iGAMING UNDER THE INDIAN GAMING REGULATORY ACT

A Look at Santa Ysabel and the Iowa Tribe of Oklahoma's Contrasting Approaches to Indian iGaming

By Heidi McNeil Staudenmaier and Anthony J. Carucci

Since the Department of Justice backed away from its long-standing position that any gaming through the Internet constitutes a violation of the Federal Wire Act,[1] few tribes have tested the waters of Internet gaming.

And perhaps for good reason. After the Iipay Nation of Santa Ysabel Tribe ("Santa Ysabel") became the first Indian Tribe to offer "real-money" online gaming in November 2014 when it launched an Internet bingo website (DesertRoseBingo.com) using "proxy" players, both the State of California and the United States immediately sued to enjoin the tribe's online gaming operation.

The Santa Ysabel litigation presents a case of first impression on an unresolved question of great importance to tribes:[2] can tribes offer Class II gaming using the Internet under the Indian Gaming Regulatory Act ("IGRA")? At least until the Santa Ysabel litigation is resolved (and perhaps even after), in the absence of specific legislation or a tribal-state compact authorizing Internet gaming, there remains no clear law regarding a tribe's ability to offer Class II games to patrons using the Internet under IGRA.

In contrast to Santa Ysabel's shoot first and ask questions later approach, the Iowa Tribe of Oklahoma (the "Iowa Tribe") reached out to state regulators in September

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2015 before obtaining an arbitration award in November 2015. The award confirmed the Iowa Tribe's right to offer Internet Poker pursuant to its Tribal-State Compact and a settlement agreement entered between the State and the Cheyenne and Arapaho Tribes of Oklahoma. The Iowa Tribe is now seeking certification of that award—which the State, despite filing an answer generally denying the Iowa Tribe's legal conclusions, does not appear to be contesting—from the United States District Court for the Western District of Oklahoma.

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IGRA'S IMPLICATIONS FOR IGAMING

There are two key aspects of IGRA that bear on whether a tribe can offer Internet gaming pursuant to their existing rights under IGRA.

First, a central component of IGRA's statutory framework for tribal gaming is that it only governs "gaming activity on Indian lands." This reference is consistent throughout the statute. In enacting IGRA, Congress found that "Indian tribes have the exclusive right to regulate gaming activity *on Indian lands* if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."[3] In fact, in a recent U.S. Supreme Court case, Justice Kagan noted the phrase appears in IGRA some two dozen times.[4]

IGRA defines "Indian lands" as "all lands within the limits of any Indian reservation" and land held in trust by the United States for the benefit of a tribe.[5] The fact that IGRA only governs gaming "on Indian lands" is a crucial consideration for whether tribes can offer Internet gaming. If any gaming is found to occur off-reservation, then it will be subject to state regulation.

Second, IGRA's classification system relegates Class II gaming to the purview of tribes, with oversight by the National Indian Gaming Commission,[6] while Class III gaming may only be conducted pursuant to a Tribal-State Compact entered into by the tribe and the state and approved by the Secretary of the Interior.[7] If using the Internet to offer a game transforms the game from Class II to Class III, then the game will be subject to state regulation and a tribe's Tribal-State Compact.

Restated, IGRA presents two obstacles that must be overcome before any tribe can offer Class II Internet gaming under IGRA:

(1) Does the mere use of the Internet to offer gaming mean the gaming no longer occurs "on Indian lands?"

(2) Does the mere use of the Internet to offer Class II gaming transform the game into Class III gaming?

THE SANTA YSABEL LITIGATION

On December 12, 2014, the State of California successfully obtained a Temporary Restraining Order ("TRO") enjoining Santa Ysabel from offering any gambling over the Internet to persons not physically located on Santa Ysabel's Indian lands and from accepting any funds from persons wagering over the Internet.[8]

The State advanced two broad arguments—which squarely encompass IGRA's obstacles—in successfully obtaining a TRO.

First, the State argued Santa Ysabel's actions violated its compact and the Unlawful Internet Gambling Enforcement Act ("UIGEA")[9] by allowing off-reservation patrons to participate. The State argued the gaming takes place off-reservation because wagering occurs both where the wager is placed and where it is received, and that the UIGEA looks to the laws of the place both where the wager is placed and where it is received.

