

TRIBAL NATIONS, INDIAN GAMING, AND THE RIGGED ECONOMY

Peter J. Herne

On March 10, 2016 I was honored to serve as the key note speaker at the Native American Law in the Modern Era symposium hosted at Albany Law School.¹ During my presentation I attempted to take attendees back in time and remind them of the role that Alexander Hamilton's funding plan² had on Indian Country. What transpired for Tribal Nations under Hamilton's assumption plan was that land was bought up by security speculators at State and Federal hosted land auctions.³ Not surprisingly much of this land was still owned by Tribal Nations.⁴ Interestingly though, many land purchasers at these "Government Auctions" were security speculators who then peddled these land deeds to persons, banks, or other entities who held debt instruments issued by a state[s] or the federal government of the "new" United States.⁵

¹ Symposium, *Native American Law in the Modern Era*, ALB. GOV'T L. REV. (March 10, 2016), <http://www.albanylaw.edu/event/government-law-review-symposium/Documents/Native%20American%20Law%20in%20the%20Modern%20Era%20Materials%20Final.pdf>.

² Funding Act of 1790, Ch. 34, 1 Stat. 138 (1790) (this financial plan is known as the Assumption Plan, whereby the federal government assumed state debt incurred for fighting the war of revolution. For general discussion on the topic, and the dearth of academic work after it, see CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES & HISTORY OF THE UNITED STATES* (1913).

³ THE LEHRMAN INST., *The Founders and the Pursuit of Land*, <http://lehrmaninstitute.org/history/founders-land.html> (last visited October 19, 2016).

⁴ *Id.*

⁵ See generally Franklin B. Hough, A.M., M.D., *A History of St. Lawrence and Franklin Counties, New York, From the Earliest Period to the Present Time* 110–266 (1853) <https://ia800302.us.archive.org/25/items/ahistorystlawre00hougg0og/ahistorystlawre00hougg0og.pdf> (for example, my own territory (the St. Regis Mohawk Indian reservation) was actually cut out of one of these land sales. See laws of New York 179. A subsequent treaty was then force fitted to cover this "cut out" as a prior attempt to reach a treaty failed. For failed Treaty negotiation of October 1795, see generally pp. 110–204. For the land sale see pp.

These debt instruments were originally issued to fight the Revolutionary War.⁶ With Hamilton's assumption plan, the debt instruments would soon become valuable as repayment included their par value and some accumulated interest.⁷ Therefore, at the very founding of the United States Tribal Nations were subject to the economic "necessities" of these so-called good faith purchasers, and the economic interests of state and federal governments. In post-Revolution New York this played out at both the State and Federal level.⁸ At the time of my keynote speech I reminded symposium attendees that if one had enough interest, there was/is in fact a live "cliff note" version of Hamilton's life currently playing on Broadway.⁹

Today I have the honor to submit this paper to Albany Law School's Government Law Review to elaborate, and hopefully provide a modern example of, on the long historic shadow of Hamilton's assumption plan, the creation of American economic mores, and the effect those two things still have on Indian country. During this attempt I must first provide that I am no economist and much prefer economic history to the actual study of economics. Often referred to as the "dismal science," economics can still flex its own intellectual appeal in such works as "Freakonomics." However, one aspect in particular remains silent and little known to a clear majority of U.S. citizens. That is the use of debt instruments by government to meet economic desires/wishes/necessities of both the "public" and "private" sectors.¹⁰ For this article I hope to provide an overview of the

235–66, discussing Alexander Macomb and "Macomb's Purchase." Alexander Macomb purchased a large swath of nearly all of northern New York in 1792. He would later go bankrupt, and a Treaty with the St. Regis Indians would not conclude until 1796, ratified by Congress Jan. 1797, and the text of which clearly identifies "purchasers under Alexander Macomb" as being involved in the purported "treaty negotiations." *See* Treaty with the Seven Nations of Canada, 7 Stat. 55 (1796).

⁶ *See* John Steele Gordon, *Past & Present: Alexander Hamilton and the Start of the National Debt*, U.S. NEWS (Sept. 18, 2008 12:00 PM), <http://www.usnews.com/opinion/articles/2008/09/18/past-present-alexander-hamilton-and-the-start-of-the-national-debt>.

⁷ *See generally* Richard Sambasivam, *What Do Bond Prices Tell Us About the Early Republic?*, J. AM. REVOLUTION (Aug. 25, 2016), <https://allthingsliberty.com/2016/08/bond-prices-tell-us-early-republic/>.

⁸ *See generally* LAURENCE M. HAUPTMAN, *CONSPIRACY OF INTERESTS: IROQUOIS DISPOSSESSION AND THE RISE OF NEW YORK STATE* (1999).

⁹ DIR. THOMAS KAIL, *HAMILTON: AN AMERICAN MUSICAL*, <http://www.hamiltonbroadway.com/>.

¹⁰ *See generally* Dr. Econ, *What are the differences between debt and equity*

strange intersection of this style of funding, Indian Country, and Indian gaming in New York.

I. TRIBAL NATIONS AS GOVERNMENT

Lost in many discussions centered upon Indian Country, and Indian Gaming for that matter, is recognizing the fact that Tribal Nations are also the first, and many instances the only government, which is providing essential government services in Indian Country.¹¹ This fact has only received nascent recognition by the Supreme Court, which is surprising since “Indian Country” issues seem to find their way to the Supreme Court with some regularity.¹² In rare instances the Court has recognized a Tribal Nation governmental interest in raising revenue to provide these essential government services in Indian Country.¹³ Any casual review of “Federal Indian Law” cases of “the Court” in recent memory, one can quickly recognize that the Court has been quick to “bless” State interests over any Tribal Nation interest in such matters.¹⁴ Yet, the fact remains that in many instances it is the Tribal Nation that is in most dire need of revenue to provide essential government services to their members and residents.

The ideal of Tribal Nation as essential government services provider has recently been recognized in a paper sponsored by the Harvard Project on American Indian Economic Development. Wherein:

Federal Law and Related Practical Challenges Limit Tribes’ Revenue Options:

Tribal governments provide public goods and services similar to those provided by state and federal governments. They manage forests and fisheries, generate electricity, monitor air and water quality, operate schools and colleges, build

markets?, FED. RES. BANK OF S.F. (Oct. 2005) <http://www.frbsf.org/education/publications/doctor-econ/2005/october/debt-equity-market/>.

¹¹ National Congress of American Indians (NCAI), *Tribal Governance*, <http://www.ncai.org/policy-issues/tribal-governance> (last visited Oct. 19, 2016).

¹² See *Worcester v. Georgia*, 31 U.S. 515 (1832); *Mont. v. United States*, 450 U.S. 544 (1981); *Nev. v. Hicks*, 533 U.S. 353 (2001); *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

¹³ See *Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

¹⁴ See *Dep’t of Taxation v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994).

and maintain roads and bridges, provide health care, operate correctional facilities, and assist families in poverty. They also have responsibilities resembling those of county and municipal governments: They maintain sewer lines, police neighborhoods, provide emergency services, teach children, remove snow, provide transit services, maintain parks, collect trash, conduct elections, maintain cemeteries, and provide public housing.¹⁵

By way of example, I would point to my own community: the St. Regis Mohawk Indian Reservation. With a rapid growth in population during my lifetime, the St. Regis Mohawk Tribe (hereinafter “SRMT”) finds itself providing more and more essential government services. For instance, within its umbrella of services is a water department which is primarily self-funded by the SRMT. With the polluting of the waterways in and around the reservation this became a necessity.¹⁶ Similarly, the SRMT also heavily supports the local Volunteer Fire Department that serves the Community.¹⁷ Just recently, the SRMT has secured ambulatory services for the Reservation.¹⁸ Another service is that of health care provider. Unlike the American fee-for service model, in Indian country the primary health care provider is the Indian Health Service, and in many instances the Tribal Nations have subsumed the role of health care provider from the Indian Health Service.¹⁹ This is possible through various pieces of

¹⁵ See Kelly S. Croman & Jonathan B. Taylor, *Why Beggar Thy Indian Neighbor? The Case for Tribal Primacy in Taxation in Indian Country*, JOINT OCCASIONAL PAPERS ON NATIVE AFFAIRS (May 4, 2016) http://nni.arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian_neighbor.pdf.

¹⁶ See Atl. States Legal Found., Inc. v. Hamelin, 182 F. Supp. 2d 235, 237 (2001).

¹⁷ Tribe Supports Hogansburg-Akwesasne Volunteer Fire Department, ST. REGIS MOHAWK TRIBE (2013), http://www.srmt-nsn.gov/_uploads/site_files/TribeSupportsHAVFD_05202013.pdf (this itself was borne from an instance following a fire that claimed the lives of an entire family on the St. Regis Mohawk Indian Reservation. The local fire department did not respond, or did not respond timely).

¹⁸ Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State's Indian Law*, 63 ALB. L. REV. 125, 176–77 (1999) (this was actually by contract and was not without controversy as an Ambulatory service from the so called “Canadian” portion of Akwesasne had been providing service. Disagreements emerged, and the SRMT sought out a private company).

¹⁹ See Rose L. Pfefferbaum, Betty Pfefferbaum, Everett R. Rhoades &

federal legislation.²⁰ The SRMT also has an environmental division, broad band project, and waste disposal transfer station. If it were not for Tribal Nations undertaking these efforts there would in all likelihood be no water, fire, ambulatory, garbage, or medical services on the St. Regis Mohawk Indian Reservation (e.g. Indian country). These systems, like most systems, are not perfect. One thing which is certain however, is that when there is no funding or funding shortfalls, there is no State revenue to rely upon nor is there 'extra' federal funding to tap into.²¹ In these instances (which are often) it is the Tribal Nation (St. Regis Mohawk Tribe) that provides the funding or makes up the shortfalls in funding to get these essential government services to the members and residents of its territory.

