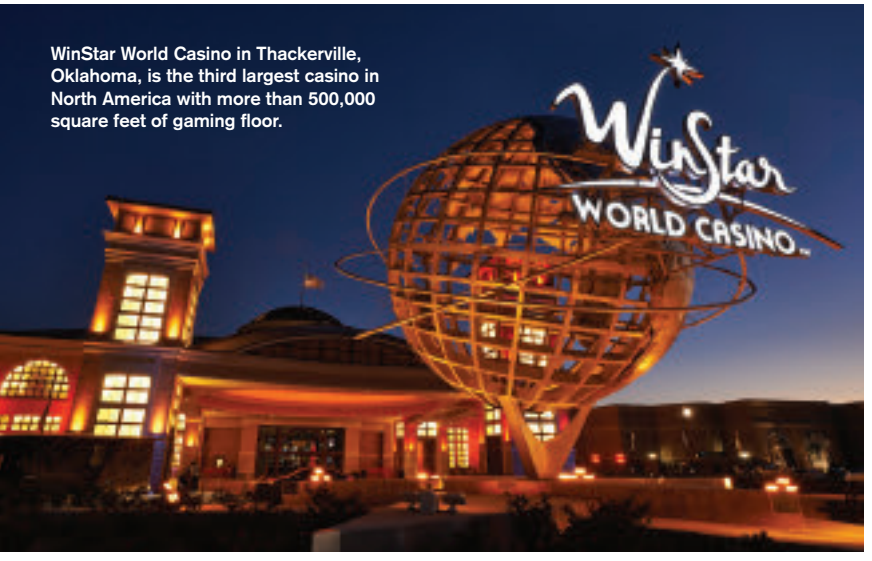
The Legal Development of Indian Gaming in Oklahoma Since 1988

BY GRAYDON DEAN LUTHEY, JR.

For gaming lawyers and their clients, Indian gaming in Oklahoma effectively started with the enactment of the Indian Gaming Regulatory Act, ("IGRA"), 25 U.S.C. § 2701, *et seq.* in 1988. That statute gave rise to two main items particularly impacting development of tribal government gaming in Oklahoma – the tribal/federal tension surrounding Class II game classification[1] and the tribal/state regulatory roles arising under the Class III tribal/state compact[2]. Largely through the tenacity of Oklahoma's unified gaming tribes and the support of vendors, both areas have developed favorably for the tribes and their citizens to fulfill IGRA's public policy purposes.[3]

A. CLASS II GAMING CLASSIFICATION IN OKLAHOMA

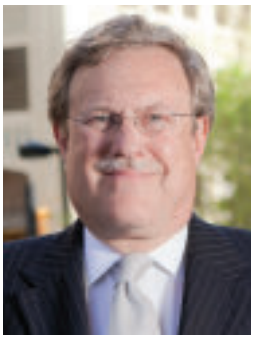
The development of Class II gaming in Oklahoma has been challenging for the tribes. Certain vendors focused on IGRA's purpose to use technology to expand player participation in Class II games. Those efforts resulted in the development of gaming technology that propelled bingo from the daubing of paper cards as numerically labelled ping-pong balls emerged from a blower to a high speed game facilitated by the use of technologic aids. Among the vendors leading the development of Class II Bingo was Multimedia Games ("MGAM"), which pressed the concepts of proxy-play and technologic aids.[4]



WinStar World Casino in Thackerville, Oklahoma, is the third largest casino in North America with more than 500,000 square feet of gaming floor.

