United States Attorney General Janet Reno honored at the Sovereignty Symposium in 1994. The U.S. Department of Justice maintained an aggressive enforcement policy of enforcing the Johnson Act against tribes and their leaders within Oklahoma that engaged in gray area class II electronic gaming. Federal courts later ruled in favor of tribes in the early 2000s and the NIGC changed definitions to clarify the in class II distinctions. (Courtesy, Sovereignty Symposium, Inc.)

IGRA's Impact on Oklahoma Indian Country

The Infancy and First 15 Years of Battling for Class III Compacting

BY MIKE McBRIDE III

Indian gaming did not start when Congress enacted the Indian Gaming Regulatory Act of 1988 ("IGRA") three decades ago this year.[3] Successful commercial Indian gaming within Oklahoma Indian country predated IGRA and the Supreme Court's landmark decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), by another decade or more. Even with IGRA in place, however, Oklahoma remained a hostile environment for tribal gaming and tribal sovereignty. Tribes fought pitched legal battles with tenacity and significant (but internally scarce) resources to reclaim some sovereignty gradually assumed by the State of Oklahoma since statehood.

Early tribal gaming economic development required legal skirmishes with the state and the federal government over Indian country territorial boundaries and the extent of tribal powers. While courts have long held that state laws do not apply in Indian country,[4] Oklahoma has often ignored that much Indian country territory persists within the state. Even recent cases within the Tenth Circuit conflict with one another about whether Indian reservations still exist within Oklahoma: *Compare Murphy v. Royal*, 866 F.3d 1164, 1164 (10th Cir. 2017) (Muscogee (Creek) Nation reservation boundaries never disestablished by Congress and therefore Oklahoma lacks criminal jurisdiction over Creek Indian country)[5] *with Osage Nation v. Irby*, 597 F.3d 1117, 1117 (10th Cir. 2010) (Osage Nation reservation dissolved by 1906 Allotment Act, as contemporaneous understandings of the parties in 1906 and "Oklahoma's longstanding reliance counsels against now establishing Osage County as a reservation").

The decades-long battles involved reestablishing, taking back (and in some cases creating) tribal courts[6]; asserting the right to issue tribal vehicle license plates and opposing the State's imposition of income and motor vehicle taxes on tribal citizens[7]; opposing the State's taxation of motels and fuel; battling the State over its demands that tribes assess, report and remit state taxes on tobacco[8]; and challenging the State's decision to condition licenses for alcohol sales on a tribe's collection, reporting and remit of taxes on non-Indians.[9]

Early tribal "lawyer warriors" who advanced these battles were often under-funded and without strong legal precedents to bolster their positions. They fought with few resources and against strong

Continued on next page

Bob Rabon, Esq. litigated numerous landmark jurisdictional cases for the Choctaw and Chickasaw Nations for nearly 30 years including up to the U.S. Supreme Court. He was lead negotiator on numerous early tribal state compacts for tobacco, motor fuels and gaming. He litigated and settled the Arkansas riverbed case and the timer land case for the Chickasaw and Choctaw Nations. Rabon is a past President of the Oklahoma Bar Association.

F. Browning Pipestem (Otoe-Missouria, left) and Judge Joe Taylor (Choctaw, right) retired from the Oklahoma Court of Civil Appeals at Sovereignty Symposium on or about 1994. Pipestem litigated the *State v. Little Chief* case that helped reestablish jurisdiction for modern trial courts. Taylor serves as a Justice on the Seminole Nation Supreme Court today. (Courtesy, Sovereignty Symposium, Inc.)

Chad Smith, Esq. (Cherokee) and F. Browning Pipestem, Esq. (Otoe Missouria) at the Sovereignty Symposium in the early 1990s. Pipestem and Smith (who later served as Principal Chief of the Cherokee Nation) were legal pioneers for modern tribal sovereignty in Oklahoma. (Courtesy, Sovereignty Symposium, Inc.).

Continued from previous page

adversaries. Tribes won some battles but lost many others. During the first 15 years following IGRA, tribes faced a number of unique challenges that hindered compacted gaming within Oklahoma. These hurdles severely stunted early Indian gaming growth within Oklahoma while tribes in other parts of the United States flourished with lucrative class III tribal state gaming compacts in place.

However, these early legal battles set the stage for the meaningful tribal state gaming compacts that would finally come in 2004. This article chronicles the early development of Indian gaming within Oklahoma and highlights a few of the Indian gaming legal pioneers and important early gaming controversies.

OKLAHOMA'S ASSUMPTIONS & RESISTANCE TO TRIBAL SOVEREIGNTY

Oklahoma is the home to 38 federally recognized tribal nations ranging in size from the Modoc Tribe with 299 citizens to the Cherokee Nation, the largest, with nearly 350,000 citizens in 2017.[10] Up until the late 1970s and early 80s, state officials largely believed that tribal governments had become worn down, anemic and skeletal "social clubs" who did little more than provide minimal stewardship of remaining tribal and federal trust assets, provide nominal services to citizens and organize cultural powwows and stomp dances.

After the Supreme Court decided *Cabazon*, Congress quickly passed IGRA. Concurrently, Oklahoma lost a number of jurisdictional legal battles against tribal nations within the state. Tribes felt emboldened by jurisdictional wins but stymied by Oklahoma's unwillingness to negotiate expanded Indian gaming. State officials likely felt overwhelmed by IGRA's "good faith" requirement to negotiate gaming compacts with so many resident tribes. Perhaps more importantly, state officials probably feared a huge influx of casinos into a religiously conservative state that disfavored gambling. State representatives also believed that tribal citizens for the most part had gradually assimilated into broader Oklahoma society (making them "Oklahomans"), had largely became compliant with Oklahoma's laws and prevailing social mores and had given up on strengthening tribal governments.

With these prevailing beliefs, Oklahoma initially resisted negotiating class III gaming compacts with tribes in the late 1980s and 90s beyond off-track, pari-mutual horse racing that buoyed an aging and declining industry. Oklahoma tribes looked with envy at the lucrative class III gaming flourishing in states such as Minnesota and Connecticut that geographically contained fewer tribes, but the State insisted on loading legal contingency terms into the nascent gaming compacts negotiated in the early 1990s that undermined the compacts' survival from inception. Meanwhile, the United States Supreme Court bolstered the states' Eleventh Amendment immunity and neutered IGRA by declaring the "good faith" negotiation enforcement provisions unconstitutional in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 44 (1996).

Some claim state officials cowered to federal law enforcement threats due to federal crackdowns on *any* new electronic gaming.[11] Throughout the 1990s, United States Attorneys in Oklahoma's three districts amplified these beliefs by undertaking hardline stances regarding the advancement of technology and the use of video displays as aids to the play of class II bingo and pull-tabs. These stances bolstered Oklahoma's recalcitrance to entering into meaningful class III gaming compacts with tribes. Oklahoma tribes had to innovate and fight before achieving meaningful compacts a decade and a half later.

OKLAHOMA INDIAN TERRITORY

How did Oklahoma come to believe that tribal governments had withered away? Much of Oklahoma was once Indian Territory, essentially a federal dumping ground for many tribes forcibly removed from other parts of the United States.[12] Only a few tribes, such as the Wichita, Tonkawa, Osage, Quapaw, and Caddo Nations (often wide-ranging hunter/gatherers), had aboriginal connections within Indian Territory prior to removal.[13] The federal government initially through treaties, and then by force in the 1830s and beyond, forced a number of tribes to migrate and relocate their homelands to Indian Territory. After the treaty era ended in 1872, the United States undertook the allotment process in the late 1890s. The allotment policy and laws of this era broke up the tribal reservation land mass into individual parcels, created "surplus lands" for white settlement and made Indian lands alienable. This laid the groundwork for Oklahoma to become a state in 1907.

OKLAHOMA STATEHOOD & EVOLVING FEDERAL INDIAN POLICY

The allotment policy formally ended in 1928 with the publication of the Meriam Report, but by then tribes across the U.S. had lost over 110 million acres of land.[14] Tribal citizens did not by-in-large become United States citizens with the right to vote until 1924.[15] The assertion of Indian sovereignty and tribal powers remained largely dormant in Oklahoma from statehood until the 1960s. Tribes hunkered down and tried to survive with caretaker governments. Some, like the Five Tribes[16], had to endure federally-appointed leaders, varying federal policies of reorganization in the 1930s and then termination in the 1950s. Few tribes had anything of value to fight over within the young State. In fact, during the height of the termination era in the 1950s when Congress passed Public Law 280 that permitted retrocession of civil and criminal jurisdiction over Indian country, Oklahoma believed (erroneously) that no Indian country remained within Oklahoma and that it did not need to undertake any of the steps necessary to assume jurisdiction.[17] The Civil Rights movement of the late 1960s helped revitalize tribal sovereignty in Oklahoma and also shut the door on state assumption of criminal and civil jurisdiction over tribal lands without the consent of tribal governments.[18]

Things began to change in the 1970s. Under President Nixon's leadership, Congress undertook a policy of self-determination that encouraged tribal governmental self-sufficiency and self-determination. That policy continues to this day. One significant case during this period, *Harjo v. Kleppe*, 420 F.Supp. 1110 (D.D.C. 1976), *aff'd sub nom.*, *Harjo v. Andres*, 581 F.2d 949 (D.C. Cir. 1978), affirmed that the Muscogee (Creek) Nation could exercise self-government and ratify a new constitution, confirming the establishment of a national council form of government and its own courts. In that case, Principal Chief candidate Alan Harjo faced opposing candidate Claude Cox. Cox believed that as Principal Chief he would be the sole embodiment of the Creek tribal government under the Principal Chief's Act[19], and other federal laws and policy. The DOI backed Cox's view. Harjo brought suit against Cox and the federal government to contest Cox's authority to disburse tribal funds and enter into contracts on behalf of the Creek Nation without the prior approval of the Creek National Council.[20] Harjo obtained a declaratory judgment and injunction enjoining the BIA from exclusively dealing with the Principal Chief as the sole embodiment of the Creek tribal government. Ultimately Cox won the Principal Chief's election race, but the federal government and Cox lost the case. The modern, tripartite constitutional form of the Creek Nation government prevailed in court demonstrating that the federal government could not ignore or displace tribal laws regarding the functioning of tribal governments. This helped ignite greater tribal nationhood within Oklahoma among the Five Tribes and beyond.

