STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph M. Strickland, Special Circuit Court Judge

Case No. 05-CP-40-3717

Catawba Indian Tribe of South Carolina,

Respondent,

v.

The State of South Carolina and Henry D. McMaster, in his official capacity as Attorney General of the State of South Carolina,

Appellants.

FINAL REPLY BRIEF OF APPELLANTS

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

ROBERT D. COOK
Assistant Deputy Attorney General

C. HAVIRD JONES, JR.
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3970

ATTORNEYS FOR APPELLANTS.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

SUMMARY OF ARGUMENT

Respondent's arguments that it is entitled to operate video poker and other similar electronic play devices on its Reservation – notwithstanding that such devices are contraband *per se* under state law – are wholly without merit. Such arguments contort and distort S.C. Code Ann. Section 27-16-110(G) by attempting to give to Respondent what this statute plainly and unambiguously takes away: once video poker is banned statewide by state law, § 27-16-110(G) mandates that the Tribe possesses no right to have video poker devices on its Reservation. Video poker machines are now completely prohibited in South Carolina; thus, by contending these machines are legal on its Reservation, Respondent seeks to turn a sensibly written statute into one which is absurdly construed. Accordingly, we ask this Court to reject Respondent's reading of § 27-16-110(G).

In essence, Respondent urges that the controlling provision in this case, 27-16-110(G), must be read as an "exception to state law" outlawing video poker statewide. See, S.C. Code Ann. Section 12-21-2710. In the Tribe's view, "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," Respondent's Brief at 15, despite the fact that no other person or entity in South Carolina now possesses such a right. The Tribe places particular emphasis upon the second sentence of § 27-16-110(G), which creates a specific exemption for the Catawbas from any action by a "county or counties which prohibit the devices." Ignoring this limited exception, Respondent argues and the circuit court concluded, that "'since the Tribe's Reservation is located in counties which prohibit video poker [and similar devices pursuant to the statewide ban of § 12-21-2710] ... [the Tribe] may operate those

devices on the Reservation if authorized by the governing body ....'" Respondent's Brief at 18. According to Respondent, this interpretation of the second sentence is a recognition by the Legislature that the Tribe is "sovereign on its Reservation ... ."

As will be seen below, Respondent's construction totally distorts the language of § 27-16-110(G) and the purpose for which it was enacted. The first sentence of § 27-16-110(G), which provides that the Tribe "may permit on its Reservation video poker or similar electronic play devices *to the same extent that the devices are authorized by state law*," is completely eviscerated by Respondent's interpretation. Clearly, as the words of the statute and its context demonstrate, the second sentence was simply designed to insure that the Tribe continued to have the right to video poker on its Reservation if the counties in the Reservation area prohibited these devices pursuant to the county local option vote authorized by the Video Game Machines Act. See *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272 (1996). On the other hand, the first sentence makes clear that if state law banned video poker statewide, as occurred pursuant to Act 125 of 2000, the devices are likewise banned on the Reservation.

Moreover, if the Tribe's construction that it somehow possesses a "vested and continuing right to operate video poker on its Reservation" is correct, then one must wonder why it was necessary for the Legislature to use phrases such as "to the same extent authorized by state law" and "located in a county or counties which prohibit the devices" to express this purpose. If Respondent's interpretation possesses any merit (and we believe it does not), it would certainly have been simple to express any "vested and continuing right" in a much more straight-forward, less subtle way than was done here. See, *Layman v. State*,

368 S.C. 631, 630 S.E.2d 265 (2006) (Generally statutes do not create contractual rights and "are created by statute only when they are expressly found in the language of the legislation."). This is particularly so where, as here, video gambling is involved. This Court has stressed it will construe laws related to gambling "in light of the recent history of video gambling in South Carolina ...." *Mims Amusement Co. v. SLED*, 366 S.C. 141, 146, 621 S.E.2d 344, 346 (2005). The simple answer is that Respondent does not possess any "vested and continuing right" to video poker on the Reservation because § 27-16-110(G) unambiguously limits the Tribe's rights to those "authorized by state law." State law now has removed any right to video poker anywhere in South Carolina, and has thus terminated the Tribe's right as well.

ARGUMENT

I.

