STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS
Catawba Indian Tribe of South Carolina, Plaintiff, vs. The State of South Carolina and Henry D. McMaster, in his official capacity as Attorney General of the State of South Carolina, Defendants.	C. A. No. 2005-CP-40-3717 ORDER GRANTING PLAINTIFF'S SUMMARY JUDGMENT MOTION AND DENYING DEFENDANTS' SUMMARY JUDGMENT MOTION

INTRODUCTION

The historical context for this action begins at the time of the first European contact with the North American continent. The Europeans encountered not only land, but people organized in societies and having their own laws as the Supreme Court of the United States described in Worcester v. Georgia, 6 Pet. 515 at 542 (1832):

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.

The historical context for this litigation includes treaties entered into between the Catawba Indian Tribe and Great Britain in 1760 and 1763, by the terms of which "the Catawbas relinquished the bulk of their aboriginal territory to Great Britain in exchange for assurances that they would be allowed to live in peace on a small portion of that territory...." South Carolina v. Catawba Indian Tribe, 476 U.S. 498 (1986) (Blackmon, J. dissenting) 476 U.S. at 512. Treaties between the Crown and Indian tribes during the colonial period were "formed as near as may be,

on the model of treaties between the crowned heads of Europe." Worcester, 6 Pet. at 550. Following the creation of the United States, "Congress... passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate." Worcester, 6 Pet. at 556.

By Article I, Section 8 of the United States Constitution the states granted to Congress the exclusive power to deal with Indian tribes. The authority of this "Indian Commerce Clause" is both plenary and preemptive. Acting pursuant to that constitutional authority, Congress enacted in 1790 an Indian Non-intercourse Act which prohibited the conveyance of tribal land without the consent of the Congress. Act of July 22, 1790, Ch. 33, §4, 1 Stat. 138 (Now 25 U.S.C. §177). In 1840, without the consent of Congress, the State of South Carolina purported to enter into a treaty with the Catawba Tribe under the terms of which the Tribe would exchange its 144,000 acre Reservation in South Carolina for money and a Reservation in Western North Carolina. History indicates that no Reservation was secured for the Tribe in Western North Carolina and ultimately the Tribe was settled on 630 acres located on its former Reservation. From 1840, the Tribe sought the return of the 144,000 acres asserting that the land had been taken illegally and without the sanction of Congress. In 1980 the Tribe filed suit in the United States District Court for the District of South Carolina seeking the return of tribal land and trespass damages. Following thirteen years of litigation and negotiation, a settlement was reached and detailed in a settlement contract denominated the Settlement Agreement. That Settlement Agreement was the basis for the adoption of the South Carolina Catawba Indian Claims Settlement Act (State Act), S.C. Code Ann. §§27-16-10 et seq. (Supp. 2004), which became effective only upon approval by Congress. In taking this necessary act to exercise the exclusive authority of Congress to regulate matters involving Indian

tribes, the Federal Act, codified at 25 U.S.C. §941, provided that the "Settlement Agreement and the State Act are approved, ratified, and confirmed by the United States to effectuate the purposes of this subchapter, and shall be complied with in the same manner and to the same extent as if they had been enacted into Federal law." 25 U.S.C. §941b(a)(2).

Accordingly, this Court is in the unique posture of declaring the meaning of a South Carolina Code section which is to be viewed entirely as a question of federal law. In addition to the requirement that the language be read as if a part of the U.S. Code, the Federal Act provided that the provisions of the State Act and the Settlement Agreement can only be changed by agreement of "both the State and the Tribe". These provisions are a clear articulation by Congress of its exclusive power to enact laws governing Indians. The language before the Court, therefore, is beyond the reach of ordinary state legislative enactments after the 1993 settlement. Likewise, the Indian Commerce Clause and the Supremacy Clause of the United States Constitution protect the Tribe's rights from state court decisions, which might otherwise seem applicable, even when such court decisions are grounded in state law.

