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**“LEGAL AND POLICY ANALYSIS ASSOCIATED WITH MIGRATING INDIGENOUS PEOPLES:
ASSESSING THE IMPACT ON THE *HAUDENOSAUNEE* WITHIN NEW YORK STATE”**

[DISCUSSION DRAFT - COMMENTS WELCOME]

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“LEGAL AND POLICY ANALYSIS ASSOCIATED WITH MIGRATING INDIGENOUS PEOPLES:
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EXECUTIVE SUMMARY

This working paper addresses the issue of Indigenous peoples who seek to migrate to a new location far removed from where they currently reside. Because of policies pursued by the United States in the early nineteenth century, Indians from dozens of Indigenous societies -- including entire nations -- chose to leave or were forcibly removed by the American military from their homelands. Many of these Indians were relocated by the government to the American Midwest, primarily to what is now the State of Oklahoma. Recent federal policies supporting casino-style gaming on Indian lands have stimulated a flurry of activity by these relocated Indians to return to their homelands in pursuit of lucrative gaming markets. In New York State, this phenomenon has been enhanced by recent settlement agreements developed by the State governor to resolve longstanding land claims brought by Indian nations within and outside of the State that were illegally deprived of their land 200 years ago.

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This paper explores the history of this development and analyzes various legal and policy dimensions associated with the migration of Indigenous peoples across state boundaries. In doing so, the following primary conclusions are developed:

- *It is irrelevant whether a relocated Indigenous people chose to leave or were removed from their homeland. What matters is whether these individuals have an inherent right to return and whether they seek to do so under the authority of a foreign tribal government.*
- *Individual Haudenosaunee have the right to return to the Haudenosaunee homelands provided that they meet the basic citizenship requirements. Such individuals who view themselves as American citizens may return to New York State at any time to live on lands outside of the Haudenosaunee homelands.*
- *The historic Haudenosaunee nations have the legal right to prevent the unilateral movement of foreign Indian nations into their historic territory.*
- *The descendants of Indians who executed removal treaties are bound to those terms until a new treaty or treaty substitute is executed.*
- *Allowing foreign Indian nations to return to territories where they have ancestral ties over the objection of Indian nations already occupying those territories is a breach of the treaty based federal trust responsibility.*
- *States have no authority under the Constitution to regulate commerce with the Indian nations and should thus be denied the authority by the United States to transform federal Indian policy.*
- *A prudent U.S. policy on the issue of migrating Indigenous peoples dictates that Indian nations be allowed to migrate significant distances across state boundaries only upon the consent of any Indian nations already in the target territory.*

I. THE LEGAL AND POLICY PROBLEM

In the early nineteenth century, the United States sought to solve its "Indian problem" by pursuing a policy of pressuring Indigenous peoples¹ in the east to relinquish their homelands and move west to new lands beyond the Mississippi River.² The reason for this change was because of the rapid expansion of American settlements into the Indian territory that had generated tremendous conflict along the frontier. While the Treaty and Reservation Policies that had been pursued had the effect of militarily neutralizing the Indian nations and obtaining much of their land, this approach was deemed insufficient to satisfy the American appetite for Indian land. Regardless of the boundary lines that were drawn under the treaties, Whites continued to illegally trespass on Indian lands unchecked by their own national government.

The so-called "Removal Policy" was first announced by President Monroe in 1825 and formally adopted by President Jackson in 1830.³ The basic concept was simple. Negotiate with the Indians for extinguishment of their aboriginal title, promise them more land west of the Mississippi than they currently occupied, and give them enough financial reward to compensate them for their loss, their travel expenses and their redevelopment costs. These terms were then bundled into a treaty which had the legal effect of manifesting consent to the removal. While it cannot be said that

¹ This paper will use the terms "Indigenous", "Indian", and "Native" to describe the first peoples of this continent. The term "Native American" will not be used as some Native people find it offensive to be referred to in a way that suggests American citizenship.

² The Indian Removal Act was passed on May 28, 1830, due to a lack of voluntary Indian consent to sell their lands in the east and relocate to the west. *See* Vine Deloria & Clifford M. Lytle, *AMERICAN INDIANS, AMERICAN JUSTICE*, 6-8 (1983).

³ *See specifically*, James Wilson, *THE EARTH SHALL WEEP, A HISTORY OF NATIVE AMERICA*, 163-165 (1998).

any Native people joyfully acceded to these proposals, many ultimately accepted these terms.⁴ Others did not and the U.S. government used military force to remove them from their homeland.⁵ Most of the Indigenous peoples that were removed or chose to leave were relocated to the "Indian Territory" west of the Mississippi River to what is now the State of Oklahoma.

Recently, some of these relocated Native peoples have sought to reclaim all or part of their homelands in states far removed from where they may have been living for 150 years or more. In some cases, claims are made based on legal arguments that the original treaties that facilitated their relocation are somehow invalid and thus do not divest them of aboriginal title to their homeland. The motivation for this recent development appears to almost exclusively economic. With the advent of gaming as a potentially lucrative economic development opportunity since 1988, billions of dollars are potentially available to an Indian nation with a casino in the right market.⁶ While there are allusions that the effort to "return" is motivated by a sentimental desire for resettlement in the homeland, recent proposals to resolve these land claims forgo any land for resettlement in lieu of a limited territorial footprint intended exclusively for the development of a casino.

The issue of migrating Indian nations is a legal and policy issue of national significance. Currently, the following states are subject to claims by Indian nations who seek to develop casinos in their aboriginal territory: Colorado, Georgia, Illinois, Indiana, Kansas, Maryland, New Jersey,

⁴ *Id.* at 163-172.

⁵ One famous incident occurred in Georgia when the Cherokee refused to leave their homelands, but they were unable to find redress in the U.S. Supreme Court. *See Cherokee Nation v. Georgia*, 30 U.S. 1, (1831). The result was the infamous "Trail of Tears."

⁶ *See* the National Indigan Gaming Commission website, <http://www.nigc.gov/nigc/index.jsp>

New Mexico, New York, Ohio, Pennsylvania, and Texas. To date, no Indian nation has been successful in exchanging land rights to their homeland for a casino.

In New York State, unique and longstanding Indian land claims against the State have recently led to proposed settlements between New York Governor George Pataki and the Seneca-Cayuga Tribe of Oklahoma,⁷ the Oneida Tribe of Indians of Wisconsin,⁸ the Stockbridge-Munsee Tribe of Wisconsin,⁹ and the Cayuga Nation of New York.¹⁰ Substantially, these deals purport to relinquish claims to aboriginal territory in New York in exchange for a casino in the Catskills Mountains near New York City.¹¹

This paper is a legal and policy analysis of the question of whether relocated Indigenous foreign nations¹² can and should be allowed to return to their homelands. Particular emphasis on these "return" efforts will be given to the situation in New York State and the impact on the historic

⁷ See Homepage of George E. Pataki, Governor of New York State, Press Releases, Nov. 12, 2004 ("Governor and Seneca-Cayuga Tribe of Oklahoma Announce a Settlement Agreement to Settle the Tribe's Land Claim and Develop a Casino in the Catskills"), www.state.ny.us/governor (last visited on January 23, 2005).

