What Constitutes Class II Bingo Gaming "Conducted" on Indian Lands for Purposes of the Indian Gaming Regulatory Act?

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Broadly speaking, the Indian Gaming Regulatory Act ("IGRA") regulates Class II "gaming activities conducted on Indian lands." But, what exactly, constitutes Class II bingo gaming "conducted" on Indian lands within the meaning of IGRA.[1] This is one of the questions that has been raised in a recent appeal to the U.S. Circuit Court of Appeals for the Ninth Circuit.

In *State of California/United States v. Iipay Nation of Santa Ysabel* (9th Cir. No. 17-55150), the Iipay Nation contends that the tribally-regulated proxy play server-based bingo gaming[2] offered by its tribal gaming operation, Desert Rose Bingo ("DRB"), is legal Class II bingo "conducted on Indian lands" under IGRA. The State of California and the U.S. Department of Justice disagree.[3] Resolution of the appeal will turn on the circuit court's statutory interpretation determining what constitutes bingo gaming "conducted on Indian lands" for purposes of IGRA in light of: (1) the undefined and ambiguous nature of the IGRA text[4] and the application of the Indian canons of construction to the interpretive analysis[5], and (2) the "maximum flexibility" technology policy that Congress enshrined in IGRA for Class II bingo gaming.

The Iipay Nation contends that all IGRA actually requires is that DRB's bingo games (*i.e.*, "gaming activities") be played (*i.e.*, "conducted on Indian lands") in the DRB gaming facility. In other words, the bingo game is "conducted" where the DRB game system servers controlling the game are located in the gaming facility[6] (where the games are played by a proxy participant[7] located on site).[8] That is because these game servers function as the traditional bingo hall official who conducts the game–*i.e.*, where the offer to purchase a bingo card is received by the official, where the official will decide to accept the card purchase offer, where the game will proceed with a ball draw if there are enough game participants, and where the official makes the game decisions to the point of payout or collection.

The proxy play gaming system[9] used by DRB to play the bingo games uses innovative technology advancements to enhance the "wholly-electronic format" of the standard Class II e-bingo gaming system[10] that has been used in Indian casinos over the last two decades (and which, as permitted by

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Continued from previous page

IGRA, do not require a patron to take a physical act when playing the bingo game with the system's technical aids after being entered into a bingo game). See 78 *Fed. Reg.* 37998 (June 25, 2013). One of the primary innovative technological engineering features of the gaming system is that it seamlessly integrates into the standard Class II e-bingo gaming system a “wholly-electronic format” proxy play technology set platform that likewise permits the legally designated proxy agent located at the DRB gaming facility, acting as a substitute for the patron located off-reservation at the time the bingo game is played, to use the system's technical aids to play the bingo game for the patron without the need of any further physical act after being entered into a bingo game.

Before approving the use of the DRB gaming system, the SYGC thoroughly analyzed IGRA, as well as the multiple tribal laws and regulations that Iipay as a sovereign nation made applicable to such gaming, to ensure that the gaming was in compliance with IGRA, including whether the bingo games played using the system were “conducted on Indian lands.”[11] Construing the ambiguous IGRA text at issue in light of the Indian canons of construction as well as applicable tribal law, SYGC, the primary regulator of Class II gaming under IGRA, determined by final agency action that the proxy play server-based bingo gaming offered by DRB is legal Class II bingo gaming “conducted on Indian lands” for purposes of IGRA.

In approving the use of the DRB gaming system and deciding that the DRB “gaming is conducted on Indian lands,” the Iipay tribal gaming commission determined that:

> For purposes of IGRA, the only essential bingo “gaming activity” elements that must be held on Indian lands are: (1) bingo cards must be assigned and distributed to players (or their proxy), (2) random numbers must be drawn, and (3) the results of the bingo game must be communicated to players (or their proxy). Like today's “Class II gaming systems,” each of these three essential elements of bingo game play is conducted on and originates on the math and game management servers of the VPNAPS gaming system which are located on Iipay Indian lands.

This is consistent with the reasoning applied by the Supreme Court in *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct.

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[1] *See, e.g.*, 25 *U.S.C.* §§ 2701(3) (“the conduct of gaming on Indian lands”); 2706(b)(1) (“class II gaming conducted on Indian lands”); 2706(b)(4) (“class II gaming conducted on Indian lands”); 2710(b)(4)(A) (“class II gaming activity conducted on Indian lands”).

[2] Class II gaming, such as bingo, is subject to tribal regulatory jurisdiction, and monitoring oversight by the National Indian Gaming Commission (“NIGC”). *See* 25 *U.S.C.* § 2710.

[3] In doing so, both rely primarily on the definition of “Indian lands” in IGRA. *See* 25 *U.S.C.* § 2703(4). But the definition for these two words only defines a geographic point. It provides no meaningful assistance in determining for purposes of IGRA what constitutes the “bingo” gaming activity that must be conducted at that geographic point, and what it means under IGRA to “conduct” such gaming.

[4] In the words of the Supreme Court, there was no “accumulated settled meaning . . . under common law” of the term bingo “gaming activities conducted on Indian lands” that it can be assumed Congress intended to adopt in lieu of providing a statutory definition. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992).