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DISCUSSION

A. The within-action was initiated by the Tribe against the State of South Carolina and its Attorney General seeking a declaration "that the Tribe has the present right to operate video poker or similar electronic play devices on its Reservation". Plaintiffs asked for a declaration from the Court that the General Assembly has violated the Federal Act by amending the State Act relative to the conduct of bingo without consent by the Tribe to the amendment as is required by 25 U.S.C. §941m(f). The Tribe also sought injunctive relief preventing the State, its Attorney General and their agents, employees or representatives from interfering with the Tribe's right to conduct video

poker or similar electronic play devices on its Reservation and preventing interference with the conduct of bingo as described in the Settlement Agreement and State Act.

Once the issues were joined cross-motions for summary judgment were filled. The matter was assigned to the undersigned sitting as a special circuit court judge, and a hearing was held on Friday, December 2, 2005 at which time the parties appeared through counsel. For purposes of the summary judgment motions, the parties focused their attention on two of the three questions raised by the amended complaint.

1. Is the Tribe entitled by virtue of the land claim settlement to operate video poker or similar electronic play devices on its Reservation?

2. Is the Tribe required to collect or pay an $18.00 per capita entrance fee surcharge for bingo?

Plaintiff supported its motion with the affidavit of A. Crawford Clarkson, Jr. Defendants supported their motion with the affidavit of Sen. Robert Wesley Hayes, Jr. Both parties filed detailed memoranda of law and Exhibits, which were most helpful to the Court. The Court has now fully considered the memoranda and the twenty-two exhibits filed by the parties as well as argument by able counsel at the hearing.

A resolution of the video poker and similar electronic play devices question requires a review of S.C. Code Ann. §27-16-110(G)(Supp. 2004) which states:

> The Tribe may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by state law. The Tribe is subject to all taxes, license requirements, regulations, and fees governing electronic play devices provided by state law, except if the Reservation is located in a county or counties which prohibit the devices pursuant to state law, the Tribe nonetheless must be permitted to operate the devices on the Reservation if the governing body of the Tribe so authorizes, subject to all taxes, license requirements,

regulations, and fees governing electronic play devices provided by state law.

The Tribe asserts that this provision of the settlement deals with two distinct situations. First, "The Tribe may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by state law." Id. [emphasis supplied]. Second, "[I]f the reservation is located in a county or counties which prohibit the devices pursuant to state law, the Tribe nonetheless must be permitted to operate the devices on the Reservation if the governing body of the Tribe so authorizes...." Id. [emphasis supplied]. The Tribe also argues that any change in general state law regarding video poker, subsequent to the 1993 adoption of section 27-16-110 (G), cannot and does not amend or repeal section 27-16-110(G).

Defendants argue no matter whether the Tribe is permitting video poker on its Reservation or operating video poker on its Reservation, it can only do so if video poker is allowed elsewhere in the state by state law. Defendants also contend the Tribe's right to operate video poker arises only "if video poker is banned by county referendum in the county where the Reservation exists." (Defs' Memorandum p. 16). It is defendants' position that just as the Tribe will lose its right to conduct bingo if the game of bingo is no longer licensed by the state as specified in section 27-16-110(F), the Tribe loses its right to permit or operate video poker if the state prohibits video poker. Defendants argue the decision of the South Carolina Supreme Court in Martin v. Condon, 324 S.C. 183, 478 S.E. 272 (1996) and that Court's decision in Joytime Distributing v. State, 338 S.C. 634, 528 S.E. 2d 647, 1999, applying Act 125 of 1999, repeal any right the Tribe obtained to video poker in 1993.

