OFF-RESERVATION NATIVE AMERICAN GAMING: AN EXAMINATION OF THE LEGAL AND POLITICAL HURDLES

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I. INTRODUCTION

The Indian Gaming Regulatory Act of 1988 ("IGRA")[1] permits Native American Tribes to conduct gaming on land acquired outside of the tribe's traditional reservation or other trust lands.[2] However, before a tribe may undertake gaming on such "off-reservation" lands – unless another exception applies – the tribe must first obtain a determination from the United States Secretary of the Interior ("Secretary") that the proposed gaming operation (1) will be in the "best interest" of the tribe and its members, and (2) will not be "detrimental" to the surrounding community.[3] More importantly, the governor of the state in which such lands are located must concur in the Secretary's determination.[4]

This article will examine the "land-into-trust" process for gaming purposes with respect to the legal issues involved, as well as related internet implications and opportunities.

II. LAND INTO TRUST FOR GAMING PURPOSES

A. *General Land-into-Trust Process*

Generally, the land-into-trust process is governed by the rules and regulations promulgated pursuant to 25 C.F.R. Part 151. The land-into-trust process can be quite lengthy, even if the acquisition is not for a gaming purpose and there is no controversy surrounding the particular piece of land being taken into trust.[5]

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[1] *See* Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 et seq. (1988).

[2] *Id.*

[3] 25 U.S.C. § 2719(b)(1)(A).

[4] *Id.*

[5] *See generally* 25 C.F.R. pt. 151.

In 1999, the Secretary proposed certain amendments to 25 C.F.R. Part 151.[6] After obtaining extensive comments and undertaking considerable review, final rules embodying the amendments were published in the Federal Register in January 2001.[7] However, following further debate and political maneuvering, these final rules were withdrawn in November 2001.[8] As of Summer 2003, there were no publicly-disclosed plans for the Secretary to reintroduce the amendments or take any further action to revise 25 C.F.R. Part 151.[9]

The greatest controversy – from both a legal and political perspective – involves land-into-trust acquisitions for gaming purposes pursuant to the 25 U.S.C. § 2719(b)(1)(A) exception of IGRA. The bulk of this article will focus on this particular exception.

B. Gaming Must Be Conducted on Indian Lands

Per IGRA, gaming must be conducted on "Indian lands."[10] "Indian lands" include (1) all lands within the limits of any Indian reservation; (2) lands held "in trust" by the United States for the benefit of any Indian Tribe; or (3) lands held by an Indian Tribe subject to restriction by the United States against alienation and over which an Indian Tribe exercises governmental power.[11] The land cannot simply be held in fee by the tribe, but must be viewed as "Indian lands" as defined in IGRA.[12]

Per IGRA, gaming is prohibited on any lands acquired *after* October 17, 1988 (the date IGRA was enacted), *unless* the lands fall into one of several specified exceptions:

1. such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on the date of enactment of this Act [enacted Oct. 17, 1988]; or
2. the Indian tribe has no reservation on the date of enactment of this Act [enacted Oct. 17, 1988] and –
   (A) such lands are located in Oklahoma and –
      (i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

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[6] *See* Acquisition of Title to Land in Trust, 64 Fed. Reg. 17,574 (Apr. 12, 1999).

[7] The proposed amendments would have made the land-into-trust application process easier for "on-reservation" acquisitions. However, the amendments would have required a more detailed analysis and scrutiny of a greater number of criteria for off-reservation acquisitions. *See* Acquisition of Title to Land in Trust, 66 Fed. Reg. 3452 (Jan. 16, 2001).

[8] Acquisition of Title to Land in Trust, 66 Fed. Reg. 56,608 (Nov. 9, 2001).

[9] Telephone interview with Robin Shield, Public Affairs Specialist, Bureau of Indian Affairs (June, 2003).

[10] 25 U.S.C. § 2703(4) (2000); 25 U.S.C. §§ 2710(b)(1), (d)(1) (2000). However, 25 U.S.C. § 2710 was held unconstitutional in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Many states have expressed concern with regard to *Seminole Tribe*. *See, e.g.*, *In re* Hood, 262 B.R. 412 (B.A.P. 6th Cir. 2001) (declining to follow as dicta); Wis. Bell, Inc. v. Pub. Serv. Comm'n of Wis., 27 F. Supp. 2d 1149 (W.D. Wis. 1998) (recognizing disagreement); *In re* O'Brien, 216 B.R. 731 (Bankr. D. Vt. 1998) (following with reservations); Reese v. Michigan, 234 F.3d 1269 (6th Cir. 2000) (recognizing limitation of holding).

[11] 25 U.S.C. § 2703(4) (1988).

[12] *Id.*

(ii) are contiguous to other land held in trust or restricted status by the United States for the Tribe in Oklahoma; or

(B) 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 which such Indian tribe is presently located.[13]

Further exceptions for post-IGRA acquired land include:

(1)(A) 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 it members, and would not be detrimental to the surrounding community, but only if the Governor . . . concurs in the Secretary's determination; or[14]

(1)(B) lands are taken into trust as part of –

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.[15]

Absent the applicability of either an exception under 25 U.S.C. § 2719(a)(1)–(2) or 25 U.S.C. § 2719(b)(1)(B)(i)–(iii), a tribe may undertake gaming on post-IGRA acquired land only pursuant to the two-step Secretarial determination and Gubernatorial concurrence process set forth in 25 U.S.C. § 2719(b)(1)(A).[16]

C. The Office of Indian Gaming Management Checklist Governs Lands Acquired After the Indian Gaming Regulatory Act

Following the passage of IGRA and the sudden prospect of tribes seeking to take land into trust for gaming purposes, the federal government determined a need to delineate specific criteria for gaming situations.[17] As a result, the Office of Indian Gaming Management ("OIGM") prepared a checklist for gaming and gaming-related acquisitions.[18]

For all such situations implicating the two-part Secretarial determination outlined in 25 U.S.C. § 2719(b)(1)(A), the OIGM is responsible for Indian gaming functions and activities delegated to the Secretary pursuant to IGRA.[19] The OIGM also reviews all land-into-trust applications for gaming purposes.[20]

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[13] *Id.* § 2719(a)(1)-(2).

