American Indian Law Review

Volume 18 | Number 2

1-1-1993

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Recommended Citation

Michael W. Ridgeway, *The Potawatomi/Oklahoma Gaming Compact of 1992: Have Two Sovereigns Achieved a Meeting of the Minds?*, 18 AM. INDIAN L. REV. 515 (1993),
<https://digitalcommons.law.ou.edu/ailr/vol18/iss2/6>

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THE POTAWATOMI/OKLAHOMA GAMING COMPACT OF 1992: HAVE TWO SOVEREIGNS ACHIEVED A MEETING OF THE MINDS?

Michael W. Ridgeway*

Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.¹

— from the Indian Gaming Regulatory Act²

I. Introduction

With the passage of the Indian Gaming Regulatory Act (IGRA) in 1988, Congress provided the statutory framework for regulating gaming activities by Indians on Indian land. The Act cleared up some of the confusion and disagreement about the powers and duties of the various state and tribal governments. However, the IGRA has spawned some new areas of uncertainty. State-tribal relations are being tested, and settled issues of sovereignty may be thrown to the wind.

This comment will first look at the IGRA in the abstract. Next, case law interpreting key sections of the IGRA will be examined. This will be followed by a reconstruction of the negotiation process which led to a gaming compact signed by the State of Oklahoma and the Citizen Band Potawatomi Indian Tribe of Oklahoma.³ The story of how these two sovereign governments negotiated toward a meeting of the minds illustrates how the IGRA can work in the real world.

The story of the Oklahoma-Potawatomi gaming compact also shows how the IGRA does *not* work in the real world. In Oklahoma, and perhaps other

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1. 25 U.S.C. § 2701(5) (1988).

2. *Id.* §§ 2701-2721.

3. Tribal-State Class III Gaming Compact, Aug. 27, 1992, Citizen Band Potawatomi Indian Tribe of Oklahoma-State of Oklahoma (on file with the *American Indian Law Review*) [hereinafter Potawatomi-Oklahoma Gaming Compact].

Gaming compacts are not published in hard copy, nor are they available in LEXIS or Westlaw. However, copies may be obtained from the Bureau of Indian Affairs, Office of Tribal Services, 1849 C Street N.W., Washington, D.C. 20240. In Oklahoma, the documents may be viewed and copies obtained from the Secretary of State, State Capitol Building, 2300 N. Lincoln, Oklahoma City, Okla. 73105 (telephone (405) 521-3911).

states, the Act may not be worth much more than the paper upon which it is printed. Congress' express intent in passing the IGRA is being thwarted by judicial decisions. Some of the problems with the IGRA will be analyzed and suggestions made for how they should be resolved.

II. Indian Gaming Regulatory Act

A. Purpose

Congress expressed three reasons for passage of the IGRA. First, the Act provided a statutory basis for tribes to operate gaming activities.⁴ Congress intended for gaming to be used as a tool to promote tribal economic development, self-sufficiency, and strong tribal governments.⁵

Second, the IGRA provided methods for regulating tribal gaming activities.⁶ This was necessary to ensure that the games would be conducted and played fairly and to prevent infiltration by organized crime or other corruption.⁷ Congress wanted to ensure that tribes received the benefits of their activities.⁸

Third, Congress wanted federal oversight to protect gaming as a means of generating tribal revenue. It created the National Indian Gaming Commission⁹ to supervise tribal bingo operations and similar enterprises.¹⁰ The Commission also has limited power to veto tribal attempts to enter into other types of gaming operations.¹¹

B. Scope of the IGRA

Congress divided gaming into three categories: class I, class II, and class III. Class I includes social games played solely for prizes of minimal value.¹² It also includes traditional Indian gaming that is related to tribal ceremonies or celebrations.¹³ Under the IGRA, class I gaming on Indian land is exclusively controlled by the tribe and is exempt from federal or state regulation.¹⁴

Class II gaming includes bingo and its variations.¹⁵ It also includes games such as pull-tabs, lotto, punch boards, and tip jars, if played in the same

4. 25 U.S.C. § 2702(1) (1988).

5. *Id.*

6. *Id.* § 2702(2).

7. *Id.*

8. *Id.*

9. *Id.* §§ 2704-2708.

10. *Id.* §§ 2702(3), 2706, 2710.

11. *Id.* § 2710(d)(2)(B).

12. *Id.* § 2703(6). "Minimal value" is not defined in the statute or in subsequent decisions.

13. *Id.* § 2703(6).

14. *Id.* § 2710(a)(1).

15. *Id.* § 2703(7).

location as a tribal bingo operation.¹⁶ Class II gaming also includes card games if the state in which a tribe is located approves of such games by statute.¹⁷ In addition, if the statutes are silent about card games, and the games are played anywhere in the state, they are considered class II.¹⁸

To some extent, the definition of class II gaming can vary from state to state, depending on local laws.¹⁹ However, the National Indian Gaming Regulatory Commission²⁰ has refined class II's definition somewhat. If the activity involves gambling devices as defined by federal law,²¹ it cannot be class II gaming.²² Class II gaming is generally regulated by the tribe.²³

Class III gaming is defined as "all forms of gaming that are not class I gaming or class II gaming."²⁴ This includes the traditional forms of gambling, such as casino games, pari-mutuel horse racing, and most electronic or mechanical games of chance. Before a tribe can operate such a venture on Indian land, it must reach an agreement with the state in which the land is situated.²⁵ The agreement, or "tribal-state compact," governs such things as regulation, operation, and taxation of class III gaming activities.²⁶ The interaction and agreement between the state and the tribe will be the focus of this comment.

C. Tribal-State Gaming Compact: The Statutory Process

An Indian tribe does not need the state's permission to conduct class I or class II gaming on Indian land.²⁷ Conversely, a tribe generally cannot conduct class III gaming without a tribal-state gaming compact.²⁸ The tribal-state compact is "the centerpiece of the IGRA's regulation of class III gaming."²⁹ The power of the states to resist such agreements is severely limited by the IGRA.³⁰ The Act contains a strong bias in favor of tribes who

16. *Id.*

17. *Id.*

18. *Id.*

19. The definition for class II gaming also includes a grandfather clause for specifically enumerated activities that were in effect prior to May 1, 1988, in Michigan, North Dakota, South Dakota, and Washington. *Id.* § 2703(7)(C). The act also recognizes the possibility of grandfathering other activities. *Id.* § 2703(7)(D), (E).

20. *Id.* § 2710(b).

21. 15 U.S.C. § 1171 (1988).

22. *See* 57 Fed. Reg. 12,382-84 (1992) (to be codified at 25 C.F.R. pt. 502).

23. 25 U.S.C. § 2710(b) (1988).

24. *Id.* § 2703(8).

25. *Id.* § 2710(d)(1)(C).

26. *Id.* § 2710(d)(3)(C).

27. *Id.* § 2710(a)(1), (b)(1).

28. *Id.* § 2710(d).

29. *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1031 (2d Cir. 1990).

