INDIAN GAMBLING IN OHIO:
A NON-ISSUE FOR ISSUE SIX

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INTRODUCTION – The Indian Gaming Regulatory Act (IGRA) of 1988 requires that federally authorized tribal gambling must be conducted on "Indian lands," which the statute defines as

> (1) lands within an Indian reservation; or
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> (2) lands held in trust by the United States for the benefit of a tribe or individual Indian.[1]

At present, there are *no* Indian reservations in Ohio and there are *no* Indian "trust" lands in Ohio. Furthermore, there are *no* federally-recognized Indian tribes located in Ohio.

It is possible – although extremely unlikely – that a group of Indians situated in Ohio may become a federally-recognized tribe, thereafter receive a land base as a reservation, and qualify to operate gaming under the IGRA. The federal government, however, is *not* actively considering any petitions for recognition from Indians in Ohio.

It is also possible – although extremely unlikely – that a federally-recognized tribe located in a state other than Ohio may acquire lands in Ohio, convince the federal government to take and hold such lands in trust for the tribe, and otherwise be permitted to operate a gaming establishment on such lands. One tribe, the Eastern Shawnee Tribe of Oklahoma, is currently seeking to establish casinos in Ohio pursuant to the IGRA. The United States, however, has *not* agreed to hold lands in trust in Ohio for the benefit of the Eastern Shawnee Tribe, and the Tribe has *not* satisfied any of the other statutory and regulatory conditions necessary in order to bring Indian gambling to Ohio.

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[1] Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. §§ 2701-2721. 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").

OVERVIEW – The purpose of this paper is two-fold: (1) to describe the statutory and regulatory requirements that must be satisfied in order for an Indian tribe to establish a casino in Ohio; and (2) to assess the likelihood of Indian gambling in Ohio. As described below, the Indian Gaming Regulatory Act generally prohibits tribal gaming on land acquired in trust after October 17, 1988 (the statute's effective date), and provides for only limited exemptions from this prohibition. Furthermore, the regulations promulgated by the United States Department of the Interior make it extremely difficult (1) for an Indian group within Ohio to obtain federal recognition as an Indian tribe; and (2) for recognized Indian tribes to establish "off-reservation" and "out-of-state" casinos. In addition to its regulations, the Interior Department in January 2008 issued a "*Guidance on Taking Off-Reservation Land into Trust for Gaming Purposes*" which it has subsequently relied upon to deny applications from tribes seeking to establish casinos at locations that exceed "a commutable distance" from their reservations. The Eastern Shawnee Tribe's reservation in Oklahoma is more than six hundred miles from Ohio.

In summary, under current federal law, one can conclude with confidence that no Indian group or recognized Indian tribe will be able to establish a casino or other type of gaming establishment in Ohio. The voters in November should evaluate Issue Six on its merits. Tribal gambling in Ohio is a non-issue. The real issue is Issue Six.

MY BACKGROUND AND EXPERIENCE WITH INDIAN GAMING – It may be helpful to briefly describe my credentials and expertise with regard to the issue of Indian law in general and the specific topic of tribal gambling pursuant to the Indian Gaming Regulatory Act of 1988. I am fifty-two years old. I graduated from Vanderbilt University, *summa cum laude* and *Phi Beta Kappa*, in 1978. I attended Duke University School of Law, where I graduated with distinction in 1981. After law school, I clerked for Judge Bailey Brown of the United States Court of Appeals for the Sixth Circuit. From 1982 to 1992, I worked as an attorney in the Environment and Natural Resources Division for the United States Department of Justice. As indicated by my resume (attached as Appendix A), my responsibilities included briefing and arguing cases in the United States Courts of Appeals, and assisting in drafting briefs in cases before the United States Supreme Court. In many instances, I represented the Department of the Interior in matters that concerned Indian sovereignty and native property rights. In 1991, just three years after the enactment of the IGRA, I helped prepare an *amicus* brief that was submitted to the United States Supreme Court in support of the Mashantucket Pequot Tribe and its efforts to construct and operate a casino in Connecticut.[2] The Tribe prevailed in the dispute and soon thereafter opened the Foxwoods Resort Casino, which today is one of the largest casinos in the world.

In 1992 I joined the faculty at the University of Dayton School of Law, where I am currently a tenured Professor of Law. My teaching interests include Indian Law, Property, Environmental Law, and Administrative Law. In the spring of 2008, I taught a course entitled *Federal Indian Law and Indian Gambling*, which focused on the requirements of the Indian Gaming Regulatory

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[2] Brief of Amici Curiae, *Connecticut v. Mashantucket Pequot Tribe* (Sup. Ct. No. 90-871). The State of Connecticut asked the Supreme Court to review a lower court decision that was favorable to the Tribe. The United States supported the Tribe, and the Supreme Court denied the State's petition for a writ of *certiorari*. See *Connecticut v. Mashantucket Pequot Tribe*, 499 U.S. 975 (1991).

