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Categorical Vs. Game-Specific: Adopting the Categorical Approach to Interpreting Permits Such Gaming

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COMMENTS

CATEGORICAL VS. GAME-SPECIFIC: ADOPTING THE CATEGORICAL APPROACH TO INTERPRETING “PERMITS SUCH GAMING”

I. INTRODUCTION

People love to gamble. Indian tribes have capitalized on this love, offering gaming to better their economies. In fact, Indian gaming generated \$25.1 billion in 2006, doubling the revenue generated in 2001.¹ While Indian gaming has recently exploded in popularity (and unpopularity) over the past two to three decades, Indian gaming is nothing new.² Prior to colonization of the Americas, Indian tribes used gaming in settlement disputes, in entertainment, in making a profit, and in certain ceremonies.³ Today, Indians still game for many of the same reasons.⁴ However, gaming is not without controversy, especially when two sovereigns, the Tribe and the State, differ on what types of gaming should be allowed.⁵ In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA), which sets guidelines for how tribes are allowed to operate their gaming facilities.⁶ Currently, Indian gaming occurs in twenty-eight of the fifty states.⁷

The enactment of the IGRA resulted in a great deal of litigation to interpret the meaning of the IGRA's sections.⁸ This article addresses 25 U.S.C. § 2710(d)(1)(B), the

1. Natl. Indian Gaming Commn., *NIGC Announces 2006 Indian Gaming Revenues*, <http://www.nigc.gov/ReadingRoom/PressReleases/PR63062007/PR63072007/tabid/784/Default.aspx> (June 4, 2007).

2. See e.g. G. William Rice, *Tribal Governmental Gaming Law* 3 (Carolina Academic Press 2006); Susan Aucoin, *Traditional Indian Games and Toys*, http://www.avcnet.org/ne-do-ba/mc_gam01.html (Dec. 2001); Tara Prindle, *Native American Technology & Art: Bowl & Dice Game*, <http://www.nativetech.org/games/bowl&dice.html> (accessed Mar. 18, 2008); see also Sen. Rpt. 100-446 at 2 (Aug. 3, 1988) (reprinted in 1988 U.S.C.A.N. 3071, 3072) (“The Seminole Tribe of Florida in 1979 was the first tribe to enter the bingo industry.”).

3. Rice, *supra* n. 2, at 3.

4. *Id.*

5. See generally *id.*

6. 25 U.S.C. §§ 2701–2721 (2000). The guidelines determine where gaming is allowed, what types of gaming are allowed, who is allowed to conduct the gaming, how the process is to take effect, who governs the gaming, and even why gaming is allowed. *Id.*

7. Rice, *supra* n. 2, at xvii–xx (States offering some form of Indian gaming: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Washington, Wisconsin, and Wyoming).

8. See e.g. *Chickasaw Nation v. U.S.*, 534 U.S. 84, 88–95 (2001) (discussing different canons of statutory

IGRA section stating “[c]lass III gaming activities shall be lawful on Indian lands only if such activities are . . . located in a State that *permits such gaming* for any purpose by any person, organization, or entity.”⁹ This article primarily focuses on the phrase “permits such gaming” because a circuit split currently exists on the proper interpretation of “permits such gaming.”¹⁰ The circuit courts interpret this provision in two different ways.¹¹

One approach of interpreting the phrase is to take a “game-specific” approach.¹² Using the “game-specific” approach, the only way the tribe can offer a certain class III game is if the state expressly allows that game “for any purpose.”¹³ For example, if a tribe wants to offer roulette, ordinarily a class III game, the state must expressly allow some organization to offer roulette for any purpose.¹⁴ The Eighth and Ninth Circuits adopt the “game-specific” approach.¹⁵

The other way to interpret the phrase is to take a “categorical” approach.¹⁶ This means the tribe can offer a certain game if a state offers any other game classified as class III “for any purpose.”¹⁷ Under this interpretation, if a tribe wants to offer roulette, a class III game, it must only ensure the state offers some other game considered a class III game such as poker or pari-mutuel wagering on horse racing.¹⁸ The Second Circuit adopts the “categorical” approach.¹⁹

This paper argues the proper interpretation of 25 U.S.C. § 2710(d)(1)(B)’s “permits such gaming” is the “categorical” approach, which is consistent with the plain meaning of the statute and conforms more to the legislative intent. In addition, using the “categorical” approach to interpret this section comports with the canon of Indian law construction that provides for resolution favoring the Tribe when there is ambiguity in a statute. Finally, this approach allows for more tribal autonomy, which is in line with one of the stated purposes of enacting the IGRA—“to provide a statutory basis for the

interpretation); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 76 (1996) (holding that a section of the IGRA was unconstitutional); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1035 (11th Cir. 1995) (interpreting 25 U.S.C. § 2710(e)).

9. 25 U.S.C. § 2710(d)(1)(B) (emphasis added).

10. See e.g. *N. Arapaho Tribe v. Wyo.*, 389 F.3d 1308, 1310–11 (10th Cir. 2004) (discussing the circuit split on how to interpret “permits such gaming”).

11. See *id.*

12. See *Cheyenne River Sioux Tribe v. S.D.*, 3 F.3d 273, 278–80 (8th Cir. 1993) [hereinafter *Cheyenne River Sioux Tribe II*]; *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1255–59 (9th Cir. 1994).

13. *N. Arapaho*, 389 F.3d at 1311.

14. See *id.* Usually the purpose for which the state allows the gaming relates to fund-raising for charities. See e.g. *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202, 205 (1987) [hereinafter *Cabazon II*] (“[The California] statute does not entirely prohibit the playing of bingo but permits it when the games are operated and staffed by members of designated charitable organizations.”); *N. Arapaho Tribe v. Wyo.*, 429 F.3d 934, 935 (10th Cir. 2005) (Counsel for the State responded that “[casino-style gaming] can be done for charitable purposes [under Wyo. Stat. Ann. §§ 6-7-102(b) and 6-7-108(a)(viii)] if people come together . . . in a bona fide social relationship.”).

15. See *Cheyenne River Sioux Tribe II*, 3 F.3d at 278–79; *Rumsey Indian Rancheria*, 64 F.3d at 1257–58.

16. See e.g. *Mashantucket Pequot Tribe v. Conn.*, 913 F.2d 1024, 1031–32 (2d Cir. 1990) [hereinafter *Mashantucket Pequot Tribe II*]; *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wis.*, 770 F. Supp. 480, 488 (W.D. Wis. 1991).

17. *N. Arapaho*, 389 F.3d at 1311.

18. See *id.*

19. See *Mashantucket Pequot Tribe II*, 913 F.2d at 1031–32.

operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.”²⁰

Part II of this paper lays the foundation for the enactment of the IGRA and describes the relevant case law that has interpreted “permits such gaming.” Part III of this paper analyzes the different approaches taken with an emphasis on the “categorical” approach as the correct approach.

II. BACKGROUND

A. Public Law No. 83-280²¹

Indian tribes enjoy many elements of sovereignty in which they retain “attributes of sovereignty over both their members and their territory.”²² However, this tribal sovereignty depends on, and is subordinate to, the federal government.²³ While a tribe’s sovereignty is usually not subordinate to state governments, Congress, exercising its plenary power over the tribes, may expressly provide that a state apply its own laws on tribal reservation land.²⁴ Prior to the enactment of the IGRA,²⁵ states attempted to apply their own laws concerning gaming on tribal lands through the authority of Public Law No. 83-280.²⁶ This provision grants states full authority over criminal matters, but only limited authority over civil matters.²⁷

Prior to the enactment of Public Law 280, there were no means for the state or federal government or for many tribes to provide for punishment of crimes committed on many Indian reservations.²⁸ A state could not exercise its jurisdiction over tribal lands and provide for punishment of crimes through its legal system, but many tribes did not have their own legal system to rely on for justice.²⁹ Thus, Congress enacted Public Law 280 to grant the states jurisdiction over tribal lands to help prevent unpunished crime by insuring there was an existing system in position to prosecute criminals and also to provide a forum for civil matters.³⁰

20. 25 U.S.C. § 2702(1) (emphasis added).

21. Pub. L. No. 83-280, 67 Stat. 589 (1953) (Public Law 280). This Act “granted jurisdiction over some or all of the Indian country within the state[s]” of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin; “[o]ther states were given Congressional approval to unilaterally extend state jurisdiction over Indian country within their state.” Rice, *supra* n. 2, at xlv.

22. *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975).

23. See *Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980).

24. *McClanahan v. St. Tax Commn. of Ariz.*, 411 U.S. 164, 170–71 (1973) (quoting U.S. Dept. Int., *Federal Indian Law* 845 (U.S. Govt. Printing Off. 1958)); see also U.S. Const. art. I, § 8, cl. 3; Sen. Rpt. 100-446 at 5 (reprinted in 1988 U.S.C.C.A.N. at 3075); 41 Am. Jur. 2d *Indians* § 33 (2005).

25. 25 U.S.C. §§ 2701–2721.

26. Pub. L. No. 83-280, 67 Stat. 589. Some parts of Public Law 280 are still codified in various sections of the United States Code. See e.g. 18 U.S.C. § 1162 (2000) & 28 U.S.C. § 1360 (2000). From the 1950s through the 1970s, Public Law 280 was construed in a way destructive to the tribe’s self-determination and tribal government. Rice, *supra* n. 2, at xlv. This Act provided for a policy that led to the “Termination Era,” whereby tribes lost their federal recognition as a tribe, and its members lost their recognition as Indians. *Id.*

27. Compare e.g. 18 U.S.C. § 1162 (criminal) with 28 U.S.C. § 1360 (civil).

28. *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 735, 745 (E.D. Wash. 1985) (“The states needed Congressional authorization to exert power over Indians.”).

29. See e.g. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197–98 (1978).

30. *Bryan v. Itasca Co.*, 426 U.S. 373, 379–80 (1976) (quoting H.R. Rpt. 83-848 at 5–6 (Aug. 15, 1953))

Because Public Law 280 distinguishes between criminal and civil matters, litigation ensued to determine what constitutes a criminal matter and what constitutes a civil matter.³¹ For example, in *Bryan v. Itasca County*,³² the Supreme Court held the central focus of Public Law 280 was to confer on the states "criminal jurisdiction over offenses committed by or against Indians on the reservations"³³ and "to grant jurisdiction over private civil litigation involving reservation Indians in state court."³⁴ Thus, when a state wishes to exercise jurisdiction under the authority of Public Law 280 and enforce state law on an Indian reservation, but the tribe balks at the enforcement, the court must determine whether the law is criminal or civil in nature.³⁵ If the court determines the law is criminal in nature, Public Law 280³⁶ fully applies, and state authority trumps tribal authority.³⁷ However, if the law is civil in nature, Public Law 280³⁸ only applies to provide a forum in state court and does not grant the State general civil regulatory authority.³⁹ Therefore, when the state wants to exercise jurisdiction under the authority of Public Law 280 to enforce state laws pertaining to gaming on an Indian reservation, it is crucial for the state that the court find the law to be prohibitory in nature.⁴⁰

When tribes began to operate gaming facilities, states used Public Law 280 to exercise jurisdiction on tribal lands to attempt to regulate matters concerned with gaming.⁴¹ The issue in these situations centered on whether the gaming the tribe was attempting to offer was criminal or civil in nature.⁴² The differentiation between criminal and civil matters and the amount of authority a state possesses regarding the matter resulted in litigation to clarify what constitutes a criminal matter and what constitutes a civil matter.⁴³ If the gaming constituted a criminal offense, states could exercise their authority to the fullest and prohibit the gaming from taking place.⁴⁴ However, if the gaming constituted a civil matter, states were not able to exercise their authority and the gaming could take place.⁴⁵ In 1987, the Supreme Court decided *California v. Cabazon Band of Mission Indians*,⁴⁶ a monumental case that distinguishes

and Sen. Rpt. 83-699 (Aug. 15, 1953) (both reprinted in 1953 U.S.C.C.A.N. 2409)); see also *Yakima Indian Nation*, 617 F. Supp. at 745; Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280*, 47 Am. U. L. Rev. 1627, 1659 (1998).