Another issue worth noting is public safety. New York is one of the States that, following World War II, was petitioning the federal government to acquire both civil and criminal jurisdiction over the Tribal Nations within "its" borders.²² What is unique is that New York's efforts in this regard were in fact fueled in large part by a U.S. Second Circuit decision that did not recognize any state jurisdiction over the Tribal Nation in the absence of a federal law granting, or permitting to the State, the exercise of such jurisdiction.²³ Following *Forness*, New York concentrated its efforts to acquire both civil and criminal jurisdiction. It is noteworthy that New York's quest to get such jurisdiction continued even as World War II efforts amped up. In fact, when a New York Legislative Committee attempted to conduct a meeting on the St. Regis Mohawk Indian Reservation, they were quickly reminded that the SRMT wished to wait as most of their

Rennard J. Strickland, *Providing for the Health Care Needs of Native Americans: Policy, Programs, Procedures, and Practices*, 21 AM. INDIAN L. REV. 211, 233–34 (1997).

²⁰ *Id.* at 236–37 (in NY there are 3 Tribal Nations which operate their own I.H.S. supported clinics: St. Regis Mohawk, Seneca Nation, and Oneida Indian Nation. The federal government provides these services; either through recognition of its Trust Responsibility, or through Treaty provisions. Tribal Nations subsume those roles through '638' Contracts, or other contracting mechanisms with the federal government which is unique to Indian Country).

²¹ *Id.* at 216.

²² 18 U.S.C. § 1162(a) (1953); 28 U.S.C. § 1360(a) (1953) (these other states would become known as Public Law 280 states. They included such states as California, Wisconsin, and Arizona. Some states refused jurisdiction unless it came with a reimbursement for costs. In fact, one state (Washington) has recently passed legislation for Tribal Nations to retrocede from the states '280' jurisdiction).

²³ See *United States v. Forness* 125 F.2d 928 (2d Cir. 1942)

men were “over there.”²⁴ Begrudgingly, the State waited. Nevertheless, by 1947 New York had acquired criminal jurisdiction²⁵ and by 1949 had acquired a choice of forum/civil jurisdiction law.²⁶

This grant of jurisdiction by the federal government has clearly been the point of various flare-ups between the Tribal Nations and the State since its passage. These instances have become in large part the measuring stick by which Tribal Nation/State relationship were defined within New York. This includes the Kinzu Dam litigation, the St. Lawrence Seaway Project litigation, New York Thruway, Moss Lake, 1979 in St. Regis, Akwesasne gaming dispute of 1990, and mid 1990’s taxation disputes near the Seneca & Onondaga Nation.²⁷ In fact, although New York may have criminal jurisdiction in the legal sense, the stark reality remains that on many Tribal Nation territories state jurisdiction is not welcome, is exercised on an invitation basis only, or it is simply non-existent on Indian reservations.²⁸ It is therefore not surprising to see that even in light of State criminal jurisdiction (and one would presume policing as well) some Tribal Nations are creating their own police forces and justice systems.²⁹

Therefore, for Tribal Nations like St. Regis and Oneida what is emerging is truly a bifurcated criminal justice system. It seems not to matter whether it is entirely Tribal Nation based (Oneida),³⁰ or a split model with both ‘sovereigns’ continuing to play a role (e.g. New York/ St. Regis).³¹ In either model it is clear

²⁴ Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State’s Indian Law*, 63 ALB. L. REV. 125, 141–42 (1999) (records of the NY Legislative Committee spearheading this effort indicates that there was NO widespread support by the Tribal Nations for this jurisdictional transfer).

²⁵ 25 USC § 232 (1948).

²⁶ 25 USC § 233 (1950).

²⁷ Porter, *supra* note 24, at 142–43.

²⁸ *Id.* at 144.

²⁹ *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 679 (1974) (Oneida Indian Nation has its own Court and exercises criminal jurisdiction over its territory and members); *People v. Herne*, 41 Misc. 3d 1086, 1094 (2013) (St. Regis has its own police force and a very limited foray into criminal jurisdiction [The SRMT collaborative Drug Court], but does have its own Vehicle & Traffic law); Porter, *supra* note 24, at 154–56 (for the Onondaga Nation there is no state criminal jurisdiction in practice, and law enforcement is limited to a working relationship with the Onondaga County Sheriff).

³⁰ *Oneida Indian Nation (New York) Codes and Rules*, NATIONAL INDIAN LAW LIBRARY (2004), http://www.narf.org/nill/codes/oneida_new_york/criminalprocedu_re1.html (Oneida has its own Court, prosecutor, penal law, and jail facility).

³¹ Tribal Police, SAINT REGIS MOHAWK TRIBE, http://www.srmt-nsn.gov/divisions/tribal_police/ (Own police force, other parts New York based).

that neither Tribal Nation is receiving any State support. In fact, under the St. Regis model there is not even any State recognition of the SRMT as even having a police department, making arrests, or serving a public safety function on the St. Regis Mohawk Indian Reservation.³²

In light of the foregoing, if one removes the Tribal Nation government from the delivery of essential government services, the picture would become even more bleak. In areas surrounding the St. Regis Mohawk Indian Reservation (Northern New York) the downturn in the agricultural economy, outsourcing, and the effects of 'brain-drain', can be acutely observed. Boarded up and no longer operating farms line the approach to small downtown areas which themselves are either boarded up or no longer existent. Villages and Towns which were able to provide basic services infrastructure (e.g. water) find that infrastructure crumbling and prospects of replacement bleak. Furthermore, any remaining government services are at a premium (e.g. police). If it were not for the many North Country volunteers who generally go un-noticed, fire and rescue services in the area would be non-existent. It is in this setting that if Tribal Nation governments did not exist (like St. Regis), and New York's governmental structures under its jurisdiction were in fact the only system available, it is likely such system would collapse if it had to cover the St. Regis Mohawk Indian Reservation.

While keeping in mind the scenario of both the St. Regis Mohawk Tribe and New York's 'North Country' that was just provided, I would like the reader to now imagine if a person/business came into this area and offered to place a 'major economic development project' in the middle of it. Let's say that the 'major-project' would create upwards of 400 construction jobs, and once operational, it would maintain full time employment of upwards 300 people. Many of these would include some benefits. In this 'Cinderella came to our ball' scenario, one should imagine what state and local officials would do. Payment in Lieu of Taxes (PILOT) agreements would be floated, property tax breaks would be floated, moneys from various entities (e.g. State Authorities) would be gathered and offers of infrastructure construction or

³² See Law Enforcement Personnel in 2015, NYS DIVISION OF CRIMINAL JUSTICE SERVICES (March 20, 2016), www.criminaljustice.ny.gov/crimnet/ojsa/2015-le-personnel.pdf (listing the law enforcement personnel in Franklin County as being just Franklin County Sheriff, Malone Village PD, Saranac Lake Village PD, Tupper Lake Village PD).

improvements would be made, cheap power, labor training incentives. The list is countless, and has been tried in numerous 'north of New York City' towns, villages, and counties. In fact, New York has recently amped up its own 'public dole for jobs' campaign by offering totally tax free zones for businesses to relocate within the Empire State (e.g. 'Start – Up' New York program). In terms of jobs created, and money invested, the 'return' has been modest for even 'Start-Up' New York and many continue to describe the upstate economy as lethargic.³³

I hope it is therefore surprising if the reader discovers that in the St. Regis/North Country region a real life 'Cinderella' did show up. However, state and local authorities did NOT offer a benefits package, tax breaks, abatements, or any infrastructure improvements. In fact, State and local authorities actually demanded an outright piece of the action. Twenty-five percent of the action, and off the top. For this 'Cinderella' had the misfortune of having 'her carriage' return to a pumpkin on an Indian reservation, and Cinderella came in the form of gaming.

Therefore, what is interesting is that not only is there a 'pay-to-play' mentality ingrained, it is with some amazement that one would be surprised to learn why the State would want to extract 25% of the capital from the St. Regis/North Country region.³⁴ What 'compels' such action whereby the state literally takes capital (money) out of a region and expectant economic development. For this answer one has to look beyond where gaming occurs, and where policy is set.

II. TAX POLICY VERSUS TRIBAL NATION AS GOVERNMENT:

Perhaps one of the strangest facets of failing to recognize 'Tribal Nation as government' is in the area of tax policy, and more particular, in the area of tax treatment of local government bonds. For many governments when the need to raise large sums of money arises, many resort to issuing their own debt instruments rather than securing a loan, or simply raising

³³ See Karen Dewitt, *Cuomo Downplays Low Job Numbers in Start Up Report*, NEW YORK NOW (Jul. 6, 2016).

