12-1460

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DANIEL T. WARREN

Plaintiff-Appellant

_____ v. ____

UNITED STATES OF AMERICA, INDIVIDUALLY, AND AS TRUSTEE OF THE GOODS, CREDITS AND CHATTELS OF THE FEDERALLY RECOGNIZED INDIAN NATIONS AND TRIBES SITUATED IN THE STATE OF NEW YORK, KEN SALAZAR IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, DONALD LAVERDURE, IN HIS OFFICIAL CAPACITY AS THE ACTING ASSISTANT SECRETARY OF THE INTERIOR FOR INDIAN AFFAIRS, UNITED STATES DEPARTMENT OF THE INTERIOR, TRACIE STEVENS, IN HER CAPACITY AS CHAIRMAN OF THE NATIONAL INDIAN GAMING COMMISSION, NATIONAL INDIAN GAMING COMMISSION, ANDREW M. CUOMO, AS GOVERNOR OF THE STATE OF NEW YORK, JOHN D. SABINI, AS CHAIRMAN, OF THE NEW YORK STATE RACING AND WAGERING BOARD,
Defendants-Appellees

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

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Reply Brief of Appellant Daniel T. Warren

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The Federal Defendants argue that Plaintiff has not alleged a concrete and particularized injury-in-fact. Federal Defendants do not address the allegations in the complaint that there will be an 8% increase in crime in Erie County, New York as a result of the Buffalo Creek Casino that is authorized by the compact entered into between the Seneca Nation of Indians and the State of New York and authorized by the Secretary of the Interior on November 12, 2002 and the approval of the Seneca Nation's amended gaming ordinance by the NIGC in 2002, 2007 and 2009.

This case does not present a "generalized grievance" so widely shared that the political process provides a more appropriate remedy. See *Federal Election Comm'n v. Akins*, 524 U.S. 11, 23-25, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998); *Warth v. Seldin*, 422 U.S. 490, 499-500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Erie County, New York is just one out of 62 counties in the State of New York and is a virtual blip on the map of the nation as a whole that is governed by IGRA.

In addressing the generalized grievance argument the Supreme Court held "The kind of judicial language to which the FEC points, however, invariably appears in cases where the harm at issue is not only widely shared, but is also of an

abstract and indefinite nature -- for example, harm to the "common concern for obedience to law." L. Singer & Sons v. Union Pacific R. Co., 311 U.S. 295, 303, 85 L. Ed. 198, 61 S. Ct. 254 (1940); see also Allen, 468 U.S. at 754; Schlesinger, 418 U.S. 208 at 217, 41 L. Ed. 2d 706, 94 S. Ct. 2925. Cf. Lujan, 504 U.S. at 572-578 (injury to interest in seeing that certain procedures are followed not normally sufficient by itself to confer standing); Frothingham, 262 U.S. 447 at 488, 43 S. Ct. 597, 67 L. Ed. 1078 (party may not merely assert that "he suffers in some indefinite way in common with people generally"); Perkins v. Lukens Steel Co., 310 U.S. 113, 125, 84 L. Ed. 1108, 60 S. Ct. 869 (1940) (plaintiffs lack standing because they have failed to show injury to "a particular right of their own, as distinguished from the public's interest in the administration of the law"). The abstract nature of the harm -- for example, injury to the interest in seeing that the law is obeyed -- deprives the case of the concrete specificity that characterized those controversies which were "the traditional concern of the courts at Westminster," Coleman, 307 U.S. at 460 (Frankfurter, J., dissenting); and which today prevents a plaintiff from obtaining what would, in effect, amount to an advisory opinion. Cf. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241, 81 L. Ed. 617, 57 S. Ct. 461 (1937)." *FEC v. Akins*, 524 U.S. 11, 23-24 (U.S. 1998).

The injury in fact claimed here which includes, but is not limited to, the 8% increase in risk of crime in Erie County, New York because it has a casino versus those counties that do not, is not one that is of an abstract and indefinite nature.