Mike McBride III

HIGH STAKES BINGO & STATE PUSH BACK

The early days of high stakes tribal bingo within Oklahoma Indian country were chaotic, risky and uncharted territory. Oklahoma had very restrictive criminal gambling laws instituted in large part to reflect citizens' strong religious views. Yet, when non-profit groups, veterans and religious groups engaged in bingo and similar games, Oklahoma authorities looked the other way.[21] If charitable organizations engaged in bingo to raise money for their organizations, why couldn't tribes?

In addition to revising their constitutions and reestablishing tribal courts, tribes began to assert greater sovereignty through high stakes bingo. Tribes did not have much economic development, and early clashes between state and tribal sovereignty centered mostly on taxes and tobacco sales. Desperate and poor

Continued on next page

G. William Rice, then Attorney General of the Sac & Fox Nation, successfully argued the "car tags" case against Oklahoma in the Supreme Court in 1993. It was a major tribal jurisdictional win. The Sac & Fox Nation celebrates the day the Supreme Court issued the decision as an official holiday annually on May 17th as "Victory Day." Rice practiced with legal pioneer F. Browning Pipestem, with whom he wrote a number of early tribal codes together. He later taught at the University of Tulsa College of Law for many years before passing away in 2016. (Photo by John Lew, Courtesy of the University of Tulsa College of Law).

Court of Indian Appeals for the Anadarko area tribes, serving various courts of Indian Offenses within Oklahoma following the federal court and later Oklahoma Court of Criminal Appeals decision in *State v. Little Chief* recognizing Indian country jurisdiction marking the establishment of modern tribal courts in the 1980s. (L-r: Magistrate Judges Craig J. Franseen, Rebecca A. Cryer, Charles G. Tate, and Chief Magistrate Judge Arvo Q. Mikkanen in about 1992). (Courtesy, Oklahoma Indian Bar Association).

Judge Philip Lujan (Kiowa/Taos Pueblo) on right at the Sovereignty Symposium in the early 1990s. Judge Lujan has served as a tribal district judge and supreme court judge for many tribal governments throughout Oklahoma for about four decades. He is still Chief District Judge of the Seminole Nation of Oklahoma.

Professor Rennard Strickland (Cherokee), Julie Rorie, Esq. and Justice Yvonne Kauger of the Oklahoma Supreme Court in the mid-1990s. Strickland was editor-in-chief of Felix Cohen's Handbook of Federal Indian Law and a distinguished law dean and scholar. Strickland served as an expert witness in a major gaming/ jurisdiction federal case for the Creek Nation in mid-1980s. Kauger is the godmother of the annual Sovereignty Symposium, now in its 30th year, and an instrumental force behind Red Earth in Oklahoma City. She served as Chief Justice in 1996. Rorie has assisted with the Sovereignty Symposium from the beginning. (Courtesy, Sovereignty Symposium, Inc.).

L to R: Chairwoman Mildred Cleghorn, Ft. Sill Apache Tribe; Jerry Haney, Principal Chief of the Seminole Nation of Oklahoma and Bill Anoatubby, Governor of the Chickasaw Nation at the Sovereignty Symposium in about 1994. (Courtesy, Sovereignty Symposium, Inc.)

John "Rocky" Barrett, decades-long Chairman of the Citizen Potawatomi Nation. Barrett fought many tribal jurisdictional legal battles to advance tribal sovereignty. (Courtesy Citizen Potawatomi Nation).

Continued from previous page

tribal governments worked hard to supplement meager grants from the federal government to fund tribal services and assist their largely poverty-stricken citizens. Unlike state or local governments, tribal governments lacked tax bases from personal incomes of citizens, property, sales or other traditional forms of government revenue. Gaming provided some promise, leading some tribes to push the envelope with high stakes bingo halls. Oklahoma tribes took their lead from tribes who fought legal battles in other states.[22]

Some commentators place the birth of tribal commercial high stakes bingo halls and poker parlors with the Supreme Court's landmark ruling in *Bryan v. Itasca County*, 426 U.S. 373 (1976).[23] The case had humble beginnings that had nothing to do with gaming. A Chippewa couple Russell and Helen Bryan received a $29.85 property tax bill from the local, non-Indian country government for their mobile home situated on Indian land in northern Minnesota. They sought help from the legal aid lawyers at Leech Lake Legal Services to challenge the state assessment.[24] The Bryans lost in district court and before the Minnesota Supreme Court, but they won in the United States Supreme Court with a unanimous decision that the state could not regulate the tribe. Professor Kevin Washburn wrote that the *Bryan* decision "was the bedrock upon which the Indian gaming industry began."[25] After *Bryan*, tribes that conducted gaming under state law (including within Oklahoma) felt emboldened to draft their own, less-restrictive bingo laws and permit significantly larger prizes to draw business away from other state-regulated bingo and poker venues.[26] At about the same time a number of state governments also sought to expand state revenues by exploring potential state-sponsored gaming.[27]

Like the Seminole Tribe of Florida, several Oklahoma tribal governments developed high-stakes bingo in the late 1970s and early 1980s. State and local officials pushed back and sought to challenge, regulate and even criminally prohibit tribal gaming on tribal lands. The debate centered on whether tribal governments have the power to conduct gaming independently from state regulation. The success of the Florida Seminoles high-stakes bingo hall in Hollywood, Florida, and direct challenge to state regulatory power over it, caused Indian tribal leaders across the country, including Oklahoma, to cast their eyes on the Sunshine State.[28]

The Seminole Tribe of Florida sued the State Attorney General Bob Butterworth and the local sheriff after they attempted to close the Tribe's high stakes bingo hall in 1980.[29] Florida exercises civil and criminal jurisdiction over Indian lands as a mandatory Public Law 280 state. The Tribe won an injunction against the State, and the

[3] For general history and issues relevant to IGRA, *see generally*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 12 at 874-920 (Nell Jessup Newton ed., 2012) discussing IGRA's enactment and the relationships among tribes, states and the federal government (written and edited largely by Professor Kevin Washburn of the University of New Mexico, former General Counsel to the National Indian Gaming Commission ("NIGC") and Assistant Secretary—Indian Affairs, Department of the Interior); *see also* G. WILLIAM RICE, TRIBAL GOVERNMENTAL GAMING LAW: CASES AND MATERIALS (2006); STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING & TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE (2005) (Professors Light and Rand are long-time, affiliated educator members of IMGL); Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARVARD J. ON LEGIS. 39 (2007) (Professor Fletcher operates the Turtle Talk blog that catalogs timely and relevant federal Indian law court cases and scholarship).

[4] *See Bryan v. Itasca County*, 426 U.S. 373, 375-76 (1976); *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."); *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (Cherokee Nation occupies its own territory "in which the laws of Georgia can have no force . . .").

[5] For a recent partisan view of history from the State of Oklahoma's perspective arguing that "Congress dismantled Indian Territory and tribal boundaries to create Oklahoma" and that, therefore, no reservations exist, *see Petition for Writ of Certiorari, Royal v. Murphy*, No. 17-1107 (S. Ct. Feb. 7, 2018).

[6] *See* Dennis Arrow, *Oklahoma's Tribal Courts: A Prologue, the First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 OKLA. CITY U. L. REV. 5, 31-70 (1994) (discussing the history of tribal courts in Oklahoma, state court skirmishes and federal court battles); Mike McBride III, *Oklahoma's Civil-Adjudicatory Jurisdiction Over Indian Activities in Indian Country: A Critical Commentary on Lewis v. Sac & Fox Tribe Housing Authority*, 19 OKLA. CITY U. L. REV. 81, 88-133 (1994) (discussing early cases including *State v. Littlechief*, 1978 OK CR 2, 573 P.2d 263, "the wellspring from which developed the modern tribal court systems in Oklahoma").

Fifth Circuit affirmed the injunction order, holding that Florida could not enforce its laws on Indian country and that the Tribe's laws exclusively regulated its bingo operation, not Florida's laws.[30] This ruling emboldened tribes around the country to further expand their bingo and poker operations and increase the prizes.[31] One commentator calculated that tribes opened more than 180 bingo operations by 1983 (including many within Oklahoma), and the BIA guaranteed about $8 million in bingo hall construction loans in direct response to the *Butterworth* decision.[32] As noted by tribal gaming lawyer Henry Buffalo, Jr., "Word in Indian country travels fast."[33]

Following suit with the bingo expansion across the country, tribes in Oklahoma doubled-down and faced similar legal battles and police enforcement efforts. State district attorneys threatened arrest and prosecution of tribal leaders for operating bingo halls within their tribal Indian country. The Muscogee (Creek) Nation operated a high-stakes, paper bingo hall on Mackey Sandbar on the Arkansas River in south Tulsa.[34] Tulsa County District Attorney David L. Moss threatened prosecution.

