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NOTES

LOTTERY LOGISTICS: THE POTENTIAL IMPACT OF A STATE LOTTERY ON INDIAN GAMING IN OKLAHOMA

Steve J. Coleman*

I. Introduction

Brad Henry was sworn in as Oklahoma's twenty-sixth Governor on January 13, 2003.¹ His journey to the State Capitol was an unlikely one. After securing the Democratic nomination with an upset victory in the primary, the Shawnee Senator utilized his plan for an education lottery to supplement his early momentum and overcome Republican candidate Steve Largent to win Oklahoma's gubernatorial election.²

Henry believes that a state-operated education lottery will generate funds of approximately \$300 million to \$500 million for the state.³ This money would be used to improve public schools, raise teacher salaries, and provide tuition-free scholarships for college students.⁴ Oklahoma is currently facing a \$677 million revenue shortfall⁵ and education, perhaps more than any other area, is feeling the effect as an increasing amount of Oklahoma teachers are being laid off, class sizes are growing, school supplies are dwindling, school days are being shortened, and extracurricular activities are being slashed. Given the situation, it is no surprise that Henry's plan for an education lottery has received strong support from Oklahomans.⁶ A state lottery potentially benefits many groups of Oklahomans: teachers, students, parents, coaches, school administrators, staff members, and Indians. That's right, Brad Henry's plan for an education lottery has the potential to substantially benefit

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1. Carmel Perez Snyder, *Henry Sworn in as Governor; Optimism Cornerstone of Message*, DAILY OKLAHOMAN, Jan. 14, 2003, at 1A.

2. John Greiner, *Candidates Take Chance on Lottery*, DAILY OKLAHOMAN, Sept. 22, 2002, at 1A.

3. *Id.*

4. *Id.*

5. Paul Connors, *Arizona, Tribes Enter Pact*, TULSA WORLD, Dec. 5, 2002, at A5.

6. Greiner, *supra* note 2, at 1A. Polls show that 73% of Oklahomans say they want a lottery if it favors education.

Oklahoma Indian tribes by providing an avenue to operate casino-style games on Indian land in Oklahoma. This aspect of the lottery fuels much of the debate as to whether the State of Oklahoma should embrace this form of gaming.

The Indian Gaming Regulatory Act (IGRA), which provides a statutory basis for tribes to operate gaming facilities divides gaming into three categories.⁷ Class III gaming includes typical, Vegas-style, casino games such as blackjack, poker, roulette, and slot machines.⁸ Parimutuel horse racing and lotteries represent other forms of Class III gaming.⁹ In 1983, the State of Oklahoma amended its gambling laws to legalize parimutuel wagering on horse racing (parimutuel horse racing).¹⁰ The Horse Racing Act defines parimutuel wagering as wagering on the outcome of horse races in which those who wager purchase tickets on a horse or horses and all the wagers for each race are pooled and held for distribution to the winners.¹¹ IGRA classifies parimutuel horse racing as a Class III game.¹² Accordingly, Class III gaming, in the form of parimutuel horse racing has existed in Oklahoma for twenty years. Since the establishment of IGRA, many Oklahoma Indian tribes have capitalized on Oklahoma's regulatory approach to parimutuel horse racing by establishing off track betting venues in their casinos. However, no Oklahoma tribe has successfully endeavored to supplement its gaming operations with other forms of Class III games by contending that Oklahoma's regulatory approach toward parimutuel racing creates a duty in the State, pursuant to IGRA, to negotiate for the operation of other Class III, casino-style games on Oklahoma Indian lands. The introduction of another Class III game, a state lottery, is likely to revitalize claims by Oklahoma Indian tribes that the State has a duty to negotiate for the operation of additional Class III games.

Title 21, section 1051 of the Oklahoma Statutes defines a lottery as any scheme for the disposal or distribution of property by chance among persons who have paid or agreed to pay valuable consideration for the chance to obtain property.¹³ The essential elements of lottery pursuant to this definition are: 1) the potential acquisition of property; 2) based on a chance for which; 3) valuable consideration is given. The propensity of a state lottery to trigger

7. 25 U.S.C. §§ 2701(5), 2703 (2000).

8. *Id.* § 2703(8).

9. *Id.*; see also *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1029 (2d Cir. 1990).

10. Oklahoma Horse Racing Act, 3A OKLA. STAT. § 200 (2001).

11. *Id.* § 200.1.

12. 25 U.S.C. § 2703(8) (2000); see also *Mashantucket Pequot Tribe*, 913 F.2d at 1029.

13. 21 OKLA. STAT. § 1051 (2001).

discussion concerning a state's permissible Class III gaming activities is well documented. Oklahoma's definition of a lottery is similar to corresponding definitions in Texas and New Mexico. In both of these states it has been argued that gaming activities such as baccarat, blackjack, craps, roulette, and slot machines are encompassed within the states' broad, permissive definitions of lottery. The foundation of this argument is that these games, like a lottery, are games that involve the essential elements of prize, chance, and consideration and that because the state permits one form of game where these elements are present, the state no longer evidences a prohibitory policy toward other games involving the same elements.¹⁴ Definitions and characteristics however, are not the only aspects of state lotteries that generate discussion regarding a state's policy toward Class III gaming. Legalization of a combination of Class III games, specifically of parimutuel horse racing and a state lottery has been determined in other jurisdictions to evidence a state policy toward Class III gaming that is regulatory rather than prohibitory, thus requiring states to negotiate for the operation of other Class III games within Indian country.¹⁵

A lottery is a unique form of Class III gaming and statutory definitions of lotteries are subject to broad interpretation. In addition, authorization of multiple Class III gaming activities may potentially alter a court's perception of state policy toward Class III gaming. IGRA's scope of gaming provision provides that: "Class III gaming activities shall be lawful on Indian lands only if such activities are located in a State that permits *such gaming* for any purpose by any person"¹⁶ The combination of this language from IGRA and a decision by the State of Oklahoma to implement a lottery will stimulate debate as to whether Oklahoma is a state that permits Class III gaming and may well pave the way for Indian tribes in Oklahoma to force the State to negotiate compacts authorizing the tribes to operate full-scale, casino-type gambling on Indian land in Oklahoma.

