United States Department of the Interior

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Jo-Ann Shyloski, Associate General Counsel
National Indian Gaming Commission
1441 L St. NW, Suite 9100
Washington, DC 20005

Re: Wampanoag Tribe of Gay Head (Aquinnah) Site-Specific Gaming Ordinance

Dear Ms. Shyloski:

This letter is in response to the National Indian Gaming Commission Office of General Counsel's letter dated June 13, 2013, requesting our opinion regarding whether the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987 ("Settlement Act"), 25 U.S.C. §§ 1771–1771i, prohibits the Wampanoag Tribe of Gay Head (Aquinnah) ("Tribe") from gaming on Settlement Lands. Less than twenty years ago, the First Circuit in *Rhode Island v. Narragansett*, 19 F.3d 685 (1st Cir. 1994), was also tasked with determining whether a tribe's settlement act prohibited gaming. It created a two-step analysis, which we employ here, first asking whether a tribe possesses the requisite jurisdiction for the Indian Gaming Regulatory Act ("IGRA") to apply to the Settlement Lands and next asking whether the Settlement Act and IGRA can be read together or whether IGRA impliedly repealed aspects of the Settlement Act regarding gaming.

It is this Office's opinion that the Settlement Act did not divest the Tribe of jurisdiction over the Settlement Lands and, therefore, IGRA applies to such lands. Further, IGRA impliedly repealed portions of the Settlement Act related to gaming.

BACKGROUND

The Tribe achieved federal recognition as an Indian Tribe on February 10, 1987.[1] Subsequently, the United States took 485 acres of land into trust for the benefit of the Tribe pursuant to the Settlement Act. The lands are located on the southwest portion of Martha's Vineyard, an island off the mainland coast of Massachusetts, within the boundaries of the Town of Aquinnah (formerly the Town of Gay Head prior to 1998). This letter concerns those trust lands.

The Tribe brought litigation in 1974 against the Town of Gay Head ("Town"), the Commonwealth of Massachusetts ("State"), and the Taxpayers Association of Gay Head, Inc., which ultimately resulted in Congress enacting the Settlement Act. The Tribe claimed the defendants violated the 1790 Non-Intercourse Act, which requires federal approval for any extinguishment of Indian title, and sought to obtain title to over 3,000 acres of land on Martha's Vineyard.[2]

[1] Final Determination for Federal Acknowledgment of the Wampanoag Tribal Council of Gay Head, Inc., 52 Fed. Reg. 4,193 (Feb. 10, 1987).
[2] *Wampanoag Tribal Council of Gay Head, Inc. v. Town of Gay Head*, Civil Action No. 74-5826-G (D. Mass. 1974).

The parties reached an agreement in 1983 entitled Joint Memorandum of Understanding Concerning Settlement of the Gay Head Massachusetts Indian Land Claims ("Settlement Agreement"). The Settlement Agreement established the parameters of a land transfer to the Tribe from public lands owned by the Town and from private lands, together known as the "Settlement Lands."[3] In exchange for the Settlement Lands, the Tribe relinquished its right to bring any aboriginal claims to title in the State.[4]

The Settlement Agreement made State law applicable on the Settlement Lands.[5] It set forth the parties' understanding that all State laws would apply to the Settlement Lands[6] and that the Tribe's exercise of jurisdiction over the Settlement Lands was limited to that permitted in the Settlement Agreement.[7] However, certain activities were expressly excluded from application of any State jurisdiction, including hunting activities of tribal members and taxation on the public lands transferred from the Town.[8]

The Settlement Agreement's finality was contingent on the State legislature and Congress enacting implementing statutes.[9] The State enacted the requisite legislation on September 18, 1985.[10] The State statute carried over the Settlement Agreement's conveyance of Settlement Lands and also applied State law to the Settlement Lands with exceptions regarding hunting and taxation.[11]

On August 18, 1987, subsequent to the Tribe's federal recognition, Congress enacted the Settlement Act,[12] which incorporated the Settlement Agreement by reference.[13] The Settlement Act provided for the

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[3] *See* Joint Memorandum of Understanding Concerning Settlement of Gay Head, Massachusetts Indian Lands Claims ¶¶ 4–7 (Sept. 28, 1983) [hereinafter Settlement Agreement].

[4] Settlement Agreement ¶ 8(d).

[5] Although the Settlement Agreement, State statute, and Settlement Act also include Town law where referring to State law's application on the Tribe's land, we will refer only to State law throughout this analysis. This is because local law is a derivative of State law and does not warrant a separate analysis. *Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 696 (1st Cir. 1994) ("[W]e see nothing to be gained by giving separate treatment to the question of local jurisdiction. As a general matter, municipal authority is entirely derivative of state authority. . . . [D]elegated powers, of necessity, cannot exceed those possessed by the delegator.") (internal citation omitted).

[6] Settlement Agreement ¶ 3 ("Under no circumstances, including any future recognition of the existence of an Indian tribe in the Town of Gay Head, shall the civil or criminal jurisdiction of the Commonwealth of Massachusetts, or any of its political subdivisions, over the settlement lands, or any land owned by the Tribal Land Corporation in the Town of Gay Head, or the Commonwealth of Massachusetts, or any other Indian lands in Gay Head, or the Commonwealth of Massachusetts, be impaired or otherwise altered . . . .").

[7] *Id.* ¶ 11.

[8] *Id.* ¶¶ 11, 13.

[9] *Id.* ¶ 2.

[10] An Act to Implement the Settlement of Gay Head Indian Lands Claims, MASS. GEN. LAWS ch. 227, §§ 1–6 (1985).

[11] *Id.* § 4 ("All federal, state, and town laws shall apply to the settlement lands subject only to the following special provisions . . . (a) The settlement lands shall not be treated as real property subject to taxation . . . but the Tribal council or any successor in interest will make payments in lieu of property taxes to the town of Gay Head or other appropriate entity if and when improvements are placed on those lands . . . (b) The Tribal council or any successor in interest will have the right, after consultation with appropriate state and local officials, to establish its own regulations concerning hunting, but not trapping or fishing, by Indians on the settlement lands by means other than firearms or crossbow . . . ."); *id.* § 5 ("Except as provided in this act, all laws, statutes and bylaws of the commonwealth, the town of Gay Head, and any other properly constituted legal body, shall apply to all settlement lands and any other lands owned now or at any time in the future by the Tribal council or any successor organization.").

[12] Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, 101 Stat. 704 (1987) (codified at 25 U.S.C. §§ 1771–1771i).

[13] 25 U.S.C. § 1771d(c) ("[A]ny other lands which are hereafter held in trust for the Wampanoag Tribal Council of Gay Head, Inc., or any successor, or individual member, shall be subject to this subchapter, the Settlement Agreement and other applicable laws.").

purchase of "Private Settlement Lands," which were to consist of 177 acres of privately held land and additional land contiguous to those acres located within the Town.[14] The 485 acres of land at issue here constitute Private Settlement Lands. It also provided for the transfer of "Public Settlement Lands" from the Town, including the Cranberry Lands, the Face of the Cliffs, and the Herring Creek located in the Town.[15] Together, the Settlement Act referred to these lands as "Settlement Lands."[16] Last, the Settlement Act contained a provision referring to lands that do not qualify as Settlement Lands and that are located outside the Town.[17]

The Settlement Act carried forward the grant of jurisdiction to the State over the Settlement Lands. In Section 1771g, the Settlement Act provides:

> Except as otherwise expressly provided in this Act or the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance).[18]

This Section grants the State jurisdiction over the Settlement Lands, and it specifically notes the inclusion of its gaming laws and regulations as among the applicable laws and regulations.[19]

In addition to granting the State jurisdiction over the Settlement Lands, the Settlement Act also limited the Tribe's exercise of its jurisdiction over the lands by requiring such exercise to conform to State and federal law. Section 1771e(a) of the Settlement Act states:

> The Wampanoag Tribal Council of Gay Head, Inc., shall not have any jurisdiction over nontribal members and shall not exercise any jurisdiction over any part of the settlement lands in contravention of this Act, the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and applicable Federal laws.[20]

