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STATEMENT OF THE CASE

Respondent commenced the within action against appellant, the State of South Carolina (State) by the filing of a summons and complaint on July 28, 2005. On August 16, 2006, the summons and complaint were amended to add as a defendant appellant Henry D. McMaster, in his official capacity as Attorney General of the State of South Carolina. Appellants answered on September 13, 2005.

Thereafter, the parties each moved for summary judgment. These cross-motions came to be heard on December 2, 2005. An order granting respondent's motion and denying appellants' motion was filed on December 13, 2005. Appellants moved on December 21, 2005 to alter or amend the December 13, 2005 order, and an order denying appellants' motion was filed on January 30, 2006. Appellants, on February 13, 2006, gave notice of their appeal of the orders of December 13, 2005 and January 30, 2006. Contemporaneously with the filing of the Notice of Appeal, appellants moved to certify the appeal to the Supreme Court of South Carolina and petitioned for a writ of supersedeas. On March 8, 2006, the petition for supersedeas was denied and the certification granted.

FACTS

Upon their arrival on the North American continent, Europeans encountered an indigenous population occupying the land. In what became the colonies of South and North Carolina, the Europeans encountered the people of the Catawba Indian Tribe. In structuring their dealings with indigenous peoples, Europeans reacted generally as they had in Europe by entering into treaties which acknowledged the co-equal sovereign status of the Europeans and the North American Indians. See Worcester v. Georgia, 31 U.S. 515, 8 L.Ed 483 (1832).

In 1760 and again in 1763, representatives of the King of England entered into treaties with respondent under the relevant terms of which respondent would have exclusive occupancy of a 15-mile square territory on the northwest frontier of the South Carolina colony and respondent's land was to be protected from encroachment by colonists.

Following the American Revolution, the treaty rights and obligations of the crown passed to the states. Upon the adoption of the United States Constitution, the original states ceded exclusive authority to deal with Indian Tribes to Congress. Acting pursuant to its Indian Commerce Clause authority, Art. I, §8 U.S. Const., Congress enacted the Indian Non-intercourse Act to restrict the conveyance of tribal lands without Congressional approval. Act of July 22, 1790, Ch. 33, § 4, 1 stat. 138 (now 25 U.S.C. § 177).

In 1840 the State, without the approval of Congress, purported to enter into a treaty with respondent under the terms of which respondent would exchange its 144,000 acre reservation for a new reservation to be purchased in western North Carolina. No new reservation was purchased, and in approximately 1843, the surviving members of respondent were settled on 630 acres located within the 144,000 acres that had been the reservation created by the treaties of 1760 and 1763.

Respondent sought redress continuously for the loss of its land, but made no progress until in 1980, suit was filed in the U.S. District Court seeking the return of the treaty land and trespass damages. See South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498 (1986). This land claim litigation led to negotiations which in turn, after more than a decade, resulted in a settlement. The settlement of the land claim is memorialized in a Settlement Agreement and state legislation (State Act), S.C. Code Ann. §§ 27-16-10 et. seq. which were in turn ratified and made effective by Congress (Federal Act). 25 U.S.C. §§ 941 et. seq. The Federal Act provided that the Settlement Agreement and State Act were to be complied with as if they were federal legislation. 25 U.S.C. § 941b(a)(2).

The within-captioned action sought: a declaration that the State had in violation of the Federal Act unilaterally amended the State Act to change the terms and conditions by which respondent could conduct bingo; a declaration confirming that the State Act gave respondent the right to operate video poker or similar electronic play devices on its Reservation if such activity were authorized by respondent's governing body; and a declaration that the State had acted in contravention of the Federal Act to change the method of taxation of respondent's bingo games. Respondent sought summary judgment as to the first two claims.

There was no dispute that appellants threatened criminal prosecution if respondent undertook to operate video poker or similar electronic play devices on its Reservation, and that the State had imposed an $18.00 per capita entrance surcharge on bingo players without respondent's consent.

appellants urge. As this Court recently held in Layman v. South Carolina, 368 S.C. 631, 630 S.E.2d 265 (2006), where a statute forms a contract, the State cannot by unilateral action alter the agreement, and such unilateral action is a breach of the contract.

Acting pursuant to its plenary power with respect to matters affecting Indian tribes, Congress alone had the authority to approve the land claim settlement, and in doing so stated:

> [T]he Settlement Agreement and the State Act are approved, ratified, and confirmed by the United States to effectuate the purposes of this subchapter, and shall be complied with in the same manner and to the same extent as if they had been enacted into Federal law.

25 U.S.C. § 941b(a)(2) [emphasis supplied].

Congress further asserted its exclusive constitutional authority in Indian matters by providing that neither the State Act nor the Settlement Agreement could be amended unilaterally by the State or respondent, but authorized amendment only "if consent to such amendment is given by both the State and the Tribe. . . ." 25 U.S.C. § 941m(f). Notwithstanding this congressional restriction on state legislative power, the State unilaterally amended the State Act to shift the regulation of respondent's bingo from the agreed-upon Article 23, Chapter 21 of Title 12 of the South Carolina Code, Settlement Agreement §16.3, (R.O.A. p. 215), to Article 24, Chapter 21 of Title 12. In doing so, the State has imposed an entrance fee surcharge of $18.00 per capita on bingo players under section 12-21-4030(B)(1). Act No. 334, 1998 S.C. Acts 2016. As appellants acknowledge in their brief, respondent did not consent to the amendment of the State Act. (App. Br. p. 47).

