SECTION III.

INDIAN GAMBLING

A. AN OVERVIEW OF INDIAN GAMBLING IN THE UNITED STATES

A number of Indian nations and tribes have claimed sovereign immunity from state regulation to offer gaming on their reservations. Initially, reservation based gaming was limited to high stakes bingo. More recently, several nations and tribes have opened casinos offering a vast array of table games and machines. This section will examine the legal basis for Indian gaming, the development of the gaming industry in Indian Country, and the potential impact of expanded Indian gaming in New York.

Of the more than 550 federally recognized Indian nations in the United States, only 147 are engaged in gaming under the terms of the federal Indian Gaming Regulatory Act (IGRA).[95] Estimated at between 5 and 7 percent of the whole gambling industry, tribal casinos are generating revenues estimated to range between $4 billion and $7 billion a year. In dollar terms, Indian gaming expanded by 1,600 percent between 1982 and 1992. Reservations provide 180,000 direct gaming jobs and 250,000 indirect jobs according to the National Indian Gaming Association, an Indian gaming organization.[96]

1. Sovereignty of Indian Nations and Tribes

The United States government has consistently recognized Indian tribes "as 'distinct political communities' qualified to exercise power of self-government, not by virtue of any delegation of powers, but by reason of their original tribal sovereignty."[97] The concept of tribal independence, subject to the paramount authority of the United States, is reflected in the United States Constitution, most notably, in the Indian Commerce Clause,[98] and the exclusion of "Indians not taxed" from the number of "free Persons" to be counted in determining representatives or apportioning direct taxes.[99]

In the 1830s, United States Supreme Court Chief Justice John Marshall analyzed the nature of the relationship between Indian tribes and the United States, and Indian tribes and the states.[100] The concept Chief Justice Marshall enunciated is that Indian tribes are "domestic dependent nations" that have a guardian-ward relationship with the United States, based upon the assumption by the United States of the role of "protector" of the Indian tribes, acknowledging and guaranteeing their

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[95]Pub. L. 100-497, Oct. 17, 1988, 102 Stat. 2467 [25 U.S.C. § 2701 *et seq.*].

[96]Rutherford, "*The Line of Battle*," Casino Journal, August 1996, p.41.

[97]Cohen, Handbook of Federal Indian Law, (1982 ed.) p. 232.

[98]Art. I, § 8, cl. 3.

[99]Art. I, § 2, cl. 3.

[100]Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832).

security as distinct political communities in exchange for their friendliness to the United States.[101] The Supreme Court held that the protectorate relationship did not extinguish tribal sovereignty, and tribes did not lose their status as sovereign governments. In fact, the United States assumed a fiduciary obligation to ensure the continued integrity of tribes as self-governing entities within certain territory.[102] This relationship was intended to preserve tribal government, and to insulate tribal governments from state interference in governance.

In summary, Worcester held that the political existence of the tribes continued after their relations with both the states and the federal government. As a consequence of the tribes' relationship with the federal government, tribal powers of self-government are limited by federal statutes, by the terms of treaties with the federal government, and by restraints implicit in the protectorate relationship itself. In all other respects, the tribes remain independent and self-governing political communities.[103]

2. Applicability of State Law in Indian Territory

"State law generally is not applicable to Indian affairs within the territory of an Indian tribe, absent the consent of Congress."[104] This inapplicability of state law extends to legislative enactments, judicial jurisdiction, and executive authority. "Federal protection of tribal self-government precludes either criminal or civil jurisdiction of state courts over Indians or their property absent the consent of Congress."[105]

While this principle applies in every state, New York historically has had a unique relationship with the tribes and nations residing on land within its borders. The early Dutch and English settlers cultivated a trade relationship with the Nations of the Iroquois Confederacy that occupied most of the northern and western parts of the State. While relations with the Iroquois were conducted in the name of the King of England, the actual management of affairs with the Iroquois was with the City of Albany. Eventually, the Crown assumed control of relations with the Iroquois on the ground that it was more a colonial than a municipal matter.[106]

It has been suggested that since colonial times, New York has assumed a self-defined role of "guardian of the Indians, in many ways analogous to the present role of the United States in

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[101] Cohen, at p. 234.

[102] Id.

[103] Id., at p. 235.

[104] Id., at p. 259.

[105] Id. at p. 349.

[106] Cohen, Handbook of Federal Indian Law, (1942 ed., reprinted 1986).

national Indian affairs."[107] It is clear that prior to 1942, New York assumed, and to some extent, exercised, jurisdiction over activities on reservations.[108] The decision of the Second Circuit Court of Appeals in United States v. Forness,[109] suggested that the State had absolutely no jurisdiction within the boundaries of the Iroquois territory. The Court held that "... state law cannot be invoked to limit the rights in lands granted by the United States to Indians, because ... state law does not apply to the Indians except so far as the United States has given its consent."[110] "[T]he Forness decision had undercut the notion that state exercises of power were valid in the absence of federal action."[111] In response to this decision, the State Legislature created the Joint Legislative Committee on Indian Affairs (JLC) to investigate the situation. In 1945, the JLC recommended bills for consideration by the United States Congress to grant New York general criminal and civil jurisdiction over Indian lands. Indian leaders in New York mostly opposed such a transfer of jurisdiction, raising a concern that it could lead to taxation of reservation lands.[112]

The United States Department of the Interior agreed with the transfer of general jurisdiction to the courts of New York, and the bills proposed by the JLC were introduced in Congress in 1947, and hearings were held. In 1948, Congress enacted a law granting New York State jurisdiction over offenses committed on reservations within the State.[113] The Act of September 13, 1950, c. 947, § 1, 64 Stat. 845 enacted 25 U.S.C. § 233, which granted the courts of New York State jurisdiction in civil actions and proceedings between Indians or between one or more Indians and other persons.

Subsequently, Congress enacted what is known as Public Law 280, which grants criminal and civil jurisdiction to six other states, and provides a mechanism for other states to acquire

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[107]Porter, *The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233,* 27 Harv. J. on Legislation 497, 500 (1990).

[108]Id., at pp. 500-506; Cohen (1982 ed.) at pp. 372-373.

[109]United States v. Forness, 125 F.2d 928 (2d Cir. 1942).

[110]Id., at p. 932.

[111]Gunther, *Governmental Power and New York Indian Lands - A Reassessment of a Persistent Problem of Federal State Relations*, 8 Buffalo L. Rev. 1, 15 (1958).

[112]Id.

[113]The Act of July 2, 1948, c. 809, 62 Stat. 1224 enacted 25 U.S.C. § 232, which reads as follows:

> The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State: Provided, That nothing contained in this section shall be construed to deprive any Indian tribe, band or community, or members thereof, hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights.

jurisdiction within Indian territory through their own legislative action.[114] While Public Law 280 is not identical to the grants of jurisdiction in 25 U.S.C. §§ 232 and 233, cases construing Public Law 280 are useful in ascertaining New York's jurisdiction under 25 U.S.C. §§ 232 and 233.[115]

There has been a great deal of litigation defining the scope of jurisdiction granted states by Public Law 280. In Bryan v. Itasca,[116] the United States Supreme Court held that Public Law 280 did not grant states general civil regulatory authority over Indian territory, but was limited to granting state courts the power to adjudicate civil disputes involving Indians. The court held that there was an "absence of anything remotely resembling an intention [on the part of Congress] to confer general state civil regulatory control over Indian reservations."[117] Along these lines, it has been written that "the legislative history of section 233 demonstrates a lack of congressional intent to grant general regulatory jurisdiction to New York. Although there is some indication that Indians should be allowed access to state courts, there is absolutely no indication that Congress intended to confer general civil regulatory authority to the State."[118]

3. Development of the Law of Indian Gaming

a. Seminole Tribe of Florida v. Buttersworth

In Seminole Tribe of Florida v. Buttersworth,[119] the Fifth Circuit Court of Appeals granted injunctive relief preventing a county sheriff from interfering with high stakes bingo games conducted by an Indian tribe, despite the fact that the tribal games' prizes greatly exceeded amounts allowed under state law, and Florida had criminal and civil jurisdiction over Indian lands within its borders pursuant to Public Law 280. In the first decision regarding the application of state gambling laws to activities of an Indian tribe, the Court created a test as to when a Public Law 280 State would be allowed to interfere on reservation lands with respect to gambling. If a law is criminal-prohibitory in nature, then it is enforceable on Indian lands. If the law is civil-regulatory in nature, then the State

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[114]Act of Aug. 15, 1953, c. 505, 67 Stat. 588, codified in various sections of 18 and 28 U.S.C., including 18 U.S.C. § 1162 (criminal jurisdiction) and 28 U.S.C. § 1360 (civil jurisdiction). This law broadened state authority over Indian affairs. Designed primarily to extend state criminal jurisdiction to specified areas of Indian lands where tribes were not adequately organized to provide needed protection, the law also granted states civil jurisdiction "to the same extent that the State has jurisdiction over other civil causes of action." Kading, *State Authority to Regulate Gaming within Indian Lands: The Effect of the Indian Gaming Regulatory Act*, 41 Drake Law Review 317 (1992).

[115]Porter, supra. The leading cases dealing with the applicability on reservations of State laws regulating gambling are discussed in the following section.

[116]Bryan v. Itasca, 426 U.S. 373 (1976)

[117]Id., at 384.

[118]Porter, supra, at p. 545.

[119] 491 F. Supp. 1015 (S.D. Fla. 1980) *aff'd*, 658 F.2d 310 (5th Cir.) *cert. den.* 455 U.S. 1020 (1982), which should not be confused with this year's Seminole Tribe v. Florida, ___ U.S. ___, 116 S.Ct. 1114 (1996).

cannot enforce such law on Indian lands.

After Buttersworth, high-stakes bingo operations and other gaming enterprises began to open on Indian lands in the United States. The rapid growth of unregulated Indian gambling enterprises became a concern to federal and state law enforcement officials who feared that Indian gambling would become the target of infiltration by organized crime or other criminal elements.[120] Generally, the federal government was not involved directly in Indian gambling matters until a Seventh Circuit Court of Appeals decision held bingo management contracts not approved by the Secretary of the Interior were null and void pursuant to 25 U.S.C. § 81.[121] In 1984, Congress began holding oversight hearings on Indian gambling because of federal and state concerns over the perceived lack of regulation and the potential for infiltration by criminal elements.

b. California v. Cabazon Band of Mission Indians

The United States Supreme Court clarified the criminal-prohibitory/civil-regulatory distinction in California v. Cabazon Band of Mission Indians[122] in 1987. The tribe operated high stakes bingo games and a card club on reservation lands near Palm Springs. California law, which permitted bingo and card games when operated by designated charitable organizations, placed significant limitations on both the prizes allowed and use of funds derived from the card games. Thus, some forms of gaming were permitted, subject to restrictions.