[14] *Id.* § 2719(b)(1)(A).

[15] *Id.* § 2719(b)(1)(B)(i)-(iii).

[16] *See generally id.* § 2719.

[17] *See generally* OFFICE OF INDIAN GAMING MANAGEMENT, U.S. DEP'T OF THE INTERIOR, CHECKLIST FOR GAMING ACQUISITIONS GAMING-RELATED ACQUISITIONS AND IGRA SECTION 20 DETERMINATIONS (Oct. 2001) [hereinafter CHECKLIST] (the OIGM is located in Washington, D.C., and can be contacted at (202) 219-4066). In 2000, the BIA proposed to codify specific rules and regulations governing the land-into-trust process for gaming purposes. *See* proposed 25 C.F.R. pt. 292. Comments were received on the proposed rule through 2002. To date, Congress has taken no action on the proposed rule and it is unknown when or whether Congress will ever take action on it.

[18] *See generally* CHECKLIST, *supra* note 17.

[19] *Id.*

[20] *Id.* at 1.

The Assistant Secretary for Indian Affairs has the authority to approve or disapprove land acquisitions for gaming purposes.[21] The Bureau of Indian Affairs ("BIA") Regional Director with jurisdiction over the land at issue is authorized to accept title in trust for the BIA.[22]

The OIGM Checklist sets forth the procedural steps for taking land-into-trust for gaming purposes. Included in these steps are:

1. Acquisition package must contain complete file of information and documents required by 25 C.F.R. Part 151 (e.g., justification for need of additional land, ownership status of property, legal and physical description of property, plat/map indicating location and proximity of land to reservation, tribal resolution authorizing trust acquisition request, tribe's governing document confirming tribe's authority for resolution, full explanation of intended purpose of land).[23]

2. Acquisition package must also demonstrate compliance with the National Environmental Policy Act ("NEPA") and other applicable federal laws, regulations, and Executive Orders.[24]

3. Notice of the proposed land acquisition shall be given to all state and local governments for the purpose of inviting comments on potential impacts (i.e., regulatory jurisdiction, real property taxes, special assessments).[25]

4. The greater the distance between the acquired land and the reservation, the greater the required justification to demonstrate the anticipated benefits to the tribe. This will require the tribe to prepare a comprehensive economic development plan demonstrating the anticipated financial benefits associated with the land acquisition.[26]

5. Acquisition package must include an "Abstract of Title or Commitment for Title Insurance Policy" covering the property to be acquired. The BIA Regional or Field Solicitor must prepare a preliminary title opinion for the property.[27]

D. Two-Part Secretarial Determination Required

As noted above, for land sought for gaming purposes pursuant to the 25 U.S.C. § 2719(b)(1)(A) exception, the Secretary must make a two-part determination: (1) the gaming operation will be in the "best interest of the Indian tribe and its members" and (2) the gaming operation will "not be detrimental to the surrounding community."[28] In addition to this two-part determination, the governor of the state in which the land is located must concur in the determination.[29]

The initial determination is made by the BIA Regional Director, who is responsible for consulting with the applicant tribe, the state (including the gov-

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[21] *Id.*
[22] *Id.* at 2.
[23] *Id.* at 1-2.
[24] *Id.* at 1.
[25] *Id.* at 3.
[26] *Id.* at 5.
[27] *Id.*
[28] *Id.* at 8.
[29] *Id.*

ernor), and local and other nearby tribal officials.[30] Typically, the Regional Director will issue consultation letters and provide at least 30 days or longer for comments and responses to the letter.[31]

In determining whether the land acquisition is in the "best interest" of the tribe, the OIGM Checklist provides that the tribe must submit the following information for review by the BIA:

1. Projections of income statements, balance sheets, fixed assets accounting, and cash flow statements for the gaming entity pursuant to Generally Accepted Accounting Principles ("GAAP") and the National Indian Gaming Commission ("NIGC") standards for at least a three-year period;

2. Projected tribal employment, job training, and career development;

3. Projected benefits to tribe from tourism and the basis for this projection;

4. Projected benefits to the tribe and its members from the proposed uses of the increased tribal income;

5. Projected benefits to the relationship between the tribe and the surrounding community;

6. Possible adverse impacts on the tribe and plans for dealing with these impacts; and

7. Any other information for the acquisition demonstrating it is in the best interest of the tribe.[32]

In determining whether the acquisition will be detrimental to the surrounding community, the OIGM Checklist provides that consulted officials and the tribe must submit the following information:

1. Evidence of the environmental impact and plans for mitigating this adverse impact;

2. Reasonably anticipated impact on social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community;

3. Income and employment of the surrounding community and the impact on the economic development of the community;

4. Costs of impact to the surrounding community and sources of revenue to accommodate them;

5. Proposed programs for compulsive gamblers and source of funding; and

6. Any other information showing that acquisition is not detrimental to the surrounding community.[33]

Because gaming has become a multi-billion dollar industry for Indian tribes, the land-into-trust process has become very political in recent years.[34]

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[30] *Id.* at 7.

[31] *Id.* at 8.

[32] *Id.* at 8-9.

[33] *Id.* at 9.

[34] At least one state has directly prohibited off-reservation gaming through the enactment of specific legislation. The Arizona Governor is prohibited from concurring in any determination by the Secretary with respect to a post-IGRA off-reservation land acquisition. *See* ARIZ. REV. STAT. ANN. § 5-601(c) (West 1992). This statute was held unconstitutional by *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012 (D. Ariz. 2001), *vacated*, 103 F.3d 1015 (9th Cir. 2002). Based on the Ninth Circuit's decision, this statute is currently valid.