Any argument appellants might make regarding respondent's consent to the amendment of section 27-16-110(B) of the State Act and the imposition of an entrance surcharge is refuted convincingly by the letter of the Director of the Department of Revenue to respondent dated May 3, 1996. Director Maybank's letter stated that while legislation had been introduced that would

change the state bingo law, it was not "the intent of the Department to impact in any way the current laws outlining the Catawba Indian Nation's Bingo Operations." (Ex. O Resp. Motion for Sum. Jdgmt. R.O.A. p 256). Notwithstanding the statements that the Department of Revenue "never considered the Catawba's bingo situation" or "never had any intention of altering or amending the guidelines regulating the Tribe's bingo operations as defined in the Settlement Agreement and the Catawba Indian Claims Settlement Act," the State in reliance on the unilateral modification of the State Act has required respondent to collect the $18.00 per capita entrance surcharge.

The State's action is consistent with its historical treatment of respondent, and a glance at the history of the relationship between respondent and the State establishes conclusively that the State acting in contravention of law has sought to deprive respondent of its property and its rights continuously since the early 19th century. One example of the State's consistent effort to disregard the law where respondent or its people are concerned antedates the current litigation by almost 200 years, and involves respondent's right to unmolested occupancy of its land. This right of occupancy has been recognized by the United States Supreme Court as paramount to the interests of all but the sovereign, "first the discovering European nation and later the original States and the United States." Oneida Indian Nation v. Oneida County, 414 U.S. 661, 667 (1974).

This right of occupancy is "Indian title," and "considered as sacred as the fee-simple of the whites." United States v. Santa Fe Pac. R. Co., 314 U.S. 339 (1941); Oneida, 414 U.S. at 669. Once the United States was organized and the Constitution adopted, tribal rights to Indian lands, including Indian lands in the original 13 states, could not be extinguished except by

Congress as the United States Supreme Court explained in Oneida Indian Nation, supra, 414 U.S. at 669:

> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13.

South Carolina in complete disregard of this policy and the Constitution of the United States sought by state law to authorize the lease of Catawba tribal lands as early as 1808, S.C. Code Ann. § 27-15-10 (Rev. 1991), and after 1840 vested the "reversionary right, title and interest of this State in and to the Catawba Indian lands…" in the lessees. S.C. Code Ann. §27-15-30 (Rev. 1991). The state acted without congressional approval.

A more recent example of the State's continuing effort to avoid the law with respect to respondent and its people is found in the treatment by the State of Catawba tribal member Robert Keesee (Keesee). The Settlement Agreement and the State Act provided that tribal members were "entitled to personal state hunting and fishing licenses without payment of fees" for 99 years following the land claim settlement. S.C. Code Ann. §27-16-120(E) (Supp. 2005). Keesee's treatment at the hands of the State is described by the South Carolina Court of Appeals:

> While patrolling Wildlife Management Area (WMA) land in Fairfield County in December 1995, a Department of Natural Resources (DNR) officer happened upon Keesee and a companion hunting on the land. Keesee produced a Catawba Indian's hunting license, which was a "combination type license, hunting and fishing." The officer asked Keesee where his WMA permit was. Keesee told the officer he did not need a WMA license in light of his Catawba combination license. The officer cited Keesee for hunting on WMA land without a WMA permit.
>
> At a bench trial in January 1996, Keesee was convicted in magistrate's court and ordered to pay a fine of $376.00. The circuit court affirmed.

State v. Keesee, 327 S.C. 627, 629, 490 S.E.2d 626, 627 (Ct. App. 1997).

The Court of Appeals also affirmed the conviction. Id. Certiorari was granted by the Supreme Court of South Carolina which reversed upon a holding that "the clear intent of the [State] Claims Act was to extend full hunting and fishing rights to members of the Catawba Tribe without charge." State v. Keesee, 336 S.C. 599, 601, 521 S.E.2d 743, 744 (1999). In other words, the effort by the State to limit the hunting and fishing benefits of the land claim settlement was unlawful and inconsistent with the land claim Settlement Agreement and State Act.

The interpretation of the State Act in Keesee by this court, to find a full extension of hunting and fishing rights, is consistent with the well recognized requirement that statutes affecting Indians are to be read to benefit them. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985).

Clearly, given the restriction with respect to amendment of the State Act placed on the State by Congress, it is beyond doubt that the State acted impermissibly to amend the State Act to change the terms by which respondent was to conduct its bingo games when such changes had not been agreed upon by the parties or consented to by respondent. The unilateral amendment was made without consent and therefore without authority in contravention of the Federal Act. The trial court was correct in declaring the unilateral amendment invalid.

II. THE TRIAL COURT WAS CORRECT IN DECLARING THAT SECTION 27-16-110(G) OF THE SOUTH CAROLINA CODE OF LAWS WAS TO BE READ AS IF IT WERE ENACTED BY CONGRESS, AND THAT IT PROVIDED RESPONDENT A VESTED AND CONTINUING RIGHT TO OPERATE VIDEO POKER OR SIMILAR ELECTRONIC PLAY DEVICES ON ITS RESERVATION IF APPROVED BY RESPONDENT'S GOVERNING BODY.

As the affidavit of the State's lead negotiator to the Catawba settlement states, tribal gaming rights were an important point of negotiation:

Court in this case as it did in Keesee. The actions of the State, at issue in this litigation, not only contravene law, they are inconsistent with historical practices whereby the British and then the United States recognized Indian nations as sovereigns as Chief Justice Marshall elaborated in Worcester v. Georgia, 31 U.S. 515, 559, 8 L.Ed. 483 (1832):

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial; with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation" so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth.

Worcester, 31 U.S. 515 at 519.