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[14] *Id.* §§ 1771d(a), 1771d(c), 1771f(6).
[15] *Id.* §§ 1771d(f), 1771f(7); *see also* Settlement Agreement ¶ 4.
[16] 25 U.S.C. § 1771f(8).
[17] *Id.* § 1771d(g) ("The terms of this section shall apply to land in the town of Gay Head. Any land acquired by the Wampanoag Tribal Council of Gay Head, Inc., that is located outside the town of Gay Head shall be subject to all the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts.").
[18] *Id.* § 1771g.
[19] The Settlement Act separately reserves from State jurisdiction hunting activities of tribal members and taxation on the Public Settlement Lands. *Id.* § 1771c(a)(1)(B) (providing, with respect to hunting, "the Wampanoag Tribal Council of Gay Head, Inc. shall have the authority, after consultation with appropriate State and local officials, to regulate any hunting by Indians on the settlement lands that is conducted by means other than firearms or crossbow to the extent provided in, and subject to the conditions and limitations set forth in, the Settlement Agreement"); *id.* § 1771e(d) (providing exemption for "taxation or lien or 'in lieu of payment' or other assessment by the [State or its political subdivisions] to the extent provided by the Settlement Agreement: Provided, however, That such [taxation] will only apply to lands which are zoned and utilized as commercial: Provided further, That this section shall not be interpreted as restricting the Tribe from entering into an agreement with the town of Gay Head to reimburse such town for the delivery of specific public services on the tribal lands").
[20] *Id.* § 1771e(a).

Thus, in this Section, the Settlement Act requires the Tribe to avoid violating State law in its exercise of jurisdiction over the Settlement Lands.

On October 19, 1988, a little over one year and two months after it enacted the Tribe's Settlement Act, Congress enacted IGRA.[21] Among IGRA's stated purposes was to establish a new regulatory framework for tribal gaming on Indian lands within a tribe's jurisdiction.[22] As a general matter, IGRA is not applicable to all land owned by a tribe. First, IGRA requires that the lands qualify as Indian lands.[23] IGRA's definition of Indian lands includes: (1) land located within the exterior boundaries of a tribe's reservation; (2) trust land over which a tribe exercises governmental power; and (3) restricted fee land over which a tribe exercises governmental power.[24] Second, IGRA requires that a tribe possess legal jurisdiction over the lands.[25] There is a general presumption that tribes possess legal jurisdiction over land located within the exterior boundaries of their own reservations.[26] Once a tribe has

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[21] Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701–2721).

[22] *See* 25 U.S.C. §§ 2701–2702, 2710; *Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 689 (1st Cir. 1994) ("The Gaming Act is an expression of Congress's will in respect to the incidence of gambling activities on Indian lands.").

[23] *See* 25 U.S.C. §§ 2703(4), 2710; 25 C.F.R. § 501.2.

[24] IGRA defines "Indian lands" to mean "all lands within the limits of any Indian reservation" or "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4). NIGC's regulations further define "Indian lands" and specify that a tribe must exercise governmental power over land not within the limits of its reservation. 25 C.F.R. § 502.12 (defining "Indian lands" as "land within the limits of an Indian reservation," "land over which an Indian tribe exercises governmental power . . . [and is] [h]eld in trust by the United States for the benefit of any Indian tribe or individual," or "land over which an Indian tribe exercises governmental power . . . [and is] [h]eld by an Indian tribe or individual subject to restriction by the United States against alienation").

[25] 25 U.S.C. § 2710(b)(1) ("An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if [it meets certain specified criteria] . . . ."); *id.* § 2710(d)(1)(A)(i) ("Class III gaming activities shall be lawful on Indian lands only if such activities are—(A) authorized by an ordinance or resolution that—(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands [and meets other specified criteria] . . . ."); *id.* § 2710(d)(3)(A) ("Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities . . . ."). *See also Narragansett Indian Tribe,* 19 F.3d at 701 (citing Sections 2710(d)(3)(A) and 2710(b)(1) of IGRA as creating IGRA's jurisdictional requirement).

[26] Letter from Penny Coleman, Acting General Counsel, Nat'l Indian Gaming Comm'n, to Bonnie Akaka-Smith, Chairwoman, Pyramid Lake Paiute Tribe, and Brian Sandoval, Attorney General, State of Nevada, re Gaming on fee land at Pyramid Lake Paiute Indian Reservation, at 4 (Sept. 27, 2005) ("A tribe is presumed to have jurisdiction over its own reservation. Therefore, if the gaming is to occur within a tribe's reservation, under IGRA, we can presume that jurisdiction exists."), *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f42_pyramidlakepauitetribe.pdf&tabid=120&mid=957 [hereinafter Pyramid Lake Paiute Indian Lands Determination]; Letter from Penny Coleman, Acting General Counsel, Nat'l Indian Gaming Comm'n, to Judith Kammins Albietz, Attorney, Buena Vista Rancheria of Me-Wuk Indians, at 6 (June 30, 2005) ("A tribe is presumed to have jurisdiction over its own reservation."), *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f05_buenavstarachramewukindns.pdf&tabid=120&mid=957 [hereinafter Buena Vista Indian Lands Determination]; Letter from Cindy Shaw, Nat'l Indian Gaming Comm'n, to Acting General Counsel, Nat'l Indian Gaming Comm'n, re Tribal jurisdiction over gaming on fee land at White Earth Reservation, at 8 (Mar. 14, 2005) ("The land at issue in this matter . . . falls within the 'limits' of the reservation . . . . In different circumstances, we would need to engage in a more lengthy analysis. If the land at issue were trust land, rather than within the limits of the reservation, we would need to . . . prove theoretical jurisdiction. Since the land at issue . . . is not trust land, however, we need examine only one issue:

established that its land qualifies as Indian lands and that the tribe possesses jurisdiction over that land—making it eligible for IGRA gaming—the tribe has the exclusive right to regulate gaming on that land, and states can only extend their jurisdiction through a tribal-state compact.[27]

IGRA places "dual limitations" on trust and restricted fee land that a tribe must adhere to.[28] The provisions of IGRA related to class I and class II gaming mandate a tribe must *have jurisdiction* over the land, and the provision defining the elements of "Indian lands" mandates a tribe must *exercise governmental power* over the land.[29] Courts have found that possession of legal jurisdiction over land is a threshold requirement to the exercise of governmental power required for trust and restricted fee land.[30] Whether a tribe possesses *legal jurisdiction* over a particular parcel of land often hinges on construing settlement or restoration acts that limit tribes' jurisdiction[31] or on a determination of which tribe possesses jurisdiction over a particular parcel of land.[32] A showing of *governmental*

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whether the land is within the limits of the reservation.") (internal citations omitted) [hereinafter White Earth Indian Lands Opinion]. However, there have been instances in which the Department conducted a jurisdictional analysis for reservation land when a federal statute limited the tribe's jurisdiction. *See, e.g.*, Letter from Penny Coleman, Acting General Counsel, Nat'l Indian Gaming Comm'n, to Herman Dillon, Sr., Chairman, Puyallup Tribal Council, re Status of Tribal Property for Gaming Purposes, at 2 (Nov. 12, 2004) ("The NIGC has previously concluded that tribal fee land located within the boundaries of a reservation constitutes Indian land over which a tribe has jurisdiction. Thus, in those circumstances, we have concluded that a tribe may conduct gaming on those lands. The situation at hand is considerably different, however, because of a Settlement Act, an Agreement between the Tribe, local governments in Pierce County and the United States (the Settlement Agreement), an MOU, and a Tribal-State Compact amendment."), *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f41_puyalluptribe.pdf&tabid=120&mid=957 [hereinafter Puyallup Indian Lands Determination]. The Department also ensures that reservation land is within the particular tribe's jurisdiction rather than another tribe's jurisdiction. *See, e.g.*, White Earth Indian Lands Opinion, at 10; Pyramid Lake Paiute Indian Lands Determination, at 5; Buena Vista Indian Lands Determination, at 12.

[27] *Id.* § 2701(5) ("The Congress finds that . . . Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."); Indian Gaming Regulatory Act, S. Rep. No. 100-446, at 446 (1988).

