

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK

3 DANIEL T. WARREN)

4 Plaintiff,)

5 vs.)

6 UNITED STATES OF AMERICA, individually, and)
7 as trustee of the goods, credits and chattels of the)
8 federally recognized Indian nations and tribes)
9 situated in the State of New York;)

10 DIRK KEMPTHORNE in his official capacity as)
11 Secretary of the U.S. Department of the Interior;)

12 CARL J. ARTMAN, in his official capacity as the)
13 Assistant Secretary of the Interior for Indian)
14 Affairs;)

15 UNITED STATES DEPARTMENT OF THE)
16 INTERIOR;)

17 PHILIP N. HOGEN, in his capacity as Chairman of)
18 the National Indian Gaming Commission;)

19 NATIONAL INDIAN GAMING COMMISSION;)

20 ELIOT SPITZER, as Governor of the State of New)
21 York;)

22 DANIEL D. HOGAN, as Chairwoman, of the New)
23 York State Racing and Wagering Board;)

24 MAURICE A. JOHN, as President of the Seneca)
25 Nation of Indians,)

E. BRIAN HANSBERRY, as President and Chief)
Executive Officer of Seneca Gaming Corp.,)

SENECA NATION OF INDIANS; and)

SENECA GAMING CORPORATION)

Defendants)

SUPPLEMENTAL AND AMENDED VERIFIED
CIVIL COMPLAINT

Case # 06-CV-00226 E(SR)

JURISDICTION AND VENUE

1. That this court has subject matter jurisdiction of this action which is founded on the existence of a Federal question pursuant to 28 U.S.C. §§ 1331, 1361.

1 2. Venue is vested in the United States District Court for the Western District of New York
2 pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 703.

3 3. This action arises under the Constitution and the laws of the United States; 10th
4 Amendment to the United States Constitution; Article 1, § 8, Clause 3 of the United
5 States Constitution (Indian Commerce Clause); 5th Amendment to the United States
6 Constitution; Administrative Procedure Act (APA), 5 U. S. C. § 551 et. seq., Indian
7 Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 et seq., and seeks injunctive and
8 declaratory relief pursuant to 28 U.S.C. §§ 2201, 2202; as hereinafter more fully appears.
9

10 **FACTUAL ALLEGATIONS**

11 4. Plaintiff, Daniel T. Warren is a resident of the Town of West Seneca, County of Erie and
12 State of New York and resides within 6 miles of the proposed gambling casino.

13 5. Plaintiff owns property in the Town of West Seneca, County of Erie, State of New York
14 and pays New York State Income Taxes, Town and County property taxes on property
15 with an assessed value of more than \$1,000.00 and sales taxes on all purchases made
16 within the State of New York.

17 6. Plaintiff works full time in the City of Buffalo, County of Erie and State of New York
18 within 1.5 miles of the proposed gambling casino and is concerned about the increased
19 risks and effects a gambling casino will have on him and his environment which includes,
20 but is not limited to: the blight that such a facility may cause him to be exposed to,
21 exposure to, and the increased risk of being a victim of, crime that will emanate from
22 such a facility, the lack of parking and the increase in traffic and its attendant risks, air
23 pollution and noise as well as other negative environmental, health and social
24 consequences that are attendant by the proposed development and use of the subject
25 lands. He is also concerned about the integrity of the laws of the United States and the
State of New York and wishes to assure those laws are carried out.

1 7. Attached hereto and incorporated by reference marked as Exhibit "A" is a copy of
2 "Measuring Industry Externalities: The Curious Case of Casinos and Crime" by Earl L.
3 Grinols and David B. Mustard. This study concludes that 8% of crime in counties with a
4 casino is attributable to casinos and that this increased crime results in an annual cost of
5 \$65 per adult. The data also indicates that casinos create crime and not merely move it
6 from one area to another.

7
8 8. Attached hereto and incorporated by reference marked as Exhibit "B" is a copy of a July
9 2004 report from the United States Department of Justice, Office of Justice Programs,
10 National Institute of Justice entitled "Gambling and Crime Among Arrestees: Exploring
11 the Link." This report concludes that compulsive or pathological gamblers represent only
12 a small percentage of the general population. Yet those who meet APA's definition for
13 pathological gambling accounted for slightly more than 1 in 10 arrestees surveyed in Las
14 Vegas and about 1 in 25 in Des Moines. Together, 14.5 percent of arrestees in Las Vegas
15 and 9.2 percent of those in DesMoines were either problem or pathological gamblers --
16 three to five times the percentage in the general population. Also more than 30 percent of
17 pathological gamblers who had been arrested in Las Vegas and Des Moines reported
18 having committed a robbery within the past year, nearly double the percentage for low-
19 risk gamblers. Nearly one-third admitted that they had committed the robbery to pay for
20 gambling or to pay gambling debts. In addition, about 13 percent said they had assaulted
21 someone to get money. Nearly 40 percent had committed more than one theft in the past
22 year, four times the number of arrestees without either a gambling or a substance use
23 problem. Approximately 38 percent of arrestees with both gambling and substance use
24 problems reported having sold drugs, nearly eight times the number of those with no
25 gambling or substance use problem. One of the key conclusions of this report is that
arrestees who report that they are or can be defined by their responses to interviews or

1 questionnaires as compulsive or pathological gamblers are drawn disproportionately from
2 the social and economic fringes of society. As legalized gambling spreads to States and
3 localities that do not now permit gambling or have it only on a small scale, these
4 jurisdictions must prepare to deal with the social ills engendered by problem gambling.