Appellants here, as has the State in the previously recited examples, refuse to acknowledge that respondent was recognized as a sovereign from the Age of Exploration and continues to this day to have attributes of sovereignty which are not subject to divestment by the State of South Carolina merely because the rights of respondent are inconvenient to the State.

Under the Settlement Agreement and the State Act, respondent could "permit," or allow, video poker or similar electronic play devices on its Reservation "to the same extent that the devices are authorized by state law." S.C. Code Ann. § 27-16-110(G) (Supp. 2005). In this circumstance, the identity of the operator of video poker was not in issue so long as the machines were authorized off its Reservation by state law. By way of illustration, respondent could have allowed by its permit an individual to engage in video poker on its Reservation so long as video

poker was authorized elsewhere in the state. An entirely different circumstance obtained once video poker was prohibited by state law in the county or counties where the Reservation is located. In this circumstance, the identity of the operator is relevant and restricted to respondent -- a governmental entity:

> [T]he Tribe nonetheless must be permitted to operate the devices on the Reservation if the governing body of the Tribe so authorizes….

S.C. Code Ann. §27-16-110(G) (Supp. 2005). [emphasis supplied]

The situation existing after video poker was prohibited by state law in the county in which the Reservation is located is parallel to the change in gambling generally in South Carolina where the state once permitted video poker to be operated by private citizens, but now has prohibited video poker while it as a government operates a governmentally owned and directed gambling enterprise, the lottery. No private video poker machines may now be permitted on its Reservation, but respondent, with the authorization of its governing body, may as a sovereign "operate the devices on the Reservation." Id. In other words, respondent, like the State, can operate specific gambling in that territory over which each has the requisite level of sovereignty.

Appellants' view of respondent's rights fails to respect either history or the law. The State negotiated a settlement of a lawsuit that had "resulted in severe economic and social hardships. . . for the State as a whole," S.C. Code Ann. § 27-16-20(2) (Supp. 2005), but at every opportunity thereafter has sought to diminish the value of the consideration given in exchange for settlement. Had the settlement been designed to preclude respondent, as a government, from operating video poker on its Reservation in the event video poker were prohibited pursuant to state law, the agreement could have tracked the agreed-upon provision for bingo which revokes respondent's right to special bingo licenses "if the game of bingo is no longer licensed by the

State." S.C. Code Ann. §27-16-110(F) (Supp. 2005). There is a termination provision for respondent's bingo because respondent is entitled to operate its two bingo games off of its Reservation where its continued operation could be seen as offensive to state sovereignty if all other bingo were prohibited by state law. In contrast, there is no termination provision for video poker operated by respondent on its Reservation when video poker is prohibited elsewhere by state law because video poker or similar electronic play devices may only be operated on its Reservation and then only by respondent upon the authorization of its governing body. The parties agreed that respondent could operate gaming off its Reservation only if the specified type of gaming, bingo, were permitted by state law. Appellants did not negotiate a similar agreement regarding gaming on respondent's Reservation so appellants have asked the courts to rewrite the contract of settlement. This is not the function of the courts.

Appellants urge as authority for their rewriting of the Settlement Agreement and State Act dictum from Narragansett Indian Tribe v. Nat'l. Indian Gaming Comm'n., 158 F.3d 1335 (D.C. Cir. 1998), for the proposition that respondent's gaming rights are a matter of exclusive state control. (App. Br. p. 7). Even the most superficial reading of the Federal Act and the State Act would give lie to this proposition. The Federal Act provides that respondent has those rights regarding games of chance identified in the Settlement Agreement and State Act:

> The Tribe shall have the rights and responsibilities set forth in the Settlement Agreement and the State Act with respect to the conduct of games of chance. Except as specifically set forth in the Settlement Agreement and the State Act, all laws, ordinances, and regulations of the State, and its political subdivisions, shall govern the regulation of gambling devices and the conduct of gambling or wagering on and off the Reservation.

25 U.S.C. §941*l*(6).

It is hard to conceive how any serious argument can be made that Congress has granted the State of South Carolina exclusive state control over gambling on the Reservation when

respondent's gambling rights are established as an exception to state law by two documents, the Settlement Agreement and State Act, which cannot be amended by the State without the consent of respondent and which have been ratified by Congress. 25 U.S.C. §941m(f). The right of respondent to operate video poker on its Reservation is established by congressionally approved language in the Settlement Agreement and State Act, and notwithstanding the State's historical disregard of both the power of Congress and the rights of respondent, respondent has a vested and continuing right to operate video poker or similar electronic play devices on its Reservation if authorized by its governing body. The State agreed to the settlement of the litigation and cannot by its post hoc maneuvers diminish the value of what it gave to obtain an end to litigation "involving tens of thousands" of South Carolina citizens. S.C. Code Ann. § 27-16-20(2) (Supp. 2005). When the State Act is read in the context of the Federal Act, it is clear that respondent cannot be divested of its rights by subsequent changes in state law without respondent's consent. Appellants' effort to "read into" the State Act language which was not agreed upon or found in the legislation as adopted and ratified by Congress, must fail for additional reasons, as detailed analysis and refutation of appellants' arguments below will demonstrate.

A. THE LAND CLAIM SETTLEMENT SECURES RESPONDENT'S RIGHT TO CONDUCT VIDEO POKER ON ITS RESERVATION.

1. Respondent's Gaming Rights Are A Matter Of Federal Law.

Before addressing the ultimate question, it is first important to understand that the provision in dispute before the Court is a matter of federal law. While section 16.8 of the Settlement Agreement is codified at section 27-16-110(G) of the South Carolina Code, this statutory provision is a matter of Federal law which can only be changed by Congress, or by consent of both respondent and the State. That is so because with Congress's exclusive authority under Article I, Section 8 of the United States Constitution to regulate matters involving Indian

tribes, section 27-16-110(G) took force and effect only upon approval by Congress. In this regard, the Federal Act provides that the "Settlement Agreement and the State Act are approved, ratified, and confirmed by the United States to effectuate the purposes of this subchapter, and shall be complied with in the same manner and to the same extent as if they had been enacted into Federal law." 25 U.S.C. § 941b(a)(2).