⁸ See *id.* Press Releases, Dec. 7, 2004 ("Governor Announces Settlement Agreements with the Oneida Indian Tribe of Wisconsin and Stockbridge-Munsee Community to Settle Land Claims and Develop Two Additional Casinos in the Catskills").

⁹ See *id.*

¹⁰ See *id.* Press Release, Nov. 18, 2004 ("Governor and Cayuga Indian Nation of New York Announce a Formal Settlement Agreement to Settle the Cayuga Indian Land Claim and Develop a Casino in the Catskills"). This proposed settlement has since been rescinded by the official spokesperson for the Cayuga Nation and will not be discussed in this paper.

¹¹ In addition, the St. Regis Mohawk Tribe, the Oneida Indian Nation, the Seneca Nation of Indians, as well as the Cayuga Nation, have all expressed interest in a Catskills casino. The question of the migration of domestic Indian nations within aboriginal territory will not be addressed in this paper.

¹² The term "foreign Indian nation" is used because the Oneida Tribe of Indians of Wisconsin, the Seneca-Cayuga Tribe of Oklahoma, and the Stockbridge-Munsee Tribe of Indians are located outside the historic *Haudenosaunee* homeland and they possess governments created under foreign laws.

Haudenosaunee (Iroquois) nations that remained in the State -- the Mohawks,¹³ the Oneidas,¹⁴ the Onondagas,¹⁵ the Cayugas,¹⁶ the Senecas,¹⁷ and the Tuscaroras.¹⁸ Part II will give a brief history of the migration of each of the foreign Indian nations now claiming a right to return to New York. Part III will set forth a legal analysis associated with the migration of Indigenous peoples. And Part IV will highlight policy considerations associated with this phenomenon.

II. A BRIEF HISTORY OF RELOCATION

Beginning in the mid-eighteenth century, *Haudenosaunee* living within what is now the territorial boundaries of New York State relocated to what is now the States of Ohio, Wisconsin, and Oklahoma and the provinces of Ontario and Quebec. A complete history would recount the myriad of factors leading to this relocation process which took place in stages over a 100 year period.¹⁹ What follows is a brief history of the relocation of mixed *Haudenosaunee*, Cayuga, Oneida, and Stockbridge Indians from their ancestral homes. This brief history is not intended to be

¹³ Reflected by the St. Regis Mohawk Tribal Council (federally recognized) and the Mohawk Nation Council of Chiefs.

¹⁴ Reflected by the Oneida Indian Nation (federally recognized).

¹⁵ Reflected by the Onondaga Nation (federally recognized).

¹⁶ Reflected by the Cayuga Nation (federally recognized).

¹⁷ Reflected by the Seneca Nation of Indians (federally recognized) and the Tonawanda Band of Senecas (federally recognized).

¹⁸ Reflected by the Tuscarora Nation (federally recognized).

¹⁹ See generally Laurence M. Hauptman and L. Gordon III (eds.), *THE ONEIDA NATION JOURNAL: FROM NEW YORK TO WISCONSIN 1784-1860*; Laurence M. Hauptman, *CONSPIRACY OF INTERESTS, IROQUOIS DISPOSSESSION AND THE RISE OF NEW YORK STATE*; J. Campisi, *ETHNIC IDENTITY AND BOUNDARY MAINTENANCE IN THREE ONEIDA COMMUNITIES*.

comprehensive, but is instead offered to illustrate the historical origins of the Indians that now seek to migrate back to the *Haudenosaunee* homeland in New York State.

A. *The Seneca-Cayugas of Oklahoma and the Cayuga Nation.*

During the 1740s, different groups of *Haudenosaunee* comprised mostly of Senecas and Mohawks moved into northeastern Ohio across the Cuyahoga River.²⁰ Beginning approximately in 1807, Cayuga Indians who had been dispossessed of all of their homelands in New York joined these mixed *Haudenosaunee* in Ohio. Although from different *Haudenosaunee* nations, they were mistakenly called "Senecas" by Whites because they were the westernmost *Haudenosaunee* (the Seneca Nation was the westernmost of the six *Haudenosaunee* nations) but were often called "Mingos."²¹ The "Senecas" and Cayugas in Ohio -- most of whom were Cayugas -- eventually "joined together and were known as the Senecas of Sandusky."²²

After 1795, New York paid annuities to two of the three separate bands of Cayugas (the band that remained in New York and lived with the Senecas, the one living in Ohio, but not the one living in Ontario).²³ In 1831, the "Senecas" of Sandusky entered into a treaty with the U.S. and agreed to cede their lands in Ohio for lands in the Indian Territory (now the State of Oklahoma).²⁴ As

²⁰ *Strong v. United States of America*, 31 Ind. Cl. Comm. 89, 97.

²¹ *See Cayuga Nation of Indians of Oklahoma v. United States*, 26 Ind. Cl. Comm. 271, 274. *For more detail see* Erminie Wheeler-Voegelin, *THE 19TH AND 20TH CENTURY ETHNOHISTORY OF VARIOUS GROUPS OF CAYUGA INDIANS*.

²² *See Cayuga Indian Nation of Oklahoma v. United States*, 26 Ind. Cl. Comm. 271, 274.

²³ *Cayuga Indian Nation v. United States*, 26 Ind. Cl. Comm. 271, 274.

²⁴ *See Treaty between the Seneca Indians of Sandusky and the United States of America*, Feb. 28, 1831, 7 Stat. 348. in Charles J. Kappler, *INDIAN AFFAIRS: LAWS AND TREATIES*, vol. II, p. 325-327.

evidence of the significant population of Cayugas in this band, it was agreed in a treaty with New York State that the "Senecas" of Sandusky who were relocating west would receive \$1700 of the annual annuity due the Cayuga Nation for the sale of their New York lands while the group of Cayugas who remained in New York would receive \$600.²⁵ Once this mixed group of "Senecas" and Cayugas relocated in Oklahoma, they eventually organized themselves in 1937 under the provisions of the Oklahoma Indian Welfare Act as the Seneca-Cayuga Tribe of Oklahoma.²⁶

The Cayugas that remained in New York (who mostly continued to live among the Seneca Nation in New York), did not form a new government or join the Seneca Nation. They continued to exist as the Cayuga Indian Nation, with their own traditional form of government, and began in 1853²⁷ to redress the sale of their lands in violation of the Trade and Intercourse Act.²⁸

B. *The Oneidas of Wisconsin, the Oneidas of the Thames, and the Oneida Indian Nation.*

In the early nineteenth century, after New York State and its citizens began encroaching upon Oneida land and seizing it through a series of illegal treaties, the Oneida Nation fragmented into three separate groups. By the 1840s, one group stayed on or near the remaining Oneida reservation lands in New York (and also lived with the Onondagas). Another group of almost 600 left to settle

²⁵ *Cayuga Indian Nation v. United States*, 28 Ind. Cl. Comm. 237, 245.

