

**NATIONAL  
INDIAN  
GAMING  
COMMISSION**

JUL 22 1997

Mr. Gary Watkins  
WorldLink Gaming Corporation  
1789 E. 71st Street  
Tulsa, Oklahoma 74136

Dear Mr. Watkins:

This letter is in response to your inquiry as to whether the National Indian Gaming Commission regards the game "Rocket Bingo - Classics Bingo Game" as a Class II or Class III game under the Indian Gaming Regulatory Act (IGRA). We have reviewed the materials you submitted and conclude that you may play your game, as discussed below, as a Class II game.

The Rocket Bingo - Classics Bingo Game (Classics Bingo Game) is described in the literature you provided as a live bingo game conducted at the Muskogee (Creek) Nation. This live bingo game is electronically transmitted, as it is played, to other Indian operator halls to allow greater player participation in the game. The Classics Bingo Game uses multi-hall linking technology similar to the MegaBingo system which was deemed Class II by the Commission on July 26, 1995. The balls are drawn one at a time by a live bingo caller who keys the number of the drawn ball into a computer processor. The Classics Bingo game is broadcast to and played on pentium processors connected to computer monitors. A card reader, also connected to the pentium processor, allows the pentium processor to recognize the player and the amount of credit that has been purchased by the player when the player inserts an identification card into the card reader.

To play the game, players purchase credit from a clerk in the participating Indian gaming facility. Once the credit has been purchased, the player proceeds to a pentium processor terminal and inserts his or her player identification card into the card reader. This action allows the pentium processor to identify the player and recognize how much credit has been purchased by the player. Once the identification is established the player may purchase bingo cards for a pre-determined period of time on the computer monitor. Customers may purchase up to thirty-six (36) cards on the computer monitor. Card purchases are deducted from a player's credit balance. The customer pays only once for each card and plays that card throughout the game.

The Classics Bingo game is played for traditional patterns such as the Letter X, Small Picture Frame, Straight Line Bingo, Four Corners Patterns, and Blackout. Which games will be played is determined by the system operator at the Muskogee (Creek) Nation and broadcast to each computer monitor prior to play. After all the cards have been purchased, the game begins with a live ball draw at the Muskogee (Creek) Nation. Players must manually daub their cards after

each ball is drawn by touching the computer monitor. The live ball draw continues until a player touches the computer monitor to declare **bingo**, thereby stopping the game and claiming the prize. If a player does not declare bingo, the game will proceed until a bingo is declared. After bingo is declared, the game is over and a new game begins.

## ANALYSIS

### THE IGRA REGULATIONS AND THE JOHNSON ACT

"IGRA established the Commission to regulate **Indian gaming**, and specifically authorized the Commission to promulgate regulations and guidelines necessary to implement the provisions of the Act. See 25 U.S.C. §§ 2704, 2706(b)(10)." Shakopee Mdewakanton Sioux Community v. Hope, 16 F.3d 261, 263 (8th Cir. 1994). In **April 1992**, the Commission issued definition regulations.

Those definition regulations establish:

Class II gaming means:

(a) Bingo or lotto (whether or not electronic, **computer**, or other technologic aids are used) when players:

- (1) Play for prizes with cards bearing numbers or other designations;
- (2) Cover numbers or designations when an object, similarly numbered or designated, are drawn or electronically **determined**, and
- (3) Win the game by being the **first person** to cover a designated pattern on such cards;

(b) If played in the same location as **bingo or lotto**, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to **bingo** . . . .

25 C.F.R. § 502.3.

Class III gaming means all forms of gaming that are not class I gaming or class II gaming, including but not limited to:

\* \* \* \*

(b) Any slot machines as defined in 15 U.S.C. 1171(a)(1) and electronic or electromechanical facsimiles of any game of **chance** . . . .

25 C.F.R. § 502.4.

Electronic, computer or other technologic aid means a device such as a computer, telephone, cable, television, satellite or **bingo blower** and that when used--

- (a) Is not a game of chance but merely assists a player of the playing of a game;
- (b) Is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and
- (c) Is operated according to applicable Federal communications law.

25 C.F.R. § 502.7.

Electronic or electromechanical facsimile means any gambling device as defined in 15 U.S.C. 1171(a)(2) or (3).

25 C.F.R. § 502.8.

Games similar to bingo means any game that meets the requirements for bingo under Sec. 502.3(a) of this part and that is not a house banking game under Sec. 502.11 of this part.