[28] *Narragansett Indian Tribe,* 19 F.3d at 701.

[29] *Id.* (citing 25 U.S.C. § 2710(d)(3)(A) and 25 U.S.C. § 2710(b)(1) as creating the jurisdictional requirement and 25 U.S.C. § 2703(4) as creating the exercise of governmental power requirement).

[30] *See Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) ("[B]efore a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land."); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701–03 (1st Cir. 1994), *superseded by statute,* 25 U.S.C. § 1708(b), *as stated in Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998) ("In addition to having jurisdiction, a tribe must exercise governmental power in order to trigger [IGRA]."); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217–18 (D. Kan. 1998) (stating a tribe must have jurisdiction in order to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) ("[T]he NIGC implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land.").

[31] *See, e.g., Narragansett Indian Tribe,* 19 F.3d at 701–02 (determining whether the Narragansett Indian Tribe possessed the requisite jurisdiction to trigger IGRA in light of its settlement act); Puyallup Indian Lands Determination, at 4–7 (determining whether the Puyallup Tribe possessed jurisdiction over its land in light of its settlement act).

[32] Letter from Lawrence S. Roberts, General Counsel, Nat'l Indian Gaming Comm'n, et al., to Tracie Stevens, Chairwoman, Nat'l Indian Gaming Comm'n, re Kialegee Tribal Town: Proposed Gaming Site in Broken Arrow, Oklahoma, at 10–13 (May 24, 2012) (determining whether it was the Kialegee Tribal Town or the Muscogee (Creek) Nation that possessed the requisite jurisdiction over the land), *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2freadingroom%2fgameopinions%2fkialegeetribaltown

power requires a concrete manifestation of authority and is a factual inquiry.[33] For trust or restricted fee land to qualify as Indian lands over which a tribe possesses jurisdiction, the "dual limitations" must both be met.

In 1997, the Department dealt for the first time with IGRA's affects on the Tribe's Settlement Act. The Assistant Secretary – Indian Affairs ("Assistant Secretary") issued a letter to the Tribe's attorney analyzing whether the Tribe possessed the requisite jurisdiction to trigger IGRA on lands not constituting Settlement Lands and located outside the Town.[34] He concluded that IGRA permitted gaming on such lands.[35] The Assistant Secretary did not evaluate IGRA's applicability to Settlement Lands.

On November 22, 2011, the Tribe enacted a class I and class II gaming ordinance. The ordinance did not specify any particular lands for gaming, except to say that the Tribe would game on lands that qualified as Indian lands.[36] Accordingly, on February 21, 2012, NIGC approved the ordinance with the caveat that it was approved for gaming on Indian lands only. Shortly thereafter, on April 7, 2012, the Tribe approved the amendment to the ordinance at issue here.[37] On April 12, 2012, the Tribe submitted the amended gaming ordinance to NIGC for approval. However, it withdrew the amendment on July 10, 2012, before the NIGC Chairperson issued a decision.

On May 30, 2013, the Tribe re-submitted its amended gaming ordinance to NIGC for approval. Under the resolution and proposed ordinance amendment, Indian lands are defined to include the Settlement Lands and any other lands held in trust by the United States for the benefit of the Tribe.[38]

ANALYSIS

The issue before us requires us to answer two distinct questions. First, does the Tribe possess sufficient jurisdiction over the Settlement Lands to make IGRA applicable? Second, if IGRA does apply, can it be harmonized with the Settlement Act or does it impliedly repeal certain aspects of the Settlement Act that address gaming?

The First Circuit in *Rhode Island v. Narragansett Indian Tribe*[39] and *Passamaquoddy Tribe v. Maine*[40] and the Fifth Circuit in *Ysleta del Sur Pueblo v. Texas*[41] have dealt with settlement or restoration acts predating IGRA that place restrictions on a particular tribe's jurisdiction. The most complete and persuasive analysis—given the analogous facts at issue here as well as the First Circuit's appellate

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opinion52412.pdf&tabid=120&mid=957; Pyramid Lake Paiute Indian Lands Determination, at 5; Buena Vista Indian Lands Determination, at 12.

[33] *Narragansett Indian Tribe,* 19 F.3d at 703.

[34] Letter from Michael J. Anderson, Acting Assistant Secretary - Indian Affairs, Dep't of Interior, to Patricia A. Marks, Attorney, Wampanoag Tribe of Gay Head (Sept. 5, 1997) [hereinafter 1997 AS-IA Letter].

[35] *Id.* at 4.

[36] *See* WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), Ordinance No. 2011-01 § 1.4(a) (November 22, 2011) ("All Gaming which is conducted within the Tribe's Indian Lands and which is otherwise authorized by applicable law shall be regulated and licensed pursuant to the provisions of this Ordinance."); *id.* § 1.5 (authorizing class I gaming on Indian lands); *id.* § 1.6 (authorizing class II gaming on Indian lands); *id.* § 1.7 (requiring the Tribe's Gaming Commission to ensure that gaming it authorizes is conducted on Indian lands); *id.* § 1.12 (stating Gaming Ordinance applies to gaming on Indian lands).

[37] Wampanoag Tribe of Gay Head (Aquinnah) Resolution 2012-23 (2012).

[38] *Id.* We note that this letter only addresses the question posed to us by NIGC's Office of General Counsel: whether the Settlement Act prohibits the Tribe from gaming under IGRA on the Settlement Lands.

[39] 19 F.3d 685, 688 (1st Cir. 1994).

[40] 75 F.3d 784 (1st Cir. 1996).

[41] 36 F.3d 1325 (5th Cir. 1994).

jurisdiction over cases brought in Massachusetts—can be found in the First Circuit *Rhode Island v. Narragansett* case.

In *Narragansett*, the land the United States held in trust for the Narragansett Indian Tribe had been received through a settlement act.[42] The settlement act mandated "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island."[43] The litigation began when the Narragansett Indian Tribe requested Rhode Island enter into a tribal-state compact pursuant to IGRA.[44] Rhode Island filed suit in federal district court asking that the court rule IGRA did not apply to the Narragansett Indian Tribe's settlement lands and, therefore, the lands were subject to Rhode Island law.[45] The district court found that IGRA controlled because the Narragansett Indian Tribe had jurisdiction sufficient to trigger IGRA, and Rhode Island appealed.[46]

On appeal, the First Circuit explained that the issue before it was "whether [IGRA] applies to lands now held in trust by the United States for the benefit of the Narragansett Indian Tribe."[47] The court began by asking whether the Narragansett Indian Tribe's settlement act left the Narragansett Indian Tribe with sufficient jurisdiction and whether it exercised governmental power over the land, thereby triggering IGRA.[48] After concluding that IGRA was triggered, the court examined the interface between the two laws, first asking whether IGRA and the settlement act could be read to give full effect to each and, finding they could not, second determining that IGRA performed an implied partial repeal of portions of the settlement act.[49]

We will follow the *Narragansett* court's framework to determine whether IGRA applies to the Tribe's Settlement Lands. We begin by asking whether the Tribe possesses sufficient jurisdiction over the Settlement Lands so that IGRA applies. Next, we examine the interface between IGRA and the Settlement Act to determine whether they can be harmonized or whether an implied repeal occurred. For the reasons stated below, we find that IGRA applies and impliedly repealed those portions of the Settlement Act related to gaming.

A. The Tribe possesses sufficient jurisdiction over the Settlement Lands for IGRA to apply.

i. IGRA requires that a tribe possess jurisdiction over its land.

In order to determine whether the Tribe possesses the requisite jurisdiction for IGRA to apply, we must first define what IGRA's reference to "jurisdiction" means. A basic tenant of Indian law dictates that tribes retain attributes of sovereignty, and therefore jurisdiction, over their land and their members.[50] This jurisdiction encompasses tribes' authority to authorize and regulate gaming.[51] In *Narragansett*, the court explained that the jurisdiction required for IGRA to apply is derived from tribes' retained rights flowing

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[42] *Narragansett Indian Tribe*, 19 F.3d at 689.
[43] *Id.* at 694 (quoting 25 U.S.C. § 1708).
[44] *Id.* at 690.
[45] *Id.* at 690–91.
[46] *Id.* at 691.
[47] *Id.* at 688.
[48] *Id.* at 700–703.
[49] *Id.* at 703–705.
[50] The Court has consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory." *California v. Band of Mission Indians*, 480 U.S. 202, 207 (1987) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)); *United States v. Wheeler*, 435 U.S. 313, 322–323 (1978) (quoting same).
[51] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (framing the analysis of whether a state may apply its gaming laws on reservation land by laying out the rule that "Indian tribes retain attributes of sovereignty over both their members and their territory") (internal citation omitted).

from their inherent sovereignty.[52] Against the backdrop of tribal sovereignty, we must construe IGRA's language.