²⁶ *See* Oklahoma Indian Welfare Act, 25 U.S.C. §§ 505 *et seq.*; Constitution and By-laws of the Seneca-Cayuga Tribe of Oklahoma.

²⁷ *See Cayuga Indian Nation v. Pataki*, 165 F.Supp. 2d 266, 354.

²⁸ *See* 25 U.S.C. § 177.

on about 65,000 acres in Wisconsin (called the Orchard and Christian parties).²⁹ And another group of about 400, which included the traditional Oneida chiefs, relocated to lands on the Thames River in Ontario, Canada.³⁰

These three distinct Oneida bands operated separately as a political matter from a very early time. This is illustrated by the removal treaties that representatives from two separate Oneida groups executed on behalf of the Oneida Nation. For example, the Treaty of Buffalo Creek in 1838, which was induced in accord with the U.S. Indian Removal Policy, made provisions for all of the New York Indians to move west of the Mississippi.³¹ The Treaty recognized a separate Oneida leadership of the Oneidas in Wisconsin and a separate leadership representing the Oneidas in New York. Neither Oneida band was viewed by the United States as having the authority to speak on behalf of the other.

In addition, the Wisconsin Oneidas entered into a separate treaty with the United States that addressed the same issues as had been agreed to in the Buffalo Creek Treaty, agreeing to reserve part of the Wisconsin land to these Oneidas (while ceding other parts of the Wisconsin land) and to pay the Wisconsin Oneidas for lands that were ceded to the U.S.³² This payment to the Orchard and First Christian parties of Wisconsin Oneidas does not benefit the New York Oneidas as they were considered a separate political entity.

²⁹ See generally Laurence M. Hauptman and L. Gordon McLester III (eds.), *THE ONEIDA INDIAN JOURNAL: FROM NEW YORK TO WISCONSIN 1784-1860*.

³⁰ *Oneida Nation of New York v. Oneida County*, 434 F. Supp. 527, 536.

³¹ *See Treaty between the United States and the New York Indians*, Jan. 15, 1838, 7 Stat. 550, Art. 2.

³² *Treaty Between the United States and the Orchard and First Christian Parties of Oneida Indians*, Feb. 3, 1838, 7 Stat. 566, in Kappler, *supra* note 24, at 517-518.

In addition, in the 1840s, the third band of Oneidas moved to Canada, along the Thames River, and the title to their new lands was made in the name of the Crown and held the land in "in trust, nevertheless, to and for the use, benefit and behalf of the Oneida Nation of Indians."³³ This action, viewed in concert with the actions of the United States with regard to the New York and Wisconsin Oneidas, establishes the recognition of three distinct Oneida sovereign governments.

C. *The Stockbridge-Munsee*

The Stockbridge Indians, a tribe of the Mahican Confederacy, and the Munsee Tribe, a division of the Delawares are known today as the Stockbridge-Munsee Community or the Stockbridge-Munsee Band of the Mohican Nation.³⁴ In the 1780's, the Stockbridge Tribe, a predecessor to the Stockbridge-Munsee Band, was invited by the Oneida Nation in New York to move from their homeland in Massachusetts to a tract of land in New York State.³⁵ New York State recognized the right of the Stockbridge Indians to enjoy the land by a treaty with the Oneida Nation and by an act of the legislature in 1813. Through a series of treaties, the Stockbridge Indians eventually ceded their lands in New York to the State.

In 1822, the Stockbridge Indians moved with some of the Oneidas to Wisconsin. During the removal period in the 1800s a group of Munsee joined the Stockbridge Indians in Wisconsin where

³³ Jack Campisis, *ETHNIC IDENTITY AND BOUNDARY MAINTENANCE IN THREE ONEIDA COMMUNITIES*, 266 (1974).

³⁴ See Homepage of the Stockbridge-Munsee Band of Mohican Indians, <http://www.mohican-nsn.gov/> (last visited on January 15, 2005).

³⁵ See *Stockbridge-Munsee Community v. United States*, 25 Ind. Cl. Comm. 281, 282; *Six Nations v. United States*, 23 Ind. Cl. Comm. 376, 389.

they joined together to form the Stockbridge-Munsee Community. The 1838 Treaty of Buffalo Creek also recognized the land in Wisconsin as a home for the Stockbridge and Munsee Indians.

III. LEGAL ANALYSIS GOVERNING THE MIGRATION OF INDIGENOUS PEOPLES

The initial question associated with determining the legal rights of Indigenous peoples to migrate is to assess which nation's laws should apply to the inquiry. Because the migration question arises in the context of migration within the United States, federal law is naturally relevant. But since Indian nations are sovereigns in their own right, it is also necessary to assess the significance of their own laws governing land usage. Moreover, this sovereign status implicates the need to address fundamental principles of international law governing the rights of individuals to live where they so choose as well as the powers of nation-states to control their homelands. These general principles of international law will be addressed first.

A. *International Law Provides that the Individual Right of Free Movement Is Limited By the Collective Right to Homeland Protection and So Consent of the Homeland Governments is Required to Return.*

1. *General International Law Principles.*

International law provides that all individuals possess a basic human right to move freely within a nation-state. The Universal Declaration of Human Rights provides that “[e]veryone has the right to freedom of movement and residence within the borders of each State.”³⁶ Moreover, international law provides that “[e]veryone has the right to leave any country, including his own, and

³⁶

United Nations Universal Declaration of Human Rights, Art. 13 (1).

to return to his country.”³⁷ This fundamental human rights principle is incorporated in U.S. domestic law, which provides that citizens are allowed to move freely from state to state.³⁸

This right, however, is not absolute. As an exercise of its own inherent sovereignty, a nation-state has the right to safeguard the borders of its homeland by encouraging or limiting entrance of non-citizens into its territory.³⁹ In the United States, this power is specifically reserved to Congress and states of the union are not allowed to legislate the immigration and deportations of aliens.⁴⁰ So, too, with the Indigenous nations within the United States which have the right to encourage or limit the entrance of non-citizens into their territories. Indian nations possess sovereignty and so only citizens of an Indian nation have the right to live within that nation's territory. Non-citizens may do so only with permission of that nation's government.⁴¹ As a result, Indigenous nations possess an inherent collective right to control the borders of their homelands and safeguard the way-of-life of their people.

This collective right to regulate and protect the borders of one's homeland is also recognized by customary international law. The Inter-American Commission on the Human Rights of Indigenous Peoples' has developed a Draft American Declaration on the Rights of Indigenous Peoples that provides that Indigenous peoples have the right to the legal recognition of their varied

³⁷ *Id.* Art. 13 (2).

³⁸ *See Shapiro v. Thompson*, 394 U.S. 618 (1969); *see also* Laurence Tribe, *American Constitutional Law*, 3rd 3d. Vol. 1, pp. 1255-1271.

³⁹ Frank L. Auerbach, *IMMIGRATION LAWS OF THE UNITED STATES 2* (Elizabeth Harper, ed.) (1975); Constitution of the United States, Article I, Section 8, Clause 3.

⁴⁰ *Henderson v. Mayor* (1876), 92 U.S. 259; *Chy Lung v. Freeman* (1876), 92 U.S. 275.