5 9. Defendant Dirk Kempthorne in his official capacity as Secretary of the U.S. Department
6 of the Interior is charged with the duty of carrying out the declared trust responsibility of
7 the United States towards Indian nations and tribes. Under the Indian Gaming Regulatory
8 Act (IGRA), 25 U.S.C. § 2701, et seq., the Secretary has the authority to approve or
9 disapprove Indian gaming compacts that are governed by the Act, or to allow such
10 compacts to be considered to have been approved. Under the Seneca Nation Settlement
11 Act of 1990, 25 U.S.C. § 1774, et seq., the Secretary has the authority to subject lands
12 acquired by the Seneca Nation of Indians (“SNI”) to the provisions of Section 2116 of the
13 Revised Statutes, 25 U.S.C. § 177, and “depending on the proximity of the land acquired”
14 to expand the boundaries of existing SNI reservations at Allegany, Cattaraugus and Oil
15 Spring in accordance with established procedures for that purpose.

16
17 10. Defendant United States of America has waived sovereign immunity to actions, such as
18 the instant action, seeking declaratory and injunctive relief pursuant to 5 U.S.C. § 702.

19 11. Defendant James Cason is the Acting Assistant Secretary of the Interior for Indian
20 Affairs. In that capacity he oversees the Bureau of Indian Affairs within the U.S.
21 Department of the Interior, and he may exercise the Secretary of the Interior’s delegated
22 authority for decisions affecting Indian Affairs.

23
24 12. Defendant United States Department of the Interior is a Cabinet-level agency of the
25 United States government.

- 1 13. Defendant Philip N. Hogen is the Chairman of the National Indian Gaming Commission.
2 The Chairman has the authority to approve tribal ordinances authorizing Class III gaming
3 on “Indian lands” under Section 11 of the IGRA, 25 U.S.C. § 2710.
- 4 14. Defendant National Indian Gaming Commission is a federal agency established within
5 the U.S. Department of the Interior by Section 5 of the IGRA, 25 U.S.C. § 2704.
- 6 15. Defendant Eliot Spitzer is currently the duly elected Governor of the State of New York.
- 7 16. Daniel D. Hogan is the duly appointed Chairwoman of the New York State Racing and
8 Wagering Board.
- 9 17. Maurice A. John, is the duly elected President of the Seneca Nation of Indians.
- 10 18. E. Brian Hansberry, is the duly appointed President and Chief Executive Officer of
11 Seneca Gaming Corp.,
12
- 13 19. The Seneca Nation of Indians is a federally recognized Indian nation by the U.S. Bureau
14 of Indian Affairs.
- 15 20. Seneca Gaming Corp., is a corporation chartered and existing under the laws of the
16 Seneca Nation of Indians with its principle place of business located at 310 Fourth St. in
17 the City of Niagara Falls, County of Niagara and State of New York.
- 18 21. On October 24, 2001 the NYS Legislature passed bill S5828 & A9459 which ultimately
19 became law and recorded in Chapter 383 of the Laws of 2001.
- 20 22. This bill was for twenty seven different purposes ranging from providing low cost
21 electricity to businesses dislocated by the events of 9-11 to establishing tourism
22 councils.
23
- 24 23. The portion of this bill/act which is the subject of this action is Part B. This part added
25 a new § 12 to the Executive Law, added a New Section 99-h to the State Finance Law,
and amended section 225.30 of the Penal Law.

1 24. This act purported to authorize the Governor of the State of New York to negotiate and
2 enter into tribal-state compacts with Indian nations and tribes for 6 casinos. Three of
3 these casinos would be operated by the Seneca Nation of Indians consistent with the
4 “memorandum of understanding between the governor and the president of the Seneca
5 Nation of Indians executed on June twentieth, two thousand one and filed with the
6 department of state on June twenty-first, two thousand one.” With up to three other
7 “Class III gaming facilities in the counties of Sullivan and Ulster”
8

9 25. On or about the 10th day of September, 2002 a compact was executed by former
10 Governor Pataki and the President of the Seneca Nation of Indians (hereinafter SNI)
11 that purports to be a compact under the Indian Gaming Regulatory Act that will permit
12 Class III gaming at three locations in the State of New York.

13 26. The compact also provides that a Casino will be located within the County of Erie, New
14 York.

15 27. The compact requires the use of Seneca Nation Settlement Act funds to acquire the land
16 within Erie County for the site of the proposed casino. (Compact ¶¶ 11(b)(3), 11(a)(2))

17 28. On or about October 24, 2002, Secretary Norton announced that she would, in
18 accordance with § 11(d)(8)(C) of IGRA, neither approve or disapprove the Class III
19 gaming compact between the Seneca Nation of Indians and the State of New York and
20 that the compact is considered to have been approved, but only to the extent that its
21 terms comply with the requirements of IGRA.
22

23 29. On or about October 25, 2002, the SNI acquired approximately 12.8 acres of land in
24 downtown Niagara Falls, New York, known as the Niagara Falls Convention and Civic
25 Center Property, from the New York State Urban Development Corporation for a
purchase price of \$1.00. These lands [hereinafter “the Niagara Site”] were identified in
Appendix I of the Compact as the site of Gaming Facilities.