31. See e.g. *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 311-16 (5th Cir. 1981) (using the civil/regulatory and criminal/prohibitory distinction for the first time with respect to Indian gaming); see also *Cabazon II*, 480 U.S. at 207-12; *Bryan*, 426 U.S. at 377-87 (using distinction with respect to property taxation on reservation lands).

32. 426 U.S. 373 (1976).

33. *Id.* at 380.

34. *Id.* at 385.

35. *Cabazon II*, 480 U.S. at 208.

36. Section 2 of Public Law 280 concerned criminal matters and was codified at 18 U.S.C. § 1162.

37. *Cabazon II*, 480 U.S. at 208.

38. Section 4 of Public Law 280 concerned civil matters and was codified at 28 U.S.C. § 1360.

39. *Cabazon II*, 480 U.S. at 207-08.

40. See e.g. *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185, 1187 (9th Cir. 1982).

41. See e.g. *Cabazon II*, 480 U.S. at 207-12; *Bryan*, 426 U.S. at 377-87; *Barona Group*, 694 F.2d at 1187.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. 480 U.S. 202.

between a state's criminal/prohibitory laws and the state's civil/regulatory laws.⁴⁷

B. *California v. Cabazon Band of Mission Indians*⁴⁸

In *California v. Cabazon Band of Mission Indians*, the Cabazon and Morongo Bands of Mission Indians brought suit against the State of California seeking a declaratory judgment that the State cannot apply California law in Indian country and an injunction to keep the State from doing so.⁴⁹ Both tribes were conducting bingo games on their reservations, and both tribes encouraged non-Indians to participate in this gaming.⁵⁰ The Cabazon Band, in addition to bingo, was operating a card club that offered a variety of card games, including draw poker.⁵¹ These operations provided for employment of tribal members and profits as the sole source of income for the tribes.⁵²

The law California sought to enforce did not prohibit the playing of bingo, but it did impose such regulations concerning who could operate the games, who could work at the games, what to do with the profits, and how much the prizes could be worth.⁵³ In violation of this statute, the tribes were operating the games,⁵⁴ employing and paying tribal members a wage to staff the operations, and not limiting the jackpots.⁵⁵

In order for California to be able to apply its own law on the lands of the Cabazon and Morongo Bands, the State alleged Congress granted the authority to do so through Public Law 280.⁵⁶ The Ninth Circuit rejected this proposition,⁵⁷ and the Supreme Court affirmed the Ninth Circuit's reasoning that California's law was "regulatory" in nature rather than "prohibitory."⁵⁸ In *Cabazon II*, the Supreme Court applied the test the Ninth Circuit formulated in *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*⁵⁹ to conclude California's law was civil/regulatory in nature:

47. *Id.* at 208-09.

48. 480 U.S. 202.

49. *Id.* at 204-06. The law the State was trying to apply was Cal. Penal Code Ann. § 326.5 (West Supp. 1987), which concerned bingo games. *Id.* at 205. Additionally, Riverside County was trying to apply local Ordinances Nos. 558 and 331, which regulated bingo and prohibited the playing of draw poker and other card games, respectively. *Id.* at 206.

50. *Id.* at 205 (In fact, the games were played predominantly by non-Indians.).

51. *Cabazon II*, 480 U.S. at 205.

52. *Id.*

53. Cal. Penal Code Ann. § 326.5; *Cabazon II*, 480 U.S. at 205. The regulations provided that charitable organizations could conduct bingo games and only members volunteering their time could work at the games. Additionally, the regulations specified that the organization must keep the profits in special account and/or use the profits for charitable purposes. Finally, the regulations dictated that a prize's maximum value could not exceed \$250. *Id.*

54. In its merits brief, the State contested that the tribes were among the authorized charitable organizations, but at oral argument, the State allowed that the tribes were among these authorized charitable organizations. *Cabazon II*, 480 U.S. at 205-06 n. 3.

55. *Id.* at 205.

56. *Id.* at 207. California cited to Public Law 280 as amended and codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360.

57. *Cabazon Band of Mission Indians v. Riverside Co.*, 783 F.2d 900, 903 (9th Cir. 1986) [hereinafter *Cabazon I*].

58. *Cabazon II*, 480 U.S. at 210.

59. 694 F.2d 1185. In this case, the Ninth Circuit determined that California's laws with respect to bingo were regulatory and of a civil nature. The factors the court considered were: (1) California law authorizes a number of organizations to operate bingo as a money-making venture, (2) bingo was not contrary to the public policy of California law, (3) the policy that ambiguities in statutes are to be construed in the Indians' favor, and

[I]f the intent of a state law is generally to prohibit certain conduct, it falls within [Public Law] 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and [Public Law] 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.⁶⁰

Because California's public policy allowed for the playing of bingo and other games, the law restricting the gaming was regulatory in nature.⁶¹ Thus, Public Law 280 did not grant California the requisite authority to apply its laws on tribal lands.⁶²

C. *The Indian Gaming Regulatory Act*⁶³

Following the *Cabazon II* decision, states and local governments began to "urg[e] Congress to enact legislation to regulate Indian gaming for the (unexpressed) purpose of protecting existing state businesses that engaged in gaming operations and the (expressed) purpose of reducing the influence of organized crime on Indian gaming."⁶⁴ Congress listened to the states' and local governments' concerns, and they also considered the interests of Indian tribes in finally enacting the IGRA on October 17, 1988.⁶⁵

The first section of the IGRA announces Congress's findings.⁶⁶ The second

(4) the purpose of the operation was to raise money for the Barona Tribe "to promote the health, education and general welfare." *Id.* at 1189-90.

60. *Cabazon II*, 480 U.S. at 209.

61. *Id.* at 210-11.

62. *Id.* at 210.

63. 25 U.S.C. §§ 2701-2721.

64. Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 Harv. J. on Legis. 39, 50 (2007) (citing 134 Cong. Rec. H5028-07 (1988) (Statement of Rep. Udall)); Steven Andrew Light & Kathryn R.L. Rand, *Indian Gaming and Tribal Sovereignty: The Casino Compromise* 42 (U. Press Kansas 2005); Brad Jolly, *The Indian Gaming Regulatory Act: The Unwavering Policy of Termination Continues*, 29 Ariz. St. L.J. 273, 297 (1997); Robert B. Porter, *Indian Gaming Regulation: A Case Study in Neo-Colonialism*, 5 Gaming L. Rev. 299, 306 (2001); Mark C. Wenzel, *Let the Chips Fall Where They May: The Spokane Indian Tribe's Decision to Proceed with Casino Gambling without a State Compact*, 30 Gonz. L. Rev. 467, 475 (1994-1995); see also *Spokane Tribe of Indians v. Wash.*, 28 F.3d 991, 993 (9th Cir. 1994).

65. See Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721); see also Sen. Rpt. 100-446 at 5 (reprinted in 1988 U.S.C.C.A.N. at 3075).

66. 25 U.S.C. § 2701 states:

The Congress finds that—

- (1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;
- (2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;
- (3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;
- (4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and
- (5) 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.

section states the three purposes of the IGRA.⁶⁷ The first purpose of the IGRA is “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.”⁶⁸ The other two purposes address the states’ and local governments’ concerns and other tribal interests.⁶⁹ The third section of the IGRA defines three classes of Indian gaming.⁷⁰ In addition to defining the types of games each class encompasses, this section of the IGRA sets forth the jurisdiction and regulations to which each class is subject.⁷¹

Class I gaming includes social games and traditional forms of Indian gaming played for low stakes.⁷² These games usually take place in connection with ceremonies or celebrations.⁷³ One example of this type of gaming is “Wa’lade hama’gan” or “hubbub,” a bowl and dice game played by the Penobscot tribe.⁷⁴ While individuals and villages wagered money on the gaming, the game was important for demonstrating “[e]lements of reciprocal exchange.”⁷⁵ The IGRA states each tribe regulates its own class I gaming.⁷⁶ The state cannot regulate a tribe’s class I gaming activities.⁷⁷ In other words, tribes have exclusive jurisdiction over class I or traditional gaming.⁷⁸

Class II gaming includes bingo, pull-tabs, lotteries, punch boards, tip jars, instant bingo, “other games similar to bingo,”⁷⁹ non-banking card games,⁸⁰ and certain

67. *Id.* at § 2702 states:

The purpose of this chapter is—

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

Id.

68. *Id.* at § 2702(1).

69. *Id.* at § 2702(2)–(3).

70. *Id.* at § 2703.

71. See 25 U.S.C. § 2710(a), (b), & (d).

72. *Id.* at § 2703(6) (“The term ‘class I gaming’ means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.”).

73. *Id.*

74. Prindle, *supra* n. 1 (describing how to play and the object of the game as well as the history and culture surrounding the game).

75. *Id.* In addition to money, individuals and villages would also bet with “[a]nimal skins and furs, kettles, knives, axes[,] . . . [and] stores of strung wampum.” *Id.*

76. 25 U.S.C. § 2710(a)(1) (“Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.”).

77. *Id.*

78. Sen. Rpt. 100-446 at 7 (reprinted in 1988 U.S.C.C.A.N. at 3077).

79. 25 U.S.C. § 2703(7)(A)(i).

80. In “banking” games, “instead of all the players competing against each other, there is one player, the banker [the casino], who competes against each of the other players individually. Often the banker has a slight

“grandfathered” card games.⁸¹ The IGRA also specifically excludes “any banking card games, including baccarat, chemin de fer, or blackjack” from class II gaming.⁸² The IGRA states tribes retain jurisdiction over class II gaming, subject to the ordinance approval and licensing regulations of the National Indian Gaming Commission (NIGC).⁸³ While the tribe is not the sole regulator as it is with class I gaming, the state cannot regulate a tribe’s class II gaming activities.⁸⁴

Finally, Congress defined class III gaming to include all other types of gaming.⁸⁵ One associates class III games with casino-style gaming as class III games include slot machines, poker, blackjack, craps, keno, etc.⁸⁶ These types of games are potentially the most profitable for the tribe.⁸⁷ They are also the games the states most want to regulate and tax.⁸⁸ The IGRA created a compromise between the tribe’s and state’s interest on the regulation of class III gaming.⁸⁹ The IGRA states a tribal-state compact regulates class III gaming.⁹⁰ This compact results from the negotiations between the Indian tribe and the State.⁹¹ Congress implemented such a scheme to address the concerns of both the states and the tribes.⁹² The states, as sovereigns, want to protect their laws and regulations, but the tribes, as sovereigns, want to keep the states from exercising jurisdiction on their lands.⁹³ Thus, before a tribe can conduct class III gaming under the

built-in advantage over the other players.” John McLeod, *Card Games: Banking Games*, <http://www.pagat.com/banking> (last updated Mar. 23, 2007). Common banking games are blackjack, roulette, craps, etc. *Id.*

81. 25 U.S.C. § 2703(7)(C). The games grandfathered into class II gaming are operated by tribes in Michigan, North Dakota, South Dakota, and Washington. *See id.* at § 2701(7)(C)–(F).

82. *Id.* at § 2703(7)(B)(i).

83. *Id.* at § 2710(b); *see also id.* at §§ 2704–2708, 2710(c); Sen. Rpt. 100-446 at 7 (reprinted in 1988 U.S.C.C.A.N. at 3077).

84. 25 U.S.C. § 2710(b).

85. *Id.* at § 2703(8) (“The term ‘class III gaming’ means all forms of gaming that are not class I gaming or class II gaming.”).

86. *See* Natl. Indian Gaming Commn., *Game Classification Opinions*, <http://www.nigc.gov/ReadingRoom/GameClassificationOpinions/tabid/789/Default.aspx> (accessed Mar. 18, 2008) (listing different games and designating them as either class II or class III).

87. *See* Fletcher, *supra* n. 64, at 52; Raymond Cross, *Tribes as Rich Nations*, 79 Or. L. Rev. 893, 949 (2000); Natl. Indian Gaming Commn., *supra* n. 1 (“Phil Hogen, Chairman of the National Indian Gaming Commission (NIGC), announced today during the United South and Eastern Tribes (USET) semi-annual meeting that net revenues from Indian gaming grew more than 11% from 2005 to 2006, generating \$25.1 billion in gaming revenues in 2006.”); *see also* Roger Dunstan, *Gambling in California*, “Indian Gaming,” <http://www.library.ca.gov/crb/97/03/Chapt4.html> (accessed Mar. 18, 2008) (calling Indian gaming the “new buffalo” because Indian gaming “is a single source capable of feeding and clothing the Indians. It has become the one economic development program that has been able to overcome the poor quality and remote location of most of their lands.”).

