

## INDIAN GAMBLING IN OHIO: WHAT ARE THE ODDS?

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[T]ribal gaming in Ohio is not a "sure bet" for several reasons. First, the controlling federal law--the Indian Gaming Regulatory Act (IGRA) of 1988 [FN11] -- 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. [FN12] 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 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.

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### 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*. [FN68] 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. [FN69] The Supreme Court, however, held that the State could 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). [FN70] 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." [FN71]

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.'" [FN72] The IGRA divides gaming in Indian country into three categories or classes. Class I consists of traditional Indian gaming, which is subject to the exclusive jurisdiction of the Tribes. [FN73] 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). [FN74] The Act specifically excludes slot machines and electronic or electromechanical facsimiles of any game of chance from the definition of Class II games. [FN75] 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. [FN76] The NIGC monitors Class II gaming and is authorized to enforce the IGRA and tribal ordinances regulating such gaming. [FN77]

All other types of gaming--including dice, non-grandfathered banking card games, and slot machines--are designated as Class III gaming under the IGRA. [FN78] Class III gaming activities, like Class II activities, are lawful on Indian lands only if "located in a State that permits such gaming for any purpose by any person, organization, or entity." [FN79] Hence, if the state does not permit "such gaming," that is the end of the matter. [FN80] 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. [FN81] 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." [FN82] The compact is "in effect" when notice of its approval by the Secretary of the Interior is published in the Federal Register. [FN83]

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." [FN84] The Act sets out an elaborate process governing the negotiation of gaming 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." [FN85] However, in *Seminole Tribe of Florida v. Florida*, [FN86] 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. [FN87] 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." [FN88] 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. [FN89] Alabama, Florida, and Kansas, however, have filed suit challenging the new regulation. [FN90]

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. [FN91] 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. [FN92] 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. [FN93] Although tribal gaming revenues are not subject to direct state taxation, several states (including Connecticut, Michigan, and Wisconsin) have negotiated tribal-state gaming compacts that require revenue sharing. [FN94] 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. [FN95] \* \* \*

## **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." [FN101] 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];" [FN102]

(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 Oklahoma;" [FN103]

(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;" [FN104]

(4) when "lands are taken into trust as part of ... the restoration of lands for an Indian tribe that is restored to Federal recognition;" [FN105]

(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;" [FN106]

(6) when "lands are taken into trust as part of ... a settlement of a land claim;" [FN107] and

(7) 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." [FN108]

The first listed exception is inapplicable since no Indian tribe had a reservation in Ohio on October 17, 1988. [FN109] The second exception applies to Oklahoma only, and the third exception is inapposite insofar as no recognized Indian tribe is "presently located" in Ohio. [FN110] 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." [FN111] The remaining three exceptions, on 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. [FN112] There are 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. [FN113] 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 Mekojay Shawnee (Wilmington). [FN114] No Indian group located in Ohio is currently recognized by the federal government, and while state recognition of Indian tribes is irrelevant for purposes of the IGRA, [FN115] Ohio in any event does not officially recognize Indian tribes. [FN116]

Historically, tribes have obtained federal recognition through treaties, legislation, executive orders and other administrative decisions, and court decisions. [FN117] Congress, by the Act of March 3, 1871, [FN118] ended treaty-making 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." [FN119] 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." [FN120]

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 unacknowledged Indian groups." [FN121] 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." [FN122] 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." [FN123] There are 562 tribes on the BIA's most recent list of recognized tribes published in July 2002. [FN124]

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." [FN125] 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." [FN126]

Another alternative to petitioning for administrative recognition pursuant to 25 C.F.R. Part 83 is to achieve federal recognition as an Indian tribe by an act of Congress. [FN127] 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. [FN128] There are several bills pending in Congress to grant federal recognition to Indian groups; [FN129] however, there is no pending legislation to recognize any group of Indians in Ohio. [FN130]

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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 the petitions currently awaiting active consideration." [FN194] The BIA concedes that the administrative acknowledgment process is unduly slow. [FN195] Indian groups complaining of dilatoriness have in some instances successfully sought mandamus because of unreasonable delays. [FN196] 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." [FN197] Congress, of course, may enact tribe-specific land claim settlement acts that facilitate tribal gaming, [FN198] limit its scope, [FN199] or withhold IGRA gaming rights. [FN200] Tribes unaffected by legislation, however, may look to the courts to establish gaming on lands taken into trust in settlement of land claims litigation.

