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Class II E-Bingo Gaming Systems Finally Receive Judicial Approval

BY KEVIN QUIGLEY AND TOM FOLEY

In the beginning – before even the dawn of the Indian Gaming Regulatory Act of 1988 (“IGRA”) – there was tribal bingo. High stakes bingo games first offered by tribes over 30 years ago were played in modest bingo halls on reservation lands and represented a new hope for tribes to break out of decades of economic stagnation. In truth, tribal bingo was, *and remains*, the cornerstone of what has grown into a \$30 billion per year Indian gaming market, with the Class II gaming segment still actively pursued today by many tribes as the springboard to greater gaming revenue opportunities, forever changing and strengthening tribal governments and economies.

IGRA expressly recognizes tribal bingo as the foundation upon which all Indian gaming is built. Placing tribal bingo at the heart of “class II gaming,” Congress declared that such gaming conducted on Indian lands was to “continue to be within the jurisdiction of Indian tribes,” and not subject to state law regulation if the state permitted bingo play in

any form by any person. 25 U.S.C. § 2710(a) & (b)(1)(A). The National Indian Gaming Commission (“NIGC”), the federal agency with oversight responsibility for “monitoring” Class II gaming under IGRA (25 U.S.C. § 2706(b)), recognizes that tribal gaming regulatory agencies (“TGRA”) are assigned under IGRA as the primary regulators with responsibility for the day-to-day regulation of class II gaming activities, including bingo, conducted on their Indian lands. It also recognizes that “the game of bingo enjoys a favored status.

While bingo at its heart is a lottery, IGRA places the game squarely within Class II and provides that the game may be played with [technologic aids].” Accordingly, any classification evaluation of a bingo gaming system containing technologic aids must be made “against [this] backdrop of IGRA.”

In short, under IGRA, Class II bingo-based games conducted by tribes are not limited to just “traditional” church-

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Pechanga Bingo at the Pechanga Casino Resort in Temecula, California is one of the most modern, innovative bingo facilities in the U.S.



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hall paper and dauber bingo games. In fact, nothing in IGRA requires class II bingo game technology to be frozen in the “analog” 20th Century world. Quite to the contrary, in enacting IGRA Congress specifically intended for tribes to have “maximum flexibility” in using innovative technological advancements in offering class II bingo gaming. Consequently, over the last two decades tribes and their gaming system vendors have become major innovation leaders in server-based gaming, developing and deploying bingo gaming systems designed and built with 21st Century high-tech advancements that enhance the client-server architecture of the standard e-bingo gaming systems currently used in most tribal casinos today. This is the logical continuation of the natural progression of the technological evolution of Class II gaming that Congress has always intended for the Indian gaming industry.

In order to conform its original 1990s-era regulations to two subsequent federal circuit court decisions (the “MegaMania Cases”) that interpreted what “electronic” gaming devices may properly be classified as class II games, the NIGC in 2002 revised its regulations defining Class II gaming and Class III gaming. Many commentators and Indian gaming law practitioners believe these amendments helped clarify what constitutes permissible Class II gaming, and have the practical effect of expanding the field of Class II gaming.

As the NIGC has explained:

IGRA permits the play of bingo, lotto, and other games similar to bingo in an electronic or electro-mechanical format, even a *wholly* electronic format, *provided that multiple players are playing with or against each other.*

67 Fed. Reg. 41166, 41171 (June 17, 2002)
(second emphasis added).¹

Later, given the evolution over the last decade of electronic server-based bingo systems permitted by IGRA, the NIGC promulgated specific regulations addressing standards for “Class II gaming systems.” See 25 CFR Part 547, 77 Fed. Reg. 58473 (September 21, 2012). These regulations are designed to ensure the integrity of “electronic Class II games and [their technologic] aids.” *Id.* at 58473. The regulations specifically contemplate a “class II gaming system” comprised of several components, including “technologic aids” that function together to aid the play of Class II server-based games. *Id.* at 58479 (Part 547.2 definition of “Class II gaming system”).

The basic design features of today’s standard “Class II gaming system” are client-server architecture with the game play server located in a secure back room electronically linked



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to patron interface terminal boxes with entertaining video display screens which are located in the public space of the tribal gaming facility – *i.e.*, a “wholly-electronic format.” A principal feature of server-based electronic-linked bingo game systems is that each gaming system is a multi-site system (*i.e.*, players compete against one another within one Indian gaming facility and/or against all players in linked Indian gaming facilities) and is played electronically on a networked system of components.