The Creek Nation fought back to assert its sovereignty. Tribal attorney and gaming pioneer Geoffrey Standing Bear (now Principal Chief of the Osage Nation) and John Echols, a civil rights and criminal trial lawyer, brought suit in federal court to enjoin the state from interfering with the Nation's bingo operations. They enlisted the aid of law Professor Rennard Strickland (Cherokee/Osage)[35] as an expert witness on tribal sovereignty in the federal court, and they obtained a permanent injunction against the state. *Indian Country, U.S.A., Inc. v. State of Okla. ex rel. Oklahoma Tax Com'n*, 829 F.2d 967, 967 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988).

Other tribes fighting significant jurisdictional battles over bingo regulation included the Chickasaw Nation (*Oklahoma ex. rel. Oklahoma Tax Com'n v. Graham*, 822 F.2d 951 (10th Cir. 1987) and 846 F.2d 1258 (10th Cir. 1988)), and the Seneca-Cayuga Tribe (*Seneca-Cayuga Tribe of Oklahoma v. Oklahoma ex. rel. Thompson*, 874 F.2d 709 (10th Cir. 1989)). In *Seneca-Cayuga*, the Tenth Circuit affirmed a declaratory judgment and injunction against Oklahoma when it sought to assert subject-matter jurisdiction over tribal gaming activities within Indian country, despite the Oklahoma Supreme Court's earlier ruling in *State ex. rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 1985 OK 54, 711 P.2d 77 (Okla. 1985), holding that the state could exert such jurisdiction. The tide was turning in favor of tribal governments.

CABAZON & CONGRESSIONAL COMPROMISE

As early as 1984, Congress had attempted to step in and craft a legislative solution to tribal, state and federal gaming interests.[36] Knowing that if tribal gaming was to survive and prosper they needed to craft a compromise solution, early gaming tribes sought to protect the right to self-regulate gaming while also providing a balance with state interests.[37] However, hopeless division between tribes, the states, the federal government and the gambling industry over the kinds of games that tribes could utilize and their regulation stymied a legislative solution.

The Supreme Court's *Cabazon* decision forced a compromise in Congress between all the interests. The decision was a bombshell that no one in Indian country expected. *Cabazon* held that the State of California had no authority under Public Law 280 to enforce bingo and card game statutes on Indian reservations, because such laws were civil (regulatory) rather than criminal (prohibitory).

Cabazon was a huge win for tribes and in line with earlier federal cases out of Wisconsin and Florida. The decision opened wide the door for an immediate expansion of gaming without state control. States had no role in regulating gaming on Indian country. Alarm bells went off in Oklahoma City, other state capitals across the country and in Washington, D.C. State interests cried that organized crime would infiltrate and imbed within tribal gaming. These exaggerated fears never materialized, and, in fact, the Supreme Court discounted this threat in the *Cabazon* opinion. Nonetheless, Congress started working in earnest to seek a compromise and craft a balance of all the interests.

Terminology and perception were extremely important. The crafters of IGRA brilliantly prevailed upon changing the term "gambling," a corruption-loaded term, to "gaming," a friendly term conjuring images of gentlemanly (and womanly) competition in a fair and regulated environment, and engendering a less morally corrupt and unlawful image.[38]

Within IGRA Congress recognized tribal sovereign status but also diminished tribal sovereignty by imposing new legal impediments that ratcheted back *Cabazon*:

> 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.

25 U.S.C. § 2701(5) (2012).

Continued on next page

[7] *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 114 (1993) (absent an explicit congressional act to the contrary, states lack jurisdiction to tax tribal citizens who live and work in Indian country whether the area consists of formal or "informal" reservations, allotted lands or dependent Indian communities).

[8] *Okla. Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 505 (1991) (Tribe not subject to state sales taxes on sales made to tribal members, but liable for taxes on sales to non-tribal members; Tribe immune to suit for direct enforcement by the State nonetheless).

[9] *Citizen Band Potawatomi Indian Tribe of Okla. v. Okla. Tax Com'n*, 975 F.2d 1459, 1459 (10th Cir. 1992) (tribal suit challenging state's authority to require beer licenses for sales on Indian land); *Citizen Potawatomi Nation v. Oklahoma*, AAA No. 01-15-0003-3452 (2016) (Boudreau, Arb.)((declaring that "federal law protecting tribal sovereignty interests preempts and invalidates the State's sales tax on the Nation's sales in question" and enjoining the State from conditioning alcohol beverage licenses upon collecting, reporting and remitting state sales taxes to non-Indians at the Nation's economic enterprises on Indian country); *confirmed*, No. CIV-16-361-C, 2016 WL 3461538, at *3 (W.D. Okla. June 21, 2016), *vacated and remanded*, No. 16-6224, 2018 WL 718606, at *11 (10th Cir. Feb. 6, 2018) (provision providing de novo review of arbitration award in federal court (void under subsequent Supreme Court decision) material to state gaming compact requiring the striking of entire dispute resolution provision).

[10] *See generally* Citizen Potawatomi Cmty. Dev. Corp., Oklahoma Indian Nations 2017-2018 Directory (3rd ed. 2017). The Oklahoma Indian Affairs Commission published the Directory until Oklahoma Governor Mary Fallin disbanded the Commission early in her first administration. The Development Corporation now carries on the research and updates to the Directory.

[11] *See* Jess Green, "Indian Gaming 2000", Sovereignty Symposium 2000 at IV-48-50.

[12] *See generally* Blue Clark, Indian Tribes of Oklahoma: A Guide (2009) (listing 42 tribes although several relocated (Nez Perce to Idaho) and others do not have federal recognition (Natchez and Yuchi/Euchee)).

[13] *Id.* at 3-22 (discussing prehistoric indigenous ancestors and later comers to modern-day Oklahoma).

Gary Pitchlynn of Norman successfully argued the Ponca Nation compact case in the Tenth Circuit the early 1990s only to see the win later vacated by the Supreme Court in the *Seminole Tribe v. Florida* case in 1996.

U.S. Attorney Vicki Miles-LaGrange (W.D. Okla.); Jess Green, Steve Lewis (U.S. Attorney, N.D. Okla.) and John Raley (U.S. Attorney, E.D. Okla.) debated federal Indian gaming policy at the Sovereignty Symposium in about 1994. All three U.S. Attorneys within Oklahoma took hardline stances on battling the incorporation of electronics and video displays in class II bingo and pull tabs by Oklahoma tribes. (Courtesy, Sovereignty Symposium, Inc.)

Continued from previous page

Neither the states nor tribes liked IGRA—it was a significant compromise for all. While Congress asserted that it acted for the benefit of tribes, the law was significantly flawed, particularly with respect to Congress' Constitutional ability to force states to negotiate class III compacts with tribes.

IGRA set the stage for predictability, enabling outside financing and stable growth that has now expanded the Oklahoma gaming market to the second largest in the nation behind California. Still, IGRA had its flaws.[39] Oklahoma tribal gaming lawyer pioneer Gary S. Pitchlynn (Choctaw)[40] described the passage of IGRA as an act "by which Congress dissected another significant piece of tribal sovereignty in the name of protecting tribes."[41] Congress attempted careful balancing in IGRA, but that balance would later tilt in the states' favor (with the emasculated IGRA enforcement provisions) leaving Oklahoma tribes in a lurch compared to tribes within many other states prospering under nearly full casino compacts.

FEDERAL EFFORTS TO CURTAIL TRIBAL ELECTRONIC GAMING EXPANSION IN THE 1990S

By 1990, estimates of the total amount wagered on Indian gaming nationally had surpassed $1.3 billion.[42] By November 1, 1990, the NIGC published its proposed regulations to implement IGRA, including a game classification definition that electronic video games and so-called hybrid video bingo, lotto and pull-tabs would constitute class III gaming and require a compact with a state to lawfully operate.[43] After receiving 1,500 pages of comments, the NIGC made the Rules final on April 9, 1991.[44] A few of the uncertain definitions regarding class II Indian gaming would lead to more than a decade of intense litigation in Oklahoma.

The unwillingness of many states, including Oklahoma, to negotiate class III gaming compacts led to considerable litigation over game classifications, the use of technology and entertaining displays for class II gaming and the limits of tribal power to force states to negotiate in good faith. Opposition mounted in Congress as well.

Casino mogul (now President) Donald Trump opposed tribal gaming and tried to persuade Congress to amend IGRA to disadvantage tribes. In 1992, Trump's casino businesses had 12% of the total revenue in the U.S. gaming industry compared to 13% for *all* of Indian gaming.[45] Very little of that revenue came from Oklahoma Indian gaming. While Trump largely failed in lobbying the Senate to restrict tribal gaming by amending IGRA, the scope of Indian gaming remained hotly contested, debated and subject to considerable negotiation within Congress. The attempts to restrict Indian gaming included restricting the definitions of "Indian country" and "Indian tribe"; making it harder to place land into trust for gaming purposes;

[14] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 73-74 (Nell Jessup Newton ed., 2012) Tribes had approximately 156 million acres in 1881 and only had about 48 million acres by 1934 when Congress passed the Indian Reorganization Act. *See* INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 22 (Lewis Meriam ed., Johns Hopkins Press 1928).