- 1 30. On or about the same day, the SNI leased the Niagara Site to the New York State Urban
2 Development Corporation n/k/a Empire State Development Corporation. Also on the
3 same day, the New York State Urban Development Corporation n/k/a Empire State
4 Development Corporation subleased the Niagara Site to the Seneca Gaming
5 Corporation.
- 6 31. On October 29, 2002, the SNI requested the Secretary of the Interior to have the
7 Niagara Site placed into restricted fee status pursuant to Section 8(c) of the Seneca
8 Nation Settlement Act of 1990, 25 U.S.C. § 1774f(c). That subsection states in pertinent
9 part, “Unless the Secretary determines within [a certain time period] that such lands
10 should not be subject to the provisions of Section 2116 of the Revised Statutes (25
11 U.S.C. § 177), such lands shall be subject to the provisions of that Act, and shall be held
12 in restricted fee status by the Seneca Nation.”
- 13 32. On November 12, 2002 Secretary Norton declined to approve or disapprove of the
14 Compact between the State of New York and the Seneca Nation of New York.
15 Attached hereto and marked as Exhibit “C” is a copy of Secretary Norton’s letter to
16 Seneca Nation President Schindler.
- 17 33. On or about November 25, 2002, the SNI submitted a Class III Gaming Ordinance to
18 the National Indian Gaming Commission for approval. The gaming ordinance was
19 accompanied by a copy of the Compact. By letter of November 26, 2002, to the SNI
20 President, the Chairman of the National Indian Gaming Commission approved the SNI
21 Class III Gaming Ordinance. The letter stated: “It is important to note that the gaming
22 ordinance is approved for gaming only on Indian lands, as defined in the IGRA, over
23 which the Nation has jurisdiction.”
- 24 34. On November 29, 2002, Neal A. McCaleb, then the Assistant Secretary –Indian Affairs,
25 concurred in a recommended decision of the BIA that he declined to make a finding

1 that the Niagara Site should not be subject to the provisions of 25 U.S.C. § 177.

2 Attached hereto and marked as Exhibit “D” is a copy of this decision and concurrence.

3 35. Attached hereto and marked as Exhibit “E” is the July 9, 2003 testimony of Aurene
4 Martin, Acting Assistant Secretary – Indian Affairs before the United States Senate
5 Committee on Indian Affairs. This document was obtained from the Department of
6 Interior’s website (<http://www.doi.gov/ocl/2003/IndianGaming.htm>) and this Court is
7 requested to take judicial notice of it. In this testimony Assistant Secretary Martin
8 testified that only three section 20(b)(1)(a) approvals have been granted since the
9 enactment of the IGRA (Ex. E page 3 ¶ 4). She further testified that those three
10 approvals were for “the Forest County Potawatomi gaming establishment in
11 Milwaukee, Wisconsin; the Kalispel Tribe gaming establishment in Airway Heights,
12 Washington; and the Keweenaw Bay Indian Community gaming establishment near
13 Marquette, Michigan.” (Ex. E page 3 ¶ 2).

14
15 36. In or about October 2003, the Seneca Gaming Corporation or those in privity, or acting
16 in concert with it acquired land in Niagara Falls, New York on the south side of
17 Niagara Street for a price of \$2 million of which, upon information and belief, none of
18 this money where funds from the Seneca Nation Settlement Act of 1990.

19
20 37. On or about October 13, 2003 the Seneca Gaming Corporation sold the property on the
21 south side of Niagara Street in Niagara Falls, New York to the Seneca Nation of Indians
22 for \$1. This dollar was from the funds established under the Seneca Nation Settlement
23 Act of 1990.

24 38. In or about October 2003, the Seneca Gaming Corporation or those in privity, or acting
25 in concert with it acquired land in Niagara Falls, New York on the east side of Fourth
Street for a price of \$1.8 million of which, upon information and belief, none of this
money where funds from the Seneca Nation Settlement Act of 1990.

- 1 39. On or about October 13, 2003 the Seneca Gaming Corporation sold the property on the
2 east side of Fourth Street in Niagara Falls, New York to the Seneca Nation of Indians
3 for \$1. This dollar was from the funds established under the Seneca Nation Settlement
4 Act of 1990.
- 5 40. In or about February 2004, the Seneca Gaming Corporation or those in privity, or acting
6 in concert with it acquired land in Niagara Falls, New York on the both sides of Fifth
7 Street for a price of \$180,000.00 of which, upon information and belief, none of this
8 money where funds from the Seneca Nation Settlement Act of 1990.
- 9 41. On or about February 3, 2004, the Seneca Gaming Corporation sold the property on
10 both sides of Fifth Street in Niagara Falls, New York to the Seneca Nation of Indians
11 for \$1. This dollar was from the funds established under the Seneca Nation Settlement
12 Act of 1990.
- 13 42. On or about April 26, 2004, the SNI submitted an amended Class III Gaming Ordinance
14 to the National Indian Gaming Commission for approval. The gaming ordinance was
15 accompanied by a copy of the Compact. By letter of May 20, 2004, to the SNI
16 President, the Chairman of the National Indian Gaming Commission approved the SNI
17 Class III Gaming Ordinance.
- 18 43. In or about June 2004, the Seneca Gaming Corporation or those in privity, or acting in
19 concert with it acquired land in Niagara Falls, New York on the east side of Fifth Street
20 for a price of \$127,500.00 of which, upon information and belief, none of this money
21 where funds from the Seneca Nation Settlement Act of 1990.
- 22 44. On or about June 30, 2004, the Seneca Gaming Corporation sold the property on the
23 east side of Fifth Street in Niagara Falls, New York to the Seneca Nation of Indians for
24 \$10. This money was from the funds established under the Seneca Nation Settlement
25 Act of 1990.

- 1 45. In or about September 2004, the Seneca Gaming Corporation or those in privity, or
2 acting in concert with it acquired land in Niagara Falls, New York on the corner of
3 Fourth Street and Niagara Street for a price of \$3.95 million of which, upon information
4 and belief, none of this money where funds from the Seneca Nation Settlement Act of
5 1990.
- 6 46. On or about September 22, 2004 the Seneca Gaming Corporation sold the property on
7 the east side of Fourth Street in Niagara Falls, New York to the Seneca Nation of
8 Indians for \$1. This dollar was from the funds established under the Seneca Nation
9 Settlement Act of 1990.
- 10 47. On or about July 27, 2005, Penny Coleman, Acting General Counsel of Defendant
11 National Indian Gaming Commission testified before the Senate Committee on Indian
12 Affairs. Attached hereto and marked as Exhibit "F" is a copy of her testimony.
- 13 48. On or about July 27, 2005, George T. Skibine, Acting Deputy Assistant Secretary –
14 Indian Affairs For Policy And Economic Development of Defendant Department of
15 Interior, testified before the Senate Committee on Indian Affairs. Attached hereto and
16 marked as Exhibit "G" is a copy of his testimony.
- 17 49. In or about July 2005 the Federal Defendants launched a full-scale review of every
18 tribal casino to ensure they are operating within the law.
- 19 50. That prior to July 2005 the Defendants did not have a system to track the land status of
20 all 404 tribal casinos and identify new concerns. The goal of this full-scale review is to
21 determine whether the casinos are operating on Indian lands as defined by the Indian
22 Gaming Regulatory Act of 1988.
- 23 51. Upon information and belief, the comprehensive review comes in response to
24 Defendants' internal criticisms. In a report, the Interior Department's Inspector General
25