30. 25 U.S.C. § 2710(d)(7) (1988).

wish to enter into a tribal-state gaming compact.³¹

When a tribe decides it wants to begin a class III gaming operation, it notifies the state that it wishes to enter into negotiations. The state is then required to "negotiate with the Indian tribe in good faith to enter into such a compact."³²

If the state fails to respond to the tribe's request for negotiations,³³ or if it attempts to directly tax the tribe or Indian lands as part of a gaming compact,³⁴ such action is evidence of bad faith. To encourage "good faith" negotiations, the IGRA contains relatively tight time restrictions. The Act allows a tribe to sue in federal court if an agreement has not been reached within 180 days of the tribe's request.³⁵ The IGRA makes it easy for a tribe to make a *prima facie* case against a state. If the tribe shows that a compact has not been entered into and introduces any evidence that the state has not acted in good faith, the burden of proof shifts to the state.³⁶ The state is then required to prove that it has made a good faith effort to negotiate the gaming compact.³⁷

The federal court can force the parties to the negotiating table and can order them to reach an agreement within sixty days.³⁸ If a tribal-state compact still has not been completed at the end of sixty days, the court can appoint a mediator of its choice.³⁹ The state and the tribe each submit their final proposals to the mediator.⁴⁰ The mediator chooses the proposed compact that best reflects the goals of the IGRA.⁴¹ If the state agrees within sixty days to the proposal chosen by the mediator, the court action is resolved and the parties have a gaming compact.⁴² If the state does not agree with the mediator's choice, the case goes to the Secretary of the Interior. At that point, the Secretary "shall prescribe, in consultation with the Indian tribe, procedures which are consistent with the proposed compact selected by the mediator."⁴³

After a gaming compact has been agreed to by negotiators for the tribe and the state, Oklahoma state law adds another step. As part of the state's approval process, the compact must have the blessing of both the governor and the state legislature's Joint Committee on State-Tribal Relations.⁴⁴ After

31. *Id.*

32. *Id.* § 2710(d)(3)(A).

33. *Id.* § 2710(d)(7)(B)(ii).

34. *Id.* § 2710(d)(7)(B)(iii).

35. *Id.* § 2710(d)(7)(B)(i).

36. *Id.* § 2710(d)(7)(B)(ii).

37. *Id.*

38. *Id.* § 2710(d)(7)(B)(iii).

39. *Id.* § 2710(d)(7)(B)(iv).

40. *Id.*

41. *Id.*

42. *Id.* § 2710(d)(7)(B)(vi).

43. *Id.* § 2710(d)(7)(B)(vii).

44. 74 OKLA. STAT. ANN. § 1221 (West Supp. 1992). The Joint Committee on State-Tribal

receiving approval, the compact is filed with the Oklahoma Secretary of State.⁴⁵

In addition, the tribe must pass an ordinance or resolution authorizing the gaming activities covered by the compact.⁴⁶ The ordinance may be passed either before negotiations, concurrent with approval of the agreement, or any other time during the process.⁴⁷ The ordinance or resolution must be approved by the Chairman of the Indian Gaming Regulatory Commission⁴⁸ and published in the Federal Register.⁴⁹ If the Chairman does not act within ninety days, the ordinance is considered to have been approved.⁵⁰

Upon completion of the above steps, the approved compact is delivered to the Secretary of the Interior. The agreement does not take effect until the Secretary's approval has been published in the Federal Register.⁵¹ The Secretary may disapprove a gaming compact *only* if it violates a provision of the IGRA, another federal law, or the federal government's trust obligations to Indians.⁵² If the compact is not acted upon by the Secretary within forty-five days, it is considered to have been approved by default.⁵³ If the compact is considered to have been approved by the Secretary's inaction, the Secretary still must publish notice of approval in the Federal Register.⁵⁴

D. Allowable Tribal Gaming Activities

Class III gaming is allowed if "located in a State that permits such gaming for any purpose by any person, organization, or entity."⁵⁵ Tribes may not conduct gaming activities within a state which, "as a matter of criminal law and public policy, prohibit[s] such gaming activity."⁵⁶ States and tribes have often disagreed on the meaning of these sentences. Does "such gaming activity" refer to class III as a whole or to a specific game?

Relations is made up of ten state legislators. Five senators are appointed by the President Pro Tempore, and five representatives are appointed by the Speaker of the House. The committee's ongoing purpose is to oversee and approve all agreements between tribal governments and the State of Oklahoma. *Id.* § 1222.

45. *Id.* § 1221(E).

46. 25 U.S.C. § 2710(d)(1), (2) (1988).

47. *Id.*

48. *Id.* § 2710(d)(1)(A)(iii), § 2710(d)(2), § 2710(e).

49. *Id.* § 2710(d)(2)(B).

50. *Id.* § 2710(e).

51. *Id.* § 2710(d)(3)(B).

52. *Id.* § 2710(d)(8)(B).

53. *Id.* § 2710(d)(8)(C).

54. *Id.* § 2710(d)(8)(D). If a compact is not acted on by the Secretary, the IGRA simply says that the compact is approved and the Secretary shall publish notice of approval. The IGRA does not specifically state *when* the Secretary must publish notice of approval. It is not clear whether a compact can take effect without publication of approval.

55. *Id.* § 2710(d)(1)(B).

56. *Id.* § 2701(5).

For example, if a state allows and regulates pari-mutuel horse racing, has it waived its objection to *any* class III gaming that a tribe may want to conduct? Is such a state required to negotiate with a tribe that wants to set up a full-blown casino? Tribes have argued for an expansive interpretation, which could allow them to operate games which may not be expressly legal within the state. In the tribes' eyes, if a state permits some forms of gambling, it cannot claim a criminal law and public policy that prohibits "such gaming activity" as encompassed by class III's definition.

States argue that Congress intended to allow them to control the specific types of class III gaming that would be allowable within the state's borders. For example, if a state's statutes allow charitable organizations to conduct lotteries, then perhaps a lottery conducted on Indian land should be subject to the same state regulations and limitations.

The conflict arises because the IGRA is conspicuously vague. The Act does not spell out what must be contained in a gaming compact. It does not answer questions of sovereignty or jurisdiction. In fact, it specifically states that such questions are open for negotiation.⁵⁷ In effect, *everything* is open for negotiation — whether to apply state or tribal laws,⁵⁸ how the costs of regulation will be paid,⁵⁹ who will enforce the law,⁶⁰ and so on. After the parties have decided that gaming will be allowed, they can get as creative as they wish. The body of federal Indian law does not necessarily apply, because sovereign rights can be created or waived by agreement.⁶¹

If the parties are going to get hung up, it will most likely be at the beginning of the negotiations. Conflicts arise regarding what games will be allowed. The question hinges on the state's criminal law and public policy.⁶² Does the state regulate games of chance or prohibit games of chance? Attempts to distinguish between civil-regulatory and criminal-prohibitory state policy began even before passage of the IGRA. The foundation for answering the regulatory-prohibitory question is the pre-IGRA case of *California v. Cabazon Band of Mission Indians*.⁶³

57. *Id.* § 2710(d)(3)(C).