⁴¹ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

and specific forms and modalities of their control, ownership, use and enjoyment of territories and property, as well as to the use of those lands to which they have historically had access for their traditional activities and livelihood.⁴² “At a minimum, therefore, the human rights norms that protect Indigenous peoples’ interests in land and natural resources obligate [nation-]states to consult with Indigenous peoples concerned about any decision that may affect their interests and to adequately weigh those interests in the decision-making process.”⁴³

The historic *Haudenosaunee* nations within New York⁴⁴ thus possess the inherent right to control whether Indigenous peoples and governments from outside New York may return to historic *Haudenosaunee* territory. The United States and New York State have recognized the aboriginal ownership of *Haudenosaunee* lands within the State. As the recognized property owners who have continually occupied their own land, the historic *Haudenosaunee* nations have an internationally protected right to control and regulate the use of that land. This includes the ability to confer and withdraw citizenship within their nations and the right to reject the settlement of non-citizens and other nations into their territories. As a result, a new nation or people cannot be relocated to the lands owned by another nation or people without the owner’s consent. “For indigenous peoples, the principle of self-determination establishes a right to control their own lands and natural resources

⁴² Proposed American Declaration on the Rights of Indigenous Peoples, Art. 18, approved by the Inter-American Commission on Human Rights, Feb. 26, 1997.

⁴³ See S. James Anaya, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 78 (1996).

⁴⁴ For purposes of this discussion, the "historic *Haudenosaunee* nations" refers to the traditional *Haudenosaunee* Confederacy nations (Mohawk Nation, Onondaga Nation, Cayuga Nation, Tonawanda Seneca Nation, and Tuscarora Nation) as well as the independent nations that are historically linked (St. Regis Mohawk Tribe, Oneida Nation (NY), and the Seneca Nation of Indians).

and to be genuinely involved in all decision-making processes that affect them.”⁴⁵ This protective right extends not just to lands currently under possession of an Indigenous people, but also to lands for which a valid claim can be made as well as lands within historic territorial control. Lands under claim remain subject to the possibility that ownership rights will be completely restored and thus constitute "owned" lands for purposes of homeland security. So, too, with respect to lands that were under historic territorial control but which are now occupied by colonizing peoples and their governments. That such lands may currently be occupied by non-Indigenous peoples and governments is irrelevant. As between a claim of use and occupation between two different Indian nations, the nation that first occupied the land and maintained a continuous presence over time has priority over the nation that left now seeks to return.⁴⁶ As discussed below, non-migrating nations have priority over the use and occupation of historic territory.

2. *Application of the General International Law Principles.*

From these principles, it is thus possible to determine whether the Oneidas of Wisconsin, the Seneca-Cayugas of Oklahoma, or the Stockbridge-Munsees of Wisconsin have the right to return to historic *Haudenosaunee* territory.⁴⁷

Individuals. At the outset, it must be emphasized that only the Oneidas of Wisconsin and the Seneca-Cayugas of Oklahoma are historically descended from a *Haudenosaunee* nation and that

⁴⁵ See Anaya, *supra* note 43, at 78.

⁴⁶ See *Johnson v. McIntosh*, 21 U.S. 543 (1823).

⁴⁷ For purposes of this discussion, the Oneidas of the Thames are not included. This is because they have not entered into a land claims settlement like the Wisconsin Oneidas, the Seneca-Cayugas, or the Stockbridge-Munsees. Moreover, the Oneidas of the Thames are *sui generis* because the traditional Oneida chiefs are located with the Thames Band, raising different issues regarding their governmental status and right to return.

the Stockbridge-Munsees are not. The only connection that the Stockbridge-Munsee Indians have to historic *Haudenosaunee* territory is that the Stockbridge Indians lived on Oneida territory for approximately 40 years as refugees. Their homeland was and is in the State of Massachusetts. As a result of this lack of historic connection, they are foreigners in relation to the historic *Haudenosaunee* nations and thus have no inherent right as individuals to live within historic *Haudenosaunee* territory.⁴⁸

As was true in the 1780's when they sought and were granted permission to live in Oneida Territory, the Stockbridge-Munsee Indians today may only live within historic *Haudenosaunee* territory if permission is granted.⁴⁹ If these Indians view themselves as American citizens, federal law provides that they may migrate as individuals to those areas in New York State that are under the State's direct jurisdictional control. But unless they first obtain the permission from the historic *Haudenosaunee* nations, they may not occupy traditional *Haudenosaunee* territory.

Individual Oneidas from Wisconsin and individual Seneca-Cayugas from Oklahoma fall into a different category. These Indians are historically descended from the *Haudenosaunee*. The Wisconsin Oneidas left in the early nineteenth century and the Seneca-Cayugas are descendants from Senecas and Cayugas who left for Ohio in the mid-1700's and early 1800's, and left for the Indian Territory (Oklahoma) in 1831. As such, they have the individual right to return to historic

⁴⁸ As an example, in *Strong v. The United States of America*, 31 Ind. Cl. Comm. 89, the Senecas of Sandusky (which also included Cayugas) could not prove aboriginal title because Ohio was not their ancestral land and they had simply migrated from another state.

⁴⁹ The Treaty of Canandaigua respects the historic *Haudenosaunee* nations' right to invite their friends to live among them, a recognition by federal law of the *Haudenosaunee* right to control the land. However, it is only the *Haudenosaunee* nations who may extend this invitation, not the State of New York.

Haudenosaunee territory only so long as they satisfy basic citizenship requirements under historic or modern *Haudenosaunee* law.

These citizenship requirements relate primarily to what is commonly known as enrollment criteria. The traditional *Haudenosaunee* citizenship requirement is membership in a clan. One is born into a clan and a *Haudenosaunee* individual becomes a member of his or her mother's clan. As a result of clan citizenship, national citizenship attaches. Thus, by operation of traditional *Haudenosaunee* law, clan membership gives rights to occupy the homeland of one's nation (assuming good behavior).⁵⁰

Unless they can demonstrate continuous clan citizenship, Wisconsin Oneida and Seneca-Cayuga individuals lack the citizenship rights that allow them to live within traditional *Haudenosaunee* territory. Again, if these individuals view themselves as American citizens, they may live in those parts of New York State that are subject to the State's direct jurisdictional control. But, if they have unclear or non-existent clan citizenship, then they have no rights to occupy traditional *Haudenosaunee* territory.

Governments. The governments formed by the Wisconsin Oneidas, the Seneca-Cayugas, and the Stockbridge-Munsees are foreign governments and thus have no authority to exercise governmental authority in traditional *Haudenosaunee* territory unless permission is granted by the historic *Haudenosaunee* nations that remained in New York. The Wisconsin Oneida and Stockbridge-Munsee governments were both formed in the 1930s under the authority of the United

⁵⁰ The only exception relates to the St. Regis Mohawk Tribe at Akwesasne, which has evolved a blood quantum system that recognizes citizenship as emanating from either one's father as well as mother.

States through the Indian Reorganization Act.⁵¹ The Seneca-Cayuga government was formed in 1937 under the Oklahoma Indian Welfare Act.⁵² As such, these governments have never exercised any governmental authority over traditional *Haudenosaunee* territory within New York.