1 found at least 10 instances of tribes operating casinos on land that was taken into trust
2 without following the IGRA process.

3 52. Plaintiff made numerous complaints and submissions to the Defendants individually
4 and as a member and officer of a group known as Upstate Citizens for Equality.

5 53. On or about July 29, 2005 Plaintiff sent an e-mail to Penny Coleman, Acting General
6 Counsel for Defendant National Indian Gaming Commission. Attached hereto and
7 marked as Exhibit "H" is a true copy of this e-mail.

8 54. By e-mail dated August 1, 2005 in which Penny Coleman responded: "Thank you for
9 your email which sets forth your views on the status of the Seneca Nation lands. We
10 will take a look at this issue as we progress on our Indian lands system."

11 55. On or about August 14, 2005 plaintiff received a response to his FOIA request for "all
12 records pertaining to all decisions, determinations, or rulings that gaming on lands
13 acquired after October 17, 1988 is permitted for the land occupied by the Turning Stone
14 Casino and Resort and the Seneca Niagara Casino along with any supporting documents
15 submitted" from the Records Access Officer of Defendant National Indian Gaming
16 Commission. Attached hereto and marked as Exhibit "I" is a true copy of this response.

17 56. On or about August 31, 2005, plaintiff received a response to his letter dated July 7,
18 2005 to the Defendant Department of Interior. Attached hereto and marked as Exhibit
19 "J" is a true copy of this response.

20 57. Upon information and belief, on or about October 3, 2005, the Seneca Gaming
21 Corporation or those in privity, or acting in concert with it acquired approximately 9
22 acres of land in downtown Buffalo, New York, bounded by Michigan Avenue, South
23 Park Avenue, Perry Street and Marvin Street for a price of \$4.6 million of which, upon
24 information and belief, none of this money where funds from the Seneca Nation
25 Settlement Act of 1990. These lands [hereinafter "the Buffalo Site"] are within the

1 geographic area designated in Paragraph 11, subparagraphs (a)(2) and (b)(1), of the
2 Compact as the site of Gaming Facilities.

3 58. On or about October 13, 2005 the Seneca Gaming Corporation sold the Buffalo Site to
4 the Seneca Nation of Indians for \$4. The \$4 was from the funds established under the
5 Seneca Nation Settlement Act of 1990.

6 59. Upon information and belief, on or about October 3, 2005, the SNI requested the
7 Secretary of the Interior to have the Buffalo Site placed into restricted fee status
8 pursuant to Section 8(c) of the Seneca Nation Settlement Act of 1990, 25 U.S.C. §
9 1774f(c). That subsection states in pertinent part, “Unless the Secretary determines
10 within [a certain time period] that such lands should not be subject to the provisions of
11 Section 2116 of the Revised Statutes (25 U.S.C. § 177), such lands shall be subject to
12 the provisions of that Act, and shall be held in restricted fee status by the Seneca
13 Nation.”

14 60. On or about October 19, 2005, plaintiff submitted through the Department of Interior’s
15 website via the Defendant’s comment form located at <http://www.doi.gov/contact.html>.
16 A copy of the acknowledgement receipt is attached hereto and marked as Exhibit “K”
17

18 61. Upon information and belief, on or about December 3, 2005, defendant James Cason,
19 Acting Assistant Secretary – Indian Affairs, or another official of the defendant
20 Department of the Interior acting in his stead, either declined or concurred in a
21 recommendation that he decline to make a finding that the Buffalo Site should not be
22 subject to the provisions of 25 U.S.C. § 177.
23

24 62. On or about August 12, 2006, the SNI submitted an amended Class III Gaming
25 Ordinance to the National Indian Gaming Commission for approval. The gaming
ordinance was accompanied by a copy of the Compact. By letter of November 6, 2006,

1 to the SNI President, the Chairman of the National Indian Gaming Commission
2 approved the SNI Class III Gaming Ordinance.

3 63. The Seneca Nation of Indians has acquired Fulton Street in the City of Buffalo, County
4 of Erie and State of New York from the City of Buffalo in or about October 2006

5 64. By order and judgment of the United States District Court for the Western District of
6 New York dated January 12, 2007 the Decision of the Defendants Hogen and NIGC
7 dated November 26, 2002 was vacated, in part, and remanded to Defendants.
8

9 65. Upon information and belief on February 19, 2007, Governor Spitzer, pursuant to the
10 authority purportedly granted to him under New York Executive Law § 12(b) signed an
11 amendment to the gaming compact between the St. Regis Mohawk Tribe and New York
12 State pursuant to which the St. Regis Mohawk Tribe will open a Class III gaming
13 facility at the Monticello Raceway in Sullivan County, New York

14 66. On or about June 9, 2007, the SNI submitted an amended Class III Gaming Ordinance
15 to the National Indian Gaming Commission for approval. By letter dated July 2, 2007,
16 to the SNI President, the Chairman of the National Indian Gaming Commission
17 approved the amended SNI Class III Gaming Ordinance.
18

19 67. The Defendants have and are acting contrary to constitutional right, power, privilege, or
20 immunity and/or in excess of statutory jurisdiction, authority, or limitations, or short of
21 statutory right and/or without observance of procedure required by law and/or their
22 actions were arbitrary, capricious, an abuse of discretion, and not in accordance with
23 law.