[15] The Indian Citizenship Act of 1924 made "all non-citizen Indians born within the territorial limits of the United States" U.S. citizens. 8 U.S.C. § 1401(b) (2012). Even though Congress finally granted citizenship to all Native Americans born in the United States, some still could not vote because the right to vote was governed by state law, with some discriminatory laws persisting in some states until 1957. Other Native Americans received citizenship earlier through receipt of allotments, military service, marriage to white people or through special statutes or treaty provisions. *See* NEBRASKASTUDIES.ORG, http://www.nebraskastudies.org/0700/frameset_reset.html?http://www.nebraskastudies.org/0700/stories/0701_0146.html (last visited Jan. 21, 2018).

[16] The Five Tribes consist of the Cherokee, Chickasaw, Choctaw, Muscogee (Creek) and Seminole Nations. The group is also called the "Five Civilized Tribes", but they prefer the former group name. The group formed the "Inter-Tribal Council of the Five Civilized Tribes" in 1949 to exchange ideas and formulate policy. The group meets quarterly. *See* INTER-TRIBAL COUNCIL OF THE FIVE CIVILIZED TRIBES, http://www.fivecivilizedtribes.org/ (last visited Feb. 12, 2018).

[17] *See generally* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535-94 (1975); CAROLE E. GOLDBERG & DUANE CHAMPAGNE, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280 (2011).

[18] 25 U.S.C. §§ 1321(a), 1322(a) and 1326 (2012). The Indian Civil Rights Act of 1968 amended Public Law 280 to provide that no states could assume jurisdiction thereafter without the tribe's consent, and this consent could only be obtained by a majority vote of all the adult members of the tribe in a special election. For further discussion of the resumption of tribal adjudicatory and regulatory jurisdiction within Oklahoma Indian country, *see* L. SUSAN WORK, THE SEMINOLE NATION OF OKLAHOMA: A LEGAL HISTORY 188-192 (2010).

[19] The Act of October 22, 1970, 84 Stat. 1091, provided for "popular selection" of the Principal Chief in accordance with procedures established by the BIA and approved by the Secretary of Interior.

[20] *Harjo v. Kleppe*, 420 F. Supp. 1110, 1115 (D.D.C. 1976).

making class III gaming game-specific, slow and neutered from the utilization of video and technologic enhancements; and placing a moratorium on new class III gaming compacts. None of these attempted efforts took hold. IGRA remained intact despite the later gutting of "good faith" negotiation enforcement mechanisms by the Supreme Court in the *Seminole* decision in 1996.

Tribes became quite frustrated when governors in Oklahoma, New Mexico and Kansas refused to negotiate compacts in good faith with tribes. In *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), the tribe won – but this would not last. But Oklahoma tribes would litigate this issue in vein IGRA's "good faith" standard Congress imposed on states for class III compact negotiations before the *Seminole* decision.[46] Oklahoma, like a number of other states refused to negotiate gaming compacts with tribes. Congress contemplated under IGRA that if a state stonewalled the tribe during negotiations then the tribe could sue in federal court as an enforcement mechanism.

While the Tenth Circuit ruled that the IGRA's requirement of good faith negotiation overcame states' Tenth and Eleventh Amendment immunities, the U.S. Supreme Court ultimately ruled that Congress could not override the states' immunities in IGRA in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 44 (1996). *Seminole* was a significant setback for tribes. Gaming in most jurisdictions could not expand under IGRA without forcing recalcitrant states to negotiate class III compacts with tribes.

THE BATTLE OVER VAGUE DEFINITIONS SEPARATING CLASS II & CLASS III

With no class III compacts, the battle turned to class II gaming, which required no compact. IGRA (as well the NIGC's first implementing regulations) provided vague definitions with little or no guidance to distinguish between the different classes of gaming, i.e. class II (left within tribal control, rather than state control, with no revenues flowing to states) and class III (requiring a negotiated tribal / state gaming compact with a significant role for the state). Efforts to amend IGRA failed again.

The NIGC first attempted to define these key class II terms in its 1992 regulations, specifically the three definitions of particular importance for an understanding of the classification scheme: 1) "technological aid"; 2) "electro-mechanical facsimile" (electronic facsimile or facsimile); and 3) "other games similar to bingo." These definitions proved too narrow and restrictive on the one hand and, on the other hand, courts found these definitions failed utterly to provide any meaningful distinctions between an "aid" and a "facsimile." The lack clarity and distinction would lead to years of litigation and hard feelings between tribes and federal prosecutors.

EARLY COMPACTING EFFORTS & EVOLVING CIVIL REGULATORY REGIME

In *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Green*, 995 F.2d 179, 179 (10th Cir. 1993) (hereinafter "*Green*"), the Tenth Circuit held that since Oklahoma outlawed gambling devices, the state could not engage in a class III tribal/state compact for video lottery terminal games featuring pull-tabs (VLT) under state law. The negotiated compact contained provisions to deal with the legal uncertainty regarding the application of the Johnson (Gambling Devices) Act, 15 U.S.C. § 1171 et. seq (2012) ("Johnson Act"). Before the Tribe could engage in the VLT use, it had to obtain a declaration from the Department of Justice (DOJ) that either the Johnson Act would not apply to the compacted VLTs or that a court would adjudicate this conclusion. Chickasaw lawyer Jess Green observed that the DOJ inappropriately attempted to influence the negotiations between Oklahoma Governor David Walters and several tribes.[47] U.S. prosecutors allegedly threatened Johnson Act prosecutions of state and tribal officials if the compacts went forward.[48] Green noted that "[i]n no other state was such an aggressive federal [enforcement] policy implemented."[49] Even with the strong federal "influences," Governor Walters signed the compact, but hedged the state's bet by loading it with additional approval requirements. The DOJ opined that the Johnson Act applied to the VLTs, and, therefore, the Tribe then sought a declaratory judgment.[50]

The district court declared that, because slot machines are prohibited within Oklahoma, the VLTs would be prohibited as well, and therefore the IGRA's provision excepting the Johnson Act's application for class III games would not apply.[51] The Tenth Circuit affirmed declaring that "[b]ecause [Oklahoma's "gambling device" definition, OKLA. STAT. tit. 21, § 981] does not differ materially from the defini-

Continued on next page

[21] Oklahoma regulates charitable gaming through its criminal code and the Oklahoma Charity Games Act. *See* OKLA. STAT. tit. 21, § 981(1)(b) (2018); OKLA. STAT. tit. 3A, §§ 401-427 (2018). The law excludes from the definition of "bet" any bingo game or comparable game of chance operated by non-profit organizations. The State issues licenses to certain non-profit bingo games through the court clerk. Oklahoma law also permits lotteries on military bases and operated by Chambers of Commerce. OKLA. STAT. tit. 21, § 1051 (2018).

[22] Fletcher, *supra* note 3, at 45-47. Professor Fletcher writes that a few tribes within California, Florida, Maine, New York and Wisconsin opened early high stakes bingo halls out of desperation for economic development.

[23] *Bryan* held that a state did not have the right to assess a tax on a tribal citizen's property on tribal land unless Congress grants specific authority. The case stands for the general proposition that states lack regulatory authority over Indian people within Indian country. Minnesota is a Public Law 280 state, and many assumed that Minnesota's (and other PL 280 states' assumptions of civil and criminal jurisdiction) largely supplanted any remaining tribal jurisdiction. *See* Kevin K. Washburn, *The Legacy of Bryan v. Itasca County: How an Erroneous $147 County Tax Notice Helped Bring Tribes $200 Billion in Indian Gaming Revenue*, 92 MINN. L. REV. 919 (2008); Henry M. Buffalo, Jr., *Indian Gaming Success in the North*, SOVEREIGNTY SYMPOSIUM XV 2002, (JUNE 10-12, 2002), Gaming, Section III-22 to 40.

[24] Washburn, *supra* note 23, at 919-22.

[25] *Id.* at 921.

[26] Henry M. Buffalo, Jr., *Indian Gaming Success in the North*, SOVEREIGNTY SYMPOSIUM XV 2002, (JUNE 10-12, 2002), Gaming, Section III at III-22 to III-28.

[27] *History*, NATIONAL INDIAN GAMING COMMISSION, https://www.nigc.gov/commission/history (last visited Feb. 12, 2018).

[28] *Seminole Tribe of Florida v. Butterworth*, 491 F.Supp. 1015, 1015 (1980), *aff'g, Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310, 310 (5th Cir. 1981).

[29] *Seminole Tribe of Florida v. Butterworth*, 491 F.Supp. 1015 (1980).

[30] *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310, 310 (5th Cir. 1981).

[31] Tribes in California and Wisconsin also fought early battles against state enforcement actions. *See Barona Group of the Captain Grande Band of Mission Indians, San Diego, California v. Duffy*, 694 F.2d 1185, 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 518 F.Supp. 712, 712 (W.D. Wis. 1981).

Lawyer warrior Jess Green, inducted into the Chickasaw Nation Hall of Fame in 2011, he passed away in 2012. Green was the longtime chair of the Sovereignty Symposium's annual gaming panel for a decade and a half. He helped litigate several key class II gaming classification cases. (Courtesy of Chickasaw Nation).