³⁴ Governor Cuomo Announces Agreement between State and Saint Regis Mohawk Tribe, GOVERNOR (May 21, 2013), www.governor.ny.gov/news/governor-cuomo-announces-agreement-between-saint-regis-mohawk-tribe; Melinda Henneberger, *Adirondack Hamlet Defies Time, and Help*, N.Y. TIMES, April 12, 1993 (In some circles the area has been described as the "Appalachia of the North").

taxes.³⁵ The debt instruments, bonds most often, also bring with them a recognition that is rarely enjoyed by other financial instruments. Tax free income.³⁶ How this works is that if the State of X or a subdivision thereof may desire to raise \$ 1 million dollars. One avenue which they may do this is through the sale of bonds. When the bonds are paid there is an interest payment attached to the bond. If it is 6 percent, the 6 percent extra that the lender (purchaser of the bond) realizes has no income tax payable on it. This status was embedded in the internal revenue code dating back to when the internal revenue code was first implemented in 1913, and has proven to be very beneficial for governments over time.³⁷

One interesting factor about this process is that the purposes which these bonds may be used is not as limited for State or local governments as it is for Tribal Nation governments. For instance, it is through this process that State/Local governments will very often establish a public authority/corporation to borrow money (e.g. issue bonds) and construct something that would otherwise be a private enterprise function.³⁸ Clearly major sports stadiums and arenas would fall into such category. As would business development parks, water front development authorities, housing authorities, and the like. Very often these types of bonds are referred to as "private activity bonds". It is through these 'private activity bonds' that a city/county government/authority etc. will utilize to lure a 'sweetheart deal'.³⁹ Such use of 'private activity bonds' can come in many guises. For instance; the pro-sport franchise that wants a new stadium, the mega hotel chain that wants a convention center associated with its property, or industry that wants a development/industrial park[s]. For our purposes, the current 'START-UP New York' program is fitting into this type of activity.

Clearly advocates and critics could, and have, argued about the utility of having such a provision in the Internal Revenue Code. However, for our purposes we must point out that Tribal Nations

³⁵ Claire Boyte-White, *What are Some Examples of Debt Instruments?*, INVESTOPEDIA (May 5, 2016, 8:11 AM), <http://www.investopedia.com/ask/answers/050515/what-are-some-examples-debt-instruments.asp>

³⁶ Municipal Bond, INVESTOPEDIA, <http://www.investopedia.com/articles/tax/08/bond-tax.asp>.

³⁷ See 26 U.S.C. § 103 (1988).

³⁸ Private Activity Bond - PAB, INVESTOPEDIA, <http://Investopedia.com/term/p/privatepurposebonds.asp>.

³⁹ *Id.*

get no such treatment under the Internal Revenue Code.⁴⁰ Although Tribal Nations can issue some bonds, there is no provision which permits them to issue 'private activity bonds' in the same manner as state and local governments can issue private activity bonds.⁴¹

For Tribal Nations it is nearly non-existent for them to issue 'private activity bonds' as State/local governments do. This is the result of limitation language contained in the same Internal Revenue Code provision which finally recognized Tribal Nation Governments as occupying the same status as State and Local Governments under the Internal Revenue Code.⁴² The limitations placed on Tribal Nation governments is threefold. First, unlike state and local governments there is no recognition for Tribal Nations to issue 'private activity bonds'.⁴³ Therefore, unlike a State or local government which can issues such bonds for a resort/convention center/golf course, Tribal Nations are not permitted to do so.⁴⁴

Second, Tribal Nation governments bond issuances can (under the Internal Revenue Code) only be used for essential government functions.⁴⁵ Lastly, when the Internal Code provision effecting Tribal Nations was amended in 1987, additional language was added to further limit Tribal Nation bonding activity to those functions "customarily" financed by State and local governments.⁴⁶ It has been this "customarily" language which has resulted in the Internal Revenue Service to severely restrict nearly all Tribal Nation activity in the Bond industry.⁴⁷ It is these last two provisions which severely restrict

⁴⁰ Tribal Tax Status Act, 26 U.S.C. § 7871 (1982).

⁴¹ See 26 U.S.C. § 7871 (1982) (in 1982 Congress enacted the Tribal Tax Status Act which brought many Tribal Nations on par with State governments in many tax aspects. The underlying principle reflects adherence to the legal principle that with respect to intergovernmental tax immunity, or simply, one government should not tax another).

⁴² 26 U.S.C. § 7871 (1982).

⁴³ 26 U.S.C. § 103 (1988).

⁴⁴ 26 U.S.C. § 103 (1988) (and yes, 'private activity bonds' have been and are routinely used for such activities).

⁴⁵ 26 U.S.C. § 7871 (c)(1) (1988).

⁴⁶ See 26 U.S.C. § 7871 (e) (1988).

⁴⁷ See Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C.L. REV. 1009, 1011, (2007) (in this article the author also traces the IRS treatment of Tribal nations that have issued bonds, and noting that Tribal Nations are more likely to be audited, and any conduit financing (e.g. use of a local entity which can issue private activity bonds) also falls under this strict I.R.S. scrutiny).

(if not outright bar) Tribal Nations from issuing ‘private activity bonds’ which normally ‘grease’ the economic development ‘wheels’ for states, local governments, and state authorities.⁴⁸

For state and local governments however there appears to be an ever growing list of projects which benefit from ‘private activity bonding.’ These have included publicly financed hotels, rental housing, road transportation, parking facilities, park and recreation facilities, golf courses, convention centers, and even gaming support facilities (e.g. lottery offices).⁴⁹ Expansion of this list has occurred whenever economic development is considered an essential government service. Once that link was made, the tourism ‘industry’ has generally reaped the most rewards.⁵⁰ For once this occurred, the IRS has been willing to permit ‘private activity bonding’ benefitting municipal golf courses, hotels, convention centers, stadiums, racetracks, and casinos themselves. For the local reader, who happens to be a fan of Americas pastime, this has included the new Yankee Stadium as well as the new Mets Stadium.⁵¹

The overall ‘private activity bonding’ is relatively unknown to many people. As small as that group is, it is even smaller with persons who are aware of the current ‘status’ of Tribal Nations in the private activity bonding market. It was not until the advent and growth of Indian Gaming that this little known fact started working its way to the forefront. Yet the status quo remains, wherein a state or local government could issue bonds to serve a private enterprise (e.g. build the roads and infrastructure in and around a gaming resort to lure a gaming company to spot a casino there), while Tribal Nations cannot do the same. In fact, Tribal Nations are often left to bear these costs through private borrowing alone.

However, in New York the problem is worse. For in New York, there has been the uncanny ability to utilize Indian Gaming Revenues to retire/pay off private activity bonds that have in no way benefitted any Tribal Nation.

III. INDIAN GAMING AND THE ADVENT OF ‘TAXATION BY COMPACT’:

⁴⁸ See Jenny Small, *Financing Native Nations: Access to Capital Markets*, 32 REV. BANKING & FIN. LAW 463 (For further explanation of this limitation).

⁴⁹ See *supra* note 47, at 1035–37.

⁵⁰ *Id.* at 1054.

⁵¹ *Id.* at 1055.

It is a misnomer to say that the Indian Gaming Regulatory Act (IGRA)⁵² is the mechanism which ‘permits’ Indian gaming. The more appropriate description recognizes that Indian Gaming is an exercise of sovereignty that, as a government, Tribal Nations enjoy. In fact, under the rational of the Supreme Court in *Cabazon*,⁵³ it can be fairly summarized that if a state permits it, but regulates it, then Tribal Nations can do the same. This is the actual ‘under-pinning’s’ of Indian Gaming.

New York, long before Indian Gaming emerged, had permitted charitable gaming which included not only bingo but ‘casino nights’, ‘poker nights’, turkey shoots’ etc.⁵⁴ Even more surprising for some is to realize that prior to *Cabazon* and passage of the Indian Gaming Regulatory Act, some Tribal Nations already had gaming; e.g. St. Regis, Seneca.⁵⁵ When *Cabazon* was being litigated the gaming in Akwesasne and Seneca had already expanded to become what was then known as high-stakes bingo. Therefore, the more appropriate chronology is New York charitable gaming, Indian gaming, *Cabazon* (1987), and then the Indian Gaming Regulatory Act (1988) (hereinafter IGRA).

Some articles discussing the history of IGRA’s passage can best encapsulate the issues and concerns of Indian Country when IGRA was being considered for passage.⁵⁶ For our purposes, it appears that IGRA may have been teetering upon failure as the *Cabazon* case worked its way to the Supreme Court. However, when *Cabazon* was decided the proverbial ‘shoe was on the other foot.’ States which thought they may be able to quash Indian Gaming had to in fact make a review of their own policies and laws when it came to gaming. Therefore, when IGRA worked its way through Congress some interesting provisions were included.

⁵² Codified at 25 U.S.C. § 2701 et al. (hereinafter referred to as IGRA).

⁵³ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

⁵⁴ See N.Y. CLS Gen. Mun. Law. § 185.

⁵⁵ See generally Gerald Benjamin, *When Does a Gambling Prohibition Not Prohibit Gambling? Or An Alternative Mad Hatter’s Riddle and How It Helps Us to Understand Constitutional Change in New York*, 75 ALB. L. REV. 739, 757 (2012) (both Tribal Nations had what was described as ‘high-stakes’ Bingo prior to passage of IGRA).

⁵⁶ See also Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?*, 26 CREIGHTON L. REV. 387 (1993). See generally Gale Couvey Toensing, *Early Pioneers of Indian Gaming Had Same Goal: To Help Their People*, INDIAN COUNTRY TODAY MEDIA NETWORK (Mar. 27, 2013), <http://indiancountrytodaymedianetwork.com/2013/03/27/early-pioneers-indian-gaming-had-same-goal-help-their-people-148381>.

Perhaps the most noteworthy IGRA provision with respect to our current discussion, is that IGRA prohibits any attempts by States to tax Indian gaming.⁵⁷ Wherein IGRA provides that neither a State or a subdivision thereof may impose any tax, fee, charge, or other assessment upon any Indian Tribe. It is at this point which some other matters must be restated. First, Indian Tribe in this context is literally the Tribal Nation itself, or in more particular, Tribal Nation AS government. As we discussed earlier, Tribal Nation governments are recognized like state governments and therefore are not subject to income taxes.⁵⁸

This is consistent with the same recognition enjoyed by all governments under the Internal Revenue Code as discussed herein.⁵⁹ Therefore, this IGRA provision is NOT granting any purported tax exemption, it is simply recognizing the accepted intergovernmental tax immunity principle which has already been included in the Internal Revenue Code to include Tribal Nations.