24 68. Plaintiff has no adequate remedy at law to eliminate the threat of increased or enhanced
25 risk and restore his ability to hold his state leaders accountable for their actions and to
represent the people of the State of New York.

1 **AS AND FOR THE FIRST CAUSE OF ACTION**

2
3 69. Plaintiff re-alleges and incorporates herein the allegations in paragraphs 1 through 68
4 above.

5 70. Defendants acted contrary to constitutional right, power, privilege, or immunity in
6 approving the Compact.

7 71. In enacting the Indian Gaming Regulatory Act, Congress exceeded its authority under
8 the Indian Commerce Clause as limited by the 10th Amendment of the United States
9 Constitution in that it commandeers state officers and the state legislature to carry out
10 and implement federal policy regarding the economic development of Indian nations
11 and tribes by compelling them to enter into agreements that are prohibited by state law
12 and regulate gambling conducted pursuant to those agreements and the act is therefore
13 unconstitutional and exceeds Congress's authority under the Indian Commerce Clause
14 of the Constitution.
15

16
17 **AS AND FOR THE SECOND CAUSE OF ACTION**

18
19 72. Plaintiff re-alleges and incorporates herein the allegations in paragraphs 1 through 71
20 above.
21

22 73. If the Indian Gaming Regulatory Act is held to be constitutional the Compact is invalid
23 because it does not meet the requirement that a tribal-state compact can only be entered
24 into where located in a State that permits such gaming for any purpose by any person,
25 organization, or entity (25 U.S.C. § 2710(d)(1)(B)).

74. The compact is invalid and in further violation of the Indian Gaming Regulatory Act in
that it provides for games of chance that are prohibited in the State of New York which

1 includes, but is not limited to, slot machines that are illegal in the State of New York
2 and not permitted for any purpose by any person, organization, or entity.
3

4 **AS AND FOR THE THIRD CAUSE OF ACTION**
5

6 75. Plaintiff re-alleges and incorporates herein the allegations in paragraphs 1 through 74
7 above.
8

9 76. Part B of Chapter 383 of the Laws of 2001 is a private and/or local bill.

10 77. Part B of Chapter 383 of the Laws of 2001 is a special law.

11 78. Executive Law § 12 as enacted purports to delegate to the Governor the authority to
12 negotiate and enter into a tribal-state compact under the Indian Gaming Regulatory Act.

13 79. On or about the 10th day of September, 2002 a compact was executed by Governor
14 Pataki and the President of the Seneca Nation of Indians that purports to be a compact
15 under the Indian Gaming Regulatory Act that will permit Class III gaming at three
16 locations in the State of New York.

17 80. By the terms of this compact the State is required to expend funds and dispose of state
18 property to assist in the acquisition of property for the Seneca Nation of Indians.

19 81. The compact also requires that the State of New York reach agreements with the host
20 municipalities to compensate them for the increase in expenses they will incur as a
21 result of locating a Class III gaming facility therein.
22

23 82. The compact contains a provision where the fee title to the Niagara Falls Convention
24 Center and its land will be transferred to the Seneca Nation for \$1.00. The Nation will
25 then lease the convention center back to the state for \$1.00 a year for 21 years. The
State then sub-leases the convention center to the Seneca Gaming Corporation for \$1.00
a year for 21 years. At the end of 21 years the Seneca Nation will pay the State the

1 balance of the general obligation bonds pledged in connection with the convention
2 center as of July 1, 2002.

3 83. The compact also provides that a Casino will be located within the County of Erie, New
4 York.

5 84. The compact also requires the State to use its powers of eminent domain to assist in
6 acquiring property for the Seneca Nation of Indians to locate the subject gaming
7 casinos.

8 85. The compact also requires the State to give to the Seneca Nation of Indians exclusive
9 rights to install and operate gaming devices including slot machines within a defined
10 geographic area. That area is defined as “(i) to the east, State Route 14 from Sodus
11 Point to the Pennsylvania border with New York, (ii) to the north, the border between
12 New York and Canada, (iii) to the south, the Pennsylvania border with New York, (iv)
13 to the west the border between New York and Canada and the border between
14 Pennsylvania and New York.”

15 86. In 1993 New York State Racing and Wagering Board was purportedly given authority
16 to regulate Class III Indian gaming in the State.

17 87. According to the New York State Racing and Wagering Board, it “maintains a constant
18 twenty-four hour presence within the gaming facilities of the three Class III facilities to
19 maintain the integrity of all activities conducted in regard to Class III gaming, and to
20 insure the fair and honest operation of such gaming activities. Additionally, the State
21 conducts background investigations on all employees of the casino and enterprises who
22 conduct gaming related business with the casino to ensure their suitability.”

23 88. The challenged compact was not lawfully ratified by the Legislature of the State of New
24 York and therefore any compact entered into with any Indian nation or tribe pursuant to
25 it is not in effect under the Indian Gaming Regulatory Act.

1 89. Any compact entered into by the State of New York pursuant to Part B of Chapter 383
2 of the Laws of 2001 is not in effect under the Indian Gaming Regulatory Act in that the
3 State Legislature exceeded its power by ratifying this special law in violation of the
4 Home Rule provisions of Article IX of the New York State Constitution and the laws of
5 the State of New York.