California claimed it had authority, under Public Law 280, to enforce the State's bingo laws on Indian lands. The State argued that enforcement of the bingo law on Indian land was within State authority because violators of the bingo law were subject to criminal penalties. Additionally, California argued that it did not regulate bingo, but prohibited high stakes games, thus it had the legal authority to prohibit activities on Indian lands located within the State that are prohibited elsewhere in the State.

The Court enunciated a two-pronged test to determine whether a state law is criminal-prohibitory or civil-regulatory. A state law is prohibitory if, one, the gaming activities are contrary to state public policy and, two, state interest in regulating gaming outweighs the tribal benefits received through gaming. Specific to the case, the Court held that California's level of gambling activities, which included a State lottery and pari-mutuel wagering on horse racing, was clearly sufficient to rule out the possibility of the Indian games being contrary to public policy. When balancing the State interest in regulating gaming in relation to tribal benefit, the Court held that California did not present sufficient evidence to demonstrate that the difference in pots and wagers between statutorily restricted games and high stakes Indian games would result in the entrance of

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[120]Cox, *The Indian Gaming Regulatory Act: An Overview*, 7 St. Thomas Law Review 769 (1995).

[121]Wisconsin Winnebago Business Comm. v. Koberstein, 762 F.2d 613 (7th Cir. 1985); Cox, p. 771.

[122]Cabazon Band of Mission Indians v. County of Riverside, 783 F. 2d 900 (9th Cir. 1986) *aff'd sub nom.* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

organized crime into Indian gambling operations, especially in comparison to the economic benefits the tribe could gain. Using a balancing test between federal, state and tribal interests, the Court found that tribes in states that otherwise allow gaming, have a right to conduct gaming on Indian lands unhindered by State regulation.

Prior to the Supreme Court's decision in Cabazon, Congress began work to remedy what was then an uncertain situation. After Cabazon, there existed an urgency for the passage of a regulatory structure as there were no controls for gambling on reservation lands. The resulting legislation became the Indian Gaming Regulatory Act, or IGRA as it is more commonly known.

4. Indian Gaming Regulatory Act of 1988

The Indian Gaming Regulatory Act (IGRA)[123] contains a regulatory scheme designed to provide different levels of jurisdiction depending upon the type of gambling that is occurring on Indian lands. In developing the legislation, Congress defined the issue as "how best to preserve the right of tribes to self-government while, at the same time, to protect both the tribes and the gaming public from unscrupulous persons."[124] These concerns were expressed by law enforcement officials, who indicated a need for federal and/or state regulation of gaming, in addition to, or instead of, tribal regulation.

The authors of the legislation took the view that, "it is the responsibility of the Congress, consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework for regulation of gaming on Indian lands. [The legislation] recognizes primary tribal jurisdiction over bingo and card parlor operations although oversight and certain other powers are vested in a federally established National Indian Gaming Commission. For Class III casino, parimutuel and slot machine gaming, the bill authorizes tribal governments and State governments to enter into tribal-State compacts to address regulatory and jurisdictional issues."[125] The jurisdictional framework for the regulation was the subject of a great deal of discussion. IGRA "provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally [sic] impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities."[126]

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[123]25 U.S.C. § 2701 *et seq.*

[124]Inouye, Senate Select Committee on Indian Affairs, 100th Cong., 2d Sess., Report on Indian Gaming Regulatory Act 1 (Report 100-446, 1988).

[125]Id., at 3.

[126]Id., at 5. "This legislation is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives, while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied."

IGRA divides gambling into three types and establishes a regulatory scheme for each. Class I gaming is described as "social games played solely for prizes of minimal value or traditional forms of Indian gaming engaged in as part of, or in connection with, tribal ceremonies or celebrations."[127] Class I gaming is under the exclusive jurisdiction of Indian tribes and is not subject to the provisions of IGRA.

Class II gaming is defined as "the game of chance commonly known as bingo ... including (if played at the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo and other games similar to bingo."[128] Bingo games may also be conducted with "electronic, computer or other technologic aids, but IGRA specifically excludes "electronic or electromechanical facsimiles of any game of chance or slot machine of any kind" from Class II gaming. Non-banking card games[129] are permissible under Class II gaming unless they are specifically prohibited by state law. Class II gaming is under tribal jurisdiction, subject to the provisions of IGRA and oversight of the National Indian Gaming Commission. States are not permitted to regulate any Class II gaming activity.

Class III gaming is defined as all other types of gambling, including banked card games (e.g., baccarat, chemin de fer and blackjack), slot machines, pari-mutuel wagering and jai alai.[130] Electronic games of chance such as video poker, are considered Class III. Under IGRA, Class III gaming may only be conducted pursuant to the terms of a compact between a tribe and the state in which its lands are located.[131]

IGRA contains tight time parameters for the negotiation of an Indian gaming compact. Upon receiving a request to negotiate a gaming compact from a federally recognized Indian tribe, a state is required to commence good faith negotiations. If a state fails to enter negotiations or fails to negotiate in good-faith, IGRA authorizes the Indian tribe to file suit against the state in federal district court. If such a suit is filed, the district court is authorized to appoint a mediator who would, after a time period for the submission of gaming compacts by the State and Tribe, select one or the other and "impose" that compact on the parties. Congress provided the tribes with federal court jurisdiction to enforce the "good faith" provision and made the Secretary of the Interior the ultimate arbiter and regulator if an agreement could not be reached on a compact.[132] This provision, granting federal courts jurisdiction over states, was later found to be in violation of the Eleventh Amendment to the U.S. Constitution.

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[127]25 U.S.C. § 2703(6)(Supp. 1996).

[128]25 U.S.C. § 2703(7)(A)(Supp. 1996).

[129]Banking card games are those games where players play against the house and the house acts as banker. Non-banking card games are those where players play against each other.

[130]25 U.S.C. § 2703 (8)(Supp. 1996).

[131]25 U.S.C. § 2710 (d)(1)(C)(Supp. 1996).

[132]25 U.S.C. § 2710 (d)(Supp. 1996).

In September 1991, the Seminole Tribe of Florida sued the State of Florida and its Governor in United States District Court, alleging refusal to enter into negotiations for a tribal/state compact. Florida moved to dismiss the suit on the ground that a suit in Federal court against the sovereign State of Florida was barred by the 11th Amendment to the United States Constitution which states in part: "The judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States..." The 11th Circuit Court held that the suit by the Seminoles against the State of Florida was barred by the 11th Amendment.[133] The Court's decision also addressed the question of remedies available to the tribe when its judicial remedy is barred: "The answer, gleaned from statute, is simple ... the tribe may file suit in the District Court. If the State pleads an 11th Amendment defense, the suit is dismissed and the tribe ... may notify the Secretary of the Interior. The Secretary of the Interior then may prescribe regulations governing Class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals..."[134]

The Seminole tribe petitioned the United States Supreme Court for certiorari on the main question, and the State of Florida cross-petitioned, seeking reversal of the 11th Amendment's substitute remedy. In Seminole Tribe v. Florida, ___ U.S. ___, 116 S.Ct. 1114, 1996 U.S. LEXIS 2165 (1996), the Supreme Court held that the suit against Florida was barred, saying: "Notwithstanding Congress' clear intent to abrogate the State's sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore cannot grant jurisdiction over a state that does not consent to be sued."[135] On the question of a substitute remedy, the Court merely noted that: "We do not consider, and express no opinion upon that portion of the decision below that provides a substitute remedy for a tribe bringing suit."[136] However, one week later, the Supreme Court denied the cross petition of the State of Florida, leaving in place the lower court's substitute remedy.[137]

5. Indian Gambling After Seminole Tribe v. Florida

The Secretary of the Interior recently issued a request for comment on proposed regulations that would, when States and tribes cannot reach an accommodation regarding a gaming compact, allow the Secretary to impose a compact on the parties. The authority of the Secretary to impose a compact on a State has been questioned by the National Governors' Association.

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[133] 11 F.3d 1016.

[134] Id., at 1029.

[135] 1996 U.S. Lexis 2165 at 6-7.

[136] Id., at 53 n. 18.

[137] Irwin, *Seminole Decision Could be the Victory That Lost the War*, Pollock's Gaming Industry Observer, Atlantic City Edition, Vol. 1, No. 1, July 1, 1996, pp. 4-5.

B. NATIVE AMERICANS AND GAMBLING IN NEW YORK STATE

1. Native Americans in New York[138]

According to the 1990 United States Census, there are over 60,000 Native Americans in New York State. Only one in six currently lives on one of the ten reservations in New York, although many who live off the reservations maintain tribal affiliations. Native Americans living off the reservations are primarily located in urban areas, especially New York City, Buffalo, Niagara Falls, Rochester and Syracuse. Detailed information on the recognized Native American tribes and reservations in New York is presented in Appendix F.

There are two existing forms of government on reservations located in New York. Some nations, including the Onondaga, Tuscarora and Tonawanda Band of Senecas, maintain a traditional form of government. Other nations, including the St. Regis Mohawk Tribe and the Seneca Nation of Indians, have adopted an elective system of government with elected leaders chosen by ballot for a specified term in office. Nations with elected leaders often have traditional leaders who still maintain an important degree of influence over tribal matters.

Currently, the only Native American community with casino gambling is the Oneida Indian Nation which owns and operates the Turning Stone Casino in Verona. The Casino has been open since 1993. The St. Regis Mohawk Tribe has announced that a casino on its reservation in Northern New York will open in the near future.

The Shinnecock Tribe and Unkechauge Nation of Poospatuck Indians of Long Island are not currently eligible to operate a legal casino under IGRA because they are not federally recognized tribes; however, every other reservation in New York is a site where some form of gaming may legally take place. Currently, none of the tribes other than the Oneida Nation and St. Regis Mohawk have approached the State to initiate a gaming compact. Many traditional leaders are opposed to casino gambling and are unlikely to authorize gambling within the territories they govern, or negotiate a Class III gaming compact with the State.

In the event of adoption of the Constitutional amendment to legalize casino gambling, Native American casino, could have an effect on casinos located in the Western part of the State. The Tuscarora and Tonawanda Reservations are in close proximity to both Niagara Falls and Buffalo, two areas designated for casino gambling under the proposed Constitutional amendment. One of these reservations, the Tuscarora, would be as close as seven miles from the Niagara Falls site. Should the Tuscaroras choose to open a casino, it would compete with any proposed Niagara Falls or Buffalo casino, located only 20 miles away. This is particularly significant considering that both casinos already would be competing with a casino in Niagara Falls, Canada.