The first rule of judicial review of a statute must be to read the statute as it has been written, and not as a party wishes it had been written. Looking at the words of the statute and assigning to

them their ordinary meaning, the settlement allowed the Tribe to permit video poker or similar electronic play devices on the Reservation so long as those devices were allowed by state law. The common definition of "permit" is "to consent to: allow or to give permission to or for: authorize." Webster's II New College Dictionary (Houghton Mifflin Co., 1995). So long as video poker or similar electronic play devices were lawful in South Carolina, the Tribe could allow or give permission for or authorize the devices to be played on the Reservation. This provision envisions the Tribe consenting to the placement of such devices in locations on the Reservation. The Tribe having authority to grant permission to allow video poker on the Reservation is analogous to the state allowing the devices to be played elsewhere in the state during the time they were otherwise legal in the state.

If the statute contained only the first sentence, the Tribe could not allow video poker on the Reservation once the state prohibited video poker. But clearly the statute contains more than just the first sentence. The second sentence as written provides an exception to a state law prohibition on video poker by language that states "except if the Reservation is located in a county or counties which prohibit the devices pursuant to state law, the Tribe nonetheless must be permitted to operate the devices on the Reservation if the governing body of the Tribe so authorizes...." It is uncontested that the Reservation is located in a county or counties which prohibit the devices pursuant to state law. (Reservation expansion authorized in York and Lancaster counties §27-16-90). All counties prohibit video poker pursuant to state law. The relevant question is what is meant by "to operate" the devices in the second sentence? "Operate" means "to control or direct the functioning of or to conduct the affairs of: manage." Webster's II New College Dictionary (Houghton Mifflin Co., 1995). This second sentence recognizes the governmental status of the

Tribe and its authority over its Reservation by making this exception to the prohibition against video poker contingent upon the game being operated by the Tribe after approval by the governing body of the Tribe. In this regard, the Tribe stands in the same position vis-à-vis video poker and similar electronic play devices on the Reservation as the state of South Carolina stands with respect to the South Carolina Educational Lottery. In both instances, the gaming activity is conducted directly by a government and not licensed to or permitted to be operated by others. In contrast with the agreement that the Tribe could operate video poker or similar electronic play devices on the Reservation, the Tribe's bingo is not restricted to the Reservation. Without the provision that the Tribe's bingo rights would terminate if bingo were to become illegal in the state generally the Tribe would be able to operate bingo off of the Reservation even when no one else could operate bingo. Since video poker is to be operated only on the Reservation, and then only if approved by the Tribe's governing body, there is no conflict with sate law with respect to video poker in those portions of the state where the Tribe has no sovereign governmental powers as it does on the Reservation.

Since section 27-16-110(G) does not make the Tribe's right to "operate" video poker or similar electronic play devices on the Reservation contingent upon the continued legality of video poker elsewhere in the state, that limitation cannot be read into the portion of the statute addressing video poker and similar electronic play devices. Similarly, since there is no reference directly or indirectly in the State Act to "county-by-county referendum" or "local option referendum" section 27-16-110(G) cannot be read as if that language were contained therein. This court cannot rewrite the Settlement Agreement or State Act to bring them into conformity with what the defendants wish they said. See, e.g., Department of Natural Resources v. Town of McClellanville, 345 S.C. 617,

550 S.E.2d 299 (2001). Looking at the language of the Settlement Agreement and the State Act, it appears to the satisfaction of the court that there is no ambiguity in the language, and since the Reservation is located in counties which prohibit video poker and similar electronic play devices pursuant to state law, the Tribe may operate those devices on the Reservation if authorized by the governing body of the Tribe. The Court also views it as important that this plain meaning of the statute supports the goals of Congress. The Federal Act in section 25 U.S.C 9411(a)(1) states "The Congress declares and finds that:

> It is the policy of the United States to promote tribal self-determination and economic self-sufficiency and to support the resolution of disputes over historical claims through settlements mutually agreed to by Indian and non-Indian parties."

The language before the Court is not ambiguous with respect to the Tribe's right to operate video poker and similar electronic play devices on its Reservation, and the Tribal governing body can decide whether or not to operate the devices on the Reservation. This conclusion is necessary under the special canons of construction applicable to Indian law. As the United States Supreme Court has held, "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 at 766 (1985). This decision by the United States Supreme Court requires this Court to confer any benefit of the statute on the Tribe.

