

2003

Indian Gambling in Ohio: What are the Odds?

Blake Watson

University of Dayton, bwatson1@udayton.edu

Follow this and additional works at: https://ecommons.udayton.edu/law_fac_pub



Part of the [Indian and Aboriginal Law Commons](#)

eCommons Citation

Watson, Blake, "Indian Gambling in Ohio: What are the Odds?" (2003). *School of Law Faculty Publications*. 74.
https://ecommons.udayton.edu/law_fac_pub/74

This Article is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in School of Law Faculty Publications by an authorized administrator of eCommons. For more information, please contact frice1@udayton.edu, mschlange1@udayton.edu.

INDIAN GAMBLING IN OHIO: WHAT ARE THE ODDS?

BLAKE A. WATSON*

I. INTRODUCTION

In 1991, as an attorney in the Department of Justice, I helped write a brief urging the United States Supreme Court to decline to consider the State of Connecticut's legal arguments raised in opposition to the plans of the Mashantucket Pequot Tribe to construct and operate a casino.¹ At that time, I had never heard of this tribe, and I would wager (no pun intended) that few people outside of Connecticut were aware that—just eight years earlier—the Mashantucket Pequots had obtained federal recognition as a tribe by an Act of Congress.²

The Pequots' Foxwoods Resort Casino opened its doors in 1992, and today is one of the largest casinos in the world, with over 5,800 slot machines, a spacious high-stakes bingo hall, and more than 300 gaming tables.³ According to one estimate, the tribal casino's gross revenue was approximately \$1.3 billion in 1999.⁴ Since 1988, Indian gambling revenues in general have grown from \$171 million to over \$12 billion per

Copyright © 2004, Blake A. Watson.

* Professor of Law, University of Dayton School of Law. J.D. 1981, Duke University School of Law; B.A. 1978, Vanderbilt University. Research for this Article was supported by the University of Dayton School of Law through a summer research grant.

¹ Brief of Amici Curiae, *Connecticut v. Mashantucket Pequot Tribe* (No. 90-871). The Supreme Court denied the State's petition for a writ of certiorari. *Connecticut v. Mashantucket Pequot Tribe*, 499 U.S. 975 (1991).

² In 1983, Congress extended federal recognition to the Mashantucket Pequot Tribe by enacting the Connecticut Indian Lands Claims Settlement Act. *See* Act of Oct. 18, 1983, Pub. L. No. 98-134, 97 Stat. 851 (1983) (codified at 25 U.S.C. §§ 1751-1760 (1992)). The Act is also known as the Mashantucket Pequot Indian Claims Settlement Act. *See* *Connecticut ex rel. Blumenthal v. Babbitt*, 26 F. Supp. 2d 397, 401 (D. Conn. 1998), *judgment rev'd and remanded*, *Connecticut ex rel. Blumenthal v. U. S. Dep't of Interior*, 228 F.3d 82 (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001) (noting that the purpose of the legislation was "'to provide Congressional ratification and implementation of a settlement of claims to land and consequential damages that [had] been raised [in a federal lawsuit filed] by the Mashantucket Pequot Tribe in 1976'" (alterations in original).

³ *See* Kathryn R.L. Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47, 63 (2002) [hereinafter Rand, *No Pequots on the Plains*].

⁴ *Id.* *See also id.* at 63 n.121 ("In 2000, the combined revenue of Foxwoods and the Mohegan Sun, Connecticut's second tribal casino [owned by the Mohegan Tribe], was about \$1.9 billion.").

year.⁵ According to a report by Merrill Lynch, American Indian casinos will take in thirty-six percent of national gaming revenue in 2003, a figure that is expected to rise to forty percent by 2006.⁶

Not all tribes, however, have benefited. According to a December 2002 *Time Magazine* article, Indian casinos in five states with almost half the Native American population (Montana, Nevada, North Dakota, Oklahoma, and South Dakota) account for less than three percent of all gaming proceeds, while casinos in California, Connecticut, and Florida—states with only three percent of the Indian population—receive forty-four percent of all revenue, an average of \$100,000 per Indian.⁷ The National Indian Gaming Association states on its website that 201 of the 562 federally-recognized Indian tribes are engaged in some form of gambling in twenty-nine states.⁸ Ohio is among the minority of states that currently

⁵ U.S. GEN. ACCOUNTING OFFICE, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 34 (Nov. 2001), at <http://www.gao.gov/new.items/d0249.pdf> [hereinafter GAO, INDIAN ISSUES]; Michael Hiestand, *Involvement of Casinos in Sports is Growing Trend*, USA TODAY, Jun. 19, 2003, at C2 (Indian tribal casinos grossed \$ 12.7 billion in 2001.); Sandra J. Ashton, *The Role of the National Indian Gaming Commission in the Regulation of Tribal Gaming*, 37 NEW ENG. L. REV. 545, 545 (2003) (“Indian gaming generated \$12.7 billion in 2001 and accounts for about a quarter of the gaming market in the United States.”).

⁶ Mark Fogarty, *Boom Times for Indian Casinos, Says Merrill Lynch: But Watch Out for Rapid Growth*, INDIAN COUNTRY TODAY, Jul. 9, 2003, at D1. The Merrill Lynch report estimates that American Indian casinos will take in \$15 billion in 2003, and states that the largest states in Indian gaming revenue are California, at \$5 billion, Connecticut, with \$2 billion, and Michigan, at around \$1 billion. Some twenty new tribes may start gaming in California, according to the report, and New York may reach \$2 billion when its new casinos begin operations. *Id.*

⁷ Donald L. Barlett & James B. Steele, *Wheel of Misfortune*, TIME, Dec. 16, 2002, at 47. See also Ashton, *supra* note 5, at 546 (“For the fiscal year ending in 2000, 62% of all tribal gaming revenues were generated by only 12% of the gaming operations.”). But see Rand, *No Pequots on the Plains*, *supra* note 3, at 49-50 (arguing that “sovereignty, rather than net profits, provides the necessary foundation for assessing whether tribal gaming is successful,” and positing that gaming tribes in North Dakota and across the Great Plains, have achieved “notable success . . . in terms of preserving tribal sovereignty and strengthening tribal government”); Tribal Court Clearinghouse: Native Gaming Resources, at <http://www.tribal-institute.org/lists/gaming.htm> (last visited May 6, 2003) (“In areas of high unemployment like North and South Dakota, 80% of Tribal governmental gaming employees are Indian.”).

⁸ See National Indian Gaming Association, Library & Resource Center, at <http://www.indiangaming.org/library/index.html> (last visited Jun. 16, 2003). The National Indian Gaming Association’s website does not list the states, unlike the federal National Indian Gaming Commission’s website, which names twenty-eight states where Indian tribes operate gaming facilities pursuant to the Indian Gaming Regulatory Act (IGRA), Pub. L.

do not have tribal gambling.

Is that about to change? Are tribal casinos coming to Ohio? Because of secrecy and uncertainty, it is difficult to separate rumor from reality, but it does appear that Ohio is being increasingly viewed as a market for Indian gaming. Several years ago, the Wyandotte, Seneca, and Ottawa Indians explored opening casinos in northern Ohio.⁹ More recently, reports have circulated about an undisclosed tribe wanting to open a casino in Clermont County (east of Cincinnati), and Shawnee Indians have discussed locating gaming and entertainment facilities near Botkins in Shelby County, Urbana in Champaign County, and Waynesville in Warren County.¹⁰ The unidentified Shawnee tribe proposing to build a \$550 million gaming center near Botkins (about fifty miles north of Dayton, Ohio) is apparently one of the three Shawnee tribes (Eastern Shawnee, Absentee Shawnee, and Loyal Shawnee) located in Oklahoma.

Despite these recent developments, tribal gaming in Ohio is not a “sure bet” for several reasons. First, the controlling federal law—the Indian Gaming Regulatory Act (IGRA) of 1988¹¹—requires that such gaming must be conducted on “Indian lands,” which includes lands within an Indian reservation and any lands held in trust by the United States for the benefit of a tribe or individual Indian.¹² At present, there is no federally-recognized Indian tribe located in Ohio, and there are no Indian reservations or Indian “trust” lands to be found in the state. Interested Indian groups and tribes—as well as their financial backers—hope to change these facts.

What are the odds that Ohio will join the growing list of states where

No. 100-497, 102 Stat. 2467, 25 U.S.C. §§ 2701-2721. See National Indian Gaming Commission (NIGC): Gaming Tribes by State, at http://www.nigc.gov/nigc/nigcControl?option=GAMING_TRIBES®IONID=0&SORT=1 (last visited Jun. 16, 2003). The twenty-two states not listed on the NIGC website are Alabama, Arkansas, Delaware, Georgia, Hawaii, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, and West Virginia.

⁹ See *infra* notes 48-51 and accompanying text.

¹⁰ See Marie McCain, *Clermont Hears Casino Hints*, CINCINNATI ENQUIRER, Feb. 9, 2003, at B1; Cathy Mong, *Indian Tribes Claiming Lost Land for Casinos*, DAYTON DAILY NEWS, Apr. 13, 2003, at A1 [hereinafter Mong, *Indian Tribes*]; *infra* notes 52-59 and accompanying text.

¹¹ Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. §§ 2701-2721.

¹² See 25 U.S.C. §§ 2710(b)(1), (d)(1) (requiring that IGRA gaming take place on “Indian lands”) and 25 U.S.C. § 2703(4) (defining “Indian lands” to mean “(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power”).

Indian gaming is conducted pursuant to the Indian Gaming Regulatory Act? The answer requires both legal analysis and political guesswork. Under the IGRA, it is possible that a group of Indians situated in Ohio may become a federally-recognized tribe, receive a land base as a reservation, and operate gaming thereon. It is also possible that a federally-recognized tribe located in a state other than Ohio may acquire lands in Ohio and operate a gaming establishment on such lands.

This Article explores the options available under the IGRA to Indian groups and tribes seeking to establish gambling establishments in Ohio. Part II of the Article begins by looking at gambling in Ohio in general, and Part III summarizes recent proposals for Indian gaming in the state. The origins and basic provisions of the IGRA are set forth in Part IV of the Article. The most pertinent portion of the statute, section 20, is the subject of Part V. Section 20 of the IGRA generally prohibits tribal gaming on land acquired in trust after October 17, 1988 (the statute's effective date), but provides several exemptions to the prohibition.¹³ In view of these exemptions, it appears that there are three possible ways under the IGRA that tribal gambling could come to Ohio.¹⁴ First, if a group of Indians in Ohio were to become federally recognized, the tribe could conduct gaming on lands that were taken into trust as part of the tribe's initial reservation.¹⁵ A second option is for a currently-recognized tribe to conduct gambling on lands in Ohio that are taken into trust as part of a settlement of a land claim.¹⁶ A third possibility is for an out-of-state tribe (such as one of the Shawnee tribes in Oklahoma) to petition the Department of the Interior to place land located in Ohio in trust for the tribe.¹⁷ However, the statute and implementing regulations limit the Secretary's discretion to grant such requests and—most critically—if the tribe proposes to use the acquired lands for gaming purposes, the Governor of Ohio must affirmatively agree to the proposal.¹⁸

If Indian gaming is allowed in Ohio pursuant to the IGRA, important questions remain regarding the types of gambling that will be permitted. Part VI of this Article addresses this issue, focusing in particular on the possibility of negotiating tribal-state compacts that require the tribes to share gaming revenues with the state.

¹³ 25 U.S.C. §§ 2719(a), (b).

¹⁴ There are more than three exemptions to the prohibition of tribal gaming on land acquired in trust after October 17, 1988, but not all exemptions are germane to efforts to establish Indian gambling in Ohio. See *infra* notes 101-112 and accompanying text.

¹⁵ 25 U.S.C. § 2719(b)(1)(B)(ii).

¹⁶ 25 U.S.C. § 2719(b)(1)(B)(i).

¹⁷ 25 U.S.C. § 2719(b)(1)(A).

¹⁸ See 25 C.F.R. § 151.11 and 25 U.S.C. § 2719(b)(1)(A).

II. GAMBLING IN OHIO: A QUICK HISTORY

Gambling in Ohio is constrained by the Ohio Constitution,¹⁹ regulated by state statutes,²⁰ and subject to federal law.²¹ In *Mills-Jennings of Ohio, Inc. v. Department of Liquor Control*,²² Justice Douglas of the Ohio Supreme Court aptly summarized state efforts to regulate gambling:

The effort to control gambling in this state is a never-ending fight. Historically in Ohio the gambling instinct was considered as an evil in and of itself. As early as the year 1790, by a law passed by the Governor and Judges of the Northwest Territory at Vincennes, it was provided that 'any species of gaming, play or pastime whatsoever' whereby money may be won or lost was prohibited. Likewise the use of billiard tables 'or other gaming tables, or any other machine' for gambling was prohibited. Effective October 1, 1795, it was provided that

¹⁹ Section 6, Article XV, of the Ohio Constitution currently provides:

Except as otherwise provided in this section, lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State.

The General Assembly may authorize an agency of the state to conduct lotteries, to sell rights to participate therein, and to award prizes by chance to participants, provided that the entire net proceeds of any such lottery are paid into a fund of the state treasury that shall consist solely of such proceeds and shall be used solely for the support of elementary, secondary, vocational, and special education programs as determined in appropriations made by the General Assembly.

The General Assembly may authorize and regulate the operation of bingo to be conducted by charitable organizations for charitable purposes.

²⁰ See, e.g., OHIO REV. CODE ANN. §§ 2915.01-06 (general criminal prohibitions relating to gambling); §§ 2915.07-12 (regulation of charitable bingo and prohibition of illegal bingo games); §§ 3763.01-08 (regulation of gaming contracts, recovery of gaming losses, effect of gaming on leases, and recovery of losses in lotteries); §§ 3769.08 (pari-mutuel wagering on horses); §§ 3769.089 (televised horse races, wagers, and taxes).

²¹ Federal statutory provisions apply in Ohio pursuant to the Supremacy Clause. U.S. CONST. art. VI, cl. 2. See, e.g., 15 U.S.C. §§ 1171-1178 (transportation of gambling devices); 15 U.S.C. §§ 3001-3007 (interstate horseracing); 18 U.S.C. §§ 1081-1084 (gambling ships); 18 U.S.C. §§ 1301-1307 (lotteries); 18 U.S.C. §§ 1951-1960 (racketeering); 18 U.S.C. §§ 1961-1968 (RICO); 26 U.S.C. §§ 4401-4424 (taxes on wagering); 28 U.S.C. §§ 3701-3704 (professional and amateur sports protection).

²² 435 N.E.2d 407 (Ohio 1982).

tavern keepers or inn holders were prohibited from permitting ‘cards, dice, billiards, or any instrument of gaming to be made use of’ on the premises operated by them as such tavern or inn.

The first Constitution of Ohio, adopted in 1802, made no direct reference to lottery or gambling. In 1805, the General Assembly passed an Act making various forms of gambling illegal. In 1807, it was made an offense to conduct a lottery ‘without a special act of the legislature.’ From 1807 to 1828 the General Assembly passed a number of Acts providing for the raising of money, by way of lottery, to make public improvements. In 1830, the General Assembly prohibited the further use of lotteries or schemes of chance for any purpose and this prohibition was carried over into the Constitution adopted in 1851. Section 6, Article XV of the Constitution of 1851 provided that ‘lotteries, and the sale of lottery tickets, for any purpose whatever shall forever be prohibited in this State.’ It is interesting to note that when the people of the state adopted the Constitution of 1851, nothing therein was said of gaming or gambling as such, or in the Amendments to that Constitution later adopted. The prohibition of the Constitution was against lotteries and the sale of lottery tickets only. As we have seen, the adverse attitude of the General Assembly toward the use of gambling machines or devices was so pronounced, and their use so adverse to the policy of the state, that it apparently was thought unnecessary to write any prohibition thereof into the Constitution. It was only because the legislatures had seen fit to employ the scheme of a lottery for public and private purposes that the people considered it necessary to prohibit lotteries in the Constitution. This is clearly demonstrated by the enactment of Ohio’s first anti-gambling provisions, on February 14, 1807, under the title, ‘an act, for the prevention of certain immoral practices.’ Every ‘. . . species, kind or way of gambling at hazard or chance, under any pretense whatever, for money or any other article of value, and betting thereon,’ were prohibited. Thus, at the time of the Constitutional Convention of 1851, all gambling, whether games or schemes of chance, was illegal in Ohio.²³

²³ *Id.* at 409-10 (citations omitted). See also *Ohio Roundtable v. Taft*, 773 N.E.2d 1113, 1117 (Ohio Com. Pl. 2002) (quoting same excerpt). Justice Douglas, in *Mills-*

The state's long-standing policy against gambling was undercut in the mid-1970s when Ohio joined other states in exploring the potential for increasing revenue through state-sponsored lotteries or gaming activities.²⁴ In 1973, the Ohio Constitution was amended to authorize a state-operated lottery, and section 6 of Article XV was again amended in 1975 to provide for the regulation of bingo conducted by charitable organizations for charitable purposes.²⁵

Jennings of Ohio, Inc., further noted that the state constitution up until the mid-1970s "was repeatedly invoked as evidencing a strong public policy against gambling" and, consequently, courts in Ohio developed the "general proposition . . . that just because the Constitution referred only to lotteries, this did not mean that other forms of gambling were allowed." 435 N.E.2d at 410 (citing *Kroger Co. v. Cook*, 265 N.E.2d 780 (Ohio 1970); *Stillmaker v. Dep't. of Liquor Control*, 249 N.E.2d 61 (Ohio 1969); *Westerhaus Co. v. Cincinnati*, 135 N.E.2d 318 (Ohio 1956)).

The Editor's Comment to section 6, Article XV of the Ohio Constitution, Baldwin's Ohio Revised Code, concurs with the characterization in *Mills-Jennings of Ohio, Inc.* of the state's historic policies towards gambling:

In colonial times and well into the Nineteenth Century, state and local governments commonly sponsored lotteries to raise money for public works projects. In 1806, for example, the General Assembly passed a special act authorizing a lottery to raise \$12,000 to improve the portage between the Cuyahoga and Muskingum Rivers. The same General Assembly also passed an act prohibiting any lottery without a special act of the legislature, and providing a heavy fine for violation. It is unclear whether the prohibition against private lotteries was meant to remove competition to government-sponsored schemes, or was prompted because private lotteries were subject to abuses. In any case, by 1851 both public and private lotteries, for any purpose, had come to be considered pernicious and were outlawed by adoption of [Section 6, Article XV of the Ohio Constitution] in its original form.

OHIO CONST. art. XV, § 6 (Editor's Comment 1992, Baldwin's Ohio Revised Code) (citations omitted).

²⁴ See Biennial Report of the National Indian Gaming Commission, 1998-2000, at 8 [hereinafter Biennial Report] (noting that tribal government-sponsored gaming began in the late 1970s, "when a number of Indian tribes established bingo operations as a means of raising revenue to fund tribal government operations").

²⁵ See OHIO CONST. art. XV, § 6 (Editor's Comment 1992, Baldwin's Ohio Revised Code); see also *Mills-Jennings of Ohio, Inc.*, 435 N.E.2d at 410 (observing that the constitutional authorization of state lotteries and charitable bingo, "added to the already existing pari-mutuel wagering on horse racing, substantially changed the public policy [of Ohio] with regard to gambling").

The Ohio Lottery television game show, *Cash Explosion*, first aired in 1987. See Ohio Freedom Forum: Casino Gambling & Lottery Timeline, at <http://www.ohioroundtabl->

In the last twenty-five years, Ohioans have been wary of state-sanctioned gambling, as well as proposals to expand such activity. In 1988, section 6 of Article XV of the Ohio Constitution was amended yet again to expressly provide that lottery proceeds shall be used solely for support of public schools.²⁶ In 1990 voters in eighty-five of Ohio's eighty-eight counties—and three of every five voters statewide—rejected Issue 3, a casino initiative which would have (1) let Lorain, Ohio, residents vote on whether to allow a single casino as a pilot program for at least five years, and (2) established a process for the Ohio General Assembly to define casino districts around seven Ohio cities.²⁷ Six years later, State Issue 1, a proposal to amend the state constitution to permit riverboat casinos at eight sites, failed in all eighty-eight Ohio counties,²⁸ despite the fact that the gambling proponents raised \$6.2 million in contrast to \$405,067 raised by their opponents.²⁹ Proponents of Issue 1 unsuccessfully argued “that the state stood to lose jobs, tax money for schools and over \$1 billion in money wagered by Ohioans elsewhere if the state did not join the national trend.”³⁰

State involvement in gambling did increase in 2001 when Governor Robert Taft signed legislation giving the Ohio Lottery Commission permission to join a multi-state lottery.³¹ A coalition of church groups and

e.org/issues/gambling/timeline.html (last visited Jun.5, 2003).

²⁶ The 1973 amendment authorizing the state to conduct lotteries provided that “the entire net proceeds of any such lottery are paid into the general revenue fund of the state.” OHIO CONST. art. XV, § 6 (amended 1973). The 1988 amendment specified that the proceeds be “paid into a fund of the state treasury that shall consist solely of such proceeds and shall be used solely for the support of elementary, secondary, vocational, and special education programs as determined in appropriations made by the General Assembly.” OHIO CONST. art. XV, § 6 (amended 1988).

²⁷ Timothy Heider, *Casino Backers Study Systems for Next Attempt*, THE PLAIN DEALER (CLEVELAND), Nov. 18, 1990, available at 1990 WL 4628871. The district centers were Cleveland, Cincinnati, Dayton, Steubenville, Toledo, Columbus and Youngstown. *Id.* Casino gambling would have been allowed in a district if the voters in such district approved. *Id.*

²⁸ *All 88 Counties Defeated Casino Issue*, COLUMBUS DISPATCH, Nov. 8, 1996, at F1, available at 1996 WL 11027044.

²⁹ Dale Dempsey & Susan Vinella, *Voters Reject Casinos*, DAYTON DAILY NEWS, Nov. 6, 1996, at A3, available at 1996 WL 10814930. Issue 1 sought to place three riverboats in Cleveland and Cincinnati and one each in Lorain and Youngstown. The proposal was defeated sixty-two percent to thirty-eight percent. See *Ohio Roundtable v. Taft*, 773 N.E.2d 1113, 1119 (Ohio Com. Pl. 2002).

³⁰ Dempsey, *supra* note 29.

³¹ Jon Craig, *Ohio Isn't Only State Gambling on New Game*, COLUMBUS DISPATCH, Jan. 21, 2002, at C1, available at 2002 WL 6323403. Ohio joined Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, and Virginia in the Mega Millions game

other gambling opponents joined the policy group Ohio Roundtable in filing suit to challenge the legitimacy of Ohio's participation in the new multi-state lottery game, popularly known as "Mega Millions."³² In July 2002, the Franklin County Court of Common Pleas held that Ohio could participate in the multi-state lottery, rejecting the contention that the Ohio Constitution permits only a lottery operated exclusively by Ohio, with no involvement by other states.³³ The court did hold, however, that H.B. 405—a 2002 state appropriations measure which authorized the General Assembly to utilize Ohio's multi-state lottery proceeds to resolve the state's budget problems—contravened the constitutional requirement, found in section 6 of Article XV, to use the "entire net proceeds" of state-conducted lotteries solely for the support of education.³⁴ The decision was affirmed on both issues by the Ohio Court of Appeals for the Tenth District in June 2003.³⁵

As seen above, Ohio has eased its anti-gambling stance in recent decades and now permits parimutuel wagering at horsetracks, charitable bingo, and lotteries. To date, however, Ohio has not permitted casino gambling, despite the related arguments that (1) Ohioans engage in such gambling in any event, albeit in other states, and (2) accommodating resident (and other) gamblers in Ohio would ease state budgetary problems.³⁶ In March 2001, Governor Taft's threat to veto a proposal to convert seven horseracing tracks into "mini-casinos" put a temporary stop to burgeoning legislative efforts.³⁷ However, in April 2003, the House

in May 2002. Andrew Welsh-Huggins, *Multistate Lottery Ruled Legal; Ohio's Mega Millions Participation OK, but Money is for Education*, AKRON BEACON JOURNAL, Jul. 16, 2002, available at 2002 WL 6738811.

³² Welsh-Huggins, *supra* note 31. See also *Ohio Roundtable*, 773 N.E.2d at 1116.

³³ Welsh-Huggins, *supra* note 31. See generally *Ohio Roundtable*, 773 N.E.2d at 1119.

³⁴ *Ohio Roundtable*, 773 N.E.2d at 1132. Although proceeds from the multi-state lottery officially are designated for education, H.B. 405 removed an equal amount of money from the schools' existing allocation. The court found this to be an "accounting formality" that sought to circumvent constitutional requirements. *Id.* at 1135. See also Tim Doulin, *Ruling Upholds Lottery*, COLUMBUS DISPATCH, Jul. 16, 2002, at A1, available at 2002 WL 23275389.

³⁵ *State ex rel. Ohio Roundtable v. Taft*, No. 02AP-911, slip op. (Ohio Ct. App. June 26, 2003).

³⁶ See, e.g., Lee Leonard, *Video Slots at Tracks; Gambling, Budget Now Before Lawmakers*, COLUMBUS DISPATCH, Jun. 11, 2003, at C1, available at 2003 WL 57336416 (Sen. Louis W. Blessing Jr., R-Cincinnati, supporting legislation to bring electronic slot machines to Ohio horse racetracks by stating that "[t]his proposal is to simply keep Ohio dollars in Ohio," and by noting that the state would collect approximately \$500 million a year from Ohioans who now go to Indiana, Ontario and West Virginia to gamble).

³⁷ Randy Ludlow, *Mini-Casino Idea Surfaces Again*, CINCINNATI POST, Mar. 29,

approved a two-year \$48.5 billion budget bill which included a temporary one-cent increase to the state sales tax that voters could rescind by approving electronic slot machines at racetracks.³⁸ As proposed, if voters agree to allow up to 2,500 video lottery terminals (VLTs) at each of Ohio's seven horseracing tracks, fifty-one and one-half percent of the proceeds would go to the state, one-half percent would go to the local governments where the tracks are located, and eight to ten percent would go to horse owners and breeders. The track owners would receive thirty-eight to forty percent.³⁹ In June 2003 the Ohio Senate State and Local Government Committee postponed discussion of the slot machine proposal until the fall, which means the earliest voters could see the issue would be on the March 2004 primary ballot.⁴⁰

The debate raging over permitting electronic slot machines at horse racetracks has been complicated by an unexpected twist—the emerging

2001, at A1, *available at* 2001 WL 5092889. Governor Taft expressed objections to video gambling “without a vote of the people.” *Id.*

³⁸ Casey Laughman, *Ohioans Face Choice: Sales Tax or Slot Machines*, ASSOCIATED PRESS NEWSWIREs, Apr. 10, 2003. Under the House budget bill, if voters were to approve the gambling expansion, the increase to the current five-cents-per-dollar tax, which would start July 1, 2003, would end June 30, 2004. If voters rejected the gambling proposal, the increase would stay in place for another year. *Id.*

In the last ten years, racetrack “casinos—dubbed ‘racinos’—have opened in Delaware, Iowa, Louisiana, New Mexico, and Rhode Island. They have been approved in Maine and New York and more than a half-dozen other states are considering them.” Barnet D. Wolf & Lee Leonard, *Win, Place or Bust: Ohio's Horse-Racing Industry Pushes Slots As Its Last Chance to Thrive*, COLUMBUS DISPATCH, Jun. 22, 2003, at A1, *available at* 2003 WL 57337808 [hereinafter Wolf, *Win, Place or Bust*].

³⁹ Laura A. Bischoff, *Ante Being Upped on Gambling*, DAYTON DAILY NEWS, May 25, 2003, at A1, *available at* 2003 WL 5770927 [hereinafter Bischoff, *Ante Being Upped*]. Proponents estimate that the House proposal would generate \$500 million a year for the state's education budget. *Id.* The Senate, however, proposed to remove VLTs from the budget bill and deal with that proposal as a separate issue. Governor Taft expressed opposition to linking the VLT proposal with the sales tax legislation, and is against bringing slot machines to Ohio. *Id.* Taft supported Ohio's entry into the Mega Millions multi-state lottery as an extension of the pre-existing Ohio state lottery, but—according to his spokesman, Orest Holubec—when voters approved the lottery in 1973, “they didn't vote for mini-casinos, and that's what (racinos) are.” Wolf, *Win, Place or Bust*, *supra* note 38.