In addition to requiring that section 27-16-110(G) be read as if it were Federal law, Congress enforced its exclusive authority to govern matters relating to Indians by prohibiting any change to the Settlement Agreement and State Act unless by act of Congress or by agreement of "both the State and the Tribe." 25 U.S.C. § 941m(f). Undoubtedly due to the well-documented and embarrassing history of the State of South Carolina treating its promises to the Catawba Indian Tribe as if they were meaningless, Congress protected respondent from unilateral state actions that would diminish respondent's rights in the Settlement Agreement and the State Act. Congress provided a practical method to secure this protection by stating that any amendment to the Settlement Agreement and the State Act would require the consent of both the State and respondent.

As to the particular provision in dispute, section 941*l* makes the Indian Gaming Regulatory Act (IGRA) inapplicable to respondent but, as to games of chance, provides that "[t]he Tribe shall have the rights and responsibilities set forth in the Settlement Agreement and the State Act with respect to the conduct of games of chance." 25 U.S.C.A. § 941*l*(b). Section 941*l* specifically grants respondent the gaming rights set forth in the Settlement Agreement and the State Act, and guarantees that respondent has these rights to "the same extent as if they had been enacted into Federal law." 25 U.S.C.A. § 941b. There is no doubt, therefore, that

> [T]he language [in dispute] before the Court . . . is beyond the reach of ordinary state legislative enactments after the 1993 settlement. Likewise, the Indian

our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183 (2004) (internal quotation marks and citation omitted).

Section 27-16-110(G) states:

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

S.C. Code Ann. § 27-16-110(G) [emphasis supplied] see also Settlement Agreement § 16.8, (Ex. B to Pl's Mem. Supp. Sum. J., R.O.A. p. 216.)

In giving the words used in section 27-16-110(G) their ordinary, plain meaning, the trial court concluded that "there is no ambiguity in the language, and since the Reservation is located in counties which prohibit video poker and similar electronic play devices pursuant to state law, respondent may operate those devices on the Reservation if authorized by the governing body of respondent." (Order of Dec. 13, 2005 at 8, R.O.A. p. 54.)

In reaching this conclusion, the court recognized the clear difference between the word "permit" as used in the first sentence and the word "operate" as used in the second sentence of the section. As has been noted by the United States Supreme Court, "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another . . . ." BFP v. Resolution Trust Corp., 511 U.S. 531, 537 (1994) (internal quotation marks and citations omitted).

The word "permit" as used in the first sentence refers to respondent's authority to authorize or give permission to others to place and maintain video poker or similar electronic

play devices on its Reservation so long as video poker or similar electronic play devices are lawful in South Carolina. The trial court likened this concept to the State permitting such electronic play devices elsewhere in the State during a time when they were legal in the State.

The second sentence "provides an exception to a state law prohibition on video poker." (Order of Dec. 13, 2005 at 6, R.O.A. p. 52.) The second sentence is explicit in stating that "if the Reservation is located in a county or counties which prohibit the devices pursuant to state law, [respondent] nonetheless must be permitted to operate the devices on the Reservation if the governing body of respondent so authorizes." To this end, in the event "the Reservation is located in a county or counties which prohibit the devices pursuant to state law," the second sentence of section 27-16-110(G) plainly recognizes respondent's governing authority over its Reservation and allows respondent to operate video poker or similar electronic play devices on its Reservation. The trial court likened respondent's authority to operate video poker on its Reservation to the State's authority to operate the South Carolina Educational Lottery. "In both instances, the gaming activity is conducted directly by a government and not licensed or permitted to be operated by others." (Order of Dec. 13, 2005 at 7, R.O.A. p. 53.)

As discussed above, in the event video poker is prohibited by state law, whether respondent maintains its right to "permit" such gaming activity by others on its Reservation pursuant to the first sentence of section 27-16-110(G) is a different question from whether respondent maintains its right to have its governing body decide to "operate" video poker on the Reservation. Neither party disputes that the Reservation is located in a county or counties which prohibit video poker pursuant to state law. Thus, pursuant to the plain language of the second sentence of section 27-16-110(G), as sovereign on its Reservation, respondent has the authority through its governing body to decide to operate video poker or similar electronic play devices on

Pursuant to the settlement between the parties, therefore, respondent's right to bingo "on or off the Reservation" expressly terminates in the event the game is no longer permitted by South Carolina law.

Section 27-16-110(G) on the other hand, setting forth respondent's right to operate video poker on its Reservation, contains no such limitation. The import of this omission must be given effect. It is "presumed that Congress act[ed] intentionally and purposely" when it authorized different treatment of respondent's bingo and video poker rights with respect to any change in the law. See Gozlon-Peretz v. United States, 498 U.S. 395, 404-05 (1991); see also, BFP, supra, 511 U.S. at 537 (1994) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal citations omitted)).

Sound reasoning also supports the difference between respondent's bingo and video poker rights. Specifically, respondent's right to bingo is not restricted to its Reservation. Therefore, were respondent given bingo rights that were not restricted by state law, respondent would be able to operate bingo in South Carolina when no one else could do so if there were a statewide prohibition. "Since video poker is to be operated only on the Reservation, and then only if approved by respondent's governing body, there is no conflict with s[t]ate law with respect to video poker in those portions of the state where respondent has no sovereign governmental powers as it does on the Reservation." (Order of Dec. 13, 2005 at 7, R.O.A. p. 101.)