25 C.F.R. § 502.9.

The term "gambling device" is defined in the Johnson Act, 15 U.S.C. Sec. 1171(a), as:

- (1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
- (2) any other machine or mechanical device (including but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
- (3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.

## BINGO

Classics Bingo tracks the Class II definition of bingo in IGRA. Classics Bingo is the game of chance commonly known as bingo, broadcast from a point of origin using computers and

other electronic equipment. The game is played for monetary prizes, with cards bearing numbers or other designations. The holder of the cards is required to daub their cards to cover such numbers or designations when a bingo ball, similarly numbered or designated, is drawn. The game is won by the first person covering a previously designated arrangement of numbers or designations on such cards.<sup>1</sup> Therefore, the games meets the basic regulatory criteria to come within the definition of bingo, a class II game if used with a technological aid rather than a gambling device.

#### GAMBLING DEVICES UNDER 15 U.S.C. § 1171

Specifically included within the regulatory definition of Class III is "any slot machines as defined in 15 U.S.C. 1171(a)(1) and electronic or electromechanical facsimiles of any game of chance." Facsimiles is defined as any gambling device under 15 U.S.C. §§ 1171(a)(2) and (3). Therefore, if the bingo game is using a gambling device, it would be transformed under NIGC regulations into a Class III game.

We are not prepared, at this time, to decide whether the game uses gambling devices. Furthermore, we believe that the manufacturer has made every effort to develop this game with the aid of technology rather than by using gambling devices. Therefore, we have determined that the Tribes may play the Classics Bingo game without risk of an enforcement action by the NIGC.

Please be advised that this legal opinion is advisory in nature only and that it may be superseded, reversed, revised or reconsidered by a subsequent General Counsel or Chairman of the Commission. Furthermore, if there are any changes made to the game as described, such changes might materially alter our conclusion.

Finally, by issuing this opinion, we do not speak on behalf of the Department of Justice or the United States Attorneys who share enforcement responsibilities with the NIGC over gambling devices.

Sincerely,



Penny J. Coleman  
Acting General Counsel

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<sup>1</sup> While the question has arisen as to whether other interim games may be considered bingo, that question is not presently before us. Therefore, we decline to opine on that question at this time.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

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SYCUAN BAND OF MISSION INDIANS, ET AL.,  
PETITIONERS

v.

PETE WILSON, GOVERNOR OF CALIFORNIA, ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1996

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No. 96-1059

SYCUAN BAND OF MISSION INDIANS, ET AL.,  
PETITIONERS

v.

PETE WILSON, GOVERNOR OF CALIFORNIA, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE**

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This brief is submitted in response to the Court's invitation to the Acting Solicitor General to express the views of the United States.

**STATEMENT**

1. a. Congress enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701 *et seq.*, in order to establish a system for regulating gaming activities on Indian lands. IGRA divides Indian gaming into three categories. Class I gaming consists of "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." 25 U.S.C. 2703(6). Class II gaming consists of bingo (including, if played at the same location, pull tabs, lotto, punch boards, tip jars, and other games similar to

(1)

negotiate in good faith, the Tribe may initiate an action against the State in federal district court. 25 U.S.C. 2710(d)(7)(A)(i). If the court finds that the State has failed to negotiate in good faith, it must order the State and the Tribe to conclude a compact within 60 days. 25 U.S.C. 2710(d)(7)(B)(iii). If the State and Tribe fail to conclude a compact within that period, each party must submit its last best offer to a court-appointed mediator, who is to select one of those two proposals. 25 U.S.C. 2710(d)(7)(B)(iv). If the State consents to the mediator-selected proposal, it is treated as a Tribal-State compact. 25 U.S.C. 2710(d)(7)(B)(vi). If the State does not consent, the Secretary of the Interior may prescribe procedures for Class III gaming. 25 U.S.C. 2710(d)(7)(B)(vii). Under this Court's decision in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), a State has a right to avoid a Tribe's suit in federal court by asserting its Eleventh Amendment immunity.

2. Seven Indian Tribes requested the State of California to negotiate a compact permitting the operation of (1) stand-alone electronic games, such as electronic pull tabs, video poker, video bingo, video lotto and video keno; and (2) banked and percentage card games. Pet. App. 10-11 & n.9. California criminal law prohibits the operation of slot machines, Cal. Penal Code § 330a (West 1988), as well as banked and percentage card games, *id.* § 330. The State refused to enter into negotiations on the ground that the Tribes' proposed games fall within those state statutory prohibitions. Pet. App. 11.