Act. I have written several law review articles on the topic of federal Indian law. In 2003, I published an article entitled *Indian Gambling in Ohio: What are the Odds?*, in the Capital University Law Review.[3] In the article, I explored the options available under the IGRA to Indian groups and tribes seeking to establish gambling establishments in Ohio. I concluded that is was unlikely that either an Indian group within the state, or a recognized Indian tribe located in another state, will be able to establish a casino or other type of gaming establishment in Ohio.[4]

Because Congress has not amended the IGRA, my analysis still applies to any current efforts to bring tribal gaming to Ohio. However, as noted below, there have been further developments and additional regulatory requirements that make the prospect of tribal gaming in Ohio even more unlikely.

BASIC PROVISIONS OF THE INDIAN GAMING REGULATORY ACT – Congress in 1988 enacted the IGRA (relevant sections attached as Appendix B) to provide a comprehensive regulatory framework for gaming activities on Indian lands. The Act requires that tribal gambling must be conducted on either (1) lands within an Indian reservation; or (2) lands held in trust by the United States for the benefit of a tribe or individual Indian. 25 U.S.C. 2710(b)(1), (d)(1). Significantly, Section 20(a) of the IGRA, 25 U.S.C. 2719(a), establishes the following general rule:

> gaming regulated by [the IGRA] shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988.

Consequently, any Indian group or recognized tribe seeking to engage in gaming in Ohio must somehow satisfy one of the narrow exceptions that Congress provided to its general rule barring tribal gaming on lands acquired after October 17, 1988.

It should be noted that – if an Indian group within Ohio or a recognized tribe from another state was somehow able to engage in gaming in Ohio, the gambling would be regulated and restricted by the provisions of the IGRA. In some instances, states have been successful in negotiating "revenue-sharing" agreements with tribes who seek to engage in Class III casino gambling pursuant to a tribal-state compact. However, states may *not* directly tax tribal gaming under the Indian Gaming Regulatory Act. Congress included a provision in the IGRA that expressly prohibits states from imposing any tax on tribal gambling.[5]

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[3] Blake A. Watson, *Indian Gambling in Ohio: What are the Odds?*, 32 Capital University Law Review 237-315 (2003).

[4] See Watson, *supra* note 2, at 315 ("So what are the chances of tribal gambling coming to Ohio? Well, I wouldn't bet on it.").

[5] In Section 11(d)(4) of the IGRA, Congress states that nothing in the Act "shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." 25 U.S.C. 2710(d)(4). Thus, the states cannot "tax" class III (casino) gambling. The states lack any regulatory authority over class II (non-

EXCEPTIONS TO THE GENERAL RULE PROHIBITING TRIBAL GAMBLING ON LANDS ACQUIRED AFTER 1988 – There are several exceptions found in Section 20 of the IGRA whereby tribal gaming could possibly take place on lands acquired after the Act's effective date of October 17, 1988. Only three of the exceptions, however, have any relevance to Ohio.[6] These three exceptions are summarized as follows:

1. **"NEW TRIBE" EXCEPTION –** The 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. 25 U.S.C. 2719(b)(1)(B)(ii).

2. **"LAND CLAIM" EXCEPTION** – The prohibition on tribal gaming on 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." 25 U.S.C. 2719(b)(1)(B)(i).

3. **"GOVERNOR APPROVAL" EXCEPTION** – The prohibition on tribal gaming on lands acquired after October 17, 1988, does not apply if a recognized tribe outside of Ohio (1) persuades the Interior Department to place land in Ohio in trust for the tribe; (2) persuades the Secretary of the Interior that gambling on such lands would be in the best interest of the Indian tribe and its members; (3) persuades the Secretary of the Interior that gambling on such lands would not be detrimental to the surrounding community; and (4) persuades the Governor of Ohio to affirmatively concur with the Secretary's determination that tribal gambling should be permitted. 25 U.S.C. 2719(b)(1)(A).

As discussed below, it is highly unlikely that a group of Indians in Ohio will be recognized by the federal government as an Indian tribe. The "land claim" exception, under new federal regulations promulgated in May 2008, requires that the tribe's claim be settled by an Act of Congress in most instances. The "governor approval" exception requires – in addition to

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casino) gambling, and thus cannot tax this type of Indian gaming as well. If per capita payments are distributed by the tribe to individual tribal members, such payments are subject to federal taxation by the Internal Revenue Service. 25 U.S.C. 2710(b)(3)(D). The IRS may also collect federal excise taxes from tribes based on Indian gaming. See 25 U.S.C. 2719(d); and *Little Six, Inc. v. United States*, 280 F.3d 1371 (Fed. Cir. 2002).