The injuries asserted are traceable to the Defendants actions because in order to conduct Class III gaming on the Buffalo Site located in Erie County, New York from which would generate the 8% increased risk in crime as alleged in the complaint it must meet the requirements of 25 U.S.C. § 2710 which in turn depend on the validity of the Indian Gaming Regulatory Act, and if it is applicable whether the legal requirements of a valid and approved tribal-state compact and an approved gaming ordinance is in effect and the proper predicate determinations were made. See *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 440. Causation may be established if the plaintiff shows a good probability that, absent the challenged action, the alleged harm would not have occurred, *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262-64, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977).

Plaintiff seeks a judgment setting aside the determination of the Secretary of the Interior allowing the tribal-state compact to become approved and the determination of Defendants Hogen and the National Indian Gaming Commission approving the gaming ordinance, and subsequent amendments, of the Seneca Nation of Indians pursuant to the IGRA along with other declaratory and injunctive

relief. If either determination is set aside, for any reason, gaming may not be conducted at the Buffalo Site and Plaintiff will not suffer the injury caused by the 8% increased risk of being a victim of a crime as alleged. Therefore the relief requested will likely redress the injury.

In response to the Federal Defendants argument relative to their complete and unfettered discretion in taking enforcement action thereby negating any relief this court could grant in this case has been already addressed by a court in this Circuit. In *Citizens Against Casino Gambling v. Hogen*, 2008 U.S. Dist. LEXIS 67743 (W.D.N.Y. Aug. 26, 2008) the Court held that "The IGRA's mandate to the NIGC provides authority to issue a writ in aid of the Court's exercise of its jurisdiction in CACGEC II. There are no controlling statutory procedures governing the NIGC's failure to act in accordance with its statutory duty with which a writ will conflict. An order compelling the NIGC and its Chairman to carry out their congressionally-mandated obligations in the face of the Court's July 8, 2008 Decision vacating the Chairman's Ordinance approval appears to be precisely the type of action contemplated by the All Writs Act."

STANDING TO RAISE TENTH AMENDMENT CHALLENGE WITHIN THE CONTEXT OF AN ACTION CHALLENGING AGENCY ACTION UNDER THE APA

The U.S. Supreme Court held in *Bond v. United States*, 131 S. Ct. 2355, 2366-2367 (U.S. 2011) "In this case, however, where the litigant is a party to an

otherwise justiciable case or controversy, she is not forbidden to object that her injury results from disregard of the federal structure of our Government. Whether the Tenth Amendment is regarded as simply a ‘'truism,'’ New York, supra, at 156, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (quoting United States v. Darby, 312 U.S. 100, 124, 61 S. Ct. 451, 85 L. Ed. 609 (1941)), or whether it has independent force of its own, the result here is the same."

Therefore Plaintiff's challenge to the tribal-state compacting requirements of the IGRA under the APA can include a challenge on Tenth Amendment grounds. The Federal Defendants read *Bond, supra*, too narrowly.

The Federal Defendants continue to fail to recognize that this case presents a much more direct injury to plaintiff due to a violation of the Tenth Amendment than that in Bond, supra, because the power to determine when, how and if commercialized gaming is conducted is reserved to the people of the State of New York rather than its legislature pursuant to NY Const. Article I § 9. Therefore, Plaintiff is deprived of his right to vote in order to exercise a power that is reserved to him and all other New York State voters in violation of the Tenth Amendment.

In regards to the Federal Defendants argument that IGRA does not violate the Tenth Amendment they make the same mistake that the District Court did in not reading the complaint to assert an as applied challenge rather than a facial challenge to the compacting provisions of IGRA. Noticeably absent from the

Federal Defendants' brief is any analysis of *Dalton v. Pataki*, 5 N.Y.3d 243 (N.Y.2005) and its pre-emption holding that is contrary to their position in this case.