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Second, the State argued the tribe's game constitutes a facsimile of the underlying game, elevating the game from Class II to Class III. The State's argument is grounded in the NIGC's view that if "a particular aid . . . becomes a necessity, or encompasses all the aspects of a particular game, it ceases to be a technological aid and becomes an electronic facsimile."[10] According to the State, Santa Ysabel's game is an electronic facsimile because the electronic system is a necessity, as the game would disappear if the electronic system were removed.

At the TRO stage, Santa Ysabel opposed both of the State's arguments on the basis that its game constitutes a "technologic aid," employing "proxy technology" that allows off-reservation players to place wagers exclusively on tribal lands. In support, the tribe cited a 2014 NIGC Advisory Opinion, which found that, from a legal perspective, the proxy is the player.[11] Santa Ysabel also argued the game is not a facsimile because the technologic aid employed by the tribe increases participation among players, rather than facilitating individual play against the "house."[12]

In granting the TRO, the court found the game constitutes an electronic facsimile, and distinguished the NIGC Advisory Opinion relied on by Santa Ysabel.[13] The court further found the UIGEA looks to the law both whether the bet is made and where the wager is received, and that the tribe's game violates state law by accepting bets initiated off-reservation.[14]

The Santa Ysabel litigation reflects some tension in the sources construing IGRA's requirements for "electronic, computer, or other technologic aids" between the aid incorporating all of the characteristics of the game into an electronic format and the aid increasing participation among players. The Internet arguably fits Congress's description of a technologic aid as something aimed at enabling broader participation. At the same time, Santa Ysabel's online bingo game incorporates all the characteristics of the game into an electronic format, which the NIGC and some courts have interpreted as the benchmark for identifying a facsimile under IGRA.[15] This tension may prove dispositive in Santa Ysabel's pursuit to operate an online bingo website. Regardless of the game's classification, however, the State will likely be entitled to a permanent injunction if the court finds the bet is initiated where the player is located, notwithstanding the tribe's proxy technology.[16]

THE IOWA TRIBE LITIGATION

On September 23, 2015, the Iowa Tribe notified the State of Oklahoma of its intent to operate an Internet gaming website from its tribal lands, in accordance with its compact.[17] The State responded by acknowledging the tribe's position appears consistent with a settlement agreement entered into between the State of Oklahoma and the Cheyenne and Arapaho Tribes, which recognized their right to operate Internet gaming on a limited scale.[18] Nevertheless, the State elected to refer the mat-

[1] 18 U.S.C. § 1084.

[2] In 2014, the National Indian Gaming Commission reported revenue for the U.S. Indian gaming market of $28.46 billion, up from $28.03 billion in 2013. National Indian Gaming Commission, *Gaming Revenues 2010–2014*, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/media/teleconference/2014%20Tribal%20Gaming%20Revenues%20by%20Gaming%20Operation%20Revenue%20Range.pdf.

[3] 25 U.S.C. § 2701(5) (emphasis added).

[4] See *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 (2014) (noting the key phrase "on Indian lands" reflects IGRA's overall scope and is "repeated some two dozen times in the statute").

[5] 25 U.S.C. § 2703(4).

[6] *Id.* § 2710(a)(2).

[7] *Id.* § 2710(d)(1)(C).

[8] The United States' lawsuit was filed on December 3, 2014, and was consolidated with the State's case on August 31, 2015. The federal lawsuit seeks a permanent injunction under the Unlawful Internet Gaming Enforcement Act.

[9] The UIGEA is a federal statute that makes it unlawful for a person engaged in the business of betting or wagering to knowingly accept a financial instrument or the proceeds thereof from a person engaged in "unlawful Internet gambling," which is defined to mean "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made." 31 U.S.C. §§ 5363, 5362(10)(A).

[10] Mem. from Penny Coleman, General Counsel, NIGC, to George Skibine, Chairman, NIGC, *re: Classification of card games played with technological aids*, 8 (Dec. 17, 2009).