[6] The exceptions that are *not* relevant to Ohio involve acquisition of lands (1) within or contiguous to an existing reservation; (2) in Oklahoma; (3) within the tribe's last recognized reservation within the state within such tribe is presently located; or (4) as part of the restoration of lands for an Indian tribe that is restored to Federal recognition. See 25 U.S.C. 2710(a) and (b). There are *no* existing reservations in Ohio and *no* tribe is "presently located" in Ohio. The absence of any "terminated" tribes from Ohio negates the application of the exception which applies to tribes that have been "restored to Federal recognition."

obtaining the concurrence of Ohio's governor – that the federal government agree to place land into trust, and further agree to permit gambling on such lands. The "land-to-trust" regulations make it extremely unlikely that the Department of the Interior will place land in Ohio into trust for a tribe located in another state, and the federal government since January 2008 has consistently denied "land-to-trust" applications from tribes seeking to establish casinos located beyond "commuting distance" from their reservations.

ANALYSIS OF THE "NEW TRIBE" EXCEPTION – Seven Indian groups in Ohio have filed petitions for federal recognition.[7] In 1994 the Bureau of Indian Affairs (BIA) revised the federal "acknowledgment" regulations – found at 25 C.F.R. Part 83 – in order "to clarify what evidence was needed to support the requirements for recognition."[8] It is important to note, however, that *none* of the seven Ohio Indian groups that has petitioned for federal recognition has yet submitted a complete application. The seven Ohio petitions are among the 175 received by the BIA as of August 2001 that are classified in a report by the General Accounting Office (GAO) as "not ready for evaluation." Moreover, the GAO predicts in its report that it "could take *15 years* to resolve all the petitions currently awaiting *active* consideration."[9]

It is plainly evident, therefore, that *no* Ohio Indian group will become federally recognized in the near future. The criteria that must be satisfied is quite demanding, and many petitioners are denied official recognition. In any event, the federal government will not even begin to consider a petition for recognition until it is complete. The Bureau of Indian Affairs is *not* actively considering any petitions for recognition from Indians in Ohio.

ANALYSIS OF THE "LAND CLAIM" EXCEPTION – 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." Congress, of course, may also enact tribe-specific legislation that permits (or prohibits) Indian gaming. The statute does not define the term "land claim" and does not state whether the lands taken into trust "as part of ... a settlement of a land claim" may include lands other than the lands claimed by the tribe. However, on May 20, 2008, the Bureau of Indian Affairs promulgated a final rule, entitled "*Gaming on Trust Lands Acquired After October 17, 1988*," that narrows the scope of the "land claim" exception.

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[7] The seven groups are the Shawnee Nation United Remnant Band (Dayton); the North Eastern U.S. Miami Inter-Tribal Council (Youngstown); the Alleghenny 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).

[8] See United States General Accounting Office, *Indian Issues: Improvements Needed in Tribal Recognition Process* 4 (Nov. 2001) (citing 59 Fed. Reg. 9,280 (Feb. 25, 1994)).

[9] United States General Accounting Office, *Indian Issues: Improvements Needed in Tribal Recognition Process* 31 (Nov. 2001) (emphasis added).

The BIA's final rule "clarifies that, in almost all instances, Congress must enact the settlement into law before the land can qualify under the exception." 73 Fed. Reg. 29,354 (May 20, 2008). Under the final rule, gambling may occur on lands acquired under a settlement of a land claim if the land at issue is either:

> (a) Acquired under a settlement of a land claim that resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, *in legislation enacted by Congress*; or
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> (b) Acquired under a settlement of a land claim that: (1) is executed by the parties, *which includes the United States*, returns to the tribe all or part of the land claimed by the tribe, and resolves or extinguishes with finality the claims regarding the returned land; or (2) is not executed by the United States, but is entered as a final order by a court of competent jurisdiction or is an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue.[10]

LITIGATION BY THE OTTAWA TRIBE OF OKLAHOMA – In January 2005, the Ottawa Tribe of Oklahoma notified Ohio that the tribe claimed 350 acres of North Bass Island. Attorney General Jim Petro, in reply, opposed the asserted claim. In June 2005, the tribe filed suit in federal court in Toledo, claiming the right to fish in Lake Erie without restrictions. In April of 2008, United States District Court Judge Jack Zouhary dismissed this lawsuit, in part because the tribe waited too long to bring its claim. The lawsuit that was dismissed involved fishing rights, although in a newspaper article the attorney for the tribe stated that his client believes it has a rightful claim to North Bass Island in Lake Erie, and may file a lawsuit claiming the island at a later date.[11] If such a lawsuit is ever filed by the Ottawa Tribe, it will undoubtedly be opposed as untimely.

LITIGATION BY THE EASTERN SHAWNEE TRIBE OF OKLAHOMA – The Eastern Shawnee Tribe of Oklahoma filed a "land claims" lawsuit in June of 2005 against the State of Ohio and numerous other defendants. The suit, which was filed in federal court in Toledo, was connected to the Tribe's efforts to establish casinos in Ohio pursuant to the Indian Gaming Regulatory Act's "land claim" exception.[12] However, at the same time that the Eastern Shawnee

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[10] 25 C.F.R. § 292.5 (emphasis added).