U.S. Attorney for the Eastern District of Oklahoma John Raley, Jess Green, Esq. and Harold Monteau, Chairman of the National Indian Gaming Commission debating gaming policy at the Sovereignty Symposium in about 1995. (Courtesy, Sovereignty Symposium, Inc.).

Continued from previous page

tion provided by the Johnson Act . . . we conclude that Oklahoma is not a state 'in which gambling devices are legal'"[52] In reaching this conclusion the panel rejected the Tribe's position that the VLTs would be lawful under the compact, because Oklahoma regulated lotteries and video games rather than outright prohibiting them.[53]

It is highly doubtful that the courts would decide *Green* the same way even shortly after the decision. Oklahoma passed the "Oklahoma Charity Games Act",[54] which became effective in December 1992 and authorized the use of electronic and mechanical devices in gaming, followed shortly by the "Amusement and Carnival Games Act".[55] These Acts significantly liberalized Oklahoma's gambling laws beyond the legal regime that the *Green* court considered in the record. Nonetheless, federal law applies state criminal laws prohibiting gaming in Indian country, except to the extent preempted by IGRA.[56] Thereafter, for a period of many years all tribal efforts to negotiate compacts for additional class III gaming in Oklahoma (beyond parimutuel off-track horse betting) floated like a lead zeppelin. It would be another decade before the entry of meaningful gaming compacts.

Meanwhile, just a year later in 1994, Oklahoma voters considered—and rejected—another public referendum that involved offering a state lottery. The failed plebiscite highlighted the strong and continuing conservative, religious and populist sentiments of Oklahoma and its citizens. Pent up frustrations on failed compact attempts led to redoubled tribal efforts to push the nebulous class II boundaries; it became a do-or-die situation for Oklahoma tribes agonizing over revenue to fund government operations and services.

Tribal gaming lawyer Gary Pitchlynn observed that, "Oklahoma Tribes have watched other tribes around the country prosper from the burgeoning gaming industry while witnessing their own bingo industry falter and decline."[57] Those that gained agreements already prospered; while others that did not, fell behind. While Oklahoma's Constitution, one of the longest in the United States, contains no prohibition on gambling, the State, the DOJ and the NIGC clung to restrictive views of gambling in Oklahoma, leaving Oklahoma tribes feeling thwarted.

While gambling laws continued to erode (and social mores to evolve) within Oklahoma during the 1990s, religious and political resistance to tribal gaming remained. The Governor would not enter into meaningful gaming compacts with tribes beyond off-track horse betting. This political resistance continued to block Indian gaming growth. As noted by Jess Green in 1994:

> If Indian gaming is the new buffalo for Indians, circumstances appears (sic) to be moving to fence Oklahoma out of the primary migration path[,,] for without devices to count pull tabs, and without class III compacts, the full potential of Indian gaming in Oklahoma cannot be reached.[58]

The Oklahoma stance, along with the NIGC and the Justice Department position that video enhancements were "facsimiles" of a game rather than an "aid" to the play of the game, allowed the DOJ to use the Johnson Act to great effect to curb enormous revenues that Oklahoma tribes began to enjoy by applying entertaining electronic

[32] William E. Horwitz, *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, 164 (1996) (footnotes omitted).

[33] Buffalo, Jr., *supra* note 26, at III-24-25 (detailing the increased operations of the Fond du Lac Band of Lake Superior Chippewa and the Shakopee Mdewakanton Dakota Community, both in Minnesota).

[34] The location is now the expanded site for the Creek Nation Margaritaville Hotel and Casino Resort that boasts a concert venue and Ruth's Chris Steakhouse. The Creek Nation reportedly financed the recent Margaritaville expansion with $380 million. *See Indian Country, U.S.A., Inc.* , 829 F.2d at 969-73 (describing the Mackey site as Indian country).

[35] Professor Strickland was Editor-in-Chief of COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.), and a past President of the Association of American Law Schools and the Society of American Law Teachers. He has served as a law school professor and/or Dean at a number of law schools, including the University of Tulsa, Oklahoma City University, and the University of Oregon. He remains Senior Scholar in Residence at the University of Oklahoma. The State unwisely challenged his credentials as an expert at trial.

[36] Michael D. Cox, *The National Indian Gaming Commission and the Challenge Ahead*, SOVEREIGNTY SYMPOSIUM V, (JUNE 9-11, 1992), Gaming, Section 8, at 3. Cox was General Counsel to the fledging NIGC that had just established its first regulations. Michael D. Cox, *The Indian Gaming Regulatory Act: An Overview*, 7 ST. THOMAS L. REV. 769 (1995); Henry Buffalo, Jr. wrote that the Bureau of Indian Affairs helped bring together a task force on Indian gaming comprised of tribal leaders and their lawyers as early as 1983 to develop strategy and policy for potential national legislation. Buffalo, Jr., *supra* note 23, at III-29. Buffalo noted the formation and first meeting of the National Indian Gaming Association in February 1985. *Id.* Cox has written that Bureau of Indian Affairs officials first established tribal gaming as an economic development policy during the Reagan administration and supported tribal bingo enterprises by approving tribal gaming codes and providing loan guarantees for financing of building bingo halls. Cox *Overview*, *Id.*at 771-73.

[37] Buffalo, Jr., *supra* note 23; FRANKLIN DUCHENEAUX AND PETER S. TAYLOR, TRIBAL SOVEREIGNTY AND THE POWERS OF THE NATIONAL INDIAN GAMING COMMISSION: AN ANALYSIS 6 (2000); Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L.J. 99 (2010).

[38] *Compare* 15 U.S.C. § 1175 (2012) (the blunt Johnson (Gambling) Devices Act, a 1950s-era federal criminal statute directed at combating organized crime), *with* 25 U.S.C. § 2701 *et seq.* (2012) (IGRA with the stated policy of "promoting tribal economic development, self-sufficiency, and strong tribal governments").

displays to class II bingo and pull tabs. Nonetheless, Oklahoma tribes pushed forward with innovation and litigation.

THE CLASH OF STATUTES: IGRA VS. JOHNSON ACT

The problem was that without more specific definitions in IGRA, confusion ensued as to the difference between a permissible "electronic aid" and a prohibited "electronic facsimile."[59] To confuse things even more, both the NIGC and the DOJ perceived a conflict with another gambling statute, the Johnson Act, a criminal law prohibiting gambling devices. Congress' 1988 policy behind the IGRA—a civil regulatory statute—was to promote economic development and encourage tribal gaming within Indian tribal jurisdictions by setting up a classification scheme. However, Congress' policy behind the Johnson Act—a 1950s era criminal statute—was to criminally prohibit the use of "gambling devices."

The two statutes support diametrically opposed Congressional policies and, thus, create inherent and irreconcilable conflicts regarding "electronic technologic aids" when read together. The Johnson Act is meant to restrict and criminally prohibit gambling. The IGRA is meant to encourage tribal economic development by permitting gambling. The NIGC adopted regulations in 1992 that applied the Johnson Act "gambling devices" definition to electronic equipment.[60]

Within Oklahoma, class III gaming was still limited to off-track betting. Tribes and enterprising manufacturers continued to push the envelope with increased use of technologic aids to the play of bingo and pull-tabs. While IGRA specifically stated that the Johnson Act would not apply to class III compacting gaming[61], IGRA remained silent as to the Johnson Act's application to class II games and advancing technology and aids to class II play.

This led to contention over whether the Johnson Act applied to class II games under IGRA. The Johnson Act was the strongest weapon remaining to reach into Indian country to stifle Indian gaming in Oklahoma. Recall that if state criminal and civil regulatory laws had no force on tribal lands, only federal officials could step in and enforce federal law to regulate Indian gaming. The Johnson Act expressly prohibits gambling devices in Indian country, but IGRA exempted class III games from Johnson Act coverage. U.S. Attorneys and the Justice Department sought to apply the Johnson Act to class II aids to the play of bingo and pull tab while tribes maintained that Congress intended for class II to grow with "maximum flexibility" and to embrace future advances in technology to enable networking among tribal gaming facilities. Most of those battles originated in or were fought within Oklahoma Indian country.

The early Oklahoma gaming battles necessarily went well beyond compacting efforts when the State refused to negotiate meaningful compacts. Tribes felt hamstrung in their attempts to achieve expanded gaming as had tribes in other parts of the country. Without the prospect of engaging in broader casino gaming under a Class III gaming compact with Oklahoma,[62] several Oklahoma tribes fought pitched battles to expand tribal gaming within class II.

After several decisions including *Cabazon Band of Mission Indians v. National Indian Gaming Com'n*, 14 F.3d 633 (D.C. Cir. 1994) (adjudicating an electronic pull-tabs game played as a popular class II game within Oklahoma tribal bingo halls), the District of Columbia Court of Appeals ruled that IGRA excludes electronic facsimiles from class II games when those games are wholly incorporated into an electronic or electromechanical version. Shortly thereafter all U.S. Attorneys for the three districts within Oklahoma issued letters to tribal leaders demanding removal of video gaming pull tab machines from play within Oklahoma and threatening criminal prosecution in short order.[63]

THE RESORT TO TRIBAL COURT FOR CLASS II CLARIFICATION

Undeterred, the Eastern Shawnee Tribe of Oklahoma developed a paper pull tab game that utilized an electronic reader to scan paper pull tabs and display an image on a video screen when the machine dispenses the paper pull tab. The Tribe's Gaming Commissioner prohibited the game. Bypassing the federal enforcement threat impasse, the Tribe sought a court ruling from the CFR Court instead.