The regulatory structure of IGRA places the primary regulation of Class II games with tribal gaming regulators, who have the legal ability to license games before deployment and to assure compliance with IGRA, including its classification requirements, during play.[5] The National Indian Gaming Commission ("NIGC"), the federal regulator created by IGRA, through its Chairman is required to approve any tribal ordinance or resolution concerning the conduct or regulation of Class II gaming if the ordinance or resolution contains certain items, none of which involve game classification.[6] The other principal regulatory power of the NIGC as to Class II gaming is retrospective-based fining and closure authority for violations of IGRA, NIGC regulations or tribal regulations, ordinances or resolutions.[7] Specifically, while permitting play of Class II games without a tribal/state compact, IGRA requires a compact before the play of Class III games.[8] As gaming progressed in Oklahoma the issue of classification of games utilizing technologic aids arose. IGRA allowed Class II games using such aids, but prohibited the play as Class II games utilizing a technological facsimile of the game.[9] Unfortunately, IGRA provided no definition of facsimile. In search for clarity, some tribes and vendors sought advisory opinions from the NIGC as to the classification of certain games. The NIGC obliged by issuing non-binding opinions usually through its general counsel's office and occasionally from its chairman,[10] but not final agency action of the Commission itself entitled to *Chevron* deference.[11] In the beginning, these opinions, on balance were favorable for gaming development.[12]

The NIGC, however, was not the exclusive federal regulator of Indian gaming. Because of its law enforcement powers, the United States Department of Justice also sought to regulate Indian gaming. The U.S. Attorney for the Northern District of Oklahoma instituted a civil forfeiture action, complete with seizure efforts pursuant to *ex parte* warrants, against MGAM claiming that certain gaming machines were unlawful Class III gaming devices operated in violation of the Johnson Act.[13] When MGAM was allowed to present its side to the court, summary judgment was entered against the government with a finding that the machines were technologic aids used in connection with a Class II game rather than facsimiles.[14] The Tenth Circuit affirmed that victory for Indian gaming.[15] The court of appeals, in upholding the district court's



Graydon Dean Luthey, Jr.

judgment for the tribe and MGAM, credited the NIGC's counsel's opinions that the game met the statutory criteria for a Class II game. The court then determined that the game was not an electronic facsimile, but instead was an aid to the game of bingo as defined in the code of federal regulations. Finally, the court held that Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game and is played with the use of an electronic aid.[16]

Unfortunately, the NIGC had adopted the Department of Justice's ("DOJ") aggressive posture. In 2000, the NIGC issued an opinion that an electronic pull-tab reader, similar to a label scanner at a supermarket checkout stand, was an unlawful gaming device and threatened an enforcement action. That NIGC conduct allowed the tribe and its vendor to institute a declaratory judgment and injunction action against likely NIGC and DOJ enforcement. After a trial on the preliminary injunction, the U.S. District Court for the Northern District of Oklahoma granted the preliminary injunction against the NIGC and DOJ. The injunction was made permanent. *Seneca-Cayuga Tribe of Oklahoma v. NIGC*, 327 F.3d 1019 (10th Cir. 2003). On appeal, the injunction was affirmed. Significantly, the Tenth Circuit rejected the federal government's attempt to use the Johnson Act against the tribe:

> If a piece of equipment is an IGRA Class II technologic aid, a court need not assess whether, independently of IGRA, that piece of equipment is a "gambling device" prescribed by the Johnson Act.

After that pull-tab litigation, the federal government did not resort to the federal courts in Oklahoma to press classification issues or create a circumstance allowing itself to be challenged in a declaratory judgment/injunction action. Instead, the NIGC attempted to utilize legislation, rulemaking and order-making to seize gaming licensing power not authorized by IGRA to declare, in advance of deployment, certain types of games to be Class III. The NIGC had allowed Oklahoma tribes to play a type of Class II gaming in which the player utilized one touch of the player station to play a game against players using other player stations (the "Game"). No NIGC or DOJ enforcement action had been brought as the Game proliferated resulting in substantial spending on facilities, hardware and tribal distributions.