Not surprisingly, federal officials involved in the two-part determination are quite careful, measured, and deliberate in their decision-making process.[35] As noted below, there are few instances, since IGRA was enacted in 1988, where the government permitted a tribe to take off-reservation land into trust for gaming purposes through the Secretarial two-part determination and required Gubernatorial concurrence.[36] Indeed, since IGRA went into effect, state governors have concurred in only three positive two-part Secretarial determinations for off-reservation gaming on trust lands.[37]

E. Relevant Case Law

Case law under the two-part Secretarial exception is relatively sparse.[38] Indeed, through mid-2003, only four federal decisions have dealt with the exception under 25 U.S.C. § 2719(b)(1)(A).[39] Of these cases, the Indian tribes have unsuccessfully challenged the Gubernatorial concurrence (1) on constitutional grounds; (2) on grounds that it is excessive because there is a valid Tribal-State Compact; and (3) on grounds of improper administrative conduct.[40]

1. Constitutionality

In *Confederated Tribes of Siletz Indians of Oregon v. United States*,[41] the Secretary denied the Siletz' gaming application because the Governor of Oregon did not concur in the Secretary's determination. The Ninth Circuit Court of Appeals held that the gubernatorial concurrence did not violate the separation of powers doctrine.[42] The Court rationalized that, under the Property Clause of the Constitution, Congress is empowered to acquire land in trust for Indians.[43] Thus, the power delegated to the Secretary under IGRA is a legislative power. This delegation of power to the Secretary is then limited by the contingent requirement of the governor's approval.[44] The Court found that this limitation did not undermine an executive function, "but merely place[d]

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[35] *See* discussion *infra* Part II.F.

[36] *See* discussion *infra* Part II.F.2.

[37] Although there are only three instances of land-into-trust approvals under 25 U.S.C. § 2719(b)(1)(A), there are several tribal casinos operating off-reservation. For example, the Seneca Nation operates a casino in Niagara, New York. The tribe obtained its land through a land claim settlement, as opposed to the Secretarial two-part exception. Telephone interview with Tom Hartman, Financial Analyst, Office of Indian Gaming Mgmt. (June 2003). *See also* Tim Herdt & Ryan Alessi, *Indians Travel Far from Home in Quest for Casinos*, VENTURA COUNTY STAR, May 6, 2001, at A1.

[38] There is a developed body of case law addressing other exceptions under 25 U.S.C. § 2719, such as restoration. *See, e.g.*, City of Rossville v. Norton, 219 F. Supp. 2d 130 (D.D.C. 2002) (holding that the United States' acceptance, pursuant to Auburn Indian Restoration Act, of a 50-acre parcel of land into trust for the purpose of operating a casino constituted a "restoration of lands" for the tribe within the meaning of the restoration of lands exception). The restoration of lands exception entails a situation where the tribe has lands restored to it as a result of the tribe being restored to federal recognition.

[39] *See* discussion *infra* Parts II.E.1-3.

[40] *Id.*

[41] 110 F.3d 688, 691 (9th Cir. 1997), *cert. denied*, 522 U.S. 1027 (1997).

[42] *Id.* at 696.

[43] *Id.* at 694.

[44] *Id.* at 696.

restrictions on the Executive's ability to choose which land [was] to be taken into trust for gaming purposes."[45]

The Siletz argued, alternatively, that the gubernatorial concurrence violated the Appointments Clause of the Constitution by providing the governor authority to act as an Officer of the United States "without being appointed through proper channels."[46] The Court found (1) IGRA did not vest in the governor "primary responsibility" for determining the applicability of IGRA's exceptions, and (2) the governor did not exercise "significant authority" under IGRA.[47] Consequently, the responsibility and authority vested in the governor did not rise to the level of a United States Officer.[48] As a result, the Court held that the concurrence requirement did not violate the Appointments Clause.[49]

In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*,[50] the plaintiff tribes filed suit alleging that the gubernatorial concurrence constituted a Congressional breach of trust and violated the non-delegation doctrine, the Appointments Clause, and the Tenth Amendment.[51]

The United States District Court for the Western District of Wisconsin granted defendants' motion for judgment on the pleadings.[52] The Court found that plaintiffs' breach of trust claim contained two fatal flaws: first, the gubernatorial concurrence requirement was not a congressional breach because it was enacted pursuant to the federal government's plenary powers over Indians; second, such a claim was barred by the federal government's sovereign immunity.[53] The Court also held that the gubernatorial concurrence requirement did not violate the Constitution based on the following:

> [T]he 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' 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.[54]

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[45] *Id.*

[46] *Id.*

[47] *Id.* at 697-98.

[48] *Id.* at 698.

[49] *Id.*

[50] 259 F. Supp. 2d 783 (W.D. Wis. 2003). *Lac Courte* involved the same parties and dispute as discussed below in *Sokaogon Chippewa Community v. Babbitt*, 961 F. Supp. 1276 (W.D. Wis. 1997). Subsequent to *Sokaogon*, the parties reached a settlement and the Secretary ultimately determined that plaintiffs' proposal to conduct gaming was in the best interest of the tribes and would not be detrimental to the surrounding community. The governor, however, did not concur with the Secretary's determination; therefore, plaintiffs' application was denied.

[51] *Id.* at 786.

[52] *Id.*

[53] *Id.* at 791.

[54] *Id.* at 787.

2. Tribal-State Compacts

In *Keweenaw Bay Indian Community v. United States*,[55] the Sixth Circuit Court of Appeals addressed whether gaming authorized by a valid state-tribal compact was also governed by U.S.C. § 2719(b)(1)(A). The Keweenaw Bay Indian Community ("Community") and the State of Michigan entered into a tribal-state compact authorizing Class III gaming activities on the tribe's "Indian lands."[56] The compact became effective only upon the endorsement by the state governor and approval by the Secretary.[57]

The Community argued that compliance with Section 2719 was not required for two reasons.[58] First, the Community argued that the compact, not IGRA, authorized and regulated the gaming activities. "[T]hus the gaming at issue was not regulated by Section 2719 [and its exceptions], because [Section 2719] applies only to 'gaming regulated by' the IGRA."[59] Second, the Community had already obtained endorsements from both the Secretary and the governor.[60] Therefore, it would be "nonsensical" to require the tribe to further comply with Section 2719(b)(1)(A).[61]

Rejecting the Community's interpretation of IGRA, the Court held that Section 2719 applied to Class III gaming authorized by a valid tribal-state compact.[62] In the Court's view, the Community overlooked that the compact was regulated by IGRA because "(1) the compact mechanism is created and governed by the IGRA . . . and (2) provisions of the IGRA other than the compact provisions regulated compact-authorized gaming."[63] Accordingly, the Community was required to comply with Section 2719(b)(1)(A).[64] This holding required the Community to obtain two sets of approvals by the Secretary and governor. The Court opined that this outcome was logical since the required approvals were "of different natures."[65]

3. Administrative Procedure

In *Sokaogon Chippewa Community v. Babbitt*,[66] plaintiffs submitted a land-into-trust application to the Secretary pursuant to Section 2719(b)(1)(A). The Secretary denied the application, citing strong opposition from neighboring communities and elected officials.[67] Moreover, the Secretary determined that

[55] 136 F.3d 469, 474 (6th Cir. 1998), *cert. denied*, 525 U.S. 929 (1998).

