the federal government on issues affecting Indian sovereignty, among others (Exhibits FF, JJ, MM).

17. The administrative record reflects that Edith Blackwell was recused, presumably due to her relationship with Michael Rossetti, "from all matters involving the SNI." (BIA-

AR127) Nevertheless, on December 12, 2008, she unrecused herself and took a central role in drafting the after-the-fact rationalization for the regulatory reinterpretation. (BIA-AR161)

18. In involving herself in the matter, Ms. Blackwell reasoned that “the letter is not the specific matter of the Seneca litigation, but the broader issue regarding the decision made in the 2719 regs.” (BIA-AR161). In fact, the SNI was the sole tribe that stood to benefit from the DOI’s reversal in position. As this Court recognized in *CACGEC II*, “there appears to be no . . . statute [other than the SNSA] then in effect or since enacted that contemplates taking land into restricted fee status.” See *CACGEC II*, 2008 WL 2746566 at *39 n.49 (citing SNI *Amicus Curiae* Brief, *CACGEC II*, Dkt No. 58 at 53 n.29), *quoted in* Amicus SNI’s Brief, *CACGEC II*, Dkt No. 70 at 17). The NIGC similarly recognized in its letter approving the SNI’s amended ordinance to conduct Class III gambling on the Buffalo Parcel that “this position on section 2719’s applicability to restricted fee land has a very limited effect because it presently affects only one tribe, the Seneca nation.” (Exhibit C at 12) Thus, it is abundantly clear that her involvement had everything to do with the SNI matter, from which she was indisputably recused.

This Motion

19. The present motion seeks disclosure of the documents redacted or withheld from the administrative record on deliberative process privilege grounds. As discussed in the accompanying Memorandum of Law, where, as here, a lawsuit challenges the decision making process itself, the deliberative process privilege evaporates and cannot bar discovery. The Defendants’ unfounded privilege claims resulted in the redaction of material that is highly germane to the administrative determination under review in this case, and Plaintiffs are entitled to the production of the improperly withheld materials.

20. This motion also seeks an order authorizing limited discovery with respect to the serious conflict of interest that infected the integrity of the administrative process and tainted the outcome, which was preordained. The administrative record, together with information in the public record, reflects that a high-level DOI attorney shares the same household with a lobbyist for the firm that represents the SNI. Moreover, despite her recusal from SNI matters, she un-recused herself to participate in actions that would benefit only the SNI. Under the circumstances, it is respectfully submitted that the evidence raises extremely serious questions, more than sufficient to warrant discovery in the form of document discovery and depositions.

Plaintiffs' Efforts to Confer in Good Faith With Defendants' Counsel

21. Prior to making this motion, Plaintiffs' counsel in good faith attempted to confer with Defendants' counsel in an effort to obtain the requested relief without court action. Specifically, on June 13, 2011, Jane Bello Burke, Esq., of this office, contacted Gina Allery, Esq., attorney of record in the U.S. Department of Justice, Environment and Natural Resources Division/Indian Resources Section, to confer regarding Plaintiffs' request for materials redacted or withheld on deliberative process privilege grounds and for discovery regarding the recusal and subsequent un-recusal of Edith Blackwell.

22. On June 16, 2011, Ms. Allery responded in a voicemail message that the Defendants were going back through the privilege log and the documents to determine if they are willing to release any of them.

23. In an email dated June 17, 2011 (Exhibit RR hereto), Ms. Burke clarified that Plaintiffs seek all of documents redacted or withheld from the administrative record on deliberative process privilege grounds, not just a bit-by-bit review, as well as discovery to supplement the administrative record. She requested that Defendants provide an answer no later

than close of business on Monday, June 20, 2011, which gave them a full week to consider the request.

24. On Monday, June 20, 2011, Mary Pat Fleming, Esq., the attorney of record in the U.S. Attorney's Office, Western District of New York, responded in an email (Exhibit SS hereto) that the Defendants still had not communicated their decision on Plaintiffs' request and that, therefore, Plaintiffs "may wish to consider filing [their] motion."

25. On June 22, 2011, as Plaintiffs' counsel were about to file this motion, the NIGC filed and served, through the CM-ECF system, notice of an amended administrative record privilege log. According to the Notice (Dkt. 36), the NIGC's May 11, 2010 privilege log (Dkt. No. 2503) "incorrectly identifies the privileges claimed by the National Indian Gaming Commission in the declaration of Michael Hoenig (Dkt. No. 25-2)." The accompanying corrected NIGC Administrative Record Privilege Log adds the designation "WP" and/or in some cases "AC," designating "work product" and/or "attorney client" privilege, to the items for which the NIGC had previously claimed only deliberative process privilege.