Rather than expose its position to cross examination in light of the NIGC facsimile definition entitled to deference and its delay in enforcement to criticism in the courts, the NIGC embarked on a different path to classify the Game as Class III. Initially, the federal government sought legislation to modify IGRA to expressly classify the Game as Class III. Because no sponsor could be found, the legislative approach was abandoned. Next, the NIGC introduced proposed regulations, which if adopted in the federal rulemaking process, would have classified the game as Class III.[17] The Oklahoma Indian Gaming Association, comprised of gaming tribes and vendor associate members, led an effort with other tribes across the United States to oppose the proposed rulemaking. After a congressional committee field hearing in Oklahoma,[18] opposition from the NIGC's own Tribal Advisory Group, and continuous legal objections and threats of litigation if the rules were promulgated, the NIGC withdrew the proposed rules.[19]

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Having failed to secure either legislation or a rule to outlaw the game as Class II gaming, the NIGC Chairman then attempted to use his gaming ordinance approval authority under 25 U.S.C. § 2710 (b)(2) to declare the game Class III. Coincidental to the NIGC's withdrawal of the proposed classification regulations, the NIGC and an Alaska tribe with very few gaming machines began to execute a plan designed to have the game's classification be determined by the Ninth Circuit Court of Appeals on review of NIGC action, likely pursuant to a deference standard. The plan contemplated final agency action to which major gaming tribes and vendors

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with significant legal resources would not be parties. IGRA requires the Chairman to approve tribal gaming ordinance, if certain specific statutory requirements are met. Prospective game classification is not within the Chairman's review and approval powers. Nevertheless, the Alaska tribe submitted an ordinance which among other things, unnecessarily classified the Game as Class II. The Chairman, in an *ultra vires* act, in reviewing the ordinance rejected that classification. The Oklahoma Indian Gaming Association intervened on appeal to the full NIGC. The apparent plan was then abandoned, the appeal was dismissed and the ordinance issue was resolved. The NIGC did not review the Chairman's decision, which accordingly did not become final agency action. The classification question did not reach the Ninth Circuit.[20] To this day, no decision of the NIGC nor a federal court of appeals has held that the Game is a Class III game requiring a tribal/state compact. The Game, through various iterations, continues to be played in Oklahoma tribal casinos without criticism from the NIGC or DOJ. As a result, in light of over a decade without any enforcement action, the Game, with its legal genesis in the Mega-Mania and pull-tab decision, has served as a foundation of Oklahoma tribal governmental gaming with its billions of dollars invested and dispensed in the Oklahoma tribal and state economies.

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B. THE TRIBAL/STATE GAMING COMPACT IN OKLAHOMA

In addition to robust Class II gaming, tribes in Oklahoma enjoy a prosperous Class III gaming environment pursuant to their tribal/state gaming compact. The origin of Class III gaming in Oklahoma is unique. The compact is a creation of legislation in its most pure form – direct action of the people. The tribes acting in concert, and the state legislative and executive branch leaders negotiated the terms of a model form tribal/state gaming compact. The legislature approved the model form and referred it to a vote of the people. On November 2, 2004, the people approved the model form compact codified at 3A O.S. § 281.[21]

The compact has several unusual features. Initially, it is a one-size-fits-all agreement since there is no provision for its modification prior to execution, or post execution amendment, and no signature from the governor or any other state official is required for its execution.[22] No other compact is expressly authorized by statute. Once the tribal leader signs, and the Secretary of the Interior approves, the compact is operational. Additionally, in the absence of one of two technical facts, the compact is not subject to unilateral termination, nor is it subject to termination for breach.[23] Rather, the compact continues until January 1, 2020, and then if gaming terminals continue in race tracks, the compact automatically renews for 15 year terms.[24] Although the compact allows for either party to request a renegotiation of the exclusivity fees the tribe pays the state, the compact is silent as to any effect of failure to reach agreement as to the future fee amount once one party invokes renegotiation.[25]

The compact also contains interesting dispute resolution provisions. Although the state is a compacting party, state courts are not included in dispute resolutions. Rather, the compact provides only for arbitration before the American Arbitration Association to resolve disputed questions of interpretation and enforcement, and then only after unsuccessful negotiation between the tribe and the state.[26] After the arbitrator's award, the loser may seek *de novo* review in federal district court. Accordingly, if a dispute arises as to amendment, continuance or termination of the compact, the Oklahoma state courts will have no involvement.[27]

