

TESTIMONY OF TRACY BURRIS
CHAIRMAN OF THE OKLAHOMA INDIAN GAMING ASSOCIATION
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

JULY 25, 2001

Mr. Chairman, I am Tracy Burris, Chairman of the Oklahoma Indian Gaming Association and a member of the Chickasaw Nation of Oklahoma. I also serve as Gaming Commissioner for the Chickasaw Nation.

Mr. Chairman and Mr. Vice-Chairman, I want to first thank you for your leadership on behalf of Indian tribes and Indian people. On behalf of the 24 member tribes of the Oklahoma Indian Gaming Association, it is an honor for me to appear before this Committee once again.

I have been involved in Indian gaming in Oklahoma for more than 16 years, starting at the ground floor, working first as a floor worker in a tribal gaming facility, selling bingo paper and pull-tabs. I also worked in concessions and as a cashier. From there, I was made a supervisor then a manager. Today, I serve as a regulator for my Tribe, the Chickasaw Nation. Employment in gaming has helped pay my way through college and support my family. I have personally witnessed the continuing struggles of tribal gaming in Oklahoma over the years, where the only "profits" of some facilities from month to month are continued employment for their tribal members.

Today, no tribe in Oklahoma has been successful in entering into a meaningful compact with the State of Oklahoma. As a result, tribal gaming facilities in Oklahoma derive nearly all of their revenues from Class II gaming, which is limited to bingo and other games similar to bingo. Tribal Governments in Oklahoma, like many other Tribal Governments across the country, largely depend on these revenues to pay for education, housing, health care and other tribal governmental programs. Absent compacts, our survival is dependent on making bingo profitable.

One of the primary issues Indian tribes in Oklahoma face is determining whether a particular game is class II or class III. As you know, the Indian Gaming Regulatory Act defines "class II gaming" as bingo and other similar games to bingo as well as certain non-banking card games permitted under State laws. It expressly permits the use of "technologic aids" to the play of bingo and similar games, while also expressly prohibiting the play of "facsimiles of any game of chance" without a compact. Determining the difference between a class II "technologic aid" and a class III "facsimile" has been the source of great confusion. As a result, tribes have spent thousands of dollars in litigation with the United States over the classification of certain machines.

A good deal of confusion about the standards for classification comes from the National Indian Gaming Commission's definitions regulations. As stated by the U.S. Court of Appeals for the D.C. Circuit in late 2000, "Boiled down to their essence, the regulations tell us little more than that a Class II aid is something that is not a Class III facsimile."¹

The regulations define the term "facsimile" exceedingly broadly, as any game that meets the Johnson Act's definition of "gambling devices." Those of us on tribal gaming commissions that are responsible for making classification decisions understand how unworkable this definition really is.

To address this problem, the NIGC has issued a Proposed Rule that would rescind the NIGC's current definition of "facsimile". The OIGA strongly supports the proposed action as a necessary step toward bringing the NIGC's regulation out of conflict with the Indian Gaming Regulatory Act and federal court decisions.

Decisions of several federal courts of appeal make clear the need for the NIGC to reform its definitions regulations. The U.S. Court of Appeals for the D.C. Circuit in the recent *Lucky Tab II* case, *Diamond Games Enterprises v. Reno*, expressly ruled that the NIGC's definitions regulations are wholly inadequate.

[W]e have no idea what the Commission thinks about the policy questions presented by the Lucky Tab II. Not only does this leave us with no agency position to which we might defer, but *the Commission's IGRA regulations provide no assistance in interpreting the statute*. Boiled down to their essence, the regulations tell us little more than that a Class II aid is something that is not a Class III facsimile.²

The court ruled that the Lucky Tab II is a class II machine without the benefit of clearly articulated classification standards from the NIGC.

While the D.C. Circuit declined to interpret the NIGC definition regulations, the Ninth and Tenth Circuit decisions in the *MegaMania* cases demonstrate the conflict between the NIGC's "facsimile" definition and the IGRA. Both courts ruled that the Johnson Act does not extend to the play of class II games that utilize technologic aids. The Ninth Circuit stated: "Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game, and is played with the use of an electronic aid."³ The Tenth similarly ruled: "The text of IGRA quite explicitly indicates that Congress did not intend to allow

¹ 230 F.3d 365, 369 (D.C. Cir. Nov. 3, 2000) (citations omitted; emphasis added).

² 230 F.3d 365, 369 (D.C. Cir. Nov. 3, 2000) (citations omitted; emphasis added).