The Circuit Court erred in granting summary judgment to Respondent and in concluding that the Catawba Tribe possesses a continuing right to video poker on its Reservation.

Respondent's arguments regarding tribal sovereignty lack any basis whatsoever. The Tribe's comparison of its "vested right" to video gambling on the Reservation as being equivalent to the right of the State of South Carolina in running the State Lottery is utterly meritless. It is well recognized that "[t]ribal sovereignty is subject to limitation by specific treaty provisions, ... by statute at the will of Congress, ... by portions of the Constitution found explicitly binding on the tribes, ... or by implication due to the tribes' dependent status." *Babbitt Ford v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983) (citing *United States v. Wheeler*, 435 U.S. 313 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Congress possesses plenary authority to limit, modify, or eliminate the powers of local self-government which tribes otherwise possess. *Id*. *United States v. Wheeler, supra* concluded that "incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." 435 U.S. at 323.

In this instance, Congress removed from the Catawbas any and all "sovereignty" with respect to video gambling. Instead, Congress subjected the Tribe to the very same state laws concerning gambling as all other South Carolinians must follow and abide by. The federal Indian Gaming Regulatory Act (IGRA) was made inapplicable to the Tribe by Congress.

Instead, the federal legislation expressly declared state law to govern the Catawbas. See 25 U.S.C. § 941 2)21. As the Court stated in *Narragansett Indian Tribe v. National Indian Gaming Comm*., 158 F.3d 1335, 1341 (D.C. Cir. 1998),

> [t]o begin with, the Narragansetts are not the only tribe excluded from IGRA and subjected instead to state gaming law. The *Catawba Indians*, the Passamoquoddy Tribe and Penobscot Nation, and the Wampanoag Tribal Council of Gay Head have also regained lands through legislative settlements in which they accepted *general state jurisdiction over tribal lands*. See 25 U.S.C. § 941 (b)(e), m(c); § 1725(h); id. § 1771(g). The Catawba Indians' and the Wampanoag Tribal Council's settlement acts *specifically provide for exclusive state control over gambling*. See *id.* § 941 2)21(a); *id.* § 1771 g. (emphasis added).

And, as the Fifth Circuit Court of Appeals concluded in *Ysleta Del Sur Pueblo v. State of Texas*, 36 F.3d 1325, 1335 (5th Cir. 1994), the Catawbas' Settlement Act represents a good example of an instance in which Congress made IGRA inapplicable and state law controlling with respect to Indian gambling activities. As the Court in *Ysleta Del Sur Pueblo* stated,

> ... we note that in 1993, Congress expressly stated that IGRA is *not* applicable to one Indian tribe in South Carolina, *evidencing in our view a clear intention on Congress' part that IGRA is not to be the one and only statute addressing the subject of gaming on Indian lands* .... Therefore, we conclude not only that the [Texas] Restoration Act survives today but also it – and not IGRA – would govern the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law. (emphasis added).

The Fifth Circuit rejected the Tribe's argument that such a limitation upon the Pueblo Tribe's gambling activities impinged upon its tribal sovereignty. The *Ysleta Del Sur Pueblo* Court stated as follows:

> [t]he Tribe warns that our conclusion (i.e., that Texas gambling laws and regulations are surrogate federal law) will constitute a substantial threat to its sovereignty in that "[e]very time the State modifies its gambling laws, the impact will be felt on the reservation." However, any threat to tribal sovereignty is of the Tribe's own making. The Tribe noted in its resolution

> that it viewed § 107(a) of he Restoration Act as a "substantial infringement upon the Tribes' [sic] power of self government" but nonetheless concluded that relinquishment of that power was necessary to secure passage of the Act. To borrow IGRA terminology, the Tribe has made its "compact" with the state of Texas and the Restoration Act embodies that compact. If the Ysleta del Sur Pueblo wishes to vitiate the compact it made to secure passage of the Restoration Act, it will have to petition Congress to amend or repeal the Restoration Act rather than merely comply with the procedures of IGRA.

