THE SENECA NATION OF INDIANS AND THE CITY OF SALAMANCA: AN ANALYSIS OF THE SENECAS' OPTIONS FOR RENEWAL OF THE 99-YEAR LEASES OF SALAMANCA

by

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A.B. Stanford University
(1978)

Submitted to the Department of
Urban Studies and Planning
in Partial Fullfillment of the
Requirements of the Degree of

MASTER OF CITY PLANNING

at the

MASSACHUSETTS INSTITUTE OF TECHNOLOGY

September 1984

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ABSTRACT

The 99-year leases of the City of Salamanca expire in 1991. The total acreage encompassed by the leases totals roughly 3200 acres. The Seneca Nation of Indians, a federally-recognized tribe in western New York State, is Salamanca's landlord. This thesis presents a history of the Seneca Nation of Indians and their tenure of their ancestral land base. Other long-term leases between Indian tribes and non-Indian communities are examined in order to determine their replicability for the Salamanca leases. The final chapter presents recommendations for negotiating and implementing the renewal of the Salamanca leases.

Thesis Supervisor: Professor Philip B. Herr
Title: Associate Professor of Urban
Studies and Planning

This thesis is dedicated to my mother,
Bette Crouse Mele,
and to my loyal friend,
Patricia Mendoza,
who each assumed loving care of my daughter
Margherita
whenever I needed so that I could complete my
semesters at MIT

ACKNOWLEDGEMENTS

The author wishes to thank the following people for their generous contributions of time and information to this thesis:

Thomas E. Hogan

Roy Campbell and Ginger Malek,
Southern Tier West Planning and Development Board,
Salamanca

The Salamanca Press

Calvin Lay, Seneca Nation Tribal Planner

Regis Pecos, Cochiti Lease Committee

Keith Kjelstrom,
Massachusetts Div. of Capital Planning & Operations

Professor Gary Hack, Dept. Head, MIT Urban Studies & Planning

Ruben Morfin, Computer Owner & Devil's Advocate

And especially to my thesis committee who endured considerable pressure from me but who showed unfailing interest in my thesis and provided the support that was often lacking elsewhere:

Prof. Phil Herr

Prof. Mark Schuster

Prof. Tunney Lee

PREFACE

The leaders of the City of Salamanca and the Seneca Nation are about to embark on the most important period of negotiation that will affect the Nation or city for many years. The lands beneath the City of Salamanca are tribal lands belonging to the Seneca Nation. The 99-year leases of those lands, roughly 3200 acres, will expire in 1991.

The pages which follow first present a history of the tenure of Seneca lands. As will be shown, this history is unusual in that the Seneca have been able to retain, despite substantial and continuous opposition, the title to their lands. What's more, the Seneca have been able to retain their lands in common, thereby preserving ancient and traditional customs of land tenure. It is important to note here that most Indian reservations are not lands given to a tribe or tribes. Rather, reservations are lands not taken from tribes. The three populated reservations of the Seneca people, Tonawanda, Cattaraugus, and Allegany, are perfect examples of that definition.

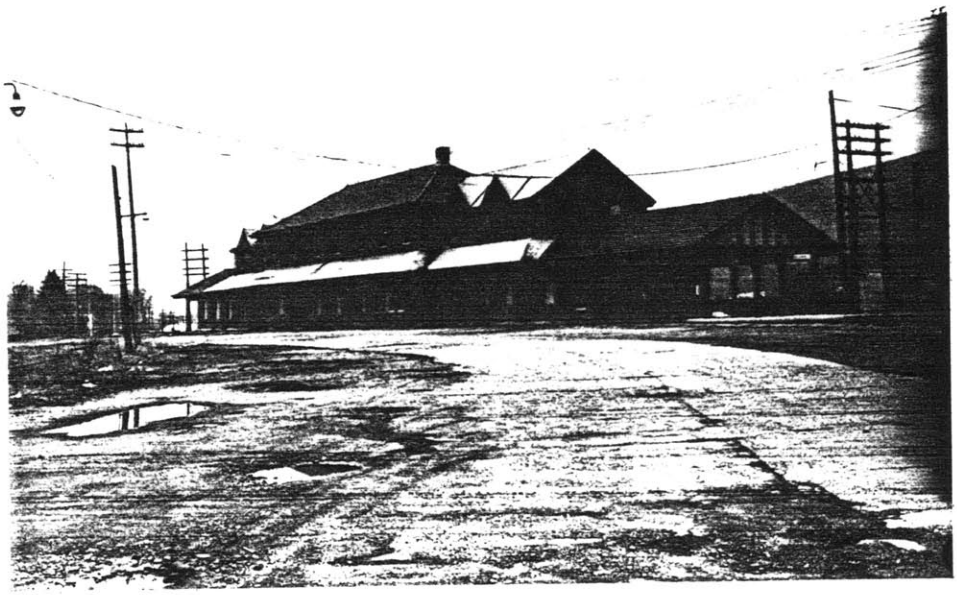
Following the history of Seneca land tenure is a comparison with other non-Indian communities which depend upon leasing Indian lands. The comparison is made to determine whether or not a precedent has been set which may be replicated for the renewal of the Salamanca leases. Based on the various problems and benefits resulting from those other leases, recommendations are made for renewing and implementing the Salamanca "Master Lease".

The recommendations which are made for renewal are 1) the inclusion of adjustments--to change the value of lease payments to reflect the changing purchasing power of the dollar; and 2) inherent incentives for both the city and the Nation to attract long-term investment and maintenance of capital in Salamanca. Several methods by which to accomplish these recommendations are suggested. Finally, various means by which to implement the lease aggreement are presented. These offer, chief among their potential benefits to both the city and the Seneca Nation, visibility and input from a range of experts in the fields of city planning, urban design, economic development, land use planning and real estate development, among others.

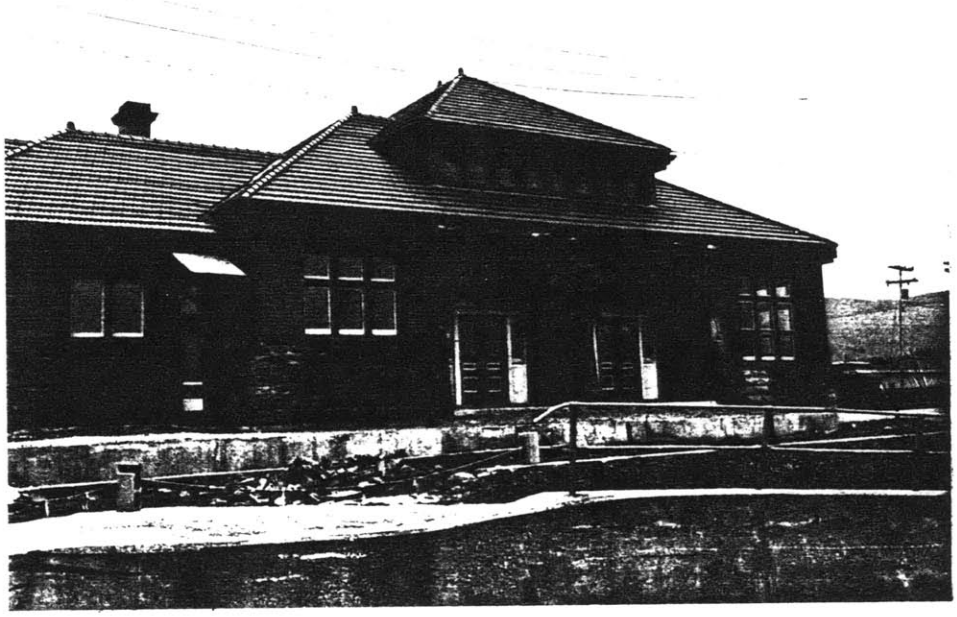
I should note that as a member of the Seneca

Nation of Indians, I have more than a passing interest in the Salamanca leases and their renewal. I had originally intended to write this thesis for my tribal government. Finding this to be impossible--the secrecy of negotiations being as they are at this time--I have written this thesis for my fellow tribal members who will be, no matter the outcome, deeply affected by the resolution of the Salamanca Master Lease arrangement.

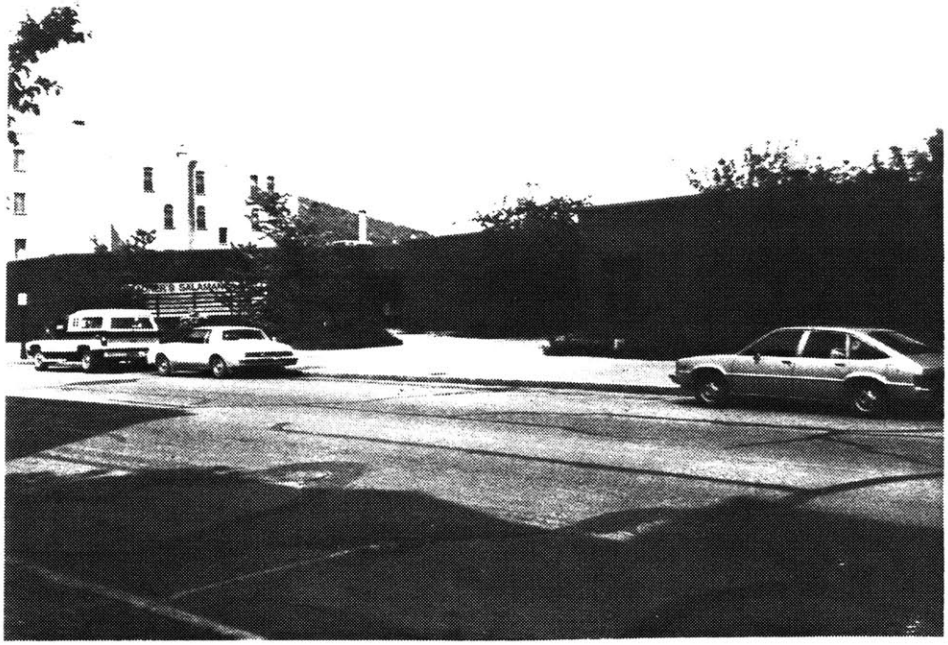
Salamanca and the Allegheny Mountains
This photo was taken from the Allegheny
State Park which adjoins Salamanca and
the Seneca Nation's Allegany Reservation



Salamanca's railroad depots; the depot below is in the process of renovation and will be reopened as the Salamanca Rail Museum



Main Street Salamanca in 1984



The Salamanca Bradner's Mall on Main Street in Salamanca
There are currently only three tenants remaining in the mall;
Bradner's, the mall's anchor, moved out in 1983