⁴⁰ See Laura A. Bischoff, *Slots Issue Probably On Hold: Voters Won't Have Say Until March at Earliest*, DAYTON DAILY NEWS, Jun. 25, 2003, at B3; Editorial, *VLTs—DOA*, CINCINNATI ENQUIRER, Jun. 26, 2003, at C8 (“Senate Republicans gave up Tuesday on crafting an authorizing amendment and a bill to allocate the estimated \$500 million annual revenue the state could receive from video lottery terminals. The issue appears dead this year in the General Assembly, although groups still could circulate petitions to put an amendment on the November ballot.”).

possibility of Indian gambling in Ohio. Governor Taft expressed concern in June 2003 that voter approval of a constitutional amendment permitting video slot machines (or other forms of casino gambling) could have the unintended consequence of “open[ing] the door” to the establishment of tribal casinos in Ohio.⁴¹ There are currently no “Indian lands” in Ohio, a necessary condition for any tribal gaming pursuant to the IGRA. Moreover, there are currently no federally-recognized Indian tribes located in Ohio. But, as discussed below, it is possible that a group of Indians presently situated in Ohio may become a federally-recognized tribe, receive a land base as a reservation, and operate gaming thereon. Alternatively, it is conceivable that a federally-recognized tribe located in a state other than Ohio may acquire lands in Ohio and operate a gaming establishment on such lands. The possibility of tribal gaming in Ohio further complicates the debate over state-sponsored gambling, because federally-authorized and regulated tribal gambling could—as anti-gambling forces in Ohio forcefully contend—“bankrupt the horse tracks and put the state lottery out of business,”⁴² thus depriving the state of anticipated revenues.

III. PROPOSALS FOR INDIAN GAMBLING IN OHIO

There have been several reports in the last decade of Indian tribes seeking to operate gaming establishments in Ohio, and it is likely that other similar proposals have not been disclosed to the public. The forty-member North Eastern U.S. Miami Inter-Tribal Council of Youngstown—which sought unsuccessfully to open bingo halls in Oakwood (near Cleveland) and Youngstown in the 1980s—recently acknowledged its continued interest in setting up a gambling operation.⁴³ This group is not a federally-

⁴¹ Jon Craig, *Approval of Video Slots Could Lead to Casinos, Taft Warns J.C.*, COLUMBUS DISPATCH, Jun. 3, 2003, at B4, available at 2003 WL 20349767 [hereinafter Craig, *Approval of Video Slots*].

⁴² Philip Morris, *Ohio Might Outsmart Itself, Slots Foe Says*, THE PLAIN DEALER (CLEVELAND), Apr. 22, 2003, at B9, available at 2003 WL 2860625 (statement by David Zanotti, head of Ohio Roundtable).

The governors of Illinois and Kansas have recently taken the debate over state-sponsored gambling to a new level by proposing *state-owned* casinos. No state-owned casinos exist in the United States, but government-owned casinos operate in Canada, the Netherlands, Austria, Germany, Italy, and the Philippines. See Stephanie Simon, *Illinois Considers Rolling the Dice on Owning a Casino; Backers See it as a Solution to State Money Woes. Critics Call it a Sucker Bet*, L.A. TIMES, Feb. 22, 2004, at A22.

⁴³ Sabrina Eaton, *Stuck in the Shadows; Reclaiming Heritage Proves Difficult for Descendants of Native Ohio Tribes*, THE PLAIN DEALER (CLEVELAND), Oct. 6, 2002, at A1, available at 2002 WL 6380067.

recognized Indian tribe, although it petitioned the Department of the Interior in 1979 for recognition.⁴⁴ Another native group currently seeking federal recognition, the Shawnee Nation United Remnant Band, has applied to the Ohio Attorney General's office for permission to run a bingo hall in an existing community center near Urbana.⁴⁵ However, the state can only sanction charitable bingo under state law; it cannot unilaterally authorize tribal gaming under the IGRA.⁴⁶ A third unrecognized Indian group, the Lake Erie Native American Council, was connected with an effort in the mid-1990s to open a casino in the Cleveland area.⁴⁷

Federally-recognized Indian tribes located in other states have also expressed interest in the possibility of tribal gaming in Ohio. The Wyandotte Tribe has been connected with casino proposals in Cleveland and Youngstown,⁴⁸ and the Chippewa have discussed in general the

⁴⁴ See Native American Resource Center: List of Petitioners by State, at <http://www.accessgenealogy.com/native/pet2.htm> (last visited Jun. 20, 2003).

⁴⁵ Jon Craig, *Indian Gaming Interests Eye Ohio; Secrecy, Big Money Surround Land Deals, Plans*, COLUMBUS DISPATCH, Jun. 1, 2003, at A1, available at 2003 WL 57337156 [hereinafter Craig, *Indian Gaming Interests*]. See also Ben Sutherly, *Delegation from Botkins Meets with Indian Tribe About Casino*, DAYTON DAILY NEWS, Sept. 17, 2003, at B3 (“[A] delegation of Botkins officials traveled to Oklahoma last weekend on its own tab to meet the tribe’s principals and visit tribal casinos.”).

⁴⁶ See OHIO REV. CODE ANN. § 2915.07-12 (West 2002) (regulation of charitable bingo).

⁴⁷ Michael Sangiacomo, *Don't Bet on American Indian Casinos; Governor's Resistance, Fractured Attempts Make it Long Shot*, THE PLAIN DEALER (CLEVELAND), Jan. 28, 1996, at B6, available at 1996 WL 3533471 [hereinafter Sangiacomo, *Don't Bet*]. The Cleveland-based Council, a group of Indians from different tribes, has not sought to become a federally recognized Indian tribe. *Id.*

According to one source, Victor Hugo, an Indian activist and chairman of the American Indian Association of Huron, has “long pushed for Indian gaming in Sandusky.” Laura A. Bischoff, *Group Says Ohio Has Tossed the Dice on Legalized Gambling*, DAYTON DAILY NEWS, Mar. 12, 2003, at B4, available at 2003 WL 5764109 [hereinafter Bischoff, *Group Says*]. The source, however, does not identify any particular tribe or group. See *id.*

⁴⁸ See Benjamin Marrison, *Voinovich Battles to Keep Casinos Out of Ohio*, THE PLAIN DEALER (CLEVELAND), Dec. 17, 1995, at A1, available at 1995 WL 11021931 (proposal to open a casino in Cleveland or on Lake Erie); Letter to Editor, *Casino Would Turn Around an Area in Desperate Need*, COLUMBUS DISPATCH, Jan. 4, 2002, at A14, available at 2002 WL 6321419 (urging Governor Taft to allow a Wyandotte Indian Casino in the Mahoning Valley in order to “turn around the declining economic and employment situation in Youngstown”); Barnet D. Wolf, *Indian Casino in Mahoning Valley Is a Long Shot*, COLUMBUS DISPATCH, Apr. 28, 2002, at D1, available at 2002 WL 17817341 [hereinafter Wolf, *Indian Casino*] (stating that the Casino for the Mahoning Valley Committee has looked at ways to put land into trust, and has talked to a number of tribes about sponsoring the casino). But see Jeff Ortega, *Opponents Vow Gambling Fight; Two*

possibility of casinos “in Ohio.”⁴⁹ More specifically, the Ottawa Tribe has in recent years explored the idea of building either a bingo hall or casino about five miles south of Toledo in Rossford, Ohio, at the intersection of two interstate highways.⁵⁰ In the summer of 2000 the New York-based Seneca Nation sent Governor Taft a letter asking him to negotiate regarding a casino in Ohio; however, the proposal was quickly dropped in view of Taft’s opposition.⁵¹

The most recent, and secretive, proposals to establish Indian gaming in Ohio appear to be connected with a Shawnee tribe in Oklahoma, although the particular tribe has not yet been disclosed.⁵² In February 2003, it was

State Senators Have or Will Introduce Legislation Expanding Gambling, YOUNGSTOWN VINDICATOR, Mar. 13, 2003, available at http://www.ohioroundtable.org/library/articles/casino/Opponents_vow_gambling.html (last visited Jun. 15, 2003) (describing as false the report that a local committee from Youngstown had been in contact with representatives of the Wyandot Indian tribe, which allegedly had been interested in starting a casino in the Mahoning Valley).

⁴⁹ Sangiacomo, *Don’t Bet*, *supra* note 47 (statement by Dennis Banks, Chippewa Indian and president of the American Indian Movement).

⁵⁰ Katherine Rizzo, *Gambling: Indians Join Move for Bingo; With No Reservation in Ohio, the Proposed Ottawa Spot Near Toledo Requires Special Action*, DAYTON DAILY NEWS, May 26, 1996, at B6 (possibility of a bingo hall); Bischoff, *Group Says*, *supra* note 47 (“Columbus-based lobbyist Tom Green said Ottawa Indians contacted him more than a year ago about establishing a tribal casino in Rossford, south of Toledo.”).

⁵¹ Sandy Theis, *Indian Gaming? Taft Won’t Play*, THE PLAIN DEALER (CLEVELAND), Jul. 2, 2000, at D5, available at 2000 WL 5154660; Michael Sangiacomo, *With Taft Firmly Opposed to Idea, Seneca Indians Drop Casino Proposal*, THE PLAIN DEALER (CLEVELAND), Jul. 15, 2000, at B5, available at 2000 WL 5156549 [hereinafter Sangiacomo, *Taft Firmly Opposed*] (“The Seneca Nation of Indians in New York has backed off attempts to open a casino in Ohio.”).

⁵² There are three federally recognized Shawnee tribes in Oklahoma: the Absentee-Shawnee Tribe of Indians of Oklahoma; the Eastern Shawnee Tribe of Oklahoma; and the Shawnee Tribe, Oklahoma. See 67 Fed. Reg. 46,328 to 46,331 (Jul. 12, 2002). The Shawnee Tribe, Oklahoma—also known as the Loyal Shawnee—was recognized by the Act of December 27, 2000, Pub. L. No. 106-568, 114 Stat. 2868, 2913-2916. The Loyal Shawnees had signed a treaty with the Cherokee Nation in 1866 and were absorbed into the larger tribe, and—although they retained their culture and tradition—they were considered legal members of the Cherokee Nation until obtaining separate federal recognition in 2000. See Mary Pierpoint, *Loyal Shawnee Granted Federal Recognition*, INDIAN COUNTRY TODAY, Jan. 3, 2001, available at <http://www.indiancountry.com/?481> (last visited Feb. 16, 2004).

The assumption that the tribe interested in Botkins is a federally recognized tribe from Oklahoma may be incorrect. In a June 2003 news article, the interested tribe was described as “federally recognized.” Ben Sutherly, *Botkins Hires Gaming Consultant*, DAYTON DAILY NEWS, Jun. 12, 2003, available at 2003 WL 5772126 [hereinafter Sutherly,

reported that Botkins, Ohio—a town of 1,200 residents just south of Wapakoneta and situated on Interstate 75—was “the preferred of two sites for an undisclosed Indian tribe and yet-to-be-named developer to begin building a bingo hall and gaming facility that would offer gaming, entertainment, restaurants and other attractions.”⁵³ In May 2003 the village council approved a non-binding agreement to work toward a formal development agreement with a California developer, National Capital I.⁵⁴ The site would include, in addition to a casino and a bingo hall, a “high-end hotel, a conference center, a concert hall, an exhibition hall, an all-weather park and a golfing facility.”⁵⁵ According to the developer, two percent of revenues would be shared with “school and other local services;” on-site construction and permanent staff workers would pay Botkins a one and one-half percent village income tax; and federal and state taxes would be negotiated as part of a state-tribal gaming compact.⁵⁶

In addition to Botkins, two locations in southwestern Ohio have surfaced as potential sites for tribal gaming. The tribe interested in Botkins

Botkins Hires Gaming Consultant]. Yet in a February 2003 news article, Tom Schnippel, a Botkins construction company owner and representative of the developer and the tribe, stated that “the tribe’s recognition by the Bureau of Indian Affairs is ‘close’.” Cathy Mong, *Gaming Could Come to Botkins*, DAYTON DAILY NEWS, Feb. 1, 2003, at B1 [hereinafter Mong, *Gaming Could Come*].

There were only two Indian groups in Oklahoma with federal recognition petitions pending as of March 2, 1999: the Yuchi Tribal Organization and the Loyal Shawnee Tribe. See Native American Resource Center: List of Petitioners by State, at <http://www.accessgenealogy.com/native/pet2.htm> (last visited May 8, 2003). The Loyal Shawnees, as noted above, were recognized in December 2000 by congressional legislation. Other Shawnee groups petitioning the Department of the Interior’s Bureau of Indian Affairs for federal recognition include the Upper Kispoko Band of the Shawnee Nation (Indiana) and the United Tribe of Shawnee Indians (Kansas). *Id.* See also *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 551 (10th Cir. 2001) (refusing to determine whether the United Tribe of Shawnee Indians is entitled to federal recognition because judicial relief “would frustrate Congress’ intent that recognized status be determined through the administrative process”).

⁵³ Mong, *Gaming Could Come*, *supra* note 52. Approximately 39,000 motorists per day pass by the site, which is about 80 driving miles from Columbus, 50 miles from Dayton, and 100 miles from both Cincinnati and Toledo. Craig, *Indian Gaming Interests*, *supra* note 45.

⁵⁴ Sutherly, *Botkins Hires Gaming Consultant*, *supra* note 52.

⁵⁵ McCain, *supra* note 10 (describing the Botkins proposal in Shelby County).

⁵⁶ Craig, *Indian Gaming Interests*, *supra* note 45. A Las Vegas architect has been named master planner and designer of the proposed gaming resort, see *Designer Named for Botkins Resort*, DAYTON DAILY NEWS, Apr. 10, 2003, at B2, and the Botkins village council has hired a Central Michigan University professor as a gaming consultant. Sutherly, *Botkins Hires Gaming Consultant*, *supra* note 52.

has also reportedly expressed interest in Clermont County, just east of Cincinnati.⁵⁷ In May 2003 the Mayor of Waynesville announced that an unidentified Indian tribe is exploring the possibility of opening a “family entertainment center” in northeastern Warren County (between Cincinnati and Dayton).⁵⁸ A Waynesville resident has offered to sell nearly four hundred acres of farmland to the developer and the unnamed tribe.⁵⁹

What is the likelihood of success of such projects? Former State Representative J. Donald Mottley, who headed two state study committees on gaming, thinks that “there are way too many political and legal hurdles,” and he considers tribal gaming in Ohio as unlikely, but not impossible.⁶⁰ Sebastian Rucci, coordinator of the Casino for the Mahoning Valley Committee, admits that the fight to establish tribal gaming in Ohio “will be an 89-degree uphill climb.”⁶¹ A spokesman for Governor Taft said in 2000 that it would be “almost impossible” for an Indian tribe to secure a casino in Ohio in light of the Governor’s opposition.⁶²

On the other hand, in June 2003 Governor Taft himself expressed concern that voter approval of video slot machines at state racetracks would lead to tribal gaming in Ohio.⁶³ David Zanotti, president of the Ohio Roundtable, a conservative group that opposes all forms of gambling, has consistently warned that Indian casinos will eventually come to Ohio.⁶⁴ Terry Casey, a Columbus consultant to the developer who wants to bring the tribal gaming complex to Botkins, has observed that a number of governors in other states, who opposed the expansion of gambling, eventually approved the agreements.⁶⁵ Despite the absence of any federally-recognized tribes in Ohio—and in spite of the fact that no out-of-state tribe has yet succeeded in acquiring off-reservation land to be placed in trust for the purpose of gaming under the IGRA—Casey is

⁵⁷ McCain, *supra* note 10.

⁵⁸ Anthony J. Gottschlich, *Tribe Exploring ‘Entertainment’ Site in Waynesville*, DAYTON DAILY NEWS, May 6, 2003, at A1.

⁵⁹ Craig, *Indian Gaming Interests*, *supra* note 45.

⁶⁰ Laura A. Bischoff, *Racetracks, Foes Lining up Lobbyists*, DAYTON DAILY NEWS, Mar. 24, 2003, at B1 [hereinafter Bischoff, *Racetracks*] (“Is it impossible? No. Is it likely? No.”).

⁶¹ Wolf, *Indian Casino*, *supra* note 48.

⁶² Sangiacomo, *Taft Firmly Opposed*, *supra* note 51.

⁶³ Craig, *Approval of Video Slots*, *supra* note 41 (“‘It’s possible if the [video slot machines] issue goes to the ballot that does open the door [to tribal casinos],’ Taft said yesterday. ‘It’s a concern of mine.’”).

⁶⁴ Craig, *Indian Gaming Interests*, *supra* note 45 (“There’s absolutely no question that there is a way for tribes to open casinos in Ohio.”).

⁶⁵ James Hannah, *Indian Casino Efforts Grow*, CINCINNATI POST, Mar. 28, 2003, at A1, available at 2003 WL 2914188.

“optimistic” about the Botkins proposal.⁶⁶

The political guesswork involved in assessing the likelihood of Indian gambling in Ohio is daunting, and beyond the expertise of the author. In contrast, the legal requirements—while also daunting—are relatively straightforward. In order to conduct gaming in Ohio, a tribe must satisfy the general requirements of the IGRA. However, because there currently are no Indian reservations or Indian trust lands in Ohio, the tribe must also comply with section 20 of the IGRA, which generally bars tribal gaming on land acquired in trust after October 17, 1988 (the statute’s effective date), but provides several pertinent exemptions to the prohibition.⁶⁷

IV. AN OVERVIEW OF THE INDIAN GAMING REGULATORY ACT OF 1988

Congress enacted the IGRA in 1988 in response to the United States Supreme Court’s decision in *California v. Cabazon Band of Mission Indians*.⁶⁸ When the Cabazon and Morongo Bands of Mission Indians in California began offering gaming on their reservations in contravention of state and country restrictions, California asserted the application of its gambling laws.⁶⁹ The Supreme Court, however, held that the State could

⁶⁶ Mong, *Indian Tribes*, *supra* note 10.

⁶⁷ 25 U.S.C. §§ 2719(a), (b). Paul Oyaski, Cuyahoga County’s development chief, told civic and political leaders in February 2004 that “it would be worthwhile to look into amending the Treaty of Greenville” in order to “allow a tribe to control land for casino development. Michael K. McIntyre, *Indian Treaty Change Could Lead to Casino*, THE PLAIN DEALER (CLEVELAND), Feb. 23, 2004, at B1. The news article goes on to say, “[i]t may not be as crazy as it sounds,” but, with respect to the idea of amending the 1795 treaty, it is. *Id.*

⁶⁸ 480 U.S. 202 (1987); Kathryn R.L. Rand, & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL’Y & L. 381, 382 (1997) [hereinafter Rand, *Virtue or Vice*]. See also Amy Head, Comment, *The Death of the New Buffalo: The Fifth Circuit Slays Indian Gaming in Texas*, 34 TEX. TECH L. REV. 377, 386 (2003) (*Cabazon* was “the first court battle between the states and the tribes over who was to control gaming on Indian lands.”).

In the 1970s and 1980s, the Seminole Tribe of Florida and various tribes in California dramatically increased their bingo gaming operations in order to generate additional revenues. In response, “competing economic and ideological concerns of the states and non-Indian gaming enterprises (such as private casinos) also increased and became more visible.” *Id.* at 385. Tribal and state governments disagreed over whether tribal governments could conduct gaming free from state regulation. See, e.g., *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 314-15 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982) (Florida statute permitting bingo games to be played by certain organizations and subject to state restrictions is “civil/regulatory” rather than “criminal/prohibitory” and, hence, cannot be enforced against the Tribe.). The issue came to a head in 1987 in *Cabazon*.

⁶⁹ Rand, *No Pequots on the Plains*, *supra* note 3, at 51.

not enforce its gambling laws to bar gaming activities conducted by Indian tribes on their reservations where state law did not prohibit gambling in general or the particular types of gaming at issue (bingo, draw poker, and other card games).⁷⁰ The Court in *Cabazon* thus upheld “the authority of tribal governments to establish gaming operations independent of state regulation, provided that the state in question permits some form of gaming.”⁷¹

Congress enacted the IGRA in the wake of *Cabazon* to provide “a ‘comprehensive regulatory framework for gaming activities on Indian lands’ which ‘seeks to balance the interests of tribal governments, the states, and the federal government.’”⁷² The IGRA divides gaming in

⁷⁰ Under applicable California law, bingo games were prohibited unless conducted by charitable organizations and limited to pots of \$250. In addition, a local county ordinance barred poker games. Pursuant to federal Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 18 U.S.C. § 1162, California’s criminal laws apply to Indians in Indian country, but its civil regulatory laws do not. The issue in *Cabazon* thus was whether the aforementioned laws were “criminal/prohibitory” or “civil/regulatory” in nature. The Supreme Court held that the state and county laws were civil/regulatory, and hence inapplicable in California’s Indian country. 480 U.S. at 209-11. See WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 284 (3d ed. 1998).

⁷¹ Biennial Report, *supra* note 24, at 8.

⁷² *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997). The purposes of IGRA, as set forth in section 2 of the Act, are

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702. In addition, in section 1 of IGRA, Congress found (among other things) that “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.” 25 U.S.C. § 2701(5). See also S. REP. NO. 100-446, 100th Cong. (1988),

Indian country into three categories or classes. Class I consists of traditional Indian gaming, which is subject to the exclusive jurisdiction of the Tribes.⁷³ Class II gaming consists of bingo, bingo-related games, and certain non-banking card games (i.e., games such as poker that are played against other players, as distinguished from games such as blackjack that are played against the house).⁷⁴ The Act specifically excludes slot

reprinted in 1988 U.S.C.C.A.N. 3071, 3071 (bill “provides for a system for joint regulation by tribes and the Federal Government of class II gaming on Indian lands and a system for compacts between tribes and States for regulation of class III gaming”).

⁷³ 25 U.S.C. §§ 2703(6), 2710(a)(1).

⁷⁴ Congress defined the term “class II gaming” in Section 103(7)(A) of IGRA to mean

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only is (sic) such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

25 U.S.C. § 2703(7)(A). The term “class II gaming” does *not* include “(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.” 25 U.S.C. § 2703(7)(B). However, certain banking card games operated on or before May 1, 1988, are treated as Class II gaming under a special grandfather provision. 25 U.S.C. § 2703(7)(C). *See* United States v. Sisseton-Wahpeton Tribe, 897 F.2d 358 (8th Cir. 1990). *See also* 25 C.F.R. § 502.3 (regulatory definition of Class II gaming).

machines and electronic or electromechanical facsimiles of any game of chance from the definition of Class II games.⁷⁵ An Indian tribe may engage in, or license and regulate, Class II gaming if three conditions are met: (1) “such Indian gaming is located within a State that permits such gaming for any purposes by any person, organization or entity,” (2) “such gaming is not otherwise specifically prohibited on Indian lands by Federal law,” and (3) “the governing body of the Indian tribe adopts an ordinance or resolution” which meets certain statutory standards and which is approved by the Chairman of the National Indian Gaming Commission (NIGC) established by the IGRA.⁷⁶ The NIGC monitors Class II gaming and is authorized to enforce the IGRA and tribal ordinances regulating such gaming.⁷⁷

All other types of gaming—including dice, non-grandfathered banking card games, and slot machines—are designated as Class III gaming under the IGRA.⁷⁸ Class III gaming activities, like Class II activities, are lawful

⁷⁵ 25 U.S.C. § 2703(7)(B)(ii).

⁷⁶ 25 U.S.C. §§ 2710(b)(1)(A)-(B). The NIGC is an independent federal regulatory agency within the Department of the Interior, headed by a Chairman and two Commissioners, each of whom serves on a full-time basis for a three-year term. *See* 25 U.S.C. §§ 2704(a), (b); National Indian Gaming Commission: Overview, at http://www.nigc.gov/nigc/nigcControl?option=about_overview (last visited May 6, 2003). IGRA requires that “[n]ot more than two members of the Commission shall be of the same political party,” and that “[a]t least two members of the Commission shall be enrolled members of any Indian tribe.” 25 U.S.C. § 2704(b)(3).

The NIGC’s primary mission “is to regulate gaming activities on Indian lands for the purpose of shielding Indian tribes from organized crime and other corrupting influences; to ensure that Indian tribes are the primary beneficiaries of gaming revenue; and to assure that gaming is conducted fairly and honestly by both operators and players.” National Indian Gaming Commission: Mission and Responsibilities, at http://www.nigc.gov/nigc/nigcControl?option=about_mission (last visited May 6, 2003). The Commission is authorized “to conduct investigations; undertake enforcement actions, including the issuance of notices of violation[,] assessment of civil fines, and/or issuance of closure orders; conduct background investigations; conduct audits; and review and approval Tribal gaming ordinances.” *Id.*

⁷⁷ *See* 25 U.S.C. §§ 2704-2709, 2713-2716; *Seneca-Cayuga Tribe of Okla. v. Nat’l Indian Gaming Comm’n*, 327 F.3d 1019, 1023 (10th Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 1651 (U.S. Mar. 1, 2004) (describing the Commission’s “broad powers”); *see also* S. REP. NO. 100-446, 100th Cong. (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3071 (“The Commission will have a regulatory role for class II gaming and an oversight role with respect to class III.”).

⁷⁸ 25 U.S.C. § 2703(8) (“The term ‘class III gaming’ means all forms of gaming that are not class I gaming or class II gaming.”). *See Seneca-Cayuga Tribe of Okla.*, 327 F.3d at 1023 (“Class III is a residual category”). Under the regulations promulgated by the NIGC, Class III gaming means:

on Indian lands only if “located in a State that permits such gaming for any purpose by any person, organization, or entity.”⁷⁹ Hence, if the state does not permit “such gaming,” that is the end of the matter.⁸⁰ However, if “such gaming” is permitted by the state, the Tribe may conduct the particular Class III gaming activity on Indian lands if two further conditions are satisfied: First, like Class II gaming, it must be authorized by the Chairman of the NIGC.⁸¹ Second, Class III gaming must be “conducted in conformance with a Tribal-State compact entered into by an Indian tribe and the State . . . that is in effect.”⁸² The compact is “in effect” when notice of its approval by the Secretary of the Interior is published in the Federal Register.⁸³

all forms of gaming that are not class I gaming or class II gaming, including but not limited to:

- (a) Any house banking game, including but not limited to—
 - (1) Card games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games);
 - (2) Casino games such as roulette, craps, and keno;
- (b) Any slot machines as defined in 15 U.S.C. 1171(a)(1) and electronic or electromechanical facsimiles of any game of chance;
- (c) Any sports betting and parimutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai; or
- (d) Lotteries.

25 C.F.R. § 502.4.

⁷⁹ 25 U.S.C. § 2710(d)(1)(B).

⁸⁰ Gambling in all forms is prohibited in Utah. Consequently, since Utah permits *no* “gaming for any purpose by any person, organization, or entity,” tribes located in Utah may not conduct Class II or Class III gaming under IGRA.

⁸¹ 25 U.S.C. § 2710(d)(1)(A).

⁸² 25 U.S.C. § 2710(d)(1)(C). By contrast, a tribe need not negotiate a compact with a state in order to engage in Class II gaming activities.

⁸³ 25 U.S.C. § 2710(d)(3)(B). IGRA further provides that the Johnson Act, 15 U.S.C. §§ 1171-1178, which prohibits the use or possession of gambling devices in Indian country, does not apply “to any gaming conducted under a Tribal-State compact that (A) is entered into . . . by a State in which gambling devices are legal, and (B) is in effect.” 25 U.S.C. § 2710(d)(6). *See generally* United States v. 1020 Elec. Gambling Machs., 38 F. Supp.2d 1213 (E.D. Wash. 1998) (gambling devices were subject to forfeiture under the Johnson Act since the tribe did not have a compact with state permitting class III gaming); Citizen Band Potawatomi Indian Tribe of Okla. v. Green, 995 F.2d 179 (10th Cir. 1993) (IGRA provision, waiving Johnson Act prohibition on use of gambling devices in Indian country if gaming is conducted under a tribal-state compact, did not allow the importation

Congress contemplated that tribal-state gaming compacts would govern the scope and conduct of Class III casino-type gaming and would serve further to “allocate jurisdiction between tribe and state.”⁸⁴ The Act sets out an elaborate process governing the negotiation of gaming

of video lottery terminals onto tribal land in Oklahoma because such devices are not legal in the state).