Statutory interpretation begins with the plain meaning of the language itself, and we "assume that the legislative purpose is expressed by the ordinary meaning of the words used. Thus, absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[53] With respect to class II gaming, IGRA states that "[a]n Indian tribe may engage in, or license and regulate, class II gaming on Indian *lands* within such tribe's jurisdiction."[54] In regard to class III gaming, IGRA explains that "[a]ny Indian tribe having jurisdiction over the Indian *lands* upon which a class III gaming activity is being conducted" must enter into a compact with the state.[55] It further requires that a gaming ordinance authorizing class III gaming be "adopted by the governing body of the Indian tribe having jurisdiction *over such lands*."[56] In each of IGRA's three references to its jurisdictional requirement, the statute clearly states that a tribe must possess jurisdiction over its *lands*.[57]

In addition to determining *what* the "jurisdiction" referenced in IGRA must be exercised over—land—the *Narragansett* court also viewed as important the *amount* of jurisdiction a tribe must possess. As the *Narragansett* court recognized, it is well-settled that tribes possess aspects of sovereignty not withdrawn by treaty or statute or by implication as a necessary result of their dependent status.[58] Put differently, tribes are presumed to have jurisdiction over their land unless it has been withdrawn.
When Congress enacts a statute depriving a tribe of jurisdiction, it must do so explicitly.[59] Further, "acts diminishing the sovereign rights of Indian [t]ribes should be strictly construed."[60] This statutory rule is bolstered by the Indian canon of construction that calls on courts to construe ambiguous statutes in favor of Indians.[61] As the *Narragansett* court explained, "[w]hen a court interprets statutes that touch on Indian

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[52] *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701 (1st Cir. 1994) ("We believe that jurisdiction is an integral aspect of retained sovereignty.").
[53] *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citations omitted); *see also Narragansett Indian Tribe*, 19 F.3d at 697 ("[C]ourts must look primarily to statutory language, not to legislative history, in determining the meaning and scope of a statute.").
[54] 25 U.S.C. § 2710(b)(1) (emphasis added).
[55] *Id.* § 2710(d)(3)(A) (emphasis added).
[56] *Id.* § 2710(d)(1)(A)(i) (emphasis added).
[57] Reading IGRA's jurisdictional requirement to apply to lands instead of individuals is in keeping with NIGC's interpretation of IGRA's jurisdictional requirement and jurisdictional grant. In NIGC's Indian lands opinion for the White Earth Band of Chippewa Indians' reservation, NIGC's Office of General Counsel concluded that "IGRA's applicability is determined by the character of the land on which gaming is conducted rather than by who is conducting the gaming." White Earth Indian Lands Opinion, at 9. This same analysis was utilized again in NIGC's Indian lands opinion for the Pyramid Lake Paiute Tribe's reservation, where NIGC's Office of General Counsel stated "IGRA's jurisdiction runs with the land and allows gaming, even by non-tribal entities, that is conducted on Indian lands." Pyramid Lake Paiute Indian Lands Determination, at 4.
[58] *Narragansett Indian Tribe*, 19 F.3d at 701 (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).
[59] *Id.* at 702 ("Since the Settlement Act does not *unequivocally articulate* an intent to deprive the Tribe of jurisdiction, we hold that its grant of jurisdiction to the state is non-exclusive.") (emphasis added); 1997 AS-IA Letter, at 3 (pointing to "long-standing Executive and Congressional policies favoring the strengthening of tribal self-government, and disfavoring the implicit erosion of tribal sovereignty" and explaining that, "[i]n this context, the U.S. Supreme Court has held that Congressional intent to delegate exclusive jurisdiction to a state must be clearly and specifically expressed") (citing *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).
[60] *Narragansett Indian Tribe*, 19 F.3d at 702.
[61] *See, e.g.*, *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. . . . The Court has applied

sovereignty, general rules of construction apply, but they must be visualized from a distinctive perspective": through the lens of the Indian canon of construction.[62]

Although not defining exactly what portion of retained jurisdiction a tribe must possess to make IGRA applicable to land, the *Narragansett* court said "so long as the portion of jurisdiction encompassed within the natural rights of the [tribe] is *substantial enough* to satisfy [IGRA's] 'having jurisdiction' prong, our inquiry is satisfied."[63] The *Narragansett* court focused on whether the Narragansett Indian Tribe's settlement act granted the state *exclusive* jurisdiction over the land, thereby *completely divesting* the tribe of jurisdiction. In its analysis, the *Narragansett* court found that Congress in the settlement act did not provide exclusive jurisdiction over the land to the State of Rhode Island and did not expressly strip the Narragansett Indian Tribe of its retained jurisdiction.[64] In the absence of an exclusive grant of jurisdiction to Rhode Island and express language divesting the Narragansett Indian Tribe of its jurisdiction, the court found that the Tribe retained concurrent jurisdiction over the land sufficient for IGRA to apply. It concluded the Tribe "retain[ed] that portion of jurisdiction they possess by virtue of their sovereign existence as a people—a portion sufficient to satisfy [IGRA's] 'having jurisdiction' prong."[65]

As the *Narragansett* court did, we require Congress's *explicit divestiture* of tribal jurisdiction to avoid IGRA's application to Indian lands. We conclude that the jurisdictional requirement in IGRA mandates a tribe must not be completely divested of jurisdiction over the land in question. Unless a tribe has been completely divested of jurisdiction, IGRA applies.

This result is consistent with IGRA's purpose. IGRA came on the heels of *California v. Cabazon*, in which the United States Supreme Court found that state gaming laws were generally inapplicable on reservations.[66] Although the Court began by noting that state law is inapplicable to Indians on their reservation land unless Congress has expressly provided otherwise, the Court explained that there could be room for state law in exceptional circumstances.[67] Because state interests in preventing infiltration of tribal games by organized crime were not sufficient to overcome federal and tribal interests in Indian self-government, including tribal self-sufficiency and economic development, exceptional circumstances were not present for tribal gaming.[68] The Court went further, finding that even in the very few Public Law 280 states, states could only apply their gaming laws on reservations when state gaming laws were criminal/prohibitory, as evidenced by their violation of state public policy, rather than civil/regulatory.[69] Additionally, the Court stated that the Organized Crime Control Act did not grant states any part in enforcing state gaming laws on reservation lands.[70] In the wake of *Cabazon*, states became wary of unregulated tribal gaming and pushed for limits on tribal jurisdiction in tribe-specific statutes.

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similar canons of construction in nontreaty matters."); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) ("If there [is] ambiguity . . . the doubt would benefit the tribe, for ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.") (internal quotation omitted).

[62] *Narragansett*, 19 F.3d at 691.

[63] *Id.* at 701 (emphasis added).

[64] *Id.* at 702. The Assistant Secretary also articulated these two paths in his 1997 letter to the Tribe. 1997 AS-IA Letter, at 4 ("Had Congress desired to defeat concurrent tribal jurisdiction on lands located outside of the Town of Gay Head, it would have either provided for 'exclusive' state and local jurisdiction, or it would have included limitations on tribal jurisdiction.").

[65] *Narragansett Indian Tribe*, 19 F.3d at 702.

[66] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216–21 (1987).

[67] *Id.* at 207, 215.

[68] *Id.* at 216–21.

[69] *Id.* at 208–09.

[70] *Id.* at 213–14.