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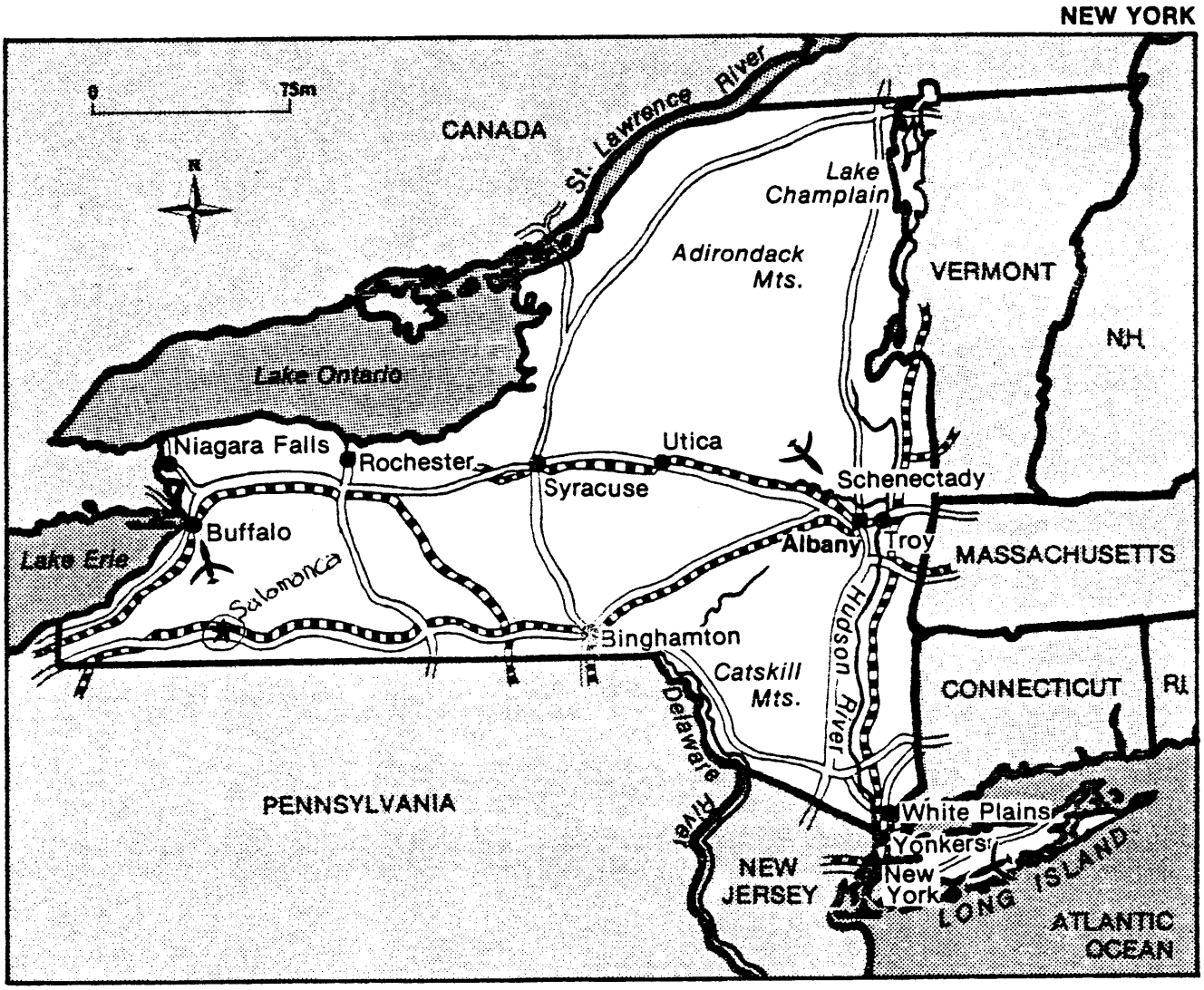
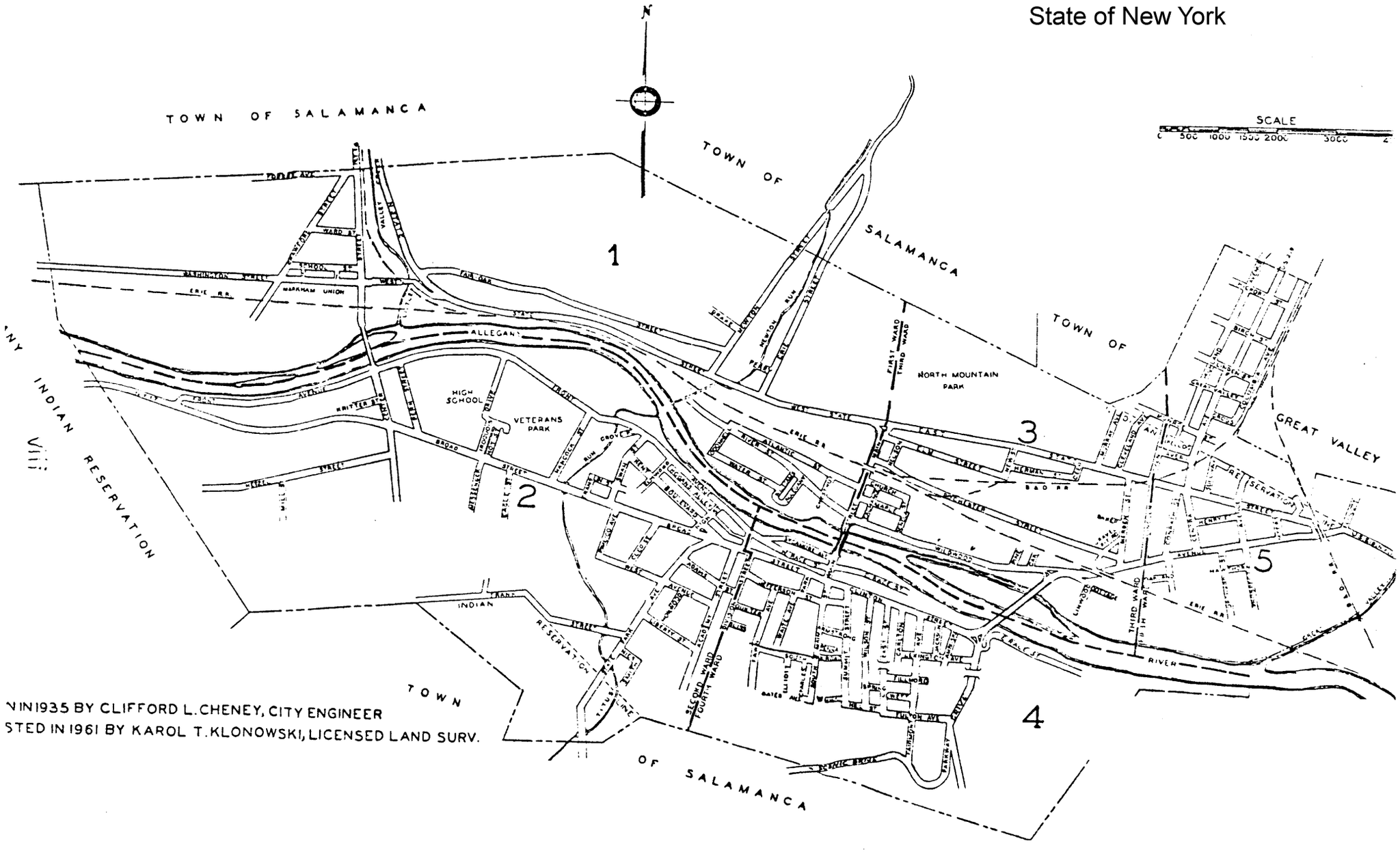
NEW YORK



City of Salamanca
State of New York



N IN 1935 BY CLIFFORD L. CHENEY, CITY ENGINEER
STED IN 1961 BY KAROL T. KLONOWSKI, LICENSED LAND SURV.

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INTRODUCTION

Salamanca proudly calls itself "the only city in the world on an Indian Reservation". A tiny railroad depot in 1852, Salamanca accepted a city charter in 1913 with over 6,000 residents. Located in the southwestern tier of New York, Salamanca is 60 miles south of Buffalo, just north of the Pennsylvania state line. The real founder of the City of Salamanca was the Erie Railroad which leased a railroad right-of-way from the Seneca Nation in 1850. Several years later, another right-of-way was leased for a second railway and it was at their junction on the Allegheny River that the village of Salamanca grew. This second route was funded in large part by the Spanish Marquis de Salamanca who contributed $10,000,000 to the Erie Railroad, and it was him for whom the City of Salamanca was named. In fifteen short years, from 1875 to 1890, the population of Salamanca increased from 2000 to 6000; an increase of 200%.

Typical of many railroad boomtowns, however, Salamanca is now in a state of economic depression. The Erie-Lackawana Railroad ceased operating out of Salamanca in the 1960s, and the population has declined by over 20% since that time. The 1950 census

showed the city of Salamanca's population at 8861; in 1960 it was 8450; in 1970 it was 7877 and in 1980, 6778 with an accompanying unemployment rate of 8.7%. The unemployment rate for the Seneca Nation of Indians was 35% in 1980, but both unemployment rates have increased during the past four years. The Seneca Nation itself is its own major employer, but with the cutbacks in federal funds under the Reagan Administration, many of the Seneca Nation's programs have been eliminated entirely or have undergone severe reductions in funds and staff. In addition, the Jamestown Tabletop Company, which was one of the largest employers in Salamanca, closed as the result of a fire in 1981.

Many residents of Salamanca claim that it is the lease arrangement between the city and the Seneca Nation of Indians which discourages economic investment in Salamanca. The 99-year leases for Salamanca all expire in 1991. Purchasers of new homes must be able to make their purchase without a mortgage, or must pay enough as a down-payment so that any amount mortgaged may be paid before the leases expire in 1991. Consequently, real estate values have plummetted. The Salamanca-Republican is currently advertising houses for sale for as little as $13,000.

As of 1984, both the Seneca Nation and the city are in the process of negotiating the leases' renewal. Contrary to popular belief among member of the Seneca Nation and residents of Salamanca, legally the leases cannot simply expire without attempted renegotiation. The 1875 Act of Congress which authorized the Seneca Nation to lease their land specifically calls for both parties to choose representatives to negotiate the renewal. Representatives of both parties are currently at this stage. There have been joint meetings of the Nation's and the city's representatives to the Lease Committee, but for the most part, both sides meet separately and their meetings are highly secretive. Neither representatives of the city nor of the Nation will speak about the progress of their meetings. As negotiations continue to stall, the uncertainty about Salamanca's future increases and feelings between Indians and whites deteriorate. According to one resident of Salamanca, a staff member of the city's Planning and Community Development Department, "the Indians are being very selfish . . . in terms of attracting business right now, they're driving it out of the area."

According to the city's assessor, Salamanca leaseholders are currently paying the Seneca Nation a

combined total of $44,268 in annual rent; some lessees are paying as little as $1 a year. Ten years ago, in 1974, the Nation received $11,000 annually from the leases. The increase is derived mainly from new 50-year leases entered in the interim period. Some of these are commercial leses, but the vast majority are residential leases for 75' x 125' lots at $150 annual rent. Both the city and the Nation agree that the Seneca Nation should receive more for the lease of their lands, but the Seneca Nation maintains that the city can afford to pay $300,000 while the city maintains that its residents can only afford to pay $75,000 in annual rent.

The Seneca Nation has had a difficult history in maintaining the title to its land base and also in leasing its lands. Ever since the end of the American Revolution, and particularly during the Treaty Period and the formation of reservations, the Seneca Nation has opposed claim after claim to the title to their lands. During the past ninety two years, the Seneca have received a disproportionately small sum for the leasing of their lands (compared to rental rates of local non-Indian lands). Even despite the small sums which were agreed to in 1892 as annual rental, the Seneca Nation has experienced periods during which lessees of Salamanca were consistently lax about

paying their rents; many lessees did not pay rent for as long as 19 years.

In 1939, the Seneca Nation finally passed a resolution which cancelled all leases which were then in default. The United States, on behalf of the Seneca Nation, brought a suit against one of the lessees in order to test the Seneca Nation resolution. The court held in favor of the Seneca Nation and the Nation was therefore able to cancel a number of forfeited leases and to increase, even minimally, the amount the Nation received in annual rent. As a result of this case and the effect it had on Salamanca leases, Congress passed an Act in 1950 to authorize the city to collect rents from Salamanca leaseholders and to pay the annual rents in a lump sum to the Seneca Nation. This act has had the desired effect of minimizing the number of forfeited leases. As the expiration date of the current leases approaches, the Seneca Nation is anxious to ensure that, whatever agreement is reached, the Nation will receive an annual sum for the lands they lease that will be substantially larger than the $44,268 they now receive.

Despite consistent efforts by unscrupulous businessmen, despite the well-meant, albeit potentially disastrous, efforts of Congressmen and

other politicians, the Seneca Nation of Indians has managed to retain ownership of its land base. By retaining the title to its land base, the Seneca Nation of Indians has ensured that the Seneca Nation will continue to exist as a tribe. The residents of Salamanca know that no matter the cost, the Seneca Nation will always fight to maintain that title. Without a common land base, no group of Indian people has been able to survive as a tribe, as a distinct group of people with specific political rights. And the Seneca Nation of Indians is well aware of that.

AUTHOR'S NOTE: "Land Base" is the term used to denote the Indian relationship to land. Indian land--traditionally, legally, and politically--is not owned individually by members of the tribe. It is the land base upon which the tribal government is based and upon which the culture of the tribe depends. Groups without a tribal land base who are now seeking federal recognition as tribes (eg, the Wampanoag of Massachusetts and the Lumbee of North Carolina) have been unable to prove their special political status as tribes. Many Indian people are of the belief that it is precisely their lack of a tribal land base which has caused their loss of a tribal identity.

BACKGROUND OF THE SENECA NATION

The Seneca Nation of Indians is one of six nations of the Iroquois Confederacy. The Seneca have traditionally referred to themselves as "Keepers of the Western Door", a league title which represents their position as the westernmost members of the Confederacy and the strategic importance that position therefore had since it was to the West that most of the Iroquois enemies were. Before white contact, which occurred in the mid-1600s, the Iroquois formed their confederacy, the League of Five Nations, with the Mohawk, Oneida, Onondaga, Cayuga, and Seneca. This political union established the Iroquois as the most powerful group of indigenous people north of Mexico. The Confederacy was more than an alliance. The purpose of forming the League was to join the five nations into one body, each with specific responsibilities and with political representation at councils. In 1722, the Iroquois Confederacy admitted the Tuscarora as a sixth nation after the Tuscarora fled North Carolina.

The Confederacy's novel concept of a democratic union of separate political bodies caused

Benjamin Franklin to write,

> It would be a very strange Thing, if six Nations of ignorant Savages should be capable of forming a Scheme for such a Union . . . and yet that a like Union should be impracticable for ten or a Dozen English Colonies, to whom it is more necessary (1)

The Confederacy's strength was proven when its alliance became the decisive factor in England's victory over France in the colonial struggle for Canada (the "French-Indian War"). The Confederacy was finally broken when the American colonists opposed the Crown; some Iroquois nations sided with the Americans, while others fought against them with the British. With the establishment of the United States came the Treaty Period and the formation of what were to become reservations. At the height of Iroquois influence in the 1600s, Iroquois country extended from New England to Illinois. By the end of the 1700s, Iroquois land had dwindled to several thousand interspersed acres in New York State, Quebec, and Ontario.

1. Quoted in "The World of the American Indian", National Geographic Society, Washington, DC (1974) p.133

> Peace itself was one of the ultimate objects aimed at by the founders of this Indian Oligarchy, to be secured by the admission, or subjugation of surrounding nations. In their progressive course, their empire enlarged, until they had stretched their chain around the half of our republic, and rendered their names a terror from the hills of New England and to the deepest seclusions upon the Mississippi; when the advent of another race arrested their career, and prepared the way for the gradual extinguishment of their council-fires and the desolation of the Long House. (2)

2. Morgan, Lewis H., "League of the Ho-de'-no-sau-nee, The Iroquois", Sage & Brother, Rochester NY, (1851) p.76

THE TREATY PERIOD

Iroquois Land Cessions and the Establishment of Reservations

The first treaty made between the Iroquois and the United States was made at Fort Stanwix in 1784. By that treaty, the United States gave "peace to the Senecas, Mohawks, Onondagas, and Cayugas" and received them "into protection" upon the condition that the Iroquois relinquish any claim to lands they formerly held to the West of the Ohio River. (3) This treaty was later referred to and confirmed in a subsequent treaty at Fort Harmar in 1789.