In addition, if both respondent's bingo and video poker rights were subject to unilateral revocation by the State, then respondent's negotiation of gaming rights to secure its self-determination and economic development on its Reservation in the Settlement Agreement would have been merely illusory. It would contravene the purpose of the Settlement Agreement and

manifests Congress's intention in ratifying the Settlement Agreement and the State Act.

For all the reasons discussed above, this Court should affirm the declaration of the trial court finding that section 27-16-110(G) secures respondent's right to have its governing body decide if it wishes to operate video poker or similar electronic play devices on its Reservation regardless of any state law prohibition on video poker operated by others elsewhere in the state.

B. EVEN IF RESPONDENT'S RIGHT TO OPERATE VIDEO POKER ON ITS RESERVATION UNDER SECTION 27-16-110(G) WERE SOMEHOW CONSIDERED AMBIGUOUS, THAT AMBIGUITY MUST BE CONSTRUED IN FAVOR OF RESPONDENT.

Even if the statute affirming respondent's right to operate video poker on its Reservation under section 27-16-110(G) were somehow considered ambiguous, that ambiguity must be construed in favor of respondent for the following reasons: (1) canons of statutory construction require the court to resolve any ambiguity in favor of respondent; (2) the legislative history of section 27-16-110(G) secures respondent's right to operate video poker on its Reservation; (3) canons of contract construction also command that respondent maintains a right to operate video poker on its Reservation. Therefore, in the event the Court finds section 27-16-100(G) ambiguous, it should affirm the trial court's declaration that section 27-16-100(G) secures respondent's right to operate video poker on its Reservation.

1. Canons of Statutory Construction Require the Court to Resolve Any Ambiguity in Favor of respondent.

The United States Supreme Court has held that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Blackfeet Tribe of Indians, 471 U.S. at 766 (1985). Thus, any decision by this Court interpreting the meaning of any ambiguity in section 27-16-110(G) must be resolved in favor of respondent. Such a resolution, moreover, is necessary to comport with Congress's goal of Indian self-determination

and economic development. 25 U.S.C. §941(a)(1).

2. The Legislative History of Section 27-16-110(G) Secures Respondent's Right to Operate Video Poker On Its Reservation Regardless Of Any Prohibition By State Law, On The Operation Of Video Poker By Others Elsewhere In the State.

"[T]he history leading up to [an Act's] adoption . . . [is] to be resorted to only for the purpose of resolving doubts as to the meaning of the words used in the act in case of ambiguity." Fairport, P. & E.R. Co. v. Meredith, 292 U.S. 589, 594 (1934). In this case, were the Court to find any ambiguity in section 27-16-110(G), the legislative history of this section clearly demonstrates an intent on the part of Congress and the parties to provide respondent the right to operate video poker games on its Reservation notwithstanding any state law that would prohibit the operation by others of video poker elsewhere in the State.

Congressman John Spratt explained to Congress during its consideration of the Federal Act that the gaming provisions of the Settlement Agreement and State Act were specifically revised to protect respondent from potential changes in state gaming laws:

> After the "Agreement in Principle" was approved by the members of [respondent] on February 29, 1993, we began work to convert the "Agreement in Principle" into state and federal implementing legislation. More negotiations and accommodations on both sides were necessary. As a result, the state implementing legislation and H. R. 2399 differ in some respects from the "Agreement in Principle." The most notable changes treat games of chance. These provisions were modified in favor of respondent because of possible changes in state gaming law.

Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993: Hearing on H.R. 2399 Before House Subcomm. On Native Am. Affairs, 103rd Cong. 180 (Statement of Congressman John Spratt [emphasis supplied]) (Ex. G attached to Pl's Mem. Supp. Summ. J.), R.O.A. p. 247.)

As originally proposed, section 27-16-110(G) linked respondent's video poker right to its bingo gaming rights. It provided:

(G) If the Tribe obtains a [bingo] license as provided in this section and operates a

unlike bingo which respondent could pursue on or off of the Reservation, video poker was strictly confined to its Reservation; and second, unlike bingo, video poker remained available to respondent on its reservation even if others were prohibited by state law from operating video poker elsewhere. Upon ratifying the State Act, Congress thus clearly understood that these changes in gaming law had been made in favor of respondent.

3. Canons of Contract Construction Also Command that Respondent Maintains a Right to Operate Video Poker on its Reservation.

As "courts will not disregard the plain language of a contract or interpolate something not contained in it," Henrietta Mills v. Comm'r of Internal Revenue, 52 F.2d 931, 934 (4th Cir. 1931), it follows that where specific language is used in one portion of a contract but not in another, the specific language should not be implied where it is not present. In contrast to respondent's conditional bingo rights provided in section 16.7 of the Settlement Agreement, section 16.8 of the Settlement Agreement must be construed to afford respondent the right to operate video poker on its Reservation notwithstanding any prohibition by state law on the operation by others of video poker elsewhere. (Ex B. to Pl's Mem. Supp. Sum. J., R.O.A. p. 216.)

Second, "the law [] . . . subsisting at the time. . . of the making of a contract" necessarily enters into and becomes part of the agreement. Wood v. Lovett, 313 U.S. 362, 370 (1941). By implication, therefore, laws enacted after the execution of an agreement are not commonly considered to become part of the agreement unless the agreement clearly provides that the parties intended to incorporate subsequent enactments. In 1993, when respondent and the State entered into the Settlement Agreement, respondent had the undisputed right to engage in video poker on its Reservation and to assert that right notwithstanding future changes in state law. As such, the settlement must be construed to provide respondent with a vested and continuing right to operate

video poker and similar electronic play devices on its Reservation.