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[138]Material contained in this section has been derived from: Hauptman, *Formulating American Indian Policy in New York State, 1970 - 1986,* State University of New York Press (1988) and New York State Department of Social Services, *A Proud Heritage: Native American Services in New York State* (1989).

However, while the Tuscarora and Tonawanda Reservations are closest to both Buffalo and Niagara Falls, the governments of those Nations have not requested compact negotiations with the State government. The Cattaraugus Reservation of the Seneca Nation is just twenty-five miles from Buffalo. The Seneca Nation has never requested negotiations for a Class III gaming compact.[139]

The other reservations in the State, including the Oneida Indian Nation Territory, are one hundred miles or more from casino sites identified in the proposed concurrent resolution to amend the State Constitution (Senate 5557 / Assembly 8356). While additional reservation casinos would contribute to the saturation of the New York market for gambling, it does not appear that they would directly compete with these other sites.

Task Force research supports the conclusion that the New York City metropolitan area is the largest market source of patrons for the proposed State-licensed casino gambling. Significant competition could arise for these patrons should the Shinnecocks and Poospatucks gain federal recognition and decide that casino gambling is in the best interest of the tribe. The reservations exist on a well established tourism route between New York City and Eastern Long Island. Both reservations are in proximity to the New York City metropolitan area and would be the closest casino to New York City. Casinos at these reservations are not likely in the near future, considering the fact that federal recognition, which is an extremely lengthy process, is required to utilize IGRA.

2. Indian Gaming in New York

Reasoning that the interpretation given Public Law 280 in Seminole Tribe of Florida v. Buttersworth would apply the same to 25 U.S.C. § 233 in New York, several Indian nations in the State opened high stakes bingo operations on their reservations. By the time of the enactment of the Indian Gaming Regulatory Act in 1988, high stakes bingo games were being operated by the St. Regis Mohawk Tribe, the Oneida Indian Nation and the Seneca Nation.[140] State officials chose not to challenge this activity, but opted to wait for the United States Supreme Court to decide the issue of the authority of states to regulate the activity under Public Law 280.

a. Oneida Indian Nation

The Oneida Indian Nation is the only Indian tribe currently operating a Class III gaming facility in New York under IGRA. The Oneidas' casino, called Turning Stone, was constructed on land that was outside their recognized reservation, but within the boundary of land recognized as the

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[139]The Seneca Nation operates Class II bingo facilities on its Allegany and Cattaraugus reservations.

[140]In 1988, Mohawks (not the St. Regis Mohawk Tribe) opened a high stakes bingo operation at Ganienkeh in Clinton County. Ganienkeh is the name applied to State-owned land that was leased to the Turtle Island Trust for the purpose of establishing a traditional Mohawk community as part of a settlement of an occupation of State land in the Forest Preserve in Herkimer County from 1974 - 1977.

Oneida Reservation in the 1794 Treaty of Canandaigua.[141] While technically not land qualifying for gaming purposes under IGRA, the U.S. Department of the Interior allowed the land in question to be used for such purposes, deeming it part of the Oneidas' original territory.

Pursuant to the provisions of IGRA, the Oneidas requested negotiations for a gaming compact on July 8, 1992. The gaming compact was approved by Thomas Thompson, Acting Assistant Secretary, Indian Affairs, U.S. Department of the Interior, on June 4, 1993. The compact authorized only games permitted by law in New York State, including those games of chance conducted by charitable organizations. Slot machines and electronic video games, lottery games other than keno, and off-track betting were not authorized.

On July 20, 1993, the Oneida Indian Nation opened its casino.[142] The 96,000 square foot facility includes approximately 120 table games and employs in excess of 1,700 people. As the casino approached its first anniversary, the Nation announced that over two million people had visited the casino.[143] While financial and operating information are not available, it has been estimated that Turning Stone Casino netted $100 million in its first year.[144] Although the figure is unconfirmed, the Nation did release information showing that the debt incurred in the development of Turning Stone, which cost approximately $10 million to build, was fully paid by December 1993.[145]

The Oneidas have announced that the Turning Stone Casino will be further developed into a full-scale resort complex. The plans call for expanded gaming areas, a 286-room luxury hotel, a 2,500-seat, 10,000 to 12,000 square foot arena for sporting and entertainment events, and a 27 hole P.G.A. golf course. Funding for the $50 million expansion project will come entirely from the Nation's gaming operations. In addition to casino gambling, the Oneidas also conduct Class II bingo at Turning Stone.

During the June 4 Task Force hearing, Nation Representative Ray Halbritter stated that the Oneida Indian Nation does not offer any opposition to the proposed State Constitutional amendment to allow casino gambling nor did the Nation see such a change as a threat to its activities. It is likely

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[141]See County of Oneida, New York v. Oneida Indian Nation of New York State, 470 U.S. 226 (1985).

[142]The Oneida Indian Nation had originally planned on engaging the services of a management company, NYMG, Inc., which was owned by Phillip Griffith, majority owner of Fitzgerald Associates, a Las Vegas-based casino, hotel and management company. The management contract, which was pending approval by the National Indian Gaming Commission, was withdrawn by the Nation approximately one week before it was to be approved. The contract was void until approved by the gaming commission. By managing Turning Stone for themselves, the Nation avoided paying 11 percent of net profits as a management fee.

[143]Manzer, *Turning Stone Comes Up Aces For Oneida Nation*, Utica Observer Dispatch, June 5, 1994.

[144]Kates, *Oneidas Expect Economic Windfall From New Casino*, Schenectady Daily Gazette, July 12, 1993.

[145]Casino attendance passed 2,000,000 by the July 20th first anniversary. See: Manzer, at note 143.

that the Oneida Indian Nation would experience a net gain in revenue with an ability to install slot machines.[146]

According to IGRA Section 2701, "Indian Tribes have the exclusive right to regulate gaming activity if the gaming activity...is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." Should New York State adopt a Constitutional amendment and subsequent criminal law changes to allow slot machines, it would have no apparent basis to withhold this type of gaming device from the list of "Approved Games and Activities" which is contained in the two gaming compacts currently in effect.

b. St. Regis Mohawk Tribe

Around 1985, several businesses on the St. Regis Mohawk Reservation (known as Akwesasne) brought in slot machines, which are criminally prohibited in New York[147] and prohibited under federal law.[148] New York State Police raided these establishments in December 1987 and June 1988, prior to the enactment of IGRA, seizing several hundred slot machines and charging the owners with violation of the Penal Law. Several casinos were opened on the St. Regis Mohawk Reservation following the 1987 Cabazon decision. These casinos offered both games similar to those permitted at games of chance nights conducted by organizations licensed pursuant to Article 9-A of the General Municipal Law and slot machines. Once IGRA was enacted, the casinos were in violation of Federal law as they were neither licensed by the Tribe nor operated pursuant to a Tribal-State Compact.[149] In the absence of a compact providing otherwise, the United States had exclusive jurisdiction to prosecute State gambling laws that were made applicable in Indian country by the IGRA.[150]

Notwithstanding several arrests and convictions between 1987 and 1989, several casinos remained open until March 1990 when reservation residents opposed to casino gambling blocked the State highways providing access to the reservation, forcing the New York State Police to set barricades off the reservation to prevent confrontations between the motoring public and the protesters. After a violent confrontation between opposing factions, forcing intervention by the New

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[146]Currently, the State and the Oneida Indian Nation are embroiled in litigation regarding the operation of the "Instant Multi-Game electronic wagering" machines. At issue is whether the games were properly added to the compact.

[147]Penal Law § 225.30 (1), Possession of a Gambling Device.

[148]18 U.S.C. § 1955 (Supp. 1996).

[149]18 U.S.C. § 1166 (Supp. 1996).

[150]Id., As a result of raids at various gambling establishments on the St. Regis Mohawk Reservation between 1987 and 1989, several individuals were convicted in United States District Court of violations of Federal statutes dealing with gambling in Indian country. U.S. v. Burns, *et al.*, 725 F. Supp 116 (1989), *aff'd sub nom.* U.S. v. Cook, *et al.*, 992 F.2d 1026 (1991).

York State Police and the Quebec Provincial Police, the St. Regis Mohawk Tribal Council requested negotiations, under IGRA, on a Class III gaming compact. Frequent meetings were held between May and August 1990, but negotiations ended when the St. Regis Mohawks initiated an action against the State alleging that the State had failed to negotiate in good faith as required under IGRA.[151] A new round of negotiations began in late 1992, and agreement on a compact was reached in June 1993. The compact was approved by the Department of the Interior in December 1993.

So far, the St. Regis Mohawks have not opened a casino under the Compact with the State. Some planned facilities were never completed because of difficulties in obtaining financing and environmental concerns. The Tribe is currently working with a member of the Tribe who has obtained the financing necessary to construct a casino on the reservation. The St. Regis Mohawks have indicated that a temporary casino facility will open in 1996.

c. Seneca Nation of Indians

The Seneca Nation operates high stakes bingo on both the Allegany Reservation in Cattaraugus County and the Cattaraugus Reservation in Erie County. The Seneca Nation has never entered into a Class III gaming compact with New York State and, at one time, repealed a resolution to request negotiations for such and agreement in the face of community opposition.

3. Expansion of Indian Gambling in New York

a. Non-gaming Nations and Tribes in New York State

The St. Regis Mohawks and Oneidas are the only federally recognized Tribes that have requested and negotiated a Class III gaming compact with the State. There are five other tribes within New York that have federal recognition and thus could immediately petition the Governor for their own gaming compact. However, because of philosophical and cultural opposition, it is unlikely that they all would express an interest in seeking a compact. These nations are the:

- Onondaga Indian Nation, with a reservation at Nedrow, just south of Syracuse in Onondaga County;
- the Cayuga Indian Nation, which does not have a reservation;
- the Seneca Nation of Indians with reservations in Cattaraugus County near Salamanca, Erie County near Gowanda, and on the Allegany-Cattarugus County border along Cuba Lake;
- the Tonawanda Band of Senecas, with a reservation near Basom in Western New York; and

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[151] 25 U.S.C. § 2710(d)(7)(B). St Regis Mohawk Tribe v. State of New York, et al., 90 Civ. 5513 (KMW), was filed in the Southern District of New York, and was transferred to the Northern District by order of Judge Kimba Wood dated September 23, 1991. Plaintiffs agreed to withdraw the action when new compact negotiations began in 1992.