Although Class III gaming devices are exempted from the Johnson Act, “Congress made no reference in IGRA to the relationship between the Johnson Act’s strictures and IGRA’s authorization of the use of technologic aids to Class II gaming.” *Seneca-Cayuga Tribe of Okla. v. Nat’l Indian Gaming Comm’n*, 327 F.3d 1019, 1023 (10th Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 1651 (U.S. Mar. 1, 2004). There is a split of authority on this issue. *Compare id.* at 1030-35 (Congress intended to shield Indian country users of IGRA Class II technologic aids from Johnson Act liability); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 725 (10th Cir. 2000) (Class II electronic bingo game machines are not prohibited in Indian country by the Johnson Act); *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1101 (9th Cir. 2000) (concluding that “[t]he text of IGRA quite explicitly indicates that Congress did not intend to allow the Johnson Act to reach [Class II] bingo aids”); *with United States v. Santee Sioux Tribe of Neb.*, 324 F.3d 607, 611-12 (8th Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 1807 (U.S. Mar. 1, 2004) (IGRA does not repeal the Johnson Act with respect to Class II gaming devices, but Lucky Tab II machines are not “gambling devices” under the Johnson Act); *Cabazon Band of Mission Indian v. Nat’l Indian Gaming Comm’n*, 14 F.3d 633, 635 n.3 (D.C. Cir. 1994), *cert. denied*, 512 U.S. 1221 (1994) (citing a district court decision which held that, while IGRA repealed the applicability of the Johnson Act for Class III devices subject to an extant, effective Tribal-State compact, there is “no other repeal of the Johnson Act, either expressed or by implication,” and therefore the Johnson Act remains “fully operative” with respect to Class II gaming).

⁸⁴ CANBY, JR., *supra* note 70, at 283. Congress provided in Section 10(d)(3)(c) of IGRA that tribal-state gaming compacts

may include provisions relating to—(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations; (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity; (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities; (v) remedies for breach of contract; (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and (vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C)(i)-(vii).

compacts, and grants federal district courts jurisdiction over “any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith.”⁸⁵ However, in *Seminole Tribe of Florida v. Florida*,⁸⁶ the Supreme Court held that Congress lacks the power under the Indian Commerce Clause to abrogate state immunity from suit in federal court as guaranteed by the Eleventh Amendment.⁸⁷ The *Seminole* decision “invalidated portions of IGRA that enabled tribes to enforce their gaming rights; as a result, tribes have been left with little recourse when a state demands revenue from tribal gaming or refuses to negotiate over gaming rights.”⁸⁸ The Department of the Interior subsequently promulgated a regulation for dealing with tribal-state compacts when a state and tribe cannot reach an agreement and the state will not waive its Eleventh Amendment immunity.⁸⁹ Alabama, Florida, and Kansas, however, have filed suit challenging the new regulation.⁹⁰

The IGRA requires that “net revenues from any tribal gaming” are not to be used for purposes other than to fund tribal government programs, provide for the general welfare of the tribe and its members, promote tribal economic development, support charitable organizations, and help fund local government agencies.⁹¹ A tribe may make per capita payments to its members only under a number of conditions, including approval of the tribe’s distribution plan by the Secretary of the Interior.⁹² Only about one-fourth of the tribes currently engaged in gaming distribute per capita payments to tribal members, and tribal members who receive such distributions pay federal income tax on the payments.⁹³ Although tribal gaming revenues are not subject to direct state taxation, several states

⁸⁵ 25 U.S.C. § 2710(d)(7)(A)(i). *See generally* 25 U.S.C. § 2710(d)(3)-(8).

⁸⁶ 517 U.S. 44 (1996).

⁸⁸ *Id.* at 47.

⁸⁸ Eric S. Lent, Note, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L. J. 451, 452 (2003).

⁸⁹ Class III Gaming Procedures, 64 Fed. Reg. 17,535 (Apr. 12, 1999) (to be codified at 25 C.F.R. pt. 291).

⁹⁰ GAO, INDIAN ISSUES, *supra* note 5, at 37-38.

⁹¹ 25 U.S.C. § 2710(b)(2)(B).

⁹² 25 U.S.C. § 2710(b)(3). *See* Rand, *Virtue or Vice*, *supra* note 68, at 421 (IGRA’s restrictions on the use of gaming revenue and its requirement that per capita payment plans be approved by the Secretary of the Interior are consistent with Congress’ idea of ‘what is best’ for the tribes, but are inconsistent with the political sovereignty of the tribes, simply because the decisions are not left wholly to the tribes.”).

⁹³ *See* Tribal Court Clearinghouse: Native Gaming Resource, at <http://www.tribal-institute.org/lists/gaming.htm> (last visited May 6, 2003); 25 U.S.C. § 2710(b)(3)(D) (“per capita payments are subject to Federal taxation”).

(including Connecticut, Michigan, and Wisconsin) have negotiated tribal-state gaming compacts that require revenue sharing.⁹⁴ The Mashantucket Pequot and the Mohegan Tribe, for example, must pay Connecticut twenty-five percent of slot machine revenues, which amounted to over \$1.4 billion in the first seven years of their compacts.⁹⁵

The IGRA is controversial.⁹⁶ Critics charge that Indian gaming is conducted with minimal oversight; benefits only a few tribes; is susceptible to infiltration by organized crime; has caused more Indian groups to seek official recognition as tribes and more individuals to seek membership in tribes; has had negative effects on the surrounding communities that must coexist with tribal gambling; and has deprived state and local governments of tax and other revenues.⁹⁷ On the other hand, proponents of the IGRA and tribal gaming point to “the notable success of many gaming tribes in terms of preserving tribal sovereignty and strengthening tribal government,

⁹⁴ See Lent, *supra* note 88, at 456-60 (describing revenue-sharing provisions of tribal-state gaming compacts); see also *infra* notes 307-26 and accompanying text.

⁹⁵ *Id.* at 456. See also Associated Press, *State, Tribes Push to Resolve Casino Dispute*, Jul. 2, 2003, available at <http://www.thenewmexicochannel.com/news/2308643/detail.html> (last visited July 7, 2003) (“The Mescaleros and Pojoaque Pueblo are the only two tribes with casinos in New Mexico that are refusing to pay a percentage of their slot machine profits to the state.”).

⁹⁶ See S. REP. NO. 100-446, 100th Cong. (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3075 (“The regulation of gaming activities on Indian lands has been the subject of much controversy”); Rand, *No Pequots on the Plains*, *supra* note 3, at 55-59 (summarizing recent criticism of Indian gaming).

⁹⁷ In December 2000, the *Boston Globe* ran a four-day series titled, “Tribal Gamble: The Lure and Peril of Indian Gambling.” See Sean Murphy & Adam Piore, *A Big Roll at Mohegan Sun: Casino Boom Benefits Non-Indians*, BOSTON GLOBE, Dec. 10, 2000; Michael Rezendes, *Few Tribes Share Casino Windfall*, BOSTON GLOBE, Dec. 11, 2000; Ellen Barry, *It’s A War of Genealogies: Recognition is a Contentious Process*, BOSTON GLOBE, Dec. 12, 2000; Ellen Barry, *Tribes Scramble to Get Into the Game*, BOSTON GLOBE, Dec. 12, 2000; Michael Rezendes, *Tribes Make Easy Criminal Targets*, BOSTON GLOBE, Dec. 13, 2000.

In December 2002, *Time Magazine* focused in consecutive issues on tribal gaming. See Donald L. Barlett & James B. Steele, *Who Gets the Money?; Needy Native Americans, You’d Think. But Indian Casinos Are Making Millions for Their Investors and Providing Little to the Poor*, TIME, Dec. 16, 2002; Donald L. Barlett & James B. Steele, *Playing the Political Slots: How Indian Casino Interests Have Learned the Art of Buying Influence in Washington*, TIME, Dec. 23, 2002. But see National Indian Gaming Association Website, Press Release (Dec. 10, 2002), available at http://www.indiangaming.org/info/pr/press_releases/time-magazine.shtml (NIGA Chairman Ernest L. Stevens, Jr., letter to *Time Magazine*, expressing “disgust” with the “twisted” December 2002 articles and noting that “your report completely discounts the value of jobs to our people who have historically suffered shocking unemployment rates, high levels of poverty and lack of economic opportunities on Indian homelands”).

which, in turn, allows those tribes to begin to rectify persisting social ills on the reservation.”⁹⁸ At least one Indian leader in Ohio has noted that, if tribal gambling were permitted in the state, gaming revenues would be used “to benefit the education and medical care of Native Americans.”⁹⁹

Regardless of the merits of tribal gaming, the fact remains that gambling under the IGRA will not occur in Ohio as long as there are no Indian reservations or Indian “trust” lands in the state. Consequently, any Indian group or tribe seeking to engage in gaming in Ohio must first comply with section 20 of the IGRA,¹⁰⁰ which generally bars tribal gaming on land acquired in trust after October 17, 1988, but provides several pertinent exemptions to the prohibition.

V. GAMING ON LANDS ACQUIRED AFTER OCTOBER 17, 1988

Section 20 of the IGRA establishes a general rule that “gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988.”¹⁰¹ However, Congress provided that tribal gaming could take place on lands acquired after the IGRA’s effective date in several situations, including:

- (1) when “such [after-acquired] lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on [October 17, 1988];”¹⁰²
- (2) when “the Indian tribe has no reservation on [October 17, 1988] and . . . such lands are located in Oklahoma and . . . are within the boundaries of the Indian tribe’s former reservation, as defined by the Secretary, or . . . are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in

⁹⁸ Rand, *No Pequots on the Plains*, *supra* note 3, at 50. *See, e.g.*, William Claiborne, *Righting Wrongs or Siting Casinos?: Tribes Try to Reclaim Lost Homelands*, WASH. POST, Sept. 27, 1998, at A3, *available at* 1998 WL 16558797 (“The 800 members of the Prairie Band [of the Potawatomie Indians], who live on what has dwindled to an 11-square-mile reservation 20 miles north of Topeka, have seen their tribe emerge from abject poverty to relative prosperity since a modest bingo hall was opened in the 1980s and gradually expanded into a Las Vegas-style casino operated by the Memphis-based Harrah’s chain. Largely as a result of gaming revenue, the tribe now has a \$6 million annual budget, employs 135 members in the tribal government and spends \$ 1.2 million a year to improve the network of dirt roads that crisscrosses the reservation.”).

⁹⁹ Eaton, *supra* note 43 (statement of Dennis Sanchez, chief of the unrecognized North Eastern U.S. Miami Inter-Tribal Council of Youngstown).

¹⁰⁰ 25 U.S.C. § 2719.

¹⁰¹ 25 U.S.C. § 2719(a).

¹⁰² 25 U.S.C. § 2719(a)(1).

- Oklahoma;”¹⁰³
- (3) when “the Indian tribe has no reservation on October 17, 1988] and . . . such lands are located in a State other than Oklahoma and are within the Indian tribe’s last recognized reservation within the State or States within such Indian tribe is presently located;”¹⁰⁴
 - (4) when “lands are taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition;”¹⁰⁵
 - (5) when “lands are taken into trust as part of . . . the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process;”¹⁰⁶
 - (6) when “lands are taken into trust as part of . . . a settlement of a land claim;”¹⁰⁷ and
 - (7) when “the Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes,

¹⁰³ 25 U.S.C. § 2719(a)(2)(A)(i)-(ii).

¹⁰⁴ 25 U.S.C. § 2719(a)(2)(B). See Tony Thornton, *Delawares; State Tribe Sees Economic Future in Kansas County*, DAILY OKLAHOMAN (OKLAHOMA CITY, OK), Oct. 26, 2003, at 6A (“The Delaware Tribe of Oklahoma is just seven years removed from becoming a federally recognized tribe, having won its independence from the Cherokees in 1996. . . . Under the Indian Gaming Regulatory Act of 1988, a tribe can open a casino apart from its federally recognized land only in certain conditions. One of those applies to the Delawares: a landless tribe seeking land in its last known reservation.”). The Delaware Tribe of Oklahoma is also relying on 25 U.S.C. § 2719(a)(2)(B) in support of their bid for a casino in Pennsylvania. Bill Troland, *2 Indian Tribes Look to Open Casinos in PA.*, PITTSBURGH POST-GAZETTE, Dec. 11, 2003, at B2 (“The Delaware Nation and the Delaware Tribe, both based in Oklahoma, once called Pennsylvania home and are scouting for potential development sites as they seek a permit to operate what’s known as ‘Class II’ casinos—the kind that allow bingo, poker and blackjack—the tribes announced this week. The 10,000-member Delaware Tribe could open a casino sooner, according to a tribe spokesman, because it has special privileges under federal law. Since it is a ‘restored’ tribe, having lost then regained its federal status, it only has to buy a site in Pennsylvania, then place the land in a trust. The restored land would then qualify as a gaming site.”). See also Carrie Budoff, *Indians’ PA. Casino Bid a High-stakes Strategy*, PHILADELPHIA INQUIRER, Jun. 12, 2003, at A1, available at 2003 WL 20395853 (“[T]he Delaware Nation and Delaware Tribe . . . are attempting what no Indian tribe has ever done: jump state borders, win back land, and build a casino.”).

¹⁰⁵ 25 U.S.C. § 2719(b)(1)(B)(iii).

¹⁰⁶ 25 U.S.C. § 2719(b)(1)(B)(ii).

¹⁰⁷ 25 U.S.C. § 2719(b)(1)(B)(i).

determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination."¹⁰⁸

The first listed exception is inapplicable since no Indian tribe had a reservation in Ohio on October 17, 1988.¹⁰⁹ The second exception applies to Oklahoma only, and the third exception is inapposite insofar as no recognized Indian tribe is "presently located" in Ohio.¹¹⁰ Likewise, the absence of any "terminated" tribes from Ohio negates perforce the application of the fourth exception, which applies to tribes that have been "restored to Federal recognition."¹¹¹ The remaining three exceptions, on

¹⁰⁸ 25 U.S.C. § 2719(b)(1)(A). Congress also provided two additional exemptions, pertaining specifically to the St. Croix Chippewa Indians of Wisconsin and the Miccosukee Tribe of Indians of Florida. See 25 U.S.C. § 2719(b)(2), (3).

¹⁰⁹ See generally *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1268 (10th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002) (cemetery adjacent to tract, which was reserved in an 1855 treaty but had not since been occupied, was not a "reservation" under IGRA provision allowing gaming on tracts adjacent to reservations).

¹¹⁰ Furthermore, the third exception pertains to Indian tribes that had no reservation "on October 17, 1988." 25 U.S.C. § 2719(a)(2)(B). The exception thus applies to tribes that were officially recognized, but without a reservation, as of that date. *Id.* No officially recognized tribe was located in Ohio "on October 17, 1988." Tribes that are recognized after this date fall instead under the fifth listed exception (initial reservations for newly acknowledged tribes). 25 U.S.C. § 2719(b)(1)(B)(ii).

It is interesting to note, however, that the last of the Shawnee lands in Ohio—reserved from cession in 1817 but ceded to the United States in 1831—included a tract ten miles square at Wapakoneta, located quite close to Botkins, Ohio, the site of a recent Shawnee proposal for tribal gaming. See *infra* notes 233-35 and accompanying text.

¹¹¹ 25 U.S.C. § 2719(b)(1)(B)(iii). Congress in the 1950s "sought to solve the Indian 'problem' by authorizing states to assume civil and criminal jurisdiction over Indian country, terminating the federal-tribal relationship, and 'mak[ing] the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States . . .'" Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 U. DAYTON L. REV. 437, 489 (1998) [hereinafter Watson, *Federal Indian Law*] (quoting H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953)) (alteration in original). The "termination" policy, which ended the federal-tribal relationship with over 100 tribes and bands, was abandoned in practice in the early 1960s and officially in 1970 when President Richard Nixon announced a new federal policy of "self-determination" for Indian tribes. Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction Over Federal Enforcement of*

the other hand, are possible ways by which tribal gaming could come to Ohio, and thus deserve closer examination.

A. *Lands Taken into Trust as Part of a Tribe's Initial Reservation*

The general prohibition on tribal gaming on lands acquired after October 17, 1988, does not apply when the lands are taken into trust as part of the initial reservation of an Indian tribe acknowledged by the Secretary of the Interior under the federal acknowledgment process.¹¹² There are

Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine, 80 MARQ. L. REV. 531, 553 n.109 (1997) [hereinafter Watson, *The Curious Case*]. Many of the tribes that were "terminated" by Congress (or by administrative fiat) have subsequently been "restored to Federal recognition," and 25 U.S.C. § 2719(b)(1)(B)(iii) authorizes tribal gaming on lands acquired after October 17, 1988, if "taken into trust as part of the restoration of lands" of such "restored" tribes. See *Grand Traverse Band of Ottawa & Chippewa Indians v. United States Attorney for the W. Dist. of Mich.*, 198 F. Supp. 2d 920, 934 (W.D. Mich. 2002) (Band that had been "administratively terminated" by the Bureau of Indian Affairs in 1872, but acknowledged as a federally recognized tribe in 1980 pursuant to the Department of the Interior's regulations, was a tribe "restored to Federal recognition" for purposes of IGRA's "restored lands" exception). No Ohio-based tribe was "terminated" by Congress. Furthermore, no Ohio group of Indians to date has asserted—in the same manner as the Grand Traverse Band of Ottawa and Chippewa Indians—that they were "administratively terminated" and are entitled to be "restored to Federal recognition." *Id.*

The "restored lands" exception has engendered much litigation. See, e.g., *Oregon v. Norton*, 271 F. Supp. 2d 1270 (D. Ore. 2003); *City of Roseville v. Norton*, 219 F. Supp. 2d 130 (D. D.C. 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003), *petition for cert. filed sub nom.*, *Citizens for Safer Communities v. Norton*, No. 03-1156 (U.S. Feb. 11, 2004); *Tomac v. Norton*, 193 F. Supp. 2d 182 (D. D.C. 2002); *Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155 (D. D.C. 2000); *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States*, 78 F. Supp. 2d 699 (W.D. Mich. 1999), *remanded by 9 Fed. Appx.* 457 (6th Cir. 2001), *appeal after remand*, 288 F.3d 910 (6th Cir. 2002); *Grand Traverse Band of Ottawa & Chippewa Indians v. United States Attorney for the W. Dist. of Mich.*, 46 F. Supp. 2d 689 (W.D. Mich. 1999). See also National Indian Gaming Commission: Indian Land Determinations, at http://www.nigc.gov/nigc/nigcControl?option=land_determinations (last visited June 25, 2003) (numerous NIGC opinions regarding the applicability of the "restored lands" exception).

¹¹² 25 U.S.C. § 2719(b)(1)(B)(ii). In response to a query from a recently-acknowledged tribe regarding the impact of acquiring other parcels of land in trust prior to acquiring a parcel in trust for gaming purposes, the Interior Department's Solicitor's Office gave the "initial reservation" language a literal interpretation:

The Band may request that a new reservation be declared. The first time a reservation is proclaimed for the Band, it constitutes the "initial reservation" under 25 U.S.C. § 2719(b)(1)(B), and the Band may avoid

numerous reasons why Indian groups are not recognized by the federal government. Some groups, such as clusters of Shawnee Indians in Ohio, stayed in historic locations while the main body of the tribe was removed or emigrated elsewhere.¹¹³ At present, seven Indian groups in Ohio have petitioned for federal recognition: the Shawnee Nation United Remnant Band (Dayton); the North Eastern U.S. Miami Inter-Tribal Council (Youngstown); the Allegheny Nation Indian Center (Canton); the Piqua Sept of Ohio Shawnee Indians (Springfield); the Saponi Nation of Ohio (Rio Grande); the Shawnee Nation, Ohio Blue Creek Band of Adams County (Lynx); and the Lower Eastern Ohio Mekojoy Shawnee (Wilmington).¹¹⁴ No Indian group located in Ohio is currently recognized

the ban on gaming on newly acquired land for any lands taken into trust as part of the initial reservation—those placed in trust before or at the time of the initial proclamation. Land acquired after the initial proclamation of the reservation will not fall within the exception. . . . This puts newly recognized tribes in a similar position to tribes having lands in trust before October 17, 1988, in that they are afforded an initial opportunity, but lands acquired after the initial reservation are subject to the ban in the same way that lands of other tribes acquired after October 17, 1988 are.

Memorandum from Acting Associate Solicitor, Division of Indian Affairs, to Regional Director, Midwest Regional Office, Bureau of Indian Affairs (Dec. 13, 2000), *available at* <http://www.nigc.gov/nigc/documents/land/potawatomi.jsp> (last visited May 6, 2003).

¹¹³ Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271, 274 (2001). Some Indian groups were never recognized due to their small size, because they never entered into agreements or treaties with the United States, or because they “represent amalgamations of members of two or more tribes that were not historically a single tribe.” *Id.* Another category of unrecognized tribes consists of “terminated” tribes that have not been restored to federal recognition. *Id.* at 275.

¹¹⁴ See Native American Resource Center: List of Petitioners by State, *at* <http://www.accessgenealogy.com/native/pet2.htm> (last visited Jun. 2, 2003) (list of Indian groups petitioning for official recognition, as of March 2, 1999, prepared by the Interior Department’s Bureau of Indian Affairs, Branch of Acknowledgment and Research). The Bureau of Indian Affairs has created several official websites that provide information regarding the acknowledgment process and the status of recognition petitions. See, e.g., Bureau of Indian Affairs, Branch of Acknowledgment and Research: Summary of Acknowledgment Cases, *at* <http://www.doi.gov/bia/bar/indexq.htm> (cited in Rosemary Sweeney, *Federal Acknowledgment of Indian Tribes: Current BIA Interpretations of the Federal Criteria for Acknowledgment with Respect to Several Northwest Tribes*, 26 AMER. INDIAN L. REV. 203, 203 n.1 (2001-2002)); Bureau of Indian Affairs, Branch of Acknowledgment and Research: What is the Background of the Federal Acknowledgment Regulations?, *at* <http://www.doi.gov/bia/arguide.html> (cited in Myers, *supra* note 113, at 272 n.18). However, the Bureau of Indian Affairs’ websites are “temporarily unavailable

by the federal government, and while state recognition of Indian tribes is irrelevant for purposes of the IGRA,¹¹⁵ Ohio in any event does not officially recognize Indian tribes.¹¹⁶

due to the Cobell Litigation.” See the U.S. Dep’t of the Interior’s Website, <http://www.doi.gov/bia/index> (last visited Jan. 23, 2004). The “Cobell Litigation” is an ongoing class action lawsuit that has established that the United States, in its role as trustee, has mismanaged Individual Indian Money accounts. See, e.g., *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

¹¹⁵ Congress limited the applicability of IGRA to “Indian tribes.” 25 U.S.C. § 2710(a) (Class I and Class II gaming); and 25 U.S.C. § 2710(d) (Class III gaming). The term “Indian tribe” in IGRA “means any Indian tribe, band, nation, or other organized group or community of Indians which—(A) is recognized as eligible by the Secretary [of the Interior] for the special programs and services provided by the United States to Indians because of their status as Indians, and (B) is recognized as possessing powers of self-government.” 25 U.S.C. § 2703(5) (emphasis added). Indian groups that are not recognized by the federal government must comply with state gaming laws. See *supra* note 113. But see Katie Thomas, *PR Firm to Raise Drumbeat for Casino; Shinnecocks Hire Advocates with Ties to Pataki, D’Amato*, *NEWSDAY* (NEW YORK), Jun. 29, 2003, at G55 (The Shinnecock tribe, which is petitioning for federal recognition, claims on its web site that “[b]ecause the state has recognized the Shinnecocks for more than 200 years . . . the tribe has the right to conduct gaming on their lands,” and “discussion about federal recognition ‘is a distracting legal argument used by those who are attempting to prevent our economic independence.’”). A federal judge initially ruled, in August 2003, that the Shinnecock Indians could not begin construction of a casino for at least eighteen months while the Bureau of Indian Affairs weighed its application for federal recognition, but then announced in November 2003 that he would bypass the BIA and decide for himself whether the Shinnecock should be recognized. Ann Givens, *Not Confined to the Reservation; Shinnecock Case Could Set National Precedent*, *NEWSDAY* (NEW YORK), Jan. 26, 2004, at A8. See *infra* note 126.

¹¹⁶ See Letter from Carrie E. Glaeden, Deputy Chief Legal Counsel, State of Ohio, to American Indian Movement Support (Jul. 22, 2002) (on file with author) (advising that “the State of Ohio does not recognize Indian Tribes in Ohio and the United Remnant Band Shawnee Nation is not a legitimate, legally recognized tribe in the State of Ohio”). Although the 133th General Assembly adopted a resolution “[t]o recognize the Shawnee Nation United Remnant Band,” Glaeden characterized the resolution as “a ceremonial document.” *Id.* See also American Indian Movement, at <http://www.aimsupport.org/Ken-Van-Wey.htm> (last visited May 8, 2003) (“Resolutions do not confer upon any group or organization the legal status of a Native American tribe.”); Letter from Betty Montgomery, Ohio Attorney General, to Meridith Z. Stanton, Acting Director, United States Department of the Interior, Indian Arts and Crafts Board (Aug. 27, 1998) (on file with author) (“The State of Ohio does not have a policy, regulation, state law, or any other formalized process to recognize that certain American Indian groups exist as tribes.”).

Despite such statements, a concurrent resolution, H.C.R. 5, was introduced in the 124th General Assembly (2001-2002) regular session, entitled “To Grant Official State

Historically, tribes have obtained federal recognition through treaties, legislation, executive orders and other administrative decisions, and court decisions.¹¹⁷ Congress, by the Act of March 3, 1871,¹¹⁸ ended

Recognition to the Saponi Nation of Ohio” (on file with author). The resolution was not voted out of the House State Government Committee. *See also* Benjamin Lanka, *Catawba Tribe Receives Recognition of Culture*, CHILICOTHE GAZETTE (CHILICOTHE, OH), Nov. 21, 2003, at 3A (“Richard Haithcock . . . , chief of the Catawba Tribe of Carr’s Run, received a letter this month recognizing his tribe and its culture. The letter was from the Ohio Senate and signed by Sen. John Carey, R-Wellston, among others. . . . Carey, however, said the resolution was not a legally binding document.”).

¹¹⁷ *See* GAO, INDIAN ISSUES, *supra* note 5, at 3 (“Historically, tribes have been granted federal recognition through treaties, by the Congress, or through administrative decisions within the executive branch—principally by BIA within the Department of the Interior.”); Myers, *supra* note 113, at 272 (“From the colonial period onward, most of the larger tribes received recognition from the executive, Congress, or the two acting together.”); CANBY, JR., *supra* note 70, at 4 (“Federal recognition may arise from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity. Any of these events, or a combination of them, then signifies the existence of a special relationship between the federal government and the concerned tribe”) (citing *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866)); Jackie J. Kim, *The Indian Federal Recognition Administrative Procedures Act of 1995: A Congressional Solution to an Administrative Morass*, 9 ADMIN. L. J. AM. U. 899, 905 (1995) (“The United States [historically] relied on treaties, executive orders, legislation, and court decisions to determine whether a particular Indian group qualified for federal recognition as an Indian tribe.”); Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209, 210 (1991) (During most of the previous century, “the executive branch, through the Department of the Interior, initially determined which tribes were eligible for its administrative services. Early principles of administrative recognition were based on a United States Supreme Court decision defining a ‘tribe’ and de facto recognition through the words and deeds of the executive and legislative branches.”).

Indian groups are interested in obtaining federal recognition for a multitude of reasons that have nothing to do with gambling. *See, e.g.*, GAO, INDIAN ISSUES, *supra* note 5, at 1 (“The federal recognition of an Indian tribe can have a tremendous effect on the tribe, surrounding communities, and the nation as a whole. Recognized tribes and their members have almost exclusive access to about \$4 billion in funding for health, education, and other social programs provided by the federal government.”); Alva C. Mather, Comment, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation*, 151 U. PA. L. REV. 1827, 1833 (2003) (federal services available to recognized tribes include “elementary, secondary, and post-secondary education, social services, law enforcement, judicial courts, business loans, land and heirship records, tribal government support, forestry, agriculture and range lands development, water resources, fish, wildlife and parks, roads, housing, adult and juvenile detention facilities, and irrigation and power systems”); Paschal, *supra*, at 209 (“Federal

treatymaking with tribes by proclaiming that hereafter “[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.”¹¹⁹ For the next hundred years or so, “the limited number of requests by groups to be federally recognized permitted the Department [of the Interior] to assess a group’s status on a case-by-case basis without formal guidelines.”¹²⁰

In 1977, the American Indian Policy Review Commission issued a report which “essentially chastised various departments of the United States for their neglect of ‘nonrecognized’ Indians and made six specific recommendations, including the establishment of a special office using precise ‘definitional factors’ to determine tribal status by petitioning

recognition of Indian tribes is a formal political act that establishes government-to-government relationships between the tribes and the United States. Recognition acknowledges both the sovereign status of the tribes and the responsibilities of the United States toward the tribes.”). Some of the non-gaming reasons for seeking federal recognition have been poignantly expressed by a member of a currently unrecognized group of Ohio Indians:

This is in regard to the June 9 article on Indians possibly opening casinos. Did it ever occur to anyone there are a hundred reasons other than opening a casino that Indians might want to get federal recognition? My family, which is Saponi Indian, has at least 12 documented generations in Ohio. My forbearers didn’t slog to America on some low-budget sloop. We were born right here in Ohio. Yet, my kids can’t get scholarships; we can’t fund cultural events or enjoy the benefits promised us by the federal government without applying for recognition. Getting the federal recognition is not about gambling. It’s about pride. It’s about getting back some of what was stolen by the pioneers.