Id. These cases fully demonstrate that an Indian Tribe, such as the Catawbas, must live with the Settlement it has made with the State. Respondent cannot rewrite the Settlement if it encounters a provision it does not like or regrets having agreed to. Here, the Respondent consented to, and the State and federal governments ratified, a Settlement which clearly subjects the Tribe to South Carolina laws making video poker and video gambling illegal. The Tribe did not complain about State law when everyone, including the Catawbas, had a right to video poker. It most certainly did not complain, indeed, it insisted upon, the State's agreeing to exempt it from the effects of the local option referendum. Respondent only complains now when video poker has been outlawed for everyone even though it agreed to be subjected to limits upon its video poker rights "to the same extent the devices are authorized by state law." It now attempts to obtain an exemption from and a monopoly in an illegal activity which state law makes a crime for anyone else to be engaged in.

In determining the Tribe has no present right to video poker on its Reservation, we must look to the express language of the federal and state Settlement Acts. Games of chance are specifically addressed in the federal implementing Act at 25 U.S.C. § 941 $^{2)\overline{21}}$. Section 941 $^{2)\overline{21}}$(a) makes IGRA expressly inapplicable to the Tribe. Pursuant to § 941 $^{2)\overline{21}}$(b), the issue of gambling is dealt with as follows:

> [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. 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 by the Tribe on and off the Reservation.*

(emphasis added).

The State Act, codified at S.C. Code Ann. Section 27-16-110(G), further provides as follows:

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

(emphasis added).

Respondent attempts to explain away the first sentence of § 27-16-110(G) by virtually rewriting the second sentence. First of all, the Tribe ignores the second sentence's literal language, i.e. "located in a county or counties which prohibit the devices ...." Respondent argues that nowhere in the statute are the words "county-by-county referendum" mentioned. Respondent's Brief at 31. While literally true, such failure to mention these exact words is insignificant. Section 27-16-110(G) does everything else but use these precise words, and one cannot mistake that the principal concern of § 27-16-110(G)'s second sentence was the approaching local option referendum concerning video poker to be held in 1994. It must, of course, be seen that the focus of the second sentence is upon the "county or counties" which prohibit the devices in which "the Reservation is located," not upon any all-

inclusive prohibition by the State on a statewide basis. The only way a county or counties could, in 1993, "prohibit" video poker – which was then *legal* across the State – see *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991), was by means of the "local option" referendum authorized by the Video Game Machines Act, enacted in that very same year.

Of course, the local option referendum, conducted county-by-county, was struck down as unconstitutional in *Martin v. Condon, supra*. Nevertheless, the authorization for these referenda was enacted by the Legislature in 1993, at virtually the same time as the Catawba Settlement Act was approved by the General Assembly. All of the Affidavits submitted by Appellants emphasize that the upcoming referendum (in the general election of 1994) was the reason that the second sentence of § 27-16-110(G) was inserted in its present form. Obviously, the negotiators of the Agreement decided to protect the Tribe from any prohibition imposed *by the counties in the claim area* by virtue of the local option vote.

However, it is a quantum leap – and one not justified by § 27-16-110(G)'s express language – to conclude that the Tribe possesses a "vested and continuing right" to video poker on its Reservation. That the sole purpose of the second sentence of § 27-16-110(G) was to protect the Tribe against the approaching local option referendum, and not to immunize it in perpetuity from any statewide ban of video poker, can easily be seen in a side-by-side comparison of the earlier and final versions of the provision. See, Record at 248. Earlier, the second sentence provided that "[i]f a county within the claim area is permitted by state law to prohibit the devices and decides to prohibit the devices, the Tribe likewise shall be prohibited or regulated in operation of the devices in the county." *Id.* Thus, in the earlier version, the Tribe would have been prohibited from the right to video

poker if "a county within the claim area ... decides to prohibit the devices ...." Such language was ultimately altered to its present form: "... if the Reservation is located in a county or counties which prohibit the devices pursuant to state law, the Tribe nonetheless may be permitted to operate the devices on the Reservation ...." In short, earlier, the design of the Settlement was that should York and/or Lancaster Counties vote to ban video poker in those areas, the Tribe would also be subject to that local ban. In the final version, however, the Tribe was protected against this County action. Thus, there can be no doubt that the second sentence dealt only with action *by the county* (via local option), and not a prohibition *by the State* in the form of a statewide ban of video poker in its entirety, as was ultimately accomplished in July, 2000 by Act No. 125. *See*, *Joytime Distribs. & Amusement Co. Inc. v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999). State action, either regulating or prohibiting video poker altogether, is instead dealt with in the first sentence of § 27-16-110(G), which entitles the Tribe to the right to video poker only "to the same extent authorized by state law."