Next, it is just as important to recognize that IGRA does require that net gaming revenues can only be used for certain enumerated purposes. Here net gaming revenues must benefit the Tribal Nation (e.g. Tribal Government). These include funding Tribal government programs (e.g. net gaming revenue as tribal government revenues), providing for the general welfare of the Indian tribe and its members (e.g. paying for essential government services/welfare), promote tribal economic development,⁶⁰ donate to charitable organizations, and help fund

⁵⁷ 25 U.S.C. §2710(d)(4).

⁵⁸ *Id.*

⁵⁹ Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C.L. REV. 1009, 1009, 1015. However, his does not result in individual gain of gaming proceeds as the Internal Revenue Service would tax that as personal income, the same holds true for gaming management companies which can enter into contracts with Tribal Nations to manage Indian Casinos. We should also note that Native Americans are subject to US personal Income Taxes, however they very often do not receive any deductions for state/local taxes paid. Therefore, they are often paying the same amount of taxes if not more by being effectively 'trapped' in higher federal income tax bracket due to the lack of deductions. Other deductions also elude Native Americans, such as those associated with real property mortgages which are generally unavailable to Native Americans residing on an Indian Reservation.

⁶⁰ 25 U.S.C. § 2710 (b)(2)(B)(i-v) (2012) (in addition to the irony of not being able to issue 'private activity bonds' IGRA was passed shortly after the IRC amendments recognizing Tribal Nations in the same status as States).

the operation of local government agencies.⁶¹ Therefore, when IGRA was being ratified, Congress simply required that the use of Indian Gaming revenues by a Tribal Nation be utilized in a manner consistent with what nearly all states are also required to do with gaming revenue.⁶² It was this aspect of IGRA which further cements the intergovernmental tax immunity provision of the IRC.

Interestingly, there appears to be only one avenue under IGRA in which a state could possibly receive tribal gaming revenues. This is in the area of regulatory costs.⁶³ In fact, it is under this IGRA provision that the Seneca Nation of Indians, Oneida Indian Nation, and St. Regis Mohawk Tribal compacts with New York have included both a police and gaming regulatory agency reimbursement provisions.⁶⁴

In light of the foregoing, that a state is NOT permitted to directly tax tribal gaming revenue, one must wonder just how does New York receive any Indian gaming revenues. That occurs by a process known to some in the Indian Gaming Business as ‘taxation by compact’. Whereby what a state cannot do directly⁶⁵ under IGRA, they do indirectly through the tacit approval of the federal government and some Tribal Nations.

The ‘taxation by compact’ can trace its roots to IGRA’s requirement that Tribal Nations are to pursue “Gaming Compacts” with the State which surrounds them. These compacts are to address a number of issues, inclusive of the reimbursement of state “regulatory costs” while at the same time be in compliance with the intergovernmental tax immunity requirements contained in IGRA (e.g. no direct taxation by state or a subdivision thereof).⁶⁶ One should not presume that this has

⁶¹ 25 U.S.C. § 2710 (b)(2)(B)(i-v) (2012) (unique is that IGRA also accomplishes that through the Tribal Nation required action of passing a Tribal Gaming ordinance, which must be built into its provisions).

⁶² See 134 CONG. REC. 12,643 (1988) (this would include, in New York, lottery revenues used for public education, charitable gaming events can only be conducted by charitable organizations. The one exception to this requirement appears to be Nevada which has the more ‘open’ gaming).

⁶³ See 25 U.S.C. § 2710 (d)(3)(C)(i-vi).

⁶⁴ Elizabeth D. Lauzon, *Jurisdiction Issues Arising Under Indian Gaming Regulatory Act*, 197 A.L.R. FED. 459, 2a (this usually consists of policing costs provided by the New York State Police and formerly, the New York State Racing and Wagering Board costs, now known as the New York State Racing and Gaming Commission).

⁶⁵ See 25 U.S.C. § 2710 (d)(3)(C)(4).

⁶⁶ See 25 U.S.C. § 2710 (b)(2)(B); 25 U.S.C. § 2710 (d)(1)(A)(ii).

been an easy path as the area of State/Tribal Nation gaming compacts spurred its own litigation with a return to the Supreme Court with respect to sovereign immunity issues of both States and Tribal Nations.⁶⁷ For our purposes it is important to note that through all this IGRA has NOT been amended or re-worded to permit State taxation. Therefore, to see 'taxation by compact' is in actual reference to another phenomenon that worked in conjunction with the 'compact requirement'.

The 'taxation by compact' owes its origination to one of the very first gaming compacts ratified under IGRA. That of the Mashantucket Pequot Gaming Compact with the State of Connecticut. Even more surprising however is that it was NOT though an act of Congress, but rather through an interpretation provided by the United States Bureau of Indian Affairs Solicitors Office. The Solicitor's Office presumes there exists a 'quid pro quo' in Indian Gaming. Whereby the state through compact provision promises to the Tribal Nations 'exclusivity' for gaming purposes. Like promises contained in numerous treaties of yester years, many of these 'gaming exclusivity' promises have been broken more and more frequently as States themselves have been expanding gaming at a quicker pace then Indian Gaming.

This is precisely what has occurred in New York as the state while promising exclusivity to the Tribal Nations, has expanded gaming to record levels within the state. With each gaming expansion it finds itself embroiled in disputes with the gaming Tribal Nations who were providing a portion of the gaming machine revenues to the State to enjoy a purported exclusivity. Like treaty provisions of the past, these seem to become more and more illusory with each gaming license handed out by the State. These disputes have included ones with the Seneca Nation of Indians, the Oneida Indian Nation, and the St. Regis Mohawk Tribe.⁶⁸ It should be noted that New York's purported

⁶⁷ See *Seminole Tribe v. Fla.* 517 U.S. 44, 47 (1996) (Rehnquist, CJ.) (citing *Ex parte Young*, 209 U.S. 123 (1908)).

⁶⁸ See *Seneca Nation ends dispute over Class III gaming compact*, INDIANZ.COM: INDIAN GAMING (June, 14, 2013), <http://www.indianz.com/IndianGaming/2013/026500.asp>; See also Gale Courcy Toensing, *The Oneida Nation and New York Sign a Historic Agreement*, INDIANCOUNTRYTODAYMEDIANETWORK.COM (May 29, 2013), <http://indiancountrytodaymedianetwork.com/2013/05/29/oneida-nation-and-new-york-sign-historic-agreement-149583>. See also Governor Cuomo Announces Agreement Between State and Saint Regis Mohawk Tribe, OFFICE OF NEW YORK STATE GOVERNOR ANDREW CUOMO (May 21, 2013), <https://www.governor.ny.gov/news/governor-cuomo-announces-agreement-between-state-and-saint-regis-mohawk-tribe>.

'exclusivity' deals with its Tribal Nations are not highly regarded by many other parts of Indian Country. One commentator noted that: "By authorizing more and more privately held and state sponsored gambling while still demanding the revenue share from the tribes those states appear to be imposing a tax in contravention of the explicit prohibition in the IGRA. California and New York are the worst among them."⁶⁹

Of course we could spend endless prose on who is getting the worse end of these exclusivity deals, or if they are even authorized under IGRA, or if it simply amounts to a tax. For current purposes though, it may be best to do that age old practice of 'following the money.' In particular, what happens to these 'Indian gaming' revenues which New York now receives? What in fact becomes of them, and do Tribal Nations actually receive anything from these revenues which left 'their' facilities? For those Tribal Nations who do have gaming and a compact with New York, we must also note that the gaming revenue split is in addition to the reimbursements for law enforcement and regulatory services.⁷⁰

IV. FOLLOWING THE NEW YORK TRIBAL GAMING REVENUE SPLIT

Buried in the nether regions of the voluminous state laws is

⁶⁹ See Harold Monteau, *Regarding Gaming Compacts and Their 'Illusory Exclusivity,'* INDIANCOUNTRYTODAYMEDIANETWORK.COM (September 21, 2012), <http://indiancountrytodaymedianetwork.com/2012/09/21/regarding-gaming-compacts-and-their-illusory-exclusivity; Not so fast, Gov. Cuomo, POSTSTAR.COM> (July 6, 2013), http://poststar.com/news/opinion/editorial/editorial-not-so-fast-gov-cuomo/article_a95623a8-e6aa-11e2-bb22-001a4bcf887a.html (the editorial describes last minute questionable legislative changes (via a process called 'messages of necessity') made by Governor Cuomo which effect Tribal Gaming with respect to the 'exclusivity' the editorial describes: "The new version of the bill retains a system under which the state is divided into six zones and casinos are allowed in only three of those zones. Since the tribal casinos are in the other zones, their exclusivity rights are protected in the new version, at least for now. But the new version leaves open the possibility of that state siting future casinos in tribal zones. The original version guaranteed the tribes' exclusivity as long as their state gaming compacts were in good standing").

⁷⁰ Governor Cuomo Announces Agreement Between State and Saint Regis Mohawk Tribe, *supra* note 68 (for the St. Regis Mohawk Tribe this, under the compact, includes regulatory costs for the New York State Racing and Wagering Board, and the New York State Police. These costs run in the millions of dollars as St. Regis has the same size Police and Regulatory details (personnel) as larger facilities (e.g. Oneida/Turning Stone), and these costs are in addition to the revenue split 25% (this is 25% of the gross take on gaming machines)).

the actual mechanism which greases New York's Indian Gaming money wheels. This can be found in § 99h of the New York State Finance law.