IGRA provided a new and consistent framework for tribal gaming that both created additional protections for tribes and a larger role for states and their gaming laws.[71] The following are three ways in which IGRA provided further protections for tribal gaming not in existence under the *Cabazon* framework. Section 1166(d), enacted alongside IGRA, impliedly repealed Public Law 280 to the extent that the federal government now holds exclusive authority to prosecute tribes for IGRA gambling that is prohibited in the state,[72] despite the fact that under *Cabazon* Public Law 280 states that had criminal/prohibitory gaming laws could enforce those laws on reservation lands.[73] Similarly, after *Cabazon* but before IGRA's enactment, the federal government could still prosecute tribes under the Organized Crime Control Act for violating state gaming laws.[74] Last, IGRA created an explicit exemption to the Johnson Act,[75] permitting tribes to maintain class III gaming devices on Indian lands when complying with IGRA.[76]

The fact that our interpretation of the requisite jurisdiction for IGRA to apply may uncover a congressional implied repeal of some aspects of settlement and restoration acts that subject certain tribes to state gaming law conforms to the broader purpose of IGRA to create a new framework for tribal gaming.[77]

ii. The Settlement Act does not divest the Tribe of jurisdiction over the Settlement Lands.

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[71] *See* 25 U.S.C. §§ 2701–2702; *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 689 (1st Cir. 1994) ("The Gaming Act is an expression of Congress's will in respect to the incidence of gambling activities on Indian lands.").

[72] *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 540 (9th Cir. 1994) ("If that exclusivity is incompatible with any provision of Public Law 280, then the Public Law 280 provision has been impliedly repealed by 1166(d).") (citing *United Keetoowah Band of Cherokee Indians v. Oklahoma, ex rel. Moss*, 927 F.2d 1170, 1176–81 (10th Cir. 1991) (stating IGRA § 1166(d) occupies Indian gaming field to exclusion of Assimilative Crimes Act, 18 U.S.C. § 13, and its incorporation of state law)).

[73] *Cabazon Band of Mission Indians*, 480 U.S. at 209. *See also* S. REP. NO. 100-446, at 6 (1988) ("The Committee wishes to make clear that, under [IGRA], application of the prohibitory/regulatory distinction is markedly different from the application of the distinction in the context of Public Law 83-280. Here, the courts will consider the distinction between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of Federal law, to either allow or prohibit certain activities.").

[74] *Cabazon Band of Mission Indians*, 480 U.S. at 214 n.16. But note that the Second Circuit in *Cook* observed that the Organized Crime Control Act remained in effect following the passage of IGRA. *See United States v. Cook*, 922 F.2d 1026, 1033 (2d Cir. 1991).

[75] 15 U.S.C. §§ 1171–1178.

[76] 25 U.S.C. § 2710(d)(6) ("The provisions of [15 U.S.C. § 1175 (the Johnson Act)] shall not apply to any gaming conducted under a Tribal-State compact that—(A) is entered into . . . by a State in which gambling devices are legal, and (B) is in effect.").

[77] The legislative history for IGRA contains language that at first blush contradicts our construction of IGRA's jurisdictional requirement. For instance, one Senate report states that the bill would authorize tribes to "exercise existing tribal governmental authority under tribal law over gaming" and sought to "retain all rights that were not expressly relinquished." S. REP. NO. 100-446, at 5, 8 (1988). In another excerpt, the committee stated that nothing in IGRA is intended to "supersede any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute, including [the Rhode Island and Maine settlement acts]." *Id.* at 12. However, the *Narragansett* court did not find this legislative history compelling because it spoke only to the bill as it was reported out of committee and reflected a special exemption in a draft version of IGRA that exempted Rhode Island and Maine from IGRA's application. *Narragansett Indian Tribe*, 19 F.3d at 700. The court explained "[w]hen Congress includes limiting language in an early version of proposed legislation, and then rewrites the bill prior to enactment so as to scrap the limitation, the standard presumption is that Congress intended the proviso to operate without limitation." *Id.* The court further did away with the legislative history by explaining that, "[i]n the game of statutory interpretation, statutory language is the ultimate trump card." *Id.* at 699. Although the later *Passamaquoddy* court found the same legislative history compelling, *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 790–91 (1st Cir. 1996), we do not. The *Narragansett* decision more correctly follows general principles of statutory construction that discard language in draft bills that were not enacted and are not persuasive.

According to the *Narragansett* court's analysis, Congress can divest a tribe of jurisdiction sufficient to avoid triggering IGRA's application by: (1) providing exclusive jurisdiction over the land to the state or (2) explicitly divesting the tribe of jurisdiction over the land. In Section 1771g of the Settlement Act, Congress made the Settlement Lands and any other lands held in trust for the Tribe subject to State law,[78] while it separately maintained limited exceptions for hunting and taxation elsewhere in the Act.[79] In Section 1771e(a), Congress required that the exercise of tribal jurisdiction be consistent with State and federal law.[80] Our task is to determine whether the Settlement Act divests the Tribe of jurisdiction and thereby bars IGRA from applying to the Settlement Lands.

a. Section 1771g's grant of jurisdiction to the State is not exclusive.

The Settlement Act's grant of jurisdiction to the State is contained in Section 1771g, where it dictates:

> Except as otherwise expressly provided in this Act or the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance).[81]

Aside from narrow exceptions for hunting by tribal members conducted by means other than firearms and crossbows and for taxation on the Public Settlement Lands,[82] State law applies to the Settlement Lands. The Massachusetts Supreme Court has found that such jurisdiction includes civil regulatory jurisdiction over the land and that the Tribe has waived its sovereign immunity for related enforcement actions.[83]

The question we must ask in examining Section 1771g is whether the Section's "jurisdictional grant is exclusive in nature."[84] The *Narragansett* court looked to whether Congress had used the terms "exclusive" or "complete" in its transfer of jurisdiction to Rhode Island.[85] In finding that it

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[78] 25 U.S.C. § 1771g.
[79] *Id.* §§ 1771c(a)(1)(B), 1771e(d).
[80] *Id.* § 1771e(a).
[81] *Id.* § 1771g.
[82] *Id.* § 1771c(a)(1)(B) (preserving Tribe's jurisdiction over tribal members' hunting conducted by means other than firearms and crossbows); *id.* § 1771e(d) (providing exemption from taxation on Public Settlement Lands).
[83] *See Building Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1 (2004) (finding Tribe must comply with State zoning laws and obtain State permits, and finding Tribe had waived in paragraph three of its Settlement Act its sovereign immunity with respect to municipal zoning enforcement).
[84] *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701 (1st Cir. 1994).
[85] *Id.* at 702. *See also United States v. Cook*, 922 F.2d 1026, 1032–33 (2d Cir. 1991) (finding absence of terms "exclusive" or "complete" in federal statute's grant of jurisdiction over offenses committed by or against Indians meant statute only extended concurrent jurisdiction with federal government to the state). The courts in both *Narragansett* and *Cook* compared the settlement acts' lack of the word "exclusive" with 18 U.S.C. § 1162's use of "exclusive" in granting "civil and criminal jurisdiction" over Indian lands to certain states. *Narragansett*, 19 F.3d at 702 ("The omission of the word 'exclusive' looms particularly large in light of the use of that word elsewhere. For instance, the word is used to modify the general jurisdictional grant in 18 U.S.C. § 1162 (1988), one of the few analogous statutes granting 'civil and criminal jurisdiction' over Indian lands to an individual state."); *Cook*, 922 F.2d at 1033 (stating use of word "exclusive" in 18 U.S.C. 1162 indicates Congress knew how to use term in granting jurisdiction).

had not, the court noted the parallels between the language in the Narragansett Indian Tribe's settlement act and the language in Section 1771g of the Settlement Act at issue here.[86] The lack of the terms "exclusive" or "complete" in the Settlement Act is particularly weighty because the Settlement Act does contain the word "exclusive" in its grant of jurisdiction to federal courts to entertain certain constitutional challenges.[87] Where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[88]

The Assistant Secretary's 1997 letter also sheds light on the relevance of Section 1771g. In that letter, the Assistant Secretary relied on the legal framework of *Rhode Island v. Narragansett*.[89] Because the land at issue there did not qualify as Settlement Lands, he explained, Sections 1771g and 1771e(a) of the Settlement Act were inapplicable and did not need to be discussed. Instead, he looked to the language in Section 1771d(g)[90]—pertaining to land that does not qualify as Settlement Lands and is not located in the Town—and paragraph three of the Settlement Agreement.[91] Section 1771d(g) states: "The terms of this section shall apply to land in the Town of Gay Head. Any land acquired by the [Tribe] that is located outside the town of Gay Head shall be subject to this subchapter, the Settlement Agreement and other applicable laws."[92]

The Assistant Secretary found that Section 1771d(g) of the Settlement Act and paragraph three of the Settlement Agreement both granted non-exclusive jurisdiction to the State but did not divest the Tribe of concurrent jurisdiction.[93] Therefore, he stated, IGRA applied and compelled an implied partial repeal of Section 1771d(g) of the Settlement Act.[94] Like Section 1771d(g) of the Settlement Act at issue in the Assistant Secretary's letter, Section 1771g at issue here applies State law to the land. The Assistant Secretary's rationale and finding that 1771d(g)'s grant of jurisdiction to the State was non-exclusive is consistent with and applies to our analysis of Section 1771g.