Readers’ Views, *Tribes Interested in More Than Gambling*, CINCINNATI ENQUIRER, Jun. 16, 2003, at B15 (letter from Janea Wirts of Xenia, Ohio).

¹¹⁸ 25 U.S.C. § 71 (originally enacted as Act of March 3, 1871, ch. 120, 16 Stat. 544).

¹¹⁹ *Id.* Congress included a savings clause which provided that “no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.” *Id.*

“The decision to deal with tribes by statutes and agreements, rather than by treaty, undermined the political status of tribes, and the 1871 Act was soon thereafter invoked by the Supreme Court in *United States v. Kagama* in support of the plenary power doctrine and the notion that, ‘within the broad domain of sovereignty’ there exists only the federal government and the states.” Watson, *Federal Indian Law*, *supra* note 111, at 487 (quoting *United States v. Kagama*, 118 U.S. 375, 379 (1886)).

¹²⁰ GAO, INDIAN ISSUES, *supra* note 5, at 3.

unacknowledged Indian groups.”¹²¹ Congress never acted on the Commission’s legislative proposals, and in lieu of statutory criteria, the Bureau of Indian Affairs (BIA) in 1978 “established a regulatory process intended to provide a uniform and objective approach to recognizing tribes.”¹²² In 1994 the BIA revised the acknowledgment regulations—found at 25 C.F.R. Part 83—“to clarify what evidence was needed to support the requirements for recognition.”¹²³ There are 562 tribes on the

¹²¹ William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 AM. INDIAN L. REV. 37, 41 (1992). See also Paschal, *supra* note 117, at 212 (“The AIPRC recognized the inconsistency of the BIA’s acknowledgment process as a major flaw in administrative policy.”).

¹²² GAO, INDIAN ISSUES, *supra* note 5, at 1. Congress has, from time to time, considered legislation to establish statutory procedures for recognizing Indian groups as tribes. See, e.g., S. 462, 108th Cong. (2003) (“[t]o establish procedures for the acknowledgment of Indian tribes”); S. 297, 108th Cong. (2003) (“[t]o provide reforms and resources to the Bureau of Indian Affairs to improve the Federal acknowledgment process, and for other purposes”).

Congress ratified the Secretary’s acknowledgment authority in the “Federally Recognized Indian Tribe List Act of 1994,” Pub. L. No. 103-454, 108 Stat. 4791, 25 U.S.C. § 479a and note, § 479a-1. As explained in a Memorandum of Understanding between the NIGC and the Department of the Interior, the 1994 Act

confirmed the Secretary of the Interior’s responsibility on behalf of the federal government to recognize Indian tribes. See 25 U.S.C. § 479a note. The Act requires the Secretary to keep a regularly updated list of all recognized tribes and to publish that list on an annual basis. 25 U.S.C. § 479a-1. The Act further provides that “a tribe which has been recognized in [this manner] may not be terminated except by an Act of Congress.” 25 U.S.C. § 479a note. The legal significance of the List is highlighted in the House Report accompanying that Act, which notes that “[r]ecognized” is more than a simple adjective; it is a legal term of art.” It explains further that federal “recognition” does the following: (1) confirms that the Tribe is a “domestic dependent nation” capable of a “government-to-government relationship” with the United States; (2) “institutionalizes the tribe’s quasi-sovereign status, along with all the powers accompanying that status such as the power to tax; and (3) “established tribal status for all federal purposes.” H.R. Rep. No. 103-781, at 2-3 (1994).

Memorandum of Understanding Between the National Indian Gaming Commission and the Department of the Interior, n.1 (Feb. 2000), at <http://www.nigc.gov/nigc/documents/land/hillman.jsp> (alterations in original).

¹²³ GAO, INDIAN ISSUES, *supra* note 5, at 4 (citing 59 Fed. Reg. 9,280 (Feb. 25, 1994)). The BIA in 1997 updated guidelines on the acknowledgment process and issued in 2000 a notice clarifying internal processing procedures. GAO, INDIAN ISSUES, *supra* note 5,

BIA's most recent list of recognized tribes published in July 2002.¹²⁴

The BIA's acknowledgment regulations are the primary, but not exclusive, means by which Indian groups can obtain federal recognition. Indian groups continue to ask the federal judiciary to make "initial determinations of whether Indian groups have been recognized previously or whether conditions for recognition currently exist."¹²⁵ However, most courts invoke the doctrines of exhaustion of administrative remedies and ripeness to hold that "[a] direct suit in federal court seeking federal recognition . . . is not appropriate relief."¹²⁶

Another alternative to petitioning for administrative recognition

at 4 (citing 65 Fed. Reg. 7,052 (Feb. 11, 2000)).

¹²⁴ 67 Fed. Reg. 46,328 (Jul. 12, 2002). Three tribes, including the Shawnee Tribe, Oklahoma, became newly recognized since the last publication in March 2000 of the list of federally acknowledged tribes in the contiguous forty-eight states and in Alaska. *Id.* The Shawnee Tribe, Oklahoma, was recognized by the Act of December 27, 2000, Pub. L. No. 106-568, 114 Stat. 2868. *See supra* note 52; *see also* *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213 (D. Haw. 2002) (suit challenging the exclusion of native Hawaiians from the process of acknowledgment of tribes under the BIA regulations raises a nonjusticiable political question).

¹²⁵ *James v. United States Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987).

¹²⁶ *Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F. Supp. 2d 76, 79 (D. D.C. 2002). *See also* *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 551 (10th Cir. 2001) (group "must proceed administratively with its claim that it is entitled to status as a recognized tribe"); *Native American Mohegans v. United States*, 184 F. Supp. 2d 198, 222-23 (D. Conn. 2002) (claim seeking judicial recognition as federally acknowledged tribe was barred for failure to exhaust administrative remedies); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 839 F. Supp. 2d 130, 134 (D. Conn. 1993), *remanded*, 39 F.3d 51 (2d Cir. 1994) ("Court decisions regarding which groups of Indians constitute tribes for Nonintercourse Act purposes would undoubtedly encourage avoiding of the DOI's processes, impede uniformity, and multiply proceedings."); *James*, 824 F.2d at 1133 ("[W]e conclude that the district court correctly rejected their request for an order that the Interior [Department] add the Gay Head Wampanoags to its list of federally recognized Indian tribes, because appellants failed to exhaust administrative remedies which may have obtained the relief sought.").

In what has been described as "an unprecedented move," U.S. District Judge Thomas Platt in November 2003 announced that he would bypass the federal Bureau of Indian Affairs and decide for himself whether the Shinnecock should be recognized. *Givens*, *supra* note 115. The Shinnecock Indian Nation seeks to construct and operate a casino in Hampton Bays, New York. The group filed its petition for federal recognition over twenty years ago. According to attorney Eric Eberhard, of Dorsey and Whitney, if Judge Platt's course of action is upheld, it "would mean that for tribes in the recognition process [with the bureau] there would now be a precedent that would suggest they could go to the judiciary and be recognized." *Givens*, *supra* note 115.

pursuant to 25 C.F.R. Part 83 is to achieve federal recognition as an Indian tribe by an act of Congress.¹²⁷ In November 2001, the General Accounting Office (GAO) reported that, of the forty-seven tribes recognized since 1960, sixteen achieved this result through Congressional legislation.¹²⁸ There are several bills pending in Congress to grant federal recognition to Indian groups;¹²⁹ however, there is no pending legislation to recognize any group of Indians in Ohio.¹³⁰ In lieu of judicial or legislative action, the

¹²⁷ There are judicially-imposed limits to the ability of Congress to confer official recognition on a group as an Indian tribe. In *Montoya v. United States*, the Supreme Court defined a “tribe” as a “body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.” 180 U.S. 261, 266 (1901). More to the point, in *United States v. Sandoval*, the Court noted that Congress may not grant federal recognition to “a community or body of people . . . by arbitrarily calling them an Indian tribe.” 231 U.S. 28, 46 (1913). See also GAO, INDIAN ISSUES, *supra* note 5, at 23 (“[T]he only practical limitations upon congressional decisions as to tribal existence are the broad requirements that (1) the group have some ancestors who lived in what is now the United States before discovery by Europeans and (2) the group be a ‘people distinct from others.’”).

¹²⁸ GAO, INDIAN ISSUES, *supra* note 5, at 25-26. Included in this group are the Loyal Shawnee Tribe, Oklahoma (Shawnee Tribe Status Act of 2000, Pub. L. No. 106-568, 114 Stat. 2913 (codified as amended at 25 U.S.C. § 1041 (2001)); the Pokagon Band of Potawatomi Indians of Michigan (Act of Sept. 21, 1994, Pub. L. No. 103-324, 108 Stat. 2152 (codified as amended at 25 U.S.C. § 1300j (2001)); the Little River Band of Ottawa Indians of Michigan (Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, 108 Stat. 2156 (1994) (codified as amended at 25 U.S.C. § 1300k (2001)); the Little Traverse Bay Bands of Odawa Indians of Michigan (Pub. L. No. 103-324, 108 Stat. 2156 (1994) (codified as amended at 25 U.S.C. § 1300k (2001)); and the Mashantucket Pequot Tribe of Connecticut (Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, 97 Stat. 851 (1983) (codified as amended at 25 U.S.C. § 1751 (2001)).

¹²⁹ See Lumbee Acknowledgment Act, S. 420, 108th Cong. § 1 (2003); Duwamish Tribal Recognition Act, H.R. 477, 108th Cong. § 1(a) (2003); Miami Nation of Indiana Recognition Confirmation Act, H.R. 954, 108th Cong. § 1 (2003); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act, H.R. 1938, 108th Cong. § 1(a) (2003) (Chickahominy Indian Tribe; Chickahominy Indian Tribe—Eastern Division; Upper Mattaponi Tribe; Rappahannock Tribe, Inc.; Monacan Indian Nation; and Nansemond Indian Tribe).

The bill to confirm federal recognition of the Miami Nation of Indiana provides that “[a]ll laws, ordinances, and regulations of the State, and of its political subdivisions, shall govern the regulation of gambling devices and the conduct of gambling or wagering by the Tribe on and off reservation lands. The Indian Gaming Regulatory Act shall not apply to the Tribe.” Miami Nation of Indiana Recognition Confirmation Act, H.R. 954, 108th Cong. § 7(a) (“Gaming Rights Withdrawn”).

¹³⁰ Even if a bill to extend federal recognition to an Indian group in Ohio were to be

remaining route by which Ohio Indian groups can obtain federal recognition is through the Department of the Interior's tribal acknowledgment regulations.

1. *The Federal Administrative Acknowledgment Process*

The GAO November 2001 report, entitled "Improvements Needed in Tribal Recognition Process," contains a wealth of information regarding the requirements, implementation, and shortcomings of the federal tribal acknowledgment regulations.¹³¹ The administrative process begins when a group files a "letter of intent" requesting federal acknowledgment as an Indian tribe.¹³² Thereafter, the petitioner is given unlimited time to produce a documented petition that is supposed to serve as the basis for meeting the burden of satisfying the substantive requirements for obtaining official tribal recognition.¹³³ A substantial majority of the recognition petitions remain at this stage of administrative purgatory; in fact, as of August 2001, 175 of the 250 petitions received by the BIA were classified by the GAO as "not ready for evaluation."¹³⁴

introduced, it is quite possible that, given the anti-gambling stance of both current Ohio senators, the bill would withhold gaming rights otherwise available under IGRA. *See* Bischoff, *Ante Being Upped*, *supra* note 39 ("Expanded gambling faces fierce opposition in Ohio from . . . both of Ohio's U.S. senators, Republicans Mike DeWine and George Voinovich."); H.R. 954, 108th Cong. § 7(a) (bill recognizing the Miami Nation of Indiana but withholding IGRA gaming rights).

¹³¹ *See* GAO, INDIAN ISSUES, *supra* note 5. In particular, Appendix II of the report, entitled "The BIA Regulatory Tribal Recognition Process," sets forth in step-by-step fashion the process used to determine an Indian group's eligibility for tribal recognition. GAO, INDIAN ISSUES, *supra* note 5, at 27-31.

¹³² 25 C.F.R. § 83.4. The letter is initially filed with the Assistant Secretary—Indian Affairs, Department of the Interior, but the group's acknowledgment petition is processed primarily by the BIA's Branch of Acknowledgment and Research (BAR). *Id.* The BIA "publishes a notice in the Federal Register, publishes a legal notice in a local newspaper, notifies the governor and attorney general of the tribe's state, sends a letter of response to the tribe, and establishes an administrative file." Myers, *supra* note 113, at 279. The BIA "also notifies any other recognized tribe or any other petitioner who appears to have a historical or present relationship with the petitioner or which may otherwise be considered to have a potential interest." GAO, INDIAN ISSUES, *supra* note 5, at 27.

¹³³ *See* GAO, INDIAN ISSUES, *supra* note 5, at 27. The BIA will conduct a "technical assistance" (TA) review of the petition in order to provide the petitioner the chance to revise the petition prior to its being placed on "active consideration." GAO, INDIAN ISSUES, *supra* note 5, at 27. *See also* Barbara N. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 NEW ENG. L. REV. 491, 494 n.18 (2003) ("There is no prescribed time period in which a group must submit its documentation.").

¹³⁴ GAO, INDIAN ISSUES, *supra* note 5, at 31. In 105 instances the BIA has received nothing beyond the initial "letter of intent." GAO, INDIAN ISSUES, *supra* note 5, at 31. Of

The GAO characterizes the next stage as “[r]eady, waiting for active consideration,” and notes that “[t]he order of consideration of petitions is determined by the date of BIA’s notification to the petitioner that it considers the petition ready to be placed on active consideration.”¹³⁵ The petitioner and interested parties are notified when the petition is ready for active consideration.¹³⁶ At this point in the process, the “BIA reviews the petition to determine whether the petitioner is entitled to be recognized.”¹³⁷ A report is prepared by the BIA “summarizing the evidence, reasoning, and analyses that are the basis for the recommendation it makes to the Assistant Secretary-Indian Affairs.”¹³⁸ The Assistant Secretary then makes a proposed determination regarding the petitioner’s status, and a summary of this determination is published in the Federal Register.¹³⁹ A public comment period ensues, and the petitioner and interested parties may submit arguments and evidence to rebut or support the proposed finding.¹⁴⁰

After consideration of the written arguments, evidence rebutting or supporting the proposed finding, and the petitioner’s response to the comments of interested parties, the Assistant Secretary makes “a final determination regarding the petitioner’s status.”¹⁴¹ The determination is

the remaining seventy petitions listed as “not ready for evaluation,” fifty-five petitions are incomplete, and fifteen petitions are characterized as “inactive” because the “petitioner is no longer in touch with BIA or legislative action [is] required.” GAO, INDIAN ISSUES, *supra* note 5, at 31.

¹³⁵ GAO, INDIAN ISSUES, *supra* note 5, at 27. See also 25 C.F.R. § 83.10(d).

¹³⁶ GAO, INDIAN ISSUES, *supra* note 5, at 28. See also 25 C.F.R. § 83.10(f). Interested parties are persons, organizations, or other entities “who can establish a legal, factual or property interest in an acknowledgment determination and who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner.” 25 C.F.R. § 83.1. Interested parties include “the governor and attorney general of the state in which a petitioner is located, and may include . . . any recognized Indian tribes and unrecognized Indian groups that might be affected by an acknowledgment determination.” *Id.*

¹³⁷ GAO, INDIAN ISSUES, *supra* note 5, at 28. According to the GAO, twenty-three petitions (as of August 2001) were “ready for evaluation,” with ten petitions ready, but waiting to be actively considered, and thirteen petitions under active consideration (but not yet resolved). GAO, INDIAN ISSUES, *supra* note 5, at 31.

¹³⁸ GAO, INDIAN ISSUES, *supra* note 5, at 28. The report is to be prepared one year from the time the petitioner is placed on active consideration, but this deadline may be extended. *Id.*; 25 C.F.R. § 83.10(h).

¹³⁹ GAO, INDIAN ISSUES, *supra* note 5, at 28; 25 C.F.R. § 83.10(h).

¹⁴⁰ 25 C.F.R. § 83.10(i). “During the response period, the Assistant Secretary shall provide technical advice concerning the factual basis for the proposed finding, the reasoning used in preparing it, and suggestions regarding the preparation of materials in response to the proposed finding.” 25 C.F.R. § 83.10(j)(1).

¹⁴¹ 25 C.F.R. § 83.10(l)(2).

effective ninety days from publication in the Federal Register “unless the petitioner or a third party files a request for the Interior Board of Indian Appeals (IBIA) to reconsider the determination.”¹⁴² The IBIA may either affirm the decision or remand it to the Assistant Secretary for reconsideration.¹⁴³ If the IBIA affirms the decision, but finds that the request for reconsideration alleges other grounds, the request for reconsideration is sent to the Secretary of the Interior, who has the discretion to request the Assistant Secretary to reconsider the petition after receiving further comments from petitioners and interested parties.¹⁴⁴ The Assistant Secretary is required to issue a reconsidered determination stemming from either the IBIA’s remand or the Secretary’s request for reconsideration within 120 days of the IBIA remand or Secretarial request.¹⁴⁵ A final agency determination is subject to judicial review.¹⁴⁶

The substantive criteria for federal acknowledgment as an Indian tribe are set forth at 25 C.F.R. § 83.7. Failure to prove any one of the criteria results in denial of the petition for recognition.¹⁴⁷ The mandatory criteria are:

- (a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900;
- (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;
- (c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present;
- (d) [The group must provide a copy of its] present governing document [and] membership criteria;
- (e) The petitioner’s membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes, which combined and functioned as a single autonomous political entity;
- (f) The membership of the petitioning group is composed principally of persons who are not members of any

¹⁴² GAO, INDIAN ISSUES, *supra* note 5, at 29; 25 C.F.R. § 83.10(1)(4).

¹⁴³ 25 C.F.R. § 83.11(e)(9)-(10).

¹⁴⁴ 25 C.F.R. § 83.11(f)(2).

¹⁴⁵ 25 C.F.R. § 83.11(g)(1).

¹⁴⁶ *See, e.g.,* Miami Nation of Indians of Ind. v. Babbitt, 112 F. Supp. 2d 742, 750-51 (N.D. Ind. 2000), *aff’d*, 255 F.3d 342 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002) (reviewing the agency’s determination against acknowledgment under the “arbitrary and capricious” standard of the Administrative Procedure Act).

¹⁴⁷ 25 C.F.R. § 83.6(c).

- acknowledged North American Indian tribe; [and]
(g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden [recognition].¹⁴⁸

The GAO's November 2001 report to Congress states that "clearer guidance is needed on the key aspects of the criteria and supporting evidence used in recognition decisions," and contends that "the process is also hampered by limited resources, a lack of time frames, and ineffective procedures for providing information to interested third parties."¹⁴⁹ It is,

¹⁴⁸ 25 C.F.R. § 83.7. The regulations provide additional information regarding the kind, and quantum, of evidence needed to satisfy the criteria. *Id.* If a petitioner provides substantial evidence of unambiguous previous federal acknowledgment, then the requirements of 25 C.F.R. § 83.7 are relaxed in some circumstances. *See* 25 C.F.R. § 83.8. For example, rather than having to show that the petitioner "has been identified as an American Indian entity on a substantially continuous basis since 1900," 25 C.F.R. § 83.7(a), a petitioner that has demonstrated previous federal acknowledgment need only prove that it has been identified as an American Indian entity on a substantially continuous basis since "the point of last Federal acknowledgment." 25 C.F.R. § 83.8(d)(1).

Although all criteria must be satisfied, "[t]he essential regulatory requirement for administrative acknowledgment as an Indian tribe is that the group has existed continuously as a tribe with retained political powers." Coen, *supra* note 133, at 491.

¹⁴⁹ GAO, INDIAN ISSUES, *supra* note 5, at 10. In particular, the GAO notes that "[c]oncerns over what constitutes continuous existence have centered on the allowable gap in time during which there is limited or no evidence that a petitioner has met one or more of these criteria." GAO, INDIAN ISSUES, *supra* note 5, at 12. Although 25 C.F.R. § 83.7(a) requires that the petitioner be identified as an American Indian entity on a substantially continuous basis since 1900, "the regulations specifically decline to define a permissible interval during which a group could be presumed to have continued to exist if the group could demonstrate its existence before and after the interval." GAO, INDIAN ISSUES, *supra* note 5, at 12. Another problem identified by the GAO is "the proportion of a petitioner's membership that must demonstrate that it meets the criterion of descent from a historic Indian tribe." GAO, INDIAN ISSUES, *supra* note 5, at 13. The language of 25 C.F.R. section 83.7(e) "only states that a petitioner's membership must consist of individuals who descend from historic tribes—no minimum percentage or quantifying term such as 'most' or 'some' is used." GAO, INDIAN ISSUES, *supra* note 5, at 13-14. In sum, the GAO asserts that "[a] lack of clear and transparent explanations of the decisions reached may cast doubt on the objectivity of decisionmakers, making it difficult for parties on all sides to understand and accept decisions, regardless of the merit or direction of the decisions reached." GAO, INDIAN ISSUES, *supra* note 5, at 14.

On average, tribes have paid between \$300,000 and \$500,000 for the creation of their petition, and some petitioners have paid more than a million dollars for their documentation. Mather, *supra* note 117, at 1840 (citing *Federal Recognition of Indian Tribes: Hearing on H.R. 2549, H.R. 4462, and H.R. 4709 Before the Subcomm. on Native*

unquestionably, a process “that is characterized by massive amounts of paper and the passage of many years.”¹⁵⁰ Of the 250 petitions for recognition pending in August 2001, only fifty-five petitioners completed the documentation needed to be considered. For the completed petitions, the “BIA has finalized 29 decisions—14 recognizing a tribe and 15 denying recognition.”¹⁵¹

2. *The Miami Indian Nation of Indiana’s Quest for Recognition*

The Miami Indian Nation of Indiana’s struggle for federal acknowledgment as an Indian tribe is worthy of mention for two reasons. First, the Nation’s twenty-two year administrative and judicial journey is illustrative of the difficulties Indian groups—such as the seven Ohio petitioners—face in seeking recognition.¹⁵² Second, as discussed later in this Article,¹⁵³ the Miami are one of several tribes with a historical connection with Ohio, and the Miami were signatories to two treaties with the United States that ceded claims to a considerable portion of the state.¹⁵⁴

The Miami’s historic domain included northern Indiana and western Ohio. The tribe, led by Chief Little Turtle, was at the forefront of Indian

Am. Affairs of the House Comm. on Natural Res., 103d Cong. 167 (1994).

¹⁵⁰ Sweeney, *supra* note 114, at 210. See also Peter Beinart, *Lost Tribes: Native Americans and Government Anthropologists Feud Over Indian Identity*, 9 LINGUA FRANCA 32, 41 (May/June 1999) (“staffers claim that they spend most of their time fulfilling administrative duties and less than half actually reviewing petitions”).

¹⁵¹ GAO, INDIAN ISSUES, *supra* note 5, at 5. “Of the remaining 26 completed petitions, 3 decisions were pending [as of August 2001,] 13 [were] under active consideration, and 10 [were] ready, awaiting active consideration.” GAO, INDIAN ISSUES, *supra* note 5, at 5.

¹⁵² The Miami Nation of Indians of Indiana petitioned the Department of the Interior for recognition in 1980. See *Miami Nations of Indians of Ind., Inc. v. United States Dep’t of Interior*, 255 F.3d 342, 345 (7th Cir. 2001), *cert denied*, 534 U.S. 1129 (2002). Twelve years later, in 1992, the agency determined that the Miami had not satisfied criteria (b) and (c) of 25 C.F.R. section 83.7, and would not be recognized, and a decade later the Supreme Court declined to review the judicial proceedings affirming the agency’s decision. See *Miami Nation of Indians of Ind., Inc. v. Norton*, 534 U.S. 1129 (2002).

The agency’s denial of the Miami petition is one of only two acknowledgment decisions that have been reviewed on the merits by the courts. Coen, *supra* note 133, at 499 n.47. In the other instance, the denial of the recognition petition was also upheld. See *Ramapough Mountain Indians, Inc. v. Babbitt*, 2000 U.S. Dist. LEXIS 14479 (D. D.C. 2000), *aff’d per curiam*, *Ramapough Mountain Indians v. Norton*, Fed. Appx. 2 (D.C. Cir. 2001), *cert. denied*, 537 U.S. 817 (2002).

¹⁵³ See *infra* notes 224-40 and accompanying text.

¹⁵⁴ See Treaty of Greenville, Aug. 3, 1795, 7 Stat. 49 (ceding, with other tribes, most of eastern and southern Ohio); Treaty of Oct. 6, 1818, 7 Stat. 189 (ceding lands in Indiana and west-central Ohio, near and including Celina, Ohio).

resistance to the American settlement of the Northwest Territory, and it joined forces with other tribes on November 4, 1791, to inflict on the American army “one of the worst defeats in the history of the United States.”¹⁵⁵ The federal government’s “removal” policy—inaugurated in 1830 and implemented most notably by the Cherokee “Trail of Tears”—was extended to the Indians of the Northwest Territory and, by 1846, about half of the Miami had been removed to the west.¹⁵⁶ Nevertheless, in 1854, a treaty was signed with both the “Kansas” Miamis and the “Indiana” Miamis, and Congress later enacted legislation specifically concerning the Indiana Miamis.¹⁵⁷

In 1897, however, the Department of the Interior withdrew acknowledgment of the Indiana Miamis, and has since refused to recognize the Indiana Miamis as an Indian tribe.¹⁵⁸ On March 25, 1980, the Miami Nation of Indians of Indiana, Inc., filed a petition for federal acknowledgment.¹⁵⁹ Twelve years later, in 1992, the Assistant Secretary of the Interior published his final determination that the group would not be recognized as an Indian tribe.¹⁶⁰ Shortly thereafter, the Miami Nation of Indiana sought judicial review.

Ten years—and six published decisions—later, the efforts to overturn the Interior Department’s refusal to accord recognition ended without success. Initially, the federal district court held that the group was barred by two statutes of limitations from seeking a declaration that the administrative withdrawal of federal recognition was *ultra vires*.¹⁶¹ The district court then rejected the contention that the federal acknowledgment regulations are invalid, holding that the regulations (1) were within the authority of the Secretary of the Interior to promulgate; (2) are not arbitrary and capricious; and (3) do not violate principles of due process or equal

¹⁵⁵ ANDREW R.L. CAYTON, FRONTIER INDIANA 160 (1996). The American forces, led by Arthur St. Clair, were attacked in their camp near the headwaters of the Wabash River. *Id.* at 159. According to one historian, “[t]he victorious Indians stuffed dirt into the mouths of the dead Americans that they might have some of the land they so hungered for.” Alan Taylor, *Land and Liberty on the Post-Revolutionary Frontier*, DEVISING LIBERTY: PRESERVING AND CREATING FREEDOM IN THE NEW AMERICAN REPUBLIC 96 (David Thomas König ed., 1995).

¹⁵⁶ See *Miami Nation of Indians of Ind., Inc. v. Lujan*, 832 F. Supp. 253, 254 (N.D. Ind. 1993). See generally STEWART RAFERT, THE MIAMI INDIANS OF INDIANA: A PERSISTENT PEOPLE 1654-1994 (1996).

¹⁵⁷ *Miami Nation of Indians of Ind., Inc.*, 832 F. Supp. at 253-54.

¹⁵⁸ *Id.* at 255.

¹⁵⁹ *Id.*

¹⁶⁰ 57 Fed. Reg. 27, 312 (Jun. 18, 1992).

