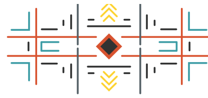
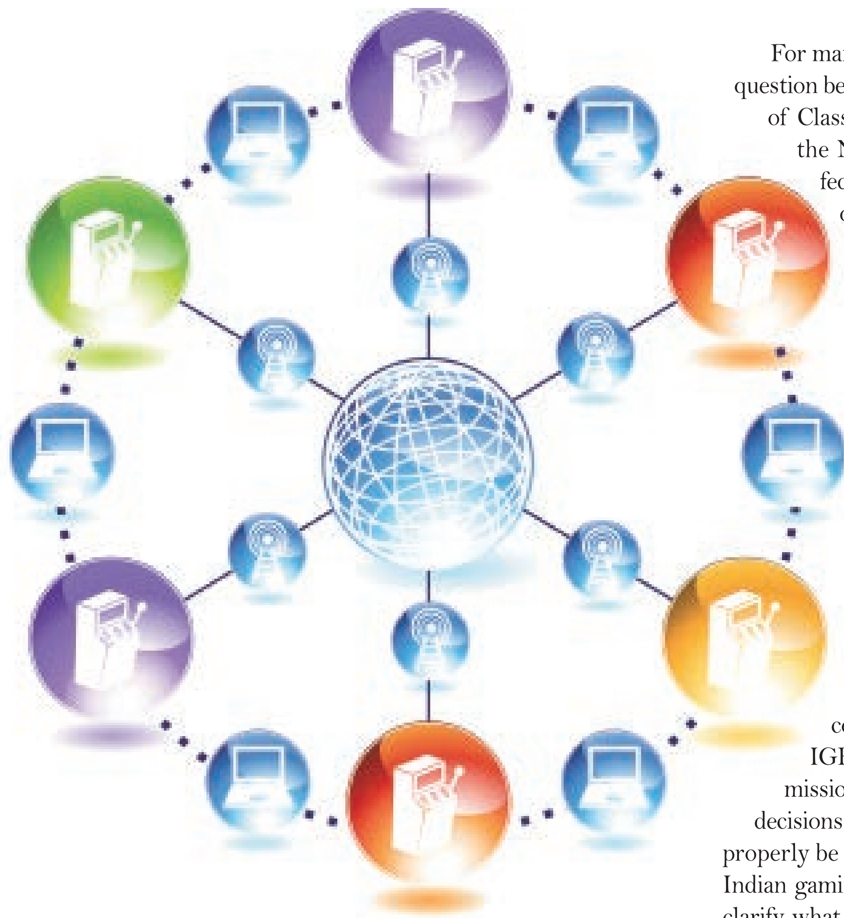


Classifying Server-Based Electronic Bingo Gaming Systems Under the Indian Gaming Regulatory Act

Who Gets to Decide Game Classification?

BY KEVIN QUIGLEY AND TOM FOLEY



Gaming vendors are offering new and innovative server-based electronic bingo gaming systems to tribal customers conducting gaming in the United States pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701, *et seq.*, P.L. 100-497, 102 Stat. 2467 (Oct. 17, 1988). And they often face a perplexing question: which regulatory agency is the proper authority under IGRA to make the game classification determining if their gaming systems are to be deemed a "Class II gaming system?"

For many years there has been tension over the answer to this question between tribal gaming regulators (the primary regulators of Class II gaming conducted by tribes pursuant to IGRA) and the National Indian Gaming Commission ("NIGC") (the federal regulatory agency assigned with monitoring and oversight responsibility for Indian gaming operations in the United States). In light of the regulatory structure crafted into IGRA and the implementing regulations adopted by the NIGC, as well as the historical sovereign rights of tribes under the U.S. constitutional framework, we think the answer is now clear – game classification determinations for server-based electronic bingo gaming systems are to be made solely by the tribal gaming regulatory authority, not the NIGC.

The issue of which regulatory agency is responsible for making classification determinations for server-based electronic bingo gaming systems was first hotly debated in Indian country starting in 2002 when the NIGC revised its original regulations in connection with the definitions associated with what constitutes Class II gaming and Class III gaming under IGRA. These revisions were designed to conform the Commission's original 1990s-era regulations to subsequent court decisions that interpreted which "electronic" gaming devices may properly be classified as Class II games. Many commentators and Indian gaming law practitioners believe these amendments helped clarify what constitutes permissible Class II gaming, and have had the practical effect of expanding the field of Class II gaming.