For the reasons provided above, the Court should affirm the trial court's ruling that section 27-16-100(G) secures respondent's right to operate video poker on its Reservation regardless of any prohibition by state law concerning the legality of such games off the Reservation.

C. APPELLANTS' ARGUMENTS THAT RESPONDENT HAS NO PRESENT RIGHT TO OPERATE VIDEO POKER ON ITS RESERVATION LACK ANY SOUND BASIS IN LAW OR FACT.

Appellants conclude that "[s]tate law now bans poker for everyone in South Carolina, including the Catawbas." (App. Br. p. 8.) To support such conclusion, appellants set forth the following arguments: (1) Act 125 of 1999 and judicial decisions interpreting Act 125 abrogate respondent's right to operate video poker on its Reservation under section 27-16-110(G) (id. at 7); (2) pursuant to the statute's plain language, respondent no longer retains the right to video poker because this gaming device is not "authorized by state law" (id. at 9); (3) Appellants' interpretation of section 27-16-110(G) comports with the alleged touchstone of the Settlement Agreement and State Act—deference to state law (id. at 8-9); (4) Appellants' interpretation of section 27-16-110(G) comports with common sense (id. at 8-9, 26-28); and (5) Appellants' affidavits from various persons involved in the land claims settlement confirm their interpretation of section 27-16-110(G) (id. at 40-44). For the reasons that follow, each of these arguments is without merit.

1. Act 125 Of 1999 And Judicial Decisions Interpreting Act 125 Neither Expressly Nor Impliedly Abrogate Respondent's Right To Operate Video Poker On Its Reservation Under Section 27-16-110(G).

Appellants contend that Act 125 of 1999 and the decision in Joytime Distributors & Amusement Co. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999), repealed section 27-16-110(G).

construed to impliedly repeal section 27-16-110(G)'s grant to respondent the right to operate video poker on its Reservation notwithstanding future changes in the status of video poker off the Reservation under state law.

In sum, even if the right to video poker was not protected by an Act of Congress, the language chosen by the General Assembly in dealing with video poker makes it clear that Act 125 did not repeal respondent's video poker rights on its Reservation. In this regard, the "argument that the Legislature did not intend this result, that it made a mistake, that it was poor policy, assumes a supervisory power in the court that it does not possess. The Legislature said so; therefore it so intended." State v. Charron, 351 S.C. 319, 326, 569 S.E.2d 388, 392 (Ct. App. 2002) (quoting Columbia Ry., Gas & Elec. Co. v. Carter, 127 S.C. 473, 482, 121 S.E. 377, 380 (1924)) see also Lamie, 540 U.S. at 542 ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result." (internal quotation marks and alteration omitted)).

2. Appellants' Plain Language Argument Does Not Involve Application Of Section 27-16-110's Plain Language.

Appellants do not dispute that respondent had the right to operate video poker on its Reservation in 1993. Instead, Appellants contend that the first sentence of section 27-16-110(G) provides respondent the right to video poker only "to the same extent the devices are authorized by State law." (App. Br. p. 19) According to appellants, the first sentence of section 27-16-110(G) mandates that, if state law prohibits video poker subsequent to 1993, respondent no longer has any right to operate video poker on its Reservation.

As to section 27-16-110(G)'s second sentence providing---"if the Reservation is located in a county or counties which prohibit the devices pursuant to state law, [respondent] nonetheless

must be permitted to operate the devices on its Reservation if the governing body of respondent so authorizes"— appellants argue this language is limited by the first sentence and establishes respondent's right to operate video poker on its Reservation only in the instance that a "county-by-county referendum" or "local option referendum" disallows such gaming device. (App. Br. p. 18.) To this end, appellants also assert that the Court completely nullified the force and effect of the second sentence of section 27-16-110(G) in Martin v. Condon, 324 S.C. 183, 478 S.E. 272 (1996), when the Court ruled a county-by-county referendum on this issue unconstitutional.

Appellants' alleged plain language arguments are without merit for the following reasons. First, appellants' interpretation of section 27-16-110(G) requires the Court to read words into the statute that are not therein provided. That is, no language in section 27-16-110(G) makes respondent's right to "operate" video poker or similar electronic play devices on its Reservation contingent upon the legality of video poker elsewhere in the state. Rather, section 27-16-110(G) specifically provides that, even if video poker becomes illegal "pursuant to state law," respondent "nonetheless must be permitted to operate the devices on its Reservation if the governing body of [respondent] so authorizes." Further, there is simply no reference, directly or indirectly, in either section 27-16-110(G) or the State Act to a county-by-county referendum or local option referendum. Remaining true to section 27-16-110(G)'s plain language, a court must acknowledge that had the General Assembly intended the provision to rely on county-by-county or local option referendum, it would have said so. In this vein, the trial court rightly concluded: "This court cannot rewrite the Settlement Agreement or State Act to bring them in conformity with what [appellants] wish they said." (Order of Dec. 13, 2005, at 7, R.O.A. p. 101.)