¹⁶¹ *Miami Nation of Indians of Ind., Inc.*, 832 F. Supp. at 255-57. The court invoked 28 U.S.C. § 2401 and 28 U.S.C. § 2501. *Id.* at 257.

protection.¹⁶² Having failed to overturn the regulations themselves, the Miami Nation of Indiana challenged the agency's acknowledgment determination on its merits.¹⁶³

Ohio Indian groups petitioning for recognition may face many of the same evidentiary problems encountered by the Miami Nation of Indians of Indiana. The denial of recognition was premised on a determination that the Miamis fell short on criteria (b) and (c) of 25 C.F.R. § 83.7, which at the time of the agency's decision required "that a substantial portion of the petitioning group inhabits a specific area or lives in [a] community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area;" and "that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present."¹⁶⁴ The Department "found that the Miami met those criteria years ago, but that the Miamis had changed since 1940 or so," and "were indistinct from the non-Indian population and not viewed by others as American Indian."¹⁶⁵ Under the 1978 regulations, "a community viewed as American Indian" is presumed from the existence

¹⁶² *Miami Nation of Indians of Ind., Inc. v. Babbitt*, 887 F. Supp. 1158, 1176-77 (N.D. Ind. 1995). The court conceded that "[n]o statute explicitly authorizes the Secretary of the Interior to promulgate regulations concerning the acknowledgment of Indian tribes," but upheld the Secretary's reliance on his general statutory authority, contained in 25 U.S.C. sections 2 and 9, to "manage Indian affairs and prescribe necessary regulations for that purpose." *Id.* at 1163.

¹⁶³ *See Miami Nation of Indians of Ind., Inc. v. Babbitt*, 979 F. Supp. 771 (N.D. Ind. 1996) (ruling on motion to complete and supplement the administrative record and to allow expert testimony); *Miami Nation of Indians of Ind., Inc. v. Babbitt*, 55 F. Supp. 2d 921 (N.D. Ind. 1999) (holding that supplementation of the administrative record was unwarranted); and *Miami Nation of Indians of Ind., v. Babbitt*, 112 F. Supp. 2d 742 (N.D. Ind. 2000), *aff'd*, *Miami Nation of Indians of Ind., Inc. v. Dep't of the Interior*, 255 F.3d 342 (7th Cir. 2001), *cert. denied*, *Miami Nation of Indians of Ind., Inc. v. Norton*, 534 U.S. 1129 (2002) (affirming agency finding that group failed to satisfy all criteria necessary for federal recognition).

¹⁶⁴ *Miami Nation of Indians of Ind., Inc.*, 112 F. Supp. 2d at 746. The Miami petition was processed under the regulations promulgated in 1978. 25 C.F.R. Part 83 was revised in 1994. *See* 59 Fed. Reg. 9,280 (Feb. 25, 1994).

¹⁶⁵ *Miami Nation of Indians of Indiana, Inc.*, 112 F. Supp. 2d at 745, 747. *See also id.* at 748 ("The Department thought there was too little evidence of regular tribe-wide interaction and social cohesion among the 4,200 or so Miami tribe members. The Department believed that evidence of marriage among members, of use of native language, and of shared and distinct cultural practices disclosed only a community that existed early in the twentieth century, and that had ceased to exist by 1940. . . . The Miami record, as the Department saw it, showed considerable intermarriage between 1846 and 1864, then a rapid decline to virtually none after the 1930s.").

of a geographic settlement if half the petitioning tribe's members reside in an area almost exclusively occupied by members of the group, with which the rest of the tribe maintains contact. However, since about one-third of the Miamis live in a five-county, 2,200-square mile area of Indiana, forming just 0.285% of the five-county population, the Department did not consider that area a village-like setting that triggered a presumption of intra-tribal interaction, and hence community.¹⁶⁶ Concluding that none of the presumptions of interaction applied, the Department instead looked for actual social interaction, "found only insubstantial social ties or interaction between Miamis who were not closely related as family members," and held that the "community criterion" was not satisfied.¹⁶⁷

The Department also concluded that the Miamis did not satisfy the "political authority" criterion in 25 C.F.R. § 83.7(c).¹⁶⁸ The 1978 regulations required a showing that the political authority has existed (formally or informally) throughout the tribe's history, and the guidelines that accompanied the 1978 regulations explained that "[t]his can be demonstrated by showing the group has formal or informal leaders or councils and that they control the group or influence and guide it."¹⁶⁹ On this point, the Department found that, by the end of the 1940s, political authority had ceased to exist, and that—although there had been some resurgent activity—"contemporary Miami leadership had no demonstrable bilateral political relationship with most of the tribe's 4,200 members and didn't act on matters of consequence to the membership."¹⁷⁰

The Miami Nation challenged the determination on several grounds, but the district court held that its review of the agency action was "deferential and thus very limited in scope"¹⁷¹ and that the findings and decision were not arbitrary and capricious.¹⁷² The Seventh Circuit Court of Appeals affirmed, holding:

Probably by 1940 and certainly by 1992, the Miami Nation had ceased to be a tribe in any reasonable sense. It had no structure. It was a group of people united by nothing more than common descent, with no territory, no significant governance, and only the loosest of social

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 748-49.

¹⁶⁸ *Id.* at 749.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 749. The Department found no evidence, for example, of constituent communication to the leadership on matters such as potential conflicts about bingo and economic development. *Id.* at 750.

¹⁷¹ *Id.* at 750.

¹⁷² *Id.* at 752-58.

ties.¹⁷³

It is the position of the Miami Nation of Indians of Indiana “that they have never given up their rights as a tribe”¹⁷⁴ despite the fact that the Interior Department withdrew recognition by an administrative edict in 1897. The Indiana Miamis—unlike the seven Ohio groups currently petitioning for federal acknowledgment—were expressly recognized by the United States in a federal-tribal treaty. However, despite this fact, efforts to reestablish recognized status pursuant to the BIA’s regulatory acknowledgment process were unsuccessful. This process has been described as “numbingly detailed, exasperatingly slow, and very costly,”¹⁷⁵ and the likelihood of success is low.¹⁷⁶ Although each Indian group’s

¹⁷³ *Miami Nation of Indians of Ind., Inc. v. United States Dep’t of the Interior*, 255 F.3d 342, 350 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002).

¹⁷⁴ RAFERT, *supra* note 156, at 299.

¹⁷⁵ John W. Ragsdale, Jr., *The United Tribe of Shawnee Indians: The Battle for Recognition*, 69 UMKC L. Rev. 311, 327 (2000).

¹⁷⁶ Of the 250 recognition petitions before the BIA as of August 2001, only in fourteen instances has a final decision been issued recognizing a tribe. GAO, INDIAN ISSUES, *supra* note 5, at 5.

In January 2001, on the last day of the Clinton Administration, three Indian groups were recognized as tribes by the Department of the Interior, despite negative findings by the BIA’s Branch of Acknowledgment and Research. See Sean P. Murphy, *Probe of Tribe Designation Sought*, BOSTON GLOBE, Mar. 28, 2001, at A16, available at 2001 WL 3926416. The “eleventh hour recognitions” were eventually overturned by the Bush Administration. See Sean P. Murphy, *Nipmuc Nation Loses Its US Status*, BOSTON GLOBE, Sep. 28, 2001, at A1, available at 2001 WL 3954036; Brian Stockes & David Melmer, *Three Tribes Denied Federal Recognition*, INDIAN COUNTRY TODAY, Oct. 5, 2001, at A1, available at <http://www.IndianCountry.com/?2241> (“Assistant Secretary for Indian Affairs Neal McCaleb has issued a proposal to deny federal recognition to two branches of the Nipmuc and a final determination against the Duwamish.”); James May, *Chinook Status Denied*, INDIAN COUNTRY TODAY, Jul. 12, 2002, available at <http://Indiancountry.com/?1026488045> (“Assistant Secretary of Indian Affairs Neal McCaleb dashed Chinook hopes July 5. His announcement reversed a decision by his predecessor Kevin Gover in the last weeks of the Clinton Administration to grant recognition.”); see also Jim Adams, *Nipmuc Nation Recognition Will Have to Wait; Federal Recognizers Switch Schedules on Nipmuc, Schaghticoke Indians*, INDIAN COUNTRY TODAY, Sept. 19, 2003, available at <http://IndianCountry.com/?1063987147> (“Nipmuc Nation applications for federal recognition will have to wait another seven months while the BIA’s Office of Federal Acknowledgement (OFA) focuses on the petition of the Schaghticoke Tribal Nation, federal officers told the Nipmucs in a letter released by the tribe on Sept. 17.”).

Since the GAO’s November 2001 report, the Interior Department has recognized three Indian tribes and refused to acknowledge three other groups (in addition to the groups

history is unique, the experience of the Miami Nation of Indians of Indiana illustrates the difficulty of achieving federal recognition by administrative petition.

3. *The Status of Recognition Petitions from Ohio Indian Groups*

As previously noted, seven Indian groups in Ohio have petitioned the federal government for recognition as an Indian tribe. The seven groups, the cities from which the petitions were sent, and the dates the letters of intent were received by the BIA, are set forth below:

recognized in the waning hours of the Clinton Administration). See Tom Wanamaker, *Muwekma Ohlone Denied Recognition*, INDIAN COUNTRY TODAY, Sept. 13, 2002, at B2, available at <http://IndianCountry.com/?1031923592> (“The Interior Department has declined to grant federal recognition to a California tribe from the Bay Area. On Sept. 6, Assistant Secretary for Indian Affairs Neal A. McCaleb issued a notice of final determination stating that the Muwekma Ohlone Tribe had failed to meet three of the seven mandatory criteria for federal recognition. . . . The tribe has 90 days in which to appeal the decision.”); Martin Issues Proposed Finding to Decline Federal Acknowledgment of the Golden Hill Paugussett, INDIAN COUNTRY TODAY, Jan. 22, 2003, available at <http://IndianCountry.com/?1043262513> (“Acting Assistant Secretary—Indian Affairs Aurene M. Martin today announced she has issued a Notice of Proposed Finding whereby she proposes to decline to acknowledge that the Golden Hill Paugussett Tribe (petition #81) in Trumbull, Conn., exists as an Indian tribe within the meaning of Federal law. The proposed finding is based on a determination that the petitioner does not satisfy three of seven mandatory criteria for Federal acknowledgment under 25 CFR Part 83.”); Alex Fryer, *U.S. Won’t Recognize the Snohomish as Tribe*, THE SEATTLE TIMES, Dec. 2, 2003, at B1 (“After waiting more than 28 years for federal recognition, the Snohomish Tribe finally heard from the government yesterday: Their petition was denied.”); James May, *Cowlitz Recognition: Washington State Tribe Prevails After Long Feud With Quinault*, INDIAN COUNTRY TODAY, Jan. 4, 2002, available at <http://IndianCountry.com/?1010180057> (“After battling for years and suffering last-minute reversals, the Cowlitz tribe has finally won federal recognition. Assistant Secretary for Indian Affairs Neal McCaleb announced his approval of the positive ‘reconsidered final determination’ on Jan. 3.”); Jim Adams, *Anti-Pequot Politicians Will Appeal Recognition*, INDIAN COUNTRY TODAY, Sept. 13, 2002, at A1, available at <http://IndianCountry.com/?1031931508> (“Opponents of recognition for the Historic Eastern Pequot tribe ended weeks of suspense Sept. 12 by announcing an appeal of the BIA’s June 24 decision to acknowledge the 1100-member tribe. Connecticut Attorney General Richard Blumenthal and two neighboring towns said they would request reconsideration, of recognition before the Interior Board of Indian Appeals (IBIA), delaying recognition until the appeal process is completed.”); Stacey Stowe, *Fourth Tribe Is Recognized in Connecticut; Casino Feared*, N.Y. TIMES, Jan. 30, 2004, at B1 (“The federal Bureau of Indian Affairs yesterday formally recognized the existence of [the Schaghticoke Tribal Nation] based in northwestern Connecticut, to the dismay of political leaders and residents who fear that the designation will lead to the creation of a third casino in the state.”).

- Shawnee Nation United Remnant Band; Dayton; March 13, 1979.¹⁷⁷
- North Eastern U.S. Miami Inter-Tribal Council; Youngstown; April 9, 1979.¹⁷⁸
- Allegheny Nation Indian Center (Ohio Band); Canton; November 3, 1979.¹⁷⁹
- Piqua Sept of Ohio Shawnee Indians; Springfield; April 16, 1991.¹⁸⁰
- Saponi Nation of Ohio; Rio Grande; September 23, 1997.¹⁸¹
- Shawnee Nation, Ohio Blue Creek Band of Adams County; Lynx; August 5, 1998.¹⁸²
- Lower Eastern Ohio Mekojoy Shawnee; Wilmington; March 5, 2001.¹⁸³

These groups have different motives for seeking federal recognition. The Lower Eastern Ohio Mekojoy Shawnee want to use eagle feathers in their rituals, but are constrained by federal laws that only permit members of officially-recognized tribes to possess such feathers.¹⁸⁴ Recognition would provide the two hundred families in the Allegheny Nation Indian Center (Ohio Band), which runs a social services center in Canton, access to federally-subsidized education and housing.¹⁸⁵ The Saponi Nation of Ohio hopes to found a Saponi cultural center to educate its members and others.¹⁸⁶ The North Eastern U.S. Miami Inter-Tribal Council of

¹⁷⁷ Shawnee Nation United Remnant Band; Receipt of Petition for Federal Acknowledgment of Existence as an Indian Tribe, 44 Fed. Reg. 23,381 (Apr. 19, 1979).

¹⁷⁸ 44 Fed. Reg. 28,110 (May 14, 1979). In the Federal Register notice, the petitioner is named the “North Eastern United States Miami, Inter Tribal Council.” *Id.*

¹⁷⁹ 45 Fed. Reg. 95 (Jan. 2, 1980). In the Federal Register notice, the petitioner is named the “Allegheny Nation [Ohio Band] Community Center Incorporated.” *Id.*

¹⁸⁰ 56 Fed. Reg. 23,160 (May 20, 1991). In the Federal Register notice, the petitioner is named the “Piquat Sept of Ohio Shawnee Indians.” *Id.*

¹⁸¹ 63 Fed. Reg. 12,817 (Mar. 16, 1998). Rio Grande, Ohio is located in the southeastern part of the state, just northwest of Gallipolis, Ohio.

¹⁸² 64 Fed. Reg. 1,818 (Jan. 12, 1999). Adams County borders the Ohio River and is located between Cincinnati and Portsmouth, Ohio.

¹⁸³ 66 Fed. Reg. 66,916 (Dec. 27, 2001).

¹⁸⁴ Eaton, *supra* note 43.

¹⁸⁵ *Id.*

¹⁸⁶ Katherine Rizzo, *Ohioan Leads Efforts for Saponi Tribe Status*, THE PLAIN DEALER (CLEVELAND), May 25, 1998, at B4, available at 1998 WL 4136912. According to chief James Keels, the Saponi want a place for their grandchildren to discover their roots, and for the grandchildren of non-Indian Ohioans to learn another side of Ohio history: “What I learned in school was how they scalped the white women, not how our land was taken from us and we were scattered all over the country. . . . We want to establish a

Youngstown would like to set up a gambling operation “to benefit the education and medical care of Native Americans.”¹⁸⁷ The Shawnee Nation, Ohio Blue Creek Band of Adams County, according to their chief, is primarily “looking for dignity.”¹⁸⁸

The fact remains, however, that none of the seven Ohio Indian groups that has petitioned the BIA for federal recognition has yet submitted a complete application.¹⁸⁹ James Keels, chief of the Saponi Nation of Ohio, stated in October 2002 that it has been “hard” for Indians whose ancestors hid their heritage to now document continuing tribal existence to the satisfaction of federal authorities.¹⁹⁰ Hawk Pope, chief of the Shawnee Nation United Remnant Band, says his group has not pursued the matter since its initial inquiry because the “application criteria are vague, the benefits of recognition are tenuous, and a rejection could be an embarrassment that would make outsiders question his tribe’s legitimacy.”¹⁹¹ Barbara Lehmann of Urbana, tribal historian of the Piqua Sept of Ohio Shawnee Indians, has related that her tribe has abandoned the acknowledgment process “because of politics,” noting: “That is a battle nobody is going to win.”¹⁹²

The seven Ohio petitions are thus among the 175 received by the BIA as of August 2001 that are classified in the GAO report as “not ready for evaluation.”¹⁹³ Based on the historic rate at which the BIA has issued final determinations, the GAO predicts that it “could take 15 years to resolve all

positive image.” *Id.*

¹⁸⁷ Eaton, *supra* note 43.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* According to BIA spokeswoman Nedra Darling, “[i]t is in their ballpark at this point.” *Id.*

¹⁹⁰ *Id.* Keels said his forbears called themselves “mulatto” on census forms and did not list their children as “Indian” on birth certificates for fear of discovery. *Id.* Chief Frank “Standing Storm” Wilson said his forbears in the Lower Eastern Ohio Mekojay Shawnee tribe “concealed their background from outsiders to avoid tangling with troops who routinely killed American Indians and seized their lands.” *Id.* Cora Tula Watters, chief of the 230-member Shawnee Nation, Ohio Blue Creek Band of Adams County, notes that “[w]e could pass for Black Irish or Spanish people, so it was easy to blend in.” *Id.*

¹⁹¹ *Id.* The Shawnee Nation United Remnant Band operates Zane Shawnee Caverns in Bellefontaine as well as a campground, a farm and a Native American museum. *Id.* See also Don Baird, *Shawnee Regain Their Heritage; Native Americans Buying Back Ohio Land*, COLUMBUS DISPATCH, Oct. 11, 1998, at C1, available at 1998 WL 16495798; and Craig, *Indian Gaming Interests*, *supra* note 45 (“Pope said his tribe . . . has applied to the attorney general’s office for permission to run a bingo hall, but not a casino, in an existing community center on 140 acres southeast of Urbana.”).

¹⁹² Eaton, *supra* note 43. Lehman added, however, that “life goes on. Living the Indian lifestyle won’t stop.” *Id.*

¹⁹³ GAO, INDIAN ISSUES, *supra* note 5, at 31.

the petitions currently awaiting active consideration.”¹⁹⁴ The BIA concedes that the administrative acknowledgment process is unduly slow.¹⁹⁵ Indian groups complaining of dilatoriness have in some instances successfully sought mandamus because of unreasonable delays.¹⁹⁶ However, this avenue of relief is not available to petitioners, such as the seven Ohio Indian groups, who have not submitted complete documentation. It is unlikely, therefore, that an Ohio Indian group will become federally recognized in the near future. Consequently, the first possible way for tribal gaming to come to Ohio—by an Indian group becoming a federally-recognized tribe, receiving a land base as part of its initial reservation, and operating gaming thereon—does not look promising. Financial backers are therefore looking instead at the possibility of currently recognized tribes acquiring lands in Ohio to operate gaming. Under the IGRA, a recognized tribe could conduct gambling on lands in Ohio that are taken into trust as part of a settlement of a land claim, or could petition the Department of the Interior to place land located in Ohio in trust for the tribe.

B. Lands Taken into Trust as Part of a Settlement of a Land Claim

The IGRA’s prohibition of tribal gaming on Indian trust lands acquired after October 17, 1988, does not apply to lands that “are taken into trust as part of . . . a settlement of a land claim.”¹⁹⁷ Congress, of course, may enact tribe-specific land claim settlement acts that facilitate tribal gaming,¹⁹⁸ limit its scope,¹⁹⁹ or withhold IGRA gaming rights.²⁰⁰ Tribes unaffected by

¹⁹⁴ GAO, INDIAN ISSUES, *supra* note 5, at 31. The BIA as of August 2001 had completed active consideration of only thirty-two petitions—with only twelve of the thirty-two petitions completed within two years or less. GAO, INDIAN ISSUES, *supra* note 5, at 17.

¹⁹⁵ *The Indian Federal Recognition Administrative Procedures Act of 1999 Hearing on S. 611 Before the Senate Committee on Indian Affairs*, 106th Cong. 54 (2000) (statement of B. Kevin Gover, Assistant Secretary—Indian Affairs).

¹⁹⁶ See *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30 (D. D.C. 2000); *United States v. 43.47 Acres of Land*, 45 F. Supp. 2d 187 (D. Conn. 1999) (Schaghticoke Tribal Nation of Connecticut). *But see Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094 (D. D. C. 2003) (holding that the district court erred by concluding that the Bureau of Indian Affairs delayed unreasonably in processing the petition for recognition, based upon the number of years the petition had been before the BIA, without first considering the BIA’s limited resources and the effect of granting mandamus relief upon other equally deserving petitioners for recognition).

¹⁹⁷ 25 U.S.C. § 2719(b)(1)(B)(i).

¹⁹⁸ See, e.g., 25 U.S.C. § 1775b (Mohegan Nation (Connecticut) Land Claims Settlement Act).

¹⁹⁹ See, e.g., 25 U.S.C. § 1778d(b) (Torres-Martinez Desert Cahuilla Indians Claims Settlement Act; stating that “[t]he Tribe may conduct gaming on only one site within the lands acquired pursuant to . . . the Settlement Agreement”).

legislation, however, may look to the courts to establish gaming on lands taken into trust in settlement of land claims litigation.

This was the strategy of the Miami Tribe of Oklahoma, which in June 2000 filed a federal lawsuit to recover 2.6 million acres in fifteen counties

²⁰⁰ See, e.g., 25 U.S.C. § 9411(a), (b) (restoring the federal trust relationship with the Catawba Indian Tribe of South Carolina; but providing that IGRA “shall not apply to the Tribe” and that instead the [t]ribe shall have the rights and responsibilities set forth in the Settlement Agreement and the State Act with respect to the conduct of games of chance”); 25 U.S.C. § 1747(b)(2)(A) (Florida Indian (Miccosukee) Land Claims Settlement Act; stating that “[t]he laws of Florida relating to . . . gambling . . . shall have the same force and effect within said transferred lands as they have elsewhere within the State”); 25 U.S.C. § 1772d(d)(1) (Florida Indian (Seminole) Land Claims Settlement; stating that “[t]he laws of Florida relating to . . . gambling . . . shall have the same force and effect within said transferred lands as they have elsewhere within the State”); 25 U.S.C. § 712e (property taken into trust for the Cow Creek Band of Umpqua Tribe of Oregon; providing that “[r]eal property taken into trust pursuant to this section shall not be considered to have been taken into trust for gaming” under the IGRA); 25 U.S.C. § 1300g-6(a) (restoration of federal supervision over the Ysleta Del Sur Pueblo; stating that “[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe”); 25 U.S.C. § 1708(b) (Rhode Island Indian Claims Settlement Act; providing that “[f]or purposes of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), settlement lands shall not be treated as Indian lands”).

The scope and meaning of the limitations placed on gaming in tribal land claims settlement acts have been contested in several instances. See *Ysleta Del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995) (reversing district court and holding that § 107 of the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, 25 U.S.C. § 1300g-6, rather than IGRA, governed whether tribe’s proposed gaming activities were allowed under Texas law), *cert denied*, 514 U.S. 1016 (1995); *Texas v. Ysleta Del Sur Pueblo*, 220 F. Supp. 2d 668 (W.D. Tex. 2001) (gaming activities at tribal casino violate Texas gaming law and the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act), *aff’d*, 69 Fed. Appx. 659 (5th Cir. 2003); *Narragansett Indian Tribe v. Nat’l Indian Gaming Comm’n*, 158 F.3d 1335 (D.C. Cir. 1998) (rational basis existed for amendment to Rhode Island Indian Claims Settlement Act prohibiting Commission from authorizing gambling on Narragansett lands); see also Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L. J. 107, 153 (1999) (“President Clinton too has made critical compromises adverse to tribal sovereignty, such as his signing of legislation denying the Narragansett Tribe the right to conduct gaming activities on their own land.”); Head, *supra* note 68 (contending that the Court of Appeals, in *Ysleta Del Sur Pueblo v. Texas*, erred in holding that the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, not IGRA, governed gaming by the Tigua and Alabama-Coushatta tribes).

located in east-central Illinois.²⁰¹ Just as in the case of Ohio, the removal of Indian tribes was so complete in Illinois that the state has no Indian reservations.²⁰² The Miami Tribe's lawsuit claimed it never ceded lands guaranteed by an 1805 treaty negotiated with William Henry Harrison—Governor of the Indiana Territory and future president—at his “Grouseland” home in Vincennes, Indiana.²⁰³ According to the Tribe, the Treaty of Grouseland gave it rights to part of Illinois and, although the Miami ceded other lands at later dates, it never relinquished the lands in the Wabash River watershed at issue in the suit.²⁰⁴

Although the Tribe's attorney said the lawsuit was “mainly about regaining treaty land and not about gaming,”²⁰⁵ the tribal chief, Floyd Leonard, stated at the time the action was filed that “[i]t is my hope, since the State of Illinois allows gaming, a possible solution to our land claim could be negotiated.”²⁰⁶ Governor George Ryan of Illinois disclosed that Miami tribal leaders offered to settle their claims “for 5,000 acres and the go-ahead for a casino,”²⁰⁷ and a New York mall developer, Thomas Wilmot, subsequently revealed that he “invested in the Miami claim because of the potential to develop a casino,” and was “bankrolling” the legal action.²⁰⁸

²⁰¹ Pete Falcone, *Tribe Sues to Reclaim Land; Treaty Dispute Over Chunk of State May Revolve Around Gaming*, THE PANTAGRAPH (BLOOMINGTON, ILL), Jun. 5, 2000, at A1, available at 2000 WL 7793797.

²⁰² Flynn McRoberts, *Miami Tribe States Claim to Farmland*, DAYTON DAILY NEWS, Jun. 20, 2000, at A2 (“the Prairie State . . . is now without a single square inch of Indian reservation”) [hereinafter McRoberts, *Miami Tribe*].

²⁰³ A Treaty Between the United States of America and the tribes of Indians called the Delawares, Pottawatimies, Miamis, Eel River, and Weas, of Aug. 21, 1805, 7 Stat. 91.

²⁰⁴ Paul Wood, *Whose Land Is It Anyway?; Miami Indian Tribe Suing Over Claim to Land in Central Illinois*, THE NEWS-GAZETTE (CHAMPAIGN, ILL), Jun. 11, 2000, at A1, available at 2000 WL 25714038. See also Flynn McRoberts, *Tribe Stakes Claim to Illinois Land; Miami Indians Say 1805 Treaty Violated, Seek Huge Swath of Land*, CHI. TRIB., Jun. 14, at A1, available at 2000, 2000 WL 3675191 (“The Miami lived at various times in other parts of Illinois, but not on the 2.6 million acres the tribe now contends it owns. That claim stems from a land swap the tribe made with the federal government in the 1805 Treaty of Grouseland. Under that pact with Jefferson's administration, the tribe ceded ancestral lands farther east in exchange for a vast chunk of largely untouched prairie in Ohio, Indiana and Illinois. In subsequent treaties, Miami Nation tribes gave up most of the new land, but not the east central Illinois portion.”).

²⁰⁵ McRoberts, *Miami Tribe*, supra note 202.

²⁰⁶ Falcone, supra note 201.

²⁰⁷ John Kelly, *Miami Indians Fight for Land Amid Growing Casino Interest*, DAYTON DAILY NEWS, Feb. 11, 2001, at A18.

²⁰⁸ *Developer Funds Case; Casino Plan Fuels Help for Miami Tribe*, THE PANTAGRAPH (BLOOMINGTON, ILL), Jan. 10, 2001, at A1, available at 2001 WL 6497374.

A year after initiating legal proceedings, however, the Miami Tribe moved to dismiss the case.²⁰⁹ The Miami Tribe of Oklahoma is no longer publicly seeking to establish gaming operations in Illinois; yet it was reported in April 2002 that the Tribe is pursuing a casino in Indiana. In a letter to the Mayor of Gary, Indiana, the Miami claimed ownership of 3.8 million acres in Indiana, but expressed a willingness “to accept far less in return for a ‘mutually beneficial’ partnership with the city.”²¹⁰

Several Indian tribes have explored the possibility in recent years of establishing gaming operations under the IGRA on lands taken into trust as part of a settlement of a land claim. The Prairie Band of Potawatomi Nation, Kansas (formerly the Prairie Band of Potawatomi Indians) are allegedly seeking to build a casino in northern Illinois on ancestral lands that the Band contends were illegally seized and sold by the United States.²¹¹ The Delaware Nation, Oklahoma (formerly the Delaware Tribe of Western Oklahoma), whose ancestors were pushed out of New Jersey, sought in 1995 to open a casino in the Jersey Shore city of Wildwood.²¹² However, when plans stalled due to state opposition, the tribe filed suit in August 1998, asserting that thousands of New Jersey acres—including Wildwood—were taken in 1820 in violation of federal law.²¹³ In response, the city commission voted to settle the claim by giving the tribe a 2.2-acre downtown parking lot, thus providing the Delawares with the opportunity of taking advantage of the provision in the IGRA allowing tribes to open

²⁰⁹ Kate Clements & Paul Wood, *Miami Not Giving Up Land Claim; Tribe Drops Lawsuit Against 15 Landowners*, THE NEWS-GAZETTE (CHAMPAIGN, ILL), Jun. 15, 2001, at A1, available at 2001 WL 18803249 (“The Miami dropped the case because it resulted in too much attention to the plight of the individual landowners and drew focus away from the tribe’s title to the land, said attorney Leslie Turner.”).