The next treaty between the United States and the Six Nations was made in 1794 and is known as the Pickering Treaty. (Pickering was the US Agent assigned to treat with the Seneca). This treaty established boundaries for four separate reservations in western New York, acknowledged lands reserved for the Oneida, Onondagas and Cayugas in their respective treaties with New York, and established boundaries for a single Seneca reservation:

> ". . . Now the United States acknowledges all the land within the aforementioned boundaries to be the property of the Seneca Nation, and the United States will never claim the same nor disturb the Seneca Nation . . . but it shall remain theirs until they

3. October 22, 1784

choose to sell the same to the people of the United States who have the right to purchase". (4)

New York and Massachusetts Dispute Claim to Seneca Land

Soon after the American Revolution, a problem became evident due to the fact that two separate land grants had been issued by the Crown and had passed to two separate colonies, New York and Massachusetts. These grants were, in part, for the same land: that of the Seneca Nation. On November 3, 1620, James the First granted to the Council of Plymouth a tract of North America, from 40 to 48 degrees north latitude from the Atlantic and extending west through the continent to the Pacific Ocean. The colony of Massachusetts was formed by a conveyance and grant by the Plymouth Council to a Sir Henry Roswell and Associates.

On October 30, 1659, Charles the Second granted to James, Duke of York and Albany, "all the country in North America, from New Scotland on the northeast, the river of Canada on the northwest, to the east side of Delaware Bay on the southwest, excepting thereout the grant to the Plymouth Company, including Massachusetts and Connecticut." (5) This

4. February 21, 1794 (Article 3)
5. Opinion of Atty. Richard Harrison in "Report of R.H. Gillett to C.A. Harris, Comm'r of Indian Affairs", Feb.7, 1896

land grant was eventually claimed by the colony of New York.

After the war and the framing of the US Constitution, the two new states appointed commissioners to settle their disputed land claims. The commissioners for the states of New York and Massachusetts met in Hartford, Connecticut in December of 1786. A compromise was reached on December 16 whereby Massachusetts ceded to New York all claims of government and jurisdiction. In turn, "New York ceded to Massachusetts and its grantees the right of preemption from the [Seneca and Tuscarora] nations and all rights of ownership except sovereignty &c." (6) [Emphasis Added] This the state of Massachusetts promptly did when it sold the rights of preemption to Robert Morris on May 11, 1791.

Six years later, on September 15, 1797, an agreement was entered into under sanction of the United States, between Robert Morris and the Seneca Nation of Indians. This contract essentially sold to Morris for, $100,000, all lands from the previously disputed land claim except for lands thereby reserved for the Seneca Nation, amounting to nine separate parcels, approximately 300 square miles in

6. Letter from J.R. Jewell, US Indian Agent, to W.A. Poucher, US Atty. for the N. Dist. of NY, Feb. 7, 1896

total. (7)

The Ogden Land Company and Its Claim of Preemption to Seneca Lands

Through various deeds and assigns, the preemptive title to Seneca lands came to be held by the Holland Land Company, last known as the Ogden Land Company. It is preemption that has cast much of the land claims and attempted congressional land claims acts as they relate to the Seneca, into question. "Preemption" has been variously defined. Webster defines "preemption", "the act or right of buying land, etc. before or in preference to others; especially such a right granted to a settler on public land" (Webster's New World Dictionary, Second Ed., 1979). Burrill's Law Dictionary defines preemption as "the first buying of a thing--a privilege formerly enjoyed by the Crown of buying up provisions and other necessaries, by the intervention of the King's purveyors, for the use of his royal households at an appraised valuation in preference to all others, and even without the consent of the owner" (Vol. 11, 326,

7. Agreement With The Seneca, Sept. 15, 1797

cited in Jewell, supra). The issues created by the "right of preemption"--particularly its monetary value, if any, has had the strongest effect on any legislative or other legal actions bearing on Seneca land tenure.

The agreement of 1797 between the Seneca and Morris is so diffuse that it is difficult to believe that it was effectively interpreted to, and genuinely understood by, the 52 Seneca sachems and chiefs who signed it. In the closing of the agreement, it is stated:

> "And it is hereby understood by and between the parties to these presents, that all such pieces or parcels of land as are hereby reserved and are not particularly described as to the manner in which they are to be laid off, shall be laid off in such manner as shall be determined by the sachems, chiefs, residing at or near the respective villages where such reservations are made . . . "(8)

Several of the parcels "not particularly described" are not measured in the contract and it is therefore difficult to determine the acreage or boundaries of those parcels.

How stringently the Seneca Nation adhered to the contract with Morris is unclear. Three separate cessions of Seneca land occurred after the Pickering Treaty. The Pickering Treaty is important in Seneca

8. Ibid

history because it was the first treaty which established separate reservations for the Nation. Such an arrangement apparently made it easier for non-Indians to procure Indian lands because during the period between US Treaties, the Seneca Nation agreed to further cessions of its land base. By the following treaty, there were only five reservations remaining to them.

The next treaty between the Seneca Nation and the United States, the Buffalo Creek Treaty, was made in 1838. This treaty is familiar to most Seneca even today as it was one of the most controversial treaties ever to occur between the United States and an Indian nation. The Buffalo Creek Treaty occurred during the period of Indian Removal, when entire nations were being forcibly dispossessed of their homes and ancestral lands and moved to "Indian Territory", present-day Oklahoma. The famous Cherokee removal, for example, was carried out by Andrew Jackson and the US Army in direct defiance of a Supreme Court decision in favor of the Cherokee (Chief Justice Marshall and the Indian Removal Act of 1830). At the behest of the Ogden Land Company, the assignees of Robert Morris, the United States appointed a special commissioner to treat with the Seneca and other Iroquois nations, and the Iroquois were enjoined to remove to the West.

Article Ten of this treaty dealt specifically with the Seneca:

> And whereas at the making of this treaty, Thomas L. Ogden and Joseph Fellows. the assignees of the State of Massachusetts, have purchased of the Seneca Nation of Indians, in the presence and with the approbation of the United States Commissioner, appointed by the United States to hold said treaty, or convention, all the right, title, interest, and claim of the said Seneca Nation, to certain lands by a deed of conveyance . . . and whereas the consideration money mentioned in said deed, amounting to two hundred and two-thousand dollars . . . the balance being the sum of one hundred and two thousand dollars, is to be paid to the owners of the improvements on the land so deeded . . . on their severally relinquishing their respective possessions to the said Ogden and Fellows. (9)

Immediately following the signing of this treaty, the Seneca Nation began to send a long series of remonstrances, or formal protests, with substantial support from The Society of Friends of Genessee, Philadelphia, New York, and Baltimore. These remonstrances charged that: 1) a majority of Seneca chiefs had <u>not</u> signed the treaty; 2) that those opposed to emigration had been invited to sign the treaty at the Commissioner's quarters where they were plied with alcohol; and 3) that at least eight chiefs had been paid a sum total of at least $21,600 "as a

9. Treaty With The New York Indians, Bufflo Creek, Jan. 15, 1838

reward for seducing their fellow-chiefs, to sell the lands of their unwilling constituents". (10) Various other charges were made by various deponents including kidnapping, forgery, and bribery by/of Commissioner Gillett, the US Indian Agent, and the Ogden Land Company's agent, Potter, all of whose names are affixed as witnesses to the treaty. (The charges of kidnapping and forgery were never substantially supported).

The document submitted to Congress by the Friends alleged:

> Powerful in its resources, this company is seeking by various means to dispossess the Indians. Whenever and wherever a treaty is to be held with this nation, then and there we find the Ogden Land Company by its agents, prepared to put in operation their measures to persuade or drive these Indians from their present homes . . By sundry documents, exhibited to us by the Seneca Indians at the late council held at Cattaraugus, it appears that to eight chiefs of that nation, the payment of $21,600 was promised upon the faith of written articles, duly executed by the company's agent for the purposes aforesaid. (11)

These charges were answered as early as

10. Friends of Genessee, etc., "Memorial & Remonstrance to the President of the US, in Relation to The Indians of NY", 1840
11. Ibid

February of 1838, one month following the signing of the treaty. Commissioner Gillett wrote to the Commissioner of Indian Affairs, "The illness of the United States interpreter during the early part of the negotiation compelled me to rely upon persons less responsible as the organ of communication. Subsequent events developed the fact that full reliance could not be placed upon such interpretations. This fact may account for some misapprehensions, which are said to exist as to some things that transpired during the negotiation." (12)

Despite the serious doubts in the Senate and in the US Office of Indian Affairs, and despite the substantial and continuous protests of the Society of Friends, the Treaty of Buffalo Creek was proclaimed by President Van Buren to have been duly ratified, on April 4, 1840. Two years had elapsed between the signing of the treaty and its proclamation -- a considerable delay. The treaty had been greatly amended by this date, which caused the treaty's legitimacy to be seriously doubted by members of Congress. A special Senate committee which debated the treaty's merits wrote, " . . . but it is in vain to contend that the signatures of the last ten

12. Letter from Buffalo Creek Comm'r R.H. Gillett to C.A. Harris, US Comm'r of Indian Affairs, Feb. 27, 1838

[chiefs] which were obtained on the second mission, or of the three who have sent their assent lately, is such a signing as was contemplated by the resolution of the senate." (13)

Due to the vociferous objections of leading Quakers and the fact that many of the articles of the treaty were essentially unexecuted, a second treaty was made at Buffalo Creek in 1842, four years after the signing of the original Buffalo Creek Treaty, and two years after its proclamation. This treaty, made exclusively with the Senecas, restored to them two of the four reservations previously ceded. The Seneca regained title to the Cattaraugus and Allegany reservations, but they agreed to cede Buffalo Creek (the largest of the four) as well as Tonawanda. Out of 114,867 acres remaining to the Seneca, 62,720 were thereby ceded to the Ogden Land Company which also continued to hold the preemptive title to Cattaraugus and Allegany.

The war between the colonies and the Crown had torn the Iroquois Confederacy apart. The Treaty of Buffalo Creek had a like effect on the Seneca. One of the most debated issues from the first, fraudulent treaty was whether or not the "chiefs" who signed the

13. Quoted in The Society of Friends' Memorial, supra, p.17

document had actually any authority to do so. Tribal and Confederate law had always required that the clan mothers should appoint the chiefs in open council. Yet many of the "chiefs" who signed the first treaty at Buffalo Creek were not chiefs and had no authority to represent the Seneca people. In a letter to the US Commissioner of Indian Affairs from Commissioner Gillett, in which Gillet answers charges made against the treaty, he states:

> Big Kettle swears that eleven persons, not full chiefs had signed the treaty, while the statement now furnished by Robinson and others, affirms that there are seventeen. The Indian agent's letter to me, annexed to my former report, states that there are eighty-one regular chiefs. Amid so many conflicting statements, which one is to be adopted as the true one? The agent is an intelligent man, and had his list of chiefs before him when he prepared the statement for me. I have no hesitation in taking his statement in preference to either of the contradictory ones furnished by the objectors [Seneca chiefs]." (14)

14. Letter from R.H. Gillett to C.A. Harris, US Comm'r of Indian Affairs, 21 March 1838

The Seneca Nation of Indians and the Tonawanda Band of Seneca

The Buffalo Creek Treaty had effectively split the Seneca. "Emigration chiefs" versus "non-emigration chiefs", chiefs versus warriors, Christian Senecas versus traditional (Long House) Senecas, all took part in a tribal call for a new government. To acquire the signing of the Treaty of Buffalo Creek, the United States had taken advantage of the Seneca political system by singling-out chiefs and pressuring them to acquiese on behalf of the Seneca. Similar tactics had been used during the war between the colonies and the Crown and when these failed, American soldiers attempted to make chiefs of warriors in their appeals for a Seneca alliance. Many Seneca believed that in order to prevent similar occurences in the future, a new government needed to be structured in order to protect the Seven Generations.

Iroquois tradition has always held that in making any long-term decisions for the member nations, the utmost care must be taken to provide for the seven subsequent generations. Iroquois statesmen did not only represent their contemporaries; there was a sacred obligation to provide for the unborn generations of their constituents as well. It was for this reason that a struggle began, to establish a new

Seneca political system.

After the Treaty With The Senecas in 1842, there were but two Seneca reservations formally recognized by the United States. These, the Cattaraugus and Allegany reservations, became the base of the Seneca Nation of Indians. The Seneca Nation is distinguished from the Tonawanda Band of Seneca in that the former adopted, in 1848, a new tribal constitution upon which the government of the Seneca Nation is based. The Tonawanda Seneca, who never emigrated from their remnant tract of 12,000 acres, were justifiably angry when the Seneca agreed, as they did in 1842, to relinquish that land. They therefore felt no compunction for the treaty nor any pressing need to break with political tradition.

The Constitution of the Seneca Nation called for the election of a president every two years, with the change of office to alternate between Cattaraugus and Allegany. Enrolled Senecas from both reservations would elect a president who would serve for two years. After those two years, the Seneca people would elect a president from the other reservation. The clerk and treasurer are likewise elected for two year terms, alternating between the two reservations. Finally, there are sixteen councillors elected, eight from each

reservation. The 136 year old government of the Seneca Nation of Indians survives today, firmly founded on the Nation's constitution.