Furthermore, it is absurd to contort a provision which employs the language "located in *a county or counties* which *prohibit* the devices" to include a statewide ban of video poker whereby the devices are prohibited altogether, in *all 46 counties* by state law. The phrase "a county or counties" obviously does not contemplate a statewide ban, but relates only to county action, separate and apart from any statewide prohibition. When video poker was legal statewide at the time § 27-16-110(G) was enacted, this "county or counties" language could only refer to the 1994 referendum in which video poker was prohibited on a county-by-county basis. At that point in time, only a local option vote could be approved by the

General Assembly, which did not yet have the political will to prohibit the devices altogether. See, *Westside Quik Shop v. Stewart*, 341 S.C. 297, 301, 534 S.E.2d 270, 272 (2000). The circuit court incredibly read the second sentence as including the present situation, in which video poker is illegal everywhere in South Carolina, even though it clearly only references action by the "county or counties." To try and "shoehorn" this clear language into one addressing the situation where video poker is now illegal in *every county* in the State (including York and Lancaster), as the circuit court did, so dilutes this provision that it becomes absurd.

Moreover, Respondent's attempt to parse the words "permit" and "operate," as used in § 27-16-110(G), in order to try and demonstrate that these words mean different things for purposes of the statute, is without the slightest foundation. There is no evidence whatsoever that the Legislature placed any different emphasis on the word "permit," as used in the first sentence, compared to the word "operate" in the second sentence. Indeed, there is very little difference, if any, between the word "permit" which means to "allow" and the word "operate" which means to "produce a desired or proper effect." *American Heritage College Dictionary* (3d ed). *Compare, Gregory v. Marks*, 10 Fed. Cas. 1194 (1877) ["permit" means "empower" or "allow"] with *People v. Hill*, 192 N.Y.S.2d 342, 344 (1959) ["operate" means "superintend"]. If the Tribe may "allow" video poker on its Reservation to the same extent authorized by law, then to "operate" video poker by "producing a desired or proper effect" or "superintending" means substantially, if not precisely, the same thing. For Respondent somehow to equate the word "operate" to that of the State as sovereign in running the State Lottery, is, again, absurd. As *Narragansett, supra* correctly states, Congress, in making

IGRA inapplicable to the Catawba Tribe, and in dealing with games of chance and gambling devices in the federal ratifying legislation, intended to provide for "exclusive state control over gambling" with respect to the Tribe.

In addition, Respondent's comparison between § 27-16-110(F) (bingo), wherein it was expressly stated that the Tribe's right ended if bingo was terminated, and § 27-16-110(G), where termination of video poker was not mentioned, is also completely misplaced. The appropriate comparison is not between the language of subsections (F) and (G), but between the language used in the first and second sentences of subsection (G) itself – the controlling provision here. Reading these sentences as a coherent whole, the intent is clear: the Tribe would possess the limited right to video poker on the Reservation, even if York and/or Lancaster Counties banned such devices. This is clearly what Congressman Spratt meant when he stated that the provisions were modified in the Tribe's "favor" because of "possible changes in State gambling laws." Record at 246-247. He was obviously referring to the local option referendum and nothing more. As seen above, comparison between the earlier version of subsection (G) and its final form confirms that such change was indeed in the Tribe's "favor" vis à vis the effect of the local option vote.

However, the "authorized by state law" language, contained in the first sentence, was always present and inextricably ties the Tribe to whatever state law allows or prohibits concerning video poker. This meant that any right the Tribe possessed by virtue of its immunity from the effects of the local option referendum would be terminated if and when state law banned video poker statewide. That "if and when" has now occurred. Such a sensible construction is also entirely in accord with the Congressional Act, which provides

that "state law shall govern the regulation of gambling devices on and off the Reservation." 25 U.S.C. § 941 2)21 (b); *Narragansett, supra*. This construction correctly treats the Tribe equally to all South Carolinians.