88. *See* Dunstan, *supra* n. 87.

89. Sen. Rpt. 100-446 at 13 (reprinted in 1988 U.S.C.C.A.N. at 3083).

90. 25 U.S.C. § 2710(d).

91. *Id.* at § 2710(d)(3).

92. Sen. Rpt. 100-446 at 13 (reprinted in 1988 U.S.C.C.A.N. at 3083) (“[T]he use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises. . . . [T]he compact process is a viable mechanism for setting [sic] various matters between two equal sovereigns.”); *see also* *Lac du Flambeau Band*, 770 F. Supp. at 481–82.

93. *See* Sen. Rpt. 100-446 at 13 (reprinted in 1988 U.S.C.C.A.N. at 3083). *See also* *Lac du Flambeau Band*, 770 F. Supp. at 481–82.

IGRA, the tribe and the state must negotiate a tribal-state compact.⁹⁴

D. Interpreting "Permits Such Gaming"

In addition to negotiating a tribal-state compact, there are two other requirements a tribe must comply with in order to engage in class III gaming.⁹⁵ The Indian tribe must first adopt an ordinance or resolution that comports with the requirements of 25 U.S.C. § 2710(b) and is approved by the NIGC's chairman.⁹⁶ Additionally, the planned gaming must be "located in a State that *permits such gaming* for any purpose by any person, organization, or entity."⁹⁷ As mentioned above, it is with the phrase "permits such gaming" that this article is primarily concerned.

Three circuit courts have addressed this issue.⁹⁸ The Eighth and Ninth Circuits have taken a "game-specific" approach in interpreting "permits such gaming."⁹⁹ The Second Circuit has taken a "categorical" approach in interpreting the phrase.¹⁰⁰ In *Northern Arapaho Tribe v. Wyoming*,¹⁰¹ the Tenth Circuit declined to choose either approach, deciding the case on other merits.¹⁰² However, in deciding the case, the court did quote from *Mashantucket Pequot Tribe v. Connecticut (Mashantucket Pequot Tribe II)*,¹⁰³ which adopted the "categorical" approach, giving at least one analyst hope that should the Tenth Circuit need to decide this issue, it would also adopt the "categorical" approach.¹⁰⁴

The Second Circuit adopted the "categorical" approach in *Mashantucket Pequot Tribe II*.¹⁰⁵ In that case, the Indian tribe wanted to engage in class III gaming and requested Connecticut to enter into negotiations with them in order to form a tribal-state compact.¹⁰⁶ However, the State refused to negotiate because it felt its obligation to negotiate did not arise until the Tribe adopted a tribal ordinance approved by the NIGC.¹⁰⁷ The court rejected Connecticut's contention.¹⁰⁸

Connecticut law provided for the playing of a number of class III games, though only for limited occasions.¹⁰⁹ Certain non-profit organizations could offer "blackjack,

94. 25 U.S.C. § 2710(d)(1)(C).

95. See *id.* at § 2710(d)(1)(A)–(C).

96. *Id.* at § 2710(d)(1)(A).

97. *Id.* at § 2710(d)(1)(B) (emphasis added).

98. See *Mashantucket Pequot Tribe II*, 913 F.2d at 1031–32; *Cheyenne River Sioux Tribe II*, 3 F.3d at 278–80; *Rumsey Indian Rancheria*, 64 F.3d at 1255–59.

99. See e.g. *Cheyenne River Sioux Tribe II*, 3 F.3d at 278–79; *Rumsey Indian Rancheria*, 64 F.3d at 1257–58.

100. See e.g. *Mashantucket Pequot Tribe II*, 913 F.2d at 1031–32.

101. 389 F.3d 1308.

102. *Id.* at 1311.

103. *Id.* at 1312 (quoting from *Mashantucket Pequot Tribe II*, 913 F.2d at 1031).

104. That analyst is Professor G. William Rice, co-director of the Native American Law Center and Associate Professor of Law at The University of Tulsa College of Law. He is also the author of the casebook, *Tribal Governmental Gaming Law*.

105. 913 F.2d 1024 (2d Cir. 1990).

106. *Id.* at 1025.

107. *Id.* at 1025, 1028.

108. *Id.* at 1028.

109. *Id.* at 1026.

poker, dice, money-wheels, roulette, baccarat, chuck-a-luck, pan game, over and under, horse race games, acey-ducey, beat the dealer, and bouncing ball" on "Las Vegas nights" for fund-raising purposes.¹¹⁰ The State set limitations on the operation of "Las Vegas nights" concerning who could conduct "Las Vegas nights," how much could be wagered or paid out, and how often "Las Vegas nights" could be offered, among other criteria.¹¹¹

In accordance with the IGRA,¹¹² the tribe waited 180 days to file suit against Connecticut and its governor to seek "an order directing the State to conclude within sixty days a tribal-state compact . . . and appointing a mediator to resolve any impasse."¹¹³ Additionally, the tribe sought "a declaratory judgment that the IGRA obliges the State to negotiate in good faith with the Tribe regarding the conduct of gaming activities on the Reservation."¹¹⁴ The district court granted the tribe summary judgment.¹¹⁵ The Second Circuit affirmed the decision.¹¹⁶

In opposition, Connecticut argued the limited consent needed for non-profit organizations to operate "Las Vegas nights" for fund-raising purposes "does not amount to a general allowance of 'such [casino-type] gaming,' within the contemplation of section 2710(d)(1)(B), as the Tribe would institute."¹¹⁷ The State further argued this type of "gaming activity is contrary to [Connecticut's] public policy."¹¹⁸ In opposition, the tribe argued Connecticut's statute allows for "[a]ny nonprofit organization, association or corporation" to conduct "Las Vegas nights."¹¹⁹ Therefore, although Connecticut set limitations on this type of gaming, the state law permits class III gaming for some purpose.¹²⁰

The Second Circuit first looked to the IGRA's section concerning congressional findings, 25 U.S.C. § 2701.¹²¹ Specifically, the court noted that in § 2701(5), Congress set forth the finding that "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."¹²²

The Second Circuit then turned to the Senate Report accompanying the enactment of the IGRA, which approves of the *Cabazon II* distinction between criminal laws prohibiting an activity and civil laws regulating an activity to determine a State's public

110. *Mashantucket Pequot Tribe II*, 913 F.2d at 1026 n. 5 (citing Conn. Gen. Stat. § 7-186k-15 (1988)).

111. *Id.* at 1029.

112. 25 U.S.C. § 2710(d)(7)(B)(i).

113. *Mashantucket Pequot Tribe II*, 913 F.2d at 1025. The tribe sought the order pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii)-(iv). *Id.*

114. *Id.*

115. *Mashantucket Pequot Tribe v. Conn.*, 737 F. Supp. 169, 176 (D. Conn. 1990) [hereinafter *Mashantucket Pequot Tribe I*].

116. *Mashantucket Pequot Tribe II*, 913 F.2d at 1025.

117. *Id.* at 1029.

118. *Id.*

119. *Id.* (citing Conn. Gen. Stat. §§ 7-186a to 7-186p (1989)).

120. *Id.*

121. *Mashantucket Pequot Tribe II*, 913 F.2d at 1029.

122. *Id.* at 1029 (citing 25 U.S.C. § 2701(5) and noting that this finding is consistent with the ruling in *Cabazon II*).

policy.¹²³ The court notes that this Senate Report “specifically adopted the *Cabazon II* rationale as interpretive of the requirement in section 2710(b)(1)(A) that class II gaming be ‘located within a State that permits such gaming for any purpose by any person, organization or entity.’”¹²⁴

Although the Senate Report deals with the interpretation of section 2710(b)(1)(A) that regulates class II gaming, the Second Circuit found the Senate Report instructive for determining the interpretation of section 2710(d)(1)(B) which regulates class III gaming.¹²⁵ The court found it instructive because sections 2710(b)(1)(A) and 2710(d)(1)(B) have nearly identical language.¹²⁶

Section 2710(b)(1)(A) states that class II gaming is allowed on Indian lands if “such Indian gaming is *located within a State that permits such gaming for any purpose by any person, organization or entity* (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law).”¹²⁷ Section 2710(d)(1)(B) states class III gaming is allowed on Indian lands if “such activities are . . . *located in a State that permits such gaming for any purpose by any person, organization, or entity.*”¹²⁸ The Second Circuit notes that a principle of statutory construction dictates “that ‘[w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place.’”¹²⁹ Thus, the Second Circuit determined whether the tribe could offer casino-style gaming on its reservation turned on a *Cabazon II* analysis of Connecticut’s public policy.¹³⁰

The Second Circuit rejects the State’s approach which would apply “the full corpus of state laws and regulations with regard to gambling”¹³¹ to tribal gaming, concluding it would nullify the “compact process that Congress established as the centerpiece of the IGRA’s regulation of class III gaming.”¹³² The Senate Report indicates the compacting process was a compromise considering the sovereignty of both the State and the tribe, but the compacting process does not strip the tribe of its sovereignty.¹³³ The Senate Report states,

[a]fter lengthy hearings, negotiations and discussions, the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as pari-mutuel horse and dog racing, casino gaming, jai alai and so forth.

123. *Id.* (quoting Sen. Rpt. 100-446 at 6 (reprinted in 1988 U.S.C.C.A.N. at 3076); citing *U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8th Cir. 1990)).

124. *Id.* (quoting 25 U.S.C. § 2710(b)(1)(A)) (referencing Sen. Rpt. 100-446 at 6 (reprinted in 1998 U.S.C.C.A.N. at 3076)).

125. *Id.* at 1030.

126. *Mashantucket Pequot Tribe II*, 913 F.2d at 1030.

127. 25 U.S.C. § 2710(b)(1)(A) (emphasis added).

128. *Id.* at § 2710(d)(1)(B) (emphasis added).

129. *Mashantucket Pequot Tribe II*, 913 F.2d at 1030 (quoting *U.S. v. Nunez*, 573 F.2d 769, 771 (2d Cir. 1978)).

130. *Id.*

131. *Id.* at 1031.

132. *Id.*

133. *Id.* at 1030 (citing Sen. Rpt. 100-446 at 13 (reprinted in 1988 U.S.C.C.A.N. at 3083)).

The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not now apply. The Committee balanced these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. The Committee concluded that the compact process is a viable mechanism for setting [sic] various matters between two equal sovereigns.¹³⁴

Thus, the court concludes a tribe is not "subject to the entire body of State law on gaming" just because it must create a compact with the State.¹³⁵ Instead, to offer class III gaming, the tribe must only comply with the public policy of the State in accordance with a *Cabazon II* analysis.¹³⁶

The Second Circuit approved of the district court's conclusion that such gaming did not violate the State's public policy because Connecticut allows games of chance for fund-raising purposes and permits other types of statewide gambling,¹³⁷ thus, class III gaming must not be "totally repugnant to the State's public policy."¹³⁸ Thus, Connecticut regulates rather than prohibits class III gaming, so it must enter into good faith negotiations with the tribe in order to form a compact to regulate class III gaming on tribal lands.¹³⁹ To arrive at this result, the Second Circuit adopted the "categorical" approach to interpret "permits such gaming."¹⁴⁰

Although the Second Circuit has been the only federal court of appeals to adopt the "categorical" approach, some other circuits' district courts interpreting 25 U.S.C. § 2710(d)(1)(B) have also adopted the "categorical" approach.¹⁴¹ In fact, the "categorical" approach is also sometimes called the "Wisconsin" analysis¹⁴² because of the decision announced in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*.¹⁴³ This case was decided after the Second Circuit announced its judgment in *Mashantucket Pequot Tribe II*, and the decision in *Lac du Flambeau Band* deals more directly with the question of whether a State may refuse to negotiate on a particular game if the State does not permit that particular game to take place.¹⁴⁴ The district court in *Lac du Flambeau Band* answered that question in the negative.¹⁴⁵

134. *Mashantucket Pequot Tribe II*, 913 F.2d at 1030.

135. *Id.* at 1031 (quoting *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 366 n. 10).