[56] *Id.* Class III gaming is defined in IGRA as all forms of gaming that are not Class I gaming or Class II gaming as these terms are defined in 25 U.S.C. § 2703(6)-(7). Examples of Class I games include social games played for minimal prizes or traditional forms of Indian gaming as part of a ceremony. 25 U.S.C. § 2703(6). Generally, bingo, lotto, and punch boards are considered Class II games. 25 U.S.C. § 2703(7). Please refer to 25 U.S.C. § 2703(6)-(7) for the complete list of Class I and II games.

[57] *Keweenaw Bay*, 136 F.3d at 471.

[58] *Id.*

[59] *Id.* at 472.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 476.

[64] *Id.*

[65] *Id.*

[66] 961 F. Supp. 1276, 1278 (W.D. Wis. 1997).

[67] *Id.*

the proposed casino would negatively impact nearby casinos.[68] Plaintiffs filed suit alleging that improper contact and political pressure from high-level officials tainted the Secretary's decision.[69]

Plaintiffs alleged a variety of improper contacts, including two meetings held outside plaintiffs' presence.[70] In the first meeting, representatives of the Secretary met with rival tribes who opposed plaintiffs' planned casino.[71] Although on its face this meeting was not improper, the Secretary did not notify plaintiffs of the meeting until six weeks later.[72] In the second meeting, the opposing tribes and Congressional representatives met with the Democratic National Committee Chairman and White House staff officials. Again, plaintiffs were not included in, or given notice of, this meeting.[73]

In addition to these meetings, plaintiffs alleged improper political pressure.[74] As part of this, a lobbyist for the rival tribes wrote to Harold Ickes, White House Deputy Chief of Staff for Policy and Political Affairs, indicating that the opposing tribes were important contributors to the President's political party.[75] Moreover, a Secretary official faxed two letters to a White House staffer: the first letter indicated that the Secretary decided to deny the application; the second letter indicated that the Secretary "was reviewing the matter with 'great care.'"[76] The complete turnabout between the OIGM's issuance on June 8, 1995, which recommended approval, and the Secretary's denial only weeks later raised suspicion.[77]

The court concluded from these two letters that, "[t]he mere fact that Sibbison sent two somewhat contradictory letters . . . seems almost to allow Ickes to choose which direction he wanted the department to take."[78] Taking all circumstances into consideration, the Wisconsin Federal Court found there was a sufficiently strong showing of improper influence and, thus, plaintiffs were entitled to extra-record discovery and examination of Secretarial personnel.[79] In evaluating whether plaintiffs made the requisite "strong showing," the Court focused on the competing inferences that could be drawn from the evidence.[80] Although the contacts by themselves did not satisfy the "strong showing" standard, in combination "they arouse[d] suspicion" and justified the burden of depositions and discovery.[81]

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[68] *Id.*
[69] *Id.*
[70] *Id.* at 1282.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.* at 1278.
[75] *Id.* at 1282.
[76] *Id.* at 1283.
[77] *Id.* at 1284.
[78] *Id.* at 1283.
[79] *Id.* at 1278.
[80] *Id.* at 1281.
[81] *Id.* at 1280-81.

F. Application of Law to Facts

1. Hurdles to Overcome in Satisfying Section 2719(b)(1)(A) Criteria

Given the complex web of federal, state, local, and tribal interests involved, the land-into-trust process under 25 U.S.C. § 2719(b)(1)(A) is long and arduous. As noted above, a tribe must overcome a number of obstacles before securing the Secretary's approval for off-reservation gaming.[82]

a. Support from Local Communities

Although local communities are statutorily powerless under 25 U.S.C. § 2719, "their support can make or break attempts to establish new Indian lands for gaming where none existed before."[83] A tribe must demonstrate that taking land into trust will not negatively impact the community's social structure, services, economic development, housing, and community character.[84] According to George Skibine, Director of the OIGM, "[w]hat we've found is that the tribes that have done their homework show they've gained community support."[85]

Gaining local support begins with choosing a location that satisfies the most people in the community. Most communities are concerned with the crowds and traffic that a casino would invariably attract.[86] For example, critics of the Federated Indians of Graton Rancheria contend that the tribe's proposed casino site in California would create an environmental catastrophe.[87] They allege that, not only would a casino disrupt current wetlands restoration, it would further harm the wetlands because it would be a "spur for more growth in the area."[88]

b. Benefits to the Tribe

In determining whether the land acquisition is in the "best interest" of the tribe, the tribe must demonstrate that it and its members will reap benefits from the gaming operation.[89] Benefits include tribal employment, job training, and development. Further, the Secretary will closely scrutinize casino profit distribution.[90] Pursuant to the OIGM Checklist, the BIA will review projections of income statements, balance sheets, fixed assets accounting, and cash flow statements of the gaming entity for at least three years.[91] The BIA will also review projected benefits to the tribe and its members from the proposed uses of the increased tribal income.[92]