The last treaty made between the United States and the Seneca was made in 1857 with the Tonawanda Band of Senecas. The treaty is unusual in that it acknowledges the errors made through the Buffalo Creek Treaty and restores Tonawanda to the Seneca, although at a financial gain to the Ogden Land Company:

> Whereas a certain treaty was heretofore made between the Six Nations of New York Indians and the United States on the 15th day of January, 1838, and another between the Seneca Nation of Indians on the 20th day of May, 1842, by which, among other things, the Seneca Nation of Indians granted and conveyed to Thomas Ludlow Ogden and Joseph Fellows the two certain Indian reservations in the State of New York known as the Buffalo Creek and the Tonawanda reservations, to be surrendered to the said Ogden and Fellows . . . and . . . . Whereas, for divers reasons and differences, the said treaties remain unexecuted as to the said Tonawanda reservation, and the band of Senecas residing thereon; . . . It is hereby agreed that the Tonawanda band may purchase of said Ogden and Fellows . . . the entire Tonawanda reservation, or such portion thereof as they may be willing to sell and said band may be willing to purchase; and the United States undertake and agree to pay for the same out of the said sum of $256,000, upon the express condition that the rate of purchase shall not exceed, on an average, $20 per acre. The land so purchased shall be taken, by deed of conveyance to the Secretary of the Interior of the United States, and his successors in office, in fee, to be held by him in trust for said Tonawanda band of Seneca Indians

> and their exclusive use, occupation, and enjoyment, until the State of New York shall pass an act designating some persons, or public officer of that State, to take and hold said land upon a similar trust for said Indians; whereupon they shall be granted by said Secretary to such persons or public officer. (15)

The Tonawada Reservation was thereby restored to the Seneca living on it and the two separate bodies of the tribe became officially distinct. All three of the Seneca reservations are held in trust by the State of New York and are owned in common by the Seneca people. The Seneca Nation of Indians owns in common and has jurisdiction over the Allegany and Cattaraugus; the Tonawanda Band of Seneca has jurisdiction over the Tonawanda Reservation.

The U.S. Congress abolished treaty-making powers for tribes in 1871 and replaced tribal decision makers with U.S. government Indian Office superintendents and agents. And so began a period in Indian history in which the U.S. Government, not the Indian tribal governments, made decisions for their "wards". Indian tribes were to be considered, in the words of one Supreme Court Justice, "semi-sovereign nations", apparently unfit for the responsibilities of self-determination.

THE GENERAL ALLOTMENT ACT

The Treaty Period was closely followed by the "Allotment Period" in U.S.-Indian history. U.S. Senator Henry Dawes of Massachusetts introduced legislation that would permanently and irrevocably end the tribal law of land ownership; namely, land held in common. As Dawes maintained, "They have got as far as they can go because they own their land in common . . . there is no selfishness, which is at the bottom of civilization". (16) The Dawes Allotment Act was passed in 1887. Under it, tribal lands, often promised "forever" in previous U.S. treaties, were to be divided among tribal members and allotted in severalty. After a period of 25 years, said lands would be eligible for sale by the allotee.

The Indian concept of land ownership had always baffled white settlers in the Americas. And, to a very great degree, the European concept of owning land had similarly baffled Indian people. As the Shawnee leader, Tecumseh, had proclaimed, "Sell a country?! Why not sell the air, the clouds, and the great sea as well?"(17) Dawes and his fellow lawmakers believed that if a tribe was stripped of its land base, and its members gained

16. Henry Dawes in 1885, quoted in Vine Deloria, "The World of the American Indian", supra

17. Quoted in "The World of the American Indian, supra, p.326

individual title to the land (title in severalty), that such a process would erase the tribal characteristics of those people, and hasten the proccess of "civilizing", or assimilating, the Indian. Indian people immediately opposed the Dawes Allotment Act for those very reasons. Without a tribal land base, Indian people would not be able to retain their tribal identity. This was a price which no Indian people were willing to pay.

The Dawes Act was based upon two fundamental assumptions. One was that the Indian was a "vanishing race", destined for extermination. For this reason no measures were taken to expand the land base of an "allotment tribe". Rather, land held in severalty was to be divided among the heirs of an allotee as is the case even today for tribes affected by this legislation. After almost 100 years of this form of land ownership, it is not uncommon for a single allotment to be divided among some 200 heirs, amounting to shares such as "3,124/115,755,091,200ths". (18) The reckoning of kinship, of heirs, and of the inherited portions of an allotment were overseen by the U.S. Indian Office and agencies thereof.

The other assumption upon which the Dawes Act was based was that lands owned in severalty would hasten the "civilization" of tribes, transforming Indians into

18. Ibid

church-going farmers. To hold land in common, with no rigid (read:written) regulations for its inheritance was regarded by Dawes and his contemporaries as unduly primitive. Lands were therefore divided between enrolled members. Heads of households received allotments of 160 or 320 acres (depending upon the climate and soil condition of the tribe's land base); individuals were allotted less land. After the land had been summarily divided among tribal members, the "surplus" was open by the U.S. Government to white settlement. The Iowa tribe retained 8,600 acres after allotment while 207,000 acres were declared "surplus". (19) It mattered little to the U.S. Government whether the tribe had previously depended upon agriculture for subsistence. Hunting tribes, such as the Cheyenne and Kiowa, were allotted most frequently. Tribal lands continued to dwindle even after being "guaranteed" through allotment; individuals leased all or part of their allotments to local farmers or ranchers and after 25 years were able to sell the lands outright. The pattern of ownership on tribal lands became checkerboarded.

As one 19th Century observer of U.S.-Indian relations remarked, "The present system of national supervision is evidently temporary in its plans and purposes . . . It carries, upon all its features, the impression that the presence of the Indian upon this

19. Ibid, p.369

continent is temporary." (20)

It was during the Allotment Period that pressure was brought to bear on Congress to divide the remnant lands of the Seneca and to allot their ancestral land in severalty. And it was also during this period that the major lease legislation for the City of Salamanca was passed.

20. Morgan, in his 1851 "League of the Iroquois, supra, p. 457

History of the Allegany Leases

With the introduction of railroads in the early 1800s came the granting of rights-of-way through Indian lands across the country. Indian lands were particularly prone to the trespass of the burgeoning industry due to the ease with which railroad companies could secure rights-of-way through commonly-owned, rather than individually-owned land. The Allegany Reservation was no exception. In 1950, the Erie Railway negotiated a right-of-way with the Seneca Nation and in 1852, completed construction of a railroad along the Allegheny River which dissects the Allegany Reservation. Eight years later, in 1860, the Erie constructed the Atlantic & Great Western Railroad. (21) At their junction on the Allegheny River, the village of Salamanca grew to a tiny city.

At this railroad junction, homes were built for employees of the railroad companies which in turn attracted businesses so that by the 1870s, there were some 2000 white people residing on the Allegany Reservation. The railroad companies, through their negotiation for the rights-of-way had leased a sum total of 169 acres for $5385 (about $32 per acre) forever, or as long as the railroads remained in

21. H.R. Rep. No. 2786 51st Cong., 1st Sess., to accompany H.R. 10130 (July 22, 1890)

operation. (22) Employees of the railroad companies and the businesses they attracted began to lease lands individually from members of the Seneca Nation. "At Salamanca the Indians began to lease lands to white people employed by said railroads for village lots and afterwards to other people until in 1875 a large village had sprung up at that point . . . but the village was composed of hastily and cheaply constructed buildings on account of the uncertainty of the tenure and the invalidity of the leases." (23)

In 1873, the New York State courts decided that reservation lands of a federally-recognized Indian nation were beyond the jurisdiction of state courts. The Seneca lands were under the protection of U.S. treaties and therefore, only Acts of Congress could have any valid effect on their use. All leases in effect at that time were thereby nullified. (24)

Congress Authorizes Seneca Nation to Lease Lands

Due to the overwhelming uncertainty among white residents of Salamanca and other villages on Allegany, Congress passed an act in 1875 entitled, "An Act to

22. Thomas E. Hogan, "Salamanca, City in a Quandaray", NY History (January, 1974), p. 85
23. H.R. Rep. No. 2786, supra
24. Hogan, supra, p.88

authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations and to confirm existing leases". (U.S. Statutes at Large, Vol. 18, p.330, Feb. 19, 1875) This Act restricted renewal of leases to periods not to exceed 12 years, and also entitled the lessee to seek further renewal when the leases expired in 1892. Furthermore, the act prohibited individuals from entering leases as lessors, requiring instead the approval of the Seneca Nation Council for such contracts.

This Act seemed to satisfy both the Nation and the residents of the growing village of Salamanca, at least initially. Brick buildings -- "substantially built" -- began to be constructed as early as 1880. Among these were " . . . a high school with buildings costing $40,000, a large tannery, saw mills, lace factory, two national banks, and the usual industries that go to make up an active and enterprising town." (25) It was during this boom period that a third railroad was built on Allegany, the Buffalo, Rochester and Pittsburgh Railroad, which also joined the other railroads at Salamanca.

By 1890, the (white) population of Salamanca had increased from 2,000 in 1875 to over 6,000 in 1890: an increase of 200% in fifteen years. It seemed to the "city

25. Ibid

fathers" of Salamanca -- as it no doubt did to the Seneca -- that the city of Salamanca would continue to grow at an astounding rate. But the limitation on lease renewals of twelve years seemed too short a period for the economic growth and long-term investment that most residents of Salamanca wanted to attract, so plans were drawn for further congressional action.

As early as 1874, the Atlantic & Great Western's attorney, John W. Street, had foreseen the difficulties for his and other railroad companies by restricting leases to twelve years. He therefore devised a scheme (which he named "A Treaty Between the United States of America and the Seneca Nation of Indians") wherein the Seneca Nation would elect a U.S. citizen as "Commissioner" every four years. The "Commissioner" was to oversee the division of 1000 acres in Salamanca and 300 acres in West Salamanca, Red House, Great Valley and Carrollton into "proper streets and blocks". Thereafter, said

Commissioner would ". . . offer for sale leases of all said lots for the term running ninety-nine years from the ratification of this treaty", prices would "not exceed the sum of $10 per foot frontage on the abutting street or be less than one dollar per foot frontage . . . and after such classification and prices are approved [by the Council of the Seneca Nation] <u>they shall forever after remain without change either in classification or price so far as The</u>

Seneca Nation of Indians is concerned ." [Emphasis added.] (26) Street estimated that his plan would generate an annual income of between $30,000 and $75,000 to the Seneeca Nation.

Street's plan was particularly detailed, required zoning (including set-back requirements for businesses and residences), and established maximum lot sizes. It was also the first plan which included the provision of ninety-nine year leases. However, due to the fact that the plan also called for the Commissioner to be a non-Indian (since the Commissioner was to be a U.S. citizen and Indians were not granted citizenship until 1924) and to usurp the position of the Treasurer of the Seneca Nation, the Seneca opposed the proposed plan.

Residents of Salamanca also opposed the plan as they greatly mistrusted the railroad companies' interests in negotiating a lease arrangement. The Salamanca newspaper, The Cattaraugus-Republican, featured an article which indicated that Street wanted the commissioner job for himself and that he represented only the interests of the railroad companies which were referred to as "the millstones between which the Indians and whites [were] to be reduced to a powder." (27) There also appeared to be

26. John W. Street, Atty. for Atlantic & Great Western RR, to Comm'r Indian Affairs (Aug. 29, 1874)
27. Cattaraugus-Republican, May 14, 1874, quoted in Hogan, supra, p. 90

likely apprehension among residents due to the fact that the proposed lease payments seemed excessive; the majority of leaseholders in 1874 paid a total of one to five dollars per year and Street's plan required a minimum rent payment of ten dollars per lease per year.

Seneca Nation Opposes Efforts to Allot Its Land in Severalty

In any event, at that time Congress was already in the process of amending the bill which was enacted in 1875. This bill had originally intended to allot Seneca land in severalty and to extinguish the preemption title of the Ogden Land Company. (28) However, and much to their credit, the Seneca Nation was successful in convincing members of Congress through another series of remonstrances that to allot lands in severalty would be unfair to most members of the Nation. Why, they asked, should the lands be divided among members of the Nation and redistributed equally when only some members had made "improvements" on the land and had begun farming?

In a remonstrance to Congress made in 1874, the President and Council of the Seneca Nation advised:

> Your petitioners would further state that they do believe that every part and all of their lands are needed and required by their people; that they as a Nation have discharged their duty in this, that no Indian is a charge upon the poor-fund or poor-house of the whites; that no Indian suffers for the want of food,

28. Hogan, supra, p.93

> clothing or warmth; that provision has been made for the education of all our Indian children; and that the criminal records of the counties in which our lands are located will show that crimes are very much less frequent among our people than among an equal number of whites adjoining us. Our churches are sustained with personal attendance and with money . . . Your petitioners would further state that they are an agricultural people; that if they can be assured of holding their lands they can make permanent improvements but that every effort made to deprive them of their lands tends to prevent action in that direction; that all they need and ask is such an assurance of their continued possession as a refusal by Congress to consider any proposition providing for the sale of their lands. (29)

The remonstrance was successful in convincing Congress that the purpose sought in allotting Indian lands in severalty--civilizing the Indian by transforming him into a church-going farmer--was already fulfilled among members of the Seneca Nation and there was therefore no need to allot Seneca lands in severalty. Mr. B.W. Harris, of the House Committee on Indian Affairs, submitted the Seneca remonstrance to Congress and reported that "The value of improvements made upon land in Salamanca and the other villages by the white settlers is estimated at $3,000,000. Under this state of the case, the residents in these villages have no remedy whatsoever against wrong doers and trespassers . . . Their only dependence now is the well-known and long-acknowledged high sense of honor of the Seneca Indians". (30) Through fortuity and

29. H.R. Rep.No. 472 43d Cong., 1st Sess. (Apr. 20, 1874)
30. Ibid

considerable political skill, the Seneca Nation managed to convince Congress to defeat H.R. 3080 and to lay to rest their anxieties about losing their tribal land base, the inevitable consequence of changing the title to their land from communal to individual ownership.

