

Californian court puts tribal online bingo website on ice

A Native American tribe's attempt to launch an internet bingo website has faced setbacks following a recent court order temporarily restraining the site's operation. In its decision, the Court made a number of important findings regarding the classification of online gaming services by such tribes. Heidi McNeil Staudenmaier and Anthony J. Carucci, of US law firm Snell & Wilmer offer a blow-by-blow account of the interlocutory legal proceedings and the next steps.

On 12 December 2014, Judge Anthony Battaglia of the US District Court for the Southern District of California granted the State of California's (the 'State') motion for a temporary restraining order ('TRO') against the Iipay Nation of Santa Ysabel Indian Tribe (the 'Tribe'). The TRO restrains the Tribe from offering any gambling over the internet to persons not physically located on the Tribe's Indian lands and from accepting any funds from persons wagering over the internet. The Court's TRO comes just weeks after the Tribe became the first Indian tribe to offer 'real money' online gaming when it launched an internet bingo website in November 2014 using 'proxy' players (DesertRoseBingo.com).

Following the launch, the State promptly filed a lawsuit to shut down the Tribe's online bingo operation, alleging (1) breach of the Tribe's Tribal State Compact (the 'Compact')¹ and (2) violation of the Unlawful Internet Gambling Enforcement Act of 2006 (the 'UIGEA'). The US filed its own suit for a permanent injunction in early December under the UIGEA. That lawsuit has been transferred to Judge Battaglia, but there has been

no further activity to date.

The litigation presents a case of first impression with respect to a tribe's right to conduct class II gaming online pursuant to the Indian Gaming Regulatory Act (the 'IGRA') and the effect of the internet on a game's status as class II or class III under the statute. The outcome of the litigation could set a critical precedent for Indian gaming nationwide. Tribes across the country may be willing to follow Santa Ysabel into the online gaming market if the Tribe successfully establishes its right to conduct online class II gaming pursuant to the IGRA. By contrast, a defeat may set a precedent sufficient to deter many, if not all, tribes from attempting to offer online gaming in the absence of legislation or a Tribal State Compact authorising them to do so.

Key issues

The IGRA's classification system is at the heart of the litigation. How the Tribe's game is characterised determines whether it is classified as permissible class II gaming subject only to Tribal regulation, or as class III gaming prohibited by the Tribe's Compact. The IGRA allows tribes to conduct class II gaming on Indian lands free from state regulation. The key focus is whether 'on Indian lands' means the player must be physically located on the Tribe's reservation. Another key issue is whether 'electronic, computer, or other technologic aids' encompasses technology enabling people to gamble on Indian lands while physically located elsewhere.

There seems to be tension in the sources construing the 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. This tension may prove dispositive in the Tribe's quest to operate an online bingo website. On the one hand, the internet arguably fits Congress's description of a technologic aid as something aimed at enabling broader participation. On the other hand, the Tribe's online bingo game incorporates all of the characteristics of the game into an electronic format - which the National Indian Gaming Commission (the 'NIGC') and some courts have interpreted as the benchmark for identifying a facsimile under the IGRA. If the game is deemed a facsimile, and not a technologic aid, then it falls outside the class II definition and is deemed a class III game.

Arguments raised by the parties

The State advanced two broad arguments for why the Tribe's actions should be restrained. First, the State argued that the Tribe's actions violate the law and the Compact by offering bingo through the internet, since it enables off-reservation patrons to participate. Even if the online bingo game is considered a class II game, the State may prevail if the Court finds that any gaming occurs off-reservation - where the actual player is located. The State argued that the gaming takes place off-reservation because the wagering occurs both where the wager is placed as well as 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 to determine whether unlawful internet gambling has occurred.

The State next contended that the online bingo game constitutes a facsimile of the underlying game, elevating it from class II to class III status. The State's argument is

based upon 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.'²² The State asserts that the Tribe's game is an electronic facsimile because the electronic system is a necessity of the game, proven by the fact that the game would disappear if the electronic system were removed. As such, because the Tribe agreed to only engage in class III gaming expressly authorised in the Compact, and because the Tribe's Compact does not authorise internet gaming or this specific game, the State contends the Tribe breached its Compact and violated the IGRA, regardless of where the gaming takes place.

In opposing the State's motion for a TRO, the Tribe first argued that sovereign immunity bars the State's claims because the Compact does not apply to the Tribe's operation of class II gaming and the State failed to follow the enforcement mechanisms in the Compact. Second, the Tribe argued its online bingo operation is a 'technologic aid,' employing 'proxy technology' that allows off-reservation patrons to place wagers exclusively on tribal lands. In support of its submission, the Tribe cited a recent NIGC Advisory Opinion in which the NIGC took the position that, legally, the proxy is the player³.

The Tribe also argued that the bingo 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.' Because the Santa Ysabel Gaming Commission has primary authority under the IGRA to regulate class II gaming, the Tribe asserted that the Court must defer to the Commission's judgment that the Tribe's Virtual

The Court concluded that the Tribe's online bingo operation is an electronic facsimile and therefore constitutes class III gaming

Private Network Assisted Play System constitutes a technologic aid to a class II bingo game.

The Court's findings

In granting the State's motion for a TRO, the Court rejected the Tribe's sovereign immunity argument after finding the Compact 'specifically provides that the parties may bring action for "issues arising under [the Compact]."' The Court then concluded that the Tribe's online bingo operation is an electronic facsimile and therefore constitutes class III gaming. In so finding, the Court was not persuaded by the Tribe's reliance on the NIGC Advisory Opinion, distinguishing the facts in Bingo Nation based upon the nature of the linked bingo game and proxy system used there. The Court further found that the UIGEA looks to the law both where the bet is made and where the wager is received (accepting the State's arguments), and that the Tribe's online bingo violates state law by accepting bets initiated off-reservation.

Based on its conclusions, the Court determined the State is likely to succeed on the merits of both claims for relief. The Court also found the State will continue to suffer irreparable harm while the Tribe's online bingo operation continues and that public interest mandated shutting down the Tribe's activities. The Desert Rose bingo website was promptly shutdown thereafter.

What's next?

Notwithstanding the TRO, the Tribe intends to continue fighting for its right to offer class II bingo through the internet. On 31 December 2014, the Tribe filed a motion to dismiss the State's lawsuit, set for hearing on 5 March 2015. If the Court denies the Tribe's motion, the Tribe may file a

permissive interlocutory appeal to the Ninth Circuit Court of Appeals. In the event the Ninth Circuit denies the Tribe's request, the parties have stipulated to expedited proceedings to be held in connection with a permanent injunction hearing consolidating the trial on the merits.

As one would expect, these California court proceedings will be watched with great interest by the gaming industry.

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1. A link to the Tribal State Compact can be accessed here: http://www.cgcc.ca.gov/documents/compacts/original_compacts/Santa_Ysabel_compact.pdf
2. As per Internal NIGC memorandum dated 17 December 2009.
3. See NIGC Advisory Opinion regarding Bingo Nation dated 27 June 2014.