- the Tuscarora Indian Nation, with a reservation near Niagara Falls.[152]

Additionally, there are two tribes on Long Island, the Unkechaug (Poospatuck) near Mastic, and the Shinnecock near Southampton. These tribes have a government-to-government relationship with New York State but not with the United States. As a matter of policy, the State of New York does not grant recognition to or enter into government-to-government relations with Indian Nations that are not Federally recognized. Their Poospatucks and Shinnecock relationship with New York State was cultivated during colonial times, when on July 2, 1700 the Poospatucks received a deed for land from William Tangier Smith and on August 16, 1703 the Colony of New York and the Town of Southhampton gave the Shinnecocks a one thousand year lease for certain land on Long Island. The State continued to treat these groups as Indian tribes after the American Revolution. Before these tribes could open a casino under IGRA, they would first have to obtain Federal recognition through the Department of the Interior. A group known as the Ramapough Mountain Indians also have a presence in the State in Rockland County, but they have been unsuccessful in obtaining either State or Federal recognition as a Tribe. The Montauk Indian Nation of Long Island has indicated its intention to apply for federal recognition.[153]

b. The Monticello Issue

On February 28, 1995, Oneida Indian Nation Representative Ray Halbritter announced that the Oneida Nation would seek approval to open a casino in Monticello in Sullivan County. The site of that proposed casino was a five to six acre lot, part of the grounds of Monticello Raceway. Earlier in the month Berenson Pari-Mutuels, Inc. had announced that it had reached agreement with Watermark Investments Limited, a Bahamian merchant banking firm, for the sale of the 220 acre raceway to Watermark. The Oneida/Watermark plan called for Watermark to sell the small parcel to the Oneidas who would in turn request the Secretary of the Interior take the land into trust for gaming purposes under provisions of IGRA.[154] Casino gambling would then be operated on the Indian trust lands. When Watermark was not able to reach agreement with the Oneidas, it sought to reach a similar agreement with the St. Regis Mohawks. The provisions of IGRA allowing off-reservation gambling are discussed in depth below.

c. Off-Reservation Indian Gaming

IGRA contains a provision addressing Indian gaming on lands acquired after its effective date of October 17, 1988. In general, there is a basic prohibition against allowing gaming on lands acquired by the Secretary of the Interior in trust for the benefit of an Indian tribe after that date unless

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[152]See generally: Hauptman, Formulating American Indian Policy in New York State, 1970 - 1986 (1988).

[153]61 Fed. Reg. 19315 (May 1, 1996); A letter of intention to file was received by the Secretary of the Interior on July 31, 1995.

[154]25 U.S.C. §§ 2701 *et. seq.* (Supp. 1996).

the lands are located within, or contiguous to, the boundaries of the tribe's reservation on October 17, 1988,[155] or the Indian tribe has no reservation land and the newly after acquired lands are within the Indian tribe's last recognized reservation.[156] There are four exceptions to the general prohibition:

- the lands are taken into trust as part of a settlement of a land claim;[157]
- the lands are part of the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process;[158]
- the lands are taken into trust as part of the restoration of lands for an Indian tribe that has been restored to Federal recognition;[159] or
- other lands on which gaming is approved by the Secretary with the concurrence of the Governor of the state in which such lands are located.[160]

The fourth exception allows the Secretary, after consultation with the Indian tribe and appropriate state and local officials, including officials of other Indian tribes, to determine whether a gaming establishment on the newly acquired lands would be in the best interests of the tribe and its members, and would not be detrimental to the surrounding community. If the Secretary determines such land should be taken into trust for gaming purposes, the Governor of the State must concur with the Secretary's determination.

C. NATIVE AMERICAN GAMBLING ON AFTER-ACQUIRED LANDS

As previously stated, there are four exceptions to the general prohibition against gaming conducted pursuant to IGRA on lands not held by the subject Indian tribe at the time of October 17, 1988.[161] These four exceptions are for lands accepted into trust when a tribe is originally federally

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[155]25 U.S.C. 2719(a)(1).

[156]25 U.S.C. §2719(a)(2).

[157]25 U.S.C. §2719(b)(1)(B)(I).

[158]25 U.S.C. §2719(b)(1)(B)(ii).

[159]25 U.S.C. §2719(b)(1)(B)(iii).

[160]25 U.S.C. §2719(b)(1)(A).

[161]An exception also applies, in an extremely limited circumstance, lands contiguous to the tribes existing reservation and to certain lands in Oklahoma. To qualify under either of these limitations, the following exceptions must apply:

1. The land to be acquired qualifies as either: land that is located within the boundaries of the tribe's

recognized, when a tribe is restored to Federal recognition, when a land claim settlement occurs and when certain restrictions are met for lands not qualifying under any of the three previous exceptions.

a. Recognition

If the lands taken into trust after October 17, 1988 is accomplished so as the initial reservation of a newly acknowledged Indian tribe given Federal recognition under the Federal acknowledgment process, IGRA section 2719 (b)(1)(B)(ii) allows these lands to be utilized for

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reservation as such reservation existed on October 17, 1988, or, land that is contiguous to the boundaries of the tribe's reservation as such reservation existed on October 17, 1988. Documentation must be included which establishes that the land is contiguous and the Field or Regional Solicitor's concurrence in that conclusion.

2. The tribe had no reservation on October 17, 1988, and the land is located in Oklahoma, and the land to be acquired is within the boundaries of the Indian tribe's former reservation as defined by the Secretary. A Field or Regional Solicitor's opinion must be included that the land is within the tribe's former reservation, or, the land to be acquired is contiguous to other land held in trust or restricted status by the United States for the Indian Tribe in Oklahoma. Documentation must be included which establishes that the land is contiguous and the Field or Regional Solicitor's concurrence.

When the proposed acquisition is claimed as the Indian tribe's "former reservation" the Area Director must provide a legal opinion from the Regional or Field Solicitor's office that the land qualifies as "former reservation lands" and therefore should be treated as such for the purposes of the IGRA.

When the proposed acquisition is claimed as land that is contiguous to other trust land or land held in restricted status by the United States for the Oklahoma tribe, the acquisition package must include documentation of the trust or restricted status of the land which is contiguous to the proposed acquisition. A plat or map showing the contiguous status of the respective parcels of land should be included in the acquisition package. The Area Director's findings should include all legal descriptions of the lands (lengthy descriptions can be noted as attachments, exhibits, etc.), references to significant dates such as the acquisition date and approval date of trust status. Any and all facts, historical and present, which will establish the finding that the proposed acquisition is contiguous should be discussed and included in the Area Director's findings. The Regional or Field Solicitor's concurrence that the land is contiguous must be included.

3. The tribe had no reservation on October 17, 1988, and the land is located in a State other than Oklahoma and: such land is within the Indian tribe's last recognized reservation with the State or States within which such Indian tribe is presently located.

When the proposed acquisition is claimed as land that is within the Indian tribe's "last recognized reservation," the Area Director must provide documentation that the proposed acquisition is in the tribe's last recognized reservation. The Area Director's analysis of this issue must include documented information relating the history of the tribe to show that the tribe is presently located in the state in which the land proposed for trust acquisition is located. A legal opinion from the Regional or Field Solicitor's office on this issue must be included.

gaming purposes[162].

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[162]Recognition is not easily obtained. In 1978 the federal Department of the Interior promulgated a set of rules to establish formal procedures and standards for acknowledging that certain American Indian tribes exist. The process is for tribes that are ethnically and culturally identifiable and have not been currently acknowledged. The procedure is not applicable to those tribes formed in recent years or those splintering from currently recognized groups. Prior to rule adoption federal tribal recognition was bestowed by Acts of Congress. While Congressional recognition is still an option for recognition, the Interior Rules procedure is more commonly utilized.

Application Procedures

The tribe that is seeking federal recognition must file a petition with the Assistant Secretary of the Interior for Indian Affairs (ASIA). The procedure for recognition and the contents of the petition are specific. There are a number of mandatory criteria that the tribe must prove. The requirements, which are reviewed by ASIA under a preponderance standard, all must be met before the tribe is given recognition status. The mandatory requirements are as follows:

1. The petition must include a statement of facts that the petitioner has been identified from historical times to the present on a substantially continuous basis. This evidence may include:

a. repeated identification by federal authorities;
b. repeated dealings with a county, parish or local government based upon group identity;
c. longstanding relationships with state government;
d. identification as an Indian entity by records in courthouses, churches or schools;
e. identification as an Indian entity by anthropologists, historians or other scholars;
f. repeated identification as an Indian entity in newspapers or books; or
g. repeated identification and dealings as an Indian entity with recognized tribes or national indian organizations.

2. Evidence that a substantial portion of the petitioning group lives in a specific area or in a community identified as Indian. Must include evidence that the members living there are descendants of an Indian tribe that historically inhabited the area.

3. Statement of facts that shows the petitioner has maintained tribal political influence over members as an autonomous entity throughout history to the present.

4. Petitioner must submit a copy of the group's governing document or if there were none, a statement describing the group's membership criteria and the tribe's procedures for governing.

5. Petitioner must list all current members and submit a copy of all available former lists based upon the tribe's membership criteria. Membership must come from evidence of descendancy of historical tribes. This evidence may include:

a. descendancy rolls prepared by the Secretary of the Interior for other purposes;
b. State, Federal or other official records identifying present members or their ancestors as being of Indian descent and as members of the petitioning group;
c. Church, school or enrollment records identifying members of the petitioning entity;
d. affidavits of recognition by tribal elders, leaders or the governing body as being an Indian descendant of the tribe; or
e. other records or evidence identifying persons as members of the petitioning tribe.

Of the eight tribes that have received federal recognition since the effective date of IGRA, only the

Submission to the ASIA

Upon receipt of the petition for tribal recognition the ASIA must, within 30 days, send the tribe an acknowledgement of receipt. The ASIA must also notify the Governor and the Attorney General of the tribe's home state and publish a notice in a major newspaper in the city nearest the location of the petitioner. This notice must:

1. announce that the petitioner is seeking federal tribal recognition;
2. give an opportunity for other parties to submit factual or legal arguments in support or opposition to the petition.

The petitioning tribe must be given copies of the submissions that ASIA receives concerning the application and is allowed to respond to the submissions prior to the final determination or final ruling on the petition.

The petitions are reviewed on a first come, first serve basis. However, the ASIA must notify the petitioner of obvious deficiencies or omissions in the application if there appear to be any. The petitioner then has the opportunity to withdraw the petition or cure the deficiency.

Consideration

When the ASIA begins to actively consider the petition, the tribe must be notified in writing. The ASIA must publish their proposed findings in the Federal Register within one year of active consideration. While consideration of the petition may include supporting evidence received and factual evidence contained within the petition, the ASIA may also initiate other research for any purpose relative to analyzing the petition and obtaining information on the petitioner's status.