6 90. Any compact entered into by the State of New York pursuant to Part B of Chapter 383
7 of the Laws of 2001 is not in effect under the Indian Gaming Regulatory Act in that the
8 State Legislature exceeded its power as limited by Article III § 15 of the State
9 Constitution which provides “No private or local bill, which may be passed by the
10 legislature, shall embrace more than one subject, and that shall be expressed in the
11 title.”

12 91. Any compact entered into by the State of New York pursuant to Part B of Chapter 383
13 of the Laws of 2001 is not in effect under the Indian Gaming Regulatory Act in that the
14 State Legislature exceeded its power as limited by Article III § 17 of the State
15 Constitution which prohibits the legislature from passing any private or local bill
16 “Granting to any private corporation, association or individual any exclusive privilege,
17 immunity or franchise whatever.”

18 92. The compact entered into by the State of New York with the Seneca Nation of Indians
19 pursuant to Part B of Chapter 383 of the Laws of 2001 is not in effect under the Indian
20 Gaming Regulatory Act in that it loans the State’s money or credit to or in aid of any
21 individual, or public or private corporation or association, or private undertaking in
22 violation of Article VII § 8 of the State Constitution.

23 93. If the Court finds that the Indian Gaming Regulatory Act is constitutional and Article I
24 § 9 of the New York Constitution is not pre-empted by federal law then the Compact is
25 not in effect under the Indian Gaming Regulatory Act in that it was entered into in

1 violation of the State Constitutional prohibition on commercial gambling contained in
2 Article I § 9 of the New York Constitution.

3 94. Plaintiff attempted to raise these issues in an action in the Supreme Court of the State of
4 New York, Erie County entitled Daniel T. Warren v. George E. Pataki, et al, Index #
5 2004-5270. This action was dismissed not on the merits, but for failure to join
6 necessary and indispensable parties on the motion of the State of New York and the
7 Oneida Indian Nation.

8 95. The state officials who authorized and entered into this tribal-state compact acted ultra
9 vires and in excess of their authority and the compact is not in effect as required by 25
10 U.S.C. § 2710(d)(1)(C).
11

12
13 **AS AND FOR THE FOURTH CAUSE OF ACTION**
14

15 96. Plaintiff re-alleges and incorporates herein the allegations in paragraphs 1 through 95
16 above.

17 97. Defendants are charged with the duty to promulgate and implement the United States
18 trust responsibility towards Indian Nations and tribes and their members which include
19 when and how lands acquired by the various Indian nations and tribes will be taken into
20 trust or restricted fee status and the duty to make the necessary determinations relative
21 to gaming on Indian lands and, if permitted, the monitoring and regulation of the on-
22 going conduct of such gaming.

23 98. Defendants are charged to carry out this duty consistent with the Constitution and Laws
24 of the United States which includes, but is not limited to, the duty to carry out its duties
25 according to due process of law.

1 99. The failure of Defendants to adhere to what regulations they have promulgated and their
2 failure to promulgate and implement regulations setting forth their longstanding policies
3 that are necessary to carry out their duties has resulted in ad hoc and irrational, arbitrary
4 and capricious decisions in determining land status and the applicability of the
5 provisions of the IGRA.

6 100. As testified to by Earl E. Devaney, the Inspector General for the Department of the
7 Interior before the U.S. Senate Committee on Indian Affairs on April 27, 2005 “We
8 determined that neither the BIA nor NIGC has a systematic process for identifying
9 converted lands or for determining whether the IGRA exemptions apply. Therefore,
10 unless a tribe abides by the rules and applies for approval, conversion of trust lands to
11 gaming purposes goes essentially unchecked. Neither the Department nor NIGC has a
12 way to ensure that Indian gaming is being conducted only on approved lands.”

13 Attached hereto and marked as Exhibit “L” is a true copy of this testimony.

14 101. As testified by Penny Coleman, Acting General Counsel of the National Indian Gaming
15 Commission before the U.S. Senate Committee on Indian Affairs on July 28, 2005,
16 “The Commission and the Department have been criticized by the Department’s Office
17 of Inspector General for failing to decide the Indian lands questions before a facility
18 opens and for failing to have a systematic approach to making such decisions. We share
19 the Inspector General’s concern on this. Good government requires that regulators know
20 the extent of their jurisdiction. Furthermore, if we decide that a tribe should not have
21 opened a facility because the lands did not qualify for gaming under the Act, extensive
22 litigation is guaranteed and, if the Commission is correct, the tribe will have incurred
23 millions of dollars in debt with few options for repaying the debt.”

24 102. On or about February 1, 2006 a hearing was held before the U.S. Senate Committee on
25 Indian Affairs at which George T. Skibine, the Bureau of Indian Affairs official in

1 charge of gaming, testified that he has circulated proposed regulations to cure the
2 aforementioned deficiencies. After further questioning by the Committee, Senator
3 McCain, the Chairman of the Committee, stated to Mr. Skibine "I'm a little dispirited
4 when you, sort of as an aside, said, 'Well, we haven't begun a consultation with the
5 Indian tribes over proposed regulations,'. . . That means that we have a long way to go."
6 Senator McCain further stated "I don't see how we can effectively regulate Indian
7 gaming, and certainly exercise Congressional oversight, unless there's regulations to
8 implement the law we passed. . ."

9
10 103. Senator Dorgan, Vice-Chairman of the Senate Committee on Indian Affairs at the
11 February 1, 2006 hearing stated "This is a controversial and difficult issue and I think
12 regulations are necessary, uniform interpretations are necessary. . ."

13 104. Mr. Skibine testified at the February 1, 2006 hearing before the Senate Committee on
14 Indian Affairs "As we do the consultation, we have not as this point figured out exactly
15 how we are going to proceed . . . At this point we haven't come up with a plan yet,
16 except that we will do it, for sure."

17 105. At this February 1, 2006 hearing Sen. John McCain and Sen. Byron Dorgan expressed
18 frustration with the slow-moving pace. They said it was unacceptable that the rules
19 aren't in place 17 years after the passage of the Indian Gaming Regulatory Act.