136. *Id.*

137. The other types of gambling Connecticut permits are a state-operated lottery, bingo, jai alai, and pari-mutuel betting. *Id.* at 1031.

138. *Id.*

139. *Mashantucket Pequot Tribe II*, 913 F.2d at 1032.

140. *Id.* at 1029-32.

141. See e.g. *Ysleta Del Sur Pueblo v. Tex.*, 852 F. Supp. 587, 593 (W.D. Tex. 1993); *Lac du Flambeau Band*, 770 F. Supp. at 488; see also *Dalton v. Pataki*, 835 N.E.2d 1180, 1189 (N.Y. 2005) (a state's highest court interpreting the issue). The New York Court of Appeals considered the issue when "a group of citizen taxpayers, state legislators, and not-for-profit organizations 'opposed to the spread of gambling'" brought suit against New York's governor seeking to have certain provisions of New York's law governing gaming be declared unconstitutional. *Id.* at 1185. The court rejected the argument, adopting the "categorical" approach to determine the issue. *Id.* at 1189.

142. *N. Arapaho*, 389 F.3d at 1311.

143. 770 F. Supp. 480. Wisconsin is part of the Seventh Circuit whose court of appeals has not issued an opinion adopting the "categorical" or "game-specific" approach.

144. *Id.* at 482.

145. *Id.* at 488.

The Lac du Flambeau Tribe of Lake Superior Chippewa Indians and the Sokaogon Chippewa Community brought suit to determine whether it was necessary for Wisconsin to negotiate with the tribe concerning certain types of games in forming the compact to allow class III gaming.¹⁴⁶ The class III gaming activities the tribes wanted to include in the compact consisted of “Black Jack 21-cards, Cards, Video/Slots, games such as Black-Jack and Poker, Craps, Roulette, Keno, off track betting parlor, [and] Sports book.”¹⁴⁷ However, the State determined the only class III gaming Wisconsin allowed is “lotteries and on-track parimutuel wagering,” and the State refused to negotiate on any other class III gaming.¹⁴⁸

The State argued it negotiated in good faith since the other types of class III gaming the tribes sought to include in the compact “are not permitted for any purpose by any person, organization or entity within Wisconsin [and] because they are not, the state is not required to bargain over these games.”¹⁴⁹ The State focused on the word “permits” in the language of 25 U.S.C. § 2710(d)(1)(B) in its argument.¹⁵⁰ The State argued the word “permits” as used in § 2710(d)(1)(B) ought to be read as “grant[s] leave.”¹⁵¹ Thus, under Wisconsin’s approach, “unless a state grants leave expressly for the playing of a particular type of gaming activity within the state, that activity cannot be lawful on Indian lands,”¹⁵² and the state is under no obligation to negotiate with regards to that “particular type of gaming activity.”¹⁵³ The court disagreed with the State, pointing out “permits” has more than one meaning.¹⁵⁴

For example, the court pointed out the State’s definition ignores the prohibitory/regulatory distinction set out in *Cabazon II*.¹⁵⁵ The court reasoned because Congress relied on the *Cabazon II* decision in drafting the IGRA, that distinction is essential in interpreting the meaning of the IGRA.¹⁵⁶ Thus, if Wisconsin’s policy “permits” some class III gaming, the State merely regulates the activity rather than prohibits it.¹⁵⁷ Because Wisconsin permits some class III gaming in the form of lotteries or pari-mutuel wagering, its policy is to regulate class III gaming.¹⁵⁸ The district court concluded that

[i]t was not Congress’s intent that the states would be able to impose their gaming regulatory schemes on the tribes. The Act’s drafters intended to leave it to the sovereign

146. *Id.* at 481.

147. *Id.* at 483.

148. *Lac du Flambeau Band*, 770 F. Supp. at 483.

149. *Id.* at 484.

150. (The language of 25 U.S.C. § 2710(d)(1)(B) is “[c]lass III gaming activities shall be lawful on Indian lands only if such activities are . . . located in a State that permits such gaming for any purpose by any person, organization, or entity.”).

151. *Id.* at 484–85.

152. *Id.*

153. *Lac du Flambeau Band*, 770 F. Supp. at 485.

154. *Id.* (quoting the fifth edition of *Black’s Law Dictionary* defining “permits” as “[t]o suffer, allow, consent, let; to give leave or license; to acquiesce by failure to prevent, or to expressly assent or agree to the doing of an act”).

155. *Id.* at 485.

156. *Id.*

157. *Id.*

158. *Lac du Flambeau Band*, 770 F. Supp. at 486.

state and tribal governments to negotiate the specific gaming activities involving prize, chance and consideration that each tribe will offer under the terms of its tribal state compact.¹⁵⁹

The court held because Wisconsin "does not, as a matter of criminal law and public policy, *prohibit* such gaming activity"¹⁶⁰ and proffers "a state policy toward gaming that is now regulatory rather than prohibitory in nature,"¹⁶¹ the State is required to negotiate with the tribes on games the tribes want to include which are not expressly prohibited by state law.¹⁶²

To summarize, the Second Circuit used the language of the IGRA to establish Indian tribes have the right to govern the gaming that takes place on tribal lands.¹⁶³ Then the court concluded the IGRA's legislative intent was to codify the *Cabazon II* distinction between prohibited and regulated activities.¹⁶⁴ The court then determined Connecticut regulates, rather than prohibits, class III gaming since its policy is to allow those types of games to take place on occasion.¹⁶⁵ Because Connecticut "permits such gaming," albeit occasionally, it is not against state policy for class III gaming to take place.¹⁶⁶ Since the tribe governs gaming on tribal lands and class III gaming is not prohibited, the tribe should be able to offer class III gaming at a casino as a revenue-generating enterprise.¹⁶⁷ The court ordered the State to negotiate with the tribe in good faith.¹⁶⁸ This opinion suggests the tribe and State might negotiate over any class III game whether or not the State specifically allows the particular game.¹⁶⁹ The *Lac du Flambeau Band* court continued this analysis; it ruled that if the State's policy allows for any class III gaming, the State must negotiate with the tribe over any class III game even if the State does not expressly allow it under any other circumstance.¹⁷⁰

Subsequent to the Second Circuit's and Wisconsin district court's decisions, the Eighth and Ninth Circuits considered the issue of what "permits such gaming" entails.¹⁷¹ Unlike the Second Circuit's and Western District of Wisconsin's broad interpretations, the Eighth and Ninth Circuits defined "permits such gaming" much more narrowly and adopted the "game-specific" approach.¹⁷² If a jurisdiction adopts the "game-specific" approach, the State must only negotiate with the tribe over games the State expressly

159. *Id.* at 487 (citing *Mashantucket Pequot Tribe II*, 913 F.2d at 1024).

160. *Id.* at 486 (emphasis in original).

161. *Id.*

162. *Id.* at 488.

163. *Mashantucket Pequot Tribe II*, 913 F.2d at 1029.

164. *Id.*

165. *Id.* at 1031.

166. *Id.*

167. *Id.* at 1032.

168. *Mashantucket Pequot Tribe II*, 913 F.2d at 1032.

169. *Id.* ("This ruling means only that the State must negotiate with the Tribe concerning the conduct of casino-type games of chance at the Reservation. We necessarily leave to those negotiations the determination whether and to what extent the regulatory framework under which such games of chance are currently permitted in the State shall apply on the Reservation.").

170. *Lac du Flambeau Band*, 770 F. Supp. at 488.

171. See *Cheyenne River Sioux Tribe II*, 3 F.3d at 278-80; *Rumsey Indian Rancheria*, 64 F.3d at 1255-59.

172. *Cheyenne River Sioux Tribe II*, 3 F.3d at 279; *Rumsey Indian Rancheria*, 64 F.3d at 1258.

allows.¹⁷³

The first appellate court to adopt this approach was the Eighth Circuit in *Cheyenne River Sioux Tribe v. South Dakota*.¹⁷⁴ In this case, the tribe sued the State for failure to negotiate in good faith under 25 U.S.C. § 2710(d)(7)(B)(i).¹⁷⁵ The tribe sought an injunction “order[ing] the State and the Indian Tribe to conclude . . . a compact within a 60-day period”¹⁷⁶ pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii).¹⁷⁷

South Dakota offers the following types of class III gaming: “[L]otteries, video lottery, limited card games, slot machines, parimutuel horse and dog racing, and simulcasting.”¹⁷⁸ Prior to the Cheyenne River Sioux Tribe’s request to enter into negotiations to execute a tribal-state compact allowing class III gaming, the State had formed tribal-state compacts with six of the nine federally recognized tribes residing in South Dakota.¹⁷⁹ South Dakota executed its first tribal-state compact in 1990 with the Flandreau Santee Tribe.¹⁸⁰ South Dakota used this compact as the “model” for all subsequent tribal-state compacts.¹⁸¹

The State and the Cheyenne River Sioux Tribe held “five ‘official’ negotiations,” and the tribe and the governor of South Dakota met on three separate occasions.¹⁸² In these negotiations, the State “adopted a ‘rigid’ negotiation strategy by offering the tribe the so-called ‘Flandreau compact.’”¹⁸³ The Cheyenne River Sioux Tribe sought to include games not included in the “Flandreau compact,”¹⁸⁴ higher wagering limits, and

173. See e.g. *Cheyenne River Sioux Tribe II*, 3 F.3d at 279; *Rumsey Indian Rancheria*, 64 F.3d at 1258.

174. 3 F.3d 273.

175. *Id.* at 276; see also *Cheyenne River Sioux Tribe v. S.D.*, 830 F. Supp. 523, 524 (D.S.D. 1993) [hereinafter *Cheyenne River Sioux Tribe I*].

176. 25 U.S.C. § 2710(d)(7)(B)(iii).

177. *Cheyenne River Sioux Tribe II*, 3 F.3d at 276; see also *Cheyenne River Sioux Tribe I*, 830 F. Supp. at 524.

178. *Cheyenne River Sioux Tribe II*, 3 F.3d at 276.

179. *Id.* Those six tribes are the Flandreau Santee Tribe, the Sisseton-Wahpeton Sioux Tribe, the Yankton Sioux Tribe, the Lower Brule Sioux Tribe, the Crow Creek Sioux Tribe, and the Standing Rock Sioux Tribe. The historic community of Deadwood, South Dakota, also offers class III gaming though this is not tribal gaming, so it is not regulated by a tribal-state compact. *Id.*

180. *Id.*

181. *Id.* at 277.

182. *Cheyenne River Sioux Tribe II*, 3 F.3d at 276.

183. *Id.* (footnote omitted).

184. The court describes the “Flandreau compact” as:

A. The Tribe is allowed initially to operate 180 gaming devices to be split at the Tribe’s choice between slot machines, poker tables and blackjack tables.

B. If the Tribe can demonstrate that their devices average at least \$63.75 per day of play, then they are entitled to add an additional 70 devices, bringing the total to 250 devices.

C. The blackjack and poker games and the slot machines are to be operated in accordance with state regulations covering pot and bet limits, payout limits and hours of operation.

D. The State conducts background investigations for all potential tribal gaming operators. These persons must meet state licensing requirements. An arbitrations procedure may be invoked to handle licensing disputes.

E. The Flandreau Tribal Gaming Commission handles discipline of licensees. However, there is oversight by the executive director of the State Gaming Commission. The executive director has the ability to require the Tribal Gaming Commission to impose greater penalties in discipline situations if he/she believes that the penalties imposed by the Tribe are not severe enough.

"gaming sites on commercially valuable Indian trust lands located near Fort Pierre and Pluma."¹⁸⁵ The State refused to negotiate on these terms unless the tribe granted the state certain concessions.¹⁸⁶ The tribe refused these concessions and sued the State for failure to negotiate in good faith.¹⁸⁷

At the district court, the tribe argued the "Flandreau compact" was unreasonable for its needs and it was entitled to a different kind of compact than the Flandreau Tribe negotiated with the State.¹⁸⁸ The tribe's rationale was it is larger in population and area than the other tribes, it is located in a remote area, and it "has a mature tribal government, including tribal police and tribal courts."¹⁸⁹ However, the district court rejected the tribe's arguments and refused to grant summary judgment for either the tribe or the State.¹⁹⁰ The district court determined the State did negotiate in good faith because South Dakota law sets bet limits and only allows for video keno.¹⁹¹ The court denied summary judgment because a material fact question remained concerning whether the operation of the gaming off the tribe's reservation lands in Fort Pierre and Pluma met the requirements of the IGRA.¹⁹² Both the State and tribe appealed the district court's judgment.¹⁹³

The tribe specifically wanted to offer traditional keno as part of its class III gaming venture.¹⁹⁴ It argued that because the State permits video keno and also allows charities

F. If state bet limits are increased or decreased, the Tribe's bet limits are increased or decreased automatically.

G. If the State authorizes new or different games, the Tribe is entitled upon amendment of the compact to offer such games.