²¹⁰ Rudolph Bush, *Gary Open to Casino Proposal from Tribe; Native Americans Try to Claim Land*, CHI. TRIB., Apr. 29, 2002, at 1, available at 2002 WL 2649876 (“Though the letter doesn’t explicitly mention gaming, ‘they’re clearly looking at wanting a casino,’ [Gary Mayor Scott] King said.”).

²¹¹ Claiborne, *supra* note 98; James P. Miller, *SEC Suit Latest in 150-Year Saga; Potawatomi Tribe Allegedly Defrauded*, CHI. TRIB., Jun. 2, 2000, available at 2000 WL 3671255. See also Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,328, 46,330 (Jul. 12, 2002) (noting the change in the Potawatomi tribal name).

²¹² Iver Peterson, *Legal Obstacles Loom for Proposed Indian Casino Near Atlantic City*, N. Y. TIMES, Aug. 8, 1998, at B1.

²¹³ *Id.*; Claiborne, *supra* note 98. The Tribe’s claim is based on the 1790 Non-Intercourse Act, July 22, 1790, which in its current form provides that “[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.” 25 U.S.C. § 177.

casinos on land acquired through the settlement of land claims.²¹⁴ However, the state intervened, suing to stop the transfer on the ground that it would alter the municipality's boundaries without permission of the Legislature, and, in March 1999, the Delaware Nation withdrew its claim.²¹⁵

On January 15, 2004, the Delaware Nation of Anadarko, Oklahoma filed a land claim in federal district court for 315 acres of ancestral land in northeastern Pennsylvania. The land was owned by Chief Moses Tandy Tatamy, who received it in 1738 from descendents of William Penn, and the Nation asserts there is no evidence that the federal government ever agreed to the sale of the property. According to an attorney representing both the Delaware Nation and the Delaware Tribe, which may join the lawsuit, "[t]he Delawares remain committed to working cooperatively with state officials to secure their right to game in Pennsylvania. But it is also clear that the filing of the federal land claim is necessary to ensure that these rights are protected."²¹⁶

In contrast to the aforementioned Indian tribes, the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma have to date succeeded with their land claim litigation against the State of New York for over 64,000 acres around the northern end of Cayuga Lake.²¹⁷ On

²¹⁴ *Metro News Briefs: New Jersey; Tribe Gives Up Suit Seeking Land for Casino*, N. Y. TIMES, Mar. 5, 1999, at B10.

²¹⁵ *Id.* ("The tribe's lawyer . . . is to file a motion next week withdrawing the claim.").

²¹⁶ Christine Graef, *Delawares File Federal Lawsuit to Pursue Gaming*, INDIAN COUNTRY TODAY, Jan. 24, 2004, available at <http://www.indiancountry.com/?1074965667>. The recently federally acknowledged Schaghticoke Indian Nation of Connecticut has confirmed that it is investigating land claims "that could be used as bargaining chips for a casino development project," Rick Green, *Casino Battle Taking Shape; Schaghticoke Prefer to Bargain*, THE HARTFORD COURANT, Jan. 31, 2004, at A1, and the Cheyenne and Arapaho tribes in Oklahoma say "they have a claim on 27 million acres of land in Colorado but would give it up in exchange for a 'small' reservation where they can build a casino." Mike Soraghan, *Okla. Tribes Push For Controversial Casino Near Denver*, THE DENVER POST, Jan. 15, 2004, at A1. The Oneida Tribe of Wisconsin have acquired 250 acres in upstate New York and have offered to settle their share of outstanding land litigation in exchange for a casino. Tom Wanamaker, *Wisconsin Oneidas Hope to Settle Land Claim, Score Casino*, INDIAN COUNTRY TODAY, Dec. 8, 2003, available at <http://www.indiancountry.com/?1070912893>.

²¹⁷ See *Cayuga Indian Nation of N. Y. v. Cuomo*, 730 F. Supp. 485 (N.D. N.Y. 1990) (declaring that Cayuga treaties with the State in 1795 and 1807 were invalid under the federal Nonintercourse Act because the United States never ratified those conveyances); *Cayuga Indian Nation of N. Y. v. Cuomo*, 758 F. Supp. 107 (N.D. N.Y. 1991) (because the Cayuga obtained recognized title in the subject land through the 1794 Treaty of Canandaigua, defendants' abandonment defense was insufficient to defeat the Cayuga's claims to that land); *Cayuga Indian Nation of New York v. Cuomo*, 771 F. Supp. 19 (N.D. N.Y. 1991) (defense of laches unavailable); see also Tom Wanamaker, *Let the Games*

October 2, 2001, the federal district court entered judgment in the amount of \$247,911,999.42, representing the jury's damage award of \$36,911,672.62, and the court's subsequent prejudgment interest award of \$211,000,326.80.²¹⁸ The court reaffirmed the award in March 2002, and certified the judgment for immediate appeal.²¹⁹ The state, various local governments, private landowners, and the Cayugas, who seek \$1.7 billion, appealed the decision.²²⁰

According to Thomas Wilmot—the same Rochester, New York, developer who financed the Miami Tribe of Oklahoma's efforts to open a casino in Illinois—the Seneca-Cayuga Tribe of Oklahoma is willing to swap its share of a \$247.9 million land claim award in exchange for two gambling casinos in the state.²²¹ If lands are taken into trust as part of a settlement of the Seneca-Cayuga land claim, the Tribe would come within the exception set forth in section 20(b)(1)(B)(i) of the IGRA,²²² and could engage in Class II gaming without state sanction and Class III casino-gaming pursuant to a negotiated tribal-state compact. Gubernatorial approval—which is essential if a tribe seeks to conduct gaming pursuant to section 20(b)(1)(A) of the IGRA²²³—is not required when a recognized tribe conducts gambling under section 20(b)(1)(B)(i) on lands taken into trust after October 17, 1988, as part of a settlement of a land claim.

Do any out-of-state Indian tribes have viable land claims that could serve as the basis for conducting tribal gaming in Ohio pursuant to section 20(b)(1)(B)(i) of the IGRA? There are defunct and currently-recognized tribes with historical ties to the state. The Shawnee, Delaware, Wyandot, Ottawa, Chippewa, Potawatomi, Miami, Eel River, Wea, Kickapoo, Piankishaw, and Kaskaskia tribes were signatories to the pivotal 1795

Begin: Potential Ugliness Could Erupt in New York, INDIAN COUNTRY TODAY, Jun. 2, 2003, available at <http://www.indianCountry.com/?1054564980> [hereinafter Wanamaker, *Let the Games Begin*].

²¹⁸ Cayuga Indian Nation of N. Y. v. Pataki, 188 F. Supp. 2d 223, 228 (N.D. N.Y. 2002) (describing Cayuga Indian Nation of N. Y. v. Pataki, 165 F. Supp. 2d 266 (N.D. N.Y. 2001)). The damage award of \$36,911,672.62 was divided into two categories: "(1) \$1,911,672.62 for the fair rental value of the Cayuga's former homeland for 204 years; and (2) an additional \$35,000,000.00 in damages for future loss use and possession of that same land." *Cayuga Indian Nation of N.Y.*, 165 F. Supp. 2d at 272.

²¹⁹ Cayuga Indian Nation of N.Y. v. Pataki, 188 F. Supp. 2d 223 (N.D. N.Y. 2002).

²²⁰ Mong, *Indian Tribes*, *supra* note 10; Wanamaker, *Let the Games Begin*, *supra* note 216.

²²¹ Agnes Palazzetti, *Land Claim Award May Complicate Casino Deal*, BUFFALO NEWS, Mar. 16, 2002, at B1, available at 2002 WL 7422582. Wilmot also invested \$4 million in aid of the Golden Hill Paugussetts' efforts to get government approval for a casino on the Bridgeport, Connecticut waterfront. *Developer Funds Case*, *supra* note 208.

²²² 25 U.S.C. § 2719(b)(1)(B)(i).

²²³ 25 U.S.C. § 2719(b)(1)(A).

Treaty of Greenville, which ceded to the United States most of eastern and southern Ohio.²²⁴ The Shawnee, Delaware, Wyandot, Chippewa, and Ottawa were parties to several other treaties involving Ohio lands, and the Munsee, Potawatomi, Seneca, Miami, and Moravian (Christian) Indians also signed treaties concerning Ohio.²²⁵ Cartographers and historians have placed these tribes—as well as Erie, Mingo, Mahican, Abenaki, Missisauga, and Mohawk—in Ohio at some point in time.²²⁶

Ohio lands were transferred from Indian tribes to the United States in a series of treaties. As evidenced by a map of Ohio in Charles Royce's *Indian Land Cessions in the United States*, Indian title to Ohio was for the most part ceded in five treaties:

TABLE 1: TREATIES CEDING INDIAN TITLE TO OHIO²²⁷

Treaty	Signatories	Lands Ceded
Treaty of Aug. 3, 1795, 7 Stat. 49	Wyandot, Delaware, Shawnee, Ottawa, Chippewa, Miami, Potawatomi, Eel River, Wea, Kickapoo, Piankishaw, and Kaskaskia	Most of east and southern Ohio, including Youngstown, Canton, Coshocton, Delaware, Bellefontaine, Sidney, and points south.
Treaty of July 4, 1805, 7 Stat. 87	Wyandot, Ottawa, Munsee, Chippewa, Potawatomi, Shawnee, and Delaware	North-central Ohio, from Cleveland to Sandusky, including Mansfield, Ashland, and Wooster.

²²⁴ A Treaty of Peace Between the United States of America and the Tribes of Indians called the Wyandots, Delawares, Shawanees, Ottawas, Chipawas, Putawatimes, Miamis, Eel-river, Weeas, Kickapoos, Piankishaws, and Kaskaskias, Aug. 3, 1795, 7 Stat. 49. The Wea, Piankishaw, and Kaskaskia Indians are now part of the Peoria Tribe of Indians of Oklahoma. The Eel River were affiliated with the Miami and are no longer a separate recognized tribe.

²²⁵ See generally CHARLES C. ROYCE, *INDIAN LAND CESSIONS IN THE UNITED STATES* (1900).

²²⁶ See *ATLAS OF GREAT LAKES INDIAN HISTORY* 32-33, 40-41, 58-59, 99-99, 164-65 (Helen Hornback Tanner ed., 1987) (maps depicting Indian villages at different points in time, and Indian reservations in Ohio up to 1842); H.C. SHETRONE, *THE INDIAN IN OHIO*, 309-455 (1918) [hereinafter SHETRONE, *THE INDIAN IN OHIO*] (describing historic settlement of Ohio by Indian tribes and summarizing the cession of Ohio lands by treaties); Henry Clyde Shetrone, *THE OHIO ABORIGINES*, in 1 *THE FOUNDATIONS OF OHIO* 34, 55-58 (Beverly W. Bond, Jr., ed., 1941) (describing Erie, Miami, Shawnee, Delaware, Wyandot, Mingo, and Ottawa occupation of Ohio).

²²⁷ See ROYCE, *supra* note 225, at 654-55, 666-69, 684-89, 692-93.

Treaty of Nov. 17, 1807, 7 Stat. 105	Ottawa, Chippewa, Wyandot, and Potawatomi	Northern Ohio, from Sandusky to Toledo, and a portion of northern Ohio north of the Maumee River.
Treaty of Sept. 29, 1817, 7 Stat. 160	Shawnee, Delaware, Chippewa, Ottawa, and Potawatomi	Northwest corner of Ohio, and lands south of the Maumee River, including Bowling Green, Upper Sandusky, Kenton, Lima, Van Wert, and Ottawa.
Treaty of Oct. 6, 1818, 7 Stat. 189	Miami	A portion of west-central Ohio, south of St. Mary's River, including Celina.

Most—but not all—Ohio lands were transferred to the United States in these five treaties. In eighteen instances, Indian tribes (namely, the Delaware, Ottawa, Seneca, Shawnee, and Wyandot) reserved lands from cessions, and three other tracts of land were provided for the Moravian (Christian) Indians near Gnadenhutten in eastern Ohio.²²⁸ However, all of the reserved lands were eventually purchased by the United States.²²⁹ The

²²⁸ By an Act of Congress approved June 1, provision was made for patenting the three tracts to the Society of United Brethren, in trust for the benefit of the Moravian Christian Indians. Public Lands Appropriated For the United Brethren, June 1, 1796, 1 Stat. 490, 491.

The Delaware reserved two tracts in the Treaty of Mar. 3, 1807, 2 Stat. 448, and one tract in the Treaty of Sept. 29, 1817, 7 Stat. 160. The Ottawa reserved three tracts in both the Treaty of November 7, 1807, 7 Stat. 105, and the Treaty of Sept. 29, 1817, 7 Stat. 160. The Seneca reserved two tracts (sharing one with the Shawnee) in the Treaty of Sept. 29, 1817, 7 Stat. 160. Both Seneca tracts were supplemented by the Treaty of Sept. 17, 1818, 7 Stat. 178. The Shawnee reserved three tracts (sharing one with the Seneca) in the Treaty of Sept. 29, 1817, 7 Stat. 160. The shared tract and one of the two remaining Shawnee tracts were supplemented by the Treaty of Sept. 17, 1818, 7 Stat. 178. The Wyandot reserved three tracts in the Treaty of Sept. 29, 1817, 7 Stat. 160; and two tracts in the Treaty of Sept. 17, 1818, 7 Stat. 178.

²²⁹ The Moravian Christian lands in Tuscarawas County were purchased under the authority of an Act of Congress, Mar. 3, 1823, 3 Stat. 749. The Delaware reservations were ceded by the Treaty of Sept. 29, 1817, 7 Stat. 160; and the Treaty of Aug. 3, 1829, 7 Stat. 326. The Ottawa ceded their reserved lands by the Treaty of Aug. 30, 1831, 7 Stat. 359; and the Treaty of Feb. 18, 1833, 7 Stat. 420. The Seneca relinquished their reserved lands in the Treaty of Feb. 28, 1831, 7 Stat. 348, and the Treaty of July 20, 1831, 7 Stat. 351. The Shawnee reservations were ceded by the Treaty of July 20, 1831, 7 Stat. 351; and the Treaty of Aug. 8, 1831, 7 Stat. 355. Finally, the Wyandot ceded their reserved lands—

last of the Delaware lands in Ohio were ceded to the United States in August 1829.²³⁰ The Senecas of the Sandusky, and the so-called “mixed Senecas,” who affiliated with the Shawnee on a reservation in Logan County, sold their lands in 1831.²³¹ In February 1833, the Ottawas ceded to the federal government their remaining reservation, a tract thirty-four square miles at the mouth of the Maumee River, and withdrew from the state.²³² The Shawnee in Ohio ceded their remaining lands in August 1831.²³³ It is worth noting that these lands included a tract ten miles square at Wapakoneta, just north of Botkins, Ohio.²³⁴ Thus, the last of the Shawnee lands in Ohio—reserved from cession in 1817 but ceded to the United States in 1831—included a tract situated in the proximity of the site of a recent proposal by an Oklahoma-based Shawnee tribe for tribal gaming.²³⁵

The Wyandot were the last tribe to relinquish lands in Ohio and, according to Helen Hornback Tanner, the “[m]ost reluctant”:

In 1838 the fifty gallons of alcoholic beverages supplied by the treaty commissioner failed to weaken Wyandot determination to retain their Grand Reserve at Upper Sandusky. It took trusted friend John Johnston, called from retirement, to persuade them to give it up in 1842.²³⁶

The Wyandot’s final reservation in Ohio was a tract of land twelve miles square, of which Upper Sandusky was the center.²³⁷

Because the lands of Ohio were ceded by Indians to the United States,

and the remaining Indian lands in Ohio—in three treaties: the Treaty of Jan. 19, 1832, 7 Stat. 364; the Treaty of Apr. 23, 1836, 7 Stat. 502; and the Treaty of Mar. 17, 1842, 7 Stat. 607.

²³⁰ Treaty of August 3, 1829, 7 Stat. 326. This reservation was located directly to the south of and adjoining that of the Wyandots at Upper Sandusky, Ohio. SHETRONE, *THE INDIAN IN OHIO*, *supra* note 226, at 188.

²³¹ SHETRONE, *THE INDIAN IN OHIO*, *supra* note 226, at 189.

²³² SHETRONE, *THE INDIAN IN OHIO*, *supra* note 226, at 190.

²³³ SHETRONE, *THE INDIAN IN OHIO*, *supra* note 226, at 190.

²³⁴ SHETRONE, *THE INDIAN IN OHIO*, *supra* note 226, at 190.

²³⁵ See Mong, *Indian Tribes*, *supra* note 10 (Terry Casey, a Columbus consultant representing the Shawnee tribe interested in Botkins, said teams of lawyers flush in the complex history of Indian land have been researching the Shawnee nation and its former life in Ohio for at least two years. Casey “maintains the only thing standing in the tribe’s way is the federal government agreeing that the proposed gaming site is aboriginal Shawnee land, or a reservation whose tribal ownership was never properly extinguished through federal approval.”) (emphasis added).

²³⁶ ATLAS OF GREAT LAKES INDIAN HISTORY, *supra* note 226.

²³⁷ SHETRONE, *THE INDIAN IN OHIO*, *supra* note 226, at 190.

the cessions did not violate the 1790 Nonintercourse Act, which has been relied upon by tribes asserting land claims in the original thirteen colonies.²³⁸ Glenn D. McGogney, an attorney who represented the Delaware Nation, Oklahoma, in its bid to recover ancestral lands in New Jersey, advises that “if a tribe can show lands in Ohio were taken after 1790 without congressional approval, then the treaty is invalid and the land must be returned to the Indians or settlement made.”²³⁹ On the other hand, Arlinda Locklear, a member of the Lumbee Tribe of North Carolina and a lawyer specializing in American Indian law, believes that the Nonintercourse Act is not germane to Ohio, and that all lands in Ohio appear to have been ceded by tribes to the federal government.²⁴⁰ However, Indian land claims are not restricted to the original colonies—as evidenced by the claims of the Miami Tribe of Oklahoma to lands in Illinois and Indiana, and the claim of the Prairie Band of Potawatomi Nation, Kansas, to ancestral lands located west of Chicago in DeKalb County, Illinois. The viability of establishing gaming operations under the IGRA on lands taken into trust as part of a settlement of a land claim is, at the end of the day, directly related to the viability of the land claim itself.

C. *Lands Taken into Trust for Gaming with Gubernatorial Concurrence*

The final way under the IGRA that tribal gambling could come to Ohio is for an out-of-state recognized tribe (1) to persuade the Department of the Interior to place land located in Ohio in trust for the tribe; and (2) to comply with section 20(b)(1)(A) of the IGRA, which permits tribal gaming on Indian trust lands acquired after October 17, 1988, when:

the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary’s determination.²⁴¹

This is a two-step process: The Department of the Interior considers whether to take land in trust according to regulations set forth at 25 C.F.R. Part 151. If the tribe desires to use such lands for gaming purposes, the Department must also take into account the requirements in section

²³⁸ See Mong, *Indian Tribes*, *supra* note 10.

²³⁹ *Id.*

²⁴⁰ *Id.* (“I don’t see a single parcel of land not covered by a federal treaty of some sort”, [Locklear] said, using the 1899 standard reference, *Royce’s Indian Land Cession*.”).

²⁴¹ 25 U.S.C. § 2719(b)(1)(A) (2003).

20(b)(1)(A) of the IGRA.²⁴² As discussed below, it is possible to petition the Department to place lands located in another state in trust for the tribe.²⁴³ The regulations provide, however, that “as the distance between the tribe’s reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe’s justification of anticipated benefits from the acquisition.”²⁴⁴ Even more critical is the fact that, if the tribe proposes to use the lands for gambling, the governor of the state in which the lands are located is authorized under the IGRA to unilaterally veto the proposed tribal gaming operations.²⁴⁵

1. *Acquisition of Off-Reservation Lands to be Taken in Trust*

Assimilation and allotment—the transfer of communal tribal lands to individual Indians, who presumably would become farmers, Christians, and eventually tax-paying American citizens—governed federal Indian policy in the last part of the nineteenth century and the first part of the twentieth century.²⁴⁶ The allotment era, however, was in large measure a failure (except for non-Indians who were able to purchase and settle former tribal lands), and, by 1934, “approximately two thirds of Indian lands [were] converted to non-Indian ownership and very little progress [was made] towards the assimilation of Indians into United States culture.”²⁴⁷ This “disastrous allotment era ended with the enactment of the Indian Reorganization Act of 1934, which heralded a major shift in federal Indian policy ‘from assimilation to self-determination,’ in large part by encouraging Indian tribes to adopt their own constitutions and to provide for the own court systems.”²⁴⁸ Section 1 of the Indian Reorganization Act

²⁴² See U.S. DEP’T OF INTERIOR, *Background Paper: Departmental Decisionmaking on Off-Reservation Land-In-Trust Applications for Gaming Purposes*, Jan. 6, 1998, available at <http://www.doi.gov/topstory/dogtrack.html> (last visited May 6, 2003) [hereinafter *Background Paper*].

²⁴³ See *supra* notes 17-18 and accompanying text.

²⁴⁴ 25 C.F.R. § 151.11(b) (2003).

²⁴⁵ See *Background Paper*, *supra* note 241.

²⁴⁶ See Watson, *Federal Indian Law*, *supra* note 111, at 488.

²⁴⁷ *Id.* (citing James A. Casey, Note, *Sovereignty By Sufferance: The Illusion of Indian Tribal Sovereignty*, 79 CORNELL L. REV. 404, 413 (1994)) (alterations in original). “Implementation of the Allotment Act resulted in the alienation of as much as 90 million acres of land originally reserved to tribes by treaties and Executive Orders.” Acquisition of Title to Land in Trust, 64 Fed. Reg. 17,574 (Apr. 12, 1999) (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 138 (1982)). The loss “was catastrophic and generally is regarded by historians and others as being responsible for a precipitous decline in the economic, cultural, social and physical health of tribes and their members.” *Id.* (citing CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 19-21 (1987)).

²⁴⁸ Watson, *The Curious Case*, *supra* note 111, at 551 (quoting Vincent C. Milani, Note, *The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and*

(IRA) ended future allotments,²⁴⁹ and section 5 of the IRA authorizes the Secretary of the Interior “in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to land, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land to Indians.”²⁵⁰

Section 5 of the IRA is implemented by the BIA in its regulations concerning “Land Acquisitions” found at 25 C.F.R. Part 151. Prior to 1995, the regulations did not distinguish between on-reservation and off-reservation acquisitions.²⁵¹ The regulations provide in pertinent part that

Congressional Control, 31 AM. CRIM. L. REV. 1279, 1281 (1994)). The Indian Reorganization Act is also called the Wheeler-Howard Act. See Act of Jun. 18, 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-79) (2003). See also Acquisition of Title to Land in Trust, 64 Fed. Reg. 17,574 (Apr. 12, 1999) (“One of the primary goals of the IRA was the restoration to tribal ownership of allotted land within existing reservations.”).

²⁴⁹ 25 U.S.C. § 461.

²⁵⁰ 25 U.S.C. § 465. Section 5 further provides that “[t]itle to any lands [so] acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.” *Id.*

The State of South Dakota challenged the constitutionality of section 5 of the IRA in connection with the Secretary of Interior’s acquisition of land in trust for the Lower Brule Tribe of Sioux Indians located seven miles outside its reservation. See generally *South Dakota v. United States Dep’t of the Interior*, 69 F.3d 878 (8th Cir. 1995). The Eighth Circuit, in a 2-1 decision, held that “25 U.S.C. § 465 . . . is an unconstitutional delegation of legislative power.” *Id.* at 880. The United States sought Supreme Court review, and the decision was subsequently vacated and remanded. See generally *Dep’t of the Interior v. South Dakota*, 519 U.S. 919 (1996), mandate recalled and opinion vacated, 106 F.3d 247 (8th Circuit 1996). The Supreme Court returned the matter for reconsideration in light of the Department’s April 1996 modification of the land acquisition regulations, designed to address the “delegation” issue and facilitate judicial review of agency determinations. See 25 C.F.R. § 151.12(b); Mary Jane Sheppard, *Taking Indian Land Into Trust*, 44 S. D. L. REV. 681, 691-92 (1999); *Background Paper*, supra note 242 (“Believing that the absence of judicial review for Part 151 determinations was an important factor in [the Eighth Circuit’s] decision, and wishing to preserve the Part 151 program, in April 1996 the Department amended its Part 151 regulations to provide an opportunity for judicial review.”); see also *United States v. Roberts*, 185 F.3d 1125, 1136-37 (10th Cir. 1999) (rejecting the argument that 25 U.S.C. § 465 unconstitutionally delegates standardless authority to the Secretary of the Interior).

²⁵¹ In view of the more controversial nature of off-reservation acquisitions for gaming purposes, however, the Interior Department in July 1990 adopted a policy requiring that all decisions on off-reservation acquisitions for gaming purposes be made by BIA’s Central Office. See *Background Paper*, supra note 242 (“In February 1992, Secretary

“land may be acquired for a tribe in trust status . . . [w]hen the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.”²⁵² With respect to off-reservation acquisitions for tribes, the Secretary must consider the following criteria, which also apply to on-reservation acquisitions for tribes:

- “[t]he existence of statutory authority for the acquisition and any limitations contained in such authority;”²⁵³
- “[t]he purposes for which the land will be used;”²⁵⁴
- “[i]f 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 the tax rolls;”²⁵⁵ and
- “[t]he extent to which the applicant has provided information that allows the Secretary to comply with [requirements relating to consideration of environmental impacts and the presence of hazardous substances].”²⁵⁶

In addition, the Secretary must consider additional requirements “when the land is located outside of and noncontiguous to the tribe’s reservation, and the acquisition is not mandated:”²⁵⁷

- “[t]he location of the land relative to state boundaries, and its distance from the boundaries of the tribe’s reservation, shall be considered as follows: as the distance between the tribe’s reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe’s justification of anticipated benefits from the acquisition.

Lujan signed an additional Directive on Indian Gaming Management that underscored the duty to consult with local, state, and tribal governmental officials in considering off reservation trust acquisitions for gaming purposes.”); *see also* Larry E. Scrivner, *Acquiring Land into Trust for Indian Tribes*, 37 NEW ENG. L. REV. 603, 606 (2003) (“All gaming, and gaming-related acquisitions, must be approved by the Assistant Secretary. Any time a tribe makes one of these applications, the local BIA Regional Office must submit it to the BIA Central Office for review and a decision.”).

²⁵² 25 C.F.R. § 151.3(a)(3). *See also* Scrivner, *supra* note 251, at 606.

²⁵³ 25 C.F.R. § 151.10(a).

²⁵⁴ 25 C.F.R. § 151.10(c).

²⁵⁵ 25 C.F.R. § 151.10(e).

²⁵⁶ 25 C.F.R. § 151.10(h). *See, e.g.*, Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Jamul Indian Village 101 Acre Fee-to-Trust Transfer and Casino Project, San Diego County, CA, 67 Fed. Reg. 15,582 (Apr. 2, 2002).

²⁵⁷ 25 C.F.R. § 151.11(b).

The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section;²⁵⁸ and

- “[w]here land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.”²⁵⁹

Paragraph (d) of 25 C.F.R. § 151.11 requires the Secretary to notify “the state and local governments having regulatory jurisdiction over the land to be acquired” and provide them an opportunity to comment “as to the acquisition’s potential impacts on regulatory jurisdiction, real property taxes and special assessments.”²⁶⁰

²⁵⁸ 25 C.F.R. § 151.10(b).

²⁵⁹ 25 C.F.R. § 151.11 (c). *See generally* City of Lincoln City v. United States Dep’t of the Interior, 229 F. Supp. 2d 1109, 1117-18 (D. Ore. 2002) (rejecting arguments that an off-reservation fee-to-trust transfer violated the Equal Footing Clause and resulted in the creation of a “form of government” in violation of the guarantee of a republican form of government in Article IV, Section 4 of the United States Constitution); *Carcieri v. Norton*, 290 F. Supp. 2d 167, 186-90 (D. R.I. 2003) (rejecting arguments that 25 U.S.C. § 465 is an unconstitutional delegation of legislative authority and that the acceptance of the parcel at issue into trust violates the Enclave Clause of Article I, Section 8, the Admissions Clause of Article IV, Section 3, and the Tenth Amendment of the United States Constitution).