Does a state lottery open the door to Class III gaming on Indian land in Oklahoma? The State's most informed individuals disagree. R. Perry Beaver, principal chief of the Muscogee (Creek) Nation, a tribe that contributed to Brad Henry's campaign, believes that a state lottery may allow his tribe to

14. See *Clark v. Johnson*, 904 P.2d 11 (N.M. 1995); *Ysleta Del Sur Pueblo v. Texas*, 852 F. Supp. 587 (W.D. Tex. 1993).

15. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991).

16. 25 U.S.C. § 2710(d)(1)(B) (2000) (emphasis added).

venture in to other Class III arenas.¹⁷ Brad Henry disagrees, "I've done the research on the lottery and based on my research, I'm extremely confident that a state-sponsored lottery will not open up full-scale Class III gaming in Oklahoma to the Indian tribes."¹⁸ Neal Leader, Assistant Attorney General thinks that the rights of Oklahoma tribes may be slightly increased. He believes that IGRA is "game- specific" meaning that if a state implements a lottery, then lotteries, and not other Class III games, become a proper subject of state-tribal compacts.¹⁹

Who is right? The answer to this complex dilemma rests with the interpretation of the IGRA scope of gaming provision: "Class III gaming activities shall be lawful on Indian lands only if such activities are located in a State that permits such gaming for any purpose by any person . . ."²⁰ More specifically the result hinges on the interpretation of the words "such gaming." What does "such gaming" mean? How broadly should a court construe these two words?

This note analyzes the substantial impact of the words "such gaming" on the scope of permissible gaming within Indian Country. Part II begins with a breakdown of *California v. Cabazon Band of Mission Indians*,²¹ the foundation of Federal Indian gaming law. Part III follows with an outline of the Indian Gaming Regulatory Act. The combination of *Cabazon* and IGRA set the stage for courts in each circuit to evaluate IGRA's scope of gaming provision as it relates to the range of permissible gaming within Indian Country. Part IV encompasses an examination of the principal cases within each circuit that have thoroughly scrutinized IGRA's scope of gaming provision. Part V involves a review of noted Federal Indian law expert Judge William C. Canby's interpretations of several key scope of gaming issues. The note concludes with a discussion of the potential impact a state-sanctioned lottery may have on the State of Oklahoma and the Indian tribes within its borders.

II. *California v. Cabazon Band of Mission Indians*

Modern Indian gaming originated in the 1970s with Indian tribes in Florida and California. Tribes in these states operated bingo halls and other

17. Randy Ellis, *Governor-Elect Says 'No' to Vegas-Style Gambling*, DAILY OKLAHOMAN, Nov. 24, 2002, at 1A.

18. *Id.*

19. *Id.*

20. 25 U.S.C. § 2710(d)(1)(B) (2000).

21. 480 U.S. 202 (1987).

commercial gaming activities that were not in accordance with state laws and regulations.²² Both Florida and California believed that state gaming regulations applied equally to Indian tribes. California's efforts to prohibit tribal games, or at least impose state gaming laws on Indian tribes within Indian Country, prompted the case of *California v. Cabazon Band of Mission Indians*.²³

California was, and still is, a Public Law 280 state, meaning that its criminal laws apply to Indians in Indian country but that its regulatory and legislative authority do not. The central issue before the Supreme Court was whether California's law prohibiting gaming activities, unless operated by charitable organizations, was criminal-prohibitory or civil-regulatory.²⁴ If California intended to prohibit certain conduct, then Public Law 280 controlled the conduct and the Indians were precluded from operating the challenged gaming activities. However, if the state permitted the challenged conduct, but subject to state regulation, then the law was civil regulatory and California law was not applicable in Indian country.²⁵ The Court concluded that California regulated rather than prohibited gambling activities and as a result Indian tribal gaming activity was subject to tribal and not state jurisdiction.²⁶ This decision reflected the principle that tribes are sovereign entities and that federal law limits the applicability of state and local law to tribal Indians within Indian Country.²⁷

The Court reasoned that because California authorized parimutuel horse racing, permitted many organizations to conduct bingo and card games, and even encouraged its citizens to participate in casino-style gambling via a state lottery, the state's public policy did not prohibit gambling.²⁸ Additionally, the Court rationalized its decision by citing the government's strong interest in encouraging tribal economic development²⁹ and explaining that gaming offered a substantial source of revenue for the tribes.

Cabazon's impact on Indian Gaming was substantial. This case provided a broad, categorical basis for distinguishing between criminal-prohibitory and civil-regulatory state laws as they relate to Indian gaming. The *Cabazon*

22. Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 427 (2001).

23. 480 U.S. 202 (1987).

24. *Id.* at 205-07.

25. *Id.* at 209.

26. *Id.* at 210-11.

27. *Id.* at 207.

28. *Id.* at 210-11.

29. *Id.* at 216, 218-19.

decision established that in a state where gaming is not criminally prohibited, tribes are not subject to state regulation and interference concerning the challenged gaming.³⁰ States that do not prohibit all forms of Class III gaming are powerless to curtail gaming in Indian country, but Congress is not.

The United States serves a guardian role in relation to the Indian tribes.³¹ This role creates in Congress a duty to act in the tribes' best interest and also vests in the government a plenary power over the Indian tribes.³² Congress utilized this power to create the Indian Gaming Regulation Act (IGRA) of 1988, which served as "a legislative limitation to the [inherent] tribal power recognized in . . . *Cabazon*."³³ IGRA was Congress's attempt to strike a balance between the rights of tribes as sovereigns and the interests of many states in regulating and limiting sophisticated forms of gambling within their boundaries.³⁴

III. Indian Gaming Regulatory Act — IGRA

Congress identified three reasons for the implementation of IGRA. The first and primary goal is to provide a statutory basis for Indian tribes to conduct gaming activities as a means of encouraging tribal economic development, self-sufficiency, and strong tribal governments.³⁵ The second goal is ensuring that tribes receive the benefits from their gaming activities and thus provides methods for regulating tribal gaming activities that are geared toward protecting these activities from organized crime.³⁶ The third goal is creation of a federal body to oversee and protect Indian gaming. Congress did this in the form of the National Indian Gaming Commission.³⁷

Congress divided gaming into three categories: Class I, Class II, and Class III. Class I games are defined as traditional games commonly associated with tribal ceremonies and played for prizes of minimum value.³⁸ Class I games are solely under the control of the Indian tribes.³⁹

30. Washburn, *supra* note 22, at 428.

31. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

32. *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977).