For starters what occurs is the law itself does NOT set how much is actually going to be given to the State.⁷¹ That figure is actually derived from the Tribal State Compact entered into between the 'State' and the Tribal Nation for the proverbial 'exclusivity'.⁷²

This money is then placed in what is to be known as "tribal-state compact revenue account".⁷³

"Such account shall consist of all revenues resulting from tribal-state compacts executed pursuant to *article two of the executive law* and a tribal-state compact with the St. Regis Mohawk tribe . . . "⁷⁴

Surprisingly NYS Executive Law Article 2 actually provides:

"The office of the governor shall be known as the executive chamber, and his residence, as the executive mansion"⁷⁵

Therefore, the revenues (\$) placed into the "tribal-state compact revenue account" are actually from an agreement entered into between the "executive chamber" and/or "executive mansion" and the St Regis Mohawk Tribe. What is certain is that there is NO New York legislative appropriation funding the "tribal-state compact revenue account" under this provision.

Next, it would appear the State Finance Law then specifically provides that the moneys in the "tribal-state compact revenue account" are to be used for certain enumerated purposes.⁷⁶ It is here that New York localities get 'their/our' share of the "tribal-state compact revenue account".

"Moneys of the account, following the segregation of appropriations enacted by the legislature, shall be available for purposes including but not limited to: (a) reimbursements or payments to municipal governments that host tribal casinos pursuant to a tribal-state compact for costs incurred in connection with services provided to such casinos or arising as a result thereof, for economic development opportunities and job

⁷¹ N.Y. STATE FIN. LAW § 99-h (Consol. 2016).

⁷² See Governor Cuomo Announces Agreement Between State and Saint Regis Mohawk Tribe, *supra* note 68.

⁷³ See N.Y. STATE FIN. LAW § 99-h(1) (Consol. 2016).

⁷⁴ FIN. § 99-h(2).

⁷⁵ N.Y. STATE EXEC. § 2 (Consol. 2016).

⁷⁶ FIN. § 99-h(3)(a).

expansion programs authorized by the executive law; ***provided, however, . . .***⁷⁷

It is from the “***provided, however***” that is most important for localities surrounding the St. Regis Mohawk Indian Reservation, as that provides:

a minimum of twenty-five percent [25%] of the revenues received by the state pursuant to the state’s compact with the St. Regis Mohawk tribe ***shall be made available*** to the counties of Franklin and St. Lawrence, and affected towns in such counties. Each such county and its affected towns shall receive fifty percent [50%] of the moneys made available by the state . . .⁷⁸ [my number edit].⁷⁹

The first item to note is that the amount for the localities is ‘limited’. Here the reader should be reminded that the provision is only addressing revenue from one (1) individual Executive Chamber/Tribal Nation compact (St. Regis= 25% gaming machine take). The language here makes it very clear that there is NO ‘pooling’ of tribal gaming revenues into the “tribal-state compact revenue account.” The sub-set of money just defined is then split again and sent to specific entities.⁸⁰ Furthermore, this limited apportionment is then directed as to how much is to be split among the specific entities (Each such county and its affected towns shall receive fifty percent [50%] of the moneys made available by the state).⁸¹

Providing simple numerical values, we could speculate that IF \$100,000 is to be placed in the “tribal-state compact revenue account” via a compact, the first split would total \$25,000 (\$100k x 25%). This \$25,000 would then be divided among Towns and County: If 2 counties, then \$12,500 to each (\$25k ÷ 2), then

⁷⁷ FIN. § 99-h(3)(a) (emphasis added).

⁷⁸ *Id.* (emphasis added).

⁷⁹ *Id.* (it appears that these provisions pre-date the recent constitutional amendment passed in New York to ‘legalize’ casino gambling in the state. most surprising is that there is no mention in the above provision, just as there was none made publicly when it was passed, to have any such gaming revenues be dedicated to “education” like other state gambling).

⁸⁰ FIN. § 99-h(3)(a) (made available to the counties of Franklin and St. Lawrence, and affected towns in such counties; e.g. 50% of the 25% set aside).

⁸¹ *Id.*

within the Counties among the “affected” Towns ($12,500 \div 2 = \$6,250$). And this would be “made available” to them.

Although the obvious question is “What happens with the remaining 75%?” Let us review some other matters first. The language used in the Finance Law does not appear to limit the use of the funds by the Counties and Towns of the ‘50% of the 25% set-aside’, as the phrase “***provided, however***” seems to indicate that the money may be used for purposes other than those contained in (a) and (b) of Finance Law § 99h (3). The statute appears to indicate that Franklin and St. Lawrence Counties get their percentage, and then the moneys (remaining?) must be used for the enumerated purposes contained in Finance Law § 99-h (3). Of course litigation or a scholarly piece on statutory interpretation may clarify. For current purposes I add this because for a good number of years the public portrayal has been that the ‘percentage split’ contained in Finance Law § 99-h (3) could only be utilized by the County and Town for the purposes identified in section (a) (reimbursements or payments to municipal governments . . . for costs incurred in connection with services provided to such casinos arising as a result thereof, ***for economic development opportunities and job expansion programs***. . .).⁸² Yet, the language used in the law does not fit this public portrayal.

With ‘tongue in cheek: Shockingly’ this section of Finance Law § 99-h(3)(a) does not come even remotely close to describe the experience of the St. Regis Mohawk Tribe in opening and operating the Akwesasne Mohawk Casino. Meaning that neither the Town of Bombay or the Town of Fort Covington, or the County of Franklin for that matter, provided any services to either the SRMT or the Akwesasne Mohawk Casino which would require reimbursement or re-payment.⁸³ In fact it still doesn’t!

The water line serving the Akwesasne Mohawk Casino is a SRMT/BIA project, the roads/parking/curbs around the facility

⁸² See, e.g., Susan Mende, St. Lawrence County faces decrease in revenue from Akwesasne Mohawk Casino, DAILY COURIER-OBSERVER (Feb. 9, 2016, 1:31 AM), <http://www.mpcourier.com/dco/st-lawrence-county-faces-decrease-in-revenue-from-akwesasne-mohawk-casino-20160209> (describing the Compact money as “Now, it’s just another revenue, like sales tax or bed tax . . . There’s not that criteria that has to be met for economic development.” This is in reference to compact money prior to this date) (emphasis added).

⁸³ See, e.g., SRMT Courts Town of Bombay for Ambulance Service, INDIAN TIME (May 19, 2016), <http://www.indiantime.net/story/2016/05/19/news/srmt-courts-town-of-bombay-for-ambulance-service/21327.html>.

were part of the casino financing costs bore solely by the SRMT through borrowing (no private activity bond issuance *see above*). Similarly, the sewage system serving the Akwesasne Mohawk Casino is a SRMT paid project. Police services, pursuant to the compact, were done by the New York State Police and had to be paid by the SRMT/Casino facility to the State, and were in addition to the revenue split!⁸⁴ In fact, it has only been recently that SRMT own Police Department has taken a bigger role in law enforcement at the Akwesasne Mohawk Casino.⁸⁵

The casino clears its own snow, the SRMT provides waste disposal services, and the SRMT now provides its own building code inspection standards. Therefore, if there is a service that was actually “provided” by either the Town of Bombay or Franklin County to the Akwesasne Mohawk Casino, many St. Regis Mohawk Tribal members and residents sure would like to see it.⁸⁶ Clearly, if reliance is being made on the provision: “for costs incurred in connection with services provided to such casinos or arising as a result thereof,”⁸⁷ then it should fail spectacularly.

For St. Lawrence County, and its purported effected Towns, it is even worse. As noted here, in 1947 Congress authorized the exertion of State criminal jurisdiction on the St. Regis Mohawk Indian reservation via 25 USC § 232.⁸⁸ For reasons which are

⁸⁴ See, e.g., Kristen Sentoff, *Tribal-State Relations in New York State: Past and Present*, NEW YORK FEDERAL-STATE TRIBAL COURTS AND INDIAN NATIONS JUSTICE FORUM, <http://www.nyfedstatetribalcourtsforum.org/listeningconference/pdfs/KristenSentoffTribalNewYorkPastandPresent.pdf> (This was probably the worst cost scenario as the so-called policing costs have been astronomical with relatively little need for such costs. clearly the County, via the County Sheriff could have filled this role. But this appears to have never been contemplated and it was the New York State Police who filled this role).

⁸⁵ See, e.g., Gale Courey Toensing, *Saint Regis Mohawk Tribal Police Take Over Casino Duties*, INDIAN COUNTRY TODAY MEDIA NETWORK (Jan. 18, 2012), <http://indiancountrytodaymedianetwork.com/2012/01/18/saint-regis-mohawk-tribal-police-take-over-casino-duties-73044> (this actually saved both the SRMT/Casino money. Here the State would be ambivalent as they receive the monies for the Tribal state compact from the gross revenue of machines).

⁸⁶ In fact, also reimbursed to the New York State was the so-called regulatory costs of the New York State Racing & Wagering Board. However, in the instance where mismanagement of the casino occurred it was the SRMT Gaming Commission which revoked the gaming licenses of the Casino Management Company and then had to bear the litigation costs. *See* NY CLS Racing & Wagering § 104 (2016) (it must be noted that these costs do NOT come from the revenue split, they are in fact additional to the revenue split.).

⁸⁷ *See* NY ST. FIN. LAW § 99-h (3)(a) (2016).