Ironically, it was the long-standing claim to preemption of the Ogden Land Company which also served to persuade white residents of Salamanca to oppose the allotment of Allegany. Should those lands be allotted in severalty, surely the Ogden Land Company would be able to claim first rights to the purchase of the Seneca lands and hence thwart the residents' efforts to procure the same for themselves. Several bills proposing to allot the Seneca lands were introduced until 1888, the last of which also sought to extinguish the Ogden Company's claims to preemption of Seneca lands. (31) The Land Company was able to prevent this cancellation of their claim so, in 1890, residents of Salamanca sought a long-lease proposal for a 99-year lease arrangement with the Seneca Nation. Such an arrangement would surely attract the long-term financial investment desired by residents of Salamanca, while simultaneously increasing the value of the Senecas' lands.

Congress Amends Authorization To Lengthen Terms of Allegany Leases

The Committee on Indian Affairs, to whom was

31. Hogan, supra, p.95

referred the bill H.R. 10130 to amend the 1875 act reported,

> The present bill proposes to extend the term of these leases from twelve to ninety-nine years--and in that respect only does it change the law of 1875--It is urged to the Committee that the growth and prosperity of the town is retarded by the shortness of the term; that manufacturing on any extended scale or involving any considerable outlay is prevented; and that strangers, who would make desirable citizens, are kept away from the place . . . It seems to your committee that the Indians would receive a great benefit from the growth of these villages, as it would tend to increase the value of their land . . . . " (32)

And so it was agreed. On September 30, 1890, the 1875 law was amended to extend leasing periods "for a term not exceeding ninety-nine years" (33) In the 1875 law, however, there is a specific clause in Section Three which entitles lessees to renewal of the land at the expiration of the term (1892) and for further renewal (not exceeding 99 years) when those terms expire in 1991. In the event that the Nation and the lessee cannot agree on the amount of annual rents or the conditions of such leases, the parties to the lease shall "choose one person, as referees to fix and determine the terms of said lease and the amount of annual rent to be paid; and if the two so appointed and chosen can not agree, they shall choose a third person to

32. H.R. Rep. No. 2786, supra
33. Act of Congress, 51st Cong., 1st Sess. (Sep. 30, 1890)

act with them, the award of whom, or the major part of whom, shall be final and binding upon the parties . . . . " (34) According to this arbitration clause, the city and the Nation are each obliged by this legislation to choose an individual to negotiate the leases' renewal. In the event that the two cannot reach an agreement, they shall agree upon the choice of a third person who shall act as arbitrator.

This is the last Congressional Act bearing on the terms of Allegany leases. Section Six of this act deals specifically with rents and calls for their recovery by the Seneca Nation treasurer. In 1896, the Department of the Interior was authorized to "ascertain and report to Congress a detailed statement of all the leases made and entered into by the Seneca Nation of Indians . . . giving an itemized statement of each and every lease now in existence or force, with the date and terms of each lease and amount or amounts due on each lease." (35) Subsequent events and delegations of the work revealed that 1,080 leases were renewed in 1892 for 99 years for an average annual rental of $5 per lease.

There was apparently disagreement as to the number of leases in force, the area they encompassed, and the

34. Ibid
35. D.M. Browning, Comm'r Indian Affairs, to D.R. Francis, Sec'y of Interior (Dec. 10, 1896)

question as to whether the 1890 amendatory act required or merely allowed terms of 99-years. In 1898, the Acting Commissioner of Indian Affairs wrote to the Secretary of the Interior that "The language of the latter act relating to the renewal of leases gave rise to the question as to the time for which said leases should be reserved and was construed one way by the Indians and another way by the lessees." (36) This question was reportedly settled soon thereafter, although there were serious problems developing related to the collection of annual rental payments for Allegany leases. On February 28, 1901, Congress passed another amendatory act which authorized the U.S. Indian Agent for the New York Agency to collect annual rents in place of the treasurer of the Seneca Nation. (31 Stat 819) Such an amendment, it was hoped, would ensure that the rents would not become delinquent each year as had been the case in 1901.

36. Jan 18, 1898

Seneca Nation Confronts Problems With Rent Collections

The Seneca Nation soon discovered that the amendatory act did not have the desired effect of ensuring that annual rental payments would be made to the Nation. Despite the fact that the U.S. Indian agent was then responsible for collecting the rents, most leaseholders in Salamanca continued to allow their payments to lapse. On November 29, 1910, the Office of Indian Affairs appointed an Inspector to go to Salamanca and make a schedule of leases then in force. On January 25 of 1911, Inspector James McLaughlin made his report to the Secretary of the Interior. In his report, he listed the names of the original lessees, the amounts of annual rental on each lease, the date to which the rental has been paid, and any delinquent amount unpaid on each lease. Inspector McLaughlin ascertained that there were 1471 original leases then in force, a number of which had been divided and sub-leased, bringing the total of leases and subleases to 1911. The Inspector noted that there were "glaring inequalities as to rental appearing in the schedule" and spoke in particular of one lease which had since been divided into 85 subleases "but from the desireableness of the location, I regard the annual rental paid by many of the sub-lessees within this tract as unreasonably inadequate." (37)

37. Inspector Jas. McLaughlin to Sec'y of Interior (Jan. 25, 1911)

But the most severe problem with the leases cited by McLaughlin was the delinquency in payment of rents to the Indian Agent. Several lessees had not paid rents since the new leases were drawn in 1892. One of the most flagrant violators was a Charles Nies who, through a total for some six leases, owed $505 with rents for some of his leases being delinquent for 19 years, as long as the leases had been in force. In reference to such occurences, McLaughlin reported, " . . . some of the leases are delinquent since the leases were made in 1892, and when it was learned that a government agent was in Salamanca checking up Seneca leases upon which rentals were delinquent, lessees commenced coming to the Agent's office and paying up, some of whom had been several years in arrears, and during the last six days I was in Salamanca, $1817.55 was thus received by Agent Walker, which he stated was greatly in excess of any previous lease rentals received at the Agency." (38) In spite of the several guilt-ridden amends, the total amount in arrears as of January 20, 1911 was $16,357.

The report of these delinquencies to Washington prompted the Secretary of the Interior to consult the U.S. Attorney General for advice on what remedial action could best be taken to collect the delinquent rents. The Seneca Nation was anxious to collect delinquent rents and was of

38. Ibid

the opinion that, should reliable efforts fail, the unpaid leases ought to be cancelled and new ones entered into in their place.

On March 15, 1912, the Assistant Attorney General informed Representative Edward B. Vreeland that he would instruct the U.S. Attorney for the Western District of New York to assume the duties of rent collection for the Seneca Nation. As precedent, he cited the Act of March 3, 1893 (27 Stat 612) which provides:

> In all states and territories where there are reservations or allotted Indians the United States district attorney shall represent them in all suits at law and in equity. (39)

No such action was taken, however, for on August 28, 1915, James Lynn, the United States Attorney for the Western District of New York informed the U.S. Attorney General that:

> [I]t appears that information that the U.S. Attorney was about to institute suits to collect past due rents was being circulated in Salamanca and that as a result of such reports many delinquents had already paid the rents and others were arranging to do so. (40)

He further advised that:

39. Asst. Atty. Gen'l to E.B. Vreeland (Mar. 15, 1912) Nat'l Archives letter file #26417, NY Agency
40. U.S. Atty., W. Dist. NY to U.S. Atty. General (Aug. 28, 1915)

> By far the larger part of the rentals are, however, incurred for the use of lands in the city of Salamanca where the forfeiture of a lease for non-payment of rent would be such a disaster to the tenant that none would permit it. Collection of rentals from these tenants can easily be enforced and litigation is not necessary. Those that were in arrears are rapidly paying up. Of the $14,000 of arrears at the beginning of Mr. Ansley's term in 1913, only about $5000 remains uncollected. (41)

Mr. Lynn's final recommendation was that the Indian agent should utilize the services of the attorney for the Seneca Nation in order to collect delinquent rents.

The Seneca Nation was tiring of the bureaucratic obstacles being cast in their way by the U.S. Office of Indian Affairs and later by the U.S. Attorney General. The rental payments agreed upon in 1892 were not adequate as it was; why should the Seneca Nation be made to wait before the forfeited leases were cancelled and new ones, which would certainly reflect the current market values of their lands, initiated in their stead?

Seneca Nation Cancels All Delinquent Leases

At some point during the 1920s, the Indian agent commenced the custom of sending notices to lessees in Salamanca which advised them of the possibility of having interest payments attached to any portion of their rent which remained uncollected. The notices were sent to all leaseholders in the City of Salamanca and read as follows:

41. Ibid

Notice

Be sure to bring this statement with you. Rents are payable at the United States Indian Office, Room 5, Federal Building, only. Rents are due each year in advance on February 19, and must be paid on or before April 20 thereafter, or interest will be charged from the time that the rent became due. (42)

The notice did not have the desired effect of increasing the collection of rents. Instead, the fact that such notices were being sent to lessees was used as a defense on the part of the defendant in the case United States v. Alice L. Gates. This suit was brought in 1939 against the defendant, a Salamanca lessee, by the United States on behalf of the Seneca Nation. The suit was brought to test the Nation's resolution of March 4, 1939 which stated, "That all leases made with the Seneca Nation as lessor, which are delinquent in rental payments this 4th day of March, 1939, be and the same are hereby cancelled as of this date." (43) Defendant Gates maintained that the Seneca Nation had always allowed lessees to be delinquent in their rent payments without resorting to enforcement procedures and she therefore claimed that the Seneca Nation had forfeited its right to cancellation of the leases:

42. C.C. Daniels, Sp. Asst. Atty. Gen'l, to John Reeves, Chief Council, Offiice of Indian Affairs (Nov. 21, 1939)
43. Ibid

> [S]aid United States Indian Agent, with the approval of the Seneca Nation of Indians, has established a custom of allowing rentals to remain in arrears, has taken no steps to enforce payment thereof and thereby it has become an established custom for said agent and the leaseholders to allow rentals to remain unpaid from year to year on the understanding that payment thereof might be made at any time before April 20th in each year. (44)

For some reason, the case United States v. Gates never reached the courts. Instead, in 1942, a similar case was brought by the United States on behalf of the Seneca Nation against a Salamanca lessee, Forness. This case, United States v. Forness (45) was brought to test the same Seneca Nation resolution which cancelled "hundreds of similar leases".

In this particular case, the lessee had built a $63,000 building on the leased land which in 1934 was mortgaged to the Salamanca Trust Company for $15,000. Salamanca Trust had entered the case as defendants as did three other financial institutions because of their inteest as mortgagees of similar properties. The annual rent for the defendant's property was $4 a year. The re-entry clause of the lease called for an annual rent equal to 2 1/2% of the assessed value of the land without "improvements", estimated at $115 annual rent in 1942. The

44. Ibid
45. 125 F. 2d 928 (2d Cir. 1942)

defendants had last paid rent in 1930 and were nine years in arrears when the Seneca Nation's resolution was passed. The defense for Forness was very similar to that of Gates. The defendant attempted to show that the Seneca Nation had "forfeited" its right to cancellation of its lease since it had become customary for the Seneca Nation to allow leases to remain delinquent for several years.

In a very lengthy opinion delivered in 1942, it was noted:

> There is overwhelming evidence that lessees of these [Allegany] lands were customarily lax about paying their rent. In 1911, for example, 1,095 leases were in default . . . . An attempt was made in 1911 by the Senecas to retain an attorney to collect the arrears, but the Department of the Interior ruled that the 1901 Act, which allocated the disposition of the rentals, prevented use of the funds for this purpose . . . The present action by the Nation, then, represents the culmination of a long struggle by the Indians to enforce their economic rights. (46)

In the closure of this opinion, the court makes an effort to chastise the defendants while offerring advice to the Seneca landlords:

> The consideration--$4 a year--comes close to being unconscionably small . . . the expenses of suits for their recovery makes their collection impractical; the consequence is that, for practical purposes, the lease is the equivalent of one which explicitly denies the landlord any right to sue for the rent, leaving him the cancellation of the lease as his sole remedy for

46. Ibid at 931

> nonpayment. That the tenant, under such a lease, can unfairly take advantage of the landlord is amply demonstrated in this case. A lease of that kind may shock even a calloused conscience . . . Our refusal to exercise our equity powers in these circumstances is reinforced by an unhappy realization that the dealings of certain of our citizens with the Indians have often been far from praiseworthy. (47)

The court held in favor of the Seneca Nation and the Nation was therefore free to proceed with its plans to draw up new leases in lieu of the cancelled ones. Several of the leases now in force on Allegany are therefore based on an economic index--the rents rise and fall depending on the assessed value of the land. The majority of the leases, however, are static and will remain at the same cost assessed in 1892 until 1991. With the expiration of the 99-year leases less than seven years away, the Seneca Nation must make every effort to ensure that its rights as landlord of the city of Salamanca are not abused again. Residents agree that the annual rents paid by individuals are, for the most part, "unconscionably small". The snag in the lease negotiations lies in the solution to attracting capital and decreasing the unemployment rate of both the city and the Nation.

47. Ibid at 941

The Salamanca Leases Today: A Comparison With Other Long-Term Tribal Leases

Salamanca is a railroad boomtown without a railroad. During the 1970s, Salamanca underwent a serious period of economic depression; of twenty stores on Main Street, eight were closed in 1970. Most of the businesses which closed during this period were family-run enterprises and many were owned by people approaching retirement age whose children had moved from the area. Then, in 1972, Salamanca received an Urban Renewal Program grant from the Department of Housing and Urban Development.