The arbitration provision has been used in three significant circumstances. After the Oklahoma Supreme Court determined, in contravention of long held rules of sovereign immunity, that state courts had subject matter jurisdiction over casino patron claims for injuries arising on trust property, the compact arbitration provision was invoked to interpret the subject matter jurisdiction provision for such claim contained in the compact.[28] A clear dispute between the state (through its Supreme Court) and certain tribes clearly existed. The arbitrator, a former federal judge, found for the tribes. The federal district court confirmed the arbitration awards. The Oklahoma Supreme Court, in a subsequent case, acknowledged that confirmation, and overruled its prior decisions denying sovereign immunity.[29]

Additionally, the state and tribe agreed that international internet gaming for servers in Indian country was allowed as a compacted game under state and federal law. When presented an agreed-to compact amendment for such tribal international internet gaming, the Secretary of the Interior refused approval finding that the game could not be exclusive and the state therefore could not receive an exclusivity fee. As a result, the state and a tribe initiated an arbitration. The arbitration was confined to the tribe and the state. Those parties agreed that the international internet gaming was lawful under the compact and state law and federal law. Even though the compact required a dispute exist for arbitration,[30] the arbitrator recognized there was no disagreement and accepted the parties' unopposed, united position. The award was confirmed by the federal district court without review of the merits. The matter raises the question of the precedential effect of an arbitration when the parties agree that no dispute exists and the further policy question as to why the governor would be incented to support a gaming expansion under a compact when the state receives no fee.[31]

Recently, the compact arbitration provision has been used to challenge state taxes imposed on tribal casino liquor sales. Although not directly related to any game, the dispute was real and hotly contested. The arbitrator, a retired Oklahoma Supreme Court Justice, found that federal preemption precluded the state tax. The award was confirmed by the federal district court in Oklahoma City, Oklahoma. While the result demonstrates what tribes can achieve in the politically neutral form of a contested arbitration, the greater significance is the availability of arbitration under the compact to resolve issues ancillary to gaming itself.[32]

The compact's provision as to the regulation of Class III gam-

ing is particularly significant in application. The compact makes clear that the tribes are the regulators of Class III gaming. The state merely monitors Class III gaming.[33] If the state perceives a problem it has no enforcement power. Rather, the state only may complain in writing to the tribe and cause a meeting to occur within thirty days to attempt to resolve the dispute. If the meeting fails to resolve the dispute, the state still has no enforcement power. Instead, the state only can institute an arbitration asking the arbitrator to enforce the compact. If the tribe loses the arbitration, the tribe may seek *de novo* review in federal district court. If the tribe loses in federal district court, it may appeal.[34]

This profound limitation on state enforcement power has recently been acknowledged by both the state itself and the Department of the Interior. The state, dissatisfied with the play of certain games, issued a Notice of Violation and a Cease and Desist Order to a tribe. When informed that it had no authority to do so, the state walked back its over-reacting conduct. By so doing, the state acknowledged it had no direct enforcement powers. Additionally, the state recently accused a tribe of unilaterally amending the compact without the approval of the Department of the Interior. In response to the state, the Department of the Interior told the state that no amendment had occurred requiring secretarial approval and instructed the state to use the compact arbitration provisions.[35] The state failed to pursue arbitration. Those concessions by the State of Oklahoma underscore the principal, and basically exclusive, regulatory authority over Class III gaming in Oklahoma, conferred by the people on tribes through the compact referendum.

CONCLUSION

Oklahoma tribes enjoy successful governmental gaming because they, with help from their vendor partners, had the fortitude to secure rights under IGRA. That coalition both defeated the federal government in federal court and blocked federal agency attempts legislatively and administratively to shut down successful games that complied with federal law. The tribes further coalesced to obtain enactment by the people of Oklahoma of a compact that provided for a dispute resolution mechanism used by tribes to their benefit and that relegated state regulation of Class III gaming to mere monitoring, while the tribes served properly as the actual regulator of the Class III governmental gaming which they operate. That tribal commitment has advanced tribal self-sufficiency, helped tribal citizens and provided a firm foundation for tribal government, economic success and political importance of tribes in the years to come in Oklahoma. ❊