58. *Id.* § 2710(d)(3)(C)(i).

59. *Id.* § 2710(d)(3)(C)(iii), (iv).

60. *Id.* § 2710(d)(3)(C)(ii).

61. *Id.* § 2710(d)(3)(C). Pre-IGRA decisions and decisions involving class II gaming often center on the applicability of the Assimilative Crimes Act, 18 U.S.C. § 13 (1988). The ACA allows federal prosecution of certain state law violations that occur on Indian land. Class III gaming compacts can go beyond state law by allowing games on Indian land that are more tightly regulated on state land. Because such games would be conducted pursuant to an agreement with the state, an exception to state law is created. Therefore, it is unlikely that the ACA will often apply to class III gaming.

62. 25 U.S.C. § 2701(5) (1988).

63. 480 U.S. 202 (1987).

In *Cabazon*, the Indians operated bingo and card game operations on tribal land. California law limited bingo to certain charitable organizations and capped prizes at a maximum of \$250 per game. The State of California attempted to prohibit the tribal games or at least impose its statutory limitations on the tribes. The United States Supreme Court held that tribes may conduct gaming operations free of state regulation in states which regulate, but do not prohibit, gaming.⁶⁴

The Court discussed why California could not prohibit activities on Indian land that were regulated on state land:

California does not prohibit all forms of gambling. California itself operates a state lottery, and daily encourages its citizens to participate in this state-run gambling. California also permits parimutuel horse-race betting. Although certain enumerated gambling games are prohibited . . . , games not enumerated, including the card games played in the *Cabazon* card club, are permissible. . . . In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.⁶⁵

The Court also explained why a state could not impose its regulations on tribal gaming activities. The federal government has a strong interest in encouraging tribal economic development.⁶⁶ The interests of tribes parallel that of the federal government, and bingo and other gaming provides a major source of revenue for tribes.⁶⁷ State regulation of tribal gaming would infringe upon a tribe's sovereign powers.⁶⁸

The Supreme Court's decision in *Cabazon* was handed down just six days after the IGRA was introduced.⁶⁹ Congress made it clear that the reasoning from *Cabazon* should apply to the IGRA. The Senate Report on the bill specifically recognized *Cabazon* as defining the distinction between state laws which prohibit an activity and laws which regulate permissible activities.⁷⁰

Tribes sometimes want to operate gaming activities in a manner that violates state law. In *United States v. Sisseton-Wahpeton Sioux Tribe*,⁷¹ the tribe sought a declaratory judgment that its blackjack operation was legal,

64. *Id.* at 221-22.

65. *Id.* at 210-11 (citations omitted).

66. *Id.* at 216-17.

67. *Id.* at 218-19.

68. *Id.* at 221-22.

69. *Cabazon* was decided on Feb. 25, 1987. The IGRA was introduced on Feb. 19, 1987.

70. S. REP. NO. 446, 100th Cong., 2d Sess. 6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3076.

71. 897 F.2d 358 (8th Cir. 1990).

even though it accepted bets in excess of the maximum limit allowed under South Dakota law. The Eighth Circuit held that a tribe's blackjack game does not have to comply with the state's law regarding wager and pot limits.⁷²

The court grandfathered the tribe's venture into class II, but its reasoning regarding state law is relevant to class III as well. The court pointed out that the IGRA's legislative history embraces the rationale of *Cabazon*.⁷³ In order to determine the effect of state law on the tribe's card games, the court examined whether South Dakota's gaming laws were regulatory or prohibitory.⁷⁴ Because South Dakota allowed bingo, horse and dog race betting, certain card games, and other forms of gambling, the state's policy could not be considered prohibitory.⁷⁵ The court stated that the tribe had fulfilled the IGRA's requirement that gaming be "located within a State that permits such gaming for any purpose by any person, organization or entity"⁷⁶ Because of the *Cabazon* rule, the State of South Dakota was not allowed to extend its betting limits to a regulated activity conducted on Indian land.⁷⁷

States may want to limit tribal-state gaming compacts to games which are approved of by the state. In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*,⁷⁸ the State believed that certain games were not proper subjects for a gaming compact. The State refused to negotiate, and the Tribe sued for failure to bargain in good faith. The court ordered Wisconsin to negotiate with the Tribe for the games in question.⁷⁹

Again, the court followed *Cabazon* in reasoning that the "issue is not whether the state has given express approval to the playing of a particular game, but whether Wisconsin's public policy toward class III gaming is prohibitory or regulatory."⁸⁰ The court discussed the gaming activities that the state allowed: promotional sweepstakes, bingo, lotteries, and pari-mutuel betting.⁸¹ Because the State regulated *some* activities that involved the elements of prize, chance and consideration, it did not have a public policy against class III gaming in general.⁸² Wisconsin's policy was regulatory, not prohibitory.⁸³

Wisconsin argued that even if its policy toward class III gaming was regulatory, it should not be required to negotiate games which it did not

72. *Id.* at 368.

73. *Id.* at 366.

74. *Id.*

75. *Id.* at 367.

76. *Id.* at 368 (quoting 25 U.S.C.A. § 2710(b)(1)(A) (West Supp. 1993)).

77. *Id.*

78. 770 F. Supp. 480 (W.D. Wis. 1991).

79. *Id.* at 488.

80. *Id.* at 486.

81. *Id.*

82. *Id.* at 488.

83. *Id.*

expressly permit.⁸⁴ The court disagreed, ruling that express permission was not the standard. Rather, the question was whether the State *allowed* the activity.⁸⁵ The court used the example of certain class III games operated by small charitable groups on very limited occasions without state interference.⁸⁶ By allowing such charitable games, the State foreclosed its claim that it has a prohibitory policy toward those types of games.⁸⁷

The State also argued that its existing regulations should apply to gaming on Indian land.⁸⁸ The court flatly rejected this claim, stating that "[i]t was not Congress's intent that the states would be able to impose their gaming regulatory schemes on the tribes. The Act's drafters intended to leave it to the sovereign state and tribal government to negotiate the specific gaming activities . . . under the terms of its tribal-state compact."⁸⁹

Thus, according to *Lac du Flambeau*, a state is required to negotiate any activity that is not *expressly* prohibited by the state's constitution or statutes. If a state allows an activity, or simply looks the other way while charitable organizations conduct certain fundraising events, it could be opening the door to commercial gambling. Tribes may begin to bolster their arguments with evidence of every football pool, poker game, charity raffle, and Casino Night that is not actively prosecuted by the state.⁹⁰

In summary, the question of what games can be included in a tribal-state class III gaming compact is answered by looking at state law. If a state prohibits all class III activities, then it should not negotiate with a tribe for any class III gaming.

However, if the state allows any form of gambling, then its general policy toward class III gaming is regulatory, not prohibitory. In such a case, the tribe may properly request to negotiate any game that is not *expressly prohibited* by the state. If a state regulates or restricts a game in some way without prohibiting it, the tribal-state compact does not have to mirror state law. As long as the activity is permitted for any purpose by any person anywhere in the state, the details of regulating conduct on Indian land are open for negotiation.