In 1972, local developers, with federal backing through the Urban Renewal award, approached the owners of several contiguous businesses on Main Street Salamanca. They purchased the properties at a price reported by one source as "outrageously high--the families would never have received such a large sum from the private sector." The deal was encouraging not only to the owners of the properties sought by the developers, but to other business owners who saw the offer as an indication that Salamanca property values were finally on the increase. The deal was made, the old buildings were torn down, and a shopping mall was built in their place.

In order to finance the development, the developers were required by the financers to enter a new lease agreement with the Seneca Nation so that the developers would still retain the lease when the construction and permanent loans had been paid-off. The developers thereby negotiated and entered a 50-year lease with the Seneca Nation, and pay escalating lease payments to the Nation, currently $10,380 per year for the .7-acre parcel. Since the mall opened in 1973, half of the tenants have either relocated or have gone out of business. The mall has never been fully rented which raises questions about the soundness of the guarantees required of the merchant tenants, the marketing studies conducted by the developers, and the subsequent rent-roll projections they prepared. Now, 11 years after the mall opened, more than half of the property remains vacant.

Many residents and merchants of Salamanca cite the rental payments to the Seneca Nation, which they believe to be inordinately high, as the cause of the mall's failure. The mall's manager, located in Scarsdale, New York, reports that rents are often delinquent and that since the mall's "anchor", Bradner's Department Store, filed bankruptcy, his management company has made no money at all from the mall. The mortgagee, he reports, currently receives approximately 2% in interest payments. The manager insists that the rents are not the cause of the mall's failure, claiming that

the current tenants are paying "very little to nothing at all", although he will not divulge the specific payments. In addition to management problems, it is the design of the mall itself which is forbidding and offers no incentive to passersby for entering. Most of Salamanca's businesses, particularly those on Main Street, were built around the turn of the century--from 1880 to 1920. The new mall, however, has been built of brick and is entirely windowless. In a city where merchants are accustomed to direct street frontage, the mall must certainly seem threatening to their ability to attract shoppers. In fact, many of Salamanca's residents say that the mall resembles a "prison". The structure is not only conflicting with the design of adjacent buildings, but the design itself prohibits accessibility to the shops within. It is unfortunate that the higher lease payments which the Nation presently receives for this parcel are cited as reasons why Salamanca can not afford increased lease payments. The planning and design of the development itself has ensured its failure.

There are several other cases in Salamanca in which private developers have negotiated special 50-year leases with the Seneca Nation. The Seneca Nation has naturally attempted to obtain the maximum amount possible in lease payments for the new leases. Residents of Salamanca are increasingly worried that the amount in rents

which will be sought by the Seneca Nation in 1991 will be too large a burden for the majority of residents, and too prohibitive to attract new business: new business which is vital to both the Nation and the city.

According to the 1980 census data, the median family income in the city of Salamanca was $15,687. Broken down by race, the median family income was $16,947 for whites and $12,896 for Indians. As noted previously, the unemployment rate was 8.7% for whites and 35% for the Seneca Nation. The U.S. Department of Labor's unemployment figure for the county is 12% for March of 1984. The Tribal Planner estimates that the unemployment rate for the Seneca Nation is 48% in June of 1984. Clearly, both Salamanca and the Seneca Nation would benefit from economic development and job creation in Salamanca. 38% of Salamanca's residents age 25 and older did not complete high school and most of the jobs currently filled by the work force of Salamanca and the Seneca Nation are blue-collar: construction and light industry.

Over 50% of all owner-occupied housing was valued at $19,999 or less, according to the census data. Accompanying Salamanca residents' anxiety about future lease payments has been a sharp decline in property values. Until the lease is negotiated, property values will continue to decline. The uncertainty about the leases' renewal has delayed maintenance of existing properties and

investments in new ones. Currently, the only way for investors to be able to finance homes or businesses is to negotiate a new 50-year lease on an individual basis with the Seneca Nation. Such "piecemeal negotiations" (as they have been called by the former chairman of Salamanca's Lease Committee) have helped to raise the Seneca Nation's lease income from $11,000 to $44,268 in ten years. However, there is concern that such private deals are jeopardizing the majority of the leases which will be renewed in 1991. Furthermore, there are no adjustment clauses in the new leases which would provide for an increase in payments upon any increase in the land's value. Nor are there any incentives designed into the leases which encourage long-term business investment or job creation.

Members of the city's and the Nation's lease committees are meeting separately and they jealously guard any information about prospective plans for the lease's renewal. Officially, the two parties are supposed to combine and meet as one lease committee, but for various reasons, the parties meet separately. The last known plan sought by both parties to the lease committee was referred to as the "super fund". Under this plan, the city of Salamanca was expected to attract and amass enormous sums from both the private and (federal) public sectors. In lieu of residents and businesses paying rent to the Seneca Nation, the interest payments alone generated by the "super

fund" would be paid annually to the Seneca Nation. Conservatively then, if the Seneca Nation was to receive $75,000 in annual rent--the maximum amount which the city has offerred in response to the Seneca Nation's claim that Salamanca is able to pay $300,000--then the "super fund" would have to amount to at least $750,000 compounded annually at 10% in order to bear interest at $75,000 a year. When interest rates decline, so will the amount received by the Seneca Nation in return for the lease of their land. There is no built-in incentive tied to this plan for either the Nation or the city to encourage further injections of long-term capital or business development. No one is willing to disclose the source or likelihood of acquiring this money and, according to one Salamanca resident and a professional planner, "There are no contingencies to this plan. Everything right now is riding on the super fund."

As early as 1966, The Wall Street Journal published an article entitled "Indian Landlords: Tribes Seek to Prosper By Leasing Reservations for Industry, Suburbs". (48) In the article, several tribes across the country were reported to be preparing to lease large tracts of their land to developers. "The opportunity to live on an Indian reservation should have real romantic appeal if properly merchandised", was what a Coldwell-Banker vice

48. Wall Street Journal, Oct. 3, 1966, p.1

president was reported to have said of the possibility of the Pima-Maricopa leasing their desert lands adjacent to Phoenix, Arizona. (49) The Seneca Nation and Salamanca were described in order to point-out the differences between their lease situation and others. "The Seneca Nation, for example, hasn't forgotten the 1875 Federal law that granted bargain-rate leases to squatters . . . .Yet many continue to yield the tribe as little as $1 a year, and in all, the Salamanca leases produce only about $11,000 annually." (50)

In 1980, the Seneca Nation requested the Bureau of Indian Affairs to notify them of any similar lease arrangements between an Indian tribe and a community of non-Indians on an Indian reservation. When the BIA responded to the Seneca Nation's request, only three similar arrangements were acknowledged by the Bureau. One of these, Agua Caliente-Palm Springs California, had been mentioned in the Wall Street Journal article. According to the article, the Agua Calientes were, in 1966, anticipating $1.7 million for 59 leases. When the BIA reported about the lease situation 14 years later, there were 197 long-term leases, providing "approximately $5,000,000 annual rental to the Indian owners." (51) The

49. Ibid
50. Ibid
51. Charles Pleasky, BIA Acting Dir. of Trust Responsibility to House of Representatives' Stanley Lundine, Apr. 21, 1980

luxury resort community of Palm Springs had originally been leased from the Agua Caliente for 25 years. In 1959, Congress amended the Act in order to lengthen the terms up to 99 years. "The amendment lengthened the term to provide for large scale capital construction and improvement opportunities to prospective lessee/developers who were hindered by many lending institutions that were unwilling to make loan commitments on leaseholds unless the terms of the leases were longer than fifty (50) years." The Bureau further advised that, "No matter what length of lease is given, when the expiration date gets within twenty years, the equity of the lessee in the improvement will drop rapidly." (52)

Another similar lease situation has transpired on the White Mountain Apaches' Fort Apache Reservation in Arizona. In 1959, seventy 25-year leases were made to non-Indians for homesites. Several hundred were made within the next five years. This year, in 1984, the first seventy leases expired. There was no renewal clause in the lease, so when the Chairman of the Tribe decided, as he reportedly did in 1976, to terminate all leases to non-Indians on his reservation, the lessees had no alternative but to return the land to the Apaches. Several non-Indian property owners on the reservation have vowed to burn their $250,000 homes rather than abandon them to their

52. Ibid

Indian landlords.

The leases were terminated because, as the BIA reported, the chairman "began to envision the enormous problems down the road as the leased communities began to age and decay and the leases neared their expiration. He saw that, in order to ensure viability of those communities and maintenance of the improvements and values, the tribe would have to, in effect, guarantee renewal of the leases in perpetuity. Whatever lands were under lease were lost to the Indian community forever. He also had dissatisfied people demanding, pressuring, and badgering for a presentation of their problems before the Tribal Council . . . How long, he wondered, would it be before pressure began for representation of those five-hundred families or so on the Tribal Council" (53) The Bureau acknowledges the tribe's criticism of its "failure to provide for an adjustment clause despite the Tribe's prior disposition". However, the Fort Apache Tribal Council's decision to terminate the leases was clearly more an issue of tribal sovereignty than an economic issue.

The only other lease situation similar to the Seneca Nation's has occurred at Cochiti Pueblo in New Mexico. There, in 1969, the Pueblo leased 6000 acres to Great Western Cities, Inc., a subsidiary of Hunt International Resources Corporation, for 99 years. "The

53. Ibid

purpose of the lease was to develop a city by subleasing lots adjacent to a recreation lake created by the Army Corps of Engineers".(54) Rentals for the land were to be "based on a minimum initial amount increased by percentages of 'Basic Sales Prices' of subleases for both residential and commercial lots plus percentages of annual rentals of all subleases". (55) The first adjustment was due in 1984, based on increase or decrease of value of the land, using the Department of Labor's Consumer Price Index. At the termination of the lease, the land and improvements will be delivered to Cochiti Pueblo.

This arrangement was approved by the BIA and the Pueblo's Tribal Council. It included both an adjustment clause and provision of handling improvements at the lease's termination. However, the case at Cochiti has been tied-up in court for 13 months, and the lease has been in default for over a year and a half. According to Regis Pecos, a member of the Cochiti Lease Committee, Hunt International and Great Western Cities have each separately filed for bankruptcy. One case is in federal court, and the other is in (New Mexico) state court where Hunt International is presently seeking a change of venue to Texas. The United States, on behalf of Cochiti Pueblo, is seeking $100,000,000 from the subsidiary corporations (both

54. Ibid
55. Ibid

are subsidiaries of Hunt Brothers, Inc., of Texas) for punitive damages and breach of contract. The first rental adjustment, which was to have occurred this year, was never made and the tribe had anticipated a minimum annual income of $350,000 from the lease.

The bankruptcy claims have left both the tribe and the 350 residents of Cochiti Lake in the lurch. Presently, Cochiti Pueblo is seeking to reduce the lease to the core of the town where development has actually occurred. (30,000 to 40,000 population had been projected for 1984). The tribe does intend to arrange an adequate adjustment in order to accomodate the 350 residents who are already living in the development area. But, according to Mr. Pecos, the main problem for Cochiti Pueblo lies in the tribe's ability to "pierce the corporate veil" of Hunt Brothers, Inc.

The only lease situation then which has proved to be beneficial to the tribal landlord has been the Agua Calientes' lease of Palm Springs in California. According to the BIA, "The Tribal Council and the individual [Agua Caliente] landowners have become very knowledgeable and sophisticated in terms of land use and development." (56) There are obvious reasons why the Seneca Nation can not hope to achieve the same economic benefits from leasing the City of Salamanca as the Agua Caliente do the city of Palm

56. Ibid

Springs. But there are lessons to be learned from each of the three similar tribal lease arangements. At Palm Springs, for example, the tribe and the city faced a situation similar to that being faced by the Seneca Nation and Salamanca today. When the leases approached 20 years' termination, economic activity on the affected lands slowed. Not until the terms were lengthened did economic activity begin to flourish again. During the interim period, the tribal council and individual tribal members become "knowledgeable and sophisticated in terms of land use and development". As a result, the tribe derives not only flat rental income from the leases, but also percentages of commercial income originating from hotels, office buildings and retailers on the leased land. Both the rental and percentage income are based on fair market value.

The White Mountain Apache lease points to the problems which may result from lack of renewal or adjustment clauses in the lease agreement. The Act of Congress which authorized the Salamanca leases contained neither an adjustment clause nor provision for settlement of improvements at the lease's termination. Lack of both of these is now presenting serious problems for the Seneca Nation and the city.

Finally, the Cochiti Pueblo's lease with the two subsidiaries of the Hunt Brothers will, if nothing else,

provide a warning to other tribes considering lease arrangements with real estate development corporations. This lease arrangement has also provided a lesson to members of Cochiti Pueblo in that they should have paid far more attention to the actual negotiations as they occurred. Mr. Pecos and his fellow members on the Cochiti Lease Committee unravelled information about the lease which, had it been made known to tribal members and Bureau officials before the lease was drawn, might have saved the Pueblo the legal expenses which they are now incurring in two separate courts. Fifteen years into the Cochiti lease, the lease committee discovered that their tribal lawyer was also representing the developers. Charges of conflict-of-interest can not help the Pueblo now that the developers have filed bankruptcy. Other facts which were uncovered only increase the Tribe's resolve to make certain that any future long-term plans will be more thoroughly researched and publicized to tribal members.