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[82] *See generally* 25 U.S.C. § 2719 (1988).
[83] Tim Herdt & Ryan Alessi, *Indians Travel Far from Home in Quest for Casinos*, VENTURA COUNTY STAR, May 6, 2001, at A1.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] Pamela J. Podger, *Landless Tribe Seeks Site for Casino*, S.F. CHRON., June 16, 2002, at B4.
[88] *Id.*
[89] CHECKLIST, *supra* note 17, at 8.
[90] *Id.* at 8-9.
[91] *Id.*
[92] *Id.*

c. Tribal Competition

Tribes with existing casinos sometimes oppose other tribes seeking to establish nearby gaming facilities.[93] There are instances of rival tribes vying to acquire the same piece of land.[94] For example, the Chemehuevi Indians of Needles, California, and the Los Coyotes Band of Cahuilla both want to secure an off-reservation casino site in Barstow, California.[95] Los Coyotes won the city's blessing to build a $150 million hotel-casino. Nevertheless, the Chemehuevi have asserted they have aboriginal ties to the area and therefore should have priority rights to use the land at issue.[96]

d. Reluctance of Secretary and Administration to Allow Off-Reservation Gaming

With the change in administration after the Fall 2000 election, the Secretary has grown progressively more hostile towards off-reservation gaming.[97] In a letter last year to New York Governor George Pataki, pertaining to the approval of certain tribal-state compacts in New York, Secretary Gale Norton said she was bothered that "tribes are increasingly seeking to develop gaming facilities in areas far from their reservations."[98] In the last year, the Secretary refused to approve a tribal-state compact between the Jena Band of Choctaws and Louisiana, in large part because the proposed casino was 150 miles from the tribe's ancestral base.[99]

e. Governor Approval

Even when a tribe obtains approval from the Secretary, the governor of the affected state, ultimately, has veto power.[100] For instance, both the Sault St. Marie Tribe of Chippewa Indians of Michigan and the St. Regis Band of Mohawk of New York met the Secretary's two-part test, but the respective governors did not concur. Consequently, the tribes were unable to open off-reservation gaming operations.[101]

2. Specific Instances of Section 2719(b)(1)(A) Land-Into-Trust Acquisition

a. Successes

The Keweenaw Bay Indian Community of the Lake Superior Bands of Chippewa Indians successfully obtained the Secretary's approval and gover-

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[93] Thomas Hargrove, *American Indians See Political Gains*, ALBUQUERQUE TRIB., Sept. 14, 2002, at A1.

[94] Ben Schnayerson & Chuck Mueller, *Second Tribe Lays Claim for Barstow Casino*, SAN BERNARDINO COUNTY SUN, June 4, 2003.

[95] *Id.*

[96] *Id.*

[97] *See, e.g.*, Steve Wiegand, *Big-Money Dreams Drive Indian Casinos to Cities*, SACRAMENTO BEE, Dec. 8, 2002, at A1.

[98] *Id.*

[99] *Id.*

[100] 25 U.S.C. § 2719(b)(1)(A) (1988).

[101] Telephone interview with Tom Hartman, Financial Analyst, Office of Indian Gaming Mgmt. (June 2003).

nor's concurrence.[102] The Community operates Ojibwa Casino II in Chocolay Township, seventeen miles east of Marquette, Michigan.[103]

The Forest County Potawatomi were also successful and opened a gaming establishment in Milwaukee, Wisconsin, in 2000.[104] Tribal members and local officials are considering the possibility of relocating the Potawatomi's casino to downtown Milwaukee.[105] The move would require the proposed site to be declared as federal trust land.[106] The proposed relocation entails swapping the land held in trust for the tribe at its current location with the downtown site. The Secretary has never considered such a land swap.[107]

The Kalispell Tribe also successfully had land put into trust for gaming purposes in Airway Heights, Washington, in 1998, after an exhaustive administrative process.[108]

b. Pending Applications

Currently, there are a number of tribes that have filed applications with the Secretary or are considering such action.[109] For example, the Cayuga Nation of New York recently filed an application to take a parcel of land adjacent to the Monticello Raceway into trust.[110] The Ho-Chunk Nation, located in Wisconsin, also unveiled plans early in 2003 for a $120 million casino in Illinois.[111] The Ho-Chunk Nation has not obtained the Secretary's approval.[112] Further, the Governor of Illinois expressed his opposition to such a tribal casino.[113] Additionally, as noted above, the Los Coyotes Tribe is seeking to build a casino in Barstow, California, on non-reservation land.[114]

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[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] Steve Schultze & Dave Umhoefer, *Casino Move Has Key Support*, MILWAUKEE J. SENTINEL, May 28, 2003, at A1.

[106] *Id.*

[107] *Id.*

[108] Tracy Ellig, *Locke Defends Approval of Tribal Casino*, SPOKESMAN REV. (Spokane, WA), July 10, 1998, at A1.

[109] Telephone interview with Tom Hartman, Financial Analyst, Office of Indian Gaming Mgmt. (June 2003).

[110] *Lead Agency Confirms Updated Environmental Assessment for Empire Resort's Cayuga Casino at Monticello Raceway*, BUS. WIRE, Apr. 21, 2003.

[111] Kimbriell Granderson, *Governor Can Block Ho-Chunk Project Federal Officials Say Blagojevich's Veto Power Can't Be Appealed*, CHI. DAILY HERALD, June 6, 2003, at F1.

[112] *Id.*

[113] *Id.*

[114] Other tribes in California are attempting to construct off-reservation casinos as well. These tribes, however, are not pursuing their land acquisitions under 25 U.S.C. § 2719(b)(1)(A). The Upper Lake Tribe of Pomo Indians proposes to open a casino in Sacramento. The Pomos claim they have an ancestral claim to the land based on their historical ties to the area. The Lytton Band of Pomo Indians had land put into trust near Oakland through Congressional action. The Lytton Band's trust application, which was the subject of considerable litigation, was approved and the land was finally taken into trust on October 9, 2003. County of Contra Costa, State of California Recorders Office, Serial No. 2000-566433, *available at* Contra Costa County, California Recorders Office, http://www.criis.com/webtemp/131.216.173.165/27629.00104155.f1.htm (last visited Mar. 02, 2004).

III. OFF-RESERVATION GAMING: OTHER OPTIONS

Tribes have explored other options to conduct "off-reservation" gaming without physically leaving the reservation proper. The first instance involved the Coeur D'Alene Tribe of Idaho's attempt to conduct a national lottery. The other involves the fast-growing internet gaming industry.

A. *Coeur D'Alene National Lottery*

1. *Overview*

For a short period of time in the 1990s, the Coeur D'Alene Tribe operated a national lottery that enabled off-reservation participants to purchase lottery tickets via the internet and telephone. Shortly after deploying its gaming website and providing toll-free access to the lottery, the tribe was subjected to numerous lawsuits regarding the legality of the lottery under IGRA.