This debate intensified a few years later when the NIGC attempted to adopt "bright line" classification-related regulations that would have assigned game classifications for electronic gaming devices (including server-based electronic bingo gaming systems) to the sole discretion of the NIGC. A firestorm rose in Indian country over this regulatory overreach and eventually the NIGC was forced to retreat. Instead, a Tribal Gaming Working Group, consisting of Indian gaming regulators and industry leaders, worked with the NIGC to bring forth new regulations that would be consistent with IGRA's regulatory structure and the tribes' historical sovereign

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rights to govern their gaming activities on their lands. The end result was the adoption in November 2008 of NIGC regulations published at 25 CFR Part 547 - *Minimum Technical Standards for Class II Gaming Systems and Equipment* and 25 CFR Part 543 - *Minimum Internal Control Standards for Class II Gaming*.

The Part 543 and Part 547 regulations were developed through a sometimes contentious process between the NIGC and the Tribal Gaming Working Group spanning several years and countless hours working out the language that was finally adopted. It was a triumph of tribal interests collaborating with the NIGC to create an outcome that benefited Class II gaming overall and reinforced tribal sovereignty at its core. Both Parts 543 and 547 recognize the primary and exclusive role that the Tribal Gaming Regulatory Agencies ("TGRAs") play in the regulation of Class II games. It is a foundational principle of IGRA that Tribal governments are the primary regulators of gaming conducted on their Indian lands. This is especially true with Class II gaming because Tribal-State compacts cannot apply to the rules and play of the games.

Whenever a TGRA approves and licenses a server-based electronic bingo gaming system and allows it to be placed on a gaming floor for play, it affirmatively makes a classification decision as the primary regulator. These determinations are done on a daily basis by TGRAs all over Indian country. To this end, key provisions of Parts 543 and 547 rightly delegate to the TGRA the legal responsibility and authority to make a classification determination as to whether a server-based electronic bingo gaming system is properly classified as Class II gaming. These provisions include Part 543.8(g) which requires the *TGRA* [not the NIGC] to establish procedures to safeguard integrity of technologic aids to the play of bingo during installations and operations, including procedures that require: (1) the *TGRA* [not the NIGC] to approve "all technologic aids before they are offered for play; and (2) the *TGRA* [not the NIGC] to determine that all Class II gaming systems comply with Part 547 standards.

Other regulation provisions highlight the TGRA's primacy in approving a server-based electronic bingo gaming system and determining if it is properly classified as Class II gaming. Part 547.4(a) requires that to ensure fairness as to game play on a Class II gaming system, a testing lab must calculate math expectations and submit a "report *to the TGRA*" – [not to the NIGC]. Part 547.4(b) requires that all components used with a Class II gaming system must be identical to the prototype reviewed by testing lab "*and approved for use by the TGRA*" [not the NIGC] pursuant to Part 547.5. And Part 547.5(c) requires that *the TGRA* [not the NIGC] "may not permit the use of any Class II gaming system, unless following receipt of the testing lab's report, "the *TGRA* [not the NIGC] *makes a finding that the Class II gaming system"* conforms to the standards established by Part 547, applicable provisions of Part 543 and those standards further *established by the TGRA* [not the NIGC]. There are other provisions of the regulations that continue to make it clear that the TGRA [not the NIGC] is to make final determinations.

Accordingly, any informal NIGC practices (*e.g.*, advisory opinions) that were being followed as to reviewing *electronic-linked bingo game systems* prior to November 10, 2008, the date on which Parts 543 and Part 547 (a) were first effective for bingo and other games similar to bingo – or, at the latest – (b) September 21, 2012 when amended and fully implemented for all Class II gaming, are now simply irrelevant and superseded by Parts 543 and 547. In our view, any attempt by the NIGC or others to use the old informal NIGC practices to circumvent or undermine a TGRA classification decision made under these formal and binding regulations as part of the approval of any server-based electronic bingo gaming system would itself be a violation of the NIGC regulations and IGRA.

TGRAs routinely make classification determinations for Class II bingo gaming systems via final agency action as part of their licensing of Class II vendors to their respective gaming operations, and there is no record of the NIGC ever not endorsing those TGRA decisions. In fact, with only one exception, *neither the NIGC Chairman nor the full Commission* has ever made any determination via final agency action as to the classification of a particular Class II gaming system. (That exception was rendered in 2008 and rejected the Metlakatla Indian Community Class II gaming ordinance permitting generally one-touch bingo systems. Significantly, the NIGC no longer supports that analysis, as indicated by its one-touch bingo pronouncement officially published in the *Federal Register* in June 2013.)

The NIGC has *never* actually "rendered" *any* published classification determinations over the last fifteen years. Rather, the Commission involvement with classification issues has been limited to the NIGC's Office of General Counsel writing a handful of "private letter advisories" (between mostly 2003-2009) related to some early

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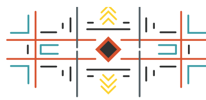

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first-generation electronic linked bingo game systems, which are not published in the *Federal Register.* Instead, they are merely posted on the NIGC website as "guidance."