Also the Federal Defendants assert that they took no action and therefore no action lies to challenge a compact approved by inaction pursuant to 25 U.S.C. § 2710(d)(8)(C). However, the Court in *Amador County v. Salazar*, 640 F.3d 373, 383 (D.C. Cir. 2011) held "that where, as here, a plaintiff alleges that a compact violates IGRA, thus requiring the Secretary to disapprove the compact, nothing in the APA precludes judicial review of a subsection (d)(8)(C) no-action approval."

Appellant has standing to raise the proposed Second and Third Cause of Action and it states a cause of action and the District Court erred in denying leave to amend them as futile

The Federal Defendants assert that they and the court assumed that this cause of action was asserted against the State of New York and that it is only on appeal that it is asserted against the United States (US Br. Fn 1 Page 11 (US Br. Refers to the Brief filed by the Federal Defendants in this Court Docket #54)). This simply is not the case since it was raised in Plaintiff's memorandum of law in support of the motion to amend and supplement the complaint (District Court Docket 73 page 9 ¶¶ 1 & 2).

Federal Courts have jurisdiction under the APA to decide whether or not state law that is incorporated by reference in federal statutes were complied with in determining whether final agency action was proper (see *Eskra v. Morton*, 380 F. Supp. 205). In the case at bar IGRA incorporates by reference state laws relating to gambling and state laws relating to if, how and when state officers can enter into agreements that bind the State to a tribal-state compact (see 18 U.S.C. § 1166, 25 U.S.C. §§ 2710(b), 2710(d). It should be noted that the Court of Appeals for the District of Columbia has held that "The Secretary points out that in prior cases, including Patchak, where we have allowed community groups and neighbors to sue under IGRA, those groups were challenging the Secretary's decision to take land into trust rather than the Secretary's approval of a tribal-state compact. A suit in the latter situation is, the Secretary argues, essentially a challenge to an action of the State. Again, we disagree." *Amador County v. Salazar*, 640 F.3d at 379 (D.C. Cir. 2011). Therefore, contrary to the assertion of the State Defendants (NY Br.pages 14-19 (NY Br. Refers to the Brief filed by the State Defendants in this Court Docket #57)) these challenges to federal agency action are based on federal law which just happens to look to State Law to determine whether or not they complied with the requirement of federal law that there is a valid tribal-state compact and that compact is in effect in accordance with IGRA.

***Appellant has standing to raise the proposed Fourth Cause of Action and it states a cause of action* and the District Court erred in denying leave to amend it as futile**

Federal Defendants assert that a valid tribal-state compact that is in effect is not required in order for the NIGC to approve a gaming ordinance that contain provisions relative to Class III gaming. The Federal Defendants raised a similar argument in a challenge to the same approvals challenged herein but in respect to an "Indian lands" determination which was rejected. The Court held that "the findings, purpose and language of the IGRA relative to the NIGC's jurisdiction implicitly require such a determination. Whether proposed gaming will be conducted on Indian lands is a critical, threshold jurisdictional determination of the NIGC. Prior to approving an ordinance, the NIGC Chairman must confirm that the situs of proposed gaming is Indian lands. If gaming is proposed to occur on non-Indian lands, the Chairman is without jurisdiction to approve the ordinance." *Citizens Against Casino Gambling v. Kempthorne*, 471 F. Supp. 2d 295, 323-324 (W.D.N.Y. 2007). Similarly, the existence of a valid tribal-state compact that is in effect as required by IGRA to conduct Class III gaming is a jurisdictional pre-requisite to the NIGC's jurisdictional inquiry to approve the ordinance, because if

the gaming is to be conducted pursuant to a compact that is not in compliance with IGRA the Chairman is without jurisdiction to approve the ordinance.