H. The 180 gaming devices authorized by the compact is based upon twice the number that one individual can control in Deadwood. If the maximum gaming device numbers for individuals in Deadwood is increased or decreased, then the Flandreau Tribe is entitled automatically to a proportional increase or decrease in authorized device numbers.

I. The compact also deals with civil and criminal jurisdiction related to gaming. The jurisdiction is basically agreed to be as follows:

Tribal member criminal defendants will be proceeded against in federal or tribal court. All others will be proceeded against in state court except consistent with *State v. Larson*, 455 N.W.2d 600 (S.D. 1990). Civilly, disputes between tribal members will be heard in tribal court. If either party to the dispute is not a tribal member, the case will be heard in state court unless the parties stipulate the case to be heard in tribal court. Tribal sovereign immunity is not waived.

Id. at 276-77 n. 4.

185. *Id.* at 277. The Cheyenne River Sioux Tribe's reservation "is located in a remote western part of the state, far from population centers, which are located in the southeastern corner of the state." *Id.* Fort Pierre and Pluma are not on, nor near the tribe's reservation lands. *Cheyenne River Sioux Tribe II*, 3 F.3d at 278 n. 5.

186. *Id.* at 277 (One example of such a concession is expanded state criminal jurisdiction.).

187. *Id.* at 276.

188. *Id.* at 277.

189. *Id.*

190. *Cheyenne River Sioux Tribe II*, 3 F.3d at 278.

191. *Id.* at 277 (The tribe wanted to offer traditional keno as part of its class III gaming enterprise, but the State refused to negotiate over traditional keno.).

192. *Id.* at 277-78 (citing *Cheyenne River Sioux Tribe I*, 830 F. Supp. at 525-26); see also 25 U.S.C. § 2703(4) (defining "Indian lands").

193. *Cheyenne River Sioux Tribe II*, 3 F.3d at 278.

194. *Id.* at 277.

to operate “casino-type games such as craps and blackjack”¹⁹⁵ at “Las Vegas” nights, the tribe should be allowed to operate “similar casino-type gambling and traditional keno.”¹⁹⁶ The State countered that traditional keno is fundamentally different than video keno, and it would be unfair to allow the Cheyenne River Sioux Tribe to offer the traditional form since the other tribes offering class III gaming were not able to offer it.¹⁹⁷ The State also alleged charities may only legally operate bingo and raffles.¹⁹⁸

The court agreed with the State that “[t]he ‘such gaming’ language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit.”¹⁹⁹ The court used a similar rationale with regards to whether the Cheyenne River Sioux Tribe could operate games with higher bet limits, concluding the State did not need to negotiate with the tribe concerning this since the State expressly allowed for a bet limit of five dollars.²⁰⁰

The Ninth Circuit also adopted a “game-specific” approach to interpreting “permits such gaming” in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*.²⁰¹ In this case, seven tribes²⁰² sued the governor of California because the State refused to negotiate with the tribes in the compacting process over the inclusion of three types of class III gaming—stand-alone electronic gaming devices, live banking card games, and live percentage card games.²⁰³

California law allows for some class III gaming, namely “video lottery terminals, parimutuel horse racing, and nonbanked, nonpercentage card gam[es].”²⁰⁴ However, California law prohibits live banking and percentage card games as well as slot machines as misdemeanor offenses.²⁰⁵ Therefore, whether California would be obligated to negotiate with the tribes over the inclusion of these games in the tribal-state compact hinges on the interpretation of the phrase “permits such gaming” as found in 25 U.S.C. § 2710(d)(1)(B).²⁰⁶

The State argued that because the proposed gaming activities are illegal under State law,²⁰⁷ the IGRA does not obligate California to negotiate with tribes.²⁰⁸ This

195. *Id.* at 278.

196. *Id.*

197. *Id.*

198. *Cheyenne River Sioux Tribe II*, 3 F.3d at 278–79.

199. *Id.* at 279.

200. *Id.*

201. 64 F.3d 1250.

202. *Id.* at 1255. The seven tribes included: (1) the Rumsey Indian Rancheria of Wintun Indians; (2) Table Mountain Rancheria; (3) Cher-Ae Heights Indian Community of the Trinidad Rancheria; (4) San Manuel Band of Mission Indians, Viejas Reservation of the Capitan Grande Band of Diegueno Mission Indians and Hopland Band of Pomo Indians; (5) Barona Band of Mission Indians; (6) Sycuan Band of Mission Indians; and (7) Agua Caliente Band of Cahuilla Indians. *Id.* at 1250–51. Other complaining tribes joined in the appeal. *Id.* at 1255.

203. *Id.* (footnotes omitted).

204. *Rumsey Indian Rancheria*, 64 F.3d at 1256.

205. *Id.* (citing Cal. Penal Code Ann. §§ 330, 330a, & 330b).

206. *See id.*

207. In *Score Family Fun Center, Inc. v. Co. of San Diego*, 225 Cal. App. 3d 1217 (1990), the California appellate court “indicated that electronic machines of the sort requested by the Tribes fall within the scope of [the] prohibition” in Cal. Penal Code §§ 330a and 330b. *Rumsey Indian Rancheria*, 64 F.3d at 1256.

208. *Id.*

argument follows the "game-specific" approach.²⁰⁹ The tribes argued that because the State offers some class III gaming, its policy is to regulate class III gaming in general as a matter of public policy.²¹⁰ This argument follows the "categorical" approach.²¹¹ The tribes cited to *Cabazon II* and emphasized that decision's shorthand test for determining whether the state regulates or prohibits an activity such as gaming is whether "the conduct at issue violates the State's public policy."²¹²

The court rejected the tribes' broad reading of the IGRA in favor of the State's more narrow interpretation.²¹³ The court rationalized this decision using "[their] traditional tools of statutory construction."²¹⁴ The court determined because the IGRA's language was not ambiguous, the plain meaning would be conclusive in its interpretation.²¹⁵ Because of this, the court did not consider the legislative history surrounding the IGRA, nor the canon of construction dictating that courts should read statutes affecting Native Americans liberally in the Native Americans' favor.²¹⁶

In its interpretation of 25 U.S.C. § 2710(d)(1)(B), the court focused on the definition of "permit."²¹⁷ The Ninth Circuit had previously adopted the "dictionary definition of the term permit as meaning [t]o suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act."²¹⁸ The court used this definition to decide that California did not permit the tribes' proposed gaming activities.²¹⁹

The court did acknowledge the senate report accompanying the passage of the IGRA interpreted the term "permit" differently, but pointed out this was only in connection with the discussion of class II gaming.²²⁰ The tribes relied on this Senate report to urge the court to accept that Congress intended to implement the *Cabazon II* distinction between prohibited and regulated activities in defining "permits such gaming" for both class II and class III gaming.²²¹ The court agreed with the tribes' argument with respect to class II gaming, but it rejected the argument with respect to class III gaming.²²²

The Second Circuit, in *Mashantucket Pequot Tribe II*, also recognized Congress's stated intent to implement the *Cabazon II* distinction in the IGRA with respect to class II

209. See generally *N. Arapaho*, 389 F.3d at 1311.

210. *Rumsey Indian Rancheria*, 64 F.3d at 1256.

211. See generally *N. Arapaho*, 389 F.3d at 1311.

212. *Rumsey Indian Rancheria*, 64 F.3d at 1257 (emphasis omitted).

213. *Id.*

214. *Id.*

215. *Id.* (quoting *Mallard v. U.S. Dist. Ct. for the So. Dist. of Iowa*, 490 U.S. 296, 300 (1989) ("Interpretation of a statute must begin with the statute's language."); *U.S. v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'").

216. *Rumsey Indian Rancheria*, 64 F.3d at 1257 (quoting *Fernandez v. Brock*, 840 F.2d 622, 632 (9th Cir. 1988)).

217. *Id.* at 1258-59.

218. *Id.* at 1257 (internal quotations omitted) (quoting *U.S. v. Launder*, 743 F.2d 686 (9th Cir. 1984)).

219. *Id.* at 1257-58.

220. *Id.* at 1259 (quoting Sen. Rpt. 100-446 at 6 (reprinted in 1988 U.S.C.C.A.N. 3071, 3076)).

221. *Rumsey Indian Rancheria*, 64 F.3d at 1259.

222. *Id.*

gaming but, unlike the Ninth Circuit, extended the distinction to class III gaming.²²³ The Second Circuit extended the distinction to class III gaming because it compared the language of the two sections in the IGRA and found them to be nearly identical.²²⁴ The Second Circuit implemented the principle of statutory construction prescribing “[w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place.”²²⁵

The Ninth Circuit rejected this principle of statutory construction with respect to 25 U.S.C. §§ 2710(b)(1)(A) and 2710(d)(1)(B).²²⁶ Instead, the court stated “[i]dential words appearing more than once in the same act, and even in the same section, may be construed differently if it appears they were used in different places with different intent.”²²⁷ The court found this to be the case with respect to these two sections of the IGRA because the Senate Report was silent with regards to the *Cabazon II* analysis and class III gaming, and because the court determined “Congress envisioned different roles for Class II and Class III gaming.”²²⁸

The court further supported its decision by analogizing to *Cheyenne River Sioux Tribe II* and agreeing with the approach the Eighth Circuit adopted—the “game-specific” approach.²²⁹ The court in *Rumsey Indian Rancheria* concluded “a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.”²³⁰

III. “PERMITS SUCH GAMING” AND THE “CATEGORICAL” APPROACH

The proper interpretation of 25 U.S.C. § 2710(d)(1)(B)’s “permits such gaming” is the “categorical” approach which is consistent with the plain meaning of the statute and conforms more to the legislative intent.²³¹ In addition, using the “categorical” approach to interpret this section comports with the canon of Indian law construction that provides

223. *Mashantucket Pequot Tribe II*, 913 F.2d at 1030.

224. *Id.* Title 25 U.S.C. § 2710(b)(1)(A) states that class II gaming is allowed on Indian lands if “such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by federal law).” *Id.* (emphasis added). Title 25 U.S.C. § 2710(d)(1)(B) states that class III gaming is allowed on Indian lands if “such activities are . . . located in a State that permits such gaming for any purpose by any person, organization, or entity.” *Id.* (emphasis added).

225. *Mashantucket Pequot Tribe II*, 913 F.2d at 1030 (quoting *Nunez*, 573 F.2d at 771).

226. *Rumsey Indian Rancheria*, 64 F.3d at 1259. In a footnote, the Ninth Circuit stated that the Second Circuit came to the correct conclusion in *Mashantucket Pequot Tribe II*, but it disagreed with the Second Circuit’s “use of the Class II legislative history to interpret IGRA’s Class III provisions.” *Id.* at 1259 n. 5.

227. *Id.* at 1259 (quoting *Vanscooter v. Sullivan*, 920 F.2d 1441, 1448 (9th Cir. 1990)).

228. *Id.* (citing *Ariz. Elec. Power Coop. v. U.S.*, 816 F.2d 1366, 1375 (9th Cir. 1987) for the *expressio unius* principle). *Expressio unius est exclusio alterius* is “[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.” *Black’s Law Dictionary* 620 (Bryan A. Garner ed., 8th ed., West 2004).

229. *Rumsey Indian Rancheria*, 64 F.3d at 1258.

230. *Id.* (footnote omitted). The Tribes petitioned for an en banc rehearing. *Id.* at 1252. The Ninth Circuit denied this request over a vigorous dissent. *Id.* at 1252–55 (Canby, Pregerson, Reinhardt & Hawkins, JJ., dissenting).