As a result of the litigation, the tribe terminated the lottery shortly after it began operation. Due to the discontinuation of the lottery, the suits against the tribe were settled and the courts have not had an opportunity to decide whether the off-reservation aspects of the lottery, and thus off-reservation gaming activities in general, are authorized by IGRA.

2. *Chronology of the* Coeur D'Alene *Cases*

The Coeur D'Alene Tribe is a federally recognized, northern Idaho-based Indian Tribe. In 1994, the tribe sought to establish casino-type gaming activities on its reservation.[115] Because IGRA requires a tribe to negotiate a compact with the state for casino-style gaming on Indian land, the tribe entered into negotiations with the State of Idaho.[116] The state authorized the tribe to conduct a lottery and pari-mutuel betting on horse, mule, and dog races.[117] The state refused to authorize anything more, however, on the basis that any other type of gaming activity was prohibited by the state's constitution, law, and public policy.[118]

The tribe brought suit against the State in the United States District Court for the District of Idaho.[119] The court agreed with the State's position and held that the tribe could only offer the two gaming activities authorized by the State.[120]

Thereafter, the tribe entered into a management contract with UNISTAR Entertainment, Inc., to administer the tribe's lottery, U.S. Lottery.[121] As part of the contract, UNISTAR developed and maintained the tribe's internet gaming site, located at www.uslottery.com.[122] The tribe housed the servers that hosted

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[115] *See* Coeur D'Alene Tribe v. Idaho, 842 F. Supp. 1268, 1269 (D. Idaho 1994).
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* at 1283.
[121] *See* AT&T Corp. v. Coeur D'Alene Tribe, 295 F.3d 899, 902 (9th Cir. 2002) [hereinafter AT&T II].
[122] *See* Missouri v. Coeur D'Alene Tribe, 164 F.3d 1102, 1104 (8th Cir. 1999).

the U.S. Lottery site and the software that selected the winning numbers on the Coeur D'Alene reservation.[123]

To facilitate greater access to U.S. Lottery, the tribe, through UNISTAR, negotiated with AT&T Corporation to provide lottery participants toll-free interstate telephone service.[124] The lottery was available in thirty-three states and the District of Columbia.[125] The website and toll-free telephone service allowed users to purchase lottery tickets without physically being on the tribe's reservation.[126]

To purchase a lottery ticket, users opened an account either by registering a credit card on the website or forwarding funds to the tribe.[127] The lottery tickets remained on the reservation.[128] In addition, the winnings were credited to the user's on-reservation account, and the user could obtain the funds in person or through the mail.[129]

As required by IGRA, the tribe submitted the UNISTAR management contract – which made clear that off-reservation players could access U.S. Lottery – to the NIGC for approval.[130] The NIGC Chairman approved the contract and specifically found that U.S. Lottery did not violate IGRA.[131]

Shortly after the lottery was announced, attorneys general from numerous states, including Missouri, notified AT&T that providing toll-free service for the lottery would violate federal and state laws.[132] Upon receiving these notices, AT&T informed Coeur D'Alene that it would not provide service outside of Idaho until the tribe resolved any legal problems with these states.[133] The tribe filed suit in the Coeur D'Alene Tribal Court to have the lottery declared legal and to have AT&T enjoined from refusing to provide the toll-free telephone service.[134] The Tribal Court granted summary judgment for the tribe.[135] The Coeur D'Alene Tribal Appellate Court affirmed the Tribal Court's decision.[136]

In August 1997, AT&T filed suit in the United States District Court for the District of Idaho to overturn the Tribal Court's decision.[137] The District Court affirmed its earlier decision that states may prohibit or regulate off-reservation gaming.[138] According to the court, the lottery was protected by IGRA preemption only to the extent that the activities constituting the lottery occurred on the

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123 *See* AT&T Corp. v. Coeur D'Alene Tribe, 45 F. Supp. 2d 995, 998 (D. Idaho 1998) [hereinafter AT&T I].
124 *Id.*
125 *Id.*
126 *Id.*
127 *Id.*
128 *Id.*
129 *Id.*
130 *See* AT & T II, 295 F.3d at 902.
131 *Id.*
132 *Id.*
133 *See* AT&T I, 45 F. Supp. 2d at 997.
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.* at 999-1000.

Coeur D'Alene's reservation.[139] The court found that because a telephone participant purchased a lottery ticket off the reservation, the toll-free service resulted in off-reservation gaming activities.[140] Thus, the court held that the lottery was outside the preemptive force of IGRA and subject to state regulation.[141] Accordingly, AT&T was not required to provide the 800-number service in states prohibiting the lottery.[142]

At about the same time, the Attorney General of Missouri filed two state court actions to enjoin the tribe and UNISTAR from allowing Missouri residents access to the lottery website on the basis that internet gambling is illegal in Missouri.[143] Coeur D'Alene removed the cases to the United States District Court for the Western District of Missouri.[144] The District Court dismissed the cases, finding that IGRA completely preempted state law.[145]

Missouri appealed the District Court's decision to the United States Court of Appeals for the Eighth Circuit.[146] Similar to the Idaho District Court holding, the Eighth Circuit held that because IGRA regulates only those gambling activities occurring on Indian lands, the preemptive force of IGRA is relevant only to gaming *on* reservations.[147] The Court remanded the case to the District Court to determine whether the internet lottery was conducted on Indian land.[148]

In March 2000, Coeur D'Alene appealed the Idaho District Court's decision to the United States Court of Appeals for the Ninth Circuit.[149] The Ninth Circuit reversed the District Court's decision, holding that because the NIGC approved the tribe's management contract with UNISTAR – which included the national lottery – the lottery was legal under IGRA until the NIGC's determination was successfully challenged.[150]

Following the issuance of the Ninth Circuit opinion in 2002, the United States and fifteen states brought suit in the United States District Court for the District of Columbia to challenge the NIGC's decision that the lottery's off-reservation gaming aspects were permitted under IGRA.[151] The suit was ultimately settled because the tribe no longer maintains a lottery.[152] In fact, the lottery was terminated almost immediately after the tribe was initially sued by

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[139] *Id.* at 1000.