Moreover, the reason that Subsections (F) and (G) are worded somewhat differently is clear: protection of the Tribe's special bingo license. Bingo was of paramount importance to the Tribe as evidenced by the fact that, as Judge Currie concluded, the Tribe gave up the right to have IGRA made applicable in exchange for first one, then two special bingo licenses. Record at 134-137. Such special license is "identical in all respects to the class of license permitting the highest level of prizes allowed by law and carries the same privileges and duties as the class of license permitting the highest level of prizes provided by law ..." with six exceptions enumerated. *See*, § 27-16-110(C). These exceptions give the Tribe certain advantages which other bingo license holders do not have, and thus the Tribe was said to own the "best game in town." Therefore, § 27-16-110(F) has a different wording than (G) in order to make clear that if bingo is no longer licensed, the Tribe may not have bingo either, but that if licensing is restored, the Tribe's special license [with the advantages provided in § 27-16-110(C)] "must be reinstated if the Tribe complies with all licensing requirements and procedures."

Finally, comparison between subsections (F) and (G) is not warranted under ordinary rules of construction. When statutory language is clear and unambiguous, the court generally does not look to other provisions of the Code to interpret the statute. *See, Britt Const. Co. v. Magazzine Clean* 623 S.E.2d 886 (Va. 2006). Only when the provision is unclear and not unambiguous will the court turn to other provisions of the same statutory

scheme. *Ross v. St. Bd. Election,* 876 A.2d 692 (Md. 2005). *See also, State ex rel Frier v. State Bd. Ed*., 179 S.C. 188, 183 S.E. 705 (1935) (unambiguous statute's meaning can only be gathered from literal interpretation of statute and other enactments could not be considered); *Coosaw Min. Co. v. State,* 144 U.S. 550 (1892) (clear provision cannot be varied by title or preamble).

In short, the provisions of the Settlement Agreement, the state Act and the implementing Congressional legislation must be construed *as they are written*, not as the Tribe would wish they were written. As this Court has frequently emphasized over the years, in construing a statute or statutes, the words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *City of Myrtle Beach v. Juel P. Corp. and Gay Dolphin, Inc.,* 344 S.C. 43, 543 S.E.2d 538 (2001). Statutes, *as a whole*, must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. *TNS Mills, Inc. v. South Carolina Dep't. of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). The Court is not permitted to rewrite the Agreement or implementing statutes and it may not interject matters not in the statute's language. *Timmons v. S.C. Tricentennial Comm*., 254 S.C. 378, 175 S.E.2d 805 (1970).

Examining the Agreement, as well as the implementing state and federal legislation, it is evident that deference to state law concerning gambling – whatever that law might be, either regulation or absolute ban – was the touchstone intended by those who reached the Settlement Agreement and ratified it. Thus, there is absolutely no suggestion in any of these provisions that the Tribe possesses a right in perpetuity to have video poker, or a "vested and

continuing right" to possess and operate video poker devices when such devices are made illegal *per se* contraband throughout the State pursuant to state law. For the Tribe to contend that such right to have video poker be deemed to have "vested" with the consummation of the Settlement Agreement and ratifying Acts is utterly inconsistent with the language of the Agreement and state Act, as well as the intent of the framers of the Agreement. Likewise, it is inconsistent with the words used by Congress in ratifying the State Act and Settlement Agreement – language making state law controlling with respect to the regulation of gambling devices on the Reservation.

Second, common sense dictates that neither the State of South Carolina nor the General Assembly would have agreed to give the Catawbas a right to possess or operate video poker machines *ad infinitum* in the face of a subsequent statewide ban thereupon. The entire tenor and tone of the Settlement Agreement – which the Catawbas participated in and agreed to – was to treat the Catawba Tribe similarly to other South Carolinians in terms of the applicability of state civil, criminal and regulatory law. And, as Judge Currie found in her Order, the consideration for the Tribe's negotiated agreement that IGRA be made inapplicable to the Catawbas was not the vested and continuing right to video poker, but the right to two special bingo licenses. Record at 134-138. The Tribe has engaged in a "revisionist" version of history here; a vested and continuing right to video poker was never thought to have been conceded to the Tribe by the State and we ask this Court not to rewrite the Settlement Agreement now so as to bestow such right.