Steve Lewis, the U.S. Attorney for the Northern District of Oklahoma, took the view that if any gaming device plugged into the wall, it was an unlawful class III electromechanical facsimile of a pull tab game. Lewis also chaffed at any tribal gaming establishment that called itself a "casino" instead of a bingo hall. The Eastern Shawnee Tribe's casino manager sought and obtained a resolution permitting the federal "CFR" Court of Indian Offenses serving the Tribe to de-

Continued on next page

[39] *See* generally, Alan Meister, PhD.'s annual Indian Gaming Industry Report, published by Casino City Press.

[40] "Tribal attorney Gary Pitchlynn has spent most of his career helping Indians find equal footing in the casino industry." *Lone Wolf*, GLOBAL GAMING BUSINESS MAGAZINE, Dec. 21, 2011, https://ggbmagazine.com/article/lone-wolf/.

[41] Gary S. Pitchlynn, *Delaying the Progress of Indian Gaming in Oklahoma: Is the State Running Out of Excuses?* SOVEREIGNTY SYMPOSIUM XV 2002, Gaming, Part III at 1.

[42] Meister, *supra* note 39; Cox, *supra* note 36, at 2. The NIGC did not begin to publish compiled gross gaming revenue for the Indian gaming industry until 1995. Noted economist Alan Meister and Nathan & Associates started the annual Indian gaming survey in 2001.

[43] Cox, *supra* note 36, at 11.

[44] *Id.* at 11-14.

[45] Jess Green, *Indian Gaming 1994*, SOVEREIGNTY SYMPOSIUM VII (June 6-9, 1994) Section 5, at p. 13, fn. 34 (citing Standard and Poor's Industry Surveys: Leisure-Time, Nov. 12, 1992). Today, Oklahoma Indian gaming alone has about 13% of gaming revenue in the United States—Indian gaming and non-Indian commercial gaming combined. *See* Meister, *supra* note 39.

[46] *Citizen Band of Potawatomi Indian Tribe of Oklahoma v. Green*, 995 F.2d 179, 179 (10th Cir. 1993) (prohibiting certain electronic games for tribal/state compacted gaming as inconsistent with Oklahoma laws and that Oklahoma laws were prohibitory rather than regulatory); *Ponca Tribe of Oklahoma v. State of Oklahoma* 834 F.Supp. 1341 (W.D. Okla. 1992), *aff'd in part, rev'd in part*, 37 F.3d 1422 (10th Cir. 1994) *vacated and remanded*, 517 U.S. 1129 (1996) (following *Seminole Tribe v. Florida*).

[47] Jess Green, "Indian Gaming 2002", III-73 to 74, SOVEREIGNTY SYMPOSIUM XV 2002 and generally, "Indian Gaming 1995", SOVEREIGNTY SYMPOSIUM VIII (June 5-8, 1995), Section 7.

[48] Jess Green, *Indian Gaming 2000*, SOVEREIGNTY SYMPOSIUM 2000, IV-43, IV-49. Green wrote in comparison to California where DOJ lawyers and the NIGC did not take positions on Johnson Act enforcement:

> In Oklahoma, however, all United States District Attorneys were active players in reducing Indian gaming. As the Citizen Band Potawatomi Tribe neared negotiation completion with the state of Oklahoma on a viable gaming compact, Oklahoma United States District Attorneys wedged themselves in the negotiations by reportedly threatening Johnson Act prosecutions for both state and tribal officials. The interference resulted in the Indian government seeking a declaratory judgment as:
>
> > Oklahoma negotiated for this condition because the U.S. had informed the state the importation of VLTs under the compact could subject both Oklahoma and the tribe to liability under the Johnson Act which prohibits possession or use of any gaming devise on Indian land.
>
> *Id.*

The late Judge George Tah-Bone (Kiowa) at the Sovereignty Symposium. Judge Tah-Bone decided the *Captain v. Ross* (CIO Eastern Shawnee 1995) case holding that an early paper pull-tab game using video display aids constituted a class II game under IGRA. (Courtesy, Sovereignty Symposium, Inc.)

Justice Yvonne Kauger of the Oklahoma Supreme Court and Judge Stephanie Seymour of the U.S. Court of Appeals for the Tenth Circuit at the Sovereignty Symposium in the mid to late 1990s. Kauger is the godmother of the Sovereignty Symposium. Seymour is a now a senior judge and previously, Chief Judge of the Tenth Circuit. Seymour authored a number of important tribal sovereignty decisions including the *Indian Country U.S.A. v. Okla. Tax Comm'n* case from 1987. (Courtesy, Sovereignty Symposium, Inc.)

Continued from previous page

cide the dispute.[64] The district court issued a restraining order against the gaming commissioner and ruled the game constituted a class II game under IGRA as the video display was a visual aid that did not impact the outcome of the game.[65] Upon service of the lawsuit and given the opportunity to weigh in on the litigation, Lewis sent a letter to Judge George Tah-Bone stating that "[n]either the CFR nor a tribal court has jurisdiction to enter a declaratory judgment regarding the classification of a gaming device."[66]

U.S. Attorney Steve Lewis refused to abide by the ruling, obtained a search warrant and, with scores of FBI agents, raided the Tribe's Bordertown casino, seized devices and sought to forfeit bank accounts and gaming devices. The Tribe in turn filed a federal lawsuit against the U.S. Attorney.[67] Ultimately, the Tribe and the U.S. Attorney settled the dispute with the government returning the money and dismissing its proceedings, and the Tribe, under continued threat of prosecution of individual tribal leaders, agreeing not to use the gaming devices. The game was technologically flawed under the legally evolving jurisprudence interpreting pull-tabs, class II and Johnson Act devices, but it would set the stage for future battles. Try as he and others might, U.S. Attorney Lewis could not stem the innovation and legal challenges to class II aids under IGRA. Other legal test cases with better class II technology would follow shortly.

IGRA CLASS II INNOVATION & DETERMINATION

Tribes and creative manufacturers intensified efforts to conceptualize, engineer, test and offer aids to the play of bingo and pull tabs utilizing increasingly sophisticated and visually appealing electronics to aid the games' play, entertaining video displays and captivating sounds. These innovators also pioneered networked games, so players could compete with each other—a key class II distinction—instead of stand-alone slot machines that use random number generators as a game of chance. IGRA's legislative history discussed the intent to permit maximum flexibility and the use of evolving technology. In following years, networked game architecture would become the standard for almost all electronic gaming by allowing for easier control, maintenance, accounting and ease of changing game themes.

By July 10, 1996, the NIGC Chairman issued a letter finding MegaMania, an electronically broadcast bingo game, a class II game under IGRA. However, shortly thereafter, political changes took hold, and the NIGC began adding caveats to game classification opinions. The letters added that the DOJ and individual U.S. Attorneys could have a different view and that the DOJ shares responsibility with the NIGC. Moreover, they noted that other federal officials (i.e. prosecutors) could determine that the Johnson Act applies to class II devices.[68]

Thereafter, in mid-1997, the three United States Attorneys within Oklahoma agreed to meet with tribal leaders and discuss electronic-aided bingo and how far the DOJ would go in its enforcement of the Johnson Act.[69] At about the same time, the NIGC issued separate classification opinions that Rocket Bingo and Multimedia Bingo machines that contained electronic and networked elements would constitute class II games under IGRA and would not require a compact for play. While the DOJ endorsed the NIGC's Rocket Bingo opinion, the prosecutors cancelled the proposed tribal meetings.[70] U.S. Attorney Lewis thereafter ignored calls to meet with tribal leaders and sent a letter to Multimedia Games disagreeing with the

[49] *Id.* at IV-49.
[50] *Green*, 995 F.2d at 180-81.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] OKLA. STAT. tit. 3A, § 401 *et. seq.* (2018).
[55] OKLA. STAT. tit. 3A, § 501 *et. seq.* (2018).
[56] 18 U.S.C. § 1166 (2012).
[57] Pitchlynn, *supra* note 41, at 1.
[58] Jess Green, *supra* note 45, at 15. Jess Green described the scope of Indian gaming in Oklahoma as of 1994 as:
> focused, with [the] exception of Shawnee and Tulsa, on perimeter areas. The Chickasaws operate a large hall on Exit 1 on Highway [Interstate] 35 just out of [North] of Texas; the Choctaws have a large hall near the Texas border south of Durant; three Indian halls of size are located in the northeast corner of the state with the Eastern Shawnee have a high reputation for success. In north central Oklahoma near the Kansas border the Kaw, Ponca and Otoe-Missouria tribes have gaming halls. Economically, these locations can bring millions of outside dollars to Oklahoma. Their success could be greatly multiplied if class III gaming is implemented in Oklahoma.

Id. Jess Green was one of two General Members (Oklahoma) of the International Masters of Gaming Law. He moderated annual Indian gaming panels at the Sovereignty Symposium for about a decade and a half. Jess Green passed away in 2012.
[59] *See generally* Heidi McNeil Staudenmaier & Andrew D. Lynch, *The Class II Gaming Debate: The Johnson Act vs. the Indian Gaming Regulatory Act*, 74 MISS. L.J. 843 (2004) (Staudenmaier is a founding member and past-president of IMGL).
[60] D. Michael McBride III, *Is Oklahoma 'Class II.5" Compacting a Good Bargain for Tribes? & 'Other Games Similar to Bingo': Statutory and Regulatory Dissonance—A More Reasonable Reading of the IGRA*, SOVEREIGNTY SYMPOSIUM XVIII 2004, IV-151 to 161.