However carelessly the Pueblo may have handled the negotiations fifteen years ago, there are interesting points about the lease which may be adopted by the Seneca Nation for the Salamanca leases' renewal. The most important of these is the inclusion of adjustment clauses. The first adjustment was deferred and was not to occur for fifteen years. By this time, it will be remembered, there were to have been at least 30,000 people living in Cochiti

Lake and land values were certainly expected to increase, thereby providing the tribe with an increase in rental income. Thereafter, adjustments were to be made every five years for the lease's duration. The five-year adjustments would be made to protect both the tribe and lessees. Should land values begin to decline, an appropriate adjustment would therefore be made so that neither the tribe nor the lessees would bear the full costs of an economic boom or decline. Finally, at the lease's termination, it was agreed that "possession of the premises would revert to the tribe". If the tribe wanted, come 2068, to obtain full control of the development, it would have been in a position to do so--at least legally. Cochiti Pueblo would have been able to sell homes or businensses and lease the property on an individual basis; it may have been able to hire a city manager to collect the rents, arrange necessary repairs to infrastructure, perhaps assume tax collection and other services and responsibilites of a municipality.

Many members of the Seneca Nation, not knowing what the Nation plans to do or has actually done about the Salamanca leases, have made various suggestions about what <u>should</u> be done. Some say that the Nation should simply renege on its end of the agreement (as the lessees did on theirs by refusing to pay rents) and take possession of Salamanca in 1991. But as has already been discussed, the

lessees are entitled to renewal in 1991 and there is no provision in the original authorization for settlement of improvements. So, the Nation must negotiate a renewal. But the renewal does not have to be for another 99 years and it is possible to arrange a lease that can be beneficial to both the tribe and the city.

Members of the Seneca Nation are also voicing mistrust about current proceedings. Few know, or so they claim, what becomes of the money once it reaches the Seneca Nation. Furthermore, mistrust is prompted by the refusal by members of the Nation's government and lease committee to discuss the lease or allow tribal members to meetings of the lease committee. Although the Seneca Nation is accountable for the lease income, there is apparently insufficient communication between leaders and members of the Seneca Nation as to the destination of the income. The Super-Fund would, if it depended upon federal funding, require the Seneca Nation to make the financial records available to members of the Nation. Visibility would be further ensured by requiring the Nation to publish in the local newspaper an accounting of how the money was spent during each previous year. It should be pointed out, however, that residents of Salamanca are equally unaware of the city's plans for renewal of the lease. For whatever reason, both parties have determined that secrecy is the best policy and so the cycle of mistrust is perpetuated.

In order to prevent a repeat of the Cochiti Pueblo lease fiasco from taking place at Salamanca, it is definitely in the interests of tribal members and city leaseholders to become as familiar as possible with any proposed lease arrangements. Both the Seneca Nation and the city are sufferring economically and it is in both their interests to instill economic growth in the region. The railroads are not going to return, everyone is aware of that, so some other economic generator needs to be attracted.

Lack of communication between affected parties has had serious consequences at Cochiti and, to a great extent, at Fort Apache. Ideally, members of the Nation and residents of Salamanca will hold public meetings to voice their opinions and receive information from the decision makers of the Nation and the city. By sharing such information, it is certainly more likely that both parties will benefit from the lease by including built-in incentives for both sides to attract and maintain the economic mainstay that left with the railroad.

RECOMMENDATIONS FOR RENEWAL OF THE SALAMANCA LEASES

The Salamanca leases renewed in 1991, the "Master Lease", should include two items which were not included either in the original leases or in the Congressional authorization. These items are:

1) Adjustment (escalation) clauses to periodically adjust the rent payments <u>throughout</u> the term of the leases; and

2) Built-in incentives for <u>both</u> parties to the lease to attract and maintain long-term capital investment, including job creation.

In addition to these essential items, the lease agreement should include an optional renewal clause which will provide for any renewal to occur <u>at least</u> twenty years before the lease's termination. This renewal should be at the option of the Seneca Nation; it should not be an entitlement of the leaseholders as was the case 92 years ago and is the case today. As such, the Seneca Nation should, twenty years before the lease's termination, agree to <u>discuss</u> renewal with the leaseholders, but they should not be bound to arbitrate or to renew the leases.

As has already been demonstrated with the Salamanca leases' renewal (as well as with the Apache and Palm Springs leases), once the termination of the leases approaches twenty years, the lessees' equity in the leasehold is severely reduced. No matter what

term is agreed to, this is an inevitable consequence of the uncertainty which prevails when the term's end is within twenty years. The situation which is created during the twenty years before the leases' renewal becomes a problem for both the lessor and the leaseholder. Scheduling the Senecas' option of renewal well in advance of the term's expiration will require that the Seneca Nation makes the decision to renew or not with sufficient time allowed to the leaseholders to make necessary preparations for the lease's renewal or termination.

The Seneca Nation is acquiescing to the leaseholders' pressure by renewing (and entering new) leases on a piecemeal basis. This arrangement may help the immediate goals of the individual lessees to secure mortgages, but it creates management problems for the Nation. The new leases will have to correspond with those renewed in 1991 so that the adjustments, payment schedules, and terms may be managed as one Master Lease. According to the Seneca Nation's former president Robert Hoag, all the new fifty-year leases will "tie-in" to the Master Lease and adjustments will be made to each so that all adjustments will be uniform. The Salamanca city assessor estimates that there are currently over two hundred fifty-year leases which were made in advance

of the Master Lease. With 3,700 leases in the city of Salamanca, and less than seven years remaining in the original leases' term, it is very likely that the Seneca Nation will enter or renew more leases for more acreage than will be included under the Master Lease. This will undoubtedly create problems for both the Seneca Nation and the leaseholders since it is unlikely that as much care is taken to renew the separate leases as will be necessary to renew the Salamanca Master Lease.

The Seneca Nation recently published a booklet entitled "Salamanca Lease Briefing Booklet" (March 1,1984). Although there is no discussion about the Nation's plans for renewal, the booklet does contain a glossary which defines "Assessed Valuation" and "New York State Board of Equalization and Assessment". The latter is defined as "The public body commissioned by New York State to provide advise (sic) and assistance to local public bodies in determining fair market values for land and improvements". The glossary provides, in addition to the Seneca Nation's definition of certain terms, an inkling of proposed plans for settlement of the Master Lease. Everytime adjustments have been mentioned by the Nation's or the city's representatives, "assessment" has been an essential point in those

discussions.

Presumably, assessment -- "assessed valuation" -- has been considered because the city of Salamanca relies on that method of valuation to levy property taxes. But the Seneca Nation does not have to rely on that method to determine the value of such an important resource. Certainly the Indian concept of land ownership has an extremely important influence on Indian people's value of land. Many Indian people have argued that Indian people can't assign a monetary value to land; that such a practice would desecrate the Indian's relationship to land. Indian people are always going to be very reluctant to allow non-Indians to assign a value to Indian land. However, despite such cultural differences, the fact remains that by leasing land and by placing a monetary value on that land for compensation, no matter how traditional a tribe may otherwise be, such an arrangement is decidedly non -Indian. The lessor-tribe will have to negotiate --although not necessarily agree to -- a monetary value according to the established custom.

Although assessment may have to be used to assign a monetary value for the initial period of the leases' term, such a value as may be assigned will not be inflexible; there will be room for negotiation.

Furthermore, reassessment does not have to be used for subsequent adjustments. Adjustments should be used to determine the base rents or "minimums" of all the leases encompassed by the Master Lease. Residential leases will be based solely on "minimums" but commercial leases should be based on a combination of minimums plus a percentage which reflects the community's business climate. The problem would therefore lie in the parties being able to agree on an index to be used to determine the adjustments.

In his article, "The Case for Index Leases", (57) Shenkel emphasizes that the purpose of index leases is "to adjust rent so that the tenant and owner neither gain nor lose from price inflation." He further emphasizes that there are two underlying assumptions made in using index leases: 1) inflation is not temporary; and 2) inflation can not be controlled. Comparisons are made between three indices, the Consumer Price Index, the Wholesale Price Index, and the Implicit Price Deflator. In making a case for rent adjustments, the author points out that the rent index, which is a component part of the Consumer Price Index, increased by only 29.36 percent between 1967 and 1974 while the Consumer Price Index

57. William Shenkel, "The Case for Index Leases", Journal of Property Management (July 1975), p.156

itself increased by 49.7 percent during that same period. The reason for the lag in rent increase is believed to be a result of the infrequency of adjustments. Although the prices of most goods and services may change from month to month, rents are normally increased annually at most; long-term leases are adjusted less frequently. Adjustments should therefore be made at least every five years, although the initial adjustment should be deferred for ten years in order to allow a settling-in period for the new and renewed leases.

The Consumer Price Index has been used most widely in index leases. However, this index has been criticized for its dependence on a market basket of goods and services which the U.S. Department of Labor determines that a "typical" urban family purchases each month. Although the Consumer Price Index is weighted to a certain degree, it is not weighted for such effects as investment or government which have a considerable influence on the changing value of money. The criticism of this index is made because it is believed to be too specific, therefore suggesting an imprecise change in value. Given the enormous importance of the land to both Salamanca residents and the Seneca Nation, a more comprehensive index would be required.

The Wholesale Price Index is based on over 2,000 commodities purchased in the primary market each month, but measures only the prices of goods, not services. Like the Consumer Price Index, it is not weighted for the effects of investment or government. It should also be pointed out that this index is far more sensitive than the Consumer Price Index and the series may not have any bearing on the value of the particular good-and-service being measured -- in this case, the rental of land.

Due to the specific nature of the Consumer Price Index and the Wholesale Price Index, the Implicit Price Deflator is suggested by Shenkel as an index to determine rent adjustments for long-term leases. The Implicit Price Deflator is based on the GNP and represents the value of <u>all</u> goods and services produced in the United States. Like the Consumer Price Index and the Wholesale Price Index, the Implicit Price Deflator converts prices from current dollars to constant dollars, but it reflects the changing value of all goods and services, weighted by investment, consumption, government, and net foreign investment. The Implicit Price Deflator is not as widely used as the Consumer Price Index, but would be more suitable to determine rental values because it is more reflective of the change in the

dollar's purchasing power.

The Seneca Nation certainly has the right to increase its compensation for use of its land. Lessees have taken advantage of the Nation not only by using the land without adjustments for a century, but also by refusing to pay rents until the United States interceded on the Nation's behalf. However, not long after the Court decided the landmark case for the Seneca Nation in 1942, the U.S. Army Corps of Engineers decided, despite expert advice to the contrary, that 10,000 acres of Seneca land should be taken for the Kinzua Dam. The Army Corps' decision was supported by President Kennedy and 10,000 acres of arable Allegany land were taken from the Seneca Nation, breaking the 168-year old Pickering Treaty which was, at that time, the oldest unbroken Indian treaty. (58) This fact, when coupled with the fact that the Seneca Nation's population has increased steadily for the past twenty years, supports the Nation's case for a considerable increase in the value of its land.

When it comes time to assess a monetary value to that land, the Nation must make certain that its case for increased value is clearly conveyed and

58. See Alvin Josephy's Cornplanter Can You Swim? in "Now That The Buffalo's Gone", Alfred Knopf, New York (1982), p.127

understood. The New York State Board of Equalization and Assessment, although it may have considerable experience in assessing land which is fee-owned, does not have much experience, if any, in assessing commonly-owned tribal land. The initial value which will be assigned to the Seneca Nation's land is certainly going to be the most difficult point to negotiate. Once this value is agreed to, adjustments should occur regularly throughout the term of the lease.

Commercial leases, as previously suggested, should be based on <u>both</u> minimum and percentage rents. When combinations of both minimum and percentage rents are used, the lessee pays a minimum rent plus a percentage of gross income which exceeds a certain value--usually the "break-even point". For example, if a lessee's expenses, including the minimum rent, were met when the lessee grossed $100,000 (the break-even point), the percentage would therefore be assigned to any gross income exceeding $100,000. Percentages paid by lessees usually range from four to eight percent. The amount paid <u>in addition</u> to minimum rent is called "overage". Overage is earned by the lessor only when the gross income exceeds a certain level, generally the break-even point of the lessee. Whatever base rate is initially determined,

the rate does not have to be recalculated from year to year, but should be used until a new adjustment is made at which time the lessee may have the opportunity to make a case for a different rate to be used. The purpose of including percentages as a source of rent is twofold. First, percentage rent encourages the lessor to support or enhance the lessee's business. Second, the lessor shares in the success of that business. The lessor and the leaseholder both have a stake in the business and therefore both will work to ensure its success.

Despite the fact that percentage rent is the prevailing method of attaching overage to minimum rent, the drawback is that the system creates an enormous amount of administrative work. In addition, tenants frequently decry the invasion of privacy which the percentage rent system requires. Landlords must have access to the tenants' books, or financial records, in order to assess any overage. To effectuate the percentage rent system, the Seneca Nation would likely need to hire someone specifically for this purpose. However, given that percentages would provide incentives for the Nation and the city to work together to attract commercial leaseholders to Salamanca, the Nation may be willing to take the necessary additional measures to include percentages

as a source of rental income. The new business would therefore be an increased source of additional rent for the Nation, and a source of revenue for the city.

Another possible source of rent which has been suggested is a payroll-based rent. Under such a plan, the formula used would be in addition to minimum base rent, but in lieu of percentage rent. Such a formula would therefore charge a different level of rent for businesses depending upon the number of people employed by a business holding a commercial lease. A payroll formula would have the desired effect of building into the lease an incentive for both the city and the Nation to attract and maintain business to Salamanca. However, there is the distinct possibility that it may have the undesired effect of encouraging businesses to hire as few people as possible in order to avoid additional rental payments.