The Court in *Citizens Against Casino Gambling v. Kempthorne*, 471 F. Supp. 2d at 325 (W.D.N.Y. 2007) held that "The Government suggests in its argument that the Chairman has discharged his duty by simply ascertaining that a tribe and state have entered into a compact under 25 U.S.C. § 2710(d)(3); he is not obliged to actually review the compact. This Court expresses no view on whether such limited review, as a general principle, may sometimes be sufficient. What is clear from the record here, though, is that the Ordinance and Compact were submitted to the Chairman as an integrated document, thereby necessitating the Chairman's review of the Compact in this case." Since this case was dismissed on a pre-answer motion the administrative record for the challenged actions were not filed in this case.

The Federal Defendants argue that the 2002 and 2007 gaming ordinances have been vacated and no longer in effect based on a different case and on a different basis from that asserted here and therefore the challenges to these ordinances in this case should be dismissed. However, they concede that they are appealing the court's final judgment vacating them. These challenges should not be dismissed on this ground in the absence of the Federal Defendants withdrawing

those appeals because it is a possibility that the judgment vacating them on those other grounds may be reversed on appeal.

Even if the 2002 and 2007 gaming ordinances remain vacated the proposed amended complaint also challenges the 2009 gaming ordinance of the Seneca Nation as approved by the NIGC and this cause of action should not be dismissed and amendment of this cause of action is not futile. For example if the 2009 ordinance approval is vacated then the 2007 ordinance becomes effective. Likewise if the 2007 ordinance approval is vacated the 2002 ordinance then becomes effective again, except for its applicability to Erie County because the 2002 ordinance as it relates to Erie County was vacated by the decision in *Citizens Against Casino Gambling v. Kempthorne*, 471 F. Supp. 2d 295, 328-329 (W.D.N.Y. 2007).

THE STATE DEFENDANTS' ALTERNATE ARGUMENT FOR AFFIRMANCE FAILS AS A MATTER OF LAW

The State Defendants argue that the District Court's judgment should be affirmed insofar as it dismissed them from this action based on their affirmative defense of res judicata (NY Br. Pages 23-24). In New York, res judicata applies when (1) "there is a judgment on the merits rendered by a court of competent jurisdiction," (2) "the party against whom the doctrine is invoked was a party to the previous action", and (3) the subsequent litigation is based upon "the same

transaction or series of connected transactions." *People ex. rel. Spitzer v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 122, 894 N.E.2d 1, 12, 863 N.Y.S.2d 615, 626 (2008) (internal quotation marks and citation omitted).

Res judicata does not apply in this case because the prior state court action did not result in a judgment on the merits. Noticeably absent from the State Defendants' argument is any assertion that the judgment in this prior action was rendered on the merits. In fact the judgment entered in the prior action does not even contain the recitation that it was "on the merits" or "with prejudice" but rather it granted the Oneida Indian Nation's motion to dismiss for lack of jurisdiction (A-98 – A-101). Therefore the State Supreme Court determined it was not a court of competent jurisdiction. (See 10 Weinstein-Korn-Miller, NY Civ Prac P 5011.11, at 50-116 (2d ed) ("Whereas a dismissal based on the statute of limitations or statute of frauds grounds is a determination that the matter is irremediably flawed as a matter of law, it is equivalent to a determination on the merits for res judicata purposes. At the opposite end of the spectrum, dismissal for prematurity, lack of standing, absence of ability of the court to proceed by reason of a defect in jurisdiction over subject matter or person or other forms of procedural inadequacy unique to the particular case in the particular forum are not intended to have any determinative effect 'on the merits' of the action")).