Because of this status, basic international law principles require that the historic *Haudenosaunee* nations that remained in New York have authority to determine whether foreign Indian nations are allowed to exercise governmental authority within historic *Haudenosaunee* territory. It matters not that the land that these foreign Indian nations seek to occupy -- small tracts in the Catskills -- are currently under the direct jurisdictional control of the State. The activities that they purport to engage in on these territories -- casino gaming, collection of State taxes, and compliance with State and local laws and regulations -- directly threatens the economic security, political integrity, and health and well-being of the historic *Haudenosaunee* nations within the State.

These land claim settlement agreements entered into with the State by these foreign Indian nations will, if approved by the United States and the State of New York, have dramatic consequences on the historic *Haudenosaunee* nations within the State. If implemented, the casinos to be built will result in significant economic competition with the existing *Haudenosaunee* nations who engage in gaming activities. And, because of the compromise of tax immunities and jurisdictional rights reflected by the proposed settlement agreements, a disastrous precedent would be set that would undermine the treaty-protected tax and regulatory immunities possessed by historic *Haudenosaunee* nations in the State.

⁵¹ See 25 U.S.C. § 476.

⁵² See 25 U.S.C. § 503.

Accordingly, the historic *Haudenosaunee* nations have the right to protect themselves from any foreign threats to their existence. In this case, the foreign threat is the entry of the Wisconsin Oneida, Seneca-Cayuga, and Stockbridge-Munsee governments into historic *Haudenosaunee* territory at the invitation of New York State. Principles of international law dictate that this migration is permissible only upon the consent of the existing Indigenous nations currently in possession of the homeland.

B. *Federal Law Provides that the Law of the Homeland Government Controls the Land Use and Occupancy Rights and So Consent of the Homeland Governments is Required to Return.*

1. *General Federal Law Principles.*

Federal law provides that foreign Indian nations are barred from controlling lands held by other Indian nations without their consent. The question of land ownership is governed by membership or citizenship in an Indian Nation. As a matter of federal law and policy, determinations of membership or citizenship are matters of tribal law. Accordingly, the United States would have to violate its own established laws and policies to allow a foreign Indian nation to occupy the lands of another Indian nation.

Federal case law provides support for this proposition. In *Prairie Band of Potawatomi Indians v. United States*, the Hannahville Indian Community ("HIC"), descendants of the Potawatomi Nation, sought a right to participate in an Indian Claims Commission award to the Prairie Band and Citizen Band of Potawatomi Nation.⁵³ The HIC did not migrate when the Prairie and Citizen Bands relocated. The Court recognized that the HIC did not have rights in the recovery by the Prairie and

⁵³ *Prairie Band of Potawatomi Indians v. United States*, 165 F.Supp. 139 (1958).

Citizen Bands because they did not migrate and live in the lands subject to the suit. The right to govern the land fell to those who were living upon it. The Court said that

[t]his right to use the land is, however, the property of the band, tribe, or nation of Indians that occupies the land, either by Indian title or a right of occupancy that is recognized by the United States by treaty. The individual's right to use depends upon tribal law or custom.⁵⁴

As a result, the HIC could not benefit from a judgement award from tribal lands owned by the Prairie and Citizen Bands because they did not meet the membership qualifications of either Band. The Court held that

continued membership in the tribe permits participation in distribution of the [Prairie and Citizen Bands' assets]. Loss of membership in the tribe brings a loss of rights in the tribal community property and of participation in the proceeds of any subsequent sale, distribution or allotment of tribal property. *Loss of membership occurs through absence from the tribe.*⁵⁵

Similarly in *Cherokee Trust Funds* case,⁵⁶ the Court recognized the right of an Indigenous nation to regulate withdrawal of membership and its benefits, including ownership of land. *Cherokee Trust Funds* involved a dispute over whether the Eastern Band of Cherokee could benefit from the proceeds of certain lands and annuities derived by the Cherokee Nation from its Western lands. Following the removal of many Cherokee from their homeland, those that stayed behind organized themselves into the Eastern Band of Cherokee and those that left became the Cherokee Nation of Oklahoma. The Court recognized that the Cherokee Nation's constitution stated that

⁵⁴ *Id.* at 147.

⁵⁵ *Id.* at 148 (emphasis added).

⁵⁶ 117 U.S. 308 (1886).

whenever any citizen moved outside of the limits of the nation and became citizens of another government, all their rights and privileges as citizens ceased. The Supreme Court stated,

If Indians in that state, or in any other state east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee nation, in whatever form it may exist, *they must, as held by the court of claims, comply with the constitution and laws of the Cherokee nation, and be readmitted to citizenship as there provided.* They cannot live out of its territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the nation. Those funds and that property were dedicated by the constitution of the Cherokees, and were intended by the treaties with the United States, for the benefit of the united nation, and not in any respect for those who had separated from it, and become aliens to their nation.⁵⁷

These federal cases support the proposition that an Indian nation has the authority to control its own lands and that this authority is derived from the citizenship status of the individuals who comprise that nation. If citizens of foreign Indian nations wish to migrate to historic *Haudenosaunee* lands in New York State, they must comply with the citizenship laws of the nations that currently occupy the land.

2. *Application of the General Federal Law Principles.*

From these general federal law principles, it can be determined whether the Oneidas of Wisconsin, the Seneca-Cayugas of Oklahoma, or the Stockbridge-Munsees of Wisconsin have the right to return to historic *Haudenosaunee* territory.

Individuals. The federal courts in *Prairie Band* and *Cherokee Trust Fund* cases recognized that the homeland nation holds title to the land and that tribal law regulates the use of that land. As a result, in New York State, the historic *Haudenosaunee* nations govern the right to use their own

⁵⁷ *Id.* at 311-312 (emphasis added).

historic lands. The Stockbridge-Munsees cannot claim citizenship in any of the historic *Haudenosaunee* nations and thus cannot receive any benefits of the land without permission. If the Wisconsin Oneida and Seneca-Cayuga Indians can satisfy citizenship/ membership requirements, they may be eligible to derive benefits from the land, in accordance with the laws of the Cayuga Indian and Oneida Nations in New York. In sum, the Wisconsin Oneidas and Seneca-Cayugas Indians cannot receive benefits from the lands of historic *Haudenosaunee* Nations while evading the obligations and burdens of citizenship within those nations.

Governments. The right to benefit from the historic *Haudenosaunee* lands in New York can only be extended to citizens of the nations occupying those lands. Any migration of Oneidas or Seneca- Cayugas Indians to the historic *Haudenosaunee* homeland, as illustrated by the *Cherokee Trust Funds* case, can only be accomplished by complying with the laws of the historic *Haudenosaunee* nations.