84. *Id.* at 487.

85. *Id.* at 488.

86. *Id.*

87. *Id.*

88. *Id.* at 487.

89. *Id.*

90. Linda Epperly, *Class III Gaming . . . An Overview of Federal Caselaw and State Statutes*, in SOVEREIGNTY SYMPOSIUM V: THE YEAR OF THE INDIAN 426 (1992) (handbook prepared by Okla. Supreme Court, Okla. Indian Affairs Comm'n, and Sovereignty Symposium, Inc. for Sovereignty Symposium V, Oklahoma City, Okla., June 9-11, 1992).

*III. The Oklahoma Experience: Class III Gaming Compact
Between the Citizen Band Potawatomi Indian Tribe of Oklahoma
and the State of Oklahoma*

A. History of Negotiations

Governor David Walters knew that some tribes in Oklahoma wanted to set up gaming operations on Indian land.⁹¹ In early June 1991, the governor appointed Linda Epperly to represent the State of Oklahoma in negotiations with the tribes.⁹² Ms. Epperly was already employed by the State as a member of the State Tourism Commission, and state law prohibits employees from receiving more than one state salary ("dual office holding").⁹³ According to Ms. Epperly, Governor Walters apparently believed that the job of negotiator would take very little time.⁹⁴ Therefore, Ms. Epperly agreed to accept the appointment without compensation.⁹⁵

The Potawatomi Tribe decided it wanted to begin gaming activities on tribal land near Shawnee, Oklahoma. On September 9, 1991, the Tribe sent a letter to Governor Walters, expressing an interest in entering into negotiations for a tribal-state gaming compact.⁹⁶

Linda Epperly responded to the Potawatomi's request by scheduling a preliminary meeting for September 30, 1991.⁹⁷ This meeting was rescheduled for October 16, at which time Ms. Epperly met with tribal representatives and Michael Minnis, attorney for the Potawatomis.⁹⁸ The Tribe communicated its desire to begin some sort of gaming operations, although specific games were not discussed at the initial meeting.⁹⁹ The Tribe also proposed some ideas regarding what the compact should include, based on similar compacts that had been proposed in other states.

Ms. Epperly advised the Tribe that she needed input from the Governor regarding what he would be willing to include in the negotiations.¹⁰⁰ She promised to get back with the Potawatomis by November 6. The deadline came and went, with no word from Ms. Epperly or the Governor's office. Mr.

91. Telephone Interview with Linda Epperly, former Indian Gaming Negotiator, Office of Oklahoma Governor David Walters (Oct. 28, 1992) [hereinafter Epperly Interview].

92. *Id.*

93. *Id.*; OKLA. CONST. art. XXIII, § 10; 12 Op. Okla. Att'y Gen. 294 (1980) (opinion no. 80-173).

94. Epperly Interview, *supra* note 91.

95. *Id.*

96. Interview with Michael Minnis, Attorney for Citizen Band Potawatomi Indian Tribe of Oklahoma (Oct. 7, 1992) [hereinafter Minnis Interview].

97. Minnis Interview, *supra* note 96; Epperly Interview, *supra* note 91.

98. Minnis Interview, *supra* note 96; Epperly Interview, *supra* note 91.

99. Minnis Interview, *supra* note 96; Epperly Interview, *supra* note 91.

100. Minnis Interview, *supra* note 96; Epperly Interview, *supra* note 91.

Minnis made several inquiries, trying to discover the reason for the silence. The Tribe was anxious to move forward with negotiations.¹⁰¹ Finally, on January 16, 1992, the Governor's office sent a letter to Mr. Minnis, advising him and the Potawatomis that Ms. Epperly had resigned effective January 15.¹⁰²

When she resigned, Ms. Epperly told the Governor that the job was more demanding than anyone had expected. By January 1992, twenty-two other tribes in Oklahoma had expressed an interest in negotiating for gaming compacts.¹⁰³ Ms. Epperly suggested that Governor Walters either hire a full-time negotiator or appoint someone to be paid an hourly rate.¹⁰⁴ In a February 7 follow-up letter to Mr. Minnis, the Governor promised that a new negotiator would be named within ten days.¹⁰⁵

On February 14, Governor Walters named Robert A. Nance as the new, paid negotiator for the State.¹⁰⁶ The parties were back at square one, starting over from scratch. On February 24, Mr. Nance sent a letter to Mr. Minnis and representatives of the other tribes, announcing that the State was ready to talk.¹⁰⁷

On March 2, Mr. Nance met with Mr. Minnis, and the Tribe again expressed its desire to enter into a gaming compact. Mr. Nance told them that Governor Walters had not given him any express limitations on the scope of an agreement. The parties left the meeting agreeing that each would begin seriously working on making the compact a reality.¹⁰⁸

On March 6, Mr. Minnis agreed to draft a generic contract as a starting point. The contract would generally set forth what the Potawatomis wanted, without specifying what games would be allowed.¹⁰⁹ On the same date, Mr. Nance sent a memorandum to all of the tribes, explaining what activities he believed were appropriate for gaming compacts with the State of Oklahoma.¹¹⁰ The memo outlined the requirements of the IGRA and discussed how courts have interpreted the statute.¹¹¹ It pointed out that Oklahoma law is

101. Minnis Interview, *supra* note 96.

102. *Id.*

103. Telephone Interview with Susan Witt Conyers, General Counsel, Office of Oklahoma Governor David Walters (Aug. 12, 1992) [hereinafter Conyers Interview]; Letter from Susan Witt Conyers, General Counsel, Office of Oklahoma Governor David Walters, to author (Mar. 8, 1993) (on file with author) [hereinafter Conyers Letter].

104. Epperly Interview, *supra* note 91.

105. Minnis Interview, *supra* note 96.

106. *Id.* Mr. Nance is a former Oklahoma Assistant Attorney General. He is currently employed by the Oklahoma City law firm of Chapel, Riggs, Abney, Neal & Turpen.

107. Minnis Interview, *supra* note 96.

108. *Id.*

109. *Id.*

110. Memorandum from Robert A. Nance to Oklahoma Tribes Seeking Class III Gaming Negotiations (Mar. 6, 1992).

111. *Id.*

fairly specific in prohibiting most of the activities that the Tribe might want to conduct as part of its gaming operation.¹¹²

Because Oklahoma law strictly prohibited most gambling as a matter of state policy, such activities could not be included in a gaming compact. The memo concluded with an invitation for differing legal opinions and authority. If any of the tribes disagreed with the State's position, Mr. Nance expressed a willingness to keep an open mind.¹¹³

The Potawatomis wanted to negotiate a much broader range of gaming activities. On March 27, Mr. Minnis sent a memorandum of legal authorities to support his assertion that the Governor could negotiate the activities that Mr. Nance believed were not proper. On April 10, Mr. Nance gave his oral response to the memo: The only gaming activity proposed by the Potawatomis that the State would consider was video lottery terminals (VLTs).¹¹⁴