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The key feature of today’s “Class II gaming system” for purposes of IGRA is that at least two patrons must have requested bingo cards for the same common game (*i.e.*, “head-to-head competition” among persons is required) or the bingo game will not start and the bingo mathematics and game management software programs will not electronically run. In other words, with today’s “Class II gaming system,” the bingo game play originates on the math and game servers located in the secure back office area of the tribal casino, and the game results are then sent on a time-delayed basis via a communication link to the patron’s interface unit. There is no requirement that this patron interface be a “fixed unit,” see 25 CFR Part 547.2 (definition of “player interface”), where the game results are revealed by software components that “translate” the winning or losing

associated with the patron’s bingo card into an entertaining graphic display.

Other than making a request to join a game by purchasing a bingo card, the patron need not take any other action to play bingo games using a standard “Class II gaming system” if the tribal casino chooses to activate the gaming system’s “auto-daub” functionality. The technology devices that assist a bingo player to “cover” when the numbers are drawn are generally referred to as “electronic bingo card minder” devices that function as an “auto-daub” assistant to the bingo player. Such electronic bingo card minder devices use software programs to electronically read and daub the multiple bingo cards of a player while tracking the numbers drawn, and to notify the player of any winning cards. Early mechanical versions of these types of auto-daub technology devices were first deployed in commercial bingo halls over two decades ago. And the next generation of these types of auto-daub technology devices is in use today in both commercial bingo halls and in tribal casinos located throughout the United States.

Each patron interface unit of an e-bingo gaming system produces audible sound and a visual display on the video screen after a patron makes a play during the common bingo game. In this respect, once the outcome of a player’s bingo card is determined for each play made in a common bingo game, the bingo card results are displayed on the patron interface unit’s video screen. An animated presentation sequence also begins on the video screen of the patron interface unit. The animated sequence displays an array of spinning reels and symbols that stop on the appropriate combinations for the value of the prize won by the player (if any) in the bingo game. The ani-

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“The Desert Rose Bingo litigation is a groundbreaking decision for modern Class II gaming system architecture. It judicially recognizes for the first time the ‘e-bingo system exception’ to the definition of facsimile. Its judicial approval of server-based electronic-linked bingo gaming systems as Class II gaming under IGRA is consistent with the NIGC’s view that bingo’s ‘favored status’ under IGRA requires that special ‘consideration [be given] to an interpretation of bingo that embraces rather than stifles technological advancements in gaming.’”

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mated sequence never shows the game outcome before the results are shown on the bingo card.

In the end, although a sophisticated “technologic advancement in gaming,” the standard server-based “Class II gaming system” – i.e. an e-bingo gaming system with client-server architecture – used in Indian country today is simply a collection of “technologic aids” to the play of the bingo game so that the game itself continues to meet the three statutory criteria for a class II bingo game. This is evidenced by the fact that the game is always a bingo-based game played across a linked network of actual players – who are competing in a common draw group against each other with different bingo cards. At no time does the e-bingo gaming system allow a single player to commence play alone against the common ball draw for the game.

As we have noted in the Autumn 2016 edition of this publication, consistent with their authority under IGRA and the responsibilities assigned to them under the NIGC’s 25 *CFR* Parts 543 and 547 regulations, since 2008 TGRAs have routinely made 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. There is no record of the NIGC ever not endorsing these TGRA decisions. The NIGC has even issued a “MICS Class II – Audit Checklist, Bingo (BI)” for use by TGRAs. *See* 25 *CFR* §543.8. This checklist highlights that it is the TGRA that has the authority and responsibility under IGRA for approving server-based electronic bingo gaming systems for play in tribal casinos, and for ensuring that “Class II gaming systems” comply with the standards established for these gaming systems under 25 *CFR* Part 547. *See* Checklist questions Nos. 129–130.

The Audit checklist also highlights that both manual and electronic bingo using client-server architecture are permitted under IGRA. *See, e.g.*, questions Nos. 29–42 vs. 43–47. It also highlights that, in connection with electronic bingo using client-server architecture, IGRA permits the ball draw for the bingo game to be made solely by an “electronic aid” (i.e. by software program on a server rather than by a mechanical “ball blower”). *See* question No. 51.