[11] *Ottawa Tribe's Claim on North Bass Island Rejected*, Cleveland Plain Dealer, Pg. B3 (June 2, 2005); *Attacking Ohio*, Cincinnati Post, Pg. A12 (July 1, 2005); *Tribe Loses Lawsuit for Right to Fish Lake Erie: Ottawas to Appeal Zouhary's Ruling*, Toledo Blade (April 3, 2008) ("Once the fishing rights lawsuit is resolved, "We'll go after the island," Mr. Rogavin said.").

[12] *Eastern Shawnee Suit Claims Ohio Land Rights*, Cincinnati Enquirer (June 28, 2005); *Tribe Sues, Wants Land, Money . . . or Casinos*, Cleveland Plain Dealer (June 28, 2005); *Shawnee File Suit*, Massillon Independent (June 28, 2005) ("The lawsuit lays claim to 145 square miles of former reservation lands in the northwestern part of the state and 11,315 square miles of former hunting and fishing ground in the southwestern part of the state.").

Tribe filed its land claim, a federal court of appeals overturned an award of approximately $248 million for the Cayuga Indian Nation of New York, holding that the tribe had waited too long to bring its claim. *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2nd Cir. 2005). In October, the State of Ohio moved to dismiss the lawsuit, and relied in part on the *Cayuga Indian Nation* decision, arguing that the "Eastern Shawnee's legal claims are over 150 years old and it would be inequitable and unconscionable to allow them to set aside property interests of those who have no connection to the treaties at issue."[13]

In July of 2006, the Tribe moved to voluntarily dismiss most of the defendants, and asked the federal court to approve certain "settlements" with the remaining defendants. The Ohio Attorney General argued that the tribe's "dressed-up, flimsy" settlements did not change the state's position that the Eastern Shawnee have no legal land claims in Ohio. The Tribe sought to settle land claims against the remaining defendants by taking options on land from parties who were *not* defendants in the lawsuit. In other words, the Tribe proposed to settle claims against Defendants #1 and #2, if Defendants #1 and #2 in turn would agree to allow the Tribe to buy land that Defendants #1 and #2 did not own. Not surprisingly, Defendants #1 and #2 readily agreed. The land that the Tribe wanted Defendants #1 and #2 to "allow" to be purchased was land in Botkins, Ohio, and Monroe, Ohio. These are the locations where the Tribe hopes to establish casinos. It is evident that the land in Botkins and Monroe was not at issue in the Tribe's lawsuit, but the Tribe hoped by bringing the desired lands into the settlement, it could thereafter take advantage of IGRA's "land claim" exception and ask the Interior Department to take the Botkins and Monroe property into trust "as part of ... a settlement of a land claim."[14]

The State was one of the parties dismissed from the lawsuit, but thereafter intervened in order to oppose the proposed settlements. In the words of Attorney General Jim Petro:

> What we're striving to do is ensure that the Eastern Shawnee Tribe doesn't pull a fast one on this office, on the citizens of Ohio, and on the federal court, and that's essentially what they're trying to do. ... It is not a settlement of a legitimate claim to tribal lands in Ohio. It's a sham.[15]

In April of 2007, Judge James G. Carr rejected the Tribe's proposed settlement offer. In his ruling, Judge Carr said he would not sign anything that could be seen as "settlement of a land claim," which the tribe could take to the U.S. Department of Interior. "In the state's view," Carr wrote, "this suit and settlement agreement have been concocted solely to get property into the

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[13] *Attorney General Petro Rejects Land Claim Made by Eastern Shawnee Tribe of Oklahoma*, 2005 WLNR 16736807 (Westlaw) (October 14, 2005); See Motion to Dismiss at http://www.ag.state.oh.us/press_releases/attachments/051014_motion_to_dismiss.pdf .

[14] *Tribe Looks to Settle Suits over Land; Oklahoma Shawnee Seek Court Approval*, Cleveland Plain Dealer (July 15, 2006).

[15] *Petro Seeks to Intervene in Indian Tribe's Lawsuit - He Wants to Stymie Recognition of Ancestral Land*, Toledo Blade (July 22, 2006).

tribe's hands in a way that enhances the likelihood that it ultimately can build" casinos.[16] The Ohio Attorney General issued additional comments after another ruling by Judge Carr:

> In an order issued on July 6th, Federal District Court Judge James G. Carr denied the Eastern Shawnee Tribe of Oklahoma's motion to expand the scope of its lawsuit to add new claims and parties. This decision, along with Judge Carr's earlier decision refusing to expressly approve the Eastern Shawnee's privately-reached agreements with amenable landowners, makes clear that the agreements in question are private agreements between willing buyers and settlers, and not the settlement of valid legal claims to Ohio lands. The Court stated: "I have refused, and continue to refuse to include any [language finding that the Eastern Shawnee have obtained land through the settlement of land claims] in any order that I would consider signing."[17]

On July 26, 2007, Judge Carr dismissed the lawsuit at the request of the Tribe and the remaining defendants. According to one news article, "Judge James Carr has always refused to endorse language in settlements that referred to land claims and repeated that in his dismissal ...."[18]

THE EASTERN SHAWNEE TRIBE'S PENDING LAND-TO-TRUST APPLICATIONS – According to recent news accounts, the Eastern Shawnee Tribe in April of 2008 filed two "land-to-trust" applications with the Interior Department to have the United States take land into trust for casinos at the Botkins and Monroe sites in Ohio.[19] The articles do not state whether the applications are based on the "land claims" exception.