20 106. Additionally the Defendants' own internal criticism prompted a review of all 404
21 casinos to make sure they are operating legally.

22 107. These systemic issues have resulted in inconsistent, arbitrary and capricious decisions
23 such is the case at bar by failing to follow a procedure which satisfies elementary
24 standards of fairness and reasonableness essential to the due conduct of the proceeding
25 which Congress has authorized.

1 108. These systemic issues have resulted in the Federal Defendants approving gaming
2 ordinances and tribal-state compacts prior to a proper determination as to whether
3 gaming is permitted under 25 U.S.C. § 2710(d)(1)(C) or § 2710(d)(1)(b) and/or prior to
4 a proper determination as to whether or not gaming on land acquired, or to be acquired,
5 is permitted under 25 U.S.C. § 2719.

6 109. Just in this state the Defendants have allowed the Turning Stone Casino to continue to
7 operate absent a valid tribal-state compact on land acquired after October 17, 1988 and
8 not currently held in trust or restricted fee status.

9
10 110. In a letter dated June 4, 1993 the United States Department of the Interior advised the
11 Oneidas that the compact between the Oneidas and New York was approved and
12 advised the OIN that the “compact does not specifically refer to the site where we
13 understand the Nation has built a major new facility in anticipation of being able to
14 conduct gaming in the future. Since the compact tracks the “Indian lands” definition in
15 IGRA, we need not decide and take no position with regard to whether this new facility
16 is on “Indian land” as that term is used in IGRA”

17 111. In a July 13, 1993 article that appeared in The Buffalo News entitled “LAND-STATUS
18 ISSUE PUTS FUTURE OF ONEIDAS' CASINO IN QUESTION” by Associated Press
19 reporter William Kates, Michael Cox, then general counsel of the National Indian
20 Gaming Commission stated in regards to the status of the land where the Turning Stone
21 Casino is situated “It's a matter that needs to be resolved because it has interesting
22 ramifications. . . It could open a whole new way for Indian tribes to get into gaming and
23 have a major impact on where their gaming operations are located.” Mr. Cox further
24 stated that “It is an issue we are going to look into. . . We can't just not decide it.” In
25 regards to questions relating to the NIGC possibly closing the Turning Stone Casino
Mr. Cox stated “We are not interested in testing our authority.”

1 112. The New York Court of Appeals has declined to review a decision of the Appellate
2 Division, Fourth Department of the New York Supreme Court affirming a trial court's
3 ruling that the compact under which the Oneida Indian Nation of New York operates
4 the Turning Stone Casino as being illegal and unconstitutional and their petition for
5 certiorari to the United States Supreme Court has been denied.

6 113. Plaintiff complained of the lack of enforcement against this illegal gambling at Turning
7 Stone by e-mail on or about May 4, 2006. In response to this complaint Penny Coleman
8 as Acting General Counsel of Defendant NIGC by letter dated July 14, 2006 stated "We
9 appreciate you concern regarding gaming at Turning Stone in light of the State court
10 ruling. However, whether we choose to take enforcement action is part of an internal
11 decision-making process, which, at this time, is ongoing. We assure you that we are
12 giving this issue careful consideration and reviewing all of our options."

13 114. Despite these rulings of the New York Courts and complaints of others including
14 plaintiff the Defendants have failed to take any action on this obviously illegal
15 gambling.
16

17 115. Earl Devaney, the Inspector General for the United States Department of the Interior
18 testified before the House Government Reform subcommittee on Energy and Resources
19 in September 2006. He testified that "Simply stated, short of a crime, anything goes at
20 the highest levels of the Department of the Interior. Ethics failures on the part of senior
21 department officials -- in the form of appearances of impropriety, favoritism and bias --
22 have been routinely dismissed with a promise 'not to do it again.' . . . Numerous OIG
23 reports, which have chronicled such things as complex efforts to hide the true nature of
24 agreements with outside parties; intricate deviations from statutory, regulatory and
25 policy requirements to reach a predetermined end; palpable procurement irregularities;
massive project collapses; bonuses awarded to the very people whose programs fail; and

1 indefensible failures to correct deplorable conditions in Indian Country, have been met
2 with vehement challenges to the quality of our audits, evaluations and investigations. . .
3 Typically, the department has disputed a number of negligible details contained in our
4 reports, losing sight of -- or, perhaps intentionally eclipsing -- the greater issues, tainting
5 the whole of any given report with trifling details."

6
7 116. By letter dated March 15, 2007 the Federal Defendants notified the State Defendants
8 and the Oneida Indian Nation of New York that they were going to reconsider the June
9 4, 1993 approval of the tribal-state compact between them.

10
11 117. By letter dated June 13, 2007 the Federal Defendants concluded their reconsideration
12 and stated "IGRA provides no process to modify or revoke an approval after expiration
13 of the 45 day review period."

14
15 118. Despite the Federal Defendants assurances to Congress and repeated representations to
16 the plaintiff and the public that they have launched a full-scale review of every tribal
17 casino to ensure that they are operating within the law the Federal Defendants now
18 conclude that such review is not provided for under IGRA.

19
20 119. In fact the Federal Defendants November 26, 2002 approval of the Seneca Nation's
21 Gaming Ordinance was vacated in part due to the failure of the Federal Defendants to
22 make a proper determination that the land a tribal gaming facility is to be situated on is
23 gaming eligible under IGRA by Judge Skretny of the United States District Court for
24 the Western District of New York in a Decision and Order dated January 12, 2007 in
25 CACGEC, et al v. Kempthorne, et al, Case #06-CV-0001.