Second, appellants fail to construe section 27-16-110(G) as a whole. Appellants' insistence that the first sentence of section 27-16-110(G) circumscribes the scope of the second

sentence of section 27-16-110(G) totally ignores the critical difference in the General Assembly's use of the word "permit" in the first sentence of section 27-16-110(G) and the word "operate" in the second sentence of section 27-16-110(G). The importance of this difference is fully discussed above in section A.2. To this end, however, the trial court did not conclude that "the second sentence of [section] 27-16-110(G) is paramount to the first" (App. Br. p. 37); but rather, that the second sentence means something different from that expressed in the first sentence as each addresses a distinct and mutually exclusive circumstance. Appellants also fail to reconcile section 27-16-110(F)'s explicit condition of respondent's right to engage in bingo on and off its Reservation upon the continuation of the State's authorization of such gaming, and section 27-16-110(G)'s allowance for respondent's right to operate in video poker within the confines of its Reservation without such qualification. S.C. Code Ann. §§ 27-16-110(F)-(G). In fact, appellants do not address this sound statutory argument at all in their Initial Brief, preferring to persist in reading "county-by-county referendum" into the statute.

Third, appellants' interpretation of section 27-16-110(G) disregards the legislative history of section 27-16-110(G) which shows that the provision providing for video poker was specifically modified in favor of respondent to provide an unfettered right to operate video poker on its Reservation, as opposed to respondent's conditional right to conduct bingo gaming on and off its Reservation. See supra, section B.2.

Fourth, appellants' contention that Act 164 of 1993, which authorized a county-by-county referendum, should be "read into" the second sentence of section 27-16-110(G) cannot be reasonably accepted by this Court. This contention, of course, is not an application of the statute's plain language. In addition, it is impossible for the General Assembly to have intended to include provisions of Act 164 as a part of section 27-16-110(G). At the time the General

nullified the force and effect of section 27-16-110(G). To this end, appellants argue that the touchstone of the Settlement Agreement and State Act require that respondent defer to state gambling laws. (App. Br. p. 19-23.) In support of this proposition, appellants rely on section 27-16-40, which subjects respondent to "the civil, criminal, and regulatory jurisdiction of the State, . . . except as otherwise expressly provided in this chapter or in the federal implementing legislation," S.C. Code Ann. § 27-16-40, and section 16.2 of the Settlement Agreement, which states that "[e]xcept as specifically provided in the Federal Implementing legislation and this Agreement, all laws, ordinances, and regulations of South Carolina . . . govern the conduct of gambling or wager by respondent on and off its Reservation." (Settlement Agreement § 16.2, Ex. B to Pl's Mem. Supp. Sum. J., R.O.A. p. 215.) For the reasons provided below, appellants' reliance on these Code and Settlement Agreement sections are to no avail.

In taking their position, appellants ignore the plain import of the Federal Act. Respondent's right to video poker under section 27-16-110(G) is not subject to the criminal and regulatory jurisdiction of the State because respondent's right to operate video poker under section 27-16-110(G) is "otherwise expressly provided in this chapter or in the federal implementing legislation," S.C. Code Ann. § 27-16-40; and "specifically provided in the Federal Implementing legislation and this Agreement." (Settlement Agreement § 16.2, Ex. B to Pl's Mem. Supp. Sum. J., R.O.A. p. 215.) The General Assembly provided that the State Act was not to be effective "until the Congress of the United States has passed and the President of the United States has signed into law federal implementing legislation." (Section 2 of Act 142 of 1993). Congress in turn passed and the President signed the Federal Act. The Federal Act provides that the "Tribe shall have the rights and responsibilities set forth in the Settlement Agreement and the State Act with respect to the conduct of games of chance." 25 U.S.C.A. §

the settlement negotiations, the gambling rights available to respondent under the IRGA were recognized by Congress as a "means of generating tribal governmental revenue" and consistent with Federal Indian policy to promote tribal economic development, tribal self-sufficiency, and strong tribal government. 25 U.S.C. § 2701. The parties and Congress, moreover, understood these gaming rights provided significant opportunities to enable respondent to raise tribal governmental revenue and pursue economic self-sufficiency. At the same time, however, the State of South Carolina made clear that it did not want a Class III gambling casino in the State. (App. Br. p. 42.) Thus, the State reached an agreement with respondents manifested in the Settlement Agreement and State Act. In lieu of the lucrative opportunities to establish casino-type gambling operations as well as other gambling rights under the IRGA, respondent negotiated for bingo and video poker rights, which for the many reasons discussed above, include respondent's right to operate video poker on its Reservation pursuant to section 27-16-110(G) regardless of any prohibition under state law with respect to the operation of video poker elsewhere by others.

Appellants' contention that the State maintains the ability to unilaterally abolish all rights to gaming on respondent's Reservation is directly at odds with the language of the Settlement Agreement and the State Act. More importantly, this assertion contravenes Congress's clear goal to provide respondent with meaningful opportunities for "self-determination and economic self-sufficiency." Common sense weighs against any notion that the parties would agree to permit the State to destroy the value of respondent's bingo games by promoting a massive

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but the right to two special bingo licenses." (App. Br. p. 9.) This contention is a complete mischaracterization of Judge Currie's Order. In Catawba, Judge Currie discerned the meaning of section 27-16-110(D), a provision permitting respondent to operate one of its bingo games outside the land claim area under a special license provided respondent first obtained the approval of the governing authority of the county. In this regard, Judge Currie only considered the bingo provisions of the Settlement Agreement and State Act. Judge Currie's Order in Catawba does not consider or mention respondent's video poker rights under the Settlement Agreement and State Act.

competing State Lottery or prohibiting bingo under state law, and, then, by its unilateral actions obliterate any continued opportunity for respondent's governing body to pursue economic development through the alternative of video poker on its Reservation. Such interpretation of section 27-16-110(G) would give to the State the power to defeat Federal Indian Policy and unilaterally veto legislation approved by Congress.