Jess Green, Norm Des Rosiers, Dean Luthey, Gary Pitchlynn, Mark Van Norman and Mike McBride on the Sovereignty Symposium gaming panel in about 2010. Des Rosiers was Vice Chair of the National Indian Gaming Commission and Van Norman was executive director of the National Indian Gaming Association at the time. (Courtesy, Sovereignty Symposium, Inc.).

NIGC opinion and threatening Johnson Act enforcement.[71]

On New Year's Eve 1997, the busiest and most lucrative gaming day of the year, and without notice to tribes, Lewis orchestrated a search and seizure raid on Multimedia's Tulsa headquarters, as well as gaming facilities for the Cherokee Nation and the Seneca-Cayuga Tribe, seizing all Multimedia electronic games.[72] The seizure interrupted important tribal commerce for 20 days, until the games were returned by agreement. A summary judgment decision calling for the return of the games also followed.[73]

Lewis was not done. He then personally prosecuted a similar action in California against MegaMania's devices.[74] The DOJ lost on summary judgment. Appeals of both MegaMania cases then proceeded simultaneously to the Ninth and Tenth Circuits.

LEGAL MOMENTUM FOR AN OKLAHOMA GAMING COMPACT

With the new millennium, momentum for Oklahoma Indian gaming swung sharply upward in rapid succession with five federal decisions adding clarity to the lines between class II games utilizing technological aids and class III games in IGRA, minimizing the potential application of the Johnson Act to class II devices:

- *United States v. 103 Gambling Devices*, 223 F.3d 1091, 1101 (9th Cir. 2000) (the devices "broaden[ ] participation in a common game" in a common game of class II bingo by linking players together through video terminals);
- *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 725 (10th Cir. 2000) (accord) ("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 an electronic aid");
- *Diamond Game Enterprises, Inc. v. Reno*, 230 F.3d 365, 367 (D.C. Cir. 2000) ("Lucky Tab II" device, an advanced pull tab game was class II, not a class III "electronic facsimile," because the device itself does not play the game, it is simply an aid to a traditional paper pull tab game; "Class II aides permitted under IGRA, do not run afoul of the Johnson Act");
- *United States v. Santee Sioux Tribe of Nebraska*, 174 F.Supp.2d 1001, 1005 (D. Neb. 2001) ("I conclude that the Johnson Act is not applicable to Class II devices"), *aff'd on other grounds*, 324 F.3d 607 (8th Cir. 2003), *cert. denied*, 540 U.S. 1229 (2004)); and
- *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Com'n*, 327 F.3d. 1019, 1035-37 (10th Cir. 2003) (holding the "Magical Irish" device simply speeds up the play of a traditional paper pull tab game, therefore, making it a class II game under IGRA) ("We hold that if a piece of equipment is a technologic aid to an IGRA class II game, its use, sale, possession or transportation within Indian country is then necessarily not proscribed as a gambling device under the Johnson Act").

Following on the footsteps of these cases, NIGC Vice Chair Elizabeth L. Homer and Commissioner Teresa E. Poust authorized rule changes to codify the court holdings and clarify the definitions affecting class II technological aids and class III facsimiles, as well as exemptions for class II games under the Johnson Act.[75] NIGC Chairman Montie R. Deer strongly dissented, believing that the 1992 definitions were the only possible interpretation of IGRA and that the NIGC would invade Congress' legislative function by promulgating the new definitions.[76]

Continued on next page

[61] 25 U.S.C. § 2710(d)(6).
[62] In *Green, supra* note 47, the Citizen Band of Potawatomi Indians filed suit to enjoin the U.S. Attorney from interfering with compact negotiations between the tribe and the Governor and threatening enforcement of the Johnson Act if the Governor entered into a compact. *See* Jess Green, *Indian Gaming 1995*, SOVEREIGNTY SYMPOSIUM VIII (June 5-8, 1995) Section 7, at 3, fn. 8.
[63] *Id. See* letters from United States Attorneys Vicki Miles-LaGrange (W.D. Okla.) dated Feb. 23, 1994 to Chickasaw Nation; Steve Lewis (N.D. Okla.) dated Feb. 7, 1994 recipient omitted; John Raley (E.D. Okla.) to Bill Fife, Principal Chief of Creek Nation dated Feb. 4, 1994, appended to SOVEREIGNTY SYMPOSIUM VII, Section 5 "Gaming".
[64] *Captain v. Ross*, 4 Okla. Trib. 306, 306 (Eastern Shawnee CIO 1995). *See* Jess Green, Indian Gaming 1995, *Id.* at 4-15. Jess Green (Chickasaw) represented the casino manager Danny Captain while this author represented the gaming commissioner Jack Ross. The late Magistrate Judge George Tah-Bone (Kiowa) decided the case. Judge Tah-Bone served the courts of Indian Offenses for the Eastern and Western Oklahoma tribes.
[65] *Captain*, 4 Okla. Trib. at 318.
[66] Green, *supra* note 48, at IV-50 (citing January 11, 1995 Letter of Steve Lewis, U.S. Attorney for N.D. Okla.).
[67] *See Eastern Shawnee Tribe of Oklahoma v. United States*, Case No. 4:95-cv-00945 (N.D. Okla. Sep. 19, 1995).
[68] Green, *Indian Gaming 2004*, SOVEREIGNTY SYMPOSIUM XVII 2004, IV-1, IV-17 to 18.
[69] Green, *Id. supra* at note 48 IV-50.
[70] *Id.* Green at IV-50. and Jess Green, "Indian Gaming 2001" SOVEREIGNTY SYMPOSIUM XIV 2001, IX-51, 58.
[71] *Id.*
[72] *Id.*
[73] *Id.* at IV-51; *United States v. 162 Megamania Gaming Devices*, No. 97-CV-1140-K, 1998 WL 36010316, at *6 (N.D. Okla. 1998).
[74] *Green, supra* note 69 at IV-51; *United States v. 103 Electronic Gaming Devices*, No. 98-1984-CRB, 1998 WL 827586 at *10 (N.D. Cal. 1998). Lewis, the U.S. Attorney for the Northern District of Oklahoma personally prosecuted the matter in the Northern District of California.
[75] 25 CFR §§ 502.7, 502.8, 502.9 (2012) (definitions for "Electronic, computer or other technologic aid", "Electronic or electromechanical facsimile", and "Other games similar to bingo"). See NIGC's commentary for rule change *see* 67 FED. REG. 41166- (June 17, 2002).

Continued from previous page

Since then, however, the overwhelming majority of the district and appellate courts and the NIGC have found that Congress intended for the IGRA to provide an implied exception to the Johnson Act for class II gaming devices utilizing electronic technologic aids played on Indian lands, so long as gaming is conducted pursuant to IGRA. Otherwise, the Johnson Act remains in full force and effect in Indian country. In the preamble to the 2002 revised regulations, the NIGC recognized and acknowledged (and sought to cure) the hopelessly circular reasoning found in its 1992 definitions of "electronic or electromechanical facsimiles."

Proper statutory construction and the degree of deference given to regulatory agencies by courts remains an important issue in carrying out the IGRA. The NIGC and the DOJ have differed at times on policy choices (and legal definitions) about what constitutes IGRA class II versus class III "electronic aid" equipment and whether the Johnson Act should apply to such equipment. Despite the DOJ's adamant quest for certiorari review and reversal, the Supreme Court's decision to let stand two lower court opinions defining "electronic aids to bingo" and pull tabs as class II devices solidified these interpretations into law, providing some certainty to the industry.[77]

By 2000, 47 casino/ bingo halls operated within Oklahoma Indian country[78], and Indian gaming comprised 20% of all class III gaming within the United States.[79] Twenty-three tribes engaged in gaming within Oklahoma as of 2001.[80] As of 2004, the National Indian Gaming Association estimated that Indian gaming had produced over 300,000 direct jobs nationally for Indian and non-Indians alike.[81] With the adrenaline of court victories, tribes and manufacturers further stoked explosive Indian gaming growth in Oklahoma, despite the State's unwillingness to negotiate compacts. According to the *Indian Gaming Industry Report, 2017 Edition*, between 2001 and 2004 Indian gaming revenue within Oklahoma quadrupled and non-gaming revenue tripled. The number of gaming devices almost tripled during this time.

Phil Hogen, National Indian Gaming Commission Chairman speaking at the Sovereignty Symposium in the early 2000s. Hogen was the longest-serving NIGC Chair in its history. (Courtesy, Sovereignty Symposium, Inc.).

After these losses and with a change of Commissioners, the NIGC continued efforts to attempt to promulgate regulations to restrict the growth of class II innovation. Tribes and manufacturers pushed back and attended NIGC consultations and working groups around the country to fight for self-regulation and tribal gaming commission autonomy, as well as to check the NIGC from "evolving into a super regulatory agency that usurps the role of tribal gaming commissioners . . ."[82]

As an independent regulatory agency, the NIGC has a statutory duty to administrate and implement IGRA by regulating Indian gaming. Certain key terms within the class II definition, however, are not defined within the IGRA. Congress' failure to distinguish a "technologic aid" on the one hand and a "facsimile" on the other hand continued to cause uncertainty in the overall scheme until courts and the NIGC settled the uncertainty. Since the classification scheme is so essential to the functioning and regulation of Indian gaming as well as the enforcement of the IGRA, a proper framework for the classification of games is crucial.