C. *Haudenosaunee Law Provides that the Law of the Homeland Government Controls the Right of Return and So Consent of the Homeland Government is Required.*

In the discussion above, federal and international law recognizes that the law of Indigenous nations governs any the right of return. The historic *Haudenosaunee* law and written tribal laws provide for the regulation and migration of its citizens and member Nations.⁵⁸

Citizens. Under historic *Haudenosaunee* legal principles derived from the Great Law, citizenship in an *Haudenosaunee* nation is determined by clan membership. Clan membership, in turn, is determined by the citizenship status of one's mother. This formulation of citizenship law applies within all of the historic *Haudenosaunee* nations except the St. Regis Mohawk Tribe which relies upon a written law system of blood quantum from the father or mother. Regardless of what type of law applies, the citizenship laws of the homeland nation governs. Thus, unless Indians from foreign Indian nations can meet the citizenship requirements of any of the historic *Haudenosaunee* nations currently occupying the homeland, they have no right to live within the territory.

Governments. Indigenous law also regulates the conduct of governments. Under the Great Law, the *Haudenosaunee* forbid nations to enter their territory without the consent of the Confederacy and giving of a promise to abide by the provisions of the Great Law. Even for those nations that no longer subscribe to governance under the Great Law, there exists law governing the need for consent or permission of the government before outsiders may occupy their lands. The foreign governments of the Wisconsin Oneida, Seneca-Cayuga, and Stockbridge-Munsee have not requested permission to enter the historic *Haudenosaunee* territory in New York State. Without this consent, they are forbidden by tribal law to enter.

⁵⁸ Although each Indigenous Nation within New York State may have its own laws as to the migration of citizens and the regulation of land use, the historic *Haudenosaunee* law is simply used as an example of how the law of the non-migrating Nations may be used to regulate the return of citizens or the movement of a Nation into its territory.

D. *The Treaty of Canandaigua Reserves the Right of the Homeland Government to Control the Right of Return and So Consent is Required to Return.*

In addition to the foregoing arguments based on international, federal and *Haudenosaunee* law, the existing treaties between the *Haudenosaunee* and the United States require that the historic *Haudenosaunee* nations grant their consent to the entry of a foreign Indian nation into their historic territory.

The Treaty of Canandaigua of 1794 recognizes the sovereign right of the *Haudenosaunee* to determine who may live within their borders.⁵⁹ Articles 3 and 4 state that the United States will never “disturb...any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment” of their lands. The right to the "free use and enjoyment" of the land reflects an absolute right to control entry and occupancy on one's land. The signatory nations to the Canandaigua Treaty thus possess the right to reject the relocation of any people or nation into their historic territory.

The Stockbridge-Munsees were not signatories to the Canandaigua Treaty and thus have no rights to the "free use and enjoyment" of traditional *Haudenosaunee* land. Any "free use and enjoyment" the Stockbridge Indians enjoyed at the time of the treaty was contingent upon the Oneidas allowing them to continue to reside within Oneida territory. Accordingly, any effort by New York State to facilitate the entry of the Stockbridge-Munsees into historic *Haudenosaunee* lands is an impermissible violation of the Canandaigua Treaty.

The Wisconsin Oneidas and the Seneca-Cayugas are in a slightly different position as they

⁵⁹ See *Treaty between the United States and the Six Nations*, Nov. 11, 1794, 7 Stat. 44.

are descendants of signers of the Canandaigua Treaty (assuming some continuing clan citizenship as discussed above). In the case of the Wisconsin Oneidas, their apparent right derives from the participation of the Oneida Nation in the treaty. For the Seneca-Cayugas, their apparent right derives from the participation of the Cayuga Nation in the treaty.

But even if these Indians can accede to rights arising under the Canandaigua Treaty, they cannot simply exercise those rights to occupy or relinquish the land to the detriment of other Oneidas or Cayugas. What rights they do have are held in common with the other Oneidas and Cayugas. As a result, neither of these foreign Indian nations can obtain land interests within historic *Haudenosaunee* territory without permission.

E. *Removal Treaty Commitments Preclude the Return of Indian Nations that Were Signatories to Such Treaties.*

The Wisconsin Oneidas, the Stockbridge Indians and the Seneca-Cayugas signed treaties agreeing to move to Wisconsin and Oklahoma and none of the treaties provided for a return to New York State.⁶⁰ A treaty cannot be undone without a new legal instrument. Federal law recognizes that “[a] treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.”⁶¹ It is a contract that the United States endeavors to enforce. Thus, any treaty provision that sets aside a certain section of land for a nation will be considered by the

⁶⁰ Treaty Between the United States and the Oneida, Feb. 3, 1838, 7 Stat. 566, in Kappler, *supra* note __, at 517-518; Treaty Between the United States and the Stockbridge and Munsee, Sept. 3, 1839, 7 Stat. 580, in Kappler, *supra* note __, at 529-531; Treaty between the United States and Senecas of Sandusky, Feb. 28, 1831, 7 Stat. 348, in Kappler, *supra* note __, at 325-327.

⁶¹ *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979).

federal government as a contract between the nation and the federal government. Undoubtedly, the federal government will seek to enforce that contract and bind the nation to its agreement to reside upon lands in Wisconsin or Oklahoma.

Historically, enforcement of treaties has been one sided, with Indian nations striving to force the United States to honor its treaties. However, there are a few cases when the United States have held Indian nations to agreements made in its treaties. For example, the Seminole Nation entered into a treaty in 1866 and agreed that persons of African descent and blood, later known as the Freedmen or “Estelusti,” were to have the rights of Seminole citizens.⁶² In 2000, the Seminole Nation sought to adopt several constitutional amendments, including removal of the Freedmen's citizenship rights. The Bureau of Indian Affairs (BIA) refused to approve the nine amendments because they “sought to exclude the Freedmen and had not been submitted to the DOI for approval.”⁶³ The Nation went forward and held elections pursuant to the new amendments and although some Freedmen voted, their ballots were not counted. The BIA refused to recognize the newly elected council and broke off government-to-government relations with the Nation. In a subsequent court case, the Court found that of the nine proposed amendments, the Department of Interior properly disapproved the three amendments denying the Freedmen membership in the Nation. The Court stated, “DOI clearly express[ed] the basis for its objection to these amendments, pointing out that the Freedmen have been members of the Seminole Nation since 1866 and that their removal would violate both statute and treaty.”⁶⁴

⁶² See *Treaty between the United States and the Seminole Nation*, Mar. 21, 1866, 14 Stat. 755.

⁶³ See *Seminole Tribe v. Norton*, 223 F.Supp. 2d 122, 125 (2002).

⁶⁴ *Seminole Nation of Oklahoma v. Norton*, 223 F. Supp. 2d 122, 126. (D.D.C. 2001).