33. Washburn, *supra* note 22, at 428.

34. S. REP. NO. 100-446, at 5-6, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075-76.

35. 25 U.S.C. § 2702(1) (2000).

36. *Id.* § 2702(2).

37. *Id.* §§ 2704-2708.

38. *Id.* § 2703(6).

39. *Id.* § 2710(a)(1).

Class II games include bingo and alternate forms of the game as well as pull-tabs, lotto, tip jars, and punch cards with the requirement that these games be played in the same location as bingo.⁴⁰ Card games may also be included in Class II games if the state approves of the card games or if statutes are silent regarding the card games and such games are played elsewhere in the state.⁴¹ Class II gaming is within the control of the tribes but is subject to some restrictions within the Act. IGRA embraces the *Cabazon* holding in that there is the opportunity for Class II gaming subject to the requirement that the state “permits such gaming for any purpose by any person, organization or entity.”⁴² The circuits are divided as to whether *Cabazon’s* broad interpretation applies equally to Class III games. Another significant distinction between Class II and Class III gaming under IGRA is that if a tribe seeks to operate a Class II game and the state regulates Class II games, the tribe may operate the game. Whereas a tribe seeking to operate a Class III game in a state that regulates such games must also secure a gaming compact with the state.⁴³

Class III is defined as, “all forms of gaming that are not Class I gaming or Class II gaming.”⁴⁴ Class III encompasses most traditional casino games such as slot machines, craps, roulette, poker, blackjack, parimutuel horse racing, and lotteries. Most state policy issues with gaming concern Class III games. As a result, Congress established two requirements that tribes must meet in order to conduct Class III gaming within Indian Country. First, as with Class II gaming, tribes must satisfy IGRA’s scope of gaming provision and are only permitted to conduct Class III gaming in states that allow this category of gaming.⁴⁵ This requirement is the source of the “such gaming” debate discussed herein. Upon establishing that a state permits Class III gaming, a tribe must then secure a compact with the state to operate the proposed Class III activity.⁴⁶

Originally, the tribal-state compact requirement afforded tribes significant leverage. As enacted, IGRA required that in situations where tribes established that a state regulated and did not prohibit Class III gaming, states had a duty to negotiate a compact with the tribe.⁴⁷ States that ignored a tribe’s

40. *Id.* § 2703 (7)(A).

41. *Id.* § 2703(7)(ii).

42. *Id.* § 2710(b)(1)(A).

43. *Id.* § 2710(d).

44. *Id.* § 2703(8).

45. *Id.* § 2710(d)(1)(B).

46. *Id.* § 2710(d).

47. *Id.* § 2710(d)(3)(a).

request to enter into a gaming compact or failed to negotiate in good faith exposed themselves to federal court action by the tribe.⁴⁸ The tribes' superior leverage positions in Class III compact negotiations under IGRA was short lived.

The 1996 case of *Seminole Tribe of Florida v. Florida*⁴⁹ resulted in the nullification of a tribe's right to sue a state for failing to negotiate in good faith. The Court held that despite the clear intent of Congress to abrogate the states' sovereign immunity, Congress lacked the power to do so.⁵⁰ This decision did not invalidate any part of IGRA, but its affect on the tribes is considerable. Tribes maintain a right to engage in Class III gaming, but to do so they must negotiate with the state. After *Seminole*, a state has no incentive to negotiate with the tribes and thus can effectively block Class III Indian gaming within its borders.⁵¹ The holding in *Seminole* greatly undermines a fundamental principle of IGRA, but tribes may still have a remedy. IGRA suggests that the Secretary of the Interior has the authority to prescribe a gaming compact that is consistent with the proposed compact to allow tribes to conduct Class III gaming on Indian land.⁵² The post-*Seminole* problems now faced by tribes regarding the compacting process are indeed challenging, but recall that under IGRA reaching a tribal-state compact is the second hurdle a tribe must clear before operating Class III games in a state. The first hurdle, establishing that a state permits Class III gaming, has itself proven to be an extremely complex process.

Like Chief Beaver and Governor Henry, tribes and states frequently disagree over the scope of gaming allowed under IGRA. Again, the source of this common area of controversy is IGRA's scope of gaming provision that reads: "Class III gaming activities shall be lawful on Indian lands only if such activities are located in a State that permits such gaming for any purpose by any person"⁵³ Tribes argue that the holding of *Cabazon* and its criminal/prohibitory-civil/regulatory distinction is fully incorporated into IGRA, and as a result IGRA requires a state that allows any Class III gaming activities to negotiate with a tribe as to any form of gaming that fits within the Class III category. States, on the other hand, focus on the word permits and argue that IGRA restricted the *Cabazon* holding, thus limiting a state's

48. *Id.* § 2710(d)(7)(B)(i).

49. 517 U.S. 44 (1996).

50. *Id.* at 72-73.

51. Washburn, *supra* note 22, at 430.

52. 25 U.S.C. § 2710(d)(7)(B)(vii) (2000).

53. *Id.* § 2710(d)(1)(B).

negotiation duties to particular Class III games that the state allows others to operate.

The potential lottery in Oklahoma can be used as an example to clarify the traditional positions of tribes and states. If the State of Oklahoma implements a lottery, Oklahoma Indian tribes that wish to engage in gaming activities such as blackjack, poker, roulette, and slot machines will argue that the State, through its implementation of a lottery and regulation of parimutuel horse racing, has evidenced a regulatory rather than prohibitive policy towards the operation of Class III games, and because the State permits the operation of Class III games it has a duty to negotiate with a tribe concerning any gaming activity within the Class III category. This is an example of the “category perspective.” Many tribes believe that if a state allows any form of Class III gaming, the tribe may conduct “such gaming,” which refers to any gambling activity properly categorized as Class III and the state has a duty to negotiate for the proposed game.

States interpret IGRA’s scope of gaming provision much more narrowly and argue that IGRA granted states a means to control the forms of Class III gaming within their borders. This is an example of the “game-specific perspective.” If Oklahoma implements a state lottery then the “such gaming” language of IGRA should be read to mean that Oklahoma permits lotteries, a type of Class III gaming, and that as a result the State has a duty to negotiate with tribes seeking to conduct lotteries but not with tribes seeking to conduct alternate forms of Class III gaming in Oklahoma. Cases addressing this exact issue and requiring an interpretation of IGRA’s such gaming language have reached the appellate level in four circuits. The Second and Seventh Circuits embraced the category perspective and resolved the issue in favor of the Indians. The Eighth and Ninth circuits adopted the game-specific perspective to support the position of the states.