26. Notably, the amended filing relates only to the NIGC privilege log and not to the DOI privilege log. As of the time of this filing, the Defendants had not filed a similar "corrected" administrative record privilege log for the DOI (Dkt. 32-3).

The Accompanying Documentation Supporting this Motion

27. In support of Plaintiffs' motion, true and correct copies of the following supporting documents are respectfully submitted herewith:

Exhibit A: Letter dated November 12, 2002, from Gale Norton, DOI, to Cyrus Schindler, Seneca Nation of Indians (available at <http://www.nigc.gov/LinkClick.aspx?fileticket=1TLeSFuBOZw%3d&tabid=913>).

Exhibit B: Letter dated July 2, 2007, from the National Indian Gaming Commission approving the Seneca Nation of Indians' Class III

- Gaming Ordinance (available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/senecanationny/senecanation070207df.pdf>).
- Exhibit C: Letter dated January 20, 2009, from the National Indian Gaming Commission approving the Seneca Nation of Indians' Class III Gaming Ordinance (available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/senecanationny/SenecaOrdinanceApproval12009.pdf>).
- Exhibit D: Memorandum dated January 18, 2009, from David L. Bernhardt, Office of the Solicitor, Department of the Interior, addressing the "Applicability of 25 U.S.C. § 2719 to Restricted Fee Lands" (available at <http://www.doi.gov/solicitor/opinions/M-37023.pdf>).
- Exhibit E: Testimony of Inspector General Earl E. Devaney before the House Subcommittee on Energy and Resources, dated September 13, 2006 (available at http://www.doiig.gov/images/stories/pdf/Testimony_of_Earl_Devaney_MMS.pdf).
- Exhibit F: Letter dated July 16, 2008, from SNI to Hon. Philip Hogan, NIGC, re: Gaming Ordinance Amendment with accompanying proposed Class III Gaming Ordinance (Third Ordinance)
- Exhibit G: Notice of Violation dated September 3, 2008 (available at http://www.nigc.gov/Reading_Room/Enforcement_Actions/Seneca_Nation_of_Indians_NOV-08-20.aspx).
- Exhibit H: SNI Notice of Appeal dated September 3, 2008 (available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/ReadingRoom/enforcementactions/Notice%20of%20Appeal%20from%20NOV-08-20.pdf>).
- Exhibit I: SNI Motion to Stay Proceedings dated September 15, 2008 (available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/ReadingRoom/enforcementactions/Seneca%20Nation%20of%20Indians%20Supplemental%20Statement.pdf>).
- Exhibit J: NIGC Order Appointing Presiding Official dated October 2, 2008 (available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/ReadingRoom/enforcementactions/Order%20Appointing%20Presiding%20Official.pdf>).

- Exhibit K: NIGC Motion to Stay dated October 10, 2008, requesting a stay of the proceedings (available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/ReadingRoom/enforcementactions/Motion%20to%20Stay.pdf>).
- Exhibit L: Letter dated October 21, 2008, from SNI to Hon. Philip Hogan, NIGC, resubmitting Third Ordinance.
- Exhibit M: NIGC Order Granting Motion to Stay Proceedings dated October 28, 2008 (available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/ReadingRoom/enforcementactions/Order%20on%20Motion%20for%20Stay.pdf>).
- Exhibit N: Letter dated October 7, 2010, from Cornelius D. Murray, Esq., to Mary Pat Fleming, Esq., and Gina L. Allery, Esq.
- Exhibit O: Letter dated October 18, 2010, from Gina L. Allery, Esq., to Cornelius D. Murray, Esq.
- Exhibit P: Letter dated November 7, 2006 from Philip N. Hogen, NIGC, to George Skibine, Director, Office of Indian Gaming Management, DOI, regarding Comments on Proposed IGRA Section 20 Regulations.
- Exhibit Q: Letter dated October 31, 2006 from Kevin W. Seneca, SNI, to George Skibine, Director, Office of Indian Gaming Management, DOI, regarding Comments on Proposed IGRA Section 20 Regulations.
- Exhibit R: Real Property Resale Transaction Record, County Clerk of the Circuit Court, Fairfax, Virginia.
- Exhibit S: Divorce Record, County Clerk of the Circuit Court, Fairfax, Virginia.
- Exhibit T: Real Property Refinance Transaction Record, County Clerk of the Circuit Court, Fairfax, Virginia.
- Exhibit U: Excerpt from Clerk's Board Summary, Report of the Actions of the Fairfax County Board of Supervisors, February 23, 2009 (available at <http://www.fairfaxcounty.gov/bosclerk/summary/2009/09-02-23.pdf/>).
- Exhibit V: Excerpt from Friends of the National Zoo 2008 Annual Report at 20 (available at <http://nationalzoo.si.edu/AboutUs/AnnualReports/FONZ/pdf/2008FONZAnnualReport.pdf>).