Thirdly, any argument that the Catawbas' right to video poker may have been "frozen in time" as of the 1993 Agreement, or constituted a vested and continuing right – even if

video poker were subsequently outlawed throughout the State – is defeated by examination of the Agreement itself and the State Act of ratification. Section 27-16-110(G) expressly states that if the Reservation is located in *a county or counties* which prohibit video poker, the Tribe "nonetheless must be permitted to operate the devices ...." However, no such express language ("nonetheless must be permitted") is employed in that portion of § 27-16-110(G) which allows the Tribe to operate video poker on the Reservation "to the same extent the devices are authorized by state law ...." The use of this express language in one instance, and the omission of this same wording in the other, militates strongly against any argument that the Tribe's right continues even after enactment of South Carolina's statewide ban of video poker. *See, Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578, 582 (2000) ["to express or include one thing implies the exclusion of another, or the alternative."]

Fourth, if the Tribe possesses a right to possess and operate video poker machines even after the statewide ban, as it asserts, there would have been no need to have included the clause relating to the prohibition by "a county or counties" at all. Possession of a broad, unlimited right, notwithstanding a State ban, would obviate any need to address the contingency of a county ban. Again, any argument by Respondent that it possesses a "vested and continuing right" to have video poker on the Reservation following South Carolina's ban is thus fatally flawed. In short, there is *but one exception* in § 27-16-110(G) for video poker – the local option referendum – a right contingent upon whether state law continued to "authorize" such form of gambling. The fact that the Tribe bargained for a right which was agreed to by negotiators cannot now somehow give it that right in perpetuity, when such right was itself limited by the express language of that same Agreement. The Agreement

must be applied in its entirety, not merely the parts thereof which the Tribe chooses or which the Respondent now seeks to ignore or rewrite. Clearly, the framers of the Agreement and state Act knew how to use language granting the Tribe the right to video poker in perpetuity; if they had intended to do so, they would not have relied upon a subtle nuance or an implication. The negotiators would not, in other words, have minced words. To the contrary, here, they clearly granted no such "vested and continuing right."

Respondent's argument that the Legislature reenacted § 27-16-110(G) by way of Act No. 334 of 1998 is of no significance. The real question, above all else, is the proper interpretation of § 27-16-110(G). The "authorized by state law" language ties the Tribe to state law concerning video poker regardless of whether video poker law is banned, regulated or even reinstated as legal. The bottom line is that § 27-16-110(G) must be in interpreted in accord with its plain and unambiguous language – that the Tribe has no greater right to video poker than everyone else.

Finally, the Tribe enters any contract regarding video poker *subject to* the State's police power. In other words, there is no constitutionally protected right to gamble – whether be it by the Tribe or anyone else. *State of N.C. v. McLeary*, 65 N.C. App. 174, 308 S.E.2d 883 (1983). Absent an express provision in the Settlement Act or Congressional legislation that the Tribe possesses a right to video gambling in perpetuity – and there is none – the State has not, and indeed it cannot, bargain away its police power regarding gambling or video poker. This Court, as well as most other courts, have continually recognized that in the area of gambling, a person entering into a contract does so with eyes wide open and with the full knowledge that such contract is ultimately subject to the State's

police power to further regulate or even ban such activity. When gambling is involved, what might be legal one minute may be prohibited by the Legislature the next. *See, Joytime Distribs. & Amusement Co. Inc v. State*, *supra*; *Westside Quik Shop v. Stewart*, *supra*. This sovereign right of the State is fully recognized in the Congressional Act ratifying the Settlement Agreement. *See,* 25 U.S.C. § 941 [2][21](b) which provides that "state law shall govern the regulation of [gambling] ... devices." *See also, Narragansett, supra* [Congress provided for "exclusive state control of gambling" with respect to Catawbas]. For all of these reasons, we contend that the Agreement, state Act or Congressional Act gave the Tribe no such right as it asserts. To the contrary, these all required the Tribe to submit to state law regarding video poker.

Respondent relies upon *State v. Keesee*, 336 S.C. 599, 521 S.E.2d 743 (1999). However, that case is not at all analogous to the situation here.