On April 23, Mr. Nance visited the proposed site. Mr. Minnis made arrangements to have some VLTs brought to the state for a demonstration to be held at a later date. On April 29, Mr. Minnis notified the U.S. Attorney for the Western District of Oklahoma that the demonstrator VLTs would be brought into the state.¹¹⁵

On May 1, the U.S. Attorneys for the Northern, Eastern and Western Districts of the State of Oklahoma told Mr. Nance that they had some questions about the legality of bringing the VLTs into Oklahoma.¹¹⁶ Their concern was with the Johnson Act,¹¹⁷ a federal law which prohibits shipment of gambling devices into a state which outlaws them.¹¹⁸ On May 8, Mr. Nance and Mr. Minnis agreed that a demonstration would not be necessary.¹¹⁹

Although the U.S. Attorneys had expressed concern about the legality of bringing VLTs into Oklahoma, negotiations with the Potawatomis continued to move forward.¹²⁰ The State and the Potawatomis believed that a compact between the two sovereigns would take care of any questions of legality. On May 14, Mr. Minnis sent a revised draft of the earlier proposal, specifying VLTs as the proposed gaming activity.

On May 28, Mr. Nance met with U.S. Attorneys from each of Oklahoma's three federal court districts.¹²¹ The U.S. Attorneys' concerns were stated

112. *Id.*

113. *Id.*

114. Minnis Interview, *supra* note 96.

115. *Id.*; Conyers Letter, *supra* note 103.

116. Minnis Interview, *supra* note 96; Conyers Letter, *supra* note 103.

117. 15 U.S.C. §§ 1171-1178 (1988).

118. Minnis Interview, *supra* note 96; Conyers Interview, *supra* note 103.

119. Minnis Interview, *supra* note 96.

120. *Id.*

121. *Id.*

more forcefully than they had been previously. They argued that the Johnson Act would be violated even if there was an agreement between the State and the Tribe to bring the VLTs within the borders of the state.¹²² Mr. Nance asked for a written opinion or letter that he could send to the tribes.¹²³ The U.S. Attorneys refused.¹²⁴

On June 3, Mr. Nance met with Mr. Minnis and passed along the gravity of the U.S. Attorney's verbal warning.¹²⁵ It appeared that the previous negotiations might be all for naught. The State did not want to enter into an agreement that violated federal law.¹²⁶ Mr. Minnis proposed that they continue negotiations, with the Tribe offering to indemnify and hold harmless the State.¹²⁷ Mr. Nance agreed and asked for a clause which specifically mentioned concerns about the Johnson Act.¹²⁸ On June 10, Mr. Minnis hand-delivered the requested amendments to Mr. Nance.¹²⁹

On June 12, Mr. Nance proposed a declaratory judgment clause, which would allow the Tribe to ask the federal court for a ruling on the legality of importing VLTs into Oklahoma.¹³⁰ Mr. Minnis agreed and prepared another amendment.¹³¹ On June 16, Mr. Nance advised that the Governor had agreed to the proposed amendments.¹³² On June 23, Mr. Minnis and Mr. Nance each made a few minor changes in wording, without any substantial changes in meaning.¹³³

By June 29, Mr. Minnis finished a draft of the compact which incorporated Johnson Act concerns, provisions for compensation and term of the agreement, and all the other previously discussed factors.¹³⁴ Mr. Minnis hand delivered the final compact to Mr. Nance for approval by the State.¹³⁵

On July 2, a few more minor changes were made, and a revised final draft was distributed to the parties.¹³⁶ On July 6, 1992, the Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma unanimously approved the compact, and it was signed by the Tribe's Chairman and its Secretary/Treasurer.¹³⁷ On July 10, the compact was signed by Governor

122. Telephone Interview with Robert A. Nance, current Indian Gaming Negotiator for Oklahoma Governor David Walters (Sept. 16, 1992).

123. *Id.*

124. *Id.*

125. Minnis Interview, *supra* note 96.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Citizen Band Potawatomi Indians of Oklahoma Res. Pott #93-1 (July 6, 1992) (attached

Walters.¹³⁸ On August 27, it was approved by the state legislature's Joint Committee on State-Tribal Relations.¹³⁹ On October 23, 1992, the compact was approved by the Secretary of the Interior.¹⁴⁰

B. Contents of the Potawatomi-Oklahoma Gaming Compact

The compact begins with a resolution which sets out the rights and desires of the parties.¹⁴¹ This is followed by definitions, findings, and declarations of policy that closely mirror those in the IGRA.¹⁴² The parties agreed on a three-year automatically renewable term.¹⁴³

The State is given the right to inspect the premises, machines, and records of the Tribe's gaming operation.¹⁴⁴ The Tribe is also required to provide equipment for the State to remotely monitor all VLTs.¹⁴⁵ Various other specifications for the VLTs are enumerated.¹⁴⁶ The subjects of accounting and auditing and employment security are detailed.¹⁴⁷

The Tribe agrees to pay the costs of the compact, including a \$5000 payment to reimburse the State for negotiating costs.¹⁴⁸ The Tribe established an escrow account to pay future expenses of the State.¹⁴⁹

The compact concedes that the VLTs are gambling devices as defined by the Johnson Act.¹⁵⁰ It acknowledges that all three of the U.S. Attorneys in Oklahoma believe that importation of VLTs would violate federal law.¹⁵¹ The compact contains a detailed discussion of the Johnson Act problem and a procedure for testing the legality of the VLTs.¹⁵²

First, the Potawatomis agree to "defend, indemnify and hold harmless Oklahoma from any liability arising to Oklahoma from the importation of the

as Exhibit A to executed Potawatomi-Oklahoma Gaming Compact, *supra* note 3).

138. Potawatomi-Oklahoma Gaming Compact, *supra* note 3, at 12.

139. *Id.* The Joint Committee on State-Tribal Relations is comprised of ten state legislators, and is "responsible for overseeing and approving agreements between tribal governments and the State of Oklahoma." 74 OKLA. STAT. ANN. § 1222 (West Supp. 1992).

140. 57 Fed. Reg. 48, 428 (1992).

141. Potawatomi-Oklahoma Gaming Compact, *supra* note 3, at iii-iv.

142. *Id.* at 1-2.

143. *Id.* at 2-3.

144. *Id.* at 5.

145. *Id.*

146. *Id.* at 5-6.

147. *Id.* at 7-8.

148. *Id.* at 8-9. According to Susan Witt Conyers, "The \$5,000.00 cost does not begin to cover the state's cost for the negotiation — the original amount was intended to cover a pro rata share of costs for the Indian Negotiator." Conyers Letter, *supra* note 103. It does not include costs for in-house counsel, the Attorney General's office or the Oklahoma State Bureau of Investigation. *Id.*

149. Potawatomi-Oklahoma Gaming Compact, *supra* note 3, at 8-9.

150. *Id.* at 9-10.

151. *Id.* at 10.

152. *Id.* at 9-11.

VLTs under this compact."¹⁵³ The State was reluctant to enter into a compact for an activity which could be illegal. This clause shifted the burden for defending the legality of video lottery terminals to the Tribe.