231. See Sen. Rpt. 100-446 (reprinted in 1988 U.S.C.A.N. at 3071–72).

for resolution favoring the tribe when there is ambiguity in a statute.²³² Finally, this approach allows for more tribal autonomy, in line with one of the stated purposes of enacting the IGRA—"to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."²³³

A. Using Plain Meaning to Interpret "Permits Such Gaming"

Plain meaning is "[t]he meaning attributed to a document . . . by giving the words their ordinary sense, without referring to extrinsic indications of the author's intent."²³⁴ The plain-meaning rule is "[t]he rule that if a writing, or a provision in a writing, appears to be unambiguous on its face, its meaning must be determined from the writing itself without resort to any extrinsic evidence."²³⁵ In support of the plain-meaning rule, the Supreme Court has reiterated many times "[t]he starting point in every case involving construction of a statute is the language itself."²³⁶ The language of 25 U.S.C. § 2710(d)(1)(B) states "[c]lass III gaming activities shall be lawful on Indian lands only if such activities are . . . located in a State that permits such gaming for any purpose by any person, organization, or entity."²³⁷ The language in question is "permits such gaming."

The ordinary-meaning rule is "[t]he rule that when a word is not defined in a statute or other legal instrument, the court normally construes it in accordance with its ordinary or natural meaning."²³⁸ Because Congress did not include "permit" in the IGRA's definitions,²³⁹ the *Lac du Flambeau Band* and *Rumsey Indian Rancheria* courts looked to the dictionary definition of "permits."²⁴⁰ In *Lac du Flambeau Band*, the district court focused on *Black's Law Dictionary's* definition of "permit" as "[t]o suffer, allow, consent, let; to give leave or license; to acquiesce by failure to prevent, or to expressly assent or agree to the doing of an act."²⁴¹ In *Rumsey Indian Rancheria*, the Ninth Circuit adopted the same dictionary definition of "permit."²⁴² Using the same definition of "permit," the *Lac du Flambeau Band* court and the *Rumsey Indian*

232. 41 Am. Jur. 2d *Indians* § 2 (2005). See also *Bryan*, 426 U.S. at 392 (quoting *Alaska P. Fisheries v. U.S.*, 248 U.S. 78, 89 (1918)); *Antoine v. Wash.*, 420 U.S. 194, 199–200 (1975).

233. 25 U.S.C. § 2702(1) (emphasis added).

234. *Black's Law Dictionary* at 1002.

235. *Id.* at 1188.

236. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, Stewart & Marshall, JJ., concurring). See also *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 302 (1993) (Thomas, Blackmun & O'Connor, JJ., dissenting) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976)); *Ernst & Ernst*, 425 U.S. at 197 (quoting *Blue Chip Stamps*, 421 U.S. at 756); *Rumsey Indian Rancheria*, 64 F.3d at 1257 ("Interpretation of a statute must begin with the statute's language.") (quoting *Mallard*, 490 U.S. at 300).

237. 25 U.S.C. § 2710(d)(1)(B).

238. *Black's Law Dictionary* at 1132.

239. See 25 U.S.C. § 2703.

240. *Rumsey Indian Rancheria*, 64 F.3d at 1257; *Lac du Flambeau Band*, 770 F. Supp. at 484–85.

241. *Lac du Flambeau Band*, 770 F. Supp. at 485 (quoting *Black's Law Dictionary* 1026 (Joseph R. Nolan & M.J. Connolly eds., 5th ed., West 1979)). The court used the fifth edition of *Black's Law Dictionary*. The eighth edition of *Black's Law Dictionary* defines "permit" as (1) "[t]o consent to formally," (2) "[t]o give opportunity for," and (3) "[t]o allow or admit of." *Black's Law Dictionary* at 1176.

242. *Rumsey Indian Rancheria*, 64 F.3d at 1257. In this case, the Ninth Circuit, like the Western District Court of Wisconsin in *Lac du Flambeau Band*, used the fifth edition of *Black's Law Dictionary*. *Id.*

Rancheria court came to opposite conclusions: The Western District Court in *Lac du Flambeau* adopted the “categorical” approach, and the Ninth Circuit in *Rumsey Indian Rancheria* adopted the “game-specific” approach.²⁴³

Because the definition of “permit” is not the decisive factor in determining whether to take the “categorical” or “game-specific” approach, it is necessary to look at “such gaming.”²⁴⁴ The dictionary definition of “such” is “of the character, quality, or extent previously indicated or implied; of the same class, type, or sort.”²⁴⁵ The “previously indicated” gaming in 25 U.S.C. § 2710(d)(1)(B) is class III gaming in general, not one particular class III game.²⁴⁶ To interpret “such gaming” in “[c]lass III gaming activities shall be lawful . . . if such activities are . . . located in a State that permits *such gaming*”²⁴⁷ as referring to only a specific class III game “is not a natural reading of the statutory language.”²⁴⁸ Instead, the natural reading is to read “such gaming” as referring to class III gaming in general. Class III gaming in general is “of the same class, type, or sort”²⁴⁹ to which the statute’s language, “such gaming” refers.

In further support of this contention is the fact that Congress used “such” earlier in the statute to describe “activities” in referring back to class III gaming activities.²⁵⁰ “A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.”²⁵¹ Because “such activities” clearly refers to class III gaming in general, “such gaming” must also refer to class III gaming in general.

An example will help illustrate this point. Tribe A wants to offer roulette, craps, and poker (all class III games) at its Indian Casino. It requests State B enter into negotiations with it to form a compact so it might begin operating these games. State B allows for charitable organizations to offer roulette and poker at “Las Vegas nights” to raise funds, but State B does not allow charitable organizations to offer craps at these fundraising events. Additionally, State B operates a state lottery and provides for pari-

243. *Id.* at 1258, 1260; *Lac du Flambeau Band*, 770 F. Supp. at 485, 488.

244. See *Rumsey Indian Rancheria*, 64 F.3d at 1254 (Canby, Pregerson, Reinhardt & Hawkins, JJ., dissenting).

245. *Merriam-Webster's Collegiate Dictionary* 1247 (11th ed., Merriam-Webster 2006).

246. See *Rumsey Indian Rancheria*, 64 F.3d at 1254 (Canby, Pregerson, Reinhardt & Hawkins, JJ., dissenting).

The only natural reading of section 2710(d)(1)(B) is that, when Congress says “Class III gaming activities shall be lawful . . . if located in a State that permits such gaming,” then “such gaming” refers back to the category of “Class III gaming,” which is the next prior use of the word “gaming.” [The majority opinion in *Rumsey Indian Rancheria*] interprets the statutory language as if it said: “A Class III game shall be lawful . . . if located in a State that permits that game.” But that is not what Congress said, and it is not a natural reading of the statutory language. The plain language cuts directly against [the majority opinion]; Congress allows a tribe to conduct Class III gaming activities (pursuant to a compact) if the State allows Class III gaming by anyone.

Id.

247. 25 U.S.C. § 2710(d)(1)(B) (emphasis added).

248. *Rumsey Indian Rancheria*, 64 F.3d at 1254 (Canby, Pregerson, Reinhardt & Hawkins, JJ., dissenting).

249. *Merriam-Webster's Collegiate Dictionary* 1247.

250. See 25 U.S.C. § 2710(d)(1)(B) (“Class III gaming activities shall be lawful on Indian lands only if *such activities* are . . . located in a State that permits *such gaming* for any purpose by any person, organization, or entity.”) (emphasis added).

251. *Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2417 (2007) (citing *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005)).

mutuel wagering at greyhound and horse races. State B permits class III gaming in general by allowing for roulette, poker, a lottery, and pari-mutuel wagering. Under the plain meaning of 25 U.S.C. § 2710(d)(1)(B), State B should negotiate with Tribe A over the offering of craps in addition to roulette and poker.²⁵² This is because craps is a class III gaming activity and class III gaming activities are lawful in State B because State B “permits such gaming” by allowing for other class III gaming activities.²⁵³

Thus, 25 U.S.C. § 2710(d)(1)(B) is facially unambiguous. The plain meaning of the statute’s language supports a “categorical” approach to interpreting “permits such gaming.”

B. *Using Legislative Intent to Interpret “Permits Such Gaming”*

Although the starting point of any statutory construction begins with the plain meaning of the statute’s language, the plain meaning is not necessarily the concluding point also.²⁵⁴ The plain meaning will not be conclusive where “the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.”²⁵⁵ Therefore, if a court encounters the issue of interpreting “permits such gaming,” and finds the plain meaning of 25 U.S.C. § 2710 supports a finding for a “game-specific” approach, the court should still look to the legislative history of the IGRA. Using a “game-specific” approach is the opposite of what Congress intended, as evidenced by Senate Report 100-446 (Report).²⁵⁶

The Report begins by noting the reasons for adopting federal legislation that will place limitations on tribal sovereignty.²⁵⁷ The States and the U.S. Department of Justice repeatedly “expressed concern over the potential for the infiltration of organized crime or criminal elements in Indian gaming activities.”²⁵⁸ However, if this is the reason for

252. See *Rumsey Indian Rancheria*, 64 F.3d at 1254 (Canby, Pregerson, Reinhardt & Hawkins, JJ., dissenting). Circuit Judge Canby argues that “[t]he structure of IGRA makes clear that Congress was dealing categorically, and that a state’s duty to bargain is not to be determined game-by-game. The time to argue over particular games is during the negotiation process.” *Id.*

253. See 25 U.S.C. § 2710(d)(1)(B).

254. See e.g. *Fed. Trade Commn.*, 312 U.S. at 350 (“While one may not end with the words of a disputed statute, one certainly begins there.”).

255. *Rumsey Indian Rancheria*, 64 F.3d at 1257 (quoting *Ron Pair Enters.*, 489 U.S. at 243). See also *Holy Trinity Church v. U.S.*, 143 U.S. 457, 459 (1892).

It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. This has been often asserted, and the Reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

Id.

256. See generally Sen. Rpt. 100-446 (reprinted in 1988 U.S.C.C.A.N. 3071). A House Report was not submitted with the IGRA. *Id.* at 1.

257. *Id.* at 1-2 (reprinted in 1988 U.S.C.C.A.N. at 3071-72) (“The need for Federal and/or State regulation of gaming, in addition to, or instead of, tribal regulation, has been expressed by various State and Federal law enforcement officials out of fear that Indian bingo and other gambling enterprises may become targets for infiltration by criminal elements.”).

258. *Id.* at 5 (reprinted in 1988 U.S.C.C.A.N. at 3075). However, Senator John McCain expressed doubts whether this was a viable concern since “in 15 years of gaming activity on Indian reservations there has never

regulating Indian gaming, there is no rational purpose for adopting the “game-specific” approach over a “categorical” approach. For example, in *Cheyenne River Sioux Tribe II*, there would have been no more risk of criminal infiltration if the tribe had been allowed to offer traditional keno in addition to video keno.²⁵⁹ Likewise, using the example with Tribe A and State B above, State B would experience no more likelihood of “infiltration of organized crime or criminal elements”²⁶⁰ were Tribe A to offer craps, roulette, and poker instead of just roulette and poker.

Although deciding to regulate Indian gaming, the Report does point out there is a “strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land.”²⁶¹ In noting this, the Report also explains states have only been able to regulate Indian affairs if Congress expressly grants them the power to do so.²⁶² Usually, if Congress limits tribal sovereignty, it does so through federal grants of authority.²⁶³ However, at least with respect to class III gaming, Congress granted regulatory power to the states via the compacting process.²⁶⁴ The Report explains this is due to the fact that state agencies are already in effect and have “the expertise to regulate gaming activities and to enforce laws related to gaming.”²⁶⁵ Because state agencies with this expertise already existed and because no such agency existed at the federal level, Congress found there was no need for duplication.²⁶⁶ Additionally, the Report explains “the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as parimutuel horse and dog racing, casino gaming, jai alai and so forth.”²⁶⁷

However, Congress, in its delegation of power to the states, intended this grant of power to be very limited and did not intend the states to extend their jurisdiction or apply their other laws to the tribe.²⁶⁸ The Report states that Congress “does not intend that

been one clearly proven case of organized criminal activity.” *Id.* at 33 (reprinted in 1988 U.S.C.C.A.N. at 3103) (additional views of John McCain). Instead, Senator McCain implies the real reason States have expressed such an interest in the regulation of gaming is that they fear economic competition with their own gaming interests. Sen. Rpt. 100-446 at 33 (reprinted in 1988 U.S.C.C.A.N. 3103). He states, “the State and gaming industry have always come to the table with the position that what is theirs is theirs and what the Tribe [sic] have is negotiable.” *Id.*

259. See *Cheyenne River Sioux Tribe II*, 3 F.3d at 277.

260. Sen. Rpt. 100-446 at 5 (reprinted in 1988 U.S.C.C.A.N. at 3075).

261. *Id.*

262. *Id.*

263. *Id.*

264. See 25 U.S.C. § 2710(d).

265. Sen. Rpt. 100-446 at 5 (reprinted in 1988 U.S.C.C.A.N. at 3075).

266. *Id.*

267. *Id.* at 13 (reprinted in 1988 U.S.C.C.A.N. at 3083) (“[T]he compact process is a viable mechanism for setting [sic] various matters between two equal sovereigns.”).