[140] *Id.* at 1002.

[141] *Id.* at 1005.

[142] *Id.* at 1000.

[143] *See* Missouri v. Coeur D'Alene Tribe, 164 F.3d 1102, 1104 (8th Cir. 1999).

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* at 1109.

[148] *Id.*

[149] *See* AT&T II, 295 F.3d 899, 899 (9th Cir. 2002).

[150] *Id.* at 909-10.

[151] Telephone interviews with Ray Givens, former Outside Counsel to Coeur D'Alene Tribe; Alice Koskella, In-House Counsel to Coeur D'Alene Tribe; Patricia Schwartzchild, current Outside Counsel to Coeur D'Alene Tribe (June, 2003).

[152] *Id.*

AT&T.[153] Based on this, the Eighth Circuit case was never remanded to the District Court.[154]

3. *Impact of* Coeur D'Alene *Litigation*

In the end, the *Coeur D'Alene* cases do not provide substantive guidance as to whether "off-reservation" gaming through the internet or other similar means is permissible under IGRA and, thus, outside the state's regulatory power.[155] The legality of internet and telephonic gaming will depend on whether the particular court views the activity as occurring *on* Indian land.[156]

The Eighth Circuit and District of Idaho decisions provide persuasive reasoning that IGRA only applies to gaming activities *on* Indian land. Thus, a state may have success in seeking to enjoin internet gaming because, even though the server, software, and the lottery tickets are physically housed on the reservation, the most significant part of internet gaming is the wager or purchase of the ticket, which occurs in a place other than the reservation.[157] Some states, in negotiating the tribal-state compacts, have included specific provisions prohibiting internet gaming by tribes outright.[158]

Moreover, in almost every session in recent years, the United States Congress has considered various legislation that would generally prohibit internet gaming.[159] Senator Jon Kyl, for instance, introduced the Internet Gaming Prohibition Act of 1999 ("IGPA") to prohibit "the use [of] the Internet or any other interactive computer service . . . to place [or] receive a . . . bet or wager. . . ."[160] One amendment to the IGPA specifically required that gaming activities regulated by IGRA must be "physically located on Indian Lands."[161] While none of the proposed legislation had been enacted as of mid-2003, Congress appears intent on passing some form of an internet gambling prohibition.[162]

B. *Internet Gaming Activities on Canadian Reserve Lands*

1. *Background of Mohawk Internet Technologies*

Presently, the author is unaware of any Native American Tribes in the United States seeking to conduct gaming operations via the internet. However, across the United States border in Canada, the Mohawks of Kahnawake Indian Tribe, located near Montreal, operate Mohawk Internet Technologies ("MIT"),

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153 *Id.*

154 *Id.*

155 *See Coeur D'Alene* discussion generally *infra* Parts III.A.1-2.

156 *Id.*

157 *Id.*

158 *See, e.g.*, INTERNATIONAL MASTERS OF GAMING LAW, The Indian Community-State of Arizona Gaming Compact, *available at* http://www.gaminglawmasters.com/jurisdictions/arizona/compact/compact.final.pdf (last visited Jan. 10, 2004).

159 *See* Tom Lundin, Jr., *The Internet Gambling Prohibition Act of 1999: Congress Stacks the Deck Against Online Wagering but Deals in Traditional Gaming Industry High Rollers*, 16 GA. ST. U. L. REV. 845, 849 (2000).

160 *See* S. 692, 106th Cong. § 2 (1999); *see also* David B. Jordon, *Rolling the Dice on the Cyber-Reservation: The Confluence of Internet Gaming and Federal Indian Law*, 24 AM. INDIAN L. REV 455, 467 (2000).

161 *See* 145 CONG. REC. 14,865 (1999) (amending S. 692, 106th Cong. § 2 (1999)).

162 *Id.*

an internet service provider for numerous internet gaming websites.[163] While the Mohawk Tribe does not own these gaming websites directly, the tribe licenses the sites and provides the sites with high-speed, broadband internet access.[164]

The Mohawks of Kahnawake have consistently exercised sovereignty and jurisdiction over their territory.[165] The Mohawk Council of Kahnawake (the "Council"), the governing body that oversees the tribal community, created laws and institutions necessary for an orderly society including a Court, police force, and fire department.[166] The Council has also created and empowered numerous regulatory agencies, including the Kahnawake Gaming Commission (the "Commission").[167]

In 1998, the Council became aware of great economic opportunities in the interactive gaming industry.[168] The Council began taking advantage of these opportunities on January 5, 1999, when it formally created MIT.[169] Through MIT, a wholly-owned entity, the tribe saw an opportunity to ". . . conduct such activities as are required to develop, manage, operate and administer Internet commerce and related technologies within the Mohawk Territory of Kahnawake. . . ."[170] The MIT company operates a large facility that offers a range of services to e-commerce clients.[171] Many of these clients operate gaming websites that fall under the Commission's regulation.[172]

In addition to realizing the potential for economic growth particular to interactive gaming, the Council recognized a need for regulation of this new industry.[173] On July 8, 1999, the Commission enacted the Kahnawake Regulations Concerning Interactive Gaming.[174] The Commission understood the global implications of interactive gaming and the relative infancy of Canadian law as to internet activity.[175] As such, the regulations were intended to ". . . serve as a basis for the harmonization of regulatory schemes concerning interactive gaming in other jurisdictions and for co-operation and mutual assistance between the Kahnawake Gaming Commission and other regulatory bodies."[176]

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[163] *See* MOHAWK INTERNET TECHNOLOGIES, *Philosophy of MIT*, *available at* http://www.mohawk.ca/about.php (last visited Jan. 10, 2004).

[164] *Id.*

[165] Murray Marshall, *Kahnawake*, *in* INTERNET GAMBLING REPORT V: AN EVOLVING CONFLICT BETWEEN TECHNOLOGY, POLICY AND LAW 321, 322 (Anthony N. Cabot ed., 2002).

[166] *Id.*

[167] The Council established the Commission by the KAHNAWAKE GAMING LAW in 1996: Mohawk Council Resolution No. 26/1996-97. For more information, *see* http://kahnawake.com/gamingcommission/ (last visited Mar. 01, 2004).