However, post-importation defense is not the only burden the Tribe agreed to accept. The Potawatomis also agreed to follow a three-step procedure for assuring the legality of VLTs *before* beginning gaming operations.¹⁵⁴

The first step is an attempt to obtain written permission. If the Potawatomis obtain permission from the U.S. Attorney for the Western District of Oklahoma, they may bring the machines into the state.¹⁵⁵

If permission cannot be obtained from the U.S. Attorney, the second step is for the Tribe to seek a declaratory judgment that importation of the machines does not violate the Johnson Act.¹⁵⁶ Unlike the preceding provision, the declaratory judgment provision does not specify where the action must be filed. It merely requires that a "federal court of competent jurisdiction" decide whether importation of VLTs violates the Johnson Act.¹⁵⁷ If the federal court rules in the Tribe's favor, they may begin gaming operations.¹⁵⁸ If the federal court rules against the Tribe, presumably the decision would be appealed to the Tenth Circuit. If the federal court dismisses the declaratory judgment action without a decision on the merits, the compact provides a third step for testing the legality of importing VLTs.

The third step is a test, or direct challenge, to the threat of prosecution. The Tribe can import up to ten VLTs, simultaneously notifying the appropriate U.S. Attorney in writing of the action.¹⁵⁹ If the U.S. Attorney takes no action within thirty days, the State agrees to allow the Tribe to import as many VLTs as it desires, at the Tribe's risk.¹⁶⁰

The compact is accompanied by exhibits which describe the VLTs in detail, as well as regulations for technical specifications.¹⁶¹

C. Concurrent Negotiations: A State's Duty to Negotiate in Good Faith

When the various tribes were informed that video lottery terminals might violate the Johnson Act, they did not all react in the same way. As seen above, the Potawatomi Tribe dealt with the problem head-on by acknowledg-

153. *Id.* at 10.

154. *Id.* at 10-11.

155. *Id.* at 10.

156. *Id.*

157. *Id.* The Potawatomi's proposed gaming site is located within the Western District of Oklahoma. The other two federal court districts in Oklahoma have been interested and opinionated in the Potawatomi negotiations but would not have jurisdiction to decide the Potawatomi-Oklahoma compact's declaratory judgment question.

158. Potawatomi-Oklahoma Gaming Compact, *supra* note 3, at 10.

159. *Id.*

160. *Id.*

161. *Id.* at Exhibits B, C.

ing it in the compact. The State and the Tribe devised a method to test the legality of the machines.

The Ponca Tribe of Oklahoma was also involved in negotiations for a gaming compact with the State of Oklahoma. The Poncas interpreted the announcement of the Johnson Act problem as a change in the State's willingness to negotiate. On May 28, 1992, the Ponca Tribe broke off negotiations with the State. On June 6, the Tribe filed suit against the State in U.S. District Court for the Western District of Oklahoma. The Poncas alleged that the State had "failed to give good faith consideration to the Tribe's request for inclusion of various forms of machine gaming and casino gaming in the Compact negotiations."¹⁶²

The suit did not make it to court-ordered mediation, nor were the merits of the Poncas' bad faith claim ever heard. On September 8, 1992, Chief Judge Ralph Thompson held in *Ponca Tribe v. Oklahoma*¹⁶³ that it was unconstitutional for Congress to require a state, against its will, to enter into an agreement with a tribe regarding gambling activities on tribal land within the state.¹⁶⁴ Because the goal of the Ponca Tribe's suit was to try to *force* Oklahoma into an agreement, Judge Thompson dismissed it.

The decision was founded upon the Tenth Amendment and Eleventh Amendment. The Tenth Amendment reserves powers to the states that are not specifically enumerated in the Constitution.¹⁶⁵ The court recognized that Congress can *encourage* the states to adopt legislation that conforms to federal interests.¹⁶⁶ However, it drew a distinction at federal attempts to *force* state regulation.¹⁶⁷ The possibility exists that a state could be compelled to enter a compact against the state's wishes. Thus, a state would be forced into regulating gaming within its borders.¹⁶⁸ "A critical alternative is missing in the IGRA. — a State may not simply decline to regulate Class III gaming; it does not have the option of refusing to act."¹⁶⁹ Therefore, the court said that the IGRA creates an unconstitutional interference with the state's sovereign contracting powers under the Tenth Amendment.¹⁷⁰

The Eleventh Amendment prohibits suits in federal court "by Citizens of another State, or by Citizens or subjects of any foreign state," in which a state

162. Complaint at 7, *Ponca Tribe v. Oklahoma*, No. CIV 92-988T (W.D. Okla. filed June 6, 1992).

163. No. CIV 92-988T (W.D. Okla. Sept. 8, 1992).

164. *Id.*, slip op. at 5, 11.

165. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

166. *Ponca*, No. CIV 92-988T, slip op. at 10.

167. *Id.*, slip op. at 11.

168. *Id.*

169. *Id.*

170. *Id.*, slip op. at 1, 11-12.

is defendant.¹⁷¹ The Constitution does not expressly prohibit a suit by an Indian tribe against a state, although there is some precedent for such an expanded interpretation of a state's sovereign immunity.¹⁷²

In the *Ponca* decision, Judge Thompson recognized that a state may waive its Eleventh Amendment immunity, or Congress may enact legislation which alters the immunity.¹⁷³ However, the court said there was no indication that Oklahoma ever intended to waive its immunity.¹⁷⁴ Also, the court said that Congress did not clearly intend for the IGRA's federal jurisdiction clause to do away with the state's sovereign immunity.¹⁷⁵ "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."¹⁷⁶

The IGRA gave tribes a statutory sword that could be used to push states to the negotiating table. The district court's decision in *Ponca* takes that sword away and shifts the balance of power to the state. The ruling has sent ripples of uncertainty into the legal community.¹⁷⁷ The Ponca Tribe has appealed the decision,¹⁷⁸ and the case is currently pending before the Tenth Circuit.¹⁷⁹

IV. Problems with Tribal-State Gaming Compacts

The Oklahoma experience illustrates two serious problems with the IGRA. First, if the Johnson Act prohibits importation of machines that are the subject of the gaming compact, the Potawatomi agreement is worthless. The State represented that video lottery terminals would be acceptable, and the Tribe negotiated with the intent of setting up a VLT gaming operation. If the Johnson Act is applicable, the equipment cannot be imported, possessed, or used in Indian country.¹⁸⁰

Second, if the *Ponca* decision is affirmed on appeal, the negotiating power of the tribes will be far less than Congress intended. Tribes who want to conduct gaming activities will be limited to negotiating for what the state wants to allow. In effect, states will be able to impose their laws and regulations in Indian country. Each of these problems is discussed below.

171. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

172. See, e.g., *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578 (1991).

173. *Ponca*, No. CIV 92-988T, slip op. at 4.

174. *Id.*, slip op. at 5.

175. *Id.*, slip op. at 5-6.

176. *Id.*, slip op. at 6 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985)).

177. See, e.g., *Oklahoma Precedent May Help New Mexico*, OKLA. DAILY (Univ. of Okla., Norman, Okla.), Sept. 17, 1992, at 12.