In *Keesee*, this Court concluded that the combination hunting and fishing license issued to members of the Catawba Tribe by the Department of Natural Resources entitled the member to hunt without citation on Wildlife Management Lands. The Catawba combination license was created by DNR pursuant to the Catawba Settlement Act's provision, contained in § 27-16-120 (E). This provision requires members of the Tribe to conduct hunting and fishing "in compliance with the laws and regulations of South Carolina." However, § 27-16-120(E) also provides that "... for ninety nine years, following the effective date of this Chapter, members of the Tribe are entitled to personal hunting and fishing licenses without payment of fees." This Court concluded that the conviction of the Tribe member for failure to have a WMA permit was error because "... the clear intent of the Claims Act was to

extend full hunting and fishing rights to members of the Catawba Tribe without charge" In other words, this Court held that the Catawba combination license was the "functional equivalent" of a "sportsman license" which entitled a person to hunt on WMA lands.

This case is hardly the same as here. There is, of course, now no "license" of any kind entitling one to engage in video poker in South Carolina. In this case, it is not as in *Keesee* a matter of whether the Tribe has been given the "functional equivalent" of a "license." No person can be "licensed" today to engage in video poker or to possess video poker machines. These devices are contraband *per se* throughout South Carolina. For Respondent to compare activity which may be engaged in lawfully with a license and gambling activity which is illegal *per se* stretches credibility beyond its limits. See, *Mims, supra* (the rights possessed for contraband *per se* are hardly the same as those where derivative contraband is involved). There is a fundamental difference between the right to hunt, a generally lawful activity, and the right to possess illegal *per se* video poker machines. Moreover, in *Keesee*, the Tribe's license was substantially equivalent to the requirements of State law; here, the Tribe's "right" to video poker is directly at odds with state law.

Moreover, Respondent's argument, as an additional sustaining ground, that the court below erred in considering materials submitted to the court by Appellants "when each item was either incompetent or untimely filed," is also meritless. At the hearing on the Rule 59(e) motion, the Court below quickly ruled that it would consider Appellants' additional materials, submitted by Appellants as further support that the negotiators of the Settlement Agreement did not intend to bestow a vested and continuing right to video poker upon the Tribe. The lower court made clear in its order denying the Rule 59(e) motion that it

considered all materials submitted. Record at 88.

Before this Court is a question of law, not one of fact. *Stewart v. Rich. Mem. Hosp.*, 350 S.C. 589, 567 S.E.2d 510 (2002) (issue of interpretation of statute is a question of law for the Court). Everyone agreed, as did the circuit court, that the statute in question is not ambiguous; Respondent and the State simply read that statute very differently. Thus, the materials submitted by both sides went only to providing context and background with respect to the negotiations leading up to the Settlement Agreement and the State Act. Appellants submitted materials in support of our construction of the statute only because Respondent offered Mr. Clarkson's Affidavit. Appellants submitted additional materials only because the circuit judge focused so tenaciously upon that one Affidavit. Record at 47-58.

For Respondent now to complain about the materials Appellants submitted to demonstrate that others at the negotiating table, including Senator Hayes, Mr. Elam, Congressman Spratt, and Governor Campbell himself, had a different recollection from Mr. Clarkson as to how the applicable provision in the Settlement Agreement and § 27-16-110(G) came about, is unfortunate, to say the least. It is clear from these eminent individuals' statements that Mr. Clarkson's remembrance was not definitive.

However, regardless of what anyone "remembered" about the negotiations in 1993, this Court will undoubtedly construe § 27-16-110(G) consistently with the express language and the intent of the Legislature. Affidavits, including that of Mr. Clarkson, cannot rewrite an unambiguous statute. As this Court stressed in *Mims Amusement Co.*, *supra*, in writing in the context of the history of video gambling,

> [i]n a case raising a novel question of law, the Court is free to decide the question with no particular deference to the lower court. *The Court must decide the question based on its assessment of which answer and reasoning best comport with the law and public policies of this state and the Court's sense of law, justice and right*.