[168] Marshall, *supra* note 165, at 322.

[169] *Id.*

[170] Mohawk Council Resolution No. 62/1998-99.

[171] Marshall, *supra* note 165, at 323.

[172] *Id.*

[173] *Id.*

[174] KAHNAWAKE GAMING COMMISSION, *Kahnawake Regulations Concerning Interactive Gaming*, *available at* www.kahnawake.com/gamingcommission/forms/kgcregs.pdf (last visited Jan. 10, 2004).

[175] Marshall, *supra* note 165, at 323.

[176] KAHNAWAKE GAMING COMMISSION, pt. 1, § 3, *available at* http://www.kahnawake.com/gamingcommission/forms/kgcregs.pdf (last visited Jan. 10, 2004).

2. *Canadian Law Regarding Internet Gaming and Self-Government by Indigenous Peoples*

The Criminal Code of Canada (the "Code"), at present, does not adequately deal with interactive gaming.[177] The Code does place a general prohibition on gaming in Canada, but provides an array of exceptions.[178] The Canadian federal government has displayed little interest in regulating internet gambling. Private member's *Bill C-353*, "[a]n Act to amend the Criminal Code (Internet lotteries)" would have incorporated the regulation of interactive gaming into the Code, but was unsuccessful in the Canadian Parliament.[179] In 1999, the Canadian Radio-Television and Telecommunications Commission released a public notice stating that it would not regulate internet activities either.[180]

Canadian law appears to be moving towards a system of greater autonomy for indigenous peoples and their communities.[181] The Indian Act,[182] first enacted by the federal government in 1850, established a regulatory scheme for all issues involving indigenous peoples in Canada.[183]

The Indian Act is slowly being replaced, however, by a system of negotiation and agreements between the federal government and indigenous communities.[184] Canada created a constitutional underpinning for this process by adding Section 35(1) to the Canadian Constitution Act ("Section 35(1)"), which states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[185] The Supreme Court of Canada has consistently held that indigenous communities enjoy a degree of autonomy as to certain activities within their territories under Section 35(1).[186]

3. *Kahnawake's Stance as to Its Internet Gaming Activities*

Murray Marshall, legal counsel to the Mohawk Council of Kahnawake and the Kahnawake Gaming Commission, and a member of the International Masters of Gaming Law, has stated that "Kahnawake's jurisdiction to conduct, facilitate and regulate gaming and gaming-related activities is a facet of the right it has as a community of indigenous peoples to regulate and control economic development activities that take place within or from its territory and, more fundamentally, to govern its own affairs."[187] If necessary, Kahnawake believes it can defend its exercise of jurisdiction in this area as a valid "aborigi-

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[177] Marshall, *supra* note 165, at 326.
[178] *See generally* Criminal Code, R.S.C., ch. C-46, § 197 et seq. (1985) (Can.).
[179] The bill was proposed by Dennis J. Mills (Lib. Broadview-Greenwood) in 1996, but died "on the order paper" in 1997 when Parliament was dissolved.
[180] Marshall, *supra* note 165, at 326.
[181] *Id.* at 327-28.
[182] *See generally* Indian Act, ch. 1-5, 1985 S.C. (Can.).
[183] *Id.*
[184] Marshall, *supra* note 165, at 327.
[185] Constitution Act, R.S.C., ch. 11, § 35(1) (1985) (Can.).
[186] *See, e.g.*, R. v. Van der Peet, [1996] 2 S.C.R. 507; R. v. N.T.C. Smokehouse Ltd., [1996] 2 S.C.R. 672; R. v. Gladstone, [1996] 2 S.C.R. 723 (cases applying the test as to whether an "aboriginal right" exists under Section 35(1)).
[187] Marshall, *supra* note 165, at 325.

nal right" under Section 35(1).[188] In *R. v. Van der Peet*,[189] the Supreme Court of Canada set out the test that would be used to determine whether a particular activity was an "aboriginal right" under Section 35(1). In that case, the Court held that "[t]o be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[190] For purposes of this "integral to a distinctive culture" test, the Court defined a practice as "integral" if it is ". . . of central significance to the aboriginal society in question – one of the things which made the culture of the society distinctive."[191] The *Van der Peet* Court also concluded that the practices constituting "aboriginal rights" are those that existed before contact with European society.[192]

Kahnawake contends that conducting, facilitating, and regulating internet gambling qualifies as an "aboriginal right" under the *Van der Peet* test.[193] Murray Marshall points to a great deal of evidence that a tradition of regulated wagering and gaming existed for hundreds of years in Iroquoian culture of which the Mohawks of Kahnawake were a part.[194] He believes that the essential requirements set forth by the *Van der Peet* Court can be satisfied because:

> (1) There is a pre-contact history of gaming, games of chance and wagering among the [Kahnawake] people; (2) The existence of such games and wagering were not incidental to [Kahnawake] culture, but in fact were integral to the culture and formed part of its rituals and mythology; and (3) The games of chance and wagering were regulated by unwritten codes of conduct and by elaborate rituals that in effect constituted the "rules of the game." Failure to abide by the unwritten rules would give rise to a right of remedy on the part of the aggrieved party and corresponding punishment against the offending party.[195]

IV. CONCLUSION

The legal and political challenges faced by tribes seeking to engage in "off-reservation" gaming are formidable. As a result, the expansion of tribal gaming through "off-reservation" acquisitions will continue to be slow and deliberate, at best. Although the internet may provide new opportunities concerning "off-reservation" gaming, tribes in the United States, at least, will likely face considerable opposition in the near term if any attempt to engage in gaming operations through such means is undertaken.

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[188] Note that Kahnawake believes this argument will likely be unnecessary because the governments of Canada and Quebec have committed to dispute resolution through negotiation and agreement. Kahnawake is confident that the federal and provincial governments will address this matter in the same way, to the extent necessary. *Id.* at 334.

[189] R. v. Van der Peet, [1996] 2 S.C.R. 507.

[190] *Id.* at 509.

[191] *Id.*

[192] *Id.*

[193] Marshall, *supra* note 165, at 329-31.

[194] *Id.*

[195] *Id.* at 331.