The court was persuaded by the affidavit of A. Crawford Clarkson, Jr. Mr. Clarkson's affidavit recounted he had been appointed by Gov. Carroll Campbell to be the lead negotiator for the State of South Carolina in attempting to reach a settlement of the Tribe's land claim. Mr. Clarkson stated gaming was "one of the most important issues between the parties during negotiations" and the matter was resolved with the Tribe exchanging rights it would have had under

the Indian Gaming Regulatory Gaming Act (25 U.S.C. §§2701 et seq.) so the Tribe would have two high stakes bingo operations and the right to operate video poker or similar electronic play devices on the Reservation:

> 10. The final agreement between the parties regarding the issue of gaming provided that the Indian Gaming Regulatory Act would not be applicable to the Catawba Indian Nation.
>
> 11. In exchange for foregoing the rights under the Indian Gaming Regulatory Act, the Catawba Indian Nation was granted the right to two high stakes bingo operations and the right to operate video poker and similar electronic play devices on the Catawba Indian Reservation.
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> 12. The Catawba Indian Nation was promised during the negotiations that the agreement gave the Catawba Indian Nation the right to operate video poker machines and similar electronic devices on the Reservation irrespective of whether such machines were illegal elsewhere in South Carolina.

Mr. Clarkson's position as the state's lead negotiator places him in the best position to address the terms of the agreement that settled a suit that placed a cloud on the title to 144,000 acres of real property. Mr. Clarkson states unequivocally "that the agreement gave the Catawba Indian Nation the right to operate video poker machines and similar electronic devices on the Reservation irrespective of whether such machines were illegal elsewhere in South Carolina." (Clarkson aff. ¶12) That promise, which was a part of one of the most important issues of the Settlement Agreement is consistent with the language of the Settlement Agreement and allows the statutory language to be interpreted in favor of the Tribe as required by applicable authority. Blackfeet, supra. The Supreme Court of South Carolina has itself had one opportunity to construe a provision of the Settlement Agreement and State Act, and in doing so, resolved conflicting interpretations in favor of the Tribe when it reversed the Court of Appeals and

overturned a conviction of a tribal member for hunting without a wildlife management area permit when he was hunting with a license created by the State pursuant to the Settlement Agreement and State Act. State v. Keesee, 336 S.C. 599, 521 S.E.2d 743 (1999).

The State in Keesee had contended that a separate permit was needed in addition to the license provided the tribal member as an element of the land claim settlement. The Supreme Court rejected this interpretation to read the hunting and fishing license portion of the settlement in favor of the Tribe's position that no separate permit was required.

B. Turning to the $18.00 bingo surcharge, the Tribe contends that the surcharge was not part of the Settlement Agreement and State Act and any change in the Settlement Agreement and State Act is void unless made with the consent of both the state and the Tribe as required by Congress in 25 U.S.C. §941m(f). The Settlement Agreement and State Act provide that "The State shall govern the conduct of bingo under Article 23, Chapter 21 of Title 12... except as provided by the Special Bingo License to which the Tribe is entitled...." S.C. Code Ann. §27-16-1110(B) (Supp. 2004). Without the consent of the Tribe, the state has enacted and applied to the Tribe's bingo Article 24, Chapter 21 of Title 12 which includes section 12-21-4030(B)(1) which provides "a holder of a Class AA license shall impose an entrance fee of $18.00." The Tribe has never agreed to be subject to Article 24, Chapter 21 of Title 12 with respect to the conduct of bingo. Further, the letter of Burnett R. Maybank, III, Director of the South Carolina Department of Revenue states, "...[I]t was never the intent of the Department to impact in any way the current laws outlining the Catawba Indian Nation's bingo operations" by passage of legislation containing the surcharge mandate. Notwithstanding the statement of the Director of the state agency that regulates bingo and notwithstanding the absence of an agreement by the

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Tribe to be bound by Article 24, Chapter 21 of Title 12, the state asserts that the Tribe is nevertheless required to impose or account for an $18.00 per capita entrance fee surcharge thereby forcing a change in the way bingo was agreed to be operated by the Tribe in the settlement.