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[1] 25 U.S.C. § 2703 (7)(i).
[2] 25 U.S.C. § 2710 (d)(1).
[3] 25 U.S.C. § 2702 (1).
[4] *See*, National Indian Gaming Commission ("NIGC") Chairman's letter to Larry Montgomery, July 26, 1995, approving proxy play; NIGC Chairman's letter to Larry Montgomery, July 10, 1996, approving MegaMania and a linked electronic player station as Class II; NIGC Acting General Counsel's letter to Larry Montgomery, July 23, 1997, determining MegaMania to be Class II; NIGC Acting General Counsel's letter to Clifton Lind, April 15, 2002, rejecting Class II status for MegaNanza and similar games.
[5] 25 U.S.C. § 2710 (b)(1).
[6] 25 U.S.C. § 2710 (b)(2).
[7] 25 U.S.C. § 2713.
[8] *See* n.2, *supra.*
[9] 25 U.S.C. § 2703 (7)(B).
[10] *See* n.4.
[11] *See, Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019, (10th Cir. 2002).
[12] *See* n.4, *supra.*
[13] 15 U.S.C. § 1171-1178.
[14] *U.S. v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 716 (10th Cir. 2002).
[15] *Id.*, relying in part on a victory for MGAM as to the same game in *United States v. 103 Electronic Gaming Devices*, 223 F.3d 1091 (9th Cir. 2000).
[16] After the MegaMania decisions, the NIGC promulgated a rule defining facsimile. 25 C.F.R. § 502.8, 67 F.R. 41172 (June 17, 2002) provides: Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.
[17] 72 F.R. 60483 (October 24, 2007).
[18] 110th Congress Committee on Natural Resources, Miami, Oklahoma, February 20, 2008; Newsok.com/article/320 66 57.
[19] 73 F.R. 60490 (October 10, 2008).
[20] NIGC Release (August 20, 2008). Withdrawal of Metlakatla Appeal.
[21] The statutory authorization and enactment of the compact suggests that the power to make, as opposed to the power to negotiation, compacts with tribes in Oklahoma is legislative, not executive. 3A O.S. § 280. The Oklahoma Constitution, which acknowledges tribes, in Art. I Sec. 3, makes the governor the state's chief spokesman to federal and other state governments. The constitution is silent to the governor and the tribes. Okla. Const. Art. VI, Sec. 8. Legislation has created a legislative Joint Committee on State Tribal Relations to oversee and approve agreements made between the state and the tribes. 74 O.S. § 1221.
[22] 3A O.S. § 280.
[23] *Id.* at Part 15 (D).
[24] *Id.* at Part 15 (B).
[25] *Id.*
[26] 3A O.S. § 281, Part 12.
[27] The removal of Oklahoma courts from compact dispute resolutions eliminates electoral concerns. Oklahoma state trial judges run for direct election in non-partisan races. Oklahoma appellate judges, after gubernatorial appointment from a list of three candidates provided by a constitutional judicial nominating commission, run for retention without an opponent.
[28] *Cossey v. Cherokee Nation Enterprises*, 2009 OK 6, 212 P.3d 447.
[29] *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 2013 OK 77, 315 P.3d 359.
[30] 3A O.S. § 281, Part 12.
[31] *In the Matter of the Referral to Binding Arbitration by the Iowa Tribe of Oklahoma and the State of Oklahoma of Disputes Under and/or Arising From the Iowa Tribe – State Gaming Compact, Arbitration Award*, 24 November 2015, Oklahoma City, Charles S. Chapel, Sole Arbitrator, confirmed, *Iowa Tribe of Oklahoma v. State of Oklahoma*, Case No. 5:15-cv-01379-R (W.D. Okla. April 18, 2016).
[32] *Citizen Band Potawatomi Nation v. State of Oklahoma*, No. 01-15-0003.3452 (AAA, April 4, 2016). *Citizen Band Potawatomi Nation v. State of Oklahoma*, No. 5:16-cv-00361 (W.D. Okla. April 13, 2016).
[33] 3A O.S. § 281, Part 8.
[34] 3A O.S. § 281, Part 12, *supra* at n.20.
[35] Assistant Secretary Kevin Washburn's letter to Jeffrey C. Cartmill, August 14, 2015.