268. *Id.* at 6 (reprinted in 1988 U.S.C.C.A.N. at 3076) (“In no instance, does [the IGRA] contemplate the extension of State jurisdiction or the application of State laws for any other purpose.”). See also *id.* at 35 (reprinted in 1988 U.S.C.C.A.N. at 3104–05) (additional views of Daniel J. Evans). Applying a *Cabazon II* analysis, Mr. Evans writes

Public Law 280 only subjected the actions of individual Indians to State enforcement. Public Law [280] did not subject the governing processes of the tribes to State law and public policy constraints, which would be a fundamental derogation of tribal self-government. Likewise, [the IGRA] should be construed not to subject tribal governance to State court jurisdiction.

compacts be used as a subterfuge for imposing State jurisdiction on tribal lands.”²⁶⁹ Assistant Attorney General, John R. Bolton, writing on behalf of the U.S. Department of Justice, included in the Report his opposition of enacting the IGRA.²⁷⁰ As an opponent to Congress enacting the IGRA, he recognized the IGRA, in its very limited grant of authority to the states, “would clearly empower the tribes to run most casino games and arguably all of them. Lumping together bingo and card games would allow the tribes to run blackjack—one of the most common casino games—and poker in a State that allowed only charitable bingo.”²⁷¹

From this intent of not subjecting tribes to all state laws, it follows that the “categorical” approach is what Congress had in mind in drafting the IGRA.²⁷² Implementing the “game-specific” approach would allow states to apply their laws to the tribe and force the tribe to adhere to those laws in only offering those class III games the state offers. This is directly contrary to Congress’s stated intent.²⁷³ Instead, the “categorical” approach allows all class III gaming if the State has no public policy against class III gaming.²⁷⁴ If the State allows any class III gaming, class III gaming is not contrary to the State’s public policy.²⁷⁵ At this point, the tribe can decide what class III games to offer without reference to the State’s laws. To further illustrate this point, please refer to the example above with Tribe A and State B. Because State B allows for some class III gaming (poker, roulette, pari-mutuel wagering, and a lottery), class III gaming is not against State B’s public policy. Thus, Tribe A should be able to offer craps at its casino in addition to poker and roulette. State B should not be able to apply its law whether specifically prohibiting craps or not on the sovereign tribe’s lands.

There is a resolution for State B if it absolutely wants to prohibit craps and for Mr. Bolton’s acknowledgement that a state may have to allow a tribe to offer games the state wants to prohibit.²⁷⁶ That resolution lies in the negotiations to form a tribal-state compact.²⁷⁷ The IGRA does not prohibit a state from making concessions to a tribe, during the negotiations for a compact, to encourage the tribe not to offer a particular game.²⁷⁸ Indeed, this is exactly what the IGRA contemplates a state would do if the

Sen. Rpt. 100-446 at 35 (reprinted in 1988 U.S.C.C.A.N. at 3105). See also *Mashantucket Pequot Tribe II*, 913 F.2d at 1030. The Second Circuit rejected Connecticut’s argument “that class III gaming should be subjected to the full corpus of state laws and regulations with regard to gambling.” *Id.* at 1031.

269. Sen. Rpt. 100-446 at 14 (reprinted in 1988 U.S.C.C.A.N. at 3084).

270. *Id.* at 22-32 (reprinted in 1988 U.S.C.C.A.N. at 3092-3102).

271. *Id.* at 24 (reprinted in 1988 U.S.C.C.A.N. at 3094). Mr. Bolton’s statement, however, is incorrect with regards to allowing blackjack and poker in a state permitting only charitable bingo since blackjack and poker are class III games, and bingo is a class II game. See 25 U.S.C. § 2703(7). The point is that tribes can offer even those games that the State does not as long as the State offers some form of class III gaming. Sen. Rpt. 100-446 at 24 (reprinted in 1988 U.S.C.C.A.N. at 3094).

272. *Id.* at 6 (reprinted in 1988 U.S.C.C.A.N. at 3076) (“In no instance, does [the IGRA] contemplate the extension of State jurisdiction or the application of State laws for any other purpose.”).

273. *Id.*

274. See *Cabazon II*, 480 U.S. at 210-11.

275. See *id.*

276. See *Rumsey Indian Rancheria*, 64 F.3d at 1254 (Canby, Pregerson, Reinhardt & Hawkins, JJ., dissenting) (“The time to argue over particular games is during the negotiation process.”).

277. See 25 U.S.C. § 2710(d)(3). See also *Rumsey Indian Rancheria*, 64 F.3d at 1254; *Mashantucket Pequot Tribe II*, 913 F.2d at 1030.

278. See *Rumsey Indian Rancheria*, 64 F.3d at 1254; see also *Mashantucket Pequot Tribe II*, 913 F.2d at

tribe seeks to offer particular class III gaming the state wishes to prohibit.²⁷⁹

This contemplation does not come into effect under a “game-specific” approach; under that approach, the State only needs to negotiate with the tribe over games the State currently allows.²⁸⁰ The “game-specific” approach would cause the IGRA’s compacting process to “become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible.”²⁸¹ Instead, directly contrary to the Report’s stated intentions, the state would be able to apply its “full corpus of state laws and regulations with regard to gambling” to a sovereign tribe’s operations.²⁸² This would not be the result under the “categorical” approach. Instead, the “categorical” approach would fully implement the IGRA’s contemplation that states and tribes would negotiate over specific games’ prohibition or allowance during the compacting process after determining class III gaming in general is not against the state’s policy. Thus, using the example above, it is at the negotiations stage where State B could make concessions to encourage Tribe A to not offer craps. On the other hand, Tribe A could make concessions to encourage State B to allow the tribe to offer craps. This approach gives full effect to Congress’s implementation of the compacting process contained in the IGRA.²⁸³

Also giving more effect to Congress’s intent in enacting the IGRA is to consider the definition of “permit” in light of the Supreme Court’s use of that word in *Cabazon II*.²⁸⁴ In *Cabazon II*, the Supreme Court used “permit” as meaning “allow” in concluding California generally permitted or allowed gaming.²⁸⁵ The Report refers to *Cabazon II* no fewer than fourteen times, indicating how important this case was in the consideration behind the enactment of the IGRA.²⁸⁶

In support of the *Cabazon II* decision, the Report states Congress “anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States.”²⁸⁷

1030 (“[T]he interests of the tribe and state are to be reconciled through the negotiation of a compact.”).

279. See *Rumsey Indian Rancheria*, 64 F.3d at 1253 (citing 25 U.S.C. § 2710(d)(3) and 18 U.S.C. § 1166(c)(2)).

IGRA’s otherwise drastic extension of state gaming law to Indian country (to be enforced only by the federal government) was modified by IGRA’s process by which the states and tribes could arrive at compacts specifying what games might be allowed and who might have jurisdiction to enforce gaming laws. . . . The whole idea was to foster these compacts. That goal is defeated if the details of the state’s regulatory schemes, allowing some games and prohibiting others, apply if the state does nothing.

Id.

280. See e.g. *Mashantucket Pequot Tribe II*, 913 F.2d at 1030.

281. *Id.* at 1031.

282. *Id.*

283. See 25 U.S.C. § 2710(d)(3); Sen. Rpt. 100-446 at 5–6 (reprinted in 1988 U.S.C.C.A.N. at 3075–76).

284. See *Lac du Flambeau Band*, 770 F. Supp. at 485.

285. *Cabazon II*, 480 U.S. at 209–10.

286. See Sen. Rpt. 100-446 at 2–4, 6, 9, 23, 24, 35, 36 (reprinted in 1988 U.S.C.C.A.N. at 3072, 3073, 2074, 3076, 3079, 3093, 3094, 3104, 3105). See also *id.* at 35 (reprinted in 1988 U.S.C.C.A.N. at 3104) (additional views of Daniel J. Evans) (The IGRA “should be considered within the line of developed case law extending over a century and a half by the United States Supreme Court, including the basic principles set forth in *California v. Cabazon Band of Mission Indians*.”).

287. *Id.* at 6 (reprinted in 1988 U.S.C.C.A.N. at 3076).

Additionally, the Report notes the phrase "for any purpose by any person, organization or entity"²⁸⁸ does not distinguish "between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments are free to engage in such gaming."²⁸⁹

While the report refers specifically to class II games here, the courts should apply the same distinction to determine whether the State allows class III games.²⁹⁰ This is because the section of the IGRA regulating class II gaming, 25 U.S.C. § 2710(b)(1)(A), has nearly identical language as the section of the IGRA regulating class III gaming, 25 U.S.C. § 2710(d)(1)(B).²⁹¹ Section 2710(b)(1)(A) states class II gaming is allowed on Indian lands if "such Indian gaming is *located within a State that permits such gaming for any purpose by any person, organization or entity* (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law)."²⁹² Section 2710(d)(1)(B) states class III gaming is allowed on Indian lands if "such activities are . . . *located in a State that permits such gaming for any purpose by any person, organization, or entity*."²⁹³ It is a normal rule of statutory construction "that '[w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place.'"²⁹⁴

Even courts applying the "game-specific" approach to class III gaming have respected Congress's intent with regard to class II gaming.²⁹⁵ This result is in discord with both Congress's intent as evidenced by the Report and with the previously mentioned rule of statutory construction. Both congressional intent and this rule of statutory construction require a "categorical" approach to interpret "permits such gaming."²⁹⁶

C. *Using the Canon of Indian Law Construction to Benefit Tribes in Cases of Statutory Ambiguity to Interpret "Permits Such Gaming"*

When Congress passes legislation relating to Tribes, courts should liberally construe the statutes in order to benefit the Tribes.²⁹⁷ This is especially so when a

288. 25 U.S.C. §§ 2710(b)(1)(A), 2710(d)(1)(B).

289. Sen. Rpt. 100-446 at 12 (reprinted in 1988 U.S.C.C.A.N. at 3082).

290. *See Mashantucket Pequot Tribe II*, 913 F.2d at 1030.

291. *See id.* *See also* 25 U.S.C. §§ 2710(b)(1)(A), 2710 (d)(1)(B).

292. 25 U.S.C. § 2710(b)(1)(A) (emphasis added).

293. *Id.* at § 2710(d)(1)(B) (emphasis added).

294. *Mashantucket Pequot Tribe II*, 913 F.2d at 1030 (quoting *Nunez*, 573 F.2d at 771). *See also Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329-30 (2000) (citing *Natl. Credit Union Admin. v. First Natl. Bank & Trust Co.*, 522 U.S. 479, 501 (1998); *Bankamerica Corp. v. U.S.*, 462 U.S. 122, 129 (1983)).

295. Compare e.g. *Rumsey Indian Rancheria*, 64 F.3d at 1258 with *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (1994). In *Rumsey Indian Rancheria*, the Ninth Circuit adopted the "game-specific" approach with regards to class III gaming. 64 F.3d at 1258. In *Sycuan Band of Mission Indians*, the Ninth Circuit adopted the "categorical" approach with regards to class II gaming. 54 F.3d at 538.

296. *See Mashantucket Pequot Tribe II*, 913 F.2d at 1030 (quoting *Nunez*, 573 F.2d at 771). *See generally* Sen. Rpt. 100-446 (reprinted in 1988 U.S.C.C.A.N. 3071).