THE DISTRICT COURT ERRED IN DETERMINING THAT IT WAS FUTILE TO ADD THE PROPOSED DEFENDANTS ON THE GROUND OF THE PURPORTED SOVEREIGN IMMUNITY OF THE SENECA NATION OF INDIANS

The Federal Defendants argue that since 5 U.S.C. § 551(1) does not include the Seneca Nation and its officers and they are not necessary and indispensible parties to this lawsuit pursuant to *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1253-59 (10th Cir. 2001) (US Br. Page 54 ¶ 1). However, this does not preclude the joinder of the Seneca Gaming Corporation, its officers, the officers of the Seneca Nation of Indians or the officers of the State of New York as proper parties. If this APA cause of action can be dismissed for failure to join a necessary and indispensible party then it is also permissible to join a proper party who is not necessary or indispensible. Similarly non-federal entities have been allowed to intervene in APA actions (i.e. *Wyandotte Nation v. Salazar*, 2012 U.S. Dist. LEXIS 51066 (D. Kan. Apr. 11, 2012)). The Seneca Gaming Corporation, its officers and the officers of the Seneca Nation and State of New York are proper parties to this action since it involves the approval of the tribal-state compact between the Seneca Nation of Indians and the State of New York as managed and operated by the Seneca Gaming Corporation and approved by the Secretary of the Interior and subject to the gaming ordinance approved by the NIGC.

The Federal Defendants assert that since Plaintiff does not seek injunctive relief that *Ex parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908) is inapplicable (U.S. Br. Page 33 fn 7). However, Ex Parte Young, supra, allows prospective relief not merely injunctive relief. See *Rosenberger v. N.Y. State Office of Temp. & Disability Assistance*, 153 Fed. Appx. 753, 754 (2d Cir. N.Y. 2005). *Garcia v. Akwesasne Hous. Auth*., 268 F.3d 76, 87 (2d Cir. 2001) simply does not stand for the principle the Federal Defendants assert it does.

Not even the Seneca Nation of Indians in their amicus brief argues on this appeal that sufficient evidence exists in the record of this case to demonstrate that The Seneca Gaming Corporation can be determined an arm of the tribe as a matter of law to render their addition as party defendants futile except to point to cases where this issue was not litigated and ended favorably to the SGC on this issue.

While the Seneca Nation of Indians may not have been required to go through the recognition procedures set forth in 25 CFR Part 83 the failure to undergo a more formal recognition process affects the deference to be accorded the Department of the Interior's determination that it is federally recognized. The District Court erred in not addressing this issue that was presented to it. Even assuming that this issue was not raised in the district court, which plaintiff does not concede, this Court in *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 302 (2d Cir. 1996) held that it may consider an issue raised for the first time on appeal if

there is no need for additional fact finding. The issue of whether or not the Seneca Nation of Indians met their burden of pleading and proving that it was a sovereign entitled to sovereign immunity as a matter of law to render the amendment to add its president and the officers of the Seneca Gaming Corporation futile is a question of law.

WHATEVER SOVEREIGN IMMUNITY THE SENECA GAMING CORPORATION HAS WAS WAIVED BY THE "SUE AND BE SUED" CLAUSE IN ITS CHARTER

In construing a sue and be sued clause in relation to a federal agency the U.S. Supreme Court held that "it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be." *Franchise Tax Bd. v. United States Postal Service,* 467 U.S. 512, 518 (U.S. 1984). It is contrary to logic that more would be required of an Indian nation or tribe to waive the sovereign immunity of one of its entities that it has launched into the commercial world and endowed it with the authority to "sue or be sued" and restrictions on that authority are to be implied. Particularly since it has long been settled law that retained tribal sovereign immunity, as long as this accidental doctrine exists, is co-extensive with that of the United States. See *United States v. United States Fidelity & Guaranty Co*., 309 U.S. 506, 512; *Ramey Constr. Co. v. Apache Tribe,* 673 F.2d 315, 319-20.

CONCLUSION

For the reasons set forth above the Judgment of the District Court should be vacated, the Federal and State Defendants respective motions to dismiss should be denied and Plaintiff's motion to amend, supplement and add parties should be granted and this action remanded to the District Court for further proceedings.

DATED: November 6, 2012
Buffalo, New York

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