Thereafter, with court battles lost, anti-tribal political interests, senators and senior DOJ officials leaned on NIGC Commissioners to take a stand on creating a "bright line" between class II and class III. Later NIGC Chairmen, including Montie Deer and Phillip Hogen,

[76] The June 2002 revised definitions provides that - an "electronic, computer or other technologic aid" means any machine or device that:
(1) Assists a player or the playing of a game;
(2) Is not an electronic or electromechanical facsimile; and
(3) Is operated in accordance with applicable Federal communications law.
(b) Electronic, computer or other technologic aids include, but are not limited to, machines or devices that:
(1) Broaden the participation levels in a common game;
(2) Facilitate communication between and among gaming sites; or
(3) Allow a player to play a game with or against other players rather than with or against a machine.
(c) Examples of electronic, computer or other technologic aids include pull-tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations or electronic cards for participants in bingo games.
The NIGC also revised the definition of "electromechanical facsimile" by removing the Johnson Act definition of "gambling device" that had been incorporated into the NIGC definition in 1992. The 2002 regulations define an "electronic facsimile" as:
[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, or 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.
The third revision went to the term, "game similar to bingo." The NIGC's original definitions applied the IGRA definition of "bingo" to its definition of the term "game similar to bingo." Therefore, only the game "bingo" as defined in IGRA would meet the definition of a "game similar to bingo." This made little sense. As this appeared on its face contrary to the rules of construction' to the plain, unambiguous language contained in the statute, and to common sense, the NIGC also revised this term in 2002. The new two-part test for a "game similar to bingo" is as follows:
Other games similar to bingo means any game played in the same location as bingo (as defined in 25 U.S.C. 2703(7)(A)(i)) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes.
The IGRA provides that class II games may utilize "electronic, computer or other technologic aids." The NIGC, in 2002, revised the definitions to define a "technologic aid" as follows:
§ 502.7 Electronic, computer or other technologic aid.
(a) Electronic, computer or other technologic aid means any machine or device that:
(1) Assists a player or the playing of a game;
(2) Is not an electronic or electromechanical facsimile; and
(3) Is operated in accordance with applicable Federal communications law.

took this to heart and sought to create regulations that would cabin class II games and fence out significant technologic innovation. Hogen was a former DOJ prosecutor and DOI official, as well as the longest serving Chair of the NIGC in its history serving from 1999 until 2009.[83] Hogen earnestly believed that taking these efforts would save IGRA from hostile, anti-tribal congressional amendments that would further restrict Indian gaming. Ultimately, the Oklahoma tribes, the Oklahoma Indian Gaming Association and their lawyers prevailed in through non-stop consultations around the country in preventing the Chairman Hogen's potentially disastrous efforts to craft rules that would again stunt class II gaming.

Despite the infusion of Eleventh Amendment immunity into IGRA through the *Seminole* decision, in the end, technology and tribal litigation success brought Oklahoma to the negotiating table around 2002. Class II technology continued to advance, and tribal casinos within Oklahoma continued to expand. Perhaps state leaders began to realize that if you cannot beat the tribes, join them in cooperation. This set the stage for several years of negotiations with the Governor, great leadership efforts by State Senator E. Kelly Haney (Seminole) (and later Principal Chief of the Seminole Nation) resulting in a model tribal state gaming compact that would bypass the legislature.

Tribes banded together with the horse industry and tapped into Oklahoma's strong populist and agrarian roots to promote a deal that would provide for limited casino gaming at the state's existing horse tracks. Horsemen had previously opposed any expansion of Indian gaming, but they wanted to protect their industry. The horseracing industry nationally, not just in Oklahoma, had continued a downward decline over the past couple of decades. Governor Brad Henry and the tribes would go straight to the people with a popular referendum, State Question 712, in 2004. This successful plebiscite would catapult Oklahoma tribal gaming into stratosphere with a gaming compact that would not expire or renew until 2020. Shortly thereafter, 33 of Oklahoma's 38 tribes signed on to the model gaming compact terms for class III gaming approved in the referendum.

OKLAHOMA INDIAN GAMING UNDER THE 2004 MODEL COMPACTS

Today, Indian gaming within Oklahoma consists of 130 casinos and $4.2 billion in revenue.[84] As of July 2016, the tribes had paid Oklahoma over $1.3 billion in exclusivity fees arising out of revenues from class III gaming.[85] The Oklahoma Indian Gaming Association estimates that, as of 2016, tribal gaming has had an "induced and indirect impact on Oklahoma from both construction and operations" of over $2.2 billion with a total impact of $7.2 billion annually.[86] Of these figures the OIGA attributes 60% of this impact occurred in rural areas. A complete, 41-page OIGA study titled "Statewide Economic Impacts from Oklahoma Tribal Government Gaming" dated October 19, 2016, conducted by the Meinders School of Business at Oklahoma City University and Klas Robinson is available at http://oiga.org/wp-content/uploads/2018/01/OIGA-Impact-Report-2016.pdf

THE FOUNDATION AND THE ROAD AHEAD

Oklahoma tribes had to fight hard during the first 15 years of IGRA to craft a workable relationship with the State. It was a wild, chaotic and expensive ride. The groundwork of building and defending electronic class II games provided the framework for the explosive growth of Indian gaming over the next 15 years under the compact, providing jobs, strong and consistent revenue, as well as stable and predictable industry growth. None of this would be possible without the vision and determination of Oklahoma Indian gaming leaders and legal lawyer warriors. ❄

McBride chairs Crowe and Dunlevy's Indian Law & Gaming Practice Group out of its Tulsa office. He is First Vice President of the International Masters of Gaming Law (IMGL). He has represented tribes in Indian gaming matters since 1995 and has served over 25 tribes and their entities. He currently serves the Seminole Nation of Oklahoma as Attorney General. His career includes significant litigation victories for the Citizen Potawatomi and Comanche Nations and for the Eastern Shawnee Tribe of Oklahoma (ESTOO) on gaming and tobacco compact disputes in federal court and arbitration as well as significant gaming contract disputes for the Sac & Fox and Comanche Nations, the Seneca-Cayuga Tribe and the ESTOO. For inquiries, please contact Mike McBride or a licensed lawyer.

(b) Electronic, computer or other technologic aids include, but are not limited to, machines or devices that:
(1) Broaden the participation levels in a common game;
(2) Facilitate communication between and among gaming sites; or
(3) Allow a player to play a game with or against other players rather than with or against a machine.
(c) Examples of electronic, computer or other technologic aids include pull-tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations or electronic cards for participants in bingo games.

25 C.F.R. § 502.7 (2003) (italics original, bold added).

Under the IGRA and the NIGC regulations, one must undertake a two-part analysis for class II gaming. First, one must determine whether the electronic device is a class II game. Second, one must determine whether the device is an electronic aid to the play of the game or is a prohibited facsimile of the game. If the electronic device is a facsimile of any game of chance or slot machine, the device will not be considered class II gaming under the IGRA, 25 U.S.C. § 2703(7)(B), and would require an approved tribal/state compact for lawful play. 25 U.S.C. § 2710(d) (2012).

67 FED. REG. 41166, 41173-74 (June 17, 2002).

[77] *See United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607, 607 (8th Cir. 2003), *cert. denied*, 540 U.S. 1229 (2004); U.*S. v. Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission* , 327 F.3d 1019, 1019 (10th Cir. 2003), *cert. denied*, *Ashcroft v. Seneca-Cayuga Tribe of Oklahoma*, 540 U.S. 1218, 1218 (2004).

[78] "Oklahoma Gaming Facilities" directory published as a part of the SOVEREIGNTY SYMPOSIUM 2000, Part IV, 114-122. In 2001, one commentator estimated 330 Indian gaming establishments operated nationally. Jess Green, *Indian Gaming 2001*, SOVEREIGNTY SYMPOSIUM XIV, 2001, PART IX, 51, 64, citing Janet Plume, *Doing Big Business* 14:4 CASINO J. (April 2001).

[79] Green, *supra* note 78, at 64-65 (citing Plume).

[80] *Id.* at 65.

[81] National Indian Gaming Association, *An Overview of Indian Gaming Prepared for the University of Oklahoma.* SOVEREIGNTY SYMPOSIUM XVII 2004, IV-116, IV-126.

[82] Green, *supra* note 78 at 66.

[83] *Phil Hogen, an Oglala Sioux From South Dakota, Completes Service as Longest Serving Chair of the NIGC*, NIGC (October 2, 2009), https://www.nigc.gov/news/detail/phil-hogen-an-oglala-sioux-from-south-dakota-completes-service-as-longest-s.

[84] ALAN MEISTER, PHD., INDIAN GAMING INDUSTRY REPORT (Newton: Casino City Press 2017).

[85] "Oklahoma Tribal Exclusivity Fees Exceed $1.3 Billion", Indian Country Today (July 27, 2016), available at https://indiancountrymedianetwork.com/news/business/oklahoma-tribal-exclusivity-fees-exceed-13-billion/ (last viewed Feb. 18, 2018).

[86] OIGA, http://oiga.org/ (last visited Feb. 17, 2018).