Section 1771g's specific reference to the application of State gaming law, however, poses an additional question about the Tribe's jurisdiction over the Settlement Lands. The Settlement Act applies State gaming law to the Settlement Lands in the same section that it grants the State concurrent, but not exclusive, jurisdiction. Therefore, the gaming language is naturally read to emphasize that the State possesses concurrent jurisdiction over the Settlement Lands for purposes of applying its gaming laws.[95] This would have been important in the pre-IGRA legal framework

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[86] *Narragansett Indian Tribe*, 19 F.3d at 702.

[87] 25 U.S.C. § 1771h ("Exclusive original jurisdiction over any such action and any proceedings under section 6(e) [25 USCS § 1771(e)] is hereby vested in the United States District Court of the District of Massachusetts").

[88] *Narragansett Indian Tribe*, 19 F.3d at 702 (quoting *Rodriguez v. United States*, 480 U.S. 522, 525 (1987)).

[89] 1997 AS-IA Letter, at 3.

[90] 25 U.S.C. § 1771d(g).

[91] Settlement Agreement ¶ 3 ("Under no circumstances, including any future recognition of the existence of an Indian tribe in the Town of Gay Head, shall the civil or criminal jurisdiction of the [State] . . . over the settlement lands, or any land owned by the Tribal Land Corporation in the Town of Gay Head . . . be impaired or otherwise altered.").

[92] 25 U.S.C. § 1771d(g).

[93] 1997 AS-IA Letter, at 3. It should also be noted that the Assistant Secretary's 1997 letter does not speak to lands that do not qualify as Public or Private Settlement Lands *and* that are located in the Town. Those may not be restricted by Section 1771e(a), which is applicable to Settlement Lands only. Given the facts presented here, however, it is not necessary to reach that question for the purposes of this opinion.

[94] *Id.* at 4.

[95] The Assistant Secretary in his 1997 letter touched on the relevance of a settlement or restoration act's specific application of state gaming law to land. In finding that the Tribe possessed concurrent jurisdiction with the State over tribal lands located outside of the Town, the Assistant Secretary declined to follow the Fifth Circuit's decision

in which the Settlement Act was negotiated and ultimately enacted. It would have provided, consistent with the Supreme Court's reasoning in *Cabazon*—which had found state law inapplicable to gaming on reservation land unless Congress expressly provided otherwise—a clear and coherent statement by Congress of concurrent State jurisdiction over gaming. However, a grant of concurrent jurisdiction to the State does not divest the Tribe of jurisdiction for purposes of applying IGRA.

We find that Section 1771g's grant of jurisdiction to the State does not grant the State exclusive jurisdiction, which would have resulted in a divestiture of tribal jurisdiction.

b. Section 1771e(a)'s limit on the exercise of the Tribe's jurisdiction does not divest the Tribe of jurisdiction.

The Settlement Act explicitly limits the exercise of the Tribe's jurisdiction over the Settlement Lands. In Section 1771e(a), the Settlement Act states:

> The Wampanoag Tribal Council of Gay Head, Inc., shall not have any jurisdiction over nontribal members and shall not exercise any jurisdiction over any part of the settlement lands in contravention of this Act, the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and applicable Federal laws.

Pursuant to the terms of Section 1771e(a), the Tribe may still exercise jurisdiction over its land, including jurisdiction to game, as long as it does not contravene State or federal law.

The question we must ask in examining Section 1771e(a) is whether the Section "expressly strip[s] the Tribe of jurisdiction."[96] When interpreting a statute, the agency "is required to interpret statute as a whole and avoid constructions that would render words or provisions superfluous or meaningless."[97] The Tribe's jurisdiction over the land is apparent when compared with the language divesting the Tribe of jurisdiction over nontribal members. The statute states that the Tribe "shall not have any jurisdiction" over nontribal members but preserves the Tribe's jurisdiction over the land by stating that any jurisdiction exercised must not contravene State or federal law.

Importantly, H.R. 2868, an older version of the Settlement Act, would have barred the Tribe from exercising any form of jurisdiction over the land, but Congress ultimately changed the text before it became law. Where Congress includes limiting language in an earlier version of a bill but

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in *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994). *Id.* at 5. He reasoned that the Ysleta del Sur Pueblo's restoration act "specifically prohibits all gaming activities which are prohibited by the laws of the State of Texas" and that "[t]here is simply no comparable provision in the Wampanoag Settlement Act addressing gaming on tribal lands outside of the Town of Gay Head." *Id.* (citing Ysleta del Sur Pueblo: Restoration of Federal Supervision, 25 U.S.C. § 1300g-6(a) ("All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe.")). Although Section 1771g of the Settlement Act does specifically apply State gaming law to the Settlement Lands, it does not "prohibit" gaming activity and the Settlement Act's legislative history is distinguishable from the legislative history of the Ysleta del Sur Pueblo's restoration act.

[96] *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701 (1st Cir. 1994).

[97] *Grand Traverse Band of Ottawa and Chippewa Indians v. Michigan*, 198 F. Supp. 2d 920, 930 (W.D. Mich. 2002); *see also Platt v. Union Pacific Railroad Co.*, 99 U.S. 48, 58–59 (1878).

deletes it prior to enactment, it may be presumed that the limitation was not intended.[98] H.R. 2868 stated:

> No Indian tribe or band may exercise any form of jurisdiction (whether or not such tribe or band is a federally recognized Indian Tribe or band) over any part of the settlement lands, or any other land that may now or in the future be owned by or held in trust for such Indian entity in the town of Gay Head, Massachusetts, except to the extent provided in this Act, the State Implementing Act, or the Settlement Agreement.[99]

Based on this discarded and more stringent language, it is clear that Congress contemplated divesting the Tribe of jurisdiction but ultimately chose not to do so.

The legislative history of the Settlement Act bolsters our reading that the Tribe was left with jurisdiction over its lands. A House report states, "while the civil and criminal laws of Massachusetts will be applicable on the settlement lands, the [T]ribe will be able to assume concurrent jurisdiction over its own members with the State and the [T]own as long as such jurisdiction is consistent with the civil and criminal laws of the State and the Town."[100]

Although the analysis for determining whether a tribe exercises governmental power sufficient to establish that lands qualify as Indian lands is more fact-specific than the jurisdictional analysis, "[a]n historical perspective is also relevant to the 'having jurisdiction' inquiry. A 'longstanding assumption of jurisdiction . . . not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset . . . ."[101] The Tribe regularly asserts its jurisdiction over its Settlement Lands. The Tribe has and can still exercise jurisdiction over the land if that exercise does not conflict with State law. The tribal government "is responsible for providing a full range of services to the Tribe's members, including education, health and recreation, public safety and law enforcement, public utilities, natural resources management, economic development, and community assistance."[102] Many of these services are provided on the Tribe's land on Martha's Vineyard, including its trust lands. Furthermore, the Tribe can and does police the Settlement Lands and applies tribal laws to its members on these lands. In the Settlement Act's legislative history, the Tribe's President explained that, despite limitations on its tribal jurisdiction, "traditionally the Gay Head Wampanoags control the town government, and we believe that [even the un-enacted, more limiting version of] the settlement provides the opportunity for the tribe to maintain that control."[103] As further evidence of

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[98] *Russello v. United States*, 464 U.S. 16, 23–24 (1983). *See also Narragansett*, 19 F.3d at 700 ("When Congress includes limiting language in an early version of proposed legislation, and then rewrites the bill prior to enactment so as to scrap the limitation, the standard presumption is that Congress intended the proviso to operate without limitation. Deletion, without more, suggests that Congress simply had a change of heart.") (internal citations and footnote omitted).