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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. [FN241]

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 20(b)(1)(A) of the IGRA. [FN242] As discussed below, it is possible to petition the Department to place lands located in another state in trust for the tribe. [FN243] 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." [FN244] 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. [FN245]

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

\* \* \* [The] “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 their own court systems.” [FN248] Section 1 of the Indian Reorganization Act (IRA) ended future allotments, [FN249] 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.” [FN250]

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. [FN251] The regulations provide in pertinent part that “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.” [FN252] 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;” [FN253]

“[t]he purposes for which the land will be used;” [FN254]

“[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;” [FN255] 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].” [FN256]

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:” [FN257]

“[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. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section;” [FN258] 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.” [FN259]

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." [FN260]

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. [FN261]

## **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." [FN262] The burden of proof is on the tribe. [FN263] 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. [FN264]

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. [FN265] The gubernatorial concurrence (or "veto") provision of the IGRA has been upheld against claims that it violates the Appointments Clause, [FN266] and against separation of powers principles because it authorizes a state governor to "veto" findings made by the Secretary of the Interior. [FN267] 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. [FN268]

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To date, no Indian tribe has opened an off-reservation gaming establishment in a state other than where it is recognized. [FN274] Nevertheless, Oklahoma-based tribes have sought, or are seeking, to establish casinos in Ohio, Indiana, New York, New Jersey, Kansas, Missouri, and Colorado. [FN275] 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. [FN276]

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." [FN277] 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." [FN278] Taft has not wavered in his opposition to casino gambling and tribal gaming in Ohio. [FN279]

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" [FN280] 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. [FN281]

## ENDNOTES

[FN11]. Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. §§ 2701-2721.

[FN12]. 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").

[FN68]. 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.

[FN69]. Kathryn R.L. Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47, 51 (2002).

[FN70]. 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).

[FN71]. Biennial Report of the National Indian Gaming Commission, 1998- 2000, at 8.

[FN72]. *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), 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").

[FN73]. 25 U.S.C. §§ 2703(6), 2710(a)(1).

[FN74]. 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).

[FN75]. 25 U.S.C. § 2703(7)(B)(ii).

[FN76]. 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](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](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.*

[FN77]. 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.").

[FN78]. 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:

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.

[FN79]. 25 U.S.C. § 2710(d)(1)(B).

[FN80]. 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.

[FN81]. 25 U.S.C. § 2710(d)(1)(A).

[FN82]. 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.

[FN83]. 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 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).

[FN84]. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 283 (3d ed. 1998). 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).

[FN85]. 25 U.S.C. § 2710(d)(7)(A)(i). See generally 25 U.S.C. § 2710(d)(3)-(8).

[FN86]. 517 U.S. 44 (1996).

[FN87]. *Id.* at 47.

[FN88]. 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).

[FN89]. *Class III Gaming Procedures*, 64 *Fed. Reg.* 17,535 (Apr. 12, 1999) (to be codified at 25 C.F.R. pt. 291).

[FN90]. U.S. GEN. ACCOUNTING OFFICE, *INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS* 37-38 (Nov. 2001), at <http://www.gao.gov/new.items/d0249.pdf>.

[FN91]. 25 U.S.C. § 2710(b)(2)(B).

[FN92]. 25 U.S.C. § 2710(b)(3). See 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.* 421 (1997) (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.").

[FN93]. See *Tribal Court Clearinghouse: Native Gaming Resource*, at <http://www.tribalinstitute.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").

[FN94]. See 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, 456-60 (2003) (describing revenue-sharing provisions of tribal-state gaming compacts) \* \* \*.

[FN95]. *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.").

[FN101]. 25 U.S.C. § 2719(a).

[FN102]. 25 U.S.C. § 2719(a)(1).

[FN103]. 25 U.S.C. § 2719(a)(2)(A)(i)-(ii).

[FN104]. 25 U.S.C. § 2719(a)(2)(B). See Tony Thornton, Delaware; 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 Delaware: 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.").