178. Notice of appeal filed Oct. 6, 1992.

179. 10th Cir. No. 92-6331.

180. 15 U.S.C. § 1175 (1988).

A. Effect of Johnson Act on Gaming Activities

The Johnson Act defines a gambling device as a "machine or mechanical device . . . designed and manufactured primarily for use in connection with gambling, and . . . by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property."¹⁸¹ The State of Oklahoma and the Potawatomi Tribe agree that video lottery terminals are gambling devices.¹⁸²

The Johnson Act goes on to prohibit interstate transportation of a gambling device to a state which prohibits the device.¹⁸³ The statute implicitly presumes that states prohibit gambling devices.¹⁸⁴ However, an exception exists if a state has enacted a law allowing the particular device or allowing gambling in a certain area of the state.¹⁸⁵ If a gambling device is being transported to a facility "where betting is legal under applicable State laws," such transportation is not prohibited by the Johnson Act.¹⁸⁶ Section 1175 of the Johnson Act prohibits gambling devices within Indian country,¹⁸⁷ but the IGRA encourages class III gaming as a means of promoting tribal self-sufficiency.¹⁸⁸

As pointed out above, the Potawatomi-Oklahoma Gaming Compact provided alternatives for dealing with the Johnson Act. The U.S. Attorney for the Western District of Oklahoma would not issue a letter approving the use of video lottery terminals, so the Tribe filed a declaratory judgment action.¹⁸⁹ The court ruled against the Tribe, holding that the IGRA could not waive the Johnson Act, because video lottery terminals are not legal in Oklahoma.¹⁹⁰ The Tenth Circuit affirmed.¹⁹¹

The courts accepted the U.S. Attorney's assertion that a tribal-state gaming compact does not make betting legal under applicable state laws. Specifically, the U.S. Attorney for the Western District argued that if

Congress had intended to permit (as against Johnson Act concerns) anything that a state or state governor was willing to sign a compact for, it could have easily provided for that result by

181. 15 U.S.C. § 1171(a)(2) (1988).

182. Potawatomi-Oklahoma Gaming Compact, *supra* note 3, at 9.

183. 15 U.S.C. § 1172 (1988).

184. *Id.*

185. *Id.*

186. *Id.*

187. 15 U.S.C. § 1175 (1988).

188. 25 U.S.C. § 2702 (1988).

189. Citizen Band Potawatomi Indian Tribe v. Heaton, No. CIV-92-2095-W (W.D. Okla. filed Oct. 23, 1992).

190. Order of Feb. 2, 1993, *Heaton* (No. CIV-92-2095-W).

191. Citizen Band Potawatomi Indian Tribe v. Green, 995 F.2d 179 (10th Cir. 1993). John E. Green was substituted as defendant in place of Joe Heaton after Green took over the office of U.S. Attorney for the Western District of Oklahoma.

having § 2710(d)(6)'s language read as follows: The provisions of section 1175 shall not apply to any gaming conducted under a Tribal-State compact. [Instead, the IGRA makes the Johnson Act inapplicable] to gaming conducted under a compact with a state "in which gambling devices are legal. . . ."¹⁹²

If a state enters into a compact, do the gambling devices agreed to in the compact become legal in the state? Is a tribal-state gaming compact a law? "Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force."¹⁹³ Under this definition, the Potawatomi-Oklahoma gaming compact would certainly qualify as a law. It was negotiated by Oklahoma's Governor, was approved as provided by Oklahoma's State-Tribal Relations Act, and presumably was intended to have binding legal force to regulate gaming within the state's boundaries.

Did Congress intend tribal-state compacts signed pursuant to the IGRA to waive the Johnson Act's prohibition against use or possession of gambling devices in Indian country? Sen. Daniel Inouye (D-Haw.), one of the IGRA's sponsors, clarified the apparent conflict between the purposes of the IGRA and the Johnson Act: "The bill as reported by the committee would not alter the effect of the Johnson Act except to provide for a waiver of its application in the case of gambling devices operated pursuant to a compact with the State in which the tribe is located."¹⁹⁴

Tribal-state compacts are a relatively new creation, and the courts have not yet had a chance to define them in any detail. The most analogous creature is the interstate compact. The Constitution limits the rights of states to enter into agreements with other governments.¹⁹⁵ Congress must consent to such agreements.¹⁹⁶

Courts have consistently held that interstate compacts that have been approved by Congress have the force of law.¹⁹⁷ The U.S. Supreme Court has stated that "unless the compact to which Congress has consented is somehow

192. Defendant's Response to Plaintiff's Motion for Summary Judgment, Defendant's Cross Motion for Summary Judgment, and Brief in Support at 15, *Heaton* (No. CIV-92-2095-W).

193. BLACK'S LAW DICTIONARY 884 (6th ed. 1990) (citing *United States Fidelity & Guar. Co. v. Guenther*, 281 U.S. 34 (1930)).

194. 134 CONG. REC. 12650, Sept. 15, 1988, *quoted in* 57 Fed. Reg. 12382-01 cmt. (1988).

195. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

196. U.S. CONST. art. I, § 10, cl. 3.

197. See, e.g., *Oklahoma & Texas v. New Mexico*, 111 S. Ct. 2281, *reh'g denied*, 112 S. Ct. 27 (1991) ("[W]here the terms of the compact are unambiguous, this Court must give effect to the express mandate of the signatory States."); *Texas v. New Mexico*, 462 U.S. 554 (1983) (holding that congressional consent transforms interstate compact into law).

unconstitutional, no court may order relief inconsistent with its express terms."¹⁹³

The Constitution's Compact Clause was intended to prevent the states from binding with other governments in agreements which undermine the supremacy of the federal government.¹⁹⁹ If an interstate compact does not interfere with the supremacy of the United States, congressional approval may not be required.²⁰⁰ A tribal-state gaming compact does not interfere with the supremacy of the federal government. Rather, it promotes federal goals.

The Supreme Court has also said that Congress may consent to an interstate compact by authorizing joint state action in advance.²⁰¹ In the IGRA, Congress not only authorizes joint action between states and tribes — Congress *encourages* such joint action.²⁰² Congress clearly consents to tribal-state compacts in advance.

If interstate compacts have the force of law, then tribal-state compacts should as well. Tribal-state gaming compacts are not intended to undermine the supremacy of the U.S. government. They have been expressly authorized and endorsed by Congress as a means of promoting tribal sovereignty and self-sufficiency. Congress gave clear consent to gaming compacts and delegated specific approval duties to the Secretary of the Interior.

If courts choose to follow the precedents set by interstate compacts and the intent of Congress in the IGRA, tribal-state gaming compacts will be given the force of law. If courts seek rationale for some other conclusion, they will clearly be legislating from the bench.

The Potawatomi-Oklahoma gaming compact creates rights and responsibilities on each of the parties. It was authorized by Congress and approved by the Secretary of the Interior. The State of Oklahoma has agreed that the Potawatomi video lottery operation will be a place where betting is legal under applicable state laws. The tribal-state compact creates an exception to the Johnson Act, and the tribe should be allowed to import the VLTs without fear of criminal prosecution.