IV. Principal Scope of Gaming Decisions

A. The Second Circuit

The Second Circuit was the first court to interpret IGRA’s scope of gaming provision following the enactment of IGRA. At issue in *Mashantucket Pequot Tribe v. Connecticut*⁵⁴ was a Connecticut statute that permitted nonprofit organizations to conduct “Las Vegas Nights” during which the organizations offered games of chance such as blackjack, poker, and roulette for the purpose

54. 913 F.2d 1024 (2d Cir. 1990).

of supplementing fund-raising efforts.⁵⁵ Pursuant to IGRA, the Mashantucket Pequots (Pequots) sought an order requiring the State of Connecticut to negotiate a compact that would enable the tribe to operate the same Class III games authorized by the Connecticut statute.⁵⁶

Connecticut argued that its limited authorization of these gaming activities by nonprofit organizations did not amount to a general allowance of "such [casino-type] gaming" as required by IGRA's scope of gaming provision and also that the proposed gaming was "contrary to the State's public policy."⁵⁷ The Pequots argued that *Cabazon's* criminal/prohibitory-civil/regulatory test was incorporated into IGRA's scope of gaming provision as it relates to Class III games, and that because Connecticut allowed the category of games at issue, the games were a proper subject for tribal-state compact negotiation.⁵⁸

The Second Circuit held that the correct test for interpreting IGRA's scope of gaming provision was *Cabazon's* criminal/prohibitory-civil/regulatory test.⁵⁹ In reaching this decision, the court first looked to the legislative history of IGRA. The Senate Report committee specifically adopted the *Cabazon* test as the proper mechanism for interpreting the language of IGRA § 2710(b)(1) covering Class II games. Although Connecticut argued that the language of § 2710(d)(1), covering Class II games, and that of § 2710(d)(1), covering Class III games, indicated a congressional intent that the sections be interpreted differently, the court reasoned that the legislative history interpreting § 2710(b)(1), the Class II scope of gaming provision, was instructive as to the proper meaning of the language in § 2710(d)(1), the Class III scope of gaming provision.⁶⁰ The court stated that:

It is a settled principle of statutory construction that when the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place.⁶¹

The court also reasoned that the state's approach⁶² disregarded the heart of

55. *Id.* at 1026 n.5.

56. *Id.* at 1025.

57. *Id.* at 1029.

58. *Id.* at 1030.

59. *Id.* at 1031.

60. *Id.* at 1030.

61. *Id.* (citing *United States v. Nunez*, 573 F.2d 769, 771 (2d Cir. 1978)).

62. Regarding this approach the court said:

Under the states approach, . . . even where a state does not prohibit Class III gaming as a matter of criminal law and public policy, an Indian tribe could

the legislative compromise regarding Class III gaming — to serve the interests of both the states and the tribes⁶³ and would render the compacting process that “Congress established as the centerpiece of the IGRA’s regulation of Class III gaming . . . a dead letter.”⁶⁴

Applying the *Cabazon* test, the court concluded that Connecticut must negotiate with the Pequots regarding the tribe’s operation of casino-type games because the state authorized Class III games and thus this category of gaming did not violate Connecticut’s public policy.⁶⁵ The court’s application of the *Cabazon* test resulted in a broad interpretation of IGRA’s scope of gaming provision, the “category perspective.” This approach produces a greater likelihood that the gaming activity will become the subject of a compact because a permissive position toward any form of Class III gaming renders a state’s laws regulatory rather than prohibitory.⁶⁶ The Seventh Circuit reached a similar result the following year.

B. The Seventh Circuit

As in the Second Circuit in *Mashantucket Pequot*, the central question before the court in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin* concerned the correct interpretation of IGRA’s scope of gaming provision.⁶⁷ This case involved a dispute as to whether Wisconsin was required to include casino games, video games, and slot machines in its tribal-state compact negotiations with the Lac du Flambeau and Sakaogon tribes.⁶⁸ Wisconsin conducted a state-operated lottery and authorized parimutuel wagering.⁶⁹ The state was in the process of drafting final tribal-state compacts with the tribes when questions surfaced concerning the permissible scope of gaming under IGRA and specifically whether the tribes should be permitted to operate gambling activities such as blackjack, roulette, and slot machines

nonetheless conduct such gaming only in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming.

Id. at 1030-31.

63. *Id.* at 1030.

64. *Id.* at 1031.

65. *Id.*

66. William E. Horowitz, Note, *Scope of Gaming Under the Indian Gaming Regulatory Act of 1988 After Rumsey v. Wilson: White Buffalo or Brown Cow*, 14 CARDOZO ARTS & ENT. L.J. 153, 178 (1996).

67. 770 F. Supp 480, 484 (W.D. Wis. 1991).

68. *Id.* at 482.

69. *Id.* at 483.

in the state when these activities were "not conducted by anyone else in Wisconsin."⁷⁰

In *Lac du Flambeau*, the State contended that casino games, video games, and slot machines were not permitted for any purpose by any person and formulated this claim around the word "permits." Wisconsin argued that "permits" meant "formally or expressly granting leave." Given this definition, a Class III activity was not the proper subject of a tribal-state compact unless the State expressly authorized the playing of a particular type of game.⁷¹

In rejecting Wisconsin's position, the court first identified multiple alternate definitions of the word "permits." Second, the court asserted that Wisconsin's interpretation of IGRA's "such gaming" provision ignored the Supreme Court's decision in *Cabazon*, "the [very] case on which Congress relied in drafting the Indian Gaming Regulatory Act."⁷² The court clearly embraced *Cabazon*'s criminal/prohibitory-civil/regulatory test and offered a simple, concise test for determining a state's policy when interpreting IGRA's scope of gaming provision:

If the policy is to prohibit all forms of gambling by anyone, then the policy is characterized as criminal/prohibitory and the state's criminal laws apply to tribal gaming activities. On the other hand, if the state allows some forms of gambling, even subject to extensive regulation, its policy is deemed to be civil/ regulatory and it is barred from enforcing its gambling laws on the reservation.⁷³

The court likened the case to *Cabazon*. Just as California evidenced a regulatory policy through parimutuel racing and state lotteries, the court found that Wisconsin voters, in passing an amendment to their state constitution permitting a state lottery, had facilitated a "state policy . . . that is now regulatory rather than prohibitory in nature."⁷⁴

The State then advanced a "game-specific" interpretation of IGRA's scope of gaming provision and argued that Wisconsin law must give express authorization for a "gaming activity" before it becomes the proper subject of a compact negotiation.⁷⁵ The court noted that Wisconsin's interpretation

70. *Id.*

71. *Id.* at 484-85.