[5] Any interpretation of IGRA must be made broadly and “liberally” in favor of the tribal interests under the Indian canons of construction. “In passing IGRA, Congress assured tribes that the statute would always be construed in their best interests.” *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010).

[6] The game management and game math servers of the DRB game system, based upon information received by them, control, process and record every aspect of the transaction and the bingo game; and the acceptance or rejection of proxy play requests, the assignment of bingo cards for the game proxy participant, the virtual ball draw and the determination of game outcome are all conducted within these servers. It is undisputed that the DRB game servers are located on Iipay Indian lands.

[7] Both the NIGC and the Santa Ysabel Gaming Commission (“SYGC”) expressly permit the proxy play of Class II bingo games by a patron's agent located on Indian lands.

[8] This is consistent with how other gaming jurisdictions treat the issue. See, for example, New Jersey legislation concerning the state's internet-based gaming initiative, which declares that any internet-based gaming conducted by its licensed Atlantic City casinos actually “occurs” in Atlantic City where the casinos' servers controlling and operating the games are located—even if the casino patron participating in the internet-based gaming is not physically located in Atlantic City, New Jersey P.L. 2013, c27 (5:12-95.17(1)(J)), *available at* http://www.njleg.state.nj.us/2012/Bills/PL13/27.HTM (last accessed on May 17, 2017). In other words, in IGRA parlance, the gaming is “conducted” where the computer server controlling the game is located.

2024 (2014) – which instructs that it is only the play of the bingo game itself that constitutes the gaming activity to be conducted on Indian lands.[12] This is also consistent with the NIGC's own 1995 declaration approving "proxy play" with Class II bingo because IGRA contains "no statutory prohibition on the use of agents *for the conduct of bingo*." *See* July 26, 1995 NIGC Chairman Declaration re: "Proxy Play" at 2 (emphasis added). It is noteworthy that, in making the determination that proxy play bingo is legal under IGRA, the NIGC focused on and considered the specific question "whether this *game is actually played* on Indian lands." *Id.* (emphasis added). In the NIGC's view, the "*conduct of the game*" is lawful because it "complies with IGRA", including IGRA's conducted on Indian lands requirement. *Id.* (emphasis added).

Likewise, the Office of General Counsel of the NIGC has described the ***only*** essential bingo "gaming activity" elements that must be held on Indian lands under IGRA. ***"For the game of bingo to be played, cards must be purchased, balls must be drawn, and results called out or otherwise communicated."*** *See* November 14, 2000 OGC Advisory Letter re: National Indian Bingo, at 3, 5 (opining that tribal gaming facility employees, acting as agents of purchasers not physically present on Indian lands at time of game activity, who use bingo card minder machines to read and daub cards do not violate IGRA because "[w]hen the agent plays the [bingo] card for the player, the act of playing the card is deemed to be the act of the player/principal. The legal effect is that the agent *is* the player") (emphasis in original).

In sum, both SYGC (the primary regulator of Class II bingo gaming under IGRA) and the NIGC (the federal agency charged with the responsibility of administering IGRA) have made a reasonable interpretation of IGRA to construe the ambiguous text bingo "gaming activity conducted on Indian lands" to in effect mean bingo "game play originating on Indian lands." It remains to be seen whether the Ninth Circuit will accord judicial deference to this construction of IGRA. ❄

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[9] Similar to California's "Advanced Depositing Wagering" for the horse racing industry, the DRB gaming system allows a patron located off-reservation to remotely access the DRB gaming facility via a modern communication link in order to submit a request that bingo games be played for them at a later time by their designated proxy agent who is located on Indian lands. California and the DOJ argue that IGRA's text *expressly and unambiguously* means that the patron's "pre-game" act of making a proxy play request to DRB (which may or may not be accepted) must be considered part of the bingo game's "gaming activity" under IGRA.

[10] As explained by the NIGC in adopting its new definitions in 2002:

> IGRA permits the play of bingo, lotto, and other games similar to bingo in an electronic or electromechanical format, even a *wholly* electronic format, provided that multiple players are playing with or against each other. . . . *A manual component to the game is not necessary.*

67 *Fed. Reg.* 41166, 41171 (June 17, 2002) (first emphasis in original) (second emphasis added). In this respect, the premise of NIGC's Parts *543* and *547* regulations adopted after its 2002 definition amendments is that the bingo game is initiated and played within the Class II Gaming System's servers located on Indian lands.

[11] The SYGC made its licensing approval for the DRB gaming system pursuant to the authority delegated to it under NIGC regulations. See 25 *CFR* Parts 543 and 547 (which delegates responsibility for the licensing/classification of Class II gaming systems to tribal regulators).

[12] In *Bay Mills*, seeking to avoid tribal sovereign immunity that would protect the tribe from the lawsuit, the State of Michigan claimed that the "necessary administrative action" of licensing the casino operations – which was done by the tribal gaming agency located on Indian lands – is part of the "gaming activity" under IGRA. In the context of making its determination that tribal sovereign immunity was not waived and the lawsuit must be dismissed, Michigan's argument was soundly rejected by the Supreme Court. As Justice Kagan noted, for purposes of IGRA, "gaming activity" is limited to the "stuff involved *in playing* the [bingo] games". *Id.* at 2032 (emphasis added) (for example, with Class III games, "each roll of the dice and spin of the wheel.").