The Cherokee Nation entered into a similar treaty with the United States in 1866 agreeing that all freedmen who were liberated by voluntary act of their former Cherokee owners by law, and their descendants, were to have all the rights of the Cherokees.⁶⁵ In 1989, the descendants of the Freedmen brought suit alleging various statutory and constitutional violations for denying their right to vote in tribal elections and participate in federal Indian benefits programs.⁶⁶ Although the Court found the Freedmen's suit was barred because the Treaty did not waive sovereign immunity, the Court acknowledged that Treaty provision granting the Freedmen membership placed substantive constraints on the Tribe.⁶⁷

Based upon these federal cases, as sovereigns entering into agreements with the United States, the Wisconsin Oneidas and Seneca-Cayugas are bound to the terms of their removal treaties. These treaties do not provide them with an option to return to New York. The Wisconsin Oneidas voluntarily bought land in Wisconsin and then agreed in the Treaty of 1838 with the United States to cede part of that land and retain a portion of their new homeland. Similarly, the Stockbridge Indians moved to Wisconsin based upon treaties in 1821 and 1822 that were never ratified. However, their migration to Wisconsin was confirmed in an 1832 Treaty with the United States that provided for land in Wisconsin but made no mention of a right to return to New York State. And the "Senecas" of Sandusky also agreed to give up their lands in Ohio in exchange for new homeland

⁶⁵ *See Treaty between the United States and the Cherokee Nation*, Jul. 19, 1866, 14 Stat. 799, 801, Art. IX.

⁶⁶ *See Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (1989).

⁶⁷ *Id.* at p. 1461.

in the Indian territory west of the Mississippi River. No mention was made in the treaty of a right to return to Ohio, much less New York.

In sum, then, every Indian nation that entered into a removal treaty is bound to its terms. Without a right to return provided for in these treaties, a new treaty or treaty substitute is necessary to alter the effect of the prior removal treaties. Nonetheless, even if the federal government seeks to negotiate such a treaty or treaty substitute allowing for the return of these Nations, it cannot do so without violating the provisions of the Treaty of Canandaigua.

IV. POLICY CONSIDERATIONS

In addition to the legal considerations associated with migrating considerations, there are also important policy considerations that must be addressed. In short, is it good public policy to allow and encourage the migration of removed Indigenous peoples to their homelands?

The answer to this policy question first turns on whether any Indian nations remain within the territory claimed as "homeland". If, for example, all of the Indigenous peoples were removed from a state, then there is obviously no concern about the impact that migration back to the homeland will have on the Indigenous peoples who never left. At that point, the analysis turns solely as to whether such migration is consistent with U.S. policy objectives and the States sought to be re-occupied. If there remain Indigenous peoples in the homeland, however, then the potential conflict of competing interests dictates a far different policy outcome.

A. *No Indigenous Peoples Remaining in the Homeland.*

Whether the United States should encourage or prohibit the migration of removed Indigenous peoples is an issue clouded by its unclean hands. Indigenous peoples were, in effect, "ethnically cleansed" from the eastern and Midwestern states. If Indigenous peoples remained in the land, their consent is required because they have retained control and ancestral ties to the land. However, in states where all Indigenous peoples were removed, no one remained that could exercise control to the land or regulate membership. Thus, consent is not necessary.

B. *Indigenous Peoples Who Remain in the Homeland.*

To the extent that the U.S. considers granting consent to Indians to return to a homeland that remains occupied by Indigenous peoples, a significant conflict of interest arises. Under American law, the federal government has assumed a "trust responsibility" for Indigenous nations and peoples.⁶⁸ In accordance with this trust responsibility, the United States must act in the manner of a trustee in safeguarding the lands and resources for which it has actively assumed a protective responsibility. As a result, any action taken by the federal government that exposes protected Indians lands and resources to loss raises the possibility of a breach of trust claim being filed against it.⁶⁹

The potential for a breach of trust claim materializes in the case of removed Indians being allowed to reoccupy traditional homelands that are already occupied by other Indigenous people. This is especially true where the Indians seeking to return have formed new governments while away and now seek to exercise governmental authority back in the homeland. In that situation, there

⁶⁸ See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *United States v. Kagama*, 118 U.S. 375 (1886).

⁶⁹ See *U.S. v. Mitchell*, 463 U.S. 206 (1983).

arises a clear conflict of competing governmental interests. If the migrating Indian nation is allowed to exercise authority in the homeland, the authority of the occupying Indian nation will be undermined. Such a situation will result in a loss of sovereign political authority and may also result in a wide range of economic, social, and cultural harm. Depending upon the values, beliefs, and motivations of the migrating Indian nation, the occupying Indian nation may be exposed to a threat to its very existence. In such a situation, U.S. policy must take into account its trust responsibility to the occupying Indian nations. It cannot disrupt the *status quo* in such a way as to allow one Indian nation to prey on another Indian nation.

Such a threat exists with respect to the efforts of the Wisconsin Oneidas, Stockbridge-Munsees, and Seneca-Cayugas to establish casinos in the Catskills. The land claims settlement agreements that these foreign Indian nations have entered into with Governor Pataki promote a political and economic agenda that poses a grave threat to Indian nations already occupying the traditional *Haudenosaunee* homelands. Even though these Indian nations relinquish all claims that they might have to lands in New York to obtain a small parcel of land in the Catskills for a casino, this development would have a significant and profound impact on the occupying Indian nations if it were approved by the United States.

First, occupying Indian nations would suffer an erosion of treaty rights to the "free use and enjoyment" of their lands. The foreign Indian nations have agreed to pay State taxes, a position highly resisted by the occupying Indian nations on treaty grounds. To the extent that a policy precedent is set in the State for an Indian nation to collect State taxes, the legal and political position of occupying Indian nations is greatly undermined.

Secondly, the establishment of casinos in the traditional homeland presents an economic threat to occupying Indian nations. In the case of occupying Indian nations like the Mohawks, Oneidas, and Senecas who already operate casinos, the presence of new casinos controlled by foreign Indian nations presents a direct economic competitive threat. And for all of the occupying Indian nations, including a traditional nation like the Onondagas, the capitulation of the foreign Indian nations on the issue of State tax collection jeopardizes tax immunities that are essential for sustaining the critically important tobacco trade that provides hundreds of jobs and much needed governmental revenue.

And lastly, allowing foreign Indian nations to enter the traditional *Haudenosaunee* homeland raises the threat of social and cultural harms to the occupying Indian nations. The Stockbridge-Munsee are not only a foreign Indian nation vis-a-vis the historic *Haudenosaunee* nations, they are simply a foreign people in relation to the *Haudenosaunee*. And the Wisconsin Oneidas and Seneca-Cayugas, while with an ancestral connection to the *Haudenosaunee*, have undergone changes as a people that diverge considerably from the historic *Haudenosaunee* who remain within the traditional homeland.

For example, the Wisconsin Oneidas and Seneca-Cayugas have very little tribal land in the homes in Wisconsin and Oklahoma. Because of land allotment, title to most of their reservation land is held by individuals. This land status is inherently weak and apparently has induced in these peoples a weakness of belief regarding the need to protect and safeguard their land. The evidence of this is demonstrated by their willingness to relinquish nearly all of their claim to the homeland and pay taxes to the State on the small parcel that they would expect to re-claim. Allowing a people

with this kind of destructive philosophy to occupy historic *Haudenosaunee* land presents a grave threat to the *Haudenosaunee* people who have stayed in the homeland these last 200 years.

Because of these threats, the United States raises the possibility of a breach of its trust responsibility if it were to allow foreign Indian nations to occupy the traditional *Haudenosaunee* homeland.