72. *Id.* at 485.

73. *Id.*

74. *Id.* at 486.

75. *Id.* at 487.

would defeat the congressional intent of providing a mechanism for tribal-state negotiations because it would allow states to unilaterally impose their gaming regulatory schemes on tribes.⁷⁶ The court held that because Wisconsin had a regulatory policy toward Class III gaming, the State was obligated to negotiate with the tribes concerning any activity that includes the elements of prize, chance, and consideration and that is not prohibited expressly by state law.⁷⁷

The Seventh Circuit clearly and convincingly rejected Wisconsin's attempt to promote a game-specific interpretation that called for a narrow reading of IGRA's scope of gaming provision. Like the Second Circuit, the Seventh Circuit supported the application of *Cabazon's* expansive criminal/prohibitory-civil/regulatory test when determining the legality of Class III gaming within a state. Because the Senate report that accompanied the passage of IGRA expressly stated that the *Cabazon* test should apply to Class II gaming and IGRA's Class II and Class III gaming provisions contained identical language, these courts reasoned that the Senate Report established the applicability of the *Cabazon* test to Class III games. This expansive interpretation was challenged by the Eighth Circuit's decision in *Cheyenne River Sioux Tribe v. South Dakota*.⁷⁸

C. The Eighth Circuit

Two years later in *Cheyenne River*, IGRA's scope of gaming provision was at the heart of the controversy.⁷⁹ The Eighth Circuit's holding was simple, straightforward, and in direct opposition to the previous interpretations of IGRA's scope of gaming provision proffered by the Second and Seventh Circuits. In *Cheyenne River*, the court held that the "such gaming" language of 25 U.S.C. § 2710(d)(1)(B), referred to herein as IGRA's scope of gaming provision, did not require a state to negotiate tribal-state compacts with respect to forms of games it did not permit.⁸⁰

Beginning in 1989, South Dakota permitted state lotteries, video lottery, limited card games, slot machines, parimutuel horse and dog racing, and simulcasting.⁸¹ This fact did not persuade the court in its adoption of a very narrow, game-specific perspective of IGRA's scope of gaming provision. One

76. *Id.*

77. *Id.* at 488.

78. 3 F.3d 273 (8th Cir. 1993).

79. *Id.*

80. *Id.* at 279.

81. *Id.* at 276.

of the video games permitted by the state was video keno. The Cheyenne River Sioux tribe contended that because the state allowed a form of keno, the tribe should be able to offer traditional keno on its lands.⁸² In denying the tribe's request, the court reasoned that traditional keno and video keno were different games, that video keno was the only form of keno permitted by South Dakota, and that it would be unfair to other tribes to allow the Cheyenne River Sioux to operate traditional keno on their lands.⁸³

D. The Ninth Circuit

The Ninth Circuit Court of Appeals commands respect regarding Federal Indian law issues and specifically Indian gaming issues. It is the source of the seminal *Cabazon* decision and is home to some of the most respected minds in Federal Indian law, notably Senior Judge William C. Canby, Jr., one of the nation's leading Indian law scholars⁸⁴ and the author of the American Indian Law Nutshell.⁸⁵

In *Rumsey Indian Rancheria v. Wilson*,⁸⁶ the Ninth Circuit supported the Eighth Circuit's decision in *Cheyenne River*. The *Rumsey* court held, by a narrow five to four margin, that California was not required to negotiate compacts allowing particular games pursuant to IGRA unless identical games were authorized by state law stating:

IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming. . . . In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.⁸⁷

The controversy in *Rumsey* was triggered when the State of California refused to negotiate with several tribes a compact that would permit the operation of certain electronic gaming devices as well as live banking and percentage card games.⁸⁸ The tribes sought an interpretation by the court that would apply *Cabazon's* broad test to IGRA's scope of gaming provision as it relates to Class III games.⁸⁹ California contended that IGRA itself did not

82. *Id.* at 278.

83. *Id.*

84. Horowitz, *supra* note 66, at 184-85.

85. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (3d ed. 1998).

86. 64 F.3d 1250 (9th Cir. 1994).

87. *Id.* at 1258.

88. *Id.* at 1255.

89. *Id.* at 1257.

require the State to negotiate and argued that a state that did not permit the gaming activities had no duty to negotiate the activities with the tribe.⁹⁰ As the State of Wisconsin had unsuccessfully attempted to do in *Lac du Flambeau*, California claimed the meaning of “permit” was unambiguous and that state law clearly prohibited and did not permit the operation of banked card games or slot machines.⁹¹

In reaching its decision, the Ninth Circuit first rejected the tribes’ proposed broad interpretation of IGRA in favor of implementing a judicial standard that utilized “its traditional tools of statutory construction.”⁹² Next the court noted that IGRA’s scope of gaming provision, § 2710(d)(1)(b), was unambiguous and cited a previous case that clearly defined the term “permit.”⁹³ Although the court stated that California had no duty to negotiate because the term “permit” was unambiguous, the court proceeded to explain its interpretation of IGRA’s legislative history. The most notable portion of the court’s review of IGRA’s legislative history focused on the report’s silence as to *Cabazon*’s applicability to Class III games. The court concluded that Congress’s failure to mention Class III gaming, combined with the established principle that identical words in the same act may be construed differently, supported its position that IGRA’s Class II and Class III scope of gaming provisions were to be read differently, applying the *Cabazon* test only to Class II gaming.⁹⁴

The Ninth Circuit’s game-specific interpretation of IGRA’s scope of gaming provision effectively rejected the theory of the Second and Seventh Circuits that IGRA, as applied to Class III gaming, retains the criminal/prohibitory-civil/regulatory distinction set forth in *Cabazon*.⁹⁵ Judge Canby dissented from the opinion in *Rumsey*. His dissent raises several pertinent issues that would undoubtedly resurface if IGRA’s scope of gaming provision is subsequently called into question in the Tenth Circuit as a result of Oklahoma’s implementation of a state lottery. Before analyzing Judge Canby’s concerns, three Tenth Circuit cases that could prove influential when addressing scope of gaming questions that may arise as a result of Oklahoma’s implementation of a state lottery are briefly reviewed.