However, supported by some elements in the Department of Justice and aided by indifference and inaction by the NIGC in the face of what some Indian Gaming Law experts perceive to be Department of Justice pressure, some states

have continued to challenge the validity of Class II gaming systems, objecting to tribes operating electronic-linked bingo game systems without the states’ consent. Whether the states are motivated by some historic animus to tribal interests generally or by financial self-interest in obtaining more Class III gaming compact revenue sharing to assist with filling their depleted state coffers is not clear. However, they so appear to have had one thing in common: a belief that the issue would not be resolved until judicial approval of an e-bingo gaming system with client-server architecture as Class II gaming, any regulatory action taken by the TGRAs. It has been clear that NIGC determinations regarding these gaming systems have not settled the issue for various states.

In the absence of any judicial review of the 2002 NIGC Part 502 regulation amendments and Parts 543/547 regulations, the Class II status of modern e-bingo gaming systems in Indian country has been left in legal limbo. This, in turn, has reduced any leverage held by tribes in their negotiations with states over class III compacts (i.e. using e-bingo systems rather than class III gaming systems if the state demands too much revenue share), and stunted deployment of class II bingo systems in some states for fear of costly litigation – thereby unnecessarily restricting the tribes’ gaming revenues and their patrons’ gaming entertainment choices.

However, the tribes have finally received judicial approval of server-based electronic-linked bingo gaming systems as Class II gaming under IGRA. This development came in *State of California v. Iipay Nation of Santa Ysabel*, Case No. 3:14-cv-02724-AJB-NLS (S.D. Cal. December 12, 2016). In the context of analyzing the proper classification of a modern, fully electronic, server-based linked bingo gaming system used by a tribal operation branded as “Desert Rose Bingo,” the federal district court held that the bingo gaming system at issue – a server-based electronic-linked bingo game system containing standard client-server architecture with an auto-daub technology feature – “constitutes a technologic aid to bingo, thus rendering [the system] Class II gaming.” The court pointedly noted that “[s]ignificant to the Court’s determination is the fact that [the system] indisputably broadens participation as opposed to permitting a player to play with or against a machine.” In stating this determination, the court highlighted that (i) bingo games played in a wholly electronic format that broaden participation are exempt from the definition of “facsimile” contained in 25 *CFR* § 502.8, (ii) its determination comported with the NIGC’s June 25, 2013



pronouncement that one-touch bingo systems do “not incorporate all the characteristics of bingo into the machine,” and (iii) its “conclusion is consistent with the [MegaMania Cases]” decisions. In rendering this conclusion, the district court expressly applied the “set of analytical factors” to be used to “assist in the analysis under [Section 502.7(a)]” – i.e., do the technologic aids built into the gaming system used to play the game of bingo assist with *any* of the following three things:

- (1) *broaden the participation levels in a common game,*
- (2) *facilitate communication between and among gaming sites; or*
- (3) *allow a player to play a game with or against other players rather than with or against a machine.*

25 C.F.R. §502.7(b) (emphasis added).

It is noteworthy that, in making its ruling, the district court rejected the State of California’s attempt to re-impose on Class II gaming systems (or as the state called them “fully automated, electronic [bingo] gaming systems”) the *pre-2002* “exact replica” classification evaluation standard that now has been discarded and made obsolete with respect to such gaming systems by the NIGC’s adoption of its 2002 Part 502 definition regulations amendments and later its Part 543 & Part 547 regulations, as well as the June 2013 NIGC “One-Touch” Bingo Pronouncement. Rather, in making its classification evaluation and dismissing the state’s breach of compact claim, the district court agreed with the tribal regulator and applied current NIGC definition regulations and classification standards relating to the proper e-bingo system evaluation factors used under IGRA since 2002. In doing so, the court expressly accorded *Chevron* deference to the 2002 Part 502 amendments.

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of server-based electronic-linked bingo gaming systems as Class II gaming under IGRA is consistent with the NIGC’s view that bingo’s “favored status” under IGRA requires that special “consideration [be given] to an interpretation of bingo that embraces rather than stifles technological advancements in gaming.” 78 Fed. Reg. 38000 (June 25, 2013) (emphasis added).

In making their licensing and classification determinations for server-based electronic bingo gaming systems under Parts 543/547, TGRAs can now cite to the Desert Rose court’s classification analysis as support for concluding that even in linked electronic bingo systems with “auto-daub” features the fundamental characteristics of a Class II bingo game are preserved, unaltered by the game’s electronic format. Finally, and most importantly, going forward

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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 one of “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 several 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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¹ In contrast, NIGC regulations define an electronic or electromechanical facsimile of any game of chance (i.e. “class III gaming” subject to IGRA’s tribal-state compact requirements, see 25 U.S.C. §2703(7)(B)(ii) & §2710(d)(1)(C)) as follows:

Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, *except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.*

See 25 C.F.R. §502.8 (emphasis added).