⁸⁸ 25 U.S.C. § 232 (1948).

unclear, the actual exertion of criminal jurisdiction fell unto the Town of Bombay and Franklin County. It would therefore appear that the land base of the St. Regis Mohawk Indian Reservation was somehow placed within/under the Town of Bombay.⁸⁹ Thereby, theoretically anyways, placing the St. Regis Mohawk Indian reservation within Franklin County. It is therefore a bit of curiosity as to why St. Lawrence County and any of its Towns should receive ANY portion of the revenues from the “tribal-state compact revenue account,” as no part of the currently recognized reservation (where the Casino is located) would ever have had any services delivered by any St. Lawrence County Town, or St. Lawrence County, which would require repayment or reimbursement.⁹⁰ In fact, for them to provide any services is a geographic impossibility. Yet, St. Lawrence County and its Towns receive a portion of the revenue coming from the Akwesasne Mohawk Casino.⁹¹

Therefore, if the money provided to Franklin and St. Lawrence County is NOT for reimbursement for service provided, why should it be limited by any ‘economic development’ requirement as contained in Finance Law § 99-h (3)(a)? This fact is even more confounding when reading the entire clause of Finance Law § 99-h (3)(a) which actually provides: “. . . for economic development opportunities and job expansion programs authorized **by the executive law.**” Here, there is clearly a coupling of “economic development” not with any County or Town, but with those under the ‘executive law’. Nonetheless, it was repeated numerous times that the local towns (Bombay, Fort Covington, Massena, Brasher) and counties (Franklin St. Lawrence) had to prepare and file with the State economic development plans outlining how they were going to spend ‘their’ tribal-state compact money.⁹²

⁸⁹ See *In re Herne*, 133 Misc. 286, 286–87 (1928). See, e.g., Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State’s Indian Law*, 63 ALB. L. REV 125, 141 (1999) (it is impossible for the State to make any changes to a reservation land base.).

⁹⁰ See Thomas P. DiNapoli, *Franklin County: Fiscal Stress*, OFFICE OF THE STATE OF NEW YORK COMPTROLLER, Oct. 2013, <http://www.osc.state.ny.us/localgov/audits/counties/2013/franklin.pdf> (in fact, both St. Lawrence and Franklin County have been very negative and adverse to any settlement of the SRMT land claims which would affect them in any way).

⁹¹ Susan Mende, *St. Lawrence County Faces Decrease in Revenue From Akwesasne Mohawk Casino*, WATERTOWN DAILY TIMES (Feb. 9, 2016), <http://www.watertowndailytimes.com/news05/st-lawrence-county-faces-decrease-in-revenue-from-akwesasne-mohawk-casino-20160209>.

⁹² See *id.*

Based upon the foregoing, it would appear that any limitation on 'Gaming Compact' spending for purely economic development purposes is limited to that under the executive law. This, from all appearances would be the remaining 75% of the St. Regis Compact. A matter which we will discuss in greater detail later.

If someone chooses, they could also obtain and read State Finance Law § 99-h through a simple internet search.⁹³ One version which will appear provides for the reader a history of Indian Gaming within New York. This will provide the reader through its many amendments and "effective dates" a concise history of Indian Gaming in the State. First would be the St. Regis Mohawk Tribe with their compact, and its split with Franklin and St. Lawrence County and towns thereunder. Next would be the Seneca Nation of Indians and the split with first Niagara (county/City) then Erie, Cattaraugus, and finally Salamanca. Last 'to the party' would be the Oneida Indian Nation.⁹⁴ Again one must be reminded that under the law there is no pooling of these amounts for New York localities, therefore each compact effectively stands on its own in providing those enumerated New York entities with 'their' compact money.⁹⁵ As such, it is clear that some New York localities are going to do considerably better as 'their' casino is going to do better than others.⁹⁶ This shows that the other variable in the 'our compact money' system is the ability to wield political clout. What factors determine success appear to depend upon size, location, and political abilities of local officials. The entity that appears to have been able to enjoy the greatest success in this regard is the Niagara area, as they have historically been able to gain the most 'Compact money'.⁹⁷ Those doing the worse are those from rural

⁹³ NY ST. FIN. LAW § 99-h (2016).

⁹⁴ *Oneida Indian Nation Land Claims: Legal Background*, LAND CLAIM UPDATE (Feb. 2002), <http://www.ocgov.net/oneida/sites/default/files/issues/landclaim/lcfinal.pdf> (the Oneida Indian Nation split is clearly heavily intertwined with its land claims settlement).

⁹⁵ See *Infra* note 97.

⁹⁶ This is due to the simple, but familiar, adage, "Location. Location. Location." Interestingly though is that each entity appears to face the same regulatory and police costs which are borne by the Tribal casino. See New York State Enacted Budget Financial Plan, 1, 262, May 2016 <https://www.budget.ny.gov/budgetFP/FY2017FP.pdf>.

⁹⁷ See Philip Gambini, *State Budget Adds Local Casino Cash Partners*, NIAGARA GAZETTE (Apr. 1. 2016), http://www.niagara-gazette.com/news/local_news/state-budget-adds-local-casino-cash-partners/article_a776f863-cbeb-5ed4-beb7-c7015457ce55.html; NYS ST. FIN. LAW § 99-h (3)(a) (2016)(covering Niagara County versus other Counties).

areas, e.g. Franklin & St. Lawrence.

The next aspect of the gaming compact money is to recognize that the “tribal-state compact revenue account” is actually in “the joint custody of the comptroller and the commissioner of taxation and finance,” and the account is to be ‘housed’ within the states “special revenue fund.”⁹⁸ For our discussion, the involvement of the New York State Comptroller is most beneficial as that office has created and maintains the “Open Book” New York website.

From the ‘Open Book’ website we can discover that in 2014 the Town of Bombay received \$ 594,992 in what is described as Economic Development Fees, under the account CD2170 Community Development Income.⁹⁹ This in reality is ‘the split’ from the St. Regis Compact money. To put this in proportion for the Town of Bombay their total revenue realized from property taxes was \$ 312,816, and their other largest source of revenue was that of State Aid which was \$ 102,960.¹⁰⁰ Therefore, combined Taxes and state aid did not even equal the amount the Town received from the St. Regis Gaming Compact.¹⁰¹ In 2015 the Compact Monies for the Town of Bombay actually increased to \$ 831,159 and property tax climbed to a staggering \$ 320,295, while state aid also saw a modest increase to \$ 108,395.¹⁰² To compare the two entities, the St. Regis Mohawk Indian reservation has an estimated population of about 6,000 while the Town of Bombay has an estimated population of 1,200 people.¹⁰³ If we again note that these moneys are not for reimbursement of any services being provided to the Akwesasne Mohawk Casino,

⁹⁸ See NY ST. FIN. LAW § 99-h (1) (2016).

⁹⁹ THOMAS DiNAPOLI, TREND REPORT FOR TOWN OF BOMBAY FOR 2014, OPEN BOOK NEW YORK, <http://wwe2.osc.state.ny.us/transparency/LocalGov/LocalGovResultsTrend.cfm>.

¹⁰⁰ *Id.*

¹⁰¹ See New York State Comptroller, Open Book New York, Comparison Report for Town of Bombay, Town of Fort Covington, and Town of Massena for 2014, <http://wwe2.osc.state.ny.us/transparency/LocalGov/LocalGovResultsCompare.cfm>.

¹⁰² See NEW YORK STATE COMPTROLLER, OPEN BOOK NEW YORK, COMPARISON REPORT FOR TOWN OF BOMBAY, TOWN OF FORT COVINGTON, AND TOWN OF MASSENA FOR 2015, <http://wwe2.osc.state.ny.us/transparency/LocalGov/LocalGovResultsCompare.cfm>.

¹⁰³ See U.S. CENSUS BUREAU, *American Fact Finder: St. Regis Mohawk Reservation*, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_S0101&prodType=table. See also U.S. CENSUS BUREAU, *American Fact Finder: Bombay town*, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_S0101&prodType=table.

the money is pure revenue for the Town of Bombay. As we have noted, recent legislative/policy changes have resulted in the Town of Bombay being free to use this money however they see fit as it has broken free from any notions of being tied to economic development. Regretfully however, for the Town of Bombay this can now include paying lawyers and lobbyists to oppose decades old land claims litigation involving the St. Regis Mohawk Tribe!

Likewise, data from the 'Open-Book' website can also provide details about the Town of Fort Covington in Franklin County which unlike the Town of Bombay classified 'their' gaming monies under Miscellaneous Revenues, account A27725 Vlt/Tribal-State Compact Moneys, of which they received \$771,712 in 2014 (\$463,218 in real property taxes/ \$118,185 in state aid that year).¹⁰⁴ This Town also did not have to provide any services to the Akwesasne Mohawk Casino and as they are free to spend this money however they see fit, this can also include opposition to any settlement of the St. Regis Indian land claims.

The same analysis holds true for St. Lawrence County. Their breakdown over the time period of 2011-2014 was \$ 2.5 million, \$ 3 million, \$ 1.9 million, and \$ 2.9 million.¹⁰⁵ However, when one engages in this activity you can quickly realize that the monies have NOT been equal. There does not appear to be any readily available explanation for this, and seems contrary to the language used in New York Finance Law § 99-h.

Following some of the legislative changes we talked about (2013), the New York State Association of Counties (NYSAC) was very quick point out how much all counties were now going to receive. The 'all counties' was made possible by expansion of gaming in New York, AND a legislative change which added that the State was going to 'give-up' 10 % of its 'Indian Gaming take' to add to the distribution, and thereby be able to cast a wider net of financial aid/support.¹⁰⁶ NYSAC described it in this manner:

The state will distribute 80% of the net gaming

¹⁰⁴ *Supra* note 102.

¹⁰⁵ *See supra* note 82.