Determination

The ASIA must prepare a written report to summarize the evidence that is published in the proposed decision. After publication of the proposed results, there is a 120 day response period for individuals or organizations wishing to challenge the proposed findings. The challenges must be submitted to the ASIA in writing and contain factual or legal arguments and evidence that rebuts the proposed finding.

Sixty days after the close of the 120 day response period, the ASIA must publish a final determination on the petition, which is to become effective after sixty days. If there is a determination resulting in a lack of federal recognition, the ASIA shall send the petitioner an analysis of options, if any, for the tribe to obtain other services and benefits which do not require federal recognition.

Reconsideration

The Secretary of the Interior may request a reconsideration of the ASIA findings within the final sixty day period. The Secretary's reconsideration request is discretionary unless the Secretary believes:

1. the decision of the ASIA might be changed because of new evidence received subsequent to publication of the decision;
2. the evidence relied upon by the ASIA was unreliable or of little probative value; or
3. the petitioner's or ASIA's research appears inadequate or incomplete.

If the Secretary does request reconsideration, the ASIA will consult with the Secretary to review the initial determination and, within sixty more days, shall issue a decision that will become final and effective upon application.

Mohegan Indian Tribe of Connecticut has indicated interest in constructing a Class III casino.

b. Restoration

If the lands taken into trust after October 17, 1988 as the restoration of lands for an Indian tribe restored to Federal recognition, IGRA section 2719 (b)(1)(B)(iii), allows these lands to be utilized for gaming purposes. Only one of the eight Indian tribes that has received federal recognition since the effective date of IGRA have been restored after extinquishment of a previous recognition.[163]

c. Land Claims Settlement

IGRA section 20(b)(1), 25 U.S.C. § 2719 (b)(1)(B)(I), provides that the general prohibition of gaming on newly acquired lands will not apply if the lands are taken into trust in the course of a settlement of a land claims. Only the Mohegan Tribe of Connecticut and the Catabwa Indian Tribe of South Carolina have had lands taken into trust under this procedure. Both tribes also received Federal recognition concomitant with the land claim settlement.

d. After-Acquired Lands

Finally, IGRA section 2719 (b)(1)(A) allows other lands to be taken into trust for gaming purposes provided the Secretary, after consultation with the Indian tribe and appropriate state and local officials, including officials of other Indian tribes, determines that gaming on the newly acquired lands would be in the best interests of the tribe and its members, and would not be detrimental to the surrounding community. The Governor of the State must concur with the Secretary's determination in order for the land to be taken into trust for gaming purposes.

(1) The Lujan Directive and the Proposed Rules

To fulfill the responsibilities required of the Department of the Interior under IGRA, the Secretary of the Interior issued a directive to the Assistant Secretary - Indian Affairs outlining a new policy for the placement of land in trust status for an Indian tribe when such land is located outside of and non-contiguous to the tribes existing boundaries.[164] Expanding upon the directive, the Secretary published proposed new rules regarding such acquisitions.[165] The proposed rule, which

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[163]The Catawba Indian Tribe of South Carolina, which was terminated in 1959, had its Federal trust relationship restored in 1993 as part of the settlement of its land claim. Pub. Law 103-116, 107 Stat. 1118, 25 U.S.C. § 941 *et seq.* The statute provides that IGRA shall not apply to the Tribe.

[164]Memorandum of Manuel Lujan, Secretary of the Interior, "Policy for Placing Lands into Trust Status for American Indians," July 19, 1990.

[165]The proposed rule was published at 56 Federal Register 32276, July 15, 1991. A formal adoption of such rule has yet to occur.

alters some language of the existing rule applicable to land into trust application evaluation, established several criteria and requirements, in addition to applicable criteria regarding land trust applications,[166] to assist the Secretary in reviewing requests of tribal lands in trust when such lands are located outside of and noncontiguous to the tribes' reservation.[167]

The new section of rules provides that the property to be acquired in trust must be free of hazardous substances and that the land should be located within the same state where other tribal trust land currently exists. The tribe must also provide an economic plan with a detailed analysis of the costs and benefits of such plan. The analysis must demonstrate the economic feasibility of the plan and must list any factor, economic, legal or political, which may jeopardize the development plan or expose tribal assets to risk of loss. As distance from the reservation land base increases, particularly toward or into urbanized areas, the value of reasonable alternative uses to the land must be examined and a relatively stronger justification for trust status will be required.

A documented effort by the tribe must also be made in order to resolve various differences or objections from local governments, as well as to adopt standards similar to local ordinances pertaining to health, safety, building construction and zoning.

The new proposed rules also established several additional criteria and requirements to assist the Secretary in reviewing requests for the acquisition of tribal lands in trust when such lands located outside of and noncontiguous to the tribe's reservation, are for gaming purposes. Pursuant to these criteria, a request must:

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[166]The existing land acquisition regulation may be found at 25 CFR 151.10. It states that each land acquisition application must contain the tribe will adopt standards that provide at least comparable safe guards. 1.a. The existence of statutory authority for the acquisition and any limitations contained in such authority; b. The need of the tribe for additional land; c. The purpose for which the land will be used; d. If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from tax rolls; e. Jurisdictional problems and potential conflicts of land use which may arise; and f. If the land is to be acquired in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status; 2. The property is free of all hazardous and toxic material; 3. Trust land to be acquired is located within the states in which a tribe or band presently owns trust lands. In general, as the distance from the trust or reservation land base increases, the tribe will be required to justify greater economic benefit from the acquisition; 4. In consultation with local, city, county and state governments, an effort must be made by the tribe to resolve possible conflicts over taxation, zoning and jurisdiction. If the acquisition is opposed or raises unresolved concerns from governments, the proposal will automatically be referred to the Assistant Secretary for Indian Affairs for review and approval/disapproval; 5. The tribe shall provide an economic development plan specifying the proposed uses for the trust land with a cost/benefit analysis of the proposal; 6. Applications for trust lands located within an urbanized, and primarily non-Indian, community must demonstrate that trust status is essential for the planned use of the property and economic benefits to be realized from said property; and 7. Acknowledgment that, after consideration of all local ordinances including, but not limited to, fire safety, building codes, health codes, and zoning requirements the tribe will adopt standards that provide at least comparable safe guards.

[167]Id.

1. Be in compliance with Section 20 of the Indian Gaming Regulatory Act (25 U.S.C. §2719);
2. Be reviewed by the National Indian Gaming Commission, when appropriate;
3. Include an analysis by the tribe showing that it explored the feasibility of all reasonable alternatives (other than gaming) which would provide equivalent economic benefits from said property; and
4. Provide that the tribe, in any gaming activities on lands to be acquired, withhold the appropriate portion of individual winnings from gambling activities for Federal taxes pursuant to Federal tax laws and the amount assessed by the National Gambling Commission pursuant to Section 18 of IGRA.[168]

(2) Bureau of Indian Affairs Policy Requirements

The Bureau of Indian Affairs (BIA), under the delegated responsibility to conduct the consultation on behalf of the Secretary of the Interior, has begun promulgating rules to execute this responsibility. While these rules have been in proposed form for five years, and not yet adopted by the agency, the content of the proposed rule has been followed by the BIA, pursuant to a policy directive. Upon receipt of an application to take land into trust for gaming purposes, the initial review is undertaken by the Director of the BIA Area Office that covers the region in which the land is located. Consultation is to be conducted by letter inviting the applicant tribe and appropriate state, local and other nearby tribal officials to comment on the proposed acquisition by addressing questions/issues relating to the two-part determination. The consultation letter is to include pertinent information regarding the proposed trust acquisition for gaming including information on the location of the proposed gaming facility,. the scope of gaming proposed and other information intended to assist the respective officials to comment on the proposed acquisition.

For purposes of the consultation, appropriate state and local officials include the governor of the state in which the land is located and the governmental officials of any city, parish or borough within 30 miles of the site of the proposed trust acquisition. Nearby tribal officials include the governing bodies of all tribes located within 100 miles of the site of the proposed trust acquisition.

In addition to the letter consultation, the Area Director has the discretion to require an additional method of consultation. When an additional method is used, the Area Director must fully describe the process, the outcome or results and provide verification of the use of the process. For example, if public hearings or meetings were held, copies of the hearing transcripts, minutes or videotapes must be provided as part of the file. Newspaper articles or other written verification of the public's response to the proposed acquisition should also be included to illustrate public sentiment. It is important to note that this process is differentiated from the 25 CFR Part 151 process which requires the 30-day notice for determination of taxation, special assessments, services, zoning,

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[168] Id. at 32280.

etc.[169]

The Area Director should allow a sufficient and reasonable period of time for the responding officials to comment and respond to the consultation letter. In determining what is reasonable, the Area Director should take into consideration the number of parties contacted, the scope or magnitude of the proposed gaming project, the preliminary indications of public sentiment, support, opposition, the potential impact on other gaming operations and such other factors which likely will be issues of concern to the responding parties.

The consultation letters to the applicant tribe and respective state, local and nearby tribal officials request specific information probative of the two-part determination. The responses provided, whether they oppose or support the proposed acquisition, are to be supported by factual data and other documentary information justifying the position taken. To assist the Secretary in determining whether the gaming establishment on newly acquired land will be in the best interest of the tribe and its members, the applicant tribe should address items such as the following:

1. Projections of gross and net income for the Tribe and for other entities;
2. Projections of management and tribal expenses;
3. Basis for projections and comparison to other similar gaming establishments;
4. Projected tribal employment. What will be the impact on the tribal community if most tribal members leave to take jobs off-reservations?;
5. Basis for projecting an increase in tribal employment considering the off-reservation location of the facility;
6. Projected benefits from tourism and basis for the projection;
7. Projected training benefits for tribal employees and basis for projection;
8. Projected benefits to the tribal community from increase in tribal income;
9. Projected benefits to relationship between the Tribe and the surrounding community;
10. Possible adverse impacts on the Tribe and plans for dealing with those impacts; and
11. Any other information which may provide a basis for a Secretarial determination that the gaming establishment is in the best interest of the Indian tribe.

To assist the Secretary in his determination whether the gaming establishment on newly acquired land will not be detrimental to the surrounding community, the officials consulted and the applicant tribe should be requested to address items such as the following:

1. Evidence of environmental impacts and plans for reducing any adverse impacts;
2. Impact on the social structure in the community;
3. Impact on the infrastructure;
4. Impact on land use patterns in the surrounding community;
5. Impact on the income and employment of the community;
6. Additional and existing services required or impacted, costs of additional services

[169]25 C.F.R. § 151.10 (e).

to be supplied by the community and source of revenue for doing so;

7. Proposed programs, if any, for compulsive gamblers and the source of funding;
8. Any other information which may provide a basis for a Secretarial determination that the gaming establishment is not detrimental to the surrounding community;

Responding officials should be advised that the fact that an official does not have extensive information or documented proof on the items listed above should not prevent the responding official from addressing the items to the extent possible.