B. Effect of Ponca Tribe v. Oklahoma on Future Negotiations

As discussed above, the IGRA has a bias in favor of allowing tribes to operate gaming ventures. If a tribe is unable to reach an agreement with the state, the IGRA allows the court and/or the Secretary of the Interior to, in effect, decide what games the state will allow on Indian land within its borders. The state has a strong incentive to work with the tribe, in order to

198. *Oklahoma & Texas v. New Mexico*, 111 S. Ct. at 2294 (quoting *Texas v. New Mexico*, 462 U.S. 554, 564 (1983)).

199. *Cuyler v. Adams*, 449 U.S. 433 (1981).

200. *Id.*

201. *Id.*

202. 25 U.S.C. §§ 2701-2702 (1988).

make sure the final agreement reflects state interests. The state does not hold any similar bargaining chips or threats that it can wield as effectively against the tribe. The IGRA sets out a procedure which should result in a gaming compact that is favorable to the tribe.

The decision in *Ponca* turns the negotiating power upside down. A state can simply say "no" and walk away from the table without fear of having something forced upon it. This is clearly against the express intent of Congress. Congress intended the IGRA to promote tribal gaming.²⁰³ The Act was not directed toward protecting state interests. In fact, the Senate Select Committee on Indian Affairs said, "It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes."²⁰⁴

The Tenth Amendment rationale for the *Ponca* decision relies on *New York v. United States*,²⁰⁵ in which the U.S. Supreme Court held that Congress cannot "cross[] the line distinguishing encouragement from coercion."²⁰⁶ The *Ponca* decision said that a "critical alternative is missing in the IGRA — a State may not simply decline to regulate Class III gaming; it does not have the option of refusing to act."²⁰⁷

The federal government has an interest in promoting tribal government and self-sufficiency and can pass statutes to enable tribes to achieve these goals. The Indian Commerce Clause²⁰⁸ allows Congress to regulate commerce with Indian Tribes. Whether Oklahoma likes it or not, the federal government can intervene in the relationship between states and tribes. The Constitution specifically delegates such power to the United States.²⁰⁹

The Tenth Amendment rationale implies that states should be allowed to hold tribes hostage, by simply refusing to negotiate an IGRA-mandated compact or by limiting the scope of negotiations. In effect, Oklahoma would be imposing its statutes and regulations on tribal lands. This would contradict the well-established rule that "tribal sovereignty is dependent on, and

203. *Id.*

204. S. REP. NO. 446, 100th Cong., 2d Sess. 13 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3083.

205. 112 S. Ct. 2408 (1992).

206. *Id.* at 2428.

207. *Ponca Tribe v. Oklahoma*, No. CIV 92-988T, slip op. at 11 (W.D. Okla. Sept. 8, 1992).

208. U.S. CONST. art. I, § 8.

209. *Id.*

subordinate to, only the Federal Government, not the States."²¹⁰ The Tenth Amendment does not reserve to the states the right to govern Indian country.

The Eleventh Amendment foundation for the decision is also shaky. The court said that Oklahoma did not waive its sovereign immunity, which is true. However, the court also claimed that Congress may not have the power under the Indian Commerce Clause to abrogate state immunity. The court acknowledged that the Interstate Commerce Clause could be the source for congressional action to abrogate state immunity but refused to recognize the same power in the Indian Commerce Clause.

There may be some differences between the congressional power granted by Indian Commerce Clause and the Interstate Commerce Clause. Judge Thompson sees the former as weak and the latter as a powerful source of congressional authority. Others see the situation differently.

Felix Cohen wrote, "The commerce clause is the only grant of power in the Federal Constitution which mentions Indians. The congressional power over commerce with the Indian tribes plus the treaty-making power is much broader than the power over commerce between states."²¹¹

Justice John Marshall wrote, "As to trade with the Indian tribes, . . . it must stand on the same footing as foreign commerce and that among the states, as they are all given in the same sentence."²¹² The Supreme Court has also said that "Congress . . . has the exclusive and absolute power to regulate commerce with the Indian tribes, — a power as broad and as free from restrictions as that to regulate commerce with foreign nations."²¹³

The Tenth Circuit should reject the *Ponca* decision as an incorrect understanding of congressional power. The Constitution gives Congress authority to pass legislation which steers state-tribal relations toward federal and tribal goals. In passing the IGRA, Congress was explicitly shifting the balance of power toward Indians in gaming negotiations with the states. The clear meaning of the IGRA and the intent of Congress should be followed in overturning the district court's decision in *Ponca Tribe v. Oklahoma*.

C. Summary of Suggestions

The IGRA expanded states' control over Indian tribes by allowing states to negotiate with tribes regarding gaming activities. What had once been a questionable area of tribal sovereignty has been clarified. Indians do not have

210. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980)); see also *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (holding that Indian tribes retain sovereignty over their members and their land).

211. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 91 (Five Rings 1986) (reprint of Univ. of N.M. photo. reprint 1971) (1942).

212. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 120-21 (1824).

213. *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876).

exclusive control over Indian land. In effect, the states have been given a very loud voice on the council of any tribe that wants to conduct gaming activities.

The increased state influence over Indian country has been balanced by giving tribes the power to force good faith negotiations. The IGRA encourages gaming operations on Indian land by pushing the parties toward the negotiating table. If the state refuses to negotiate in good faith, a tribe can exercise its sovereign powers through the "cram down" provision of the IGRA.²¹⁴

In Oklahoma, the process that led to the Potawatomi gaming compact has been an eye-opener. It illustrates how the compact negotiation process can work and shows how it can break down. It also sets the stage for what games will be negotiable in the future.

Meanwhile, the Ponca Tribe's appeal to the Tenth Circuit will help determine how much power the respective parties will have in future negotiations. If the court affirms state sovereignty over Congress' purpose in passing the IGRA, the power of tribes to negotiate meaningful compacts will be gutted. States will be able to impose state rules on Indian land with little fear of repercussions.

The Tenth Circuit should recognize the shallowness of the State's Tenth Amendment and Eleventh Amendment claims. The Court should follow the well-established rule that Indians have sovereignty over their own land. The court should force the State back to the negotiating table to conclude an agreement which reflects state, tribal, and federal interests.

V. Conclusion

The Potawatomi-Oklahoma gaming compact illustrates legal issues that will have far-reaching effects in the field of Indian law. The applicability of the Johnson Act to devices destined for a legal Indian gaming facility is a roadblock that gaming opponents can use to strengthen state regulation of Indian country. Undoubtedly, the question is destined for the Supreme Court.

The Court will also be faced with whether states may use the Tenth Amendment and Eleventh Amendment as justification for walking away from negotiations with tribes who wish to enter into gaming compacts. Until the high court gives some firm, unambiguous guidance, tribal gaming is unlikely to become a reality in Oklahoma.

214. 25 U.S.C. § 2710(d)(7)(B)(vii) (1988).