³ *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1101 (9th Cir. 2000)

the Johnson Act to reach bingo aids.”⁴ These decisions indicate that the decision of the Commission in 1993 to incorporate the Johnson Act into the regulations without stating an exception for class II games that utilize technologic aids was in error. The Johnson Act definition is far too broad, arguably encompassing any game that utilizes technologic aids, including bingo played with a bingo blower.

Recent decisions also have removed legal obstacles to reforming the facsimile definition. In a 1993 challenge to the NIGC’s first set of regulations, the U.S. District Court for the District of Columbia in *Cabazon Band of Mission Indians v. NIGC* stated that the Johnson Act definition of “facsimile” was “the only definition possible in order to implement Congress’ explicit intent, as expressed in IGRA.”⁵ Although the D.C. Circuit affirmed the lower court, the tribes did not appeal the district court’s ruling on the propriety of the definition. The D.C. Circuit effectively distinguished the statement of the *Cabazon* lower court in the recent *Lucky Tab II* decision. Its ruling that all of the NIGC’s definitions were inadequate and “provide no assistance in interpreting” the IGRA directly conflicts with the lower court’s statement in *Cabazon* that the current facsimile definition is not only adequate but also the exclusively so. Thus, the district court’s ruling in *Cabazon* upholding the propriety of the “facsimile” definition is not controlling law. And now the NIGC is not only free to amend its regulations but obligated by principles of good government to do so.

On behalf of the OIGA, I want to thank the NIGC Commissioners for taking the necessary first step in bringing some common sense to this difficult, technical issue. I also want to thank members of this Committee who have been supportive of efforts to clarify the standards for class II gaming.

To reach real clarity, however, we believe the NIGC should take the additional step of revisiting its definition of “technologic aid”, engaging in a negotiated rulemaking with the appropriate parties to develop criteria for classifying games.

Mr. Chairman and Mr. Vice Chairman, you know from your good work the value Indian people place upon the sovereignty of their tribes. In Oklahoma, certainly, the spirit and sanctity of tribal sovereignty remains very strong. While we understand that gaming brings new, sometimes unique, challenges to tribal sovereignty, it is with this first principle in mind that we view our activity. From this mind, we find it extremely difficult to accept another action of the NIGC, its proposed Classification of Games regulations.

These regulations would require the NIGC to approve each game before tribes could offer the game for play. Under current law, the NIGC has an oversight role,

⁴ *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 725 (10th Cir. 2000).

⁵ 827 F. Supp. 26, 31 (D.D.C. 1993) *aff’d on other grounds*, 14 F.3d 633 (D.C. Cir. 1994).

but the tribal gaming commissions, whose authority comes only from the inherent sovereignty of the tribes, are the first line of regulation and have primary jurisdiction over these issues.

While we understand the need for the NIGC to develop a formal process for classifying games, one that takes away the sovereign authority of the tribal gaming commissions is unacceptable. This process would turn tribal gaming commissions into bureaucrats in a federal classification process in which the tribes would package information and analysis at tribal expense and send it on to the NIGC for a final administrative ruling. It is clear that the Congress did not intend that tribal gaming commissions would be relegated to such a role.

The records of tribal gaming commissions in Oklahoma on classifying games has been quite good, in fact. Litigation through the federal courts involving the MegaMania, Lucky Tab II, and Magical Irish Bingo machines have all been decided in favor of the tribes.

An example of tribal gaming commissions at work is that of the Cherokee Nation of Oklahoma. It spent thousands of dollars on two independent testing laboratories to review the technical components of the "Magical Irish Bingo" pull tab machine. Both of the independent laboratories and analysis by Commission attorneys concluded that the machine met the definition of a Class II device. The Cherokee Nation Gaming Commission gave its approval to play the game at their gaming facilities. Soon after, the NIGC determined that the Magical Irish Bingo machine was a class III game. A recent federal court decision in Oklahoma found that the Cherokee Nation Gaming Commission was correct in its classification decision. While the Justice Department has appealed this decision, the tribes are continuing to spend money to litigate these kinds of decisions.

Classification regulations can only be successful if the tribal gaming commissions have a meaningful role in the implementation of the regulation. I would hope the Committee would encourage the NIGC to work with tribal gaming commissions before it initiated a rule on this issue.

Mr. Chairman, and Members of the Committee, this issue of Class II gaming is of paramount importance for the Tribes in Oklahoma. We want to work with the Committee and the NIGC to bring greater clarity to the Class II definition and make the classification regulations workable in Indian Country.

Again, thank you for the opportunity to appear before you, and I would like to take this time to answer any questions you may have.