Because the impacts of a gaming facility established on newly acquired land will be difficult to quantify in concrete or tangible terms, the officials consulted should also be invited to address such additional concerns or factors which they believe more fully demonstrate the actual or potential impact of the proposed gaming facility. The responding officials should not be limited to the listed items.

Upon completion of the consultation process (i.e. receipt of responses, expiration of allowed response time), the Area Director will review and prepare a summary of the comments and responses received from the officials contacted. When a response raises an issue with actual or potential for adverse or negative implications which may affect the potential for a favorable two-part determination, the Area Director will analyze the issue and determine what action may be appropriate. The Area Director should also advise the tribe that failure or reluctance to respond will result in the Area Director making conclusive findings on the issue without input from the tribe.

Upon completion of all actions or activities relating to the proposed acquisition, including an independent analysis of all the information and factual evidence provided by the tribe and the parties consulted, the Area Director is to prepare proposed findings of fact addressing the two-part determination and the items of information relating to such determination. The proposed findings made and conclusions reached must be supported by the facts, supporting exhibits or other documentation.

The Area Director's Findings should include an analysis by program officers such as social services, law enforcement, finance, environmental and tribal operations, to ensure that aspects of those program areas are adequately addressed by the tribe's application. Additionally, the Area Director's Findings should also include an analysis of all agreements relied on to arrive at conclusions on the two part determination.

The two-part Secretarial determination can be made before all the requirements of 25 CFR Part 151 are satisfied or completed. If, however, any requirement of Part 151 is likely to affect or influence the two-part determination, that requirement must be completed or otherwise satisfied prior to the Secretary's determination. It should be noted that the Secretary's determination under Section 20 does not constitute a final decision to acquire the land in trust under Part 151. That decision is made after the application is found to be in compliance with 25 CFR Part 151. To that extent, the Area Director should make every effort to submit an acquisition package that recites specific

findings on each of the factors listed in 151.10.

(3) Section 2719 Applications

As of August 12, 1996, applications had been made by eight tribes to the Bureau of Indian Affairs for land to be taken into trust under Indian Gaming Regulatory Act 25 U.S.C. Section 2719 (b)(1)(A), the latest being the St. Regis Mohawk's application for thirty acres in Monticello. Of the five applications prior to the St. Regis Moahwks', only one has been granted. The applicants are:

Sac and Fox Nation, Oklahoma

The Sac and Fox Indian Nation of Oklahoma currently has an application for land to be taken into trust pending before the United States Department of the Interior Bureau of Indian Affairs. The application, which is being promoted by Black Hawk Gaming & Development Company, Inc., received the formal support of the Area Director for the Bureau in Anadarko, Oklahoma on September 6, 1995. The land is located in the redevelopment area of downtown Oklahoma City called "Bricktown," part of a planned multi-million dollar Metropolitan Area Project development. The intention of the tribe is to construct and operate a Class II High Stakes Indian Bingo Hall; however, the tribe has announced that the facility would be expanded to accommodate full casino-style gaming should the opportunity occur.

Sault Ste. Marie Tribe of Chippewa Indians, Michigan

In Michigan, the application of the Sault Ste. Marie Chippewa Indian Tribe for land in downtown Detroit to be taken into trust received approval of the Secretary of the Interior. However, Governor John Engler publicly stated that he opposed any off-reservation Indian gaming in the State. The Governor was instructed by the Department of the Interior that his negative comments at a press conference would serve to officially notify the Secretary that concurrence by the Governor would not be forthcoming and he was not required to officially notify the Interior by letter of his decision.

Forest County Potawatomi Indians, Wisconsin

The only successful application for land taken into trust under this provision occurred in Wisconsin[170] where the Forest County Potawatomi Community tribe, as a part of a land swap with the City of Milwaukee, was able to have land taken into trust for gaming purposes. Prior to the effective date of IGRA, the tribe and the State had been negotiating the land swap with a precondition that the gaming on the land would be limited to 200 slot machines. Since the enactment of IGRA, the tribe has complied with the agreement negotiated with the City, signing a compact

[170]In addition to the formal applications made by Wisconsin based Indian tribes, the Lac Du Flambeau Chippewa entered negotiations with the owners of the Geneva Lakes Kennel Club in the City of Delevan for the purchase of that racetrack. These negotiations never resulted in a formal application to the Secretary of the Interior and the racetrack has since been sold. The new owners of the racetrack have indicated that they have no interest in pursuing a deal with an Indian tribe.

limiting slot machines to 200.

Sokoagon Chippewa Community of Mole Lake; La Courte Aerials Band of Lake Superior Chippewa Indians; Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin

The three tribes applied to have land in the City of Hudson taken into trust. The land is presently the location of a greyhound racing facility that offers unlimited pari-mutuel simulcasting. The joint venture had four partners: the three tribes and the owners of the racetrack. The Secretary of the Interior, using discretionary power derived from the Indian Reorganization Act, rejected the land on grounds unrelated to those found within IGRA. Thus, Governor Tommy Thompson did not have to formally reject the trust land, which, according to news reports, he was prepared to do.

The three tribes are currently seeking judicial review of the Secretary's rejection. One of the grounds for the appeal is an allegation that the Secretary had improper contacts with the Governor's staff during the decision making process. A trial date has been set for late 1996.

The Confederated Band of Siletz Indians, Oregon

The Siletz tribe sought to have the Federal government take 20 acres of land in Salem, Oregon into trust so that the tribe could open a Class III casino. The tribe, whose land holdings were scattered in commercially inaccessible locations, sought the addition of the new land because of its close proximity to the Portland-Salem-Eugene metropolitan area. The Secretary of the Interior executed the requirements of § 2719, and issued a preliminary determination in favor of granting trust status for the land despite an earlier pronouncement by Oregon's Governor that the proposed gaming operation would be detrimental to the surrounding community. When the Governor refused to concur with the Secretary's determination, the Secretary denied the Tribe's application. The Tribe then brought suit. Via motion for summary judgment, the Siletz sought reversal of the Secretary of the Interior's denial of their request to put land into trust for gaming purposes. The State, on a cross-motion for summary judgment, sought, inter alia, a declaration severing §2719 (b)(1)(A) in its entirety from IGRA.

The District Court found that the final step of obtaining the Governor's concurrence was an integral part of the process under §2719(b)(1)(A), and that the "but only if" restrictive language precluded the Secretary of the Interior from granting an exception to §2719(a) without satisfying this final step. With the restrictive language eradicated, the Governor's role would be indisputably advisory.[171]

The Court also found that Congress violated the Appointments Clause and general separation or powers principles when it granted a state governor veto power over a discretionary determination made by an agency of the Executive Branch legislatively charged with making that determination,

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[171] Confederated Tribes of Siletz Indians of Oregon v. United States, 841 F.Supp. 1479, 1484 (D. Or. 1994).

thus, the provision of §2719(b)(1)(A) granting that veto power is unconstitutional.[172]

The Court also found that the section's meaning was "unmistakenly clear: Congress made the state's interests paramount by granting the Governor veto power over the DOI's determination."[173] If only the constitutional provision of the statute were preserved, the state's interest would no longer be paramount as Congress apparently intended.

The Siletz case was appealed to the Ninth Circuit Court of Appeals by the tribe, with oral argument taking place on July 10, 1995. Plaintiff's counsel expects, barring statutory change, the case will be appealed to the United States Supreme Court regardless of the Appellate Court decision.

D. EVALUATION OF NON-RESERVATION INDIAN GAMBLING APPLICATIONS IN NEW YORK STATE

While IGRA section 2719 (b)(1)(A) requires the governor of a state to concur in the determination by the Secretary of the Interior to permit land to be taken into trust for gaming purposes, the federal law is silent as to what criteria a governor should use to evaluate such an application. This silence mandates the governor to establish such criteria. Thus far, only former Governor Barbara Roberts of Oregon, and Governors John Engler of Michigan and Tommy Thompson of Wisconsin have entertained such an application requiring their concurrence with the Secretary of the Interior's determination. None of these States have formal criteria for evaluating such applications.

The Task Force recommends that the Governor establish, by Executive Order, an independent "Commission on Indian Gambling." The Commission, which should number no less than five individuals, must evaluate each application. After a thorough review of the application, the Commission would decide whether the Governor should concur with the decision of the Secretary of the Interior that the land be taken into trust for gaming purposes. Upon formation, the Commission immediately should develop requirements to determine an applicant's ability to conduct their proposed gambling operations at a level of integrity equivalent to that expected of commercial gambling operators. These standards, enumerated in the Regulation Section of this report, include such criteria as moral fitness of the operator, fiscal capability to maintain a casino, and significant and demonstrated experience in the operation of casinos.

After the initial determination that the applicant is qualified to conduct gaming operations, the Commission should make a thorough and complete review of the various factors surrounding off-

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[172]One commentator has suggested that no conflict exists with the Appointments Clause because the Department of the Interior has read §2719(b)(1)(A) incorrectly. This approach requires the belief that the language of the section in question is ambiguous, an approach rejected by the Siletz court. See: Lorber, *State Rights, Tribal Sovereignty, and the "White Man's Firewater": State Prohibition of Gambling on New Indian Lands*, 69 Ind. L.J. 215 (1993).

[173]Id., at 1490-1491.

reservation gambling. The Task Force suggests that the Commission base their evaluation on such criteria and standards as local fiscal impacts, environmental impacts, regulatory concerns, local zoning, support of the community and state fiscal impacts. A basic structure for such criteria is developed below.

Currently, the State's role in the regulation of Indian gambling is executed by the State Racing and Wagering Board. If the Commission determines that off-reservation Indian casinos are warranted, such casinos should be regulated by the State Racing and Wagering Board which presently regulates on-reservation casinos. Such regulation should be conducted pursuant to the criteria specified in the Regulation Section of this report.

The Task Force believes that each application should be evaluated on the basis of the following: local fiscal impacts, environmental impacts, regulatory concerns, local land use concerns, support of the community and state fiscal impacts.

1. Local Fiscal Impacts

As evidenced in other sections of this report, the entry of a casino gaming facility into a community will have wide ranging effects. A stand-alone or resort casino, whether Indian or privately operated, would require increased police and fire protection, infrastructure improvements and maintenance. Many of these additional expenses would be covered either through direct payment of costs by the casino operator or through the increased tax revenue benefit received by the state and locality if the casino is privately owned. In the case of an Indian casino, property taxes would not be directly recoverable from the facility and the State ordinarily does not receive any payments from tribally conducted casino gambling.