²⁶⁰ 25 C.F.R. § 151.11(d). The BIA in 1999 proposed to amend the land acquisition regulations “to make clearer that . . . we will apply a standard which is somewhat more demanding when a land-into-trust application involves title to lands which are located outside the boundaries of a reservation.” *Acquisition of Title to Land in Trust*, 64 Fed. Reg. 17,574 (Apr. 12, 1999). The proposed rule “requires tribes wishing to take off-reservation land into trust to submit a substantial amount of information about how the proposed acquisition would impact the surrounding non-Indian community, and about how the tribe would address that impact,” and “would continue our policy (as articulated in the existing regulations) of giving greater weight to the tribe’s need (vis-a-vis the objections of the local non-Indian community) the closer the land is to the tribe’s reservation.” 64 Fed. Reg. 17,577 (Apr. 12, 1999). In the fall of 2001, however, the Bush Administration withdrew the proposed rule. *See* Brian Stockes, *Land to Trust Regulations on Hold*, INDIAN COUNTRY TODAY, Aug. 15, 2001 (“Assistant Secretary for Indian Affairs Neal McCaleb has delayed the effective date on land to trust regulations drafted during the last administration . . . [in order] to gather comments on whether the Department of Interior should withdraw or replace the new regulations, and gather further views from state and local governments.”); Brian Stockes, *Interior Pulls Land into Trust Regulations*, INDIAN COUNTRY TODAY, Nov. 16, 2001 (“Interior says it plans to begin a new rulemaking process in consultation with tribes, but only over listed areas of concern. Current rules remain in effect during the new rulemaking process.”).

The Bush Administration, according to Professor Douglas Nash, is no longer considering the subject of fee-to-trust lands, basically creating a moratorium on such transactions. Jack McNeel, *Indian Law Practitioners Stress Importance of Land Into Trust*,

Off-reservation acquisitions for any reason are infrequent, and—as discussed below—off-reservation acquisitions for tribal gaming purposes are rarer. In order to conduct tribal gaming on off-reservation lands—whether located in another state or not—the tribe must satisfy not only the regulatory requirements of 25 C.F.R. Part 151, but also the statutory requirement of section 20(b)(1)(A) of the IGRA.²⁶¹

2. *Compliance with Section 20(B)(1)(A) of the IGRA*

Section 20(b)(1)(A) requires the Secretary of the Interior to (1) consult “with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes;” (2) determine that tribal gaming on the lands taken into trust “would be in the best interest of the Indian tribe and its members;” and (3) conclude that the gaming “would not be detrimental to the surrounding community.”²⁶² The burden of proof is on

INDIAN COUNTRY TODAY, Feb. 23, 2004, available at <http://www.indiancountry.com/?1077-574249> (remarks at conference on fee-trust issues).

²⁶¹ The Department of the Interior did propose a regulation to establish “procedures that an Indian tribe must follow in seeking a Secretarial determination that a gaming establishment would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community.” Gaming on Trust Lands Acquired After October 17, 1998, 65 Fed. Reg. 55,471 (Sept. 14, 2000). The proposed rule required the tribe to provide specific information, including the distance of the land from the Indian tribe’s reservation or trust lands, if any. *Id.* To establish that the proposed gaming establishment will be in the best interest of the tribe and its members, the proposal required the tribe to provide information on “[p]rojected tribal employment, job training, and career development”; “[p]rojected benefits to the Indian tribe from tourism;” “[p]rojected benefits to the Indian tribe and its members from the proposed uses of the increased tribal income;” “[p]rojected benefits to the relationship between the Indian tribe and the surrounding community;” and “[p]ossible adverse impacts on the Indian tribe and plans for dealing with those impacts.” *Id.* To show that the gaming would not be detrimental to the surrounding community, the proposed rule required that the application account for (1) “environmental impacts and plans for mitigating adverse impacts”; (2) “[r]easonably anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community”; (3) “[i]mpacts on the economic development, income, and employment of the surrounding community”; (4) “[c]osts of impacts to the surrounding community and sources of revenue to accommodate them”; (5) “[p]roposed programs, if any, for compulsive gamblers and the sources of funding”; and (6) “[a]ny other information that may provide a basis for a Secretarial determination that the gaming would not be detrimental to the surrounding community. *Id.*

After twice reopening the period for public comment, the Department of the Interior has not proceeded to issue a final rule. *See* Gaming on Trust Lands Acquired After October 17, 1988, 66 Fed. Reg. 66,847 (Dec. 21, 2001); Gaming on Trust Lands Acquired After October 17, 1988; Correction, 67 Fed. Reg. 3846 (Jan. 28, 2002).

²⁶² 25 U.S.C. § 2719(b)(1)(A). Section 20 does not provide authority to take land

the tribe.²⁶³ Although both 25 C.F.R. Part 151 and section 20(b)(1)(A) of the IGRA must be satisfied, the regulations and the statutory provision do overlap to some extent:

For example, both involve some assessment of the effect of the proposal (under Part 151, of taking the land in trust; and under section 20, of allowing gaming on the land) on the surrounding community. Specifically, the Part 151 regulations require consideration of (among other things) the need for and purpose of the acquisition, and an assessment of jurisdictional problems, potential conflicts in land use, and environmental factors. This means that, where gaming is a purpose of the trust land acquisition under Part 151, the Part 151 regulations require a consideration of gaming and its effect on the community. Section 20 requires specific determinations on two issues: whether the gaming proposal is in the “best interest of the [applicant] tribe and its members” and whether it is “not detrimental to the surrounding community.” Therefore, it too requires a consideration of gaming’s effect on the local community.²⁶⁴

If the Secretary makes a favorable determination, the final hurdle is obtaining the concurrence of the governor of the state in which the gaming activity is to be conducted.²⁶⁵ The gubernatorial concurrence (or “veto”)

into trust; rather, “it is a *separate and independent* requirement to be considered before gaming activities can be conducted on off-reservation land taken in trust after October 17, 1988.” *Background Paper*, *supra* note 242 (emphasis in original).

²⁶³ See *Background Paper*, *supra* note 241. In rejecting the application of the Lac Courtes Oreilles, Red Cliff and Sokaogon (Mole Lake) Chippewa bands of Wisconsin to take the “Hudson Dog Track”—located between 85 and 188 miles from the applicant tribes’ reservations—into trust, the Deputy Assistant Secretary found that the tribes failed “to demonstrate no detriment to the surrounding community,” noting the strong opposition of local communities and state elected officials on such grounds as increased traffic, land use conflicts and interference with economic development plans, and holding that “the Department was not in a position to substitute its judgment on these matters ‘for that of local communities directly impacted.’” *Background Paper*, *supra* note 242.

²⁶⁴ *Background Paper*, *supra* note 242 (citations omitted) (alterations in original).

²⁶⁵ See *Background Paper*, *supra* note 242. IGRA makes clear that the gubernatorial concurrence requirement is independent of the Department’s consideration and “does not relieve the Department of its responsibility to make its own determination whether the proposal ‘would not be detrimental to the surrounding community.’” *Background Paper*, *supra* note 241. In January 2004, Congressmen Christopher Shays, R-Conn., and Frank Wolf, R-Va., introduced federal legislation which would require state legislative approval of all tribal-state compacts and the approval of both the state governor and the state

provision of the IGRA has been upheld against claims that it violates the Appointments Clause,²⁶⁶ and against separation of powers principles because it authorizes a state governor to “veto” findings made by the Secretary of the Interior.²⁶⁷ In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, the district court rejected the Appointments Clause contention and the additional arguments that the concurrence requirement is a congressional breach of trust, violates the non-delegation doctrine, and violates the Tenth Amendment.²⁶⁸

Until recently, there were only two off-reservation casinos that were actually built and operated pursuant to the 1988 Indian Gaming Regulatory Act: the Potawatomi Tribe’s Milwaukee facility in 1990 and the Kalispell Tribe’s casino near Spokane, Washington, in 1998.²⁶⁹ The Seneca Nation,

legislature before gaming could be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988. Tribal and Local Communities Relationship Improvement Act, H.R. 3745, 108th Cong. § 2 (2004).

²⁶⁶ See *Background Paper*, supra note 241; see also U.S. CONST. art. II, § 2, cl. 2.

²⁶⁷ *Confederated Tribes of Siletz Indians of Ore. v. United States*, 110 F.3d 688, 692 (9th Cir. 1997) (holding that “§ 2719(b)(1)(A) does not violate either the Appointments Clause or separation of powers principles”). The Governor of Oregon refused to concur with the Secretary’s determination that a gaming establishment on the newly acquired (off-reservation) lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community. See *id.* at 693; see also *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 259 F. Supp. 2d 783, 796-97 (W.D. Wis. 2003) (rejecting argument that gubernatorial concurrence requirement violates the Appointments Clause).

²⁶⁸ 259 F. Supp. 2d 783 (W.D. Wis. 2003). Three Wisconsin tribes challenged the constitutionality of the gubernatorial concurrence requirement, and raised a common law claim as well, contending that the gubernatorial concurrence requirement is a congressional breach of trust. The district court concluded that

the gubernatorial concurrence of the Indian Gaming Regulatory Act does not violate the non-delegation doctrine because the legislation expresses the will of Congress and provides an intelligible principle by which it can be determined that it is Congress’s will that is being carried out; it does not violate the appointments clause because it does not diffuse executive power; and it does not conscript governors into federal service in violation of the Tenth Amendment. Therefore, the provision does not violate the Constitution. (Plaintiffs have not pursued their contention that the legislation violates the equal protection clause of the Fifth Amendment.) It is not a congressional breach of trust because it was enacted by Congress pursuant to the federal government’s plenary powers over Indians.

Id. at 787.

²⁶⁹ Steve Schultze & Dave Umhoefer, *Casino Move Has Key Support*, MILWAUKEE

however, opened a casino on New Year's Eve, 2002, in downtown Niagara Falls, and the New York tribe is currently examining potential sites for a second casino in and around the City of Buffalo.²⁷⁰ At least twenty-two tribes in California are likewise seeking to build casinos off reservation.²⁷¹ Although such casinos are clearly permitted by federal law, the sheer number of proposed off-reservation gaming facilities has prompted criticism of the IGRA by current congressional leaders,²⁷² which in turn has raised concerns among Indian gaming advocates.²⁷³

To date, no Indian tribe has opened an off-reservation gaming establishment in a state other than where it is recognized.²⁷⁴ Nevertheless,

JOURNAL SENTINEL, May 28, 2003, at A1, *available at* 2003 WL 3328210. *See also* Gaming on Trust Lands After October 17, 1988, 65 Fed. Reg. 55,471 (Sep. 14, 2000). ("Since IGRA was enacted, only two tribes have successfully qualified to operate a gaming establishment on trust land under the exception to the gaming prohibition in section 20(b)(1)(A) of IGRA."). *But see* Tom Wanamaker, *BIA to Take Off-Rez Land into Trust for Mohawks*, INDIAN COUNTRY TODAY, Oct. 15, 2003, *available at* <http://www.indiancountry.com/?1066227227> ("The BIA will take a 66-acre parcel of land into trust, allowing the St. Regis Mohawk Tribe to proceed with plans to open a casino resort [in the Catskills].").

²⁷⁰ Wanamaker, *Let the Games Begin*, *supra* note 217.

²⁷¹ Mark Simon, *Indian Casinos Facing Scrutiny; Feinstein Wants to Rein in Projects*, SAN FRANCISCO CHRONICLE, Jul. 21, 2003, at B1, *available at* 2003 WL 3758729 (statement by Senator Diane Feinstein).

²⁷² *Id.* In a letter sent to Interior Department Secretary Gale Norton in June 2003, House Speaker Dennis Hastert, R-Ill., House Majority Leader Tom DeLay, R-Texas, and two other top House Republican leaders asserted that recent attempts of Indian tribes to develop off-reservation casino sites "pose a serious threat to the current regulatory scheme that governs Indian gaming," and that federal law "did not intend to authorize 'reservation shopping' by Indian tribes." *Id.*

²⁷³ *See* Louis Sahagun, *Indian Gambling Looks Beyond the Reservations*, L. A. TIMES, Aug. 25, 2003, at Main News, Part 1, 1, *available at* 2003 WL 2429787 ("I'm concerned about tribes' trying to make new reservations out of parcels that were never part of their ancestral lands, [Hanay Geiogamah, directory of the UCLA American Indian Studies Center] said. "I think that's a risky strategy, one that could trigger a backlash in courts and in Congress, once the scope of the off-reservation movement becomes clear in people's minds."). *See also* Chet Barfield, *Tribe Considers Off-Reservation Casino; Manzanita Band's El Centro-Area Plan Seen as Long Shot*, SAN DIEGO UNION-TRIBUNE, Jul. 31, 2003, at B-1:2, *available at* 2003 WL 6599502 ("A Northern California-based casino watchdog group, Stand Up for California, is pressing for state legislation to block off-reservation deals.").

²⁷⁴ Wanamaker, *Let the Games Begin*, *supra* note 217. *But see infra* note 275 (noting that the Wyandotte Nation of Oklahoma have opened a casino in Kansas City, Kansas). Interestingly, the twenty-four members of the United South and Eastern Tribes (USET) have urged the Department of the Interior to develop policies *precluding* the exercise of tribal authority in any state other than that of the tribe's recognition. Tom Wanamaker,

Oklahoma-based tribes have sought, or are seeking, to establish casinos in Ohio, Indiana, New York, New Jersey, Kansas, Missouri, and Colorado.²⁷⁵ In addition, both a Wisconsin tribe and a New York tribe recently unveiled plans for casinos to be located near Chicago, Illinois, and a different New York tribe is considering Pittsburgh as a gaming location.²⁷⁶

Cayuga Intrigue: Can Two Tribes Assert Sovereignty Within the Same Land Claim?, INDIAN COUNTRY TODAY, Jul. 2, 2003, at D1, available at <http://www.indiancountry.com/?-1075266272> [hereinafter Wanamaker, *Cayuga Intrigue*].

In October 2003, federal legislation was introduced which provides that “[n]o Indian tribe shall have jurisdiction over . . . any land that is not located in the same State as the reservation, trust lands, or other tribal lands that constituted the principal residence and location of that Indian tribe . . . unless such land is (1) contiguous to the lands that constituted the principal residence and location of the Indian tribe as of the date of the enactment of this section; or (2) *has been taken into trust in accordance with section 5 of the Act of June 18, 1934 (25 U.S.C. 465).*” To Clarify the Lands Over Which Indian Tribes Shall Have Jurisdiction or Exercise Governmental Power, H.R. 3394, 108th Cong. § 1(a) (2003) (emphasis added). See Diana Louise Carter, *Bill Targets Out-Of-State Tribes: Pataki Tries to Curb Claims of Oklahomans in Cayuga County*, ROCHESTER DEMOCRAT AND CHRONICLE, Sept. 26, 2003, at 1B (noting that Gov. George Pataki and other New York politicians are pushing for federal legislation in an attempt to stop tribes from asserting sovereignty in states in which they do not live, but also noting the response of a tribal spokesman that a tribe could apply to the federal government for trust land in another state and become an in-state tribe).

²⁷⁵ See *supra* note 52 (Ohio); note 210 (Indiana); note 217 (New York); note 212 (New Jersey); and *supra* note 216 (Colorado); see also *Bond Vows to Fight Tribe’s Plan For Casino*, ST. LOUIS POST-DISPATCH, Apr. 12, 1997, available at 1997 WL 3335085 (“Sen. Christopher Bond wants Interior Secretary Bruce Babbitt to reject a request from an Oklahoma Indian tribe that could lead it to build a casino on land in southwest Missouri.”); and *Nation in Brief*, WASH. POST, Aug. 29, 2003, at A15, available at 2003 WL 62211423 (“The Wyandotte Nation of Oklahoma opened a cramped downtown casino [in Kansas City] despite Kansas’s opposition to a casino run by an out-of-state tribe.”); Tony Thornton, *Casino Met with Reservations*, DAILY OKLAHOMAN (OKLAHOMA CITY, OK), Oct. 26, 2003, at 1A (“The Wyandotte Nation is using the downtown casino—less than 50 yards from city hall—as leverage to get the state’s blessings for a monstrous casino some 12 miles away on the city’s burgeoning west side.”).

The Unified Board of Commissioners of Wyandotte County and Kansas City in September 2003 granted the Oklahoma-based Delaware Tribe of Indians a three-year option on 34 acres in conjunction with a casino proposal. Rick Alm, *KCK Officials Approve Tribal Casino Deal*, THE KANSAS CITY STAR, Sept. 19, 2003, available at 2003 WL 71921634. See also *supra* note 274.

²⁷⁶ See Cheryl Meyer, *Tribe Unveils Its Concept for Hoffman Estates Casino*, CHI. TRIB., Jun. 10, 2003, available at 2003 WL 57221922 (“A Wisconsin-based Indian tribe rolled out plans Monday night for a Hoffman Estates casino and entertainment complex that would include a hotel and water park.”); David Melmer, *Ho-Chunk May Set Up in Chicago*,

Paul Filzer, a lawyer who has helped tribes open casinos in Michigan and other states, assessed the possibility of tribal casinos coming to Ohio by stating in 1996 that, given the opposition of then-Governor George Voinovich, “it’s more likely that the Browns would win the Super Bowl.”²⁷⁷ A spokesman for current Governor Robert Taft stated in 2000 that it would be *almost* impossible for an Indian nation to secure a casino in Ohio without the support of the Governor, and that “the Governor is personally opposed to this.”²⁷⁸ Taft has not wavered in his opposition to casino gambling and tribal gaming in Ohio.²⁷⁹

Thus, for the tribes and their backers that are considering Ohio as a market, the fact that “no out-of-state tribe has succeeded in acquiring off-reservation land to be placed in government trust for the purpose of gaming”²⁸⁰ is an important—but not controlling—consideration. Just because no tribe *to date* has successfully crossed state lines to open a casino, it does not necessarily follow that an Indian tribe will never establish gaming operations in a state other than where it is federally recognized.²⁸¹

INDIAN COUNTRY TODAY, Jun. 22, 2003, available at <http://www.indiancountry.com/?1056-339634> (“The Ho-Chunk Nation [of Wisconsin] claim a casino near Chicago could be possible.”); Karen Mellen, *N.Y. Tribe Considers Casino in Markham; Governor’s Stance Could Be a Barrier*, CHI. TRIB., Sept. 11, 2003, at Metro, 1, available at 2003 WL 63801211 (“A spokesman for the Oneida Nation . . . confirmed the [central New York] tribe is in the preliminary stages of planning a casino in Illinois, but would give no details.”); Dan Herbeck & Tom Precious, *Senecas Want to Build Four More Casinos*, BUFFALO NEWS, Jul. 26, 2003, at A1, available at 2003 WL 6454623 (“Seneca Nation President Rickey L. Armstrong . . . has begun to explore the possibility of building a casino near Pittsburgh.”).

²⁷⁷ Sangiacomo, *Don’t Bet*, *supra* note 47.

²⁷⁸ Sangiacomo, *Taft Firmly Opposed*, *supra* note 51; Theis, *supra* note 51.

²⁷⁹ *Tribe’s Gaming Plan Faces Complex Federal Requirements*, ASSOCIATED PRESS NEWSWIRE, Apr. 13, 2003 (“Gov. Bob Taft and many state officials oppose plans to expand Ohio’s present gambling laws to allow casinos.”). *But see* Hannah, *supra* note 65 (Terry Casey, consultant to the developer who wants to bring the complex to Botkins, noting that a number of governors who opposed the expansion of gambling ended up approving agreements, and stating that “[t]here are people that don’t like gaming, but they don’t like taxes even more”).

²⁸⁰ Mong, *Indian Tribes*, *supra* note 10 (statement by Arlinda Locklear, member of the Lumbee Tribe of North Carolina and lawyer specializing in Indian law).

²⁸¹ A final issue is the “bait and switch” gambit. Proposals made after October 17, 1988, to take off-reservation land into trust which do not contemplate gaming are handled exclusively under 25 C.F.R. Part 151. According to the Interior Department, “[i]f such an acquisition is approved, and *sometime later* gaming is proposed on such land, the Department would then undertake a section 20 analysis.” *Background Paper*, *supra* note 242 (emphasis added). The question is one of timing. The Interior Board of Indian Appeals has held that “mere speculation by a third party that a tribe might, at some future time,

attempt to use trust land for gaming purposes does not require BIA to consider gaming as a use of the property in deciding whether to acquire the property in trust.” *Town of Charlestown, Rhode Island v. E. Area Dir.*, BIA, 35 IBIA 93, 103 (Jun. 29, 2000), available at 2000 WL 949337 (citing *Lake Montezuma Property Owners Ass’n, Inc. v. Phoenix Area Dir.*, BIA, 34 IBIA 235, 238 (2000), available at 2000 WL 656480; *Town of Ignacio, Colorado v. Albuquerque Area Dir.*, BIA, 34 IBIA 37, 41 (1999), available at 1999 WL 33219353). See also *Carcieri v. Norton*, 290 F. Supp. 167, 178 (D. R.I. 2003) (“[A]lthough the possibility that the parcel might be used for gaming activities was raised before the BIA, the bureau’s determination that the parcel would be used to provide housing was amply supported by the record.”); *City of Lincoln City v. United States Dep’t of Interior*, 229 F. Supp. 2d 1109, 1124 (D. Ore. 2002) (“I am not persuaded that the BIA acted arbitrarily or capriciously when it approved the fee-to-trust transfer on the basis of a detailed plan for a housing development rather than on speculation about other possible uses the Tribe might be considering, or changes in the use of the Property which might occur in the future.”).

In *Village of Ruidoso, New Mexico v. Albuquerque Area Dir.*, BIA, 32 IBIA 130 (Apr. 14, 1998), available at 1998 WL 233740, the Assistant Secretary disputed the Village’s contention that the proposed acquisition was in reality an acquisition for gaming purposes, but the IBIA held that, “[b]ecause it is not clear from his decision that the Area Director considered all relevant facts relating to the purpose for which the property in this case is to be used, the Area Director’s decision must be vacated.” *Id.* at 130.

In *Big Lagoon Park Co. v. Acting Sacramento Area Dir.*, BIA, 32 IBIA 309 (Aug. 31, 1998), available at 1998 WL 736001, the appellant requested that the BIA rescind a decision to take land into trust due to (among other reasons) “alleged misrepresentations to the BIA as to intended land use.” *Id.* at 311. The Big Lagoon Rancheria originally sought to have the eleven-acre tract taken into trust for the purpose of providing housing for its members, but decided at some later point in time to construct a gaming facility. *Id.* at 308-10. The IBIA, noting that “the Interior Department’s position has been and continues to be that review of a trust acquisition that has been completed is precluded by the Quiet Title Act [(QTA)], 28 U.S.C. § 2409a,” concluded that “it lacks authority to order the divestiture of title to land held by the United States in trust for an Indian tribe.” *Id.* at 311, 322. The IBIA did *not* hold, however, that the Big Lagoon Rancheria could proceed with gaming on the tract pursuant to IGRA. The land in question was contiguous to the existing reservation; consequently, it is possible that gaming could be conducted pursuant to section 20(a)(1) of IGRA, which permits gaming on lands acquired after October 17, 1988, when such lands “are located within or contiguous to the boundaries of the reservation of the Indian tribe.” 25 U.S.C. § 2719(a)(1).

The “bait and switch” gambit cannot succeed in Ohio. If lands are taken into trust in Ohio for an out-of-state tribe for non-gaming purposes pursuant to 25 C.F.R. Part 151, and the tribe subsequently announces plans to establish a gaming establishment on such lands, the requirements of section 20(b)(1)(A)—including the gubernatorial veto provision—would stand in the way of using the Indian trust lands for gambling. See *Acquisition of Title to Land in Trust*, 64 Fed. Reg. 17,574, 17,577 (Apr. 12, 1999) (“If a tribe applies under these regulations to have title acquired in trust for a non-gaming purpose, and then at a later date decides that it would like to conduct gaming on that parcel,

VI. IF INDIAN GAMING COMES TO OHIO, WHAT TYPES
OF GAMBLING WILL BE PERMITTED?

Even if a tribe is able to conduct gaming in Ohio by coming within one of the exceptions set forth in section 20 of the IGRA, several issues remain with respect to the scope and conditions of such gambling. As previously noted,²⁸² tribes can engage in Class II gaming (bingo, bingo-related games, and certain non-banking card games such as poker) without state approval as long as “such Indian gaming is located within a State that permits such gaming for any purposes by any person, organization or entity;” “such gaming is not otherwise specifically prohibited on Indian lands by Federal law;” and “the tribe adopts a [gaming] ordinance or resolution which is approved by the [National Indian Gaming] Commission.”²⁸³ On the other hand, Class III gaming—including baccarat, blackjack, roulette, craps, keno, sports betting, parimutuel wagering, lotteries, and slot machines—is allowed only if “such gaming” is permitted by the State, authorized by the NIGC, and “conducted in conformance with a Tribal-State compact entered into by an Indian tribe and the State.”²⁸⁴

It is not clear what types of Class III gaming would be permitted in Ohio. The State operates lotteries,²⁸⁵ participates in a multi-state “Mega Millions” lottery,²⁸⁶ and permits betting on horses and charitable gaming,²⁸⁷ but does not currently allow slot machines and other forms of “casino” gambling.²⁸⁸ In *Mashantucket Pequot Tribe v. Connecticut*,²⁸⁹ the

it will be authorized to engage in such gaming only if it complies with the requirements of Section 20 of IGRA.”).

²⁸² See *supra* notes 74-82 and accompanying text.

²⁸³ 25 U.S.C. §§ 2710(a)(2), (b).

²⁸⁴ 25 U.S.C. § 2710(d)(1)(C).

²⁸⁵ Ohio lottery games include “Super Lotto Plus,” the “Kicker,” daily “Pick 3” and “Pick 4” games, and “Buckeye 5.” There is also an assortment of “scratch-off” instant games. See Ohio Gaming Law: Permitted Gaming: Ohio Lottery, at <http://www.ohiogaminglaw.com/permitted/lottery/index.html> (last visited Jul. 30, 2003). “In fiscal year 2000, over \$2.15 billion was wagered on the state lottery. In 1999, over \$627 million dollars was wagered on horse racing and over \$780 million was wagered on charitable bingo, including instant bingo.” Ohio Gaming Law: Overview, at <http://www.ohiogaminglaw.com/overview/index.html> (last visited Jul. 30, 2003).

²⁸⁶ See *State Waits to Cash in on Mega Millions*, DAYTON DAILY NEWS, Sept. 15, 2003, at B5 (“Mega Millions drawings started . . . in May 2002. . . . In Ohio, sales for its Super Lotto Plus state game fell by as much as 48 percent some months from the year before, largely because players opted for Mega Millions tickets, which still weren’t hot sellers.”).

²⁸⁷ *Id.*

²⁸⁸ See *supra* notes 36-42 and accompanying text.

²⁸⁹ 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

Second Circuit held that the Tribe could engage in “high stakes” casino-style gambling since the State allowed similar gambling for charitable purposes pursuant to “Las Vegas night” statutes.²⁹⁰ The court of appeals took a broad view of 25 U.S.C. § 2710(d)(1)(B), agreeing with the Tribe that the phrase “such gaming” refers to Class III gaming in general, rather than specific Class III games in particular, and concluding that, because Connecticut permitted other types of Class III games, it could not refuse to negotiate over the subset of Class III games that the Tribe sought to conduct.²⁹¹ However, in *Cheyenne River Sioux Tribe v. South Dakota*,²⁹² the Eighth Circuit took a narrower view, holding that “[t]he ‘such gaming’ language . . . does not require the state to negotiate with respect to forms of gaming it does not presently permit.”²⁹³ The Ninth Circuit, in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*,²⁹⁴ also rejected the broader interpretation:

IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming. Instead, the statute says only that, if a state allows a gaming activity “for any purpose by any person, organization, or entity,” then it also must allow Indian tribes to engage in

²⁹⁰ *Id.* at 1031 (“Connecticut ‘permits games of chance, albeit in a highly regulated form. Thus, such gaming is not totally repugnant to the State’s public policy.’”). States with “Las Vegas Nights” statutes authorize charities to conduct casino-type gaming under highly regulated conditions, and participants typically receive prizes rather than money. *See, e.g.*, CONN. GEN. STAT. §§ 7-186a to 7-186p (2001); *see also* Kevin Ryan, *Municipal and State Impact of Gaming*, 37 NEW ENG. L. REV. 553, 553 (2003) (“The [Foxwoods] casino initially began with only table games, as allowed under Connecticut’s Las Vegas Nights Statutes. Under an agreement with then-Governor Weicker, the Tribe signed a compact with the State permitting the casino to have slot machines; furthermore, the agreement provided that the State would receive twenty-five percent of the profits.”). Connecticut’s attorney general, Richard Blumenthal, expects Indian tribes to challenge the state law’s repeal as unconstitutional. Marek Fuchs & Stacey Stowe, *Showdown Looms on Tribe’s Recognition*, N.Y. TIMES, Jan. 31, 2003, at B5.