366 S.C. at 145, 621 S.E.2d 344, 346 (2005) (emphasis added). Appellants presented the public policy context which underlay the negotiations concerning § 27-16-110(G) and its corresponding provision in the Settlement Agreement, Record at 44-46, 72-78, 87. Of course, Senator Hayes was not only a member of the General Assembly, but a negotiator, as was Congressman Spratt and Mr. Elam. All explain, as does Governor Campbell, that the purpose of the Settlement Agreement was to limit the Tribe, in terms of gambling activity, to whatever was "authorized by state law." Clearly, the State was anxious to avoid casino gambling on the Reservation. That is why Governor Campbell insisted upon IGRA being made inapplicable to the Tribe. Those statements of policy considerations submitted by Appellants regarding the negotiations, while they may not be available to alter the clear words of the statute, indeed are entirely consistent therewith, and are useful in explaining the strong anti-gambling policy which underlay the negotiations. *Mims, supra*.

CONCLUSION

Section 27-16-110(G) is clear and unambiguous. The second sentence of the provision protects the Tribe in its right to have video poker on its Reservation from any prohibitory effect imposed by the local option referendum authorized by the Video Game Machines Act. That county-by-county referendum was struck down as unconstitutional by this Court in *Martin v. Condon, supra*. The first sentence of § 27-16-110(G), on the other hand, allowed the Tribe only those video poker rights which are "authorized by state law." State law abolished video poker in this State pursuant to Act No. 125 of 2000. *Joytime, supra*. Accordingly, applying the plain and unambiguous terms of § 27-16-110(G), the Respondent possesses no "vested and continuing right" to video poker, as it contends. It has no right to video poker whatsoever, any more than any other citizen of South Carolina has.

The federal ratifying Act is completely consistent with such conclusion. That Act made IGRA inapplicable. The federal Act further stated that "[e]xcept as specifically set forth in the Settlement Agreement and the State Act," State law "shall govern the regulation of gambling devices ... by the Tribe on and off the Reservation." 25 U.S.C. § 941 $^{2)21}$(b). The State Act provides a single exception – that the Tribe may continue to have video poker, notwithstanding the banning by the county or counties in the claim area by the local option referendum. However, such right is necessarily contingent as a result of the first sentence of the State Act – that the Tribe may permit video poker only "to the same extent the devices are authorized by state law."

Respondent's arguments in support of its reading that the Tribe possesses a "vested and continuing right" to video poker on its Reservation are thus wholly without merit. These

arguments seek, in essence, to contort, distort and cloud an otherwise clear and unambiguous law.

For all the foregoing reasons, the Order of the circuit court should be reversed.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

ROBERT D. COOK
Assistant Deputy Attorney General

C. HAVIRD JONES, JR.
Senior Assistant Attorney General

BY:_____
ROBERT D. COOK
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3970

ATTORNEYS FOR APPELLANTS.

July 28, 2006

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph M. Strickland, Special Circuit Court Judge

Case No. 05-CP-40-3717

Catawba Indian Tribe of South Carolina,

Respondent,

v.

The State of South Carolina and Henry D. McMaster, in his official capacity as Attorney General of the State of South Carolina,

Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellants complies with Rule 211(b), SCARC.

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

ROBERT D. COOK
Assistant Deputy Attorney General

C. HAVIRD JONES, JR.
Senior Assistant Attorney General

By:_____
ROBERT D. COOK

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3970

ATTORNEYS FOR APPELLANTS.

July 28, 2006.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph M. Strickland, Special Circuit Court Judge

Case No. 05-CP-40-3717

Catawba Indian Tribe of South Carolina,

Respondent,

v.

The State of South Carolina and Henry D. McMaster, in his official capacity as Attorney General of the State of South Carolina,

Appellants.

PROOF OF SERVICE

I certify that I have served the within Final Reply Brief of Appellants on Respondent by depositing three copies of the same in the United States mail, postage prepaid, addressed to:

Dwight F. Drake, Esquire
B. Rush Smith, III, Esquire
Nelson, Mullins, Riley & Scarborough, LLP
P. O. Box 11070
Columbia, South Carolina 29211

Jay Bender, Esquire
Baker, Ravenel & Bender, LLP
P. O. Box 8057
Columbia, South Carolina 29202

Robert Marshall Jones, Esquire
P. O. Box 706
Rock Hill, South Carolina 29731

Jim O. Stuckey, II, Esquire
Littler Mendelson, P.C.
1201 Main Street, Suite 1100
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served.

This 28th day of July, 2006.

_____

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3970