When considering allowing additional off-reservation gambling sites the State must take into consideration what mechanisms could be employed to offset the costs of casino operations on State and municipal governments. Some revenue agreement must be a requirement of any after acquired trust lands to ensure that the people of New York State do not subsidize gambling in any form, be it private or Indian operated. All gambling operations must be structured to create jobs and to generate revenue for the State and its residents.

It is important to reiterate that the property tax base of any community hosting an Indian casino on after-acquired lands will immediately decrease when land is removed from the tax rolls. It should be required that any tribe successfully gaining after acquired lands hold the community harmless via payments in lieu of taxes. It should be noted that under federal law there are no limitations on the amounts of money that an Indian tribe may contribute to local governments. Every effort should be put forth to ensure that a portion of the gaming revenue derived by the Indian tribe is earmarked to the local host community for the above mentioned costs.

While municipalities may arrive at agreements for the reimbursement of services and other added costs that would be borne by a community surrounding an Indian casino, these agreements

must be evaluated by the Committee to ensure their enforceability and comprehensive coverage.

2. Local Land Use Concerns

Any acceptance of land into trust by the Secretary of the Interior not only removes that land from property tax rolls, but also removes the land from the controls of local zoning and planning boards. Because of this reality, careful consideration must be made on the impact the siting of a casino facility in a community would have.

The Committee must review what ramification the removal of a parcel, to be ultimately used for an Indian casino, will have on neighboring property owners, and on land use in the community and region as a whole. The building of a casino on any property may affect the traditional uses that neighboring properties have had over time. In a commercial casino scenario, the builder would be restricted to the local planning and zoning uses, local, county and state laws regarding construction and land use and general governmental authority. A casino owned by Indians upon newly acquired tribal lands does not have the same restrictions placed upon it.

Concerns regarding land use could be addressed through a Memorandum of Understanding between the Tribe and the locality as a condition of the Governor's approval of any gaming compact or amendment thereto.

3. State Fiscal Concerns[174]

A common criticism of the Oneida and St. Regis gaming compacts is that the State receives no money from the Indian operation of high stakes casino gambling.[175] The limitation was a function of federal law. Section 2710 (d)(4) of the IGRA specifically limits the monies that States' are authorized to receive from Indian tribes' Class III gaming operations. That section states:

> Except for any assessment that may be agreed to under paragraph (3)(c)(iii)[176] of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a Class III activity.

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[174]It is important to note that the fiscal estimates contained for resort and stand-alone casinos found throughout this Report are applicable to non-commercial casinos. Revenues determined from taxation, however, would not be applicable to Indian casinos.

[175]The State does receive reimbursement for actual costs and expenses of regulatory oversight.

[176]Allowed under §2710 (d)(3)(C)(iii) are "the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity."

Additionally, IGRA limits how each tribe may expend the revenues they derive from gaming operations. Pursuant to § 2710(b)(2),[177] the Chairman of the National Indian Gaming Commission may not approve any tribal ordinance or resolution for the conduct of Class II gaming if net revenues from the tribal gaming are to be used for purposes other than to:

1. fund tribal government operations or programs;
2. provide for the general welfare of the Indian tribe and its members;
3. promote tribal economic development;
4. donate to charitable organizations; or
5. help fund operations for local government agencies.[178]

This restriction is significant because it may limit whether a tribe can make payments from a Class III tribal casino to a state. While the tribe may not "give" money to a State, nor may a state impose a "tax or assessment" upon a tribe, there are instances under which the Department of the Interior may allow monetary payments to States beyond those enumerated in § 2710(d)(4).

a. Maximizing State Revenue

Basically, the Department of the Interior allows payments to a State only when a Tribe has purchased the exclusive right to either operate specific games of to conduct gaming in a specific region. When the St. Regis Mohawk and Oneida compacts were negotiated, exclusivity was not considered. However, the BIA has indicated that exclusivity occurs only if the tribe receives something they could not otherwise obtain through IGRA.

The following tax and fees paid by commercially operating casino companies would not be paid by Indian casinos: fee per gaming machine or gaming table; annual corporate license fee; annual employee license fee; property tax; sewer and water taxes; corporate tax; gaming revenue tax; local taxes; hotel occupancy taxes; general sales tax on retail sales; selective sales tax on retail sales, including on alcohol, tobacco, licenses, insurance; and a casino entertainment tax.

Should any Indian casino applications be entertained after commercial casino gambling is constitutionally authorized, the State should require that any reduction in the estimated tax receipts that would be collected from commercial casinos, reduced due to competition from Indian casinos on after acquired lands, be contributed to the State.

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[177] Although §2710(b)(2) addresses only Class II gaming, its provisions are made applicable to Class III gaming pursuant to §2710(d)(1)(A)(ii) and (2)(A). See, Ross v. Flandreau Santee Sioux Tribe, 809 F.Supp. 738 (D.S.D. 1992).

[178] 25 U.S.C. 2710(b)(2)(b)(I) - (v)(Supp. 1995). Per capita disbursements are also allowed to be distributed to tribal members pursuant to federal law.

b. Exclusivity: Definitions and Case Examples

As previously mentioned, the Bureau of Indian Affairs has allowed payments to a State beyond those enumerated as authorized in IGRA. Again, the general rule is that the tribe must be purchasing something "exclusive" that they could not have otherwise obtained through federal law. This has occurred only on a few occasions under IGRA.

(1) Connecticut

The Mashantucket Pequot Tribe entered into an agreement with the State of Connecticut on January 13, 1993 permitting the Tribe to operate slot machines at its Foxwoods Resort and Casino in exchange for contributing to the State 25% of the gross revenues from the slot machines. The agreement contained a $100 million per year minimum remittance. An amendment was made to the Memorandum of Understanding on April 25, 1994 allowing for an identical agreement between the State and the Mohegan Tribe, which had recently received Federal recognition. Under the two agreements, once the Mohegan casino opens, each tribe must contribute 25% of the gross slot revenues. The total minimum remittance to the State from slot machines was raised to $160 million per year.

There is no gaming compact between Connecticut and the Pequots. When the State refused to negotiate with the Tribe regarding casino gaming, the Pequots brought suit under IGRA. During this litigation[179] the State was compelled to submit a draft compact to a court appointed mediator. The mediator then chose the State's proposed compact over the compact submitted by the Tribe. Under IGRA, after the mediator selects a compact, the State may choose to "accept" the mediator's choice. As the State lawsuit was still pending before the United States Supreme Court, the State chose not to accept the proposed compact. Thereafter, the unsigned compact was transmitted to the Secretary of the Interior, who promulgated the unsigned compact as federal procedures in accordance with 25 U.S.C. §2710 (d)(7)(B)(vii). To date, the only authority to conduct gambling activity on the Pequot reservation is the regulatory enactment of the United States government.

At the time those procedures were issued, there was a dispute between the Pequots and the State as to whether the Tribe had a right, under IGRA, to operate video facsimile games. The State contended that the Tribe could not operate these games because they were not permitted under State law. The Tribe claimed that the games were subject to compact because the various types of Class III games permitted by State laws were sufficient to give the Tribe the right under IGRA to have video facsimiles as well.

The dispute was addressed in the procedures where, in section 15 (a), a moratorium was imposed on video facsimile operations until one of three conditions were met by:

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[179]See, Mashantucket Pequot Tribe v. State of Connecticut, 737 F. Supp. 169 (D. Conn.) *aff'd*, 913 F.d 1024 (2nd Cir. 1990), *cert. denied* 499 U.S. 975 (1991).

1. agreement between the Tribe and the State of Connecticut;
2. a court order; or
3. a change in State law to allow video facsimiles.

In effect, the procedures provided for three separate means of resolving the video facsimile dispute between the State and the Tribe: one, within the power of the executive, one by judicial decision, and one by legislative prerogative.

As the Memorandum of Understanding permitting the slot machines did not operate to enact new laws, nor alter the State law prohibition on video facsimile games, no legislative authorization was required for the Governor's action. The Memorandum merely resolved a dispute as to whether, based on existing law, video facsimile operations were authorized as a matter of federal law under IGRA.

(2) Massachusetts

The State of Massachusetts and the Martha's Vineyard-based Wampanoag Tribe of Gay Head have reached an agreement to allow the Tribe to locate their casino off the island on the mainland City of New Bedford in exchange for a percentage of casino revenue and regional casino exclusivity. The BIA, however, is scrutinizing the Memorandum of Understanding, concerned with the perception that the exclusivity the tribe is "purchasing" is only regionally exclusive.

On August 23, 1994 Massachusetts Governor William Weld signed a Memorandum of Understanding with the Wampanoag Tribe of Gay Head, Martha's Vineyard that would begin the process of allowing the tribe to construct a casino off their reservation land. The memorandum has a $105 million dollar benchmark, with 90 percent to the state and 10 percent to be split among towns and cities of Bristol County, where New Bedford is located. If the gross revenues are less than $375 million, the $105 million figure will be lowered by one-third the shortfall. If revenues exceed $375 million, the state and county will get one-third the excess. The memorandum is silent with regard to revenues from the hotel or theme park. Using the formula, if the casino were to gross under $60 million dollars, then neither the state nor the county will receive anything.

The state is guaranteed revenue for 6 years or so long as the tribe has exclusive casino rights to the state except in Hampden county, which is home to the City of Springfield. Four race tracks would also be allowed up to 400 electronic gaming devices. These tracks are located at Foxborough, Taunton, Raynham and East Boston. The agreement would stay in force after six years so long as nothing changes, but may be reopened at that time.

The Memorandum of Understanding also allows the Wampanoag's to operate a temporary casino prior to the opening of the final facility. The state will receive 25 percent of the net revenues from this facility. Also, in addition to the gaming revenue split, the Tribe has agreed to pay for $6 million dollars in road and infrastructure improvements around the casino area.

4. Environmental Impacts

The State of New York, as voiced through its statutes and regulations, has illustrated great concern regarding the environment. This sentiment is equally shared by members of the Task Force. The construction of a casino, whether stand-alone or resort, by a private corporation would be subjected to strict environmental rules, regulations and guidelines. The construction of a casino by a Indian tribe on lands taken into trust for gaming purposes would not, however, be subject to the same state environmental impact laws.

An Indian casino on after acquired lands would be exempt from all requirements under the State Environmental Quality Review Act[180] (SEQRA). As mentioned previously, a tribe applying to the Department of Interior under IGRA section 2719 (b)(1)(A) must pass extensive environmental hurdles under the National Environmental Protection Act (NEPA) to gain the Secretary's approval. It is the recommendation of the Task Force that the Commission independently scrutinize the findings and submissions the tribe makes under NEPA and ensure that all environmental concerns of SEQRA are satisfied as a condition of off-reservation approval.