The seven Tribes and the State agreed to seek a judicial determination of whether California "permits" the Tribes' proposed gaming activities within the meaning of 25 U.S.C. 2710(d)(1)(B), such that the activities could be lawful under IGRA if they were conducted in conformance with a Tribal-State compact. See Pet. 5. The seven Tribes



distinction between criminal/prohibitory and civil/regulatory statutes, which it understood to require a general inquiry into the State's public policy regarding the proposed game. Pet. App. 43-45.

Applying its two-part test, the district court first held that the Tribes' proposed electronic games were subject to negotiation under the first part of the test. Pet. App. 46-49. The court was of the view that "the State has authorized the State Lottery to operate electronic games virtually identical to the electronic games requested by the Tribes," and on that basis it concluded that IGRA expressly "requires that the use of electronic equipment on the Tribes' lands be held a proper subject for a Tribal-State compact." *Id.* at 48-49.

Turning to the second group of games the Tribes proposed, the district court noted that the State does not permit banking or percentage card games to be played for any purpose by any person. The court therefore held that those games are not subject to negotiation under the first part of the test it had fashioned. Pet. App. 50-51. Turning to the second part of the test, the court did not find a clear public policy against all banked or percentage card games, since California permits many banked and percentage *non*-card games (such as the state lottery and parimutuel wagering on horse racing) and allows card rooms to operate card games on a non-banked and non-percentage basis. *Id.* at 52-54. The court held, however, that banked and percentage card games using traditional casino game themes violate California's public policy against casino gaming. The court discerned that public policy from a constitutional prohibition against casinos, a statutory prohibition precluding the state lottery from operating games with casino themes, and a statutory prohibition precluding card rooms from operating casino card games. *Id.* at 54-55.

form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming.” Pet. App. 18. Under the statutory text, the court explained, “a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.” *Id.* at 19.

The court of appeals rejected the Tribes’ reliance on *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990), cert. denied, 499 U.S. 975 (1991), in which the Second Circuit held that Connecticut was required to negotiate over games of chance because Connecticut permitted charities to operate such games (albeit subject to stringent limitations) during “Las Vegas nights.” Pet. App. 22 n.13. The court concluded that the Second Circuit reached the “correct result” in *Mashantucket*, because “IGRA’s text plainly requires a state to negotiate with a Tribe over a gaming activity in which the state allows others to engage.” *Ibid.* Although the Second Circuit relied on a reference to *Cabazon’s* criminal/prohibitory test in the legislative history of IGRA discussing Class II gaming (see 913 F.2d at 1029-1030), the court below viewed that aspect of the Second Circuit’s opinion as unnecessary to support the result in that case. Pet. App. 22 n.13.

Based on its analysis of IGRA’s text, the court of appeals “affirm[ed] the district court’s judgment that the State need not negotiate over banked or percentage card games with traditional casino themes.” Pet. App. 23. The court remanded to the district court “to consider the limited question of whether California permits the operation of slot machines in the form of the state lottery or otherwise.” *Ibid.*<sup>2</sup>

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<sup>2</sup> Following the court of appeals’ decision, the California Supreme Court issued its decision in *Western Telcon v. California State Lottery*, 13 Cal.4th 475, 917 P.2d 651, 53 Cal. Rptr. 2d 812 (1996). In that case, the California Supreme Court held that a computerized keno game

activities are \* \* \* located in a State that permits such gaming for any purpose by any person, organization or entity." As the court of appeals concluded, that statutory text makes it unlawful for Tribes to operate forms of Class III gaming that state law completely prohibits. A State therefore has no duty to negotiate with respect to those forms of gaming. That has been the consistent position of the United States.<sup>3</sup>

a. The term "permit" can have more than one meaning: It can mean "to expressly assent or agree to the doing of an act," or it can mean "to acquiesce, by failure to prevent." Pet. App. 17 (quoting *Black's Law Dictionary* at 1140); see also note 7, *infra*. The term "permit," however, is unambiguous with respect to the question presented in this case. Under any definition of "permit," when a State completely prohibits a form of gaming, it does not permit it.