[99] H.R. 2868, 99th Cong. § 107(a) (1986). *See also* H. REP. NO. 99-918, at 5(1986) (explaining the Bill "provide[d] that no Indian tribe may exercise any form of jurisdiction over the settlement lands or any other lands owned by such Indian entity within the town of Gay Head except to the extent provided in this Act, the State Implementing Act or the Settlement Agreement").

[100] H. R. REP. NO. 100-238, at 6 (1987).

[101] *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 703 n.18 (1st Cir. 1994) (citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604–05 (1977)).

[102] Letter from Lawl Echo-Hawk, Attorney, Wampanoag Tribe of Gay Head (Aquinnah), to Michael Hoenig, Senior Attorney, Nat'l Indian Gaming Comm'n, at 2 (May 23, 2012).

[103] Indian Land Claims in the Town of Gay Head, MA: Hearing on S.1452 Before the S. Select Comm. on Indian Affairs, 99th Cong., S. Hrg. No. 99-688, 23–24 (1986) (statement of Gladys A. Widdiss, President, Wampanoag Tribal Council of Gay Head, Inc.).

recognition of tribal jurisdiction, in its order denying the Tribe's motion to intervene in litigation over the constitutionality of the Massachusetts gaming statute, the District Court of Massachusetts explicitly stated that the Tribe had jurisdiction over its Settlement Lands.[104]

We find that the limiting language in Section 1771e(a) of the Settlement Act does not divest the Tribe of jurisdiction over the Settlement Lands.[105] The next step in the *Narragansett* analysis is to determine whether the Settlement Lands qualify as Indian lands under IGRA,[106] which involves a determination of whether the Tribe exercises governmental power over them.[107] As this is a factual determination rather than a construction of the Settlement Act, we will leave this question for NIGC to examine. For our purposes, we will assume the Tribe has met the threshold of exercising governmental power over the Settlement Lands. Therefore, contingent upon such determination, we find that IGRA applies to the Tribe's Settlement Lands.

B. IGRA impliedly repeals portions of the Settlement Act repugnant to IGRA's regulatory framework.

Because the Tribe possesses sufficient jurisdiction to trigger IGRA, we must determine whether an implied repeal of any portion of the Settlement Act has taken place. When two federal statutes touch on the same subject matter, courts should attempt to give effect to both if they can be harmonized.[108] Therefore, "so long as the two statutes, fairly construed, are capable of coexistence, courts should regard each as effective."[109] However, if portions of the statutes are repugnant to each other, one must prevail over the other.[110] Even where two statutes are not outright repugnant, "where the later statute covers the entire subject and embraces new provisions, plainly showing that it was intended as a substitute for the first act," a repeal may be implied.[111] When a later statute impliedly repeals a former statute, a partial repeal is preferred and only the parts of the former statute that are in plain conflict with the later should be nullified.[112]

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[104] Memorandum & Order, *KG Urban Enterprises, LLC v. Patrick*, Civil No. 11-12070-NMG, at 7 (D. Mass. June 6, 2013) ("The Aquinnah is a federally recognized tribe with jurisdiction over land on the western half of Martha's Vineyard, a part of Region C, which it obtained as a result of a 1985 settlement agreement . . . ."). The court noted, however, that whether the Tribe waived its right to conduct gaming pursuant to the Settlement Agreement was an unresolved question. *Id.* at 10.

[105] The *Narragansett* court and the Assistant Secretary in his 1997 letter to the Tribe both pointed to Section 1771e(a) as an example of how Congress can limit a tribe's jurisdiction over land. *Narragansett Indian Tribe*, 19 F.3d at 702 (stating the Settlement Act "contain[s] corresponding limits on Indian jurisdiction" to go with the "grant[] of jurisdiction [to the State] parallel to [the Rhode Island Settlement Act]"); 1997 AS-IA Letter, at 4 ("Had Congress desired to defeat concurrent tribal jurisdiction on lands located outside of the Town of Gay Head, it would have either provided for 'exclusive' state and local jurisdiction, or it would have included limitations on tribal jurisdiction, as it did in 25 U.S.C. § 1771e(a) with respect to jurisdiction over settlement lands within the Town of Gay Head. Congress chose to do neither."). These discussions happened in the context of land over which the states had jurisdiction but the tribes' jurisdiction was not limited. Pointing to Section 1771e(a) of the Settlement Act as an example of how Congress can circumscribe a tribe's jurisdiction when it intends to do so is not equivalent to saying that Section 1771e(a) divests the Tribe of jurisdiction.

[106] *See* 25 U.S.C. §§ 2703(4), 2710; 25 C.F.R. § 501.2.

[107] 25 U.S.C. § 2703(4); 25 C.F.R. § 502.12; *Narragansett Indian Tribe*, 19 F.3d at 701, 702–703.

[108] *Narragansett Indian Tribe*, 19 F.3d at 703.

[109] *Id.* at 703.

[110] *Id.*

[111] *Id.* at 703–04 (internal quotation omitted).

[112] *Id.* at 704 n.19.

IGRA and the Settlement Act cannot be read in harmony and are therefore repugnant. The Settlement Act clearly applies State law, including gaming law, to the Settlement Lands.[113] This application grants the State "the non-exclusive right to exercise jurisdiction" over the Settlement Lands.[114] The Settlement Act also limits the exercise of the Tribe's jurisdiction to that which conforms to State law.[115] Regardless of what the State's gaming laws actually require, the Settlement Act dictates that the Tribe must act in conformance with the State's laws when gaming. The Massachusetts Supreme Court has found that, when the Tribe does not conform to the State's civil regulatory laws, it is subject to suit by the State pursuant to the Settlement Act.[116]

IGRA provides an entirely different framework for the Tribe's gaming. IGRA mandates exclusive tribal jurisdiction over the Tribe's class I and class II gaming.[117] Although IGRA may permit the State to exercise its jurisdiction over class III gaming as prescribed and negotiated for under the terms of an approved tribal-state compact,[118] such exercise is still dependent on the Tribe entering into such agreement through IGRA's terms.[119] Further, IGRA categorizes Indian gaming into three classes and imposes different regulatory frameworks for each class.[120]

IGRA does incorporate State law in a sense. The Tribe is only permitted to engage in class II gaming activity if the State does not prohibit gaming activities of that type.[121] Further, class III gaming requires a compact with the State, and the State is only obligated to negotiate in good faith over the compact if the State does not ban class III gaming.[122] IGRA's incorporation of State law, however, is not equivalent to applying the actual gaming laws of the State to the Settlement Lands. This is because IGRA only bars class II gaming if State law is criminal/prohibitory, but the Settlement Act applies all State law, even those that are regulatory, to the Settlement Lands.[123] More importantly, IGRA's incorporation of prohibitory State law does not in any way subject the Tribe to the criminal jurisdiction of the State.[124] Therefore, despite the fact that IGRA does incorporate State law into its regulatory scheme in some sense, it is very different than the application of State law the Settlement Act dictates. Due to this repugnancy, we must now determine which statute survives IGRA's enactment.