Congress has specifically prohibited the state from making unilateral amendments in the Settlement Agreement or State Act. Since Congress has specifically approved a Settlement Agreement and a State Act which do not include the $18.00 per capita entrance fee surcharge, that surcharge cannot be made applicable to the Tribe by the state.

The Tribe in its amended complaint also has asserted that the state has unilaterally amended the Settlement Agreement and State Act with respect to the method of taxation of the Tribe's bingo operation. The Settlement Agreement and State Act provide that the Tribe's bingo will be subject to "a special bingo tax equal to ten percent of the gross proceeds received during each session." This provision is in the State Act at section 27-16-110(C)(3). Notwithstanding the Congressional prohibition against unilateral modification of the Settlement Agreement or State Act, the state has amended the State Act to change the tax on bingo from ten percent of gross proceeds in each session to "ten percent for each dollar of face value for each bingo card sold." Act No. 334, 1998 S.C. Acts (S.C. Code Ann. §27-16-110(C)(3) (Supp. 2004)).

C. In addition to requesting a declaratory judgment, plaintiff has requested that defendants and their agents and representatives be enjoined and prohibited from interfering with the Tribe's right to operate video poker and similar electronic play devices on its Reservation. Plaintiff also requested that the court restrain and enjoin the imposition of the $18.00 per capita entrance fee surcharge. Plaintiff alleged defendants have threatened to interfere with the Tribe's

proposed operation of video poker and similar electronic play devices on the Reservation and that the state is demanding the Tribe impose an $18.00 per capita entrance fee surcharge on its bingo customers. It would be appropriate to order the injunctive relief sought by plaintiff if after the declaration of the law contained herein defendants continued to act inconsistently therewith. However, the Court expects the defendants to act consistently with the conclusions of this Order.

CONCLUSION

Based on the foregoing and in accordance with Rule 56, SCRCP, with there being no genuine issue as to any material fact, and plaintiff being entitled to a judgment as a matter of law, plaintiff's motion for summary judgment is hereby granted and the court declares:

1. The Settlement Agreement and State Act give the Tribe the present and continuing right to operate video poker or similar electronic play devices on its Reservation if the governing body of the Tribe so authorizes

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2. The $18.00 per capita entrance fee surcharge imposed by S.C. Code Ann. section 12-21-4030(B)(1) has no application to the Tribe.

IT IS FURTHER ORDERED that defendants' motion for summary judgment be, and the same hereby is, denied.

AND IT IS SO ORDERED.

JOSEPH M. STRICKLAND
SPECIAL CIRCUIT COURT JUDGE

Columbia, South Carolina

December 13, 2005

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
Catawba Indian Tribe of South Carolina,	)	C. A. No. 2005-CP-40-3717
Plaintiff,	)	
	)	CERTIFICATE OF SERVICE
vs.	)	
The State of South Carolina and Henry D. McMaster, in his official capacity as Attorney General of the State of South Carolina,	)	
Defendants.	)	

I, Teresa K. Todd, Legal Assistant to Jay Bender, of Baker, Ravenel & Bender, LLP, do hereby certify that I have served the following with the Order Granting Plaintiff's Summary Judgment Motion and Denying Defendants' Summary Judgment Motion by depositing same in the United States mail, postage prepaid to the below at the following addresses and via facsimile:

The Honorable Henry McMaster
Robert D. Cook, Esquire
C. Havird Jones, Jr., Esquire
P.O. Box 11549
Columbia, S.C. 29211

Teresa K. Todd

Columbia, South Carolina
December 13, 2005