C. *The Rightful Influence of States.*

The situation that now exists in New York has been driven primarily by the efforts of Governor Pataki in his desire to settle outstanding land claims. This initiative, however, raises troubling aspects of the role of the State of New York in seeking to influence federal Indian policy.

Historically, states have had no legal role in the administration of Indian affairs. The Constitution vests all authority over the regulation of commerce with the Indian nations in the federal government.⁷⁰ This has been construed by the Supreme Court to mean that the federal-tribal relationship is exclusive and that the states have no authority over Indian affairs.⁷¹ Over the years, there has been some erosion of this principle as it relates to the authority of states to regulate the activities of non-Indians within Indian lands.⁷² And, as a reflection of previous efforts to terminate Indian nations, Congress has also granted the states some jurisdictional authority over Indians.⁷³

⁷⁰ U.S. Const., Art. I, Sec. 8, Cl. 3.

⁷¹ *See Worcester v. Georgia* 31 U.S. 518 (1832); *see also Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

⁷² *See Williams v. Lee*, 327 U.S. 711 (1946); *Montana v. U.S.*, 450 U.S. 544 (1981); *Nevada v. Hicks*, 533 U.S. 353 (2001).

⁷³ *See Pub. L. No. 83-280*,

This has taken place in New York where Congress granted criminal jurisdiction to the State in 1948 and civil adjudicatory jurisdiction in 1950.⁷⁴

As a result, it is especially troubling to see the efforts being taken by Governor Pataki to shape federal Indian policy not just with respect to issues in New York but also nationally. To be sure, the power of a state governor to take action to address local concerns is a matter of state law and obligation. But as it relates to Indian affairs, the powers of states are quite limited. Federal officials must be mindful not only of their treaty and trust responsibilities to the historic *Haudenosaunee* nations already in New York, they must also not forget their supreme legal authority to administer Indian affairs vis-a-vis the subordinate states.

It must also not be forgotten that the only reason why there exists the problem of Indian land claims in New York is due to the illegal behavior of New York State officials in violating federal law over 200 years ago. Had New York officials complied with the provisions of the Trade and Intercourse Acts and obtained federal approval of the land transactions with the *Haudenosaunee*, there would be no land claims issues today. Unfortunately, New York's history of violating federal law is not just limited to land claims issues and has continued throughout its history.⁷⁵ The United States has an obligation to its own people, much less the historic *Haudenosaunee* nations, that its own Constitution and laws are upheld to prevent transgressions by states like New York in the area of Indian affairs.

⁷⁴ See 25 U.S.C. §§ 232, 233; Robert B. Porter, *The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233*, 27 HARVARD JOURNAL ON LEGISLATION 497 (1990).

⁷⁵ See Helen Upton, THE EVERETT REPORT IN HISTORICAL PERSPECTIVE(1980); Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State's Indian Law*, 63 Albany Law Review 125 (1999); *Building A New Longhouse: The Case for Government Reform Within the Six Nations of the Haudenosaunee*, 46 Buffalo Law Review 805 (1998).

D. *The Appropriate U.S. Policy on Migration.*

In formulating a policy for how best to deal with the issue of migrating Indian nations, the United States should pursue a policy that respects existing federal law and treaties as well as promotes the current federal Indian policy of promoting self-determination. *Such an approach dictates that Indian nations be allowed to migrate significant distances across state boundaries only upon the consent of any Indian nations already in the territory.*

Such a policy is akin to that established by the Indian Gaming Regulatory Act regarding the ability of an Indian nation to conduct gaming activities on so-called "after acquired lands."⁷⁶ IGRA prohibits gaming on lands acquired after 1988 unless such lands are "contiguous" to the nation's existing territory⁷⁷ or, in the case of landless Indian nations as of that date, on lands located "within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located."⁷⁸ In other words, existing federal law and policy prohibits Indian nations from obtaining land and conducting gaming activities far removed from their current (or last) territory within a particular state.

IGRA, however, contains an exception to the prohibition against gaming on after-acquired lands based on unique circumstances. Such gaming may take place only after the Secretary of the Interior has consulted with officials of the migrating Indian nation, the occupying Indian nations, and state and local officials. She may then allow the migration to occur and gaming activity to take

⁷⁶ The designation is in reference to the prohibition against conducting gaming activities on lands acquired after October 17, 1988 unless certain conditions are met. *See* 25 U.S.C. § 2719.

⁷⁷ *See* 25 U.S.C. § 2719(a)(1).

⁷⁸ *See* 25 U.S.C. § 2719(a)(2)(B).

place only if she determines that doing so is in the best interests of the migrating Indian nation and is not "detrimental to the surrounding community."⁷⁹ If she so decides, the governor of the affected state must concur in the decision for it to take effect.

The only problem with the policy reflected by this statutory provision of IGRA is the vagueness associated with the consultation process that the Secretary must engage in. As formulated, the Secretary is free to ignore the concerns of Indian nations that currently occupy the lands targeted by the migrating Indian nation so long as she "consults" with the occupying nations prior to making her decision. To give proper respect to the treaty-protected rights of self-determination possessed by the occupying Indian nations, these nations should have the power to concur with the Secretary's migration decision on par with that of the state governor.

Accordingly, the best policy that the United States could adopt to deal with the issue of migrating Indian nations is to allow such migration to occur only upon the consent of any Indian nations already in the target territory as well as the state government affected. This policy would thus prohibit the ability of a state to conspire with a foreign Indian nation to jeopardize the interests and treaty rights of Indian nations already located within the state. Thus, in the case of foreign Indian nations like the Wisconsin Oneidas, the Seneca-Cayugas, and the Stockbridge-Munsees who seek to enter New York and relinquish land and treaty rights, the United States should recognize its treaty and policy obligations to the traditional *Haudenosaunee* nations within New York and not act over their objection.

⁷⁹ See 25 U.S.C. § 2719(b)(1)(A).

CONCLUSION

For the reasons set forth in this paper, the following conclusions can be reached:

- *It is irrelevant whether a relocated Indigenous people chose to leave or were removed from their homeland. What matters is whether these individuals have an inherent right to return and whether they seek to do so under the authority of a foreign tribal government.*
- *Individual Haudenosaunee have the right to return to the Haudenosaunee homelands provided that they meet the basic citizenship requirements. Such individuals who view themselves as American citizens may return to New York State at any time to live on lands outside of the Haudenosaunee homelands.*
- *The historic Haudenosaunee nations have the legal right to prevent the unilateral movement of foreign Indian nations into their historic territory.*
- *The descendants of Indians who executed removal treaties are bound to those terms until a new treaty or treaty substitute is executed.*
- *Allowing foreign Indian nations to return to territories where they have ancestral ties over the objection of Indian nations already occupying those territories is a breach of the treaty protected federal trust responsibility.*
- *States have no authority under the Constitution to regulate commerce with the Indian nations and should thus be denied the authority by the United States to transform federal Indian policy.*
- *A prudent U.S. policy on the issue of migrating Indigenous peoples dictates that Indian nations be allowed to migrate significant distances across state boundaries only upon the consent of any Indian nations already in the target territory.*