116. Defendants Hogen and the National Indian Gaming Commission has reduced their duty
to review and approve tribal gaming ordinances to a perfunctory approval with no real
or hard look at the proposed ordinances to determine if it in fact complies with the
IGRA including boiler plate language which merely states that the gaming must not be

1 inconsistent with the provisions of the IGRA which is the very thing it is suppose to
2 determine.

3 121. The Federal Defendants despite being given guidelines for the agency to follow in
4 exercising its enforcement powers under the IGRA have failed to follow them and/or
5 they have conspicuously and expressly adopted a general policy that is so extreme as to
6 amount to an abdication of their statutory responsibilities.

7
8 122. The defendants have failed to adhere to their own regulations and policies, make regular
9 inspections, or take vigorous inspections in order to carry out their enforcement duties
10 under the Indian Gaming Regulatory Act of 1988, the United States Trust Obligation
11 toward the Indian nations and tribes and their delegated authority under the President of
12 the United States and the constitutional command to insure that all laws are faithfully
13 executed.

14 123. Therefore, a writ of mandamus should issue against the Defendants compelling them to
15 perform their legal duties and obligations.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiff respectfully requests that the Court issue an Order and Judgment:

- 18
19 1. Declaring the Indian Gaming Regulatory Act as unconstitutional and in violation of the
20 10th Amendment of the United States Constitution.
21
22 2. Declaring Congress exceeded its authority under the United States Constitution in
23 enacting the Indian Gaming Regulatory Act.
24
25 3. Declaring that the Compact between the Seneca Nation of Indians and the State of New
York violates, in whole or in part, the Indian Gaming Regulatory Act and to the extent
that it is in violation of the act the Compact is not approved or in effect under the Indian
Gaming Regulatory Act.

- 1 4. Declaring that Article 1 § 9 of the New York Constitution is not preempted by the Indian
2 Gaming Regulatory Act.
- 3 5. Declaring all tribal-state compacts entered into by the State of New York with any Indian
4 nation or tribe as not in effect under the Indian Gaming Regulatory Act.
- 5 6. Declaring all tribal-state compacts entered into by the State of New York with any Indian
6 nation or tribe pursuant to N.Y Executive Law § 12 as not in effect under the Indian
7 Gaming Regulatory Act.
- 8 7. Declaring that a tribal-state compact entered into in violation of state law is not in effect
9 under the Indian Gaming Regulatory Act.
- 10 8. Declaring that the Secretary's decision dated November 12, 2002 not to disapprove the
11 Compact is in excess of statutory jurisdiction, authority, or limitations, or short of
12 statutory right and contrary to the IGRA and is arbitrary, capricious, an abuse of
13 discretion, and not in accordance with law.
- 14 9. Declaring that the Secretary's decision dated November 12, 2002 to allow the Compact to
15 be considered approved is in excess of statutory jurisdiction, authority, or limitations, or
16 short of statutory right and contrary to the IGRA, and is arbitrary, capricious, an abuse of
17 discretion, and not in accordance with law.
- 18 10. Declaring that the Commissioner of the Nation Indian Gaming Commission's decisions
19 dated November 26, 2002, May 20, 2004, November 6, 2006 and/or July 2, 2007 to
20 approve the Seneca Nation's gaming ordinance and its subsequent amendments was in
21 excess of statutory jurisdiction, authority, or limitations, or short of statutory right and
22 contrary to the IGRA, and is arbitrary, capricious, an abuse of discretion, and not in
23 accordance with law.
- 24 11. Setting aside the decisions of (a) the Secretary of the Interior dated November 12, 2002,
25 purporting to allow the Compact to be considered approved; and (b) the Chairman of the

1 National Indian Gaming Commission, approving the Seneca Nation Class III Gaming
2 Ordinance and approving its amended gaming ordinance dated November 26, 2002, May
3 20, 2004, November 6, 2006 and/or July 2, 2007.

4 12. Enjoining the Federal Defendants from approving or considering as approved any tribal-
5 state compact or any amendment to a tribal-state compact authorized by New York
6 Executive Law § 12.

7 13. Enjoining the Federal Defendants from approving any tribal-state or gaming ordinance
8 that involve land acquired after October 17, 1988 absent a determination that the land is
9 gaming eligible under 25 U.S.C. § 2719.

10 14. Enjoining the Federal Defendants to review each gaming facility operated by an Indian
11 nation or tribe and those in privity with them to determine whether or not it is situated on
12 land that is gaming eligible under 25 U.S.C. § 2719.

13 15. Enjoining the Federal Defendants to take, or refer for, enforcement action against any
14 Indian nation or tribe and those in privity with them in the State of New York under their
15 respective jurisdictions that is operating under a tribal-state compact that is not in effect
16 under the Indian Gaming Regulatory Act and is engaged in Class III gaming.

17 16. Enjoining the Federal Defendants to take, or refer for, enforcement action against any
18 Indian nation or tribe and those in privity with them that is operating a gaming facility on
19 land that is not gaming eligible under 25 U.S.C. § 2719.

20 17. Awarding Plaintiffs attorney's fees, expert witness fees and costs in this action pursuant
21 to the Equal Access to Justice Act.

22 18. Granting such other and further relief that the Court deems proper.
23
24
25

1 Dated October 4, 2007
2 Buffalo, New York

3 _____
4 Daniel T. Warren
5 Plaintiff, Pro Se
6 836 Indian Church Road
7 West Seneca, New York 14224-1235

8 **VERIFICATION**

9 I Daniel T. Warren, am the Plaintiff in the within action. I declare and affirm under the
10 penalty of perjury that I have read the foregoing complaint and know the contents thereof. The
11 contents are true to my own knowledge except as to matters therein stated to be alleged upon
12 information and belief, and as to those matters I believe them to be true.

13 Executed on: October 4, 2007 in Buffalo, New York

14 _____
15 Daniel T. Warren
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