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<sup>3</sup> See 96-2162 Gov't C.A. Br. at 11-32, *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997), petition for cert. pending, No. 96-1617 (filed Apr. 10, 1997); 90-7508 U.S. Amicus Br. at 27 n.14, *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990), cert. denied, 499 U.S. 975 (1991); see also 90-871 U.S. Amicus Br. at Pet. Stage at 11-15, *Connecticut v. Mashantucket Pequot Tribe*, cert. denied, 499 U.S. 975 (1991). The Solicitor of the Interior took a similar position in a legal memorandum for the Assistant Secretary for Indian Affairs, dated April 9, 1991, concerning the procedures adopted by the Secretary under 25 U.S.C. 2710(d)(7)(B)(vii) for gaming to be operated by the Mashantucket Pequot Tribe after the State and the Tribe failed to reach a negotiated compact. The Solicitor stated that in the event that the court-appointed mediator "ch[ose] a compact which permitted a type of gaming which was not allowed by that State 'for any person, organization, or entity' under 25 U.S.C. §2710(d)(1)(B)," "[t]he Secretary could not establish procedures to implement that type of gaming." Letter from Thomas L. Sansonetti, Solicitor of U.S. Dep't of Interior, to Ass't Secretary for Indian Affairs 6 (Apr. 19, 1991). The Solicitor's memorandum was made available to the public in connection with the Secretary's adoption of procedures for gaming by the Mashantucket Pequot Tribe (see 56 Fed. Reg. 15,746 (1991)), and we have lodged a copy of that memorandum with the Clerk of this Court.

activities are lawful when such activities are "located in a State that permits *any Class III gaming activity* for any purpose, by any person, organization, or entity." Congress, however, did not adopt that categorical approach.

Moreover, the background of IGRA shows that Congress sought through the compacting process to accommodate "significant governmental interests" of the States. S. Rep. No. 446, 100th Cong., 2d Sess. 13 (1988). Yet, under Judge Canby's categorical approach, a State would be required, as a matter of federal law, to negotiate with Indian Tribes concerning forms of gaming that the State's own criminal laws completely bar, simply because the State permits some *other* form of Class III gaming. For example, any State that conducts a lottery would have a federal statutory duty to negotiate with Tribes concerning casino gambling and slot machines, even if the State's laws completely outlaw the latter forms of gaming. Nothing in Section 2710(d)(1)(B) suggests that Congress intended that sort of displacement of the significant governmental interests of the States which Congress chose to respect when it enacted IGRA's compacting process for Class III gaming. To the contrary, it imposes a negotiating obligation concerning only "such gaming" as the State "permits."<sup>4</sup>

At the same time, IGRA's compacting process affords reciprocal protection for the significant governmental interests of Tribes by requiring the States to negotiate over a form of Class III gaming as long as the State permits it "for any purpose by any person." That provision enables a Tribe to negotiate terms and conditions

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<sup>4</sup> The legislative history of IGRA also indicates that Congress sought, through the compacting process, to afford the parties an opportunity "to make use of existing State regulatory systems." S. Rep. No. 446, *supra*, at 13. Congress would not have expected state regulatory systems to be available for the regulation of forms of gaming that the State completely prohibits.

permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation.

Applying that terminology of *Cabazon* to this case, the clear intent of California law concerning the operation of banked and percentage card games and non-lottery slot machines "is generally to prohibit [that] conduct." Those state laws therefore would unquestionably have been regarded as criminal/prohibitory under *Cabazon* prior to IGRA's replacement of Public Law 280 as the federal law governing what Indian gaming is lawful in California. And continuing with the *Cabazon* terminology quoted above, just as California law does not "generally permit[] the conduct [of banked and percentage card games and non-lottery slot machines], subject to regulation," those card games and slot machines, if conducted by California Tribes, would not be located in a State that "permits such gaming for any purpose by any person" within the meaning of IGRA.

In short, nothing in either *Cabazon* or IGRA suggests that if a court concludes that a form of gaming is completely prohibited by state law, the court should nevertheless engage in a further and independent inquiry into whether that form of gaming is consistent with the State's "public policy" in a more general sense, in order to determine whether such gaming is a mandatory subject of negotiation for the State. Again, *Cabazon's* reference to "public policy" was simply a "shorthand" description of the determination of whether the state law is criminal/prohibitory; if it is, that is the end of the inquiry. Where the State has a complete criminal prohibition against a

State that permits certain card games, but limits the wagers on those games, may not avoid its duty to bargain over wagering limits on the card games by recharacterizing its regulatory law as a complete prohibition on the form of gaming known as "high stakes card games." Once a State permits card games of a certain type, it has a duty to negotiate over the wagering limits for those games.