[FN105]. 25 U.S.C. § 2719(b)(1)(B)(iii).

[FN106]. 25 U.S.C. § 2719(b)(1)(B)(ii).

[FN107]. 25 U.S.C. § 2719(b)(1)(B)(i).

[FN108]. 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).

[FN109]. 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).

[FN110]. 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. \* \* \*

[FN111]. 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 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](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).

[FN112]. 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 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).

[FN113]. 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.

[FN114]. 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 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).

[FN115]. 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.

[FN116]. 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 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*, CHILLICOTHE GAZETTE (CHILLICOTHE, 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.").

[FN117]. 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 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).

[FN118]. 25 U.S.C. § 71 (originally enacted as Act of March 3, 1871, ch. 120, 16 Stat. 544).

[FN119]. *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)).

[FN120]. GAO, INDIAN ISSUES, supra note 5, at 3.

[FN121]. 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.").

[FN122]. 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](http://www.nigc.gov/nigc/documents/land/hillman.jsp) (alterations in original).

[FN123]. 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, at 4 (citing 65 Fed. Reg. 7,052 (Feb. 11, 2000)).

[FN124]. 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).

[FN125]. *James v. United States Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987).

[FN126]. *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.

[FN127]. 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.'").

[FN128]. 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))).

[FN129]. 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").

[FN130]. Even if a bill to extend federal recognition to an Indian group in Ohio were to be 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).

[FN194]. 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.

[FN195]. 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).

[FN196]. 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).

[FN197]. 25 U.S.C. § 2719(b)(1)(B)(i).

[FN198]. See, e.g., 25 U.S.C. § 1775b (Mohegan Nation (Connecticut) Land Claims Settlement Act).

[FN199]. 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").

[FN200]. 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).

[FN241]. 25 U.S.C. § 2719(b)(1)(A) (2003).

[FN242]. See U.S. DEPT 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].

[FN243]. See *supra* notes 17-18 and accompanying text.

[FN244]. 25 C.F.R. § 151.11(b) (2003).

[FN245]. See Background Paper, *supra* note 241.

[FN248]. 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 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.").

[FN249]. 25 U.S.C. § 461.

[FN250]. 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).

[FN251]. 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 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.").

[FN252]. 25 C.F.R. § 151.3(a)(3). See also Scrivner, *supra* note 251, at 606.

[FN253]. 25 C.F.R. § 151.10(a).

[FN254]. 25 C.F.R. § 151.10(c).

[FN255]. 25 C.F.R. § 151.10(e).

[FN256]. 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).

[FN257]. 25 C.F.R. § 151.11(b).

[FN258]. 25 C.F.R. § 151.10(b).

[FN259]. 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).

[FN260]. 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, INDIAN COUNTRY TODAY, Feb. 23, 2004, available at <http://www.indiancountry.com/?1077574249> (remarks at conference on fee-trust issues).

[FN261]. 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).

[FN262]. 25 U.S.C. § 2719(b)(1)(A). Section 20 does not provide authority to take land 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).

[FN263]. 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.

[FN264]. Background Paper, *supra* note 242 (citations omitted) (alterations in original).

[FN265]. 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 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).

[FN266]. See Background Paper, *supra* note 241; see also U.S. Const. art. II, § 2, cl. 2.

[FN267]. *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).

[FN268]. 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.

[FN269]. Steve Schultze & Dave Umhoefer, *Casino Move Has Key Support*, MILWAUKEE 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].").

[FN270]. Wanamaker, Let the Games Begin, *supra* note 217.

[FN271]. 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).

[FN272]. *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.*

[FN273]. 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.").

[FN274]. 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, 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).

[FN275]. 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.

[FN276]. 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, 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.").

[FN277]. Sangiacomo, Don't Bet, *supra* note 47.

[FN278]. Sangiacomo, Taft Firmly Opposed, *supra* note 51; This, *supra* note 51.

[FN279]. 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").

[FN280]. Mong, Indian Tribes, *supra* note 10 (statement by Arlinda Locklear, member of the Lumbee Tribe of North Carolina and lawyer specializing in Indian law).

[FN281]. 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, it will be authorized to engage in such gaming only if it complies with the requirements of Section 20 of IGRA.").