



Upstate Citizens for Equality
Niagara Frontier Chapter
836 Indian Church Road
West Seneca, NY 14224-1235
<http://www.upstate-citizens.org>

October 16, 2006

Hon. David A. Franczyk
Buffalo Common Council
1315 City Hall
Buffalo, NY 14202

Fax: 716-851-4234

RE: Proposed Agreement with Seneca Erie Gaming Corporation, Seneca Gaming Corporation
and Seneca Nation

Dear Council President Franczyk:

On behalf of the members of Upstate Citizens for Equality that reside in your city I am writing to you regarding the recent agreement reached between Mayor Brown and the Senecas regarding the sale of Fulton Street. I would like to call your attention to certain issues regarding this agreement that may materially affect its enforceability and its purported benefits to the City of Buffalo.

Regardless of whether the actions challenging the casino are successful or not you may still have sovereign Indian land within the boundaries of your City. This agreement is insufficient to protect the City and its constituents in that it may not be enforceable and fails to address other key issues.

The agreement terminates in certain respects upon the termination of the compact between the State of New York and the Seneca Nation. Since there will be Indian land under the jurisdiction and control of the Seneca Nation of Indians whether or not there is a casino pursuant to the state compact this agreement should be for as there is such land within the City of Buffalo.

In Section 10(I) of this agreement it states that a prevailing party may bring an action solely and exclusively in the United States District Court for the Western District of New York. This should be revised to provide that such an action be brought in a court of competent jurisdiction. Parties cannot create subject matter jurisdiction by agreement. See *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir.1984). In addition, the mere fact that a dispute concerns a contract or an agreement to arbitrate, without more, does not raise a federal question. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 395 (5th Cir. Unit B Feb.1981) n9 (noting that the Federal Arbitration Act alone is insufficient to confer federal jurisdiction over disputes involving arbitration agreements, and that an independent basis of jurisdiction--such as diversity or a federal question--is required).

Additionally despite provisions of the agreement calling for the payment of invoices Section 10(H) specifically precludes monetary damages as a remedy for any breach of this agreement. This section needs to be modified to guarantee a claim for the payment of money in the event the payments of invoices are not made as agreed to.



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Since in the agreement the Nation only waived its sovereign immunity to claims brought in the United States District Court for the Western District Court the City may be left with a right without a remedy that is enforceable.

The agreement also does not limit the amount of land that the Nation can acquire and place in trust or restricted fee status in a binding manner. Therefore the Nation can acquire an unlimited amount of land on the open market and apply to have it taken into trust or restricted fee status. The Seneca Nation Settlement Act is not the only avenue for having this accomplished. Under the current state of the law the Nation could have this accomplished through the Indian Reorganization Act of 1934 (25 U.S.C. § 465; 25 CFR Part 151). Although the State of New York has objected to the application of this act to land in the State relative to the applications of the Oneida Indian Nation of New York and the Cayuga Indian Nation of New York it has not been ruled upon by any court and is therefore an open question. (See <http://www.dec.state.ny.us/website/ogc/oneida/platkin.pdf> and <http://www.dec.state.ny.us/website/ogc/cayuga/platkin.pdf>) Additionally any limitation that is imposed in section 9(c) is only to the extent that such land would be used for gaming purposes which means that land can be acquired for other commercial purposes using Seneca Nation Settlement Act funds.

The agreement fails to provide for any binding agreement or means to either prohibit non-gaming commercial activities on this land or alternatively provide collection of sales and compensating use taxes from non-members of the Seneca Nation and payments in lieu of taxes for land acquired for non-gaming purposes.

There is no provision in this agreement to compensate the City for the payment of any property damage, workers' compensation or disability costs for any firefighter or police officer that is injured while responding to a call on Seneca Nation property or overtime or other expenses necessitated by any response to the Seneca Nation's land by City personnel.

I urge Your Honorable body to not take any action approving this agreement in its current form for the reasons set forth above.

Sincerely,

Daniel T. Warren
Chair
Niagara Frontier Chapter of Upstate Citizens for Equality