90. *Id.* at 1256.

91. *Id.*

92. *Id.* at 1257.

93. *Id.* (citing *United States v. Luander*, 743 F.2d 686 (9th Cir. 1984)).

94. *Id.* at 1258-59.

95. *Washburn*, *supra* note 22, at 443.

E. The Tenth Circuit

The scope of gaming issue has not clearly surfaced in the Tenth Circuit Court of Appeals. One Tenth Circuit case, *United Keetoowah Band of Cherokee Indians v. Oklahoma*⁹⁶ touches slightly on the issue. While the primary impact of *Keetoowah Band* was its holding that IGRA pre-empted the application of state law within Indian Country through the Assimilative Crimes Act,⁹⁷ the court referenced Senate Report 446, which identified Oklahoma as a state that permitted some form of bingo.⁹⁸ The court stated that Oklahoma law was civil/regulatory in regard to bingo, this assertion however, stemmed from the case of *Indian Country U.S.A. v. Oklahoma*⁹⁹ and consequently did not involve an interpretation of IGRA's scope of gaming provision as it applies to Class III gaming in Oklahoma.

The New Mexico Supreme Court case of *Clark v. Johnson*¹⁰⁰ offers insight into how some courts within the Tenth Circuit are likely to interpret IGRA's scope of gaming provision. In this case the primary issue was whether New Mexico's Governor exceeded his gubernatorial power by entering into tribal-state gaming compacts and revenue sharing agreements allowing multiple tribes to conduct numerous Class III gaming activities that New Mexico state law did not expressly permit.¹⁰¹ In entering into the compacts, the Governor reasoned that the State's broad authorization of several forms of Class III gaming allowed for inclusion of all Class III games in the challenged compacts.¹⁰² The court held that the Governor had exceeded his authority in entering the compacts.¹⁰³ More relevant to this discussion, was the court's indication that the charitable lottery exception to state gambling laws did not authorize or "permit" any and all forms of "casino-style" gaming for purposes of IGRA's scope of gaming provision.¹⁰⁴ Although the court did not decide which Class III games could properly be catalogued under the lottery definition, it did cite both *Cheyenne River* and *Rumsey* indicating that it would

96. 927 F.2d 1170 (10th Cir. 1991).

97. *Id.* at 1181.

98. S. REP. NO. 100-446, at 5-6, reprinted in 1988 U.S.C.C.A.N. 3071, 3075-76.

99. 829 F.2d 967, 972 (10th Cir. 1987).

100. 904 P.2d 11 (N.M. 1995).

101. *Id.* at 11.

102. *Id.* at 17.

103. *Id.* at 27.

104. *Id.* at 20-21.

interpret IGRA's scope of gaming provision in a manner consistent with the narrow, game-specific perspective of the Eighth and Ninth circuits.¹⁰⁵

Recent decisions within the Tenth Circuit further indicate that its courts favor a game-specific analysis when interpreting IGRA's scope of gaming provision. *Northern Arapaho Tribe v. Wyoming*,¹⁰⁶ decided in February of 2002, represented the first time the Tenth Circuit or for that matter, a district court in the Tenth Circuit, had thoroughly analyzed or interpreted IGRA's scope of gaming provision.¹⁰⁷ In *Northern Arapaho Tribe*, the tribe sought to enter into a compact with the State allowing the tribe to operate an extensive range of Class III gaming activities including: calcutta, poker, roulette, parimutuel racing, keno, lottery, slot machines, blackjack, video poker, video keno, video blackjack, and video horse racing. Wyoming adopted a game-specific approach contending that, pursuant to IGRA's scope of gaming provision, it was only required to negotiate games permitted by state law.¹⁰⁸

After conducting a circuit by circuit review of the principal "scope of gaming" cases, the court concluded that the expansive, category approach embraced by the Seventh Circuit in *Lac du Flambeau* was not applicable because it was more expansive than the criminal/prohibitory-civil/regulatory approach employed by the Supreme Court in *Cabazon* and by other courts in cases interpreting IGRA's scope of gaming provision. The court instead employed a game-specific approach that necessitated a review of each game to determine if the particular game was consistent with Wyoming public policy.¹⁰⁹

The court divided the requested gaming activities into three types of gaming: 1) calcutta and parimutuel wagering; 2) gaming machines; and 3) casino-style gambling. The court stated that if Wyoming permitted any of these types of gaming for any purpose, the State must enter negotiations with the tribe regarding that game.¹¹⁰ Wyoming specifically permitted calcutta and parimutuel wagering and thus was required to negotiate with the tribe regarding these Class III activities. Wyoming expressly prohibited gaming machines and consequently was not required to negotiate with the tribe

105. *Id.*

106. No. 00-CV-221-J, 2002 WL 31961497 (D. Wyo. Feb. 6, 2002).

107. *Id.* at 8.

108. *Id.* at 1.

109. *Id.* at 7.

110. *Id.* at 9.

regarding the operation of any Class III activities that utilized gaming machines such as video poker and blackjack.¹¹¹

The most interesting portion of the decision concerned casino-style gaming. The court found that despite the fact that Wyoming expressly permitted social casino-style gambling, it does not follow that it permits Class III gaming. The court based its reasoning on the fact that Wyoming law codifies an activity that most states implicitly permit and concluded that because Wyoming did not permit casino-style gaming for "any purpose," the State was not required to negotiate such gaming with the tribe.¹¹²

The holding of the District Court of Wyoming in *Northern Arapaho Tribe* was intended to support a game-specific approach to IGRA's scope of gaming provision. However, this decision is difficult to reconcile with the game specific interpretations of courts in other circuits. While the court in *Northern Arapaho Tribe* recognized that Wyoming specifically permitted its citizens to engage in Class III gaming activities, it nevertheless managed to proffer a ruling that in effect found that the State did not permit such gaming for any purpose by any person. This holding is inconsistent with the game-specific holdings of the Eighth and Ninth Circuits. It represents an unprecedented, restrictive approach to the operation of Class III gaming under IGRA and therefore is likely subject to considerable scrutiny.