Even if the Interior Department were to place the lands into trust, any attempt by the Tribe to assert that such trust lands fall under the "land claims" exception would be immediately and vigorously challenged by the State of Ohio for two reasons. First, the Botkins and Monroe lands were *not at issue* in the Tribe's lawsuit. Second, Judge Carr consistently refused to endorse the notion that – by bringing and then dismissing its lawsuit – the Tribe had somehow "settled" a land claim.

CONGRESSIONAL APPROVAL OF LAND CLAIM SETTLEMENTS – The Interior Department's May 2008 regulations also present a problem for the Eastern Shawnee Tribe (even assuming that Ohio lands might somehow be placed into trust). Under the current regulations, an

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[16] *Judge Rejects Land Claim, Blocks Tribe's Casino Plan*, Cleveland Plain Dealer (April 5, 2007).

[17] *Attorney General Dann Supports Federal Judge's Denial of Eastern Shawnee's Latest Claims,* 2007 WLNR 13165474 (Westlaw) (July 11, 2007). See also Order Denying Motion to Amend Complaint: http://www.ag.state.oh.us/press/07/07/070711.pdf.

[18] *Judge Dismisses Eastern Shawnee Lawsuit*, Lima News (July 27, 2007).

[19] *Big Money: Gaming Opponents Say Casino Issue Could Affect Eastern Shawnee*, Lima News (Sept. 7, 2008); *Casino Foes Point to Loophole; Not All Agree Law Could Hurt Tax Revenue*, Cleveland Plain Dealer (September 17, 2008).

Indian tribe may conduct gaming on trust lands acquired after 1988 in settlement of a land claim only three circumstances:

1. When the settlement was approved by legislation enacted by Congress;

2. When the settlement was executed by the parties to a lawsuit that included the United States;

3. When the settlement was executed by the parties to a lawsuit that did not include the United States, but was "entered as a final order by a court of competent jurisdiction" or was "an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue."

The Eastern Shawnee Tribe cannot avail itself of the second situation because the United States was *not* a party to the lawsuit. The first situation requires an act of Congress. Even before this regulation was issued, other Indian tribes that have sought to invoke the "lands claims" exception have relied on acts of Congress.[20] It is most unlikely that the Eastern Shawnee Tribe could persuade the United States Congress to pass "land claims settlement" legislation on its behalf given (1) Judge Carr's public position; and (2) the opposition of the State of Ohio.

Recently, in June of 2008, the House of Representatives – by a vote of 298-121– rejected a bill that would have endorsed a land claim settlement between two Indian tribes in Michigan and the state of Michigan. It is significant that the land claim settlement was approved by the current governor, Democrat Jennifer Granholm, and also by her immediate predecessor, Republican John Engler. In contrast, the State of Ohio has *never* agreed to or endorsed the Eastern Shawnee's "settlement," and strongly opposed the Tribe's proposed settlement in proceedings before Judge Carr.[21]

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[20] The Wyandotte Nation of Oklahoma is currently operating a casino in Kansas City, Kansas, and asserts that its right to do so is based in part on IGRA's "land claim" exception. The state of Kansas disagrees and is pursuing litigation to shut down the casino. In any event, the Wyandotte Nation's argument is based in large part on an Act of Congress. See Public Law 98-602 and *Wyandotte Nation v. National Indian Gaming Commission*, 437 F.Supp.2d 1193 (D. Kan. 2006). The Seneca Nation of New York opened an "off-reservation" casino in Niagara Falls following the passage by Congress of the so-called Seneca Nation Land Claims Settlement Act of 1990, 25 U.S.C. 1774(f)(c). A federal district court recently held that – despite its name – the 1990 Act was *not* "land claims settlement" legislation, and has held that the Seneca's casino in Buffalo is not authorized by the Indian Gaming Regulatory Act. *Judge Rules Against Seneca Casinos on Land in Downtown Buffalo*, The Buffalo News (September 20, 2008) (The judge held that the 1990 Act "was not a land claim act, [which] one of the few exceptions to the law that allows Indian casinos to be opened off reservations.").

[21] *Plan for Indian Casinos Defeated*, Detroit Free Press (June 26, 2008) ("the House rejected a plan for land swaps for the Sault Ste. Marie Tribe of Chippewa Indians and the Bay Mills Indian Community that would have given them the proposed casino tracts. The deal with the state,

The third situation discussed in Interior's May 2008 regulations provides that gambling may occur on lands acquired under a settlement of a land claim if the land is acquired "under a settlement of a land claim" that "is not executed by the United States, but is entered as a final order by a court of competent jurisdiction." Judge Carr did enter a final order dismissing the Eastern Shawnee's lawsuit, but he was careful *not* to approve a "settlement of a land claim." Therefore, under the Interior Department's May 2008 regulations, the Eastern Shawnee cannot successfully assert that the failed lawsuit somehow enables it to invoke IGRA's "land claim" exception.