- Exhibit W: Excerpt from Dateline Hospice Buffalo, Fall 2009 (available at http://www.hospicebuffalo.com/documents/dateline_final_fall_09.pdf).
- Exhibit X: National Organization on Fetal Alcohol Syndrome 2009-2010 Donors (available at <http://www.nofas.org/donors.aspx>).
- Exhibit Y: Linked in Profile: Michael Rossetti.
- Exhibit Z: Excerpt from Akin Gump website (available at <http://www.akingump.com/mrossetti/>
- Exhibit AA: Excerpt from Akin Gump website (available at <http://www.akingump.com/services/servicedetail.aspx?service=417>).
- Exhibit BB: McKinley, "Democrats Contend a Pataki Lobbyist has a Conflict," *The New York Times*, Nov. 12, 2001.
- Exhibit CC: Biography of Bill Paxon – Excerpt from Biographic Directory of the United States Congress website (available at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=P000148>)
- Exhibit DD: Biography of Bill Paxon – Excerpt from Akin Gump website (available at <http://www.akintump.com/bpaxon/>).
- Exhibit EE: Biography of George Pataki – Excerpt from Wikipedia website (available at http://en.wikipedia.org/wiki/George_Pataki).
- Exhibit FF: Excerpt from *2001 Annual Report* of the New York Temporary State Commission on Lobbying.
- Exhibit GG: Zremski, "Norton Pact Approval: In Lockstep with Pataki, Bush," *Buffalo News*, Nov. 1, 2002.
- Exhibit HH: Biography of Barry Brandon– Excerpt from The C2GROUP website (available at http://www.thec2group.com/meet-the-group-barry_brandon/).
- Exhibit II: Beebe, "After dispute, Brandon forced out as Seneca Gaming Corp. counsel," *Buffalo News*, Nov. 24, 2008 (available at http://findarticles.com/p/news-articles/buffalo-news/mi_8030/is_20081124/dispute-brandon-forced-seneca-gaming/ai_n43014321/).
- Exhibit JJ: Akin Gump Lobbying Reports filed under the Lobbying Disclosure Act of 1995, 2 U.S.C. 1601 (available at

http://www.senate.gov/legislative/Public_Disclosure/LDA_reports.htm and <http://disclosures.house.gov/ld/ldsearch.aspx>).

28. In addition, charts or compilations summarizing information in the foregoing exhibits and/or discussed in the accompanying Memorandum of Law are annexed as the following exhibits:

- Exhibit KK: Key Individuals Involved in the Events Giving Rise to the Approval of the SNI's Resubmitted Third Ordinance.
- Exhibit LL: Summary of Interrelations Appearing from Information in the Administrative Record and in the Public Record.
- Exhibit MM: Summary of Reported Revenues, based on Lobbying Reports filed under the Lobbying Disclosure Act of 1995, 2 U.S.C. 1601 (available at http://www.senate.gov/legislative/Public_Disclosure/LDA_reports.htm and <http://disclosures.house.gov/ld/ldsearch.aspx>).

29. Copies of cases that are unreported or only unofficially reported are annexed as the following exhibits:

- Exhibit NN: *State of New York v. Salazar*, Case 6:08-cv-00644-LEK-DEP, Dkt 196 (Mar. 3, 2011) (Kahn, J.), *aff'g*, 701 F.Supp.2d 224 (N.D.N.Y. 2010) (Peebles, M.J.).
- Exhibit OO: *Spinner v. City of New York*, No. 01 CV 2715, 2004 U.S. Dist. LEXIS 2541 (E.D.N.Y. Feb. 19, 2004).
- Exhibit PP: *Children First Found., Inc v. Martinez*, 2007 WL 4344915 (N.D.N.Y. Dec. 10, 2007).
- Exhibit QQ: *Schaghticoke Tribal Nation v. Norton*, No. 3:06-cv-0081 (PCD), 2007 WL 867987 (D. Conn. Mar. 19, 2007).

In view of the foregoing, and based upon the accompanying supporting materials and upon the application of the relevant legal principles to the facts in the record before the court and within its judicial notice, it is respectfully submitted that Plaintiffs' motion to compel production of administrative record documents and to authorize discovery to supplement the administrative record should be granted in all respects.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: June 22, 2011

/s/ Cornelius D. Murray
Cornelius D. Murray