Appellants' argument--that if the parties had intended to grant respondent the right to operate video poker regardless of any prohibition under state law it would have said so more clearly by using words such as "in perpetuity"--is also inapposite. As discussed above, respondent contends and the trial court found the language of section 27-16-110(G) to be unambiguous and clear in its grant to respondent the right to operate video poker or similar electronic play devices on its Reservation regardless of any prohibition by state law regarding video poker elsewhere. Whether section 27-16-110(G) could have been clearer in stating respondent's rights by using the phrase "in perpetuity" is of no consequence. Respondent could argue with more force that since many rights secured for respondent and its people had specific duration, e.g. hunting and fishing licenses available at no charge for 99 years (S.C. Code Ann. § 27-16-120 (E)); no state or local income taxes on sale of pottery for 99 years (S.C. Code Ann. § 27-16-130 (c)(2)), and government purchases exempt from sales tax for 99 years (S.C. Code Ann. § 27-16-130 (H)(I)), the absence of a stated duration denotes a perpetual right.

In this vein, respondent likewise reiterates that if section 27-16-110(G) had intended to limit the application of the second sentence of section 27-16-110(G) to instances involving a county-by-county referendum it would have contained such language. Instead, neither section 27-16-110 nor any other provision of the State Act makes any reference to a county-by-county referendum while appellants' insist that section 27-16-110(G) should be read as if such language

had been included in the legislation.

Appellants' argue that respondent cannot maintain the right to operate video poker on its Reservation when that right is subject to "all taxes, license requirements, regulations and fees governing electronic play devices provided by state law," S.C. Code Ann. § 27-16-110(G), and the State having banned video poker, there are no taxes, license requirements, regulations and fees to govern video poker. This argument is easily dismissed because the State's decision to tax or regulate video poker is not a condition precedent to respondent's right to operate video poker under section 27-16-110(G). Nothing in the language of section 27-16-110(G) suggests, let alone specifies, that if the State decides not to tax or regulate video poker respondent does not have the right to operate video poker on its Reservation.

III. AS AN ADDITIONAL SUSTAINING GROUND, THE COURT BELOW ERRED IN CONSIDERING MATERIALS SUBMITTED TO THE COURT BY APPELLANTS WHEN EACH ITEM WAS EITHER INCOMPETENT OR UNTIMELY FILED.

As an additional sustaining ground offered pursuant to Rule 220(c), SCACR, and I'On L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E. 2d 716 (2000), respondent notes that it was error for the court below to consider affidavits and material offered by appellants because each item was either incompetent or untimely filed.

In support of their motion for summary judgment, appellants offered one affidavit, that of state Senator Robert Wesley Hayes, Jr., dated November 18, 2005. In his affidavit, the Senator discusses provisions inserted in the State Act, and purports to express the thoughts and intention of the South Carolina General Assembly. It has long been the law in South Carolina that statements by legislators are not to be considered to determine "the meaning or effect of the language used" in legislation. Tallevast v. Kaminski, 146 S.C. 225, 143 S.E. 796 at 799 (1928); see also Kennedy v. S.C. Retirement System, 345 S.C. 339, 549 S.E.2d 243 (2001); Timmons v.

S.C. Tricentennial Comm'n., 254 S.C. 378, 175 S.E.2d 805 (1970); Greenville Baseball, Inc., v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). Clearly, the meaning of the language in the State Act or the intent of the General Assembly cannot consistently with established precedent be ascertained from the comments of a single legislator; therefore, the Hayes affidavit was incompetent for that purpose and should not have been considered.

In support of their Rule 59(e), SCRCP, motion to alter or amend the judgment of December 13, 2005, appellants filed affidavits and materials that were not before the court either in support of their motion for summary judgment or in opposition to respondent's motion for summary judgment. Rule 59(e), SCRCP, provides an opportunity for "reconsideration" of a trial court's ruling, Elam v. S.C. Dept. of Transportation, 361 S.C. 9, 602 S.E.2d 772 (2004), not a "do-over" where a party having been unsuccessful in the first instance retools its case by presenting material that it could have presented in the first instance, but did not. Such practice has not been allowed where a party successively seeks relief by adding more to its showing to the court where preceding showings have been insufficient to obtain the relief sought. Tallevast v. Kaminski, supra (successive applications for temporary restraining orders precluded unless new and additional matter unavailable at initial application). Nothing in appellants' affidavits or other material submitted to the court indicates that the affidavits and materials were unavailable prior to the hearing on the cross-motions for summary judgment and no application was made by appellants pursuant to Rule 56(f), SCRCP, for additional time to secure the affidavits prior to the hearing that resulted in the December 13, 2005 order. Appellants were required by Rule 56(c), SCRCP, to submit affidavits not later than two days prior to the hearing on the summary judgment motion if the affidavits were offered in opposition to respondent's motion. If the post hearing affidavits and material were filed in support of appellants' motion, under Rule 56(b) and

(c), SCRCP, appellants would have been required to serve their affidavits with their motion at least ten days prior to the hearing. Appellants' affidavits and submissions were not timely, and it was error for the court below to have considered them. Likewise, it would be error for this Court to consider them.

CONCLUSION

Appellants' efforts to diminish the value to respondent of the settlement of respondent's land claims by attempting to unilaterally change the terms of the settlement is consistent with the State's long history of disregarding law and policy where respondent and its people are concerned. It is this history of unfulfilled promises by the State to respondent that led to a federal law limitation on the power of the State to avoid its settlement commitments by unilaterally modifying either the Settlement Agreement or State Act. For the reasons stated above, appellants must not be allowed to rewrite the settlement with respondent to the detriment of respondent and its people. This Court should act as it did in Keesee to protect the integrity of the settlement agreement from the impermissible actions of the state. The orders below should be affirmed.

Respectfully submitted,

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