¹⁰⁶ *See* Mark R. Alger, Stephen J Acquario, *Counties and Casino Gaming in New York State: Moving Forward* NEW YORK STATE ASSOCIATION OF COUNTIES (Dec. 2013). The big legislative change which resulted from the Nov. 2013 Constitutional Amendment was the "Upstate New York Gaming and Economic Development Act".

revenues retained by the state for state education aid ABOVE the state education formula. Next, the host municipalities (host municipality and the host county) will each receive 10%. The counties within the respective region where the casino is hosted will also receive 10%. Finally all counties within a Native American Gaming region will also share in revenue.¹⁰⁷

For the North Country (St. Regis casino region) this gaming split will now include (estimate \$) Clinton (\$2,039,734), Essex (\$719,969), Franklin (\$ 4,267,907), Hamilton (\$70,393), Jefferson (\$ 3,083,828), St. Lawrence (\$ 5,356, 209), and Warren (\$1,252,742).¹⁰⁸ Most noteworthy, and unlike prior announcements, NYSAC also provided that:

These allocations reflect the Act's preservation of Tribal exclusivity payments to localities in Niagara, Erie, Cattaraugus, St. Lawrence and Franklin counties, and expansion of such payments to Oneida and Madison Counties. This non-state revenue *must be used for property tax relief and for reimbursement for local costs associated with hosting the casino.*¹⁰⁹

Clearly any link to any notion of economic development has been broken, and we have already dispelled any notion of services being provided to the Akwesasne Mohawk Casino. What the NYACS report has also done is to shed some light with respect to the timing of the payments. Wherein:

the respective tribes will have to make their payments to the state (likely on a quarterly basis) before the state will transfer any funds to the counties. For existing compacts, the general practice has been to make payments to the state 90 days after the close of the prior fiscal quarter (i.e. for the payment liability accrued during the

¹⁰⁷ *Id.* at 3.

¹⁰⁸ *Id.* at 7.

¹⁰⁹ *Id.* at 3 (emphasis added).

January through March quarter, the cash would likely be transferred from the tribe to the state near the end of June).¹¹⁰

As was already noted, it is clear the enumerated entities under NY Finance Law are receiving ‘Compact’ money. Again though, this is only 25% of the total. The remaining 75%, or now presumed 65%, is being retained within the “tribal-state compact revenue account”. It appears that this amount can be appropriated and segregated by the legislature. For current purposes this is best synthesized down to common Albany parlance of the “three men in a room.”¹¹¹ Which has long been used to describe Albany’s budget process.

The law would appear to provide that even if this does occur, it would seem to require that the moneys be used for “economic development opportunities and job expansion programs authorized by the executive law; . . .”¹¹² However, to make sure no money escapes, the finance law also provides: “Moneys not segregated for such purposes [*meaning the ‘municipal government set aside*] shall be transferred to the general fund for the support of government during the fiscal year in which they are received.”¹¹³

Is there a State interest to not allocate all of the moneys under any Executive Chamber/Tribal Gaming Compact? Don’t know, but if it was done this would permit any remaining money to be ‘swept up’ at the state level for either appropriating via the ‘three men in a room’ or for placement in the States ‘general fund’.¹¹⁴ It is clear that the State has a compelling reason to engage in such actions as the state is in what appears to be a perpetual finance ‘juggling act’ to plug budget gaps as they appear. A process described as the “Deficit Shuffle” by the New York State Comptroller.¹¹⁵ It would be perhaps silly to presume that the

¹¹⁰ *Id.* at 4.

¹¹¹ See generally Marc Santora, *U.S. Attorney Criticizes Albany’s Three Men in A Room Culture*, N.Y. TIMES (Jan. 23, 2015), <http://www.nytimes.com/2015/01/24/nyregion/us-attorney-preet-bharara-criticizes-albanys-three-men-in-a-room-culture.html>.

¹¹² See N.Y. STATE FIN. LAW § 99h(3)(a) (Consol. 2001).

¹¹³ *Id.*

¹¹⁴ See Indian Gaming Regulatory Act, 25 U.S.C.S. § 2701 (1988) (again note no concerns for education, or for the purposes enumerated under the IGRA).

¹¹⁵ See THOMAS P. DINAPOLI, NEW YORK’S DEFICIT SHUFFLE 3 (2010) (describing how the State Budget Office **sweeps revenue accounts** to pay ‘other’ debts’ and in some instance to pay loans that were taken out to pay

"tribal-state compact revenue account" is not involved in the 'deficit shuffle' process described by the State Comptroller.

Furthermore, it is just as clear that this remaining 65-75% of Compact money should be considered in light of New York's other gaming revenues. By 2014 the New York State Comptroller reported that between 2001-2014 the State had realized \$1 billion in gaming revenue, that in 2013 New York collected more in gaming revenue than the states of Florida and California combined, and predictions at the time by the New York Division of the Budget estimated an increase of \$238 million due to passage of Upstate New York Gaming Economic Development Act. One figure that does bear noting however, is that 'lottery gaming' provided only 5% for public school district revenue in 2012-2013.¹¹⁶

This is not to say that all moneys collected are never spent on economic development or job expansion programs. Clearly money for such programs has to come from somewhere. I only hope to write to point out the ironies of the current situation[s].

For Tribal Nations within the state we must first recall that although many Tribal Nations are providing essential government services (including economic development and job expansion), they are severely hindered in how they can go about their own economic development/job expansion efforts. In more particular, they do not have access to the same financial tools that a State can use: bonds/private activity bonds. For the few Tribal Nations that have managed to issue bonds for economic development activities it is clear that they face stricter scrutiny, if not outright discriminatory treatment, by the Internal Revenue Service. For an entity like the St. Regis Mohawk Tribe this would clearly have been beneficial to be able to issue private activity bonds to construct their recent Casino expansion which now includes many resort amenities (hotel/spa/pool/conference area). Due in significant part to the IRS treatment, they had to seek out private borrowing to make this happen.¹¹⁷

If that was not difficult enough, it is clear for Tribal Nations

debts).

¹¹⁶ See Thomas P. DiNapoli, Trends In New York Lottery Revenues and Gaming Expansion 3 (2014).

¹¹⁷ ICTMN Staff, *St. Regis Mohawk Tribe Approves \$75 Million Casino Expansion and Merger*, INDIAN COUNTRY TODAY MEDIA NETWORK (May, 3, 2011), <http://indiancountrytodaymedianetwork.com/print/2011/05/03/st-regis-mohawk-tribe-approves-75-million-casino-expansion-and-merger31589> (article explains private bank loans were taken out to fund the expansion of the casino).

that it can and has been worse than ‘just that’. For Tribal Nations the one industry that has provided some economic development and job growth (casino gaming/resort) is also the one that they cannot employ the private activity bond authority upon.¹¹⁸ The worse part comes by the fact that they are simultaneously forced to ‘fork over’ a portion of their gaming earnings just to engage in activity that the State itself can now engage freely in. But the cut is deeper than just that. It comes from the fact that the percentages of the revenue split which they must fork over to the State, is then used by that State to engage in economic development activities. Economic activities that the Tribal Nations themselves cannot engage in, or, those which the Internal Revenue Service prohibits them from engaging in.¹¹⁹ While at the same time, Indian gaming revenues are now freely ‘shared’ with localities who can use these funds to defeat the Tribal Nations in trying to regain ancestral homelands.

In fact, for the St. Regis Mohawk experience this has been one of the strangest tales to witness. With their gaming enterprise they brought a substantial economic development project providing hundreds of construction and full time jobs. With the IRS prohibition they had to take on debt of private borrowing to perform tasks that localities offered no assistance in providing (e.g. roads, water, building codes, full cost electricity). Then the State appears, and in order for the gaming enterprise constructed and made operational solely by the Tribal Nation to acquire gaming machines, it is forced to take 25% off the top and give it to the State. The State is then going to use those funds for the purported reason of economic development and job expansion controlled by them under their “executive law”. Not only that, if some economic development or job expansion program catches the State’s fancy, it will issue ‘private activity bonds’ that the Tribal Nations cannot issue. The State will then be able to utilize Tribal Nation Gaming Revenues to retire those private activity bonds which the Tribal Nations themselves cannot issue!¹²⁰

¹¹⁸ INTERNAL REVENUE SERVICE, TRIBAL ECONOMIC DEVELOPMENT BONDS: NOTICE 2009-51 (2009) http://www.irs.gov/irb/2009-28_IRB/ar09.html?_ga=1.250281542.1335503045.1477003124 (explains that Tribal Economic Revenue Bonds, the equivalent to private activity bonds, may not apply to gaming).

¹¹⁹ *Id.*

¹²⁰ See *2015 Experienced Largest Tribal Revenue Gain in a Decade*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 20, 2016), <http://indiancountrytodaymedianetwork.com/2016/07/20/nigc-2015-experienced-largest-tribal-revenue-gain-decade-165208> (“many small or moderately sized Indian gaming operations that

As a state policy question it is clear that there is NO apparent, or rationale purpose[s], behind these efforts as they have clearly exhibited that these economic development and job expansion efforts go to areas that are not near the Tribal Nations. For the St. Regis Mohawk Tribe, which is located in the estimated 55th poorest County of the State, that money is not going to be spent near them, but rather in mega projects 3 hours (Syracuse-Theater/Movie capital of the state),¹²¹ 4 hours (Albany Nano tech capital of the apparent universe),¹²² or 6 hours (Buffalo Billion)¹²³ away from them. To pour salt on the wound, the State (executive chamber) has created Regional Economic Development Councils.¹²⁴

These regional councils are then tasked with developing plans in which to spend these “state funds” upon. To date, the one that “covers” the St. Regis Mohawk Indian Reservation (North Country Regional Development Council) does not appear to have a single St. Regis Mohawk Tribal member serving on it, nor does it appear that SRMT member has ever formally served upon it, nor is any project slated to assist the Akwesasne Mohawk Casino, the very source of the revenue generation. To make sure, it is just as clear that there is NO Native American sitting among the Governor’s appointees who are ultimately going to make the decision on where to spend state money on plans developed by these regional councils!¹²⁵ State monies which include those collected from the Tribal Nation Gaming enterprises!