BOTH THE "LAND CLAIMS" EXCEPTION AND THE "GOVERNOR APPROVAL" EXCEPTION REQUIRE THAT THE DEPARTMENT OF THE INTERIOR AGREE TO PLACE LANDS IN OHIO INTO TRUST FOR AN INDIAN TRIBE – Section 5 of the 1934 Indian Reorganization Act (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." 25 U.S.C. 465. Section 5 of the IRA is implemented by the BIA in its regulations concerning "Land Acquisitions" found at 25 C.F.R. Part 151. The regulations distinguish between on-reservation and off-reservation acquisitions, and impose additional burdens on Indian tribes that request the United States to take into trust lands that are not within or contiguous to their reservation.

The "land-to-trust" 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." 25 C.F.R. 151.3(a)(3). With respect to off-reservation acquisitions for tribes, the Secretary must consider the following criteria, which also apply to on-reservation acquisitions for tribes:

- the existence of statutory authority for the acquisition and any limitations contained in such authority;
- the purposes for which the land will be used;
- if the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; and
- the 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].

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reached in 2002, would have settled the tribes' claims to land in the eastern Upper Peninsula that they said the federal government wrongly sold off in the mid-1800s.").

25 C.F.R. 151.10. In addition, "when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated," the Secretary must consider the following additional requirements:

> - the 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; and
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> - where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use."

25 C.F.R. 151.10 and 25 C.F.R. 151.11. 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."

INTERIOR'S JANUARY 2008 GUIDANCE ON "LAND-TO-TRUST" APPLICATIONS – The current regulations provide that, as the distance between the tribe's reservation and the land to be acquired increases, the Secretary is required to give (1) greater scrutiny to the tribe's reasons for seeking to place the lands into trust, and (2) greater weight to the concerns of state and local governments regarding adverse impacts. In January 2008, the Interior Department issued a "*Guidance on Taking Off-Reservation Land into Trust for Gaming Purposes*" (attached as Appendix C and on-line at http://www.indianz.com/docs/bia/artman010308.pdf). The *Guidance* clarifies how the Department should apply such terms as "greater scrutiny" and "greater weight" that are part of its decision-making process. On page two of the *Guidance*, the Interior Department states that IGRA "was not intended to encourage the establishment of Indian gaming facilities far from existing reservations."

The *Guidance* is specifically directed at applications "that exceed a daily commutable distance from the reservation." In particular, the *Guidance* at page four states that

> no application to take land into trust beyond a commutable distance from the reservation should be granted unless it carefully and comprehensively analyzes the potential negative impacts on reservation life and clearly demonstrates why these are outweighed by the financial benefits of tribal ownership in a distant gaming facility.

Immediately after issuing the *Guidance*, the Department of the Interior rejected eleven requests to take into trust "off-reservation" lands for gaming purposes. In one instance, involving the St. Regis Mohawk Tribe, the "land-to-trust" application was supported by state officials. Nevertheless, the application was denied because the proposed casino was approximately 350 miles from the Tribe's reservation.[22] As noted before, the Eastern Shawnee Tribe's reservation in Oklahoma is more than six hundred miles from Ohio. Shortly after the *Guidance* was issued, the *Dayton Daily News* quoted me as describing the *Guidance* as "a death knell" for the Tribe's chances of having land put into trust in Ohio:

> "The federal government's Bush administration basically has taken the position — and it appears to be across the board — that when the land is far away from the homeland, which, of course, would be the case for the Eastern Shawnee, that they will not agree to place the land into trust," Watson said. "I think that's really a death knell for any possible approval by the Bush administration — the future administration, of course, might change their position — to be receptive to any attempt to place land in Ohio in trust for an Oklahoma tribe. I think it's fair to say that this is not a welcome turn of events for the Eastern Shawnee of Oklahoma tribe."[23]

UNDER THE "GOVERNOR APPROVAL" EXCEPTION, THREE ADDITIONAL REQUIREMENTS MUST BE MET – Even if a tribe persuades the Department of Interior to place land in Ohio into trust, in order to conduct gaming on such lands, the Tribe must also meet three additional requirements:

(1) persuade the Secretary of the Interior to find that gambling on such lands would be in the best interest of the Indian tribe and its members;

(2) persuade the Secretary of the Interior to find that gambling on such lands would not be detrimental to the surrounding community; and

(3) persuade the Governor of Ohio to affirmatively concur with the Secretary's determination that tribal gambling should be permitted.

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[22] *St. Regis Mohawks to Appeal Denied Land into Trust Application*, Indian Country Today (January 14, 2008); *Good Decision on Tribal Casinos*, New York Times (January 17, 2008) ("Interior Secretary Dirk Kempthorne made exactly the right call when he recently denied permission to 11 Indian tribes around the country to acquire more land in order to build casinos."). It should be noted that at least two disappointed tribes have filed suit to challenge to legality of the *Guidance*.