To counteract the possible reverse effects of payroll-based overage, and to remove cause for alarm to potential leaseholders who may object to the percentage rent system, the city and the Nation may want to investigate the possibility of adjusting overage based on the community's economic activity as a whole. For example, the city and the Nation could develop a formula whereby the overage charged each year would be based on the city's and the Nation's

annual employment rate, the number of Salamanca and Allegany Senecas actually employed by commercial leaseholders in Salamanca. Another possibility would be to adjust overage to reflect the city's gross commercial income; rental rates would rise or decline based on the entire city's business climate. By so doing, the Nation would still have to manage a substantial amount of administrative work, but an arrangement might be made with the city whereby the city would determine and collect overage each year. Individual leaseholders would not feel threatened by higher lease payments when they hired more employees; because the adjustments would be based on the entire city's businesses, increases or decreases would be spread and divided equally among them. The important point here is that the principal of overage is used to reflect the community's business climate.

To ensure that both the city and the Nation have an incentive to attract and maintain long-term investment, which would provide additional revenue and job creation, the lease agreement should also address itself to "target group employment goals". Few could argue that the businesses which have located in Salamanca have ever made an effort to employ members of the Seneca Nation. The unemployment statistics demonstrate this point. There has therefore never

existed any incentive for the Seneca Nation to attract industry. The rental fees have been non-escalating for over 100 years and the industries have rarely employed Seneca tribal members.

The lease agreement should, particularly if the city wants the Seneca Nation to have an interest in attracting industry, carefully and realistically determine the kinds of jobs which may be filled by members of the Seneca Nation and the percentage of the total jobs created by the industry to be filled by Seneca Nation members. Furthermore, both the Seneca Nation and Salamanca have a right to expect any industry to provide a certain amount of job training. The Salamanca Community Profile, prepared in 1980, lists the "Major Industrial Employers" in Salamanca ("Major" is defined as having 25 or more employees). There are thirteen firms listed, with the number of employees ranging from 30 to 140 (median=68). Two firms are lumber wholesalers, two firms manufacture store fixtures, two firms provide freight train service, and three firms manufacture furniture. The light industry located in Salamanca can not be defined as "high tech", and it has had little need to train employees. However, the fact there are few people in the area who are skilled in high-tech industries is insufficent reason not to attract members of this

growing industry.

Recently, Digital Electronics Corporation located a new plant in a neighborhood in Boston which, coincidentally, had the same 1980 unemployment rate as the Seneca Nation. It was precisely this reason--that there was a high number of potential employees who were readily available for training and employment--which prompted this Corporation's decision to locate to an area which has traditionally been overlooked by major industries. Digital Electronics further made a commitment to provide job training to local residents. As a result of this commitment, Digital has entered an agreement with the Boston Indian Council to train members of the Boston Indian community and to employ them upon completion of their job training. The arrangement has proved to be successful both for the business and for local residents. The possibility for this plan's replication in Salamanca does exist.

Many people who have worked in areas of job creation consider the City of Boston's goals for target group emlployment as state of the art. Such goals are relatively new and have only been addressed during the past few years. Boston's were developed as a result of the increasing development of the city which had the simultaneous effect of neglecting or

displacing residents of Boston's poorer neighborhoods. The City of Boston therefore drafted a plan which it uses with any new industry which locates in Boston. There are two sets or definitions of employment goals used by the City of Boston. One is for construction jobs and the other is for permanent jobs. For construction jobs, the formula used is 50% minorities, 50% Boston residents and 10% women. The construction goals are expressed as percentages of total hours of employment and training which the construction company "spends" or uses. For permanent jobs, Boston uses a similar formula (50% Boston residents, 50% women, 30% minorities) to establish the minimum percentage of a given target group to be employed, but the goals for permanent jobs are expressed as percentages of the total number of employees hired by the industry.

Salamanca and the Seneca Nation could therefore develop similar goals based on the population of the Allegany Reservation and the City of Salamanca. According to the 1980 Census and the City Profile, the city's population in 1980 was 6890. The Seneca Nation's Allegany Reservation population was 1165. Target group employment goals could be made to reflect the population's composition of 14% Seneca Nation members and 86% Salamanca residents. Because these percentages will change, it will be impossible

to set specific target group employment goals for the term of the lease; the goals would need to be adjusted regularly which could be accomplished when the rental adjustments are made. The numbers do not have to be absolute; the industries will expect to have some flexibility in whatever target employment goals are made. But the Seneca Nation deserves to expect that its members should benefit from the creation of jobs on its leased lands.

The city and the Nation should negotiate and agree to the specific target group employment goals for both construction and permanent jobs. The Nation's members should not be bypassed by any industry which locates in Salamanca. By attracting and keeping industry in Salamanca, both the city and Nation will benefit not only from the revenue which that industry brings, but by the creation of jobs. By designing and implementing effective goals, the plan may have the ultimate effect of creating demand. New industry will be attracted to Salamanca by the precedents established by industrial predecessors.

In addition to the arrangements discussed above, the lease agreement will also need to include a provision for the disposition of "improvements" upon the leases' termination. For commercial leaseholders, such disposition may not present a problem. For

whatever term is agreed to, the depreciation in income-producing properties will already have been exhausted and the lessee may therefore not have any objection to turning the property over to the Seneca Nation. For residential leaseholds however, the disposition of improvements will create a problem. Residential properties are exchanged more frequently than income-producing properties and the problem will arise from home-buyers being bound to mortgages when the lease is terminated. If the lease is arranged to be renewed prior to its termination, there will not be a problem. However, if the Seneca Nation decides, come 2067, that its land is needed by its members and that it is therefore going to get out of the landlord business when the leases expire in 2090, then there will be a problem with disposition of residential properties.

After investing their life savings in a home, few homeowners will be willing to simply turn their property over to the Seneca Nation. Unless proper arrangements are made, residential leaseholders will expect financial compensation for the loss of their property. The Seneca Nation and the city will therefore have to arrange for some form of lease guarantee insurance, or make it widely known well in advance of the end of the leasess' term that the

improvements may have to be removed or else be lost to their owners. By neglecting to provide for the disposition of improvements, the Seneca Nation may find that it will have to renew the leases in perpetuity. Planning for 50 to 99 years in advance has never been nor ever will be easily accomplished. The Seneca Nation must attempt to keep as many options open as possible. Although it may seem unlikely now, the Seneca Nation may want to terminate its leases in 2065 or 2090. The option to exercise such an option should be affirmed now.

Another issue which may need to be addressed in the leases' renewal is the definition of "forfeited". How the Nation defines a forfeited lease may differ from the city's definition (they differred in 1939). The specific definition needs to be agreed to before the problem arrives in court.

Once all the main points have been negotiated and agreed to, the Nation and the city will want to finalize the arrangement as quickly as possible. However, as the city and Nation have undoubtedly discovered, renewing a long-term lease of state-held commonly-owned land of a federally-recognized tribe is not a simple matter to resolve. Because the community of Salamanca is dependent upon the lease, and because the Seneca Nation's land is among its most important

resources--second only to its people--the leases' renewal is certainly going to be the most important decision which the leaders of Salamanca and the Seneca Nation will ever have to negotiate. How they decide to implement their agreement will have as far-reaching consequences as the agreement itself.

Suggested Methods for Implementation of the Master Lease Arrangement

The most expedient way to implement the agreement will be for the city and the Nation to simply enter into the agreement by having the proper signatories sign the official papers. No referendum is required. The nation will "agree" if a majority of the Tribal Concil assents. The city will agree if a majority of the "Salamanca Indian Lease Authority" assents.

However, as both sides have discovered, considerable "outside" advice may be necessary in order to reach an agreement. The Seneca Nation has already hired a number of consultants to assist the Nation in reaching various decisions. Similarly, the City of Salamanca has arranged for consultation in reaching their decisions. As a result of these consultations, the Seneca Nation determined that the city could afford to pay $300,000 per annum while the city countered with an offer of $75,000. Whatever process is used to implement the renewed leases, both sides will need to hire consultants in the fields of real estate and law. Since the attraction of industry is such an important element in the leases' renewal, both sides would benefit from the advice of an economic development planner as well.

As alternatives to the straight-forward signing-away method of renewal, there are other possibilities which should be investigated and considered by both parties to the lease agreement. The American Institute of Architects and the Urban Development Land Institute each provide a special service to communities which have important issues to resolve. The AIA will assemble a R.U.D.A.T., a Regional and Urban Advisory Team, composed of a group of professionals with expertise in needed areas (economic development, urban designers, real estate developers, architects, &c.) AIA will send the R.U.D.A.T. to the community for three or four days. During that time, the R.U.D.A.T. will study the community, hold meetings with interested members of the community, and prior to its departure, will submit a report with recommendations for the resolution of the community's problem or issue.

The Urban Land Institute provides a similar service, a "Panel Advisory Service", although the final published report would not be submitted until after the advisory team's departure. Both professional organizations require that :

1) There is an "appropriate" client request--in this case, the city and the Nation should both make the request;

2) That there be a problem which short-term consultation could resolve--in this case, most or all of the essential items in the leases' renewal will be negotiated prior to the arrival of the advisory team and so short-term consultation should be sufficient; and

3) That the requesting community pay for all travel and per diem expenses of the advisory team (there are no consultant fees charged for their service)-- in this case, since the city and the Nation are jointly making the request, they can share the expenses.

The benefits of having such a service are fairly obvious. For a minimal fee, the community will receive the advice of top-rank professionals in a variety of fields. Should either side attempt to obtain such consultation on its own--without the benefit of the professional organization which recommends and assembles them--the costs would be substantially higher and the chances of obtaining such

a high calibre of experts would be substantially reduced. The experts assembled agree to provide their services without a fee because of the honor thereby bestowed upon them by the professional organization which requests their representation. It is widely known by members of these professional organizations that in assembling the advisory team, the professional organization selects certain members because they are considered to be among the top professionals in their fields.

Another possible approach which may be taken to renew the leases is a competition . Competitions are gaining in popularity because, like the R.U.D.A.T. approach, they provide the community with expert advice for a minimal cost. Beyond these benefits, however, they also provide the community with visibility. In Salamanca's case, visibility could be a crucial factor in attracting new industry.

Although competitions have most widely been used to determine the design of a specific development, the renewal of the Salamanca leases would benefit from a competition by its provision of a design for the plan of development. The Seneca Nation and Salamanca would not open a competition until the major points in the leases' renewal were

negotiated and determined. These points--adjustment periods, adjustment measures, job creation, and target group employment goals--would therefore establish the requirements for entry into such a competition. Entrants would be required to demonstrate that they had already acquired, or would be able to acquire, commitment of an industry to locate in Salamanca. Further requirements and potential benefits of the competition (such as design issues) would be arranged by the consultant as the city ahd the Nation may determine.

There are two different forms of competitions. One is "open". Notices--including carefully designed posters--are sent to architectural firms and academic departments throughout the country (or beyond, at the client's choosing). The rules for entry are described on the announcement notices, also listing the deadline for entries, and the cost of entry, or a registration fee. In addition, the notice will announce the number of prizes to be awarded, and the amount of the award. The prizes awarded can usually be paid from the registration fees acquired. The recent competition for Times Tower in New York City offered a first prize of $10,000 with registration fees of $45.

Again, the financial rewards are not the

motivating factors in entrants' decisions to participate in the competition. By winning such a competition, there is sufficient reward. Competitions provide lesser known firms and other participants the opportunity to make their work well known. In order for such competitions to work, in order for them to attract the top-rate professionals they are meant to attract, the competition must have the sanction of an appropriate professional organization.

The other form of competition relies more heavily on the sanction of the professional organization. This form--"closed" for lack of a better term--is open only to a select group of entrants who are chosen by the member of the sanctioning body who arranges the competition. The consultant chosen would therefore need to be familiar with top-rate professionals and/or academics in the appropriate field. A fee is paid to each entrant firm or group which agrees to compete. The fee would not be as high as it would if the firm was individually hired to provide its service, but the fee would have to be sufficiently high to make the firm's competition worth its while.

The consultant hired to arrange and implement the competition would be able to assess an appropriate fee, but the fees to each entrant would be uniform,

generally between $2000 and $5000. The recent development of Copley Place in Boston was designed by the winner of such a competition. This competition, considered by professionals in the fields of architecture, planning, real estate development, and government, as "world-class" cost a total of $100,000. It is not unreasonable to estimate that the Seneca Nation and Salamanca could provide a similar competition at a total cost of $30,000 to $40,000.

Whichever competition is chosen, a member of a sanctioning professional organization would have to be hired to arrange and implement the competition. That person will also be responsible for selecting the jury panel which will ultimately choose the winners of the competition. The Seneca Nation and the City of Salamanca would both have the opportunity to assign representative members to the jury panel, but outside expert advice would also be represented. Since the consultant chosen will be responsible for most of the competition's design and implementation, the most important decision for the Seneca Nation and Salamanca as far as the competition is concerned, will be their choice of the consultant.

Despite what many residents of Salamanca and members of the Seneca Nation may think, the isssues which are created by the Salamanca leases' renewal are

challenging and fascinating. They are not only complex and unique. The visibility afforded by a competition would surely provide Salamanca's lessors and leaseholders with a surprising array of professionals who would be challenged by the issues and would be determined to provide their expertise to help the leaders of Salamanca and the Seneca Nation resolve them.

The community of Salamanca depends entirely upon the leases and their renewal. The Seneca Nation of Indians has always depended upon its land as an essential resource and will look to the leases' renewal as an exercise of its sovereign tribal rights. Salamanca can not afford <u>not</u> to seek visibility.

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