In some circumstances, a question may arise concerning whether a state law prohibits a distinct form of gaming or instead regulates the manner in which a permitted form of gaming may be played. Several hypothetical examples may illustrate the point. If state law prohibits five-card stud poker but permits seven-card draw poker (or prohibits parimutuel wagering on dog racing but not on horse racing), a question could arise as to whether that state law prohibits a distinct form of gaming known as "five-card stud poker" (or "dog racing"), or instead regulates the manner in which the permitted form of gaming known as "poker" (or "animal racing") may be conducted. If characterized in the former way, the State would have to negotiate concerning only seven-card draw poker (or horse racing); if characterized in the latter way, the State would have to negotiate over all poker games (or all animal racing). The relevant question in such a case would be whether, in light of traditional understandings and the text and legislative history of IGRA, the State has reasonably characterized the relevant state laws as completely prohibiting a distinct form of gaming.<sup>6</sup> If the State has not reasonably so characterized its laws, it would have a duty to negotiate with respect to the gaming.

This case, however, raises no question as to whether the relevant state laws merely regulate permitted forms of

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<sup>6</sup> In close cases, it may be relevant as well to examine the purposes behind the state laws that, for example, permit five-card stud poker but not seven-card draw poker.

entire state corpus of laws and regulations governing such gaming," *id.* at 1030-1031, including "the status of the sponsoring organization, size of wagers, character of prizes, and frequency of operations," *id.* at 1029. The Second Circuit reasoned that, because Connecticut allows charitable organizations to operate the specified casino games on Las Vegas nights, it "permits" such gaming within the meaning of Section 2710(d)(1)(B) and must negotiate with the Tribe on how those games may be conducted on Indians lands. *Id.* at 1029-1032. There is no inconsistency between the Second Circuit's holding that a State must negotiate concerning forms of gaming its laws permit, albeit subject to extensive regulation, and the Ninth Circuit's holding in this case that a State need not negotiate with respect to forms of gaming that its laws completely prohibit. To the contrary, the Ninth Circuit in this case expressly approved the result reached by the Second Circuit in *Mashantucket*. Pet. App. 22 n.13.

Petitioners contend (Pet. 13-14) that there is nonetheless a conflict, because the Second Circuit relied on the reference in IGRA's legislative history to *Cabazon's* criminal/prohibitory test. See 913 F.2d at 1029-1030. The Second Circuit, however, ultimately rested its conclusion on the text of 2170(d)(1)(B).<sup>8</sup> Moreover, while the Second Circuit looked to *Cabazon's* criminal/prohibitory test as illuminating IGRA's statutory test of whether a State "permits" (for any purpose by any person) the forms of gaming that a Tribe proposes, it did not suggest that where, as here, that gaming *is* prohibited under that criminal/prohibitory test, a court nevertheless should engage in a further, independent inquiry into the State's "public policy" concerning that gaming. Accordingly,

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<sup>8</sup> See 913 F.2d at 1031-1032 (rejecting Connecticut's reliance on cases discussing the *Cabazon* test on the ground that they did not involve IGRA's specific statutory text).

opposite. Moreover, the Tenth Circuit had previously held in *Citizen Band Potawatomi Indian Tribe v. Green*, 995 F.2d 179, 181 (1993), that a compact may not authorize gaming devices that are forbidden by state law.

Petitioners' assertion (Pet. 17) that there is a conflict between the decision below and the Eighth Circuit's decision in *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (1990), is also incorrect. In that case, the Eighth Circuit held that a Tribe could operate a form of Class II gaming permitted by the State, without complying with all the State's regulatory requirements for that game. *Id.* at 365-368. Interpreting language relating to Class II gaming that is similar to that at issue here, the court concluded that Congress "intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity." *Id.* at 365. That reasoning is fully consistent with the form-specific analysis adopted by the court of appeals in this case.

The Eighth Circuit subsequently adopted a form-specific analysis for Class III games in *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (1993). There, the court held that the State did not have an obligation to negotiate over traditional keno simply because the State permitted video keno. *Id.* at 278-279. The court reasoned 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." *Id.* at 279. There is therefore no conflict between the Eighth and Ninth Circuits concerning the meaning of Section 2710(d)(1)(B).

3. Finally, because the court of appeals remanded to the district court to consider "whether California permits the operation of slot machines in the form of the state



**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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