[11] National Indian Gaming Commission Advisory Opinion, *Bingo Nation*, at 5 (June 27, 2014), *available at* http://www.nigc.gov/LinkClick.aspx?filet-

ter to arbitration to determine whether the proposed gaming is permissible under the terms of the compact.[19] The parties agreed upon an arbitrator,[20] who issued his award on November 24, 2015.[21]

Notably, the State agrees with the Iowa Tribe that the Internet gaming of covered games where players are located outside the United States is not unlawful in Oklahoma if conducted on a computer server located on tribal land.[22] The narrow question submitted to arbitration was whether the gaming offered to players outside Oklahoma and the United States is conducted "on Indian lands."[23]

In concluding that it is, the arbitrator found that IGRA's legislative history, despite not mentioning the Internet, evinces an intent for tribes to "take every opportunity to use and take advantage of modern technology to promote participation among players and thereby increase tribal revenues for their people."[24] The arbitrator determined the Internet is simply modern technology that accomplishes Congress's intent.[25] This finding has two consequences. First, it means the Internet does not affect the game's status as Class II or Class III. Second, it means that if the server controlling the gaming is located on Indian lands, then that is where the gaming occurs.[26]

On December 23, 2015, the Iowa Tribe filed an action in the District Court for the Western District of Oklahoma seeking certification and enforcement of the arbitration award.[27] The State then filed an answer generally admitting the facts alleged by the Iowa Tribe, but denying the tribe's legal conclusions.[28]

On February 25, 2016, the Iowa Tribe filed a motion for summary judgment based upon the compact's dispute resolution provisions, which makes arbitration a proper forum for the resolution of disputes arising under the compact, and citing case law indicating the tribe is entitled to certification of an arbitration award.[29]

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CONCLUSION

The contrasting approaches taken by Santa Ysabel and the Iowa Tribe reveal certain insights into the process of attempting to offer Internet gaming under IGRA. The Santa Ysabel litigation is reflective of the reality that states will invariably challenge a tribe that attempts to blindly enter the Internet gaming market without any dialogue or cooperation with state regulators. Indeed, even the State of Oklahoma referred their "dispute" with the Iowa Tribe to arbitration, even though the dispute is more apparent than it is real. Tribes should be wary of appearing uncooperative, and although sometimes litigation will be unavoidable, communication with the State at the outset will narrow the contested issues and may in some cases lead to resolution. ❄

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icket=g3tqw7N3jHo%3D&tabid=789 ("When the proxy plays the bingo card for the player in Bingo Nation, the act of playing the card is deemed to be the act of the player. The legal effect is that the proxy is the player.").

[12] *See* 25 C.F.R. § 502.7(b).

[13] Order Granting Motion for Temporary Restraining Order and Order to Show Cause, Dkt. # 11, at 10–12, California v. Iipay Nation of Santa Ysabel, No. 14-cv-2724-AJB-NLS (Dec. 12, 2014).

[14] *Id.* at 13.

[15] For a more detailed discussion, see Heidi McNeil Staudenmaier & Anthony J. Carucci, *The Santa Ysabel Tribe's Bet on Internet Bingo May Determine the Future of Class II Internet Gaming*, 19 GAMING L. REV. & ECON. 139 (2015).

[16] Trial is currently set for July 26, 2016.

[17] Dkt. #1-2, Iowa Tribe of Oklahoma v. State of Oklahoma, No. 15-cv-01379-R (Dec. 23, 2015).

[18] *Id.*, Dkt. #1-3.

[19] *Id.*

[20] *Id.*, Dkt. #1-4.

[21] *Id.*, Dkt. #1-1.

[22] *Id.* at 13–14.

[23] *Id.* at 13.

[24] *Id.* at 15.

[25] *Id.*

[26] *Id.* at 19, 28.

[27] Complaint, Dkt. #1-1, Iowa Tribe of Oklahoma v. State of Oklahoma, No. 15-cv-01379-R (Dec. 23, 2015).

[28] Answer, Dkt. #6, Iowa Tribe of Oklahoma v. State of Oklahoma, No. 15-cv-01379-R (Dec. 23, 2015).

[29] *See generally* Motion for Summary Judgment, Dkt. #8, at 7, Iowa Tribe of Oklahoma v. State of Oklahoma, No. 15-cv-01379-R (Feb. 25, 2015).