These Tenth Circuit decisions are important for a number of reasons. First, they demonstrate the inexperience of Tenth Circuit courts in evaluating IGRA's scope of gaming provision as it relates to the operation of Class III gaming by Indian tribes within the region. Only one court within the Tenth Circuit has extensively evaluated IGRA's scope of gaming provision and that court reached an unprecedented result. Second, the cases hint that courts within the circuit would interpret IGRA's scope of gaming provision in a different manner. *United Keetoowah Band* mentions that Oklahoma law is civil/regulatory, suggesting the implementation of *Cabazon's* broad interpretation. In contrast, the language of *Clark* and the recent result in *Northern Arapaho Tribe* suggests that Tenth Circuit courts are inclined to adopt the restrictive, game-specific interpretations of the Eighth and Ninth Circuits. The absence of multiple comprehensive evaluations, combined with the indication of conflicting views, warrants a return to Judge Canby's dissent in *Rumsey*, as well as further discussion of several key issues, to gain a better understanding of the crucial elements that would likely be relevant to a

111. *Id.*

112. *Id.*

subsequent interpretation of IGRA's scope of gaming provision by a Tenth Circuit court.

V. The Canby Perspective

Judge Canby authored the dissent to the five to four split decision in *Rumsey*. He indicated a strong disagreement with the Ninth Circuit's narrow interpretation of IGRA's scope of gaming provision and identified several questionable findings by the court that more than likely will remain central issues of debate in scope of gaming interpretations by other courts:

This is a case of major significance in the administration of the Indian Gaming Regulatory Act ("IGRA") and it has been decided incorrectly, in a manner that conflicts with the Second Circuit's interpretation of the same statutory provision. The result is to frustrate the scheme of state-tribal negotiation that Congress established in IGRA. We should have granted rehearing en-banc to prevent the near-nullification of IGRA in a circuit that encompasses a great portion of the nation's Indian country. Our failure to do so may close the only route open to many tribes to escape a century of poverty.

The Second Circuit's fears of turning IGRA's compact process into a dead letter are well founded. The issue here is not whether California must allow every game the tribes want to conduct; it is merely whether California has a duty to negotiate with the tribes to determine what games should be conducted, on what scale, and who has jurisdiction to enforce gaming laws.

States like California that have no such wholesale public policy against Class III gaming must, under IGRA, reach an accommodation between their interests and the strong interests of the tribes in conducting such gaming . . . but under *Rumsey*, this whole process is nipped in the bud if the tribe seeks to operate games that state law . . . prohibit[s].

The *Rumsey* opinion regards the key question as being whether the words "permits" is ambiguous; it holds that the word is not ambiguous, so the State need not bargain. But the proper question is not what Congress meant by "permits," . . . but what Congress meant by "such gaming." The structure of IGRA makes clear that Congress was dealing categorically, and that a state's duty to bargain is not to be determined game-by-game. The time to argue over particular games is during the negotiation process.

The only natural reading of section 2710(d)(1)(B) is that, when Congress says 'Class III gaming activities shall be lawful . . . if located in a state that permits such gaming . . . ,' then "such gaming" refers back to the category of "Class III gaming," which is the next prior use of the word "gaming." *Rumsey* interprets the statutory language as if it said: 'A Class III game shall be lawful . . . if located in a State that permits that game.' The plain language [of IGRA] cuts directly against *Rumsey*; Congress allows a tribe to conduct Class III gaming activities (pursuant to a compact) if the state allows Class III gaming by anyone.¹¹³

Besides demonstrating strong support for the Second and Seventh Circuit's broad interpretation of IGRA's scope of gaming provisions, Judge Canby addressed several key issues that, upon a subsequent evaluation of IGRA's scope of gaming provision, could and arguably should be decided in favor of the tribes.

In interpreting IGRA's scope of gaming provision, the *Rumsey* court focused on the word "permits" instead of the words "such gaming."¹¹⁴ As evidenced by the Seventh Circuit decision in *Lac du Flambeau*, the word "permits" is susceptible to classification as an ambiguous term. The words "such gaming" are clearly ambiguous as they form the foundation of the scope of gaming debate. Despite the announcement by the court in *Rumsey* that "in interpreting IGRA, we use our traditional tools of statutory construction,"¹¹⁵ traditional tools of construction are generally not the proper standard when ambiguous federal language affects Indians. Instead, ambiguous expressions must be resolved in favor of the Indians.¹¹⁶ Resolution of IGRA's ambiguous terms in favor of the Indians would result in application of *Cabazon*'s broad category perspective to the scope of gaming issue and thereby expand the scope of permissible gaming activities within Indian Country.

Not only is the word "permits" an arguably ambiguous term, but as Canby illustrates, the proper question most likely involves Congress's intent as to the words "such gaming." Moreover, Canby's evaluation of IGRA's scope of gaming provision is consistent with the foremost grammatical authorities. Grammatical structure requires that adjectival descriptives that are reflective by nature refer back to a noun.¹¹⁷ In this case the noun, "Class III gaming

113. *Rumsey Indian Rancheria v. Wilson*, 64 F.3d 1250, 1252-54 (9th Cir. 1994).

114. *Id.* at 1257.

115. *Id.*

116. *See, e.g., Winters v. United States*, 207 U.S. 564, 576-77 (1908).

117. JOHN C. HODGES & MARY E. WHITTEN, *HARBACE COLLEGE HANDBOOK* 553 (1982).

activities" is stated in the independent clause of this complex sentence and is the only mention of gaming activities. It is the subject of the sentence, and nowhere else in the sentence can there be found any other noun/subject that deals with the central idea or main thought of the sentence. In other words, the category of Class III gaming activities is what the "such gaming" language is referencing.

VI. The Oklahoma Impact

The task of identifying and evaluating the status of the law in various federal circuits as it relates to IGRA's scope of gaming provision is a confusing and complex process. This exercise pales in comparison to predicting how an Oklahoma court would interpret IGRA's scope of gaming provision in deciding whether to adopt the game-specific perspective that "the purpose of IGRA was to create a level playing field, granting tribes no more gaming rights than are permitted by the states in which their reservations are located,"¹¹⁸ or whether to adopt the "category perspective" that IGRA was meant "to protect the sovereign right of tribes to create their own laws thereby effectively allowing them to conduct a wider scope of gaming than permitted on surrounding state land."¹¹⁹ It is apparent however, that regardless of how Oklahoma interprets IGRA's scope of gaming provision, a decision by the State of Oklahoma to implement a lottery would create a duty in the State to negotiate compacts with Oklahoma tribes wishing to conduct their own lotteries.