As the Supreme Court has stated "repeals by implication are not favored."[125] However, the *Narragansett* court was not dissuaded by this general rule. In measuring a pre-IGRA settlement act against IGRA, the court stated "where two acts are in irreconcilable conflict, the later act prevails to the extent of the impasse."[126] Indeed, the *Narragansett* court determined using this rule that IGRA, the later statute,

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[113] 25 U.S.C. § 1771g.
[114] *Narragansett Indian Tribe*, 19 F.3d at 704.
[115] 25 U.S.C. § 1771e(a).
[116] *See Building Inspector & Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1 (2004).
[117] 25 U.S.C. § 2710(a); *Narragansett Indian Tribe*, 19 F.3d at 704.
[118] *Narragansett Indian Tribe*, 19 F.3d at 704 (stating that, "in connection with class III gaming, the Gaming Act does not in itself negate the state's jurisdiction, but, instead, channels the state's jurisdiction through the tribal-state compact process"); *id.* at 704 n.13 ("State jurisdiction over class III gaming is subject to restoration in whole or in part through the compact."). *See also,* 25 U.S.C. § 2710 (d)(7).
[119] *See* 25 U.S.C. § 2710(d).
[120] *See generally id.* §§ 2710–2721.
[121] *Narragansett Indian Tribe*, 19 F.3d at 690 (citing 25 U.S.C. § 2710(b)(a)(A)).
[122] *Id.* (citing 25 U.S.C. § 2710(d)).
[123] *Ysleta del Sur Pueblo v.* Texas, 36 F.3d 1325, 1332–34 (5th Cir. 1994).
[124] S. REP. NO. 100-446, at 6 (1988).
[125] *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987); *see also Ysleta del Sur Pueblo*, 36 F.3d at 1335.
[126] *Narragansett Indian Tribe*, 19 F.3d at 704.

prevailed. Under this basic analysis, IGRA would prevail over the Settlement Act and impliedly repeal those portions that were repugnant to it. However, two other cases have employed slightly different analyses, which we explore and distinguish below.

The First Circuit in *Passamaquoddy v. Maine* was tasked with determining whether IGRA effectuated an implied repeal of the Passamaquoddy Tribe's settlement act, which submitted the Tribe's lands to Maine's jurisdiction.[127] The settlement act contained a savings clause stating: "the provisions of any federal law enacted after [the effective date of the settlement act] . . . which would affect or preempt the application of the laws of the State of Maine . . . shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine."[128] As IGRA does not explicitly state that it is applicable in Maine, the court found that IGRA did not impliedly repeal the settlement act.[129] Rather, it found that the savings clause allowed the two acts to be read in harmony.[130] And, given the specific and express terms of the restoration act at issue, the court further concluded that "when a savings clause is in play, as in this case, the omission can only mean that Congress desired the terms of the earlier statute to prevail."[131] In stark contrast, the Settlement Act at issue here contains no savings clause. Therefore, as the *Passamaquoddy* court foreshadowed could happen when settlement and restoration acts do not contain a savings clause, "the literal terms of the two statutes create[] incoherence by subjecting Indian gaming to two mutually exclusive regulatory environments."[132]

The Fifth Circuit in *Ysleta del Sur Pueblo v. Texas* found that IGRA did not impliedly repeal the Ysleta del Sur Pueblo's restoration act.[133] Following its fact-bound inquiry into the precise language of the restoration act, the court stated that, where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of their enactment.[134] On the facts at hand, we are unconvinced that the Settlement Act is more specific than IGRA or that it should prevail. As the *Narragansett* court noted, it is arguable whether a settlement or restoration act or IGRA is more specific.[135] While IGRA has more widespread implications for many tribes and the Settlement Act only pertains to the Tribe, the Settlement Act's purpose is to cover the entire field of relationships between the State and the Tribe while IGRA only affects their relationship related to gaming.[136] Further, Congress is deemed aware of an earlier law when it enacts a later law, and therefore this argument holds less

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[127] *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 780, 787 (1st Cir. 1996).
[128] 25 U.S.C. § 1735(b). *See also Passamaquoddy Tribe*, 75 F.3d at 787, 789.
[129] *Passamaquoddy Tribe*, 75 F.3d at 789 ("Where, as here, congress enacts a statute of general applicability (e.g. the Gaming Act) with full knowledge that a preexisting statute (e.g., the Settlement Act) contains a savings clause warning pointedly that a specific reference or a similarly clear expression of legislative intent will be required to alter the status quo, the only reasonable conclusion that can be drawn from the later Congress's decision to omit any such expression from the text of the new statute is that Congress did not desire to bring about such an alteration."); *see also id.* at 790 (finding IGRA "lacks force within Maine's boundaries").
[130] *Id.* at 791 ("The absence of any suggestive guideposts in the Gaming Act, coupled with the easy integration of the two laws, effectively dispatches the argument for implied repeal.").
[131] *Id.* at 791 ("But when a savings clause is in play, as in this case, the omission can only mean that Congress desired the terms of the earlier statute to prevail.").
[132] *Id.*
[133] *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1335 (5th Cir. 1994). The provision at issue in the restoration act reads: "All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986." 25 U.S.C. § 1300g-6(a).
[134] *Ysleta del Sur Pueblo*, 36 F.3d at 1335.
[135] *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 704 (1st Cir. 1994).
[136] *Passamaquoddy Tribe*, 75 F.3d at 788.

weight.[137] IGRA was enacted just one year and two months after the Settlement Act completed its path through Congress.[138] Therefore, we do not find that the Settlement Act is more specific than IGRA and so should survive IGRA's enactment

Reading IGRA to partially repeal the Settlement Act also respects congressional intent. As the *Narragansett* court explained, "courts should endeavor to read antagonistic statutes together in the manner that will minimize the aggregate disruption of congressional intent."[139] As was the case there, "reading the two statutes to restrict state jurisdiction over gaming honors [IGRA] and, at the same time, leaves the heart of the Settlement Act untouched."[140] Although we find a partial implied repeal of the Settlement Act, we highlight that IGRA "left undisturbed the key elements of the compromise embodied in the Settlement Act. It also left largely intact the grant of jurisdiction, except that portion of jurisdiction touching on gaming."[141] Therefore, as the *Narragansett* court found, we find that "the provisions of [IGRA] apply with full force" to the Tribe's Settlement Lands.[142]

CONCLUSION

IGRA applies if a tribe has not been divested of jurisdiction through an exclusive grant of jurisdiction to the state or through an explicit divesture of tribal jurisdiction. Section 1771g of the Settlement Act does not grant exclusive jurisdiction to the State, and Section 1771e(a) of the Settlement Act does not divest the Tribe of jurisdiction. For this reason, IGRA applies on the Settlement Lands. The Settlement Act and IGRA are repugnant regarding provisions related to State jurisdiction over gaming and for this reason cannot be read in harmony. Because IGRA post-dates the Settlement Act, the Settlement Act does not contain a savings clause, and IGRA's applicability furthers congressional intent, IGRA impliedly repeals those portions of the Settlement Act pertaining to State jurisdiction over gaming.[143] Therefore, the Settlement Act does not prohibit the Tribe from gaming on the Settlement Lands.

Sincerely,

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Associate Solicitor, Division of Indian Affairs

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[137] *Narragansett Indian Tribe*, 19 F.3d at 704.

[138] However, it should be noted that the Fifth Circuit in *Ysleta* found noteworthy the fact that the restoration act at issue there had been passed just one year prior to IGRA and had not been expressly repealed by IGRA. *Ysleta del Sur Pueblo*, 36 F.3d at 1335 ("Congress, when enacting IGRA less than one year after the Restoration Act, explicitly stated in two separate provisions of IGRA that IGRA should be considered in light of other federal law. Congress never indicated in IGRA that it was expressly repealing the Restoration Act. Congress also did not include in IGRA a blanket repealer clause as to other laws in conflict with IGRA.") (internal footnote omitted).

[139] *Narragansett Indian Tribe*, 19 F.3d at 704.

[140] *Id.*

[141] *Id.* ("The Gaming Act leaves undisturbed the key elements of the compromise embodied in the Settlement Act. It also leaves largely intact the grant of jurisdiction—but it demands an adjustment of that portion of jurisdiction touching on gaming.").

[142] *Id.*

[143] Per the holding in *Narragansett*, however, the State retains those portions of jurisdiction over class III gaming granted by IGRA. *Narragansett Indian Tribe*, 19 F.3d at 704 n.13 ("[I]n connection with class III gaming, the Gaming Act does not in itself negate the state's jurisdiction, but, instead, channels the state's jurisdiction through the tribal-state compact process.").