It is only compounded locally as the very localities who do receive Tribal-State compact monies are under no obligation to provide any service to the St. Regis Mohawk Tribe. Furthermore, it is clear that they remain intensely oppositional, if not outright hostile, to any settlement of the decades old land claims litigation, even as they continue to board up more buildings or watch them collapse. In fact, with the compact monies recently

support rural economic development where little else has.”)

¹²¹ REGIONAL ECONOMIC DEVELOPMENT COUNCIL, 2015 REGIONAL ECONOMIC DEVELOPMENT COUNCIL AWARDS 17–18, 56–57, 92–93 (2015) (this report gives examples of spending designated by the Regional Economic Development Council in Albany, Syracuse, and Buffalo).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ REGIONAL ECONOMIC DEVELOPMENT COUNCILS, <https://regionalcouncils.ny.gov/> (last visited Oct. 20, 2016).

¹²⁵ See Regional Economic Development Councils: North Country, *NCREDC Vision Statement*, <https://regionalcouncils.ny.gov/content/north-country> (last visited Oct. 20, 2016).

being “freed up” for Franklin & St. Lawrence Counties, as well as the Towns of Bombay, Fort Covington, Massena, and Brasher, (meaning these entities no longer have to go through the charade of guising expenditures as economic development) they are free to spend the money as they wish. Therefore, these monies either directly or indirectly make it possible for these same recipients to have more money and resources available to hire lawyers to fight the SRMT’s land claim efforts, more lobbyists to convince Albany how damaging it is to settle the SRMT’s land claims, or to spend resource to undertake directly themselves, actions detrimental or hurtful to the SRMT or its members. This is, as some sociologists recognize, the exploitation of a satellite area (St. Regis) to prop up and support a metropolis area (Albany/Syracuse/Buffalo).¹²⁶

The only matter that is ironic for the State, is to spend more money on more studies to try and determine why the “upstate economy” remains lethargic. In the last couple of decades, the State, fueled in large part by trade groups and big industry (tobacco and gas), had an easy “scape goat,” a secular and insular minority, to blame for nearly all of their economic woes. It was the “Indians” and their sale of gas and tobacco “tax-free” which is destroying the upstate economy. Therefore, it was with wonder and amazement that the Tribal Nations get to watch the State roll out its latest attempt at job creation, Start-Up New York.¹²⁷ Areas which would be totally tax free for 10 years was promised.¹²⁸

One such result of this effort was in central New York where the central New York Hub for Emerging Nano-industries was going to lure filmmakers and create hundreds of jobs. Located in DeWitt New York at the Collamer Business Park, it has attracted one entity and two employees, one of which is an Onondaga County employee.¹²⁹ Even this one entity has been described as a

¹²⁶ See Jacqueline Goodman-Draper, *The Development of Underdevelopment at Akwesasne: Cultural and Economic Subversion*, 53 THE AM. J. OF ECON. AND SOC. 1 (Jan. 1994) <https://www.questia.com/library/journal/1G1-15163026/the-development-of-underdevelopment-at-akwesasne>.

¹²⁷ Kenneth Lovett & Glenn Blain, *Gov. Cuomo’s Start-Up NY Program Adds Just 408 Jobs in 2 Years*, NEW YORK DAILY NEWS (July 1, 2016 6:31 PM), <http://www.nydailynews.com/news/politics/gov-cuomo-start-up-ny-program-adds-408-jobs-2-years-article-1.2696473>.

¹²⁸ Fergal Gallagher, *102 NYC Tax Incentives for Startups You Might Not Have Heard of*, BUILT IN NYC (Nov. 2, 2015), <http://www.buitinnyc.com/2015/10/12/nyc-tax-incentives>.

¹²⁹ *Two Thumbs Down: State’s Choice to Spend Money on Film Hub Get Poor Reviews*, WATERTOWN DAILY TIMES (Sept. 2, 2016 12:30 AM), <http://www.waterto>

company “mired in legal and financial problems.”¹³⁰ The cost to lure this one tenant: \$15 million dollars.¹³¹ Yet, the history of this one entity ties into a larger problem that seems to be a drag on nearly every Empire State Governor of recent memory.

As recent as 2015, the Comptroller issued a report with respect to the Empire State Development Corporation and noted that this agency alone has 168 subsidiaries, had \$10.7 Billion dollars in outstanding debt, and its purported support of 2,424 jobs was difficult to quantify.¹³² We should not think that this stands alone either. In April of 2015, Forbes had also reported on the failure of the Start-Up New York program, noting that some \$47 million had been spent on advertising for the program, \$323 million over the programs first three years, and of its then-estimated creation of 2,085 jobs, only 76 jobs had been created.¹³³ If that was not bad enough, by June of 2016, reports have now emerged that another piece of the Start-Up New York program, The Buffalo Billion, is now becoming enmeshed in legal woes as the United States Attorney General for the Southern District of New York had begun a probe of one of Buffalo Billions vendors (Solar City).¹³⁴

For our discussions, the economic difficulties facing Tribal Nations (as we have pointed out) in doing actual economic development is one thing, but having to financially support the State’s own “boon-dongles” is quite another. This effects not only the Tribal Nations, but also the areas that they are situated.¹³⁵

[wndailytimes.com/opinion/two-thumbs-down-states-choice-to-spend-money-on-film-hub-get-poor-reviews-20160902](http://www wndailytimes.com/opinion/two-thumbs-down-states-choice-to-spend-money-on-film-hub-get-poor-reviews-20160902).

¹³⁰ *Id.*

¹³¹ *See id.*

¹³² See Thomas P. DiNapoli, *Public Authorities by the Numbers: Empire State Development Corporation*, STATE OF NEW YORK COMPTROLLER (Feb. 2015), http://www.osc.state.ny.us/reports/pubauth/PA_by_the_numbers_ESDC_2_15.pdf.

¹³³ See Scott Beyer, *Cuomo’s START-UP NY Highlights Failures of the Empire State Development Corporation*, FORBES (Apr. 18, 2015 10:00 AM), <http://www.forbes.com/sites/scottbeyer/2015/04/18/cuomos-start-up-ny-highlight-failures-of-the-empire-state-development-corporation/#4e494e4316ce>.

¹³⁴ See Tom Precious, *New York State Comptroller Looking Into Tax Breaks Given for Buffalo Billion Program*, THE BUFFALO NEWS (June 6, 2016), <http://buffalonews.com/2016/06/06/dinapoli-looking-into-tax-breaks-for-buffalo-billion-program/>.

¹³⁵ See *St. Regis Mohawk Tribe Commissions Economic Impact Study*, INDIAN COUNTRY TODAY MEDIA NETWORK (Oct. 27, 2009), <http://indiancountrytodaymedianetwork.com/2009/10/27/st-regis-mohawk-tribe-commissions-economic-impact-study-84298> (estimating that the SRMT/Casino contributed \$119 million dollars to the local economy. Some estimates put non-native employment at the

Clearly, with the restrictions and business environment they operate in, St. Regis in particular, is proof of the current status of the “Rigged Economy” which affects us. If someone should ask why the St. Regis reservation looks to be still marred in poverty, perhaps this article can provide many answers. For instance, what if the Akwesasne Housing Authority was able to issue “private activity bonds” like other housing authorities? What if St. Regis was able to issue private activity bonds to create a Waterfront Development Authority? What if their Casino was able to issue “private activity bonds” to add other amenities to their facility (e.g. golf)? Some of these efforts would clearly not only benefit the members and residents of the St. Regis Mohawk Indian reservation, but also area residents, and if the gaming facility were to see an increase, the very localities who remain oppositional to the SRMT would also see a benefit.

While issuing bonds is one thing, retiring (paying off) those bonds is quite another. This is extremely difficult to do when the State is extracting 25% of the revenue out of the gaming facility, which literally means it is going to leave the area, which currently, for the St. Regis/Northern New York region, does occur.

One glimmer of hope is that change may be coming. Efforts at the national level are working hard to change the Internal Revenue Code, and hopefully, the beliefs and actions of the Internal Revenue Service. This includes efforts to finally amend “the code” to permit/recognize Tribal Nation authority to issue “private activity bonds.”¹³⁶ The bitter irony for Tribal Nations, something called “Indian Luck” in Indian Country, is just as these changes are on the horizon at the national level, old and familiar foes appear to be lining up for a bigger piece of the action at the woods edge here in New York.

Akwesasne Mohawk Casino at about 50%).

¹³⁶ See Tribal Tax and Investment Reform Act of 2013, 113 H.R. 3030 (2013); Kyle Glazier, *Navajo Nation Closes its First Bond Deal*, THE BOND BUYER (Nov. 18, 2015) <http://www.bondbuyer.com/news/regionalnews/navajo-nation-closes-its-first-bond-deal-1089872-1.html>; United Southern and Eastern Tribes, Inc., *USET Proposals for Tribal Tax Reform* (Apr. 2015), <http://www.finance.senate.gov/imo/media/doc/United%20South%20and%20Eastern%20Tribes,%20Inc.%20.pdf> (calling for the elimination of special restrictions on Tribal Government Debt); Jodi Gillette, *Investing in the Future of Tribal Nations*, THE WHITE HOUSE (Feb. 27, 2015 5:54 PM), <https://www.whitehouse.gov/blog/2015/02/27/investing-future-tribal-nations> (describing efforts to assist in Tribal Nations access to the tax-exempt bond market).