Connecticut recently repealed its “Las Vegas Nights” statute. *See* Rick Green, *Hunting for Foxwoods; Foes of Expansion Take Aim at \$100 Million Plan*, THE HARTFORD COURANT, Aug. 26, 2003, at A1, *available at* 2003 WL 61949123 (“Last year, the [Connecticut Alliance Against Casino Expansion] led support for the successful effort to ban charitable Las Vegas nights by the state legislature, a measure that will make it more difficult for new tribal casinos to open in the state.”).

²⁹¹ *Mashantucket*, 913 F.2d at 1030.

²⁹² 3 F.3d 273 (8th Cir. 1993).

²⁹³ *Id.* at 279.

²⁹⁴ 64 F.3d 1250 (9th Cir. 1994), *amended by* 99 F.3d 321 (9th Cir. 1996).

that same activity. In other words, a state need allow Indian tribes to operate only games that others can operate, but need not give tribes what others cannot have.²⁹⁵

Ohio courts have used the phrase “Las Vegas nights” to characterize charitable gaming.²⁹⁶ However, a new charitable gaming law was signed into law on January 2, 2003, and became effective on July 1, 2003.²⁹⁷ The state law in its current form permits charities to conduct not only bingo but also “games of chance,”²⁹⁸ defined to mean “poker, craps, roulette, or other games in which a player gives anything of value in the hope of gain, the outcome of which is determined largely by chance, but does not include bingo.”²⁹⁹ Under the superseded version of section 2915.02(D) of the Ohio Revised Code, “schemes of chance”—defined as “a slot machine, lottery, numbers game, pool, or other valuable consideration for a chance to win a prize, but does not include bingo”³⁰⁰—were also permitted in certain circumstances.³⁰¹ Hence, in terms of assessing the scope of Class III “casino” gaming that would be permitted in Ohio if a tribe ever is authorized to conduct IGRA gaming in the state, it would appear that Ohio currently authorizes “such gaming” as craps, roulette, and parimutuel

²⁹⁵ *Id.* at 1258 (citations omitted).

²⁹⁶ *See* State v. Georgakopoulos, 787 N.E.2d 674, 676 (Ohio Ct. App. 2003) (“[A]ppellant had been running ‘Las Vegas nights’ at local meeting halls which had been advertised as events given on behalf of many different charities.”); Akron Arid Club, Inc. v. Logsdon, 1991 WL 47585 (Ohio Ct. App. Apr. 3, 1991) (“The Club is licensed by the State of Ohio to conduct bingo games and ‘Las Vegas Nights’ as fundraisers.”); *see also* Lee Leonard, *Gambling Groups Should Pay for Addicts’ Treatment, Report Says*, COLUMBUS DISPATCH, Jul. 10, 2002, at B5, available at 2002 WL 23274674 (The Committee to Study the Impact of Gambling in Ohio recommends that “Ohio’s legal gambling enterprises, including charitable bingo and ‘Vegas nights,’ should underwrite a prevention and treatment program for gambling addicts.”); Scott Hiaasen, *Akron Man Gets 6 Years for Vegas Nights Gambling; Charitable Causes Are Called Bogus*, THE PLAIN DEALER (CLEVELAND), Aug. 10, 2002, at B1, available at 2002 WL 6375133 (“Vegas-style fund-raisers are legal if profits go to charity . . . said Assistant County Prosecutor T. Allan Regas.”).

²⁹⁷ Amended Substitute House Bill 512 (HB 512) was originally scheduled to become effective on April 2, 2003; however, the effective date was postponed to July 1, 2003, by House Bill 87. *See* Ohio Gaming Law: Latest News: Bingo Law Revisions (May 12, 2003), at <http://www.ohiogaminglaw.com/news/index.html> (last visited July 3, 2003).

²⁹⁸ OHIO REV. CODE ANN. § 2915.02(D) (West 2003) (permitting games of chance under certain circumstances).

²⁹⁹ § 2915.01(D). The “games of chance” are regulated in terms of time, place, and manner of operation. *Id.*

³⁰⁰ § 2915.01(C).

³⁰¹ *See* § 2915.02 (Historical and Statutory Notes).

wagering, but does not allow slot machines. Were the Sixth Circuit to adopt the Second Circuit's broad interpretation of "such gaming," the authorization by Ohio of some forms of Class III gaming would require the State to negotiate generally about Class III games, including blackjack and slot machines. On the other hand, under the more narrow approach of the Eighth and Ninth Circuits, the State would not be required to negotiate with respect to blackjack, slot machines, and other forms of Class III gaming that are presently prohibited in Ohio. Of course, were Ohio to allow video lottery terminals (i.e., electronic slot machines) at horse tracks—as advocated by numerous legislators³⁰²—then the state would permit "such gaming," and the types of permissible Class III tribal gaming in Ohio would also encompass slot machines.³⁰³

³⁰² See *supra* notes 36-40 and accompanying text.

³⁰³ Even if slot machines continue to be prohibited in Ohio, it may be possible for a tribe in Ohio to conduct gaming that is quite similar to slot machines, but falls within the definition of Class II gaming and hence can be undertaken without state input. In *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, the issue presented was whether a gambling device "called the Magical Irish Instant Bingo Dispenser System" was a "technologic aid" to Class II gaming, or an "electronic or electromechanical facsimile of any game of chance or slot machines of any kind." 327 F.3d 1019, 1021-24 (10th Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 1651 (U.S. Mar. 1, 2004) (citing 25 U.S.C. §§ 2703(7)(A)(i), (B)(ii)). According to the court, "[a]t the heart of this dispute is whether the game played with the Machine qualifies as the IGRA Class II game of pull-tabs." *Id.* at 1024. The court agreed with the NIGC's view that pull-tab dispensers and/or readers are IGRA Class II "electronic, computer, or other technologic aids," and rejected the view of the United States Department of Justice that the machine was an "electronic or electromechanical facsimile" of a slot machine. *Id.* at 1036-44. See also CANBY, JR., *supra* note 70, at 295-96 (summarizing other cases involving the Class II/Class III classification issue); Guidance on Classifying Games With Pre-Drawn Numbers, National Indian Gaming Commission, Sept. 23, 2003, at <http://www.gov.nigc/documents/bulletins/NIGC-03-3.jsp> (last visited Dec. 31, 2003) (concluding that the IGRA requirement for 'bingo' is met "only when numbers or designations are drawn after a player begins play of the game.").

Ohio's new charitable gaming law defines "bingo" to include "instant bingo, punch boards, and raffles." OHIO REV. CODE ANN. § 2915.01(S)(2) (West 2003). The term "Instant bingo" is in turn defined in pertinent part to mean

a form of bingo that uses folded or banded tickets or paper cards with perforated break-open tabs, a face of which is covered or otherwise hidden from view to conceal a number, letter, or symbol, or set of numbers, letters, or symbols, some of which have been designated in advance as prize winners.

§ 2915.01(FF). If the charitable gaming law is construed to permit "pull-tabs"—which are defined by federal law as a type of Class II gaming, see 25 U.S.C. § 2703(7)(A)(i)(III)—then "slot-like" machines such as the "Magical Irish Instant Bingo Dispenser System" could

The IGRA provides in pertinent part that tribal-state compacts governing Class III gaming may include provisions relating to

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations; (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity; . . . and (vii) any other subjects that are directly related to the operation of gaming activities.³⁰⁴

However, except for the aforementioned assessments, Congress specified that nothing in the IGRA “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.”³⁰⁵ Moreover, in determining whether a state has negotiated in good faith, Congress provided that a court “shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.”³⁰⁶

Nevertheless, an increasing number of states are negotiating gaming compacts that require tribal-state revenue sharing.³⁰⁷ One commentator

be utilized by tribes in Ohio despite the (current) state ban on slot machines and without having to negotiate a tribal-state gaming compact. See Editorial, *Racetrack Slots Could Bring More Change*, DAYTON DAILY NEWS, Apr. 20, 2003, at B6 (Class II gaming “includes games comparable to those already played in Ohio: bingo, pull tabs, punch board, tip jars.”); Cathy Mong, *Botkins OKs Land Buy for Gambling; First Step Toward Proposed Resort Center*, DAYTON DAILY NEWS, Mar. 12, 2003, at B1 [hereinafter Mong, *Botkins OKs*] (Tom Schnippel, a local developer connected with the proposal to bring tribal gaming to Botkins, Ohio, stated that “[d]espite the state’s official anti-gaming stance, ‘[c]asino gambling is going to come to Ohio. Somebody might as well be ready for it. With the pull-tab bill passed in November, casino gambling is close.”); see also Tom Precious, *Ruling Benefits Gambling Advocates; Judge Upholds Casino Legislation*, BUFFALO NEWS, Jul. 18, 2003, at C1 (noting that state Supreme Court Judge Joseph Teresi recently “rejected claims that the racetrack VLT devices are slot machines and therefore banned by the [New York] Constitution. He called the devices ‘true video lotteries,’ adding that while the devices may resemble slot machines, their internal workings distinguish them from slots.”).

³⁰⁴ 25 U.S.C. § 2710(d)(3)(C)(i)-(iii), (vii).

³⁰⁵ 25 U.S.C. § 2710(d)(4).

³⁰⁶ 25 U.S.C. § 2710(d)(7)(B)(iii)(II).

³⁰⁷ See *supra* notes 94-95 and accompanying text. See Editorial, *Stand Up for Your*

argues that “the validity of these agreements is dubious in light of the plain meaning of IGRA, its legislative history, and relevant case law addressing similar issues.”³⁰⁸ However, the Ninth Circuit, in *In re Indian Gaming Related Cases*,³⁰⁹ has upheld a gaming compact negotiated by California against a tribe’s claims that the compact’s revenue sharing provisions “fall outside the list of appropriate topics for Tribal-State compacts” and constitute “a ‘demand by the State for direct taxation of the Indian tribe,’ giving rise to a statutory presumption that the State has not negotiated in good faith.”³¹⁰

The Coyote Valley Band of Pomo Indians took issue with two revenue-sharing provisions. The gaming compact established a “Revenue Sharing Trust Fund,” which requires that gaming tribes share gaming revenues with non-gaming tribes.³¹¹ In light of the fact that California had no obligation to negotiate with tribes over forms of Class III gaming that the state did not permit,³¹² the Ninth Circuit held that when the State nevertheless agreed to negotiate over the most lucrative forms of Class III gaming in return for its demands for revenue sharing, it did not “impose” the Revenue Sharing Trust Fund within the meaning of 25 U.S.C. § 2710(d)(4).³¹³ For essentially the same reasons, the Court of Appeals also upheld the compact’s “Special Distribution Fund,” which makes a portion of tribal gaming revenues available to be appropriated by the State for

Rights, INDIAN COUNTRY TODAY, Jun. 25, 2003 (California Governor Gray Davis, “facing tens of billions of dollars in budget deficits, is pressuring for more and more ‘revenue sharing’ from the Indian enterprises \$1.5 billion at last count. This is a huge jump from the \$151 million currently paid by the tribes. . . . [T]he \$1.5 billion figure would be approximately half of all tribal gaming profits.”).

³⁰⁸ Lent, *supra* note 88, at 474.

³⁰⁹ 331 F.3d 1094 (9th Cir. 2003).

³¹⁰ *Id.* at 1109 (citing 25 U.S.C. § 2710(d)(3)(C), § 2710(d)(7)(B)(iii)(II)). *See also* Artichoke Joe’s California Grand Casino v. Norton, 353 F.3d 712 (9th Cir. 2003) (rejecting contention of card clubs and charities that tribal-state compacts entered into after California Proposition 1A—which permits casino-style gaming only on Indian lands—violate IGRA and equal protection rights guaranteed by the Fifth and Fourteenth Amendments).

³¹¹ *Id.* at 1105.

³¹² *See* Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250 (9th Cir. 1994), *amended by* 99 F.3d 321 (9th Cir. 1996).

³¹³ *Indian Gaming Related Cases*, 331 F.3d at 1111-12. The court of appeals also held that, since the Revenue Sharing Trust Fund created “a mechanism whereby *all* of California’s tribes—not just those fortunate enough to have land located in populous or accessible areas—can benefit from class III gaming activities in the State,” the provision furthered IGRA’s goal of promoting “tribal economic development, self-sufficiency, and strong tribal governments,” and thus fell within the scope of 25 U.S.C. § 2710(d)(3)(C)(vii), which provides that compacts “may include provisions relating to . . . subjects that are directly related to the operation of gaming activities.” *Id.* at 1111 (emphasis in original).

specified purposes as well as for “any other purposes specified by the legislature.”³¹⁴

The two Indian casinos in Connecticut contribute twenty-five percent of slot machine revenues each month to the state, accounting for three percent of the state’s \$13 billion annual operating budget.³¹⁵ Since August 2003, three Indian tribes have negotiated compacts with California that contain revenue-sharing provisions.³¹⁶ On July 9, 2003, the Senate Indian

³¹⁴ *Id.* at 1113. The specified purposes are as follows:

- (a) grants for programs designed to address gambling addiction; (b) grants for the support of state and local government agencies impacted by tribal gaming; (c) compensation for regulatory costs incurred by the State Gaming Agency and the state Department of Justice in connection with the implementation and administration of the compact; (d) payment of shortfalls that may occur in the [Revenue Sharing Trust Fund]; and (e) any other purposes specified by the legislature.

Id. at 1113. The court held that each purpose is “‘directly related to the operation of gaming activities’ and are thus permissible under [25 U.S.C. § 2710(d)(3)(C)(vii)].” *Id.* at 1114.

The Ninth Circuit also upheld a “Labor Relations Provision,” which required “as a precondition to entering [the compact] . . . that tribes meet with labor unions to negotiate independently a labor ordinance addressing only organizational and representational rights and applicable only to employees *at tribal casinos and related facilities*. *Id.* at 1115-16 (holding that “this provision is ‘directly related to the operation of gaming activities’ and is thus permissible pursuant to 25 U.S.C. § 2710(d)(3)(C)(vii)”).

³¹⁵ See Susannah Rosenblatt, *Tribes with Casino Profits Averse to Aiding Strapped States*, L. A. TIMES, Jul. 10, 2003, at A21; *Casinos Report Slot Revenues*, HARTFORD COURANT, Jul. 18, 2003, at B7 (“Under an agreement with the state, the two Indian casinos contribute 25 percent of slot machine revenues each month to the state, in return for the exclusive right to operate the machines in Connecticut.”).

³¹⁶ See Gregg Jones, *Tribe to Give State a Slice of Slot Profit; The Torres-Martinez Indians Will Pay 3% of the Revenue at First, Increasing to 5%. It Is the First Agreement of Its Kind*, L. A. TIMES, Aug. 14, 2003, at B1 (“Gov. Gray Davis on Wednesday announced the first new gambling agreement with a California tribe that will funnel money directly into the state general fund. . . . [The Torres-Martinez tribe] agreed to initially pay the state 3% of the revenue from its first 350 slot machines. The state’s cut will increase to 4% of revenue in the second year of operation and 5% thereafter.”); Gregg Jones, *2 Tribes Get Casino OK, Will Share Profit with State*, L. A. TIMES, Sept. 10, 2003, at B6 (“Gov. Gray Davis has reached agreement with two more Indian tribes that would allow them to open casinos in exchange for sharing 5% of their gambling revenue with the state.”).

Governor Arnold Schwarzenegger has called on California tribes to pay a portion of their winnings to the state, and an initiative intended for the November 2004 ballot would allow 30,000 non-Indian slot machines in California unless the tribes agree to pay twenty-five percent of their casino profits to the state and abide by certain state and local laws. See

Affairs Committee held a hearing which examined revenue-sharing under the IGRA.³¹⁷ At this hearing, Jacob Viarrial, governor of the Pueblo of Pojoaque in New Mexico, testified that compact negotiations have become “a smokescreen for extortion.”³¹⁸ Acknowledging that tribal payments to state governments from casino revenues are not specifically authorized by the IGRA, the Interior Department’s Acting Assistant Secretary for Indian Affairs, Aurene Martin, testified that the concept of revenue sharing has evolved over the years from the state-tribal negotiating process, and she explained that—if a tribe is willing to pay for a concession that a state is authorized to make—then the Department of the Interior reviews the agreement to ensure that the deal is fair and that the tribe is able to make the payments.³¹⁹ The Department states that it reviews new and renegotiated compacts “on a case-by-case basis.”³²⁰ Senator Ben Nighthorse

Dan Morain, *Gaming Wars May Bring Slots to L.A.; The County Could Get 20,000 Machines Under Initiative Proposed by Card Clubs, Racetracks*, L.A. TIMES, Feb. 2, 2004, at B1 (“the 17-page proposed initiative would require tribes to renegotiate the deal they struck with former Gov. Gray Davis to retain their monopoly.”).

³¹⁷ See Rosenblatt, *supra* note 315.

³¹⁸ *Id.* See also Wanamaker, *Let the Games Begin*, *supra* note 217 (“Viarrial noted that IGRA makes no mention of exclusivity or revenue sharing.”); Rosenblatt, *supra* note 315 (“The law allows [states] to demand excess money,’ said Sen. Ben Nighthorse Campbell (R-Colo.), chairman of the Committee on Indian Affairs.”) (alteration in original); Tom Wanamaker, *Minnesota, Wisconsin and South Carolina: Recent Developments Cast the Gaming Spotlight on These States*, INDIAN COUNTRY TODAY, Feb. 13, 2004, available at <http://www.indiancountry.com/?1076694478> (Governor Tim Pawlenty suggested in a radio interview “that in return for a continued monopoly on gaming in Minnesota, the tribes would share a percentage of their gaming revenue with the state.”).

³¹⁹ Wanamaker, *Let the Games Begin*, *supra* note 217. See also Rosenblatt, *supra* note 315 (“The Department of the Interior [has] adopted a loose standard for revenue sharing with states: Tribes must have ‘substantial exclusivity’ over the local gambling industry.”); Tom Wanamaker, *Economics Special: Indian Gaming is Healthy and Growing*, INDIAN COUNTRY TODAY, Sept. 10, 2003, at A1, available at www.indiancountry.com/?1062782144 (“‘One of the thresholds that we think needs to be in place is that a substantial benefit to the tribe in return for a revenue sharing agreement,’ said John Harte, NIGA’s general counsel, suggesting that perhaps long-term compacts or gaming exclusivity may be exchanged for flat-rate or percentage payments.”).

³²⁰ Jacob Coin, *Tribal Gaming Needs the Same Federal Protection As Other Trust Resources*, INDIAN COUNTRY TODAY, Sept. 3, 2003, at A5, available at <http://www.indiancountry.com/?1062165355> (statement of Aurene Martin, Acting Assistant Secretary for Indian Affairs). See also Laura Maggi, *Foster Still Backs Indian Tribe Casino; Jena Band Faces Foes and Dwindling Time*, TIMES-PICAYUNE (NEW ORLEANS), Aug. 23, 2003, at 03 (“The Interior Department last year rejected an agreement between Foster and the Jena Band that would have allowed the tribe to open a casino on the Texas border near Lake Charles, saying a proposal for the Jena to pay the state government about 15 percent of

Campbell, the chairman of the Committee on Indian Affairs and a Native American, has criticized this approach, noting that there is “no statistical basis for [the] revenue-sharing policy; no broad regulation that guides the Department [of the Interior] either.”³²¹

Unless and until revenue-sharing is declared contrary to the IGRA, it will be without doubt a topic of negotiation with any tribe seeking a compact to conduct Class III gaming in Ohio.³²² The Ohio General Assembly, in fact, has already contemplated the possibility of tribal gaming in the state.³²³ In 1997, the Ohio General Assembly enacted a law requiring legislative approval of “[e]ach authorization the governor grants for an Indian tribe to place land into trust to be used for class I, class II, or class III gaming.”³²⁴ In the same fashion, no tribal-state compact entered into with an Indian tribe by the governor “shall be ratified or take effect until the general assembly approves it by passage of an act.”³²⁵ Compacts

winnings amounted to an illegal tax.”).

³²¹ Rosenblatt, *supra* note 315 (second alteration in original).

³²² Tom Wanamaker, who specializes in reporting on gaming issues for the *Indian Country Today*, believes that

revenue sharing is an idea that's not going to go away. Federal guidelines are needed to not only ensure fair, appropriate and consistent levels of revenue sharing are met and maintained, but to also require that monies paid to the state are used to mitigate casino effects on infrastructure, schools and the like in communities adjacent to a casino.

Wanamaker, *Let the Games Begin*, *supra* note 217. To date, the question of revenue-sharing has arisen only in compact negotiations with tribes seeking to conduct gaming in the state in which the tribes are federally recognized. Wanamaker, *Cayuga Intrigue*, *supra* note 274. The IGRA's provisions relating to the negotiation of tribal-state compacts, however, do not expressly limit a state's obligation to bargain in good faith to tribes located in the state. Wanamaker, *Cayuga Intrigue*, *supra* note 274. Nevertheless, Governor George Pataki of New York “has steadfastly refused to deal with out-of-state tribes in crafting Class III compacts.” Wanamaker, *Cayuga Intrigue*, *supra* note 274. The question whether a state can refuse to negotiate a gaming compact (including revenue-sharing provisions) with an out-of-state tribe has not been litigated; however, since it is possible for a tribe to conduct gaming in another state under the IGRA, it would seem to follow that the state in question could not refuse to negotiate if Class III gaming is not prohibited by state law. The Seneca-Cayuga Tribe's plans to open a gaming facility in upstate New York is unusual since its gaming activities would arguably “violate the rights and jurisdiction of the Cayuga Nation of New York.” Wanamaker, *Cayuga Intrigue*, *supra* note 274 (statement of the United South and Eastern Tribe (USET) organization).

³²³ See OHIO REV. CODE ANN § 107.25 (West 2003).

³²⁴ OHIO REV. CODE ANN § 107.25(B)(2).

³²⁵ OHIO REV. CODE ANN § 107.25(B)(1). New York has a similar law. See Wanamaker, *Let the Games Begin*, *supra* note 217 (“On June 12, the state Court of

can not be no longer than ten years in duration, and

shall contain a binding agreement for the collection and payment of state and local sales, use, or other excise or applicable taxes, or for the payment of amounts that may be in lieu of such taxes, levied on any item sold to any nonmember of the governing tribe by any business establishment located on the land to be taken into trust.³²⁶

This law, of course, does not prohibit Ohio from negotiating revenue sharing provisions if a tribe seeks to conduct Class III gaming pursuant to a tribal-state compact.

VII. CONCLUSION

Indians have gambled in Ohio before. In the fall of 1747, a Piankashaw named Memeskia who lived among the Miami—who was known as La Demosielle to the French and Old Briton or the Piankashaw King to the British—led his followers away from their villages “along the Wabash and Maumee Rivers to a new town, Pickawillany, at the juncture of the Great Miami River and Loramie’s Creek, in western Ohio.”³²⁷ Memeskia was willing to risk French retribution in order to trade with the British-Americans, who offered goods at lower prices than the French could match.³²⁸ In response, France dispatched Céloron de Blainville on his famous journey in 1749 to strengthen French claims to the Ohio Valley by burying leaden plates—inscribed with claims of French sovereignty—at selected points where tributaries joined the Ohio River.³²⁹ Céloron told the Indians he encountered “that [the] English traders were encroaching on lands claimed by France and would soon become a threat to the Indians

Appeals, New York’s highest court, declared invalid by a 4-3 vote a 1993 compact negotiated between the St. Regis Mohawk Indians and former Governor Mario Cuomo on the grounds that the deal never received legislative approval.”).

³²⁶ OHIO REV. CODE ANN § 107.25(C)-(D) (West 2002). *See also* Bischoff, *Racetracks*, *supra* note 60 (“In 1997, [former state representative J. Donald Mottley, who headed two state study committees on gaming,] wrote a law that requires General Assembly approval of any deal negotiated between the governor and a tribe to allow casinos. Ohio’s law also requires that compacts with tribes be no longer than 10 years and that the tribes pay taxes or payments in lieu of taxes. Mottley said a look at governor-negotiated bad deals in other states prompted him to get Ohio to adopt this law.”).

³²⁷ R. David Edmunds, *Old Briton*, in, *AMERICAN INDIAN LEADERS: STUDIES IN DIVERSITY* 5 (1980).

³²⁸ R. DOUGLAS HURT, *THE OHIO FRONTIER: CRUCIBLE OF THE OLD NORTHWEST, 1720-1830* at 38 (1996).

³²⁹ HARVEY LEWIS CARTER, *THE LIFE AND TIMES OF LITTLE TURTLE: FIRST SAGAMORE OF THE WABASH* 33 (1987).

and steal their country from them.”³³⁰ Memeskia, however, continued to side with the British, to the increasing alarm of France.³³¹ On June 21, 1752, Charles de Langlade, a French-Ottawa of mixed-blood, attacked Pickawillany with 30 Frenchmen, 30 Ottawa, and 180 Chippewa from Michilimackinac, Michigan.³³² Fourteen Indians were killed, including Memeskia, who—in the words of Thomas Burney, one of two English traders who escaped—“for his attachment to the English, they boiled, and eat him all up.”³³³

Memeskia gambled by throwing his lot in with the British and moving his village to Pickawillany, near present-day Piqua, Ohio.³³⁴ In less than

³³⁰ ALLAN W. ECKERT, *WILDERNESS EMPIRE* 139 (1969).

³³¹ Pierre Jacques de Taffanal, Marquis de La Jonquière, the governor of New France, wrote to the French Minister of Marine, Antoine-Louis Rouillé, Comte de Jouy, in October 1750 to warn that

La Demosielle, chief of [the rebels who have taken refuge on Great Miami River], is doing everything possible at the solicitation of the English to draw to his side the tribes of the Wabash and even those that are domiciled at Fort de Chartres; further, speeches and belts have been carried as far as the Missouri to make all the tribes revolt and to induce them to cut off the French completely.

Illinois on the Eve of the Seven Years' War, 1747-1755, in *COLLECTIONS OF THE ILLINOIS STATE HISTORICAL LIBRARY*, VOL. XXIX at 241 (1940). La Jonquière cautioned that

if the post on Great Miami River remains for only a little longer, the English will succeed in winning over the Wabash tribes already mentioned as well as those of his post and little by little those of the Missouri, which would occasion not merely the loss of his post which the English will not fail to seize but also the loss of the trade of Canada and the communication by way of the Mississippi River.

Id.

³³² CARTER, *supra* note 329, at 34. “The Seven Years’ War, as the French and Indian War was known in Europe, did not [officially] begin until 1756”; however, Carter contends that the conflict actually “began in 1752 with the destruction of the English trading post among the Miami at Pickawillany.” *Id.* at 52.

³³³ *Id.*

³³⁴ See David Lore, *Forgotten Fort; A Pre-Revolutionary Trading Post May Hold Bloody Details to Ohio’s Past*, *THE COLUMBUS DISPATCH*, Nov. 5, 2002, at A6, available at 2002 WL 102248813 (“Today, a cornfield and forest cover the spot where the clash occurred 250 years ago along the Great Miami north of Piqua and Dayton. Spared from development, the bluff has retained its timeless, tranquil quality despite its one brief, bloody appearance on the stage of history. . . . Although the exact location of Pickawillany is unknown, the Ohio Historical Society purchased 37 acres along the bluff two years ago for an archaeological project that began last summer.”).

one hundred years after Memeskia's death, Indian title to lands in Ohio was extinguished, and all recognized tribes were removed from the state. Today, Indian tribes are seeking to return to Ohio to establish gaming operations pursuant to the IGRA.³³⁵ Ironically, one such proposal—the \$550 million gaming center near Botkins—is located just north of Piqua and the historic village of Pickawillany.

So what are the chances of tribal gambling coming to Ohio? Well, I wouldn't bet on it. But then again, I don't like to gamble.

³³⁵ See Mong, *Botkins OKs*, *supra* note 303.