297. 41 Am. Jur. 2d *Indians* § 2. *See also Bryan*, 426 U.S. at 392 (quoting *Alaska P. Fisheries*, 248 U.S. at 89).

statute is ambiguous.²⁹⁸ The Report recognizes that issues over courts' interpretation of the IGRA will arise.²⁹⁹ The Report states Congress "trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes."³⁰⁰ Thus, a court should adopt a "categorical" approach in interpreting "permits such gaming."

Black's Law Dictionary defines "ambiguity" as "[a]n uncertainty of meaning or intention, as in a . . . statutory provision."³⁰¹ As demonstrated above, courts relying on the definition of "permits" come to opposite conclusions with some adopting a "categorical" approach and some adopting a "game-specific" approach, evidencing an ambiguity in interpretation.³⁰² Additionally, some courts have found the plain meaning to be sufficient to interpret "permits such gaming" while others have found the need to resort to legislative intent, further confirming ambiguity in interpretation.³⁰³ Furthermore, the Second Circuit applied the principle of statutory construction "that '[w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place.'"³⁰⁴ However, the Ninth Circuit expressly rejected this stating "[i]dential words appearing more than once in the same act, and even in the same section, may be construed differently if it appears they were used in different places with different intent."³⁰⁵

These examples demonstrate "permits such gaming" is ambiguous. Because of this ambiguity, courts should rely on the canon of statutory construction providing for resolution favoring the tribes. The resolution most beneficial for the tribes is the adoption of the "categorical" approach. This retains more sovereignty for the tribes and allows them to offer a wider variety of class III gaming.

298. *Id.*

299. Sen. Rpt. 100-446 at 15 (reprinted in 1988 U.S.C.C.A.N. at 3085).

300. *Id.* at 15 (reprinted in 1988 U.S.C.C.A.N. at 3085).

301. *Black's Law Dictionary* at 88.

In the context of statutory interpretation the word most frequently used to indicate the doubt which a judge must entertain before he can search for and, if possible, apply a secondary meaning is "ambiguity." In ordinary language this term is often confined to situations in which the same word is capable of meaning two different things, but, in relation to statutory interpretation, judicial usage sanctions the application of the word "ambiguity" to describe any kind of doubtful meaning of words, phrases or longer statutory provisions. Hinchey's case prompted the suggestion that if, in a particular context, words convey to different judges a different range of meanings "derived from, not fanciful speculations or mistakes about linguistic usage, but from true knowledge about the use of words, they are ambiguous."

Id. (quoting Rupert Cross, *Statutory Interpretation* 76-77 (Butterworths 1976)).

302. Compare e.g. *Lac du Flambeau Band*, 770 F. Supp. at 485, 488 (adopting the "categorical" approach) with *Rumsey Indian Rancheria*, 64 F.3d at 1258-59 (adopting the "game-specific" approach).

303. Compare e.g. *Mashantucket Pequot Tribe II*, 913 F.2d at 1029 & *Lac du Flambeau Band*, 770 F. Supp. at 485 (finding need to look to legislative history) with *Rumsey Indian Rancheria*, 64 F.3d at 1258 (finding no need to look to legislative history). Although the Ninth Circuit stated it had no need to look to legislative history, it did conduct a brief examination to clarify its decision. *Rumsey Indian Rancheria*, 64 F.3d at 1258-59.

304. *Mashantucket Pequot Tribe II*, 913 F.2d at 1030 (quoting *Nunez*, 573 F.2d at 771). See also *Reno*, 528 U.S. at 329-30 (citing *Bankamerica Corp.*, 462 U.S. at 129; *Natl. Credit Union Admin.*, 522 U.S. at 501).

305. *Rumsey Indian Rancheria*, 64 F.3d at 1259 (quoting *Vanscoter*, 920 F.2d at 1448).

D. *Using a Stated Purpose of the IGRA to Interpret "Permits Such Gaming"*

Title 25 U.S.C. § 2702(1) declares that one purpose of the IGRA is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."³⁰⁶ This is such a necessary goal when viewed in light of the ongoing problems Indian Nations must confront.³⁰⁷ When compared to the national average, Indians are more likely to have higher poverty and unemployment rates, to be a victim of violent crime, to face more serious health risks, to live in poor housing conditions, and to attain lower education levels.³⁰⁸ Indian gaming provides for opportunities that were previously non-existent to curb this alarming trend.³⁰⁹ Indeed, many are referring to Indian gaming as the "new buffalo" because Indian gaming "is a single source capable of feeding and clothing the Indians. It has become the one economic development program that has been able to overcome the poor quality and remote location of most of their lands."³¹⁰

In 2006, Indian gaming "generated \$25.7 billion in gross tribal government revenues and created more than 670,000 jobs."³¹¹ In the past ten years, Indian gaming revenue has increased by billions each year.³¹² The biggest contributor to this increase in revenue has been class III games.³¹³ This increase in revenue generates employment for tribal members.³¹⁴ Additionally, tribes use this revenue that Indian gaming generates for education, children and elders services, cultural enrichment, charitable donations,

306. 25 U.S.C. § 2702(1) (emphasis added).

307. See Natl. Indian Gaming Assn., *The Economic Impact of Indian Gaming in 2006* 32, http://www.indiangaming.org/info/pr/press-releases-2007/NIGA_econ_impact_2006.pdf (accessed Mar. 19, 2008).

308. See *id.*

309. See *id.*

310. Dunstan, *supra* n. 87. See also Amy L. Cox, Student Author, *The New Buffalo: Tribal Gaming as a Means of Subsistence under Attack*, 25 B.C. Envtl. Aff. L. Rev. 863 (1998); Steven D. Hamilton, Student Author, *Panzer v. Doyle: The Wisconsin Supreme Court Fires a Near Fatal Shot at the New Buffalo*, 55 DePaul L. Rev. 1341 (2006); Amy Head, Student Author, *The Death of the New Buffalo: The Fifth Circuit Slays Indian Gaming in Texas*, 34 Tex. Tech L. Rev. 377 (2003).

311. Natl. Indian Gaming Assn., *supra* n. 307, at 6. See also Natl. Indian Gaming Commn., *supra* n. 1 (reporting \$25.1 billion in gaming revenue); Dunstan, *supra* n. 87 ("Although there is agreement that [Indian gaming] has grown dramatically, it is difficult to put an exact dollar figure on the size of Indian gaming. . . . Estimates of the gross revenues vary widely.").

312. Natl. Indian Gaming Commn., *supra* n. 1.

313. Alan Meister, *Casino City's Indian Gaming Industry Report*, <http://www.casinocitypress.com/IndianGaming/IndianGamingReport/> (accessed Mar. 19, 2008) (giving key points from Dr. Meister's report) ("Class III gaming . . . generated the lion's share of revenue.").

314. See Natl. Indian Gaming Assn., *supra* n. 307, at 6. This increase in employment also helped the federal and state governments. *Id.* at 7. The following figures are from a 2006 analysis:

The \$22.1 billion in wages generates about \$3.4 billion in federal income taxes and just under \$3.5 billion in Social Security taxes. . . .

In addition, the federal government saved an additional \$1.7 billion in reduced welfare payments and unemployment benefits. . . .

Indian gaming generated an additional \$2.4 billion in revenue for state governments through state income, payroll, sales and other taxes and direct revenue sharing payments. Indian gaming also generated an additional \$100 million in local taxes and revenue through increased sales and other taxes and governmental services agreements.

economic development, health care, police and fire protection, and housing.³¹⁵

Logically, it follows that the more class III games a tribe can offer, especially if one cannot play the game elsewhere in the state, equals more economic growth for the tribe. The "categorical" approach allows a tribe to offer a wider variety of class III games. In contrast, the "game-specific" approach limits the number of games a tribe can offer, and under this approach, the tribe can only offer games that are offered elsewhere in the state. The "categorical" approach is the approach that best reaches the purpose of the IGRA in "provid[ing] a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."³¹⁶

IV. CONCLUSION

Gaming is a viable and popular way for Indian tribes to generate revenue.³¹⁷ Class III gaming generates the bulk of that revenue helping to achieve "a principal goal of Federal Indian policy [which] is to promote tribal economic development, tribal self-sufficiency, and strong tribal government."³¹⁸ In order for the tribes to be able to take full advantage of this revenue-generating tool, courts should adopt the "categorical" approach to interpret "permits such gaming."³¹⁹

Interpreting "permits such gaming" using the "categorical" approach is consistent with the plain meaning of the statute.³²⁰ A look at the definition of both "permits" and "such" leads the interpreter to the result that "permits such gaming" must mean "allows class III gaming, in general."³²¹

Additionally, implementing the "categorical" approach to interpret "permits such gaming" comports with legislative intent.³²² The Senate Report accompanying the enactment of the IGRA makes clear that the legislative intent was to allow the tribes as much autonomy in the gaming industry as possible.³²³ The "categorical" approach grants more autonomy to the tribes by better recognizing tribal sovereignty in that tribes are not subject to all of a state's laws, just the state's policy on matters concerning gaming.³²⁴ Congress set up the compacting process to allow the state and the tribe to

315. See *id.* at 8–27.

The National Indian Gaming Association's most recent review concerning the use of revenue generated by Indian gaming revealed that Indian tribes spend net [tribal] government revenue as follows: 20% of net revenue is used for education, children and elders, culture, charity and other purposes[;] 19% goes to economic development[;] 17% to health care[;] 17% to police and fire protection[;] 16% to infrastructure[;] 11% to housing.

Id. at 8.

316. 25 U.S.C. § 2702(1) (emphasis added).

317. Natl. Indian Gaming Commn., *supra* n. 1.

318. 25 U.S.C. § 2701(4).

319. See e.g. *Mashantucket Pequot Tribe II*, 913 F.2d at 1031–32; *Lac du Flambeau Band*, 770 F. Supp. at 488.

320. See 25 U.S.C. § 2710(d)(1)(B).

321. See *Black's Law Dictionary* at 1176.

322. See generally Sen. Rpt. 100-446 (reprinted in 1988 U.S.C.C.A.N. 3071).

323. See *id.*

324. *Id.* at 5 (reprinted in 1988 U.S.C.C.A.N. at 3075) (There is a "strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land.").

have an equal say in the matter as long as the state did not have a general policy against gaming.³²⁵ If a court adopts the "game-specific" approach, the court takes away any meaningful effect the compacting process might have.³²⁶ Instead, the courts should adopt the "categorical" approach to give meaning to the compacting process.³²⁷ Even opponents of enacting the IGRA recognized the "categorical" approach was the approach intended by Congress.³²⁸

Also, courts should interpret "permits such gaming" using the "categorical" approach in order to comply with the canon of Indian law construction that provides for resolution favoring the tribe when the statute is ambiguous.³²⁹ Although 25 U.S.C. § 2710(d)(1)(B) is not facially ambiguous, courts have come to opposite conclusions in interpreting "permits such gaming."³³⁰ This result recognizes some ambiguity, thus triggering this canon of Indian law construction. The "categorical" approach, not the "game-specific" approach, is the resolution better favoring the tribe.

Finally, the stated purposes of the IGRA demand the "categorical" approach to interpret "permits such gaming" in order to allow for increased tribal autonomy.³³¹ The "categorical" approach would allow tribes to offer a wider variety and number of games thus "promoting tribal economic development, self-sufficiency, and strong tribal governments."³³²

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325. See 25 U.S.C. § 2710(d)(3). See also Sen. Rpt. 100-446 at 5-6 (reprinted in 1988 U.S.C.C.A.N. at 3075-76).

326. See *Rumsey Indian Rancheria*, 64 F.3d at 1253 (Canby, Pregerson, Reinhardt & Hawkins, JJ., dissenting); *Mashantucket Pequot Tribe II*, 913 F.2d at 1030-31.

327. See *id.*

328. See Sen. Rpt. 100-446 at 22-32 (reprinted in 1988 U.S.C.C.A.N. at 3092-3102).

329. 41 Am. Jur. 2d *Indians* § 2. See also *Bryan*, 426 U.S. at 392 (quoting *Alaska P. Fisheries*, 248 U.S. at 89).

330. Compare e.g. *Lac du Flambeau Band*, 770 F. Supp. at 485, 488 (adopting the "categorical" approach) with *Rumsey Indian Rancheria*, 64 F.3d at 1258, 1260 (adopting the "game-specific" approach).

331. 25 U.S.C. § 2702(1).

332. *Id.*

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