There is no guarantee that a state lottery in Oklahoma will translate to an Indian lottery or lotteries within the state. Oklahoma would have a duty to negotiate in good faith with the tribes regarding a tribe-sponsored lottery, on what scale it would be conducted, and which sovereign, the tribe or state, would have jurisdiction to enforce the associated gaming laws.¹²⁰ Although a few Oklahoma tribes have considered developing their own lotteries should the state approve such gaming, factors such as: funding, immature tribal infrastructures, market size, and revenue sharing indicate that the reality of an Indian-operated lottery is unlikely. A decent lottery is a function of population. California, New York, Arizona, New Mexico, and Montana are all states that operate state lotteries, retain significant Indian populations, and allow some level of Indian gaming, yet none of these states has an Indian-

118. Horowitz, *supra* note 66, at 199.

119. *Id.*

120. 25 U.S.C. § 2710(d)(7) (2000).

operated lottery.¹²¹ One possibility could be for Oklahoma tribes to pool funding and create a joint tribal lottery. This form of lottery however, raises concerns regarding allocation of revenue and intertribal coordination. Further, the idea of competing against the state and/or multiple Indian tribes in a heavily segmented market is not likely to appeal to many tribes.¹²²

From a gaming perspective, there are two other major concerns with a state-sanctioned lottery: 1) the Oklahoma lottery would be threatened by Indian operated lotteries that are able to offer larger prizes because they are not burdened by education payouts and state taxes; and 2) as a result of the lottery, the State will be forced to negotiate with tribes for an increased amount of Class III, casino-style, gaming activities. Although these results are improbable due to strictly allocated tribal funding and the more recent interpretations of IGRA's scope of gaming provision respectively, they remain as possible outcomes.¹²³ These outcomes, which form the foundation of opposition to a state-sanctioned lottery, nevertheless could prove to be powerful tools in the State's effort to cure its \$677 million revenue deficit.

Pursuant to IGRA § 2710(d)(7), if Oklahoma is deemed a state that permits Class III gaming, the State has a duty to negotiate compacts with the tribes regarding some form of Class III gaming.¹²⁴ Because tribes must have a compact to operate the Class III games, there exists a strong incentive for tribal flexibility in the negotiation process. The State of Arizona recently capitalized on this position by incorporating revenue sharing provisions into its tribal-state compacts requiring tribes to return 8% of their gaming revenues to the state.¹²⁵ Oklahoma could utilize the Arizona revenue sharing model to level the lottery playing field. If an Oklahoma tribe requests a compact that allows the operation of a tribal lottery, the State is in a position to employ a revenue sharing clause to offset any tribal financial advantages in lottery operation and simultaneously supplement the State's lottery income that is earmarked for education.

The Arizona compacting model would also be valuable if a state lottery were to trigger a broad interpretation of IGRA's scope of gaming provision in Oklahoma. The State of Oklahoma would be in a position to negotiate tribal-state compacts that are mutually beneficial to Oklahoma tribes and the State.

121. Bob Doucette, *Lottery Talk Spurs Interest for 2 Tribes*, DAILY OKLAHOMAN, Dec. 29, 2002, at 1A.

122. *Id.*

123. *Rumsey Indian Rancheria v. Wilson*, 64 F.3d 1250, 1251 (9th Cir. 1994).

124. 25 U.S.C. § 2710(d)(7) (2000).

125. *Connors*, *supra* note 5.

The tribal-state compacts would benefit: 1) tribes by allowing them to operate an expanded number of Class III gaming activities, thereby increasing gaming revenues; and 2) the State of Oklahoma through the utilization of favorable revenue sharing clauses in each compact to designate gaming proceeds for the benefit of Oklahoma education.

Indian gaming in the United States is a \$12 billion a year industry.¹²⁶ While the gaming industry in Oklahoma represents a small portion of the national market, it is one of the state's fastest growing market segments.¹²⁷ The tribal-state compact process represents an opportunity for the State of Oklahoma because it provides a means for the State to benefit from the growth of Indian gaming in Oklahoma. Moreover, the tribal-state compacting process allows the State to control its own destiny in terms of revenue production. Negotiation of an increased number of tribal-state compacts could allow tribes to operate more Class III gaming activities. The operation of additional Class III gaming activities improves tribal revenues and in doing so increases the State's share of the gaming proceeds. In addition to allowing the State to control the size of its "piece of the pie," tribes are benefitted in the form of increased employment, improved education and health care, and decreased member reliance on welfare.¹²⁸

Currently, Oklahoma tribes operate fifty-five gaming facilities throughout the state.¹²⁹ Although technology allows the tribes to operate games that remarkably resemble Class III, casino-style games, these games are subject to prize limits and other Class II specifications and therefore are not subject to tribal-state compacts. Despite the inherent revenue limitations of Class II gaming, the Indian gaming industry in Oklahoma has and will continue to grow. Because Class II games are not subject to the compacting process, the State cannot benefit from the operation of these activities. Continuation of the tribal-state standoff regarding the operation of Class III games restricts the fiscal development of Oklahoma tribes and eliminates any opportunity the State has to extract revenue from one of its most rapidly developing markets. The purpose here is not to propose that a wholesale policy toward Class III gaming is the resolution to Oklahoma's revenue shortfall, but rather to

126. Nat'l Indian Gaming Comm'n, *Tribal Gaming Revenues*, at http://www.nigc.gov/nigc/nigcControl?option=TRIBAL_REVENUE (last visited Apr. 22, 2003).

127. Liz Gray, *Oklahoma and Gaming: Is Class III on the Horizon?*, NATIVE AMERICAN TIMES.COM, ¶ 14 (2002), at <http://www.okit.com/gaming/2002/octnov/oklahomagaming.html>.

128. Joe Laxague, Note, *Indian Gaming and Tribal-State Negotiations: Who Should Decide the Issue of Bad Faith?*, 25 J. LEGIS. 77, 93 (1999).

129. Gray, *supra* note 127, ¶ 16.

demonstrate one mechanism through which a broad interpretation of IGRA's scope of gaming provision, if prompted by a state-sanctioned lottery, could be beneficial to both a state hungry for a funding boost and Indian tribes seeking to enter the next phase of a tribal economic revolution.