[23] *Monroe Casino Looking Unlikely*, Dayton Daily News (January 31, 2008).

25 U.S.C. 2719(b)(1)(A). The *Guidance*, of course, takes the position that gaming facilities beyond "commuting distances" are presumed *not* to be in the best interest of the Indian tribe and its members. In addition, the current regulations provide that, as the distance between the tribe's reservation and the land to be acquired increases, the Secretary is required to give "greater weight" to the concerns of state and local governments regarding adverse impacts.

The critical feature of the "governor approval" exception is that is gives the governor of Ohio an absolute "veto" power. Consequently, if the tribe cannot qualify under one of the other exceptions (such as the "land claim" exception), then it *must* obtain the approval of *both* the federal government *and* the governor of Ohio. In two instances, the governor of Oregon and the governor of Wisconsin refused to concur in the Secretary of the Interior's determination that gaming was appropriate on lands acquired after 1988, and consequently the proposed casinos were not permitted under the Indian Gaming Regulatory Act. The United States Supreme Court in both cases declined to grant the tribes' requests to review the adverse determinations.[24]

PROPOSED LEGISLATION TO AMEND THE IGRA – In 2006 Arizona Senator John McCain – the current Republican candidate for President – proposed a bill to strictly limit the use of exceptions in IGRA for purposes of establishing "off-reservation" casinos. A similar bill was introduced into the House of Representatives by House Resources Committee Chairman Richard Pombo (R-Calif.). Ohio's Senator George Voinovich also introduced a bill to limit Indian gaming. In September of 2006, a majority of the House voted in favor Representative Pombo's bill, but the 247-171 vote took place under a suspension of the House rules, which required a favorable two-thirds vote.[25]

"OFF-RESERVATION" AND "OUT–OF-STATE" INDIAN CASINOS ARE RARE – Since 1988, there have been only three Indian tribes that have opened casinos on off-reservation land pursuant to the "Governor Approval" exception. In each instance, the casino is located in the same state where the tribe has its reservation.[26] The only "out-of-state" casino is located in Kansas City, Kansas, and is owned by the Wyandotte Nation of Oklahoma. The state of Kansas contends that this casino is illegal, and in April of 2008 filed another lawsuit challenging the Tribe's position that the casino is lawful in light of legislation passed by Congress.

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[24] See *Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688 (9th Cir. 1997), *cert. denied*, 522 U.S. 1027 (1997); and *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 259 F.Supp.2d 783 (W.D. Wis. 2003), *aff'd*, 367 F.3d 650 (7th Cir. 2004), *cert. denied*, 543 U.S. 1051 (2005).

[25] *McCain's Bill Would Limit Future Tribal Casinos; His Proposal Halts Exceptions Allowing Gambling Palaces Away from Reservations*, San Francisco Chronicle, Pg. A4 (February 2, 2006); *GOP Bill to Curb Indian Casinos Fails; Vote Miscalculation Dooms Legislation by Pombo*, San Francisco Chronicle (September 14, 2006).

[26] The three off-reservation casinos approved pursuant to the "Governor Approval" exception are the Potawatomi's casino in Milwaukee, Wisconsin, the Kalispel Tribe's casino near Spokane, Washington, and the Keweenaw Bay Indian Community's casino near Marquette, Michigan.

LAND-TO-TRUST APPLICATIONS REJECTED IN JANUARY 2008 AS BEING BEYOND A REASONABLE COMMUTE – An article entitled *Interior's New Commutable Distance Test for Off-Reservation Gaming*, written by Sam Cohen and published in *Indian Gaming* (February 2008), includes a chart that lists the eleven land-to-trust applications that were rejected by the Department of the Interior in January 2008 pursuant to the *Guidance*. In all but two instances, the requested lands were less than 600 miles from the tribe's reservation. The Eastern Shawnee Tribe's reservation is more than 600 miles from Ohio.

Applications Rejected Pursuant to Interior's "Commutable Distance" *Guidance*

Seneca Cayuga Tribe	1,500 miles
Stockbridge Munsee Community	1,035 miles
Big Lagoon Tribe	550 miles
Hannahville Indian Community	457 miles
St. Regis Mohawk Tribe	350 miles
Lac Du Flambeau Band	304 miles
Pueblo of Jemez	293 miles
Mississippi Choctaw	175 miles
Chemehuevi Indian Tribe	135 miles
Los Coyotes Tribe	115 miles

Source: http://www.indiangaming.com/istore/Feb08_Cohen.pdf (Cached)

APPENDICES

Appendix A — Resume from Blake Andrew Watson

Appendix B — Relevant portions of the Indian Gaming Regulatory Act of 1988

Appendix C — Department of the Interior's "*Guidance on Taking Off-Reservation Land into Trust for Gaming Purposes*" (January 3, 2008) [The *Guidance* can is on-line at http://www.indianz.com/docs/bia/artman010308.pdf