5. Regulatory Concerns

The two existing compacts that the State has with Indian tribes would be applicable to after-acquired lands for gaming should the Governor concur with a land-into-trust application determination of the Secretary of the Interior. Each compact contains provisions and definitions that allow the existing compact to be utilized in its present form.

The St. Regis Mohawk Compact authorizes the Tribe to establish gaming facilities and conduct Class III gaming only within the St. Regis Mohawk Tribe Reservation.[181] "The "Reservation" means the Indian lands of the St. Regis Mohawk Tribe within the State of New York as defined by Section 4 (4) of the [IGRA], 25 U.S.C. § 2703 (4); and all lands within the State of New York title to which is either held in trust by the United States for the benefit of the Tribe or held by the Tribe subject to restriction by the United States against alienation; and all lands within the State of New York which become Indian lands as a result of the settlement of the Tribe's land claim litigation against the State."[182]

The Oneida Compact has similar provisions. The Oneida Indian Nation is authorized to

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[180]New York Environmental Conservation Law § 8-0101 *et seq.*

[181]Nation-State Compact between the St. Regis Mohawk Tribe and the State of New York, Section 3 (a) and (b).

[182]Id., Section 1 (o).

conduct Class III gaming at facilities established within Nation lands.[183] Nation lands are defined within the compact as "reservation lands of the Nation or lands within the State over which the Nation exercises governmental power and that are either (i) held by the Nation or an individual member of the Nation subject to restriction by the United States against alienation; or (ii) held in trust by the United States for the benefit of the Nation or an individual member of the Nation."[184] Thus, both Tribes could immediately utilize the existing provisions of their compacts if land were taken into trust pursuant to section 2719 (b)(1)(A) of the Indian Gaming Regulatory Act.

The Task Force, while cognizant of unique sovereignty issues surrounding Indian nations, is nonetheless concerned about the State's execution of its role in maintaining the integrity of all activities conducted in regard to Class III gaming. It is disturbing that the State does not maintain a presence in the counting room, nor employ the use of auditing to ascertain the integrity of the gaming operation. Currently this is not an issue as the State derives no direct revenues from Indian gambling. However, should the State receive revenues, either through a contractual basis or via an exclusivity arrangement, the State should require that strict accounting and reporting be conducted on behalf of New York's interests.

6. Community Support

Support of the community in which an Indian casino could be located should be a requirement of any decision regarding concurrence with a Secretary of the Interior's decision to take the land into trust for gaming purposes. This sentiment cannot accurately be measured through receipt of letters of support or opposition, through mere polling information or through illustrations of support by demonstration. It is the Task Force's belief that community support should only be measured through a non-binding countywide referendum where the subject land is located. This referendum should be conducted pursuant to State, county and local laws.

The referendum should be triggered upon the Secretary of the Interior's determination that the land should be taken into trust for gaming purposes. The vote of the referendum should should be given the utmost attention and consideration by the Committee and the Governor.

E. THE POTENTIAL OF OFF-RESERVATION INDIAN CASINO GAMBLING IN NEW YORK STATE

It should be noted that all fiscal estimates contained in Section Two, The Economic and Sociological Impacts of Casino Gambling Legalization, are **equally applicable for privately operated and/or Indian operated casinos.** The only difference between ownerships is that an Indian casino is not subject to federal, state or local taxation. While this section is centered at

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[183]Nation-State Compact between the Oneida Indian Nation of New York and the State of New York, Section 2 (a).

[184]Id., Section (o).

potential Catskills and Western New York area based Indian-owned casino on off-reservation lands, the analysis is equally applicable to other regions of the State as well. Analyses of one and two proposed Indian-owned casinos located in the Catskills are contained in this section.

While the positive fiscal estimates are equally applicable between private and Native American casinos, the negative fiscal aspects of casino legalization are likewise applicable to Native American casinos on after acquired lands. These negative fiscal projections on pari-mutuel wagering, off-track betting, the State Lottery and religious, charitable and non-profit charity gambling that commercial casinos legalization could have are equally relevant in an Indian gambling context.[185]

1. Determining the Value of an Indian Casino

To analyze the potential of off-reservation Indian-owned casino gambling in the Catskills and Western New York,[186] the Task Force used its demand-oriented IMPLAN economic impact model, utilizing assumptions on expected participation or capture rates, trip frequencies, and average casino win per visitor day. These assumptions were modified to reflect the use of videogaming devices and, in the case of Western New York, the reality of competition from a Niagara Falls, Ontario casino with slot machines. In the Catskill Region, there are no other casinos located either in the region or near the border outside of the State.

There have been no studies conducted to assess the relative competitiveness of a single, stand alone casino without slot machines in a region which is also served by other, unrestricted casinos, as would be the situation in Western New York. A Coopers and Lybrand analysis of the potential casino market in the Catskills, conducted for the Oneida Nation, indicated that the lack of traditional slot machines, the limited drawing power of a single casino, and one which stands apart from hotel accommodations would not draw extensively from markets located more than 75 miles from the casino. It was also anticipated that its ability to attract visitors from its primary and secondary markets would be reduced.

Another consideration is that there would be a significant shift in total casino revenues from gaming devices to table games, because of the absence of slot machines. Compared to slot machines' 70-percent share of total revenues in both Atlantic City and Foxwoods, it is anticipated that the less popular, video gaming devices, such as those currently used at the Turning Stone Casino, would account for only 45 percent of total casino revenues.

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[185]Please refer to Section Two for detailed examination of the likely effects of commercial casino gambling on these activities.

[186]These locations were chosen because they have been identified in published accounts as off-reservation Indian casino sites. See: Farrell, *Teletech Deal Gets Complex, Native American Group Pushes Gaming Facility*, Niagara Gazette, Aug. 25, 1996; Hughes, *Oneida Nation Wants Second Casino*, Gannett News Service, June 5, 1996.

These adjustments indicate that the Catskills region would be able to economically support at least one 200,000-square-foot Indian casino with 200 gaming tables and 3,000 non-slot, gaming machines. The Task Force estimated that demand at a tribal casino in Western New York would support a 100,000 square foot casino with about 100 gaming tables and 1,500 video devices.

2. Fiscal Estimates

Taking these limitations into account, it is estimated that a large, stand alone casino in the Catskills would attract up to 6 million visitors, and account for total gaming revenues of as much as $337 million. Unlike the Western New York region, this estimate is based on the assumption that the lack of slot machines will significantly affect competitive market draw, but not average gaming expenditures per casino visitor. Total employment, both inside and outside the casino, could total over 8,000 jobs.

A similar, smaller casino, located in the Western region of the State is expected to attract as many as 3.6 million visitors each year. In the contrast to the Catskills, the existence of another, full-service casino, in Niagara Falls, Ontario, is expected to limit both total visitation, as well as average gaming expenditures per casino visitor. In assessing the competitive condition of the regional casino market, it is estimated[187] that casino visitors would spend an average of $40 per casino visit in western New York. It is projected, therefore, that these casino visitor would generate annual casino gaming revenues of up to $143 million. Total employment, both inside and outside the casino, could total over 2,700 jobs.

3. Tax Revenue Estimates

As stated earlier, while an Indian casino does not provide direct tax revenue benefit to the State via gaming revenue taxes, it does allow for collection of other taxes captured through increased employment, sales and services at or near the Indian facility. The following represent tax revenue estimates to New York State, Sullivan County and Erie or Niagara County from proposed Indian-owned casinos, based on employment projections using the both the demand and supply economic models.

a. State Taxes

The State could receive up to $20 million in taxation revenue from a Catskills Indian casino as much as $11 million from a Western New York Indian casino. These taxes would be derived from personal income taxes paid by the employees of the Indian casino as well as increased sales and use taxes due to the casino.

(1) Personal Income Taxes: From a Catskills Indian casino, it is estimated that personal income taxes from those directly and indirectly employed by the casino could total as much as $5

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[187] Bear Stearns, Global Gaming Almanac 1996

million. The personal income taxes paid by those directly or indirectly employed by aWestern region casino could be as much as $3 million.

(2) Sales and Use Taxes: Assuming that 40 percent of local personal income is spent on purchases subject to state and local sales and use taxes, as are selected purchases by local casinos and their suppliers, employment in an Indian casino could generate up to an estimated $2.5 million state sales taxes in the Catskills, and $1.2 million state sales taxes in theWestern region.

State sales taxes generated from the spending by casino patrons in Western New York and the Catskills could generate up to $6.4 million and $12.3 million, respectively, in state sales and use taxes.

(3) Corporate Income Tax: The Task Force is reluctant to make any association concerning corporate taxes generated per job. While this may be a measure of certain corporate tax capacity in specific instances, it is generally not a valid assumption. In this case, the Indian casino would not pay corporate taxes and many of the businesses expected to benefit from the casino (hotels, motels, restaurants, etc.) would not likely pay corporate taxes; rather they would pay under the subchapter S provisions which enable corporate profits to be taxed with the personal income of the corporate shareholders. Therefore, it is more likely that personal income tax collections would increase, but that amount could not be quantified per job.

b. Local Taxes: The Catskills area locality hosting an Indian casino could receive up to $11 million in local tax revenue, while a casino located in Western New York could provide the host locality close to $5.7 million in local tax revenue.

(1) Real Property Tax: Using employment projections for a single Catskills casino as well as communtation patterns,[188] it was estimated that close to 3,000 jobs would be held by new residents of Sullivan County. Applying the same jobs per household relationship of 1.2, it was estimated that this would result in as many as 2,500 households in Sullivan County. The number of "new" households was then multiplied by the 1995 average residential tax for Sullivan County as computed by the State Office of Real Property Services (ORPS), ($2,072), to reach the estimated annual real property tax contribution of up to $5 million. For the Western region casino, a similar methodology resulted in an estimated annual real property tax contribution of approximately $1.8 million.

According to ORPS, this type of analysis overestimates tax revenues. Similarly, ORPS indicated it is not possible to make an accurate estimate of increased non-residential property taxes based simply on estimated increased business activity.

(2) Sales/Use Tax: Based upon similar methodology as was used to compute estimated state sales and use taxes, a single Catskills casino would generate up to $11 million in local sales tax, and

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[188]NYS Department of Labor, BLMI Report No. 4, July 1993

for Western New York, the increased benefit could be as much as $5 million.

(3) **Hotel Tax:** There would likely be an increase in the revenues derived by the locality from a hotel tax. In Sullivan County, room tax revenues on rentals to casino visitors is expected to account for an additional $470,700.