The foregoing demonstrates that the NIGC has, *by final agency action*, acknowledged that TGRAs are the proper regulatory agencies under IGRA empowered to make the final decision for approval of innovative server-based electronic bingo gaming systems so long as it is determined by a TGRA that such systems meet all of the required criteria as noted above in Parts 543 and 547 and tribal laws and regulations. If the NIGC ever did try to give itself the discretionary right to "review" TGRA determinations and actions expressly made pursuant to NIGC regulations and an NIGC-approved tribal gaming ordinance, a dangerous precedent would be set – one that would violate federal law. It should be noted that NIGC regulations are federal law. The NIGC could then overrule a TGRA's determination and action at any time – potentially subject to political motivation – effectively shutting down Class II gaming.

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It is clear that the NIGC cannot use any justification to overrule the classification decisions of a TGRA. Furthermore, the adoption of Parts 543 and 547 creates a deference defense for TGRA decisions made following those and all NIGC regulations. This is the precise deference that should be given to any final agency action interpreting an enabling statute.

Indian law canons of construction apply to IGRA, meaning that the act must be construed in favor of tribal interests. In this context, strict construction of the IGRA bolsters the view of giving the highest deference to TGRA decisions. The IGRA vests the NIGC with certain defined limited authority, including to (1) "review and approve tribal gaming ordinances" (25 U.S.C. §2710) but not classification determinations, (2) "monitor" the conduct of Class II gaming (25 U.S.C. §2706(b)). Direct regulation of bingo games and systems is administered by the TGRAs, with the NIGC monitoring the conduct of Class II gaming. The development of the IGRA itself supports this reading, as much of the focus of the Act was on regulating the money from Indian gaming – how it is spent, how contracts are awarded, and licensing of officials – leaving the day-to-day regulation and determinations to the TGRAs.

This regulatory arrangement reflects sound public policy as it relates to the regulation and oversight of a large and complex industry like Indian gaming. The competency and integrity of tribal regulators is above question, as evidenced by the NIGC's oft-stated praise of the "excellent job they do." The NIGC should neither unilaterally nor randomly second-guess the judgment and determinations of TGRAs. The NIGC should confine itself to the specific role granted to it in the IGRA. It is important for all parties to remember that IGRA did not "grant" anything to tribes; rather, it recognized that Class II gaming on Indian lands would continue to be within the jurisdiction of tribes subject to certain provisions of IGRA (primarily NIGC-approved tribal gaming ordinance and management contracts). The NIGC should respect the primacy of TGR as contemplated by IGRA in connection with regulating Class II gaming, and support TGRA determinations and the regulatory work that TGRAs exercise daily.

The combination of the NIGC and the expansive network of tribal regulators is what Congress envisioned when it affirmed in IGRA that tribes are to be the primary regulators of Indian gaming. At the same time, Congress did delegate to the NIGC a broader policy mandate and a limited power to monitor the conduct of Class II gaming. The current state of affairs in Indian Gaming with the adoption of Parts 543 and 547 is an example of a federal-tribal collaboration functioning successfully.

Many may have missed the full impact of the adoption of Parts 543 and 547. We hope that as Class II gaming in the United States continues to grow and prosper, the important implications arising from these regulations (*i.e.* strengthening tribal sovereignty and confirming the primacy of tribal regulation under IGRA over Class II gaming conducted on Indian lands, subject only to the tribes' NIGC-approved gaming ordinances) will become better known and appreciated throughout Indian country and by gaming vendors developing the next generation of server-based electronic bingo gaming systems.[1] ❄

Frequent speakers and writers on Indian gaming business matters, both Kevin Quigley and Tom Foley are elected members of the International Masters of Gaming Law, and have also been recognized as "Gaming's Legal Eagles" in Casino Enterprise Management's Guide to the World's Pre-eminent Gaming Attorneys, *and been selected for The Best Lawyers in America in the areas of Gaming Law and Native American Law for years. Their practice is concentrated on Indian gaming law matters involving the development, management and regulation of Indian gaming operations conducted in the United States under the authority of IGRA, and applicable state and tribal law. With extensive experience with IGRA related regulations and case law decisions, they advise a wide variety of gaming equipment vendors and others regarding IGRA related issues.*

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Mr. Foley is Senior Counsel for the national Gaming Law and Indian Country & Regulatory Affairs practice teams at the Gray Plant Mooty law firm, Washington D.C. office. His practice concentrates on Administrative Law, Indian Law, and Gambling Law, representing tribes and gaming industry companies in connection with State and Federal regulatory and administrative issues. Mr. Foley has significant experience in administrative and public policy matters. After twenty-one years in law enforcement, Foley was appointed to the National Indian Gaming Commission (1995-1998) for a three-year term as Commissioner, Vice-Chairman, and Acting Chairman.

[1] *The authors would like to acknowledge the assistance of Joe Valandra, CEO of Great Luck, LLC, with the development of this article.*