APPENDIX A

BLAKE ANDREW WATSON

EDUCATION:

Duke University School of Law, Durham, North Carolina

J.D. (With Distinction), May 1981
Duke Law Journal, Staff Member, 1979-1980
Duke Law Journal, Editorial Board Member, 1980-1981

Vanderbilt University, Nashville, Tennessee

B.A. (Summa Cum Laude), May 1978
Majors: Political Science and Business Administration
Honors: Phi Beta Kappa

LEGAL EMPLOYMENT:

Professor of Law (1992-present). University of Dayton School of Law, Dayton, Ohio

Major research interests are in the areas of Environmental Law, Natural Resources Law, and Federal Indian Law. Teaching interests include the following: Environmental Law, Natural Resources Law, Water Law, Indian Law, Administrative Law, and Property.

Visiting Professor (Spring 1998). Tulane Law School, New Orleans, Louisiana

Taught Water Law and Administrative Law; participated in seminars on the Endangered Species Act and Federal Indian Law.

Attorney (1982-1992). Appellate Section, Environment and Natural Resources Division, United States Department of Justice

Responsibilities included briefing and arguing cases in the United States Courts of Appeals, and drafting briefs for Division cases which reached the United States Supreme Court. The Division represents the United States in matters concerning the protection and enhancement of the nation's environment and wildlife resources; the acquisition and administration of land, water, and mineral resources; and the safeguarding of Indian rights and property.

Assisted in the briefing of two cases before the United States Supreme Court (*Hodel v. Irving*, 481 U.S. 704 (1987); and *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984)). Briefed and argued over fifty cases before federal appellate courts.

Judicial Law Clerk (1981-1982). The Honorable Bailey Brown, United States Court of Appeals for the Sixth Circuit, Memphis, Tennessee

PUBLICATIONS:

John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of 'Universal Recognition' of the Doctrine of Discovery," 36 Seton Hall Law Review 481-549 (2006)

Indian Gambling in Ohio: What are the Odds?, 32 Capital University Law Review 237-315 (2003)

Book Review, David E. Wilkins and K. Tsianinia Lomawaima, Uneven Ground: American Indian Sovereignty and Federal Law, 13 Great Plains Research 339-340 (Fall 2003)

"*Understanding Challenges to Land Use Regulations and Impact Fees –A Primer on the Major Cases; Types of Challenges; and Supreme Court Tests,"* Appendix in Douglas T. Kendall, Timothy J. Dowling, and Andrew W. Schwartz, TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS (2000)

The Thrust and Parry of Federal Indian Law, 23 University of Dayton Law Review 437-514 (1998)

The Curious Case of Disappearing Federal Jurisdiction over Federal Enforcement of Federal Law: A Vehicle for Reassessment of The Tribal Exhaustion/Abstention Doctrine, 80 Marquette Law Review 103-194 (1997)

Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken A Good Thing Too Far?, 20 Harvard Environmental Law Review 199-328 (1996)

State Acquisition of Interests in Indian Land: An Overview, 10 American Indian Law Review 219-256 (1982)

WORK-IN-PROGRESS:

BUYING AMERICA FROM THE INDIANS: *Johnson v. McIntosh* AND THE ISSUE OF NATIVE LAND RIGHTS [book]

AWARDS:

Professor of the Year, University of Dayton School of Law, as voted by the First Year Class, Section 1 (1992-1993, 1993-1994, 1994-1995, 1995-1996, 1998-1999, 2000-2001, 2001-2002); as voted by the Second Year Class (1993-1994, 1994-1995, 1995-1996, 1996-1997, 1998-1999); and as voted by the Third Year Class (1993-1994, 1995-1996). [The Law School discontinued the practice of awarding this honor in 2003]

Special Achievement Award, United States Department of Justice (1988)

BAR MEMBERSHIPS:

United States Supreme Court
United States Court of Appeals for the District of Columbia Circuit
United States Court of Appeals for the Fourth Circuit
United States Court of Appeals for the Sixth Circuit
United States Court of Appeals for the Eighth Circuit
United States Court of Appeals for the Ninth Circuit
United States Court of Appeals for the Tenth Circuit
State of Tennessee (currently inactive)

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RELEVANT SECTIONS OF THE INDIAN GAMING REGULATORY ACT

Sec. 2703(4). Definitions – For purposes of this chapter ... the term "Indian lands" means - (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.

Sec. 2710(d)(4). Tribal gaming ordinances – Class III gaming activities; authorization; revocation; Tribal-State compact. – Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

Sec. 2719. Gaming on lands acquired after October 17, 1988 [§20]

(a) Prohibition on lands acquired in trust by Secretary. Except as provided in subsection (b), gaming regulated by this Act shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act [enacted Oct. 17, 1988] unless (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 (ii) are contiguous to other land held in trust or restricted status by the United States for the Indian 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.

(b) Exceptions.

(1) Subsection (a) will not apply when–

(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 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; or

(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.