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Tribal gaming in the wake of the injunction against Santa Ysabel's Desert Rose Bingo

In December last year the United States District Court for the Southern District of California issued its verdict in the Desert Rose Bingo case, which concerned a real money bingo website set up by the Lipay Nation of Santa Ysabel. The State of California had argued that the website breached the Nation's tribal compact with California, arguing that it constitutes an activity not authorised by the compact or the federal Indian Gaming Review Act ('IGRA'), while both the State and the Federal Government filed suit separately arguing that the Nation's website violates the Unlawful Internet Gambling Enforcement Act ('UIGEA') by accepting wagers for gambling prohibited by state law. Heidi McNeil Staudenmaier and Anthony J. Carucci of Snell & Wilmer LLP discuss the Court's verdict, and explain how the Court order answered a few lingering questions on this area of law that courts had yet to address.

On 12 December 2016, Judge Battaglia of the United States District Court for the Southern District of California issued the Court's long-awaited ruling on the State of California and Federal Government's motions for summary judgment in the Lipay Nation of Santa Ysabel tribe's (the 'Tribe') Desert Rose Bingo case. The Court determined that the games at issue were Class II under the Indian Gaming Regulatory Act ('IGRA') and therefore denied the State of California's motion for summary judgment on the breach of compact claim. However, the Court did determine that the online bingo games violated the federal Unlawful Internet Gambling Enforcement Act ('UIGEA'), and granted both the State and Federal Government's motions for summary judgment on that claim, and entered the following Permanent Injunction:

'The Tribal Defendants and all of their officers, agents, servants, employees, and attorneys, and all persons acting under any Tribal Defendant's direction and control, are hereby PERMANENTLY ENJOINED AND RESTRAINED from the following:

1. Offering or conducting any gambling or game of chance played for money or anything of value over the Internet to any resident of or visitor to California who is not physically located on the Tribe's Indian lands;
2. Accepting any credit, or the proceeds of credit, extended to or on behalf of any resident of or visitor to California who bets or wagers over

the Internet in connection with any gambling or game of chance offered or conducted by Tribal Defendants. This includes credit extended through the use of a credit card;

3. Accepting any electronic fund transfer, funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service from or on behalf of any resident of or visitor to California who bets or wagers over the Internet in connection with any gambling or game of chance offered or conducted by Tribal Defendants; and
4. Accepting any check, draft, or similar instrument which is drawn by or on behalf of any resident of or visitor to California who bets or wagers over the Internet in connection with any gambling or game of chance offered or conducted by Tribal Defendants, and which is drawn on or payable at or through any financial institution!'

Pursuant to the Court's order granting summary judgment, the Court entered judgment in favour of the State and Federal Government on the UIGEA claim on 12 December 2016², and set an Order to Show Cause hearing for why the State's breach of compact claim should not be dismissed for 3 January 2017³. On 4 January 2017, the Court entered an Order dismissing the State's breach of compact claim *sua sponte* - "[t]here being no objection from the State of California" - and directing judgment to issue on the State's first claim of relief against the State and in favour of

the Tribe, and declaring the case closed⁴. Also on 4 January 2017, the Court entered judgment in favour of the Tribe on the State's first claim for breach of compact⁵.

What we know from the Court's order

The Court's order granting summary judgment definitively answered two lingering questions on issues that courts had yet to meaningfully address:

- (1) Does technology that allows a traditional Class II game under IGRA to be played over the internet constitute a permitted 'technologic aid'⁶ or an 'electromechanical facsimile' that elevates the game's status to Class III⁷?
- (2) Does the mere use of the internet to offer gaming mean the gaming no longer occurs 'on Indian lands,' especially when considered in the context of UIGEA's prohibition on internet gambling initiated or received within a state where such gambling is unlawful?

In answering the first question, the Court first granted *Chevron* deference to the regulations promulgated in 25 C.F.R. part 502, which constitute a National Indian Gaming Commission ('NIGC') final rule that the Court deemed to represent a permissible construction of IGRA⁸. Accordingly, *Chevron* deference to the NIGC definitions ensured that the Court applied those definitions to determine what constitutes a permissible 'technologic aid' or an electronic or electromechanical facsimile that elevates an otherwise Class II game

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to Class III status⁹. The Court noted that the NIGC regulations promulgated under IGRA define technologic aids to include 'machines or devices that: (1) Broaden the participation levels in a common game; [...] or (3) Allow a player to play a game with or against other players rather than with or against a machine'¹⁰. The regulations also carve out from the definition of electronic or electromechanical facsimiles any electronic or electromechanical format applied to bingo, lotto, or other games similar to bingo, that 'broadens participation by allowing multiple players to play with or against each other rather than with or against a machine'¹¹. Because the Tribe's Virtual Private Network Aided Play System ('VPNAPS') is technology that does just that, the Court found the Desert Rose Bingo gaming is Class II gaming under IGRA¹².

In answering the second question, the Court framed the crux of the inquiry as the meaning to be given to 'on Indian lands,' as used in IGRA, in light of Congress's later enactment of UIGEA, which prohibits internet gambling initiated or received within a state where such gambling is unlawful¹³. Based on a statutory rule of construction requiring the Court to give effect to both the IGRA and the UIGEA, the Court found the only possible conclusion is that the IGRA applies only to gaming activity that occurs solely on Indian lands¹⁴. In giving meaning to the phrase 'gaming activity,' the Court recognised that Justice Kagan's instruction in *Bay Mills* clarifies that gaming activity is what goes on in a casino - "each roll of the dice and spin of the wheel," "not the

1. Order Granting Plaintiffs' Motions for Summary Judgment and Request for Permanent Injunction, Dkt. # 80, at 33, *California v. Lipay Nation of Santa Ysabel*, No. 14-cv-2724-AJB-NLS, United States of America v. Lipay Nation of Santa Ysabel, 14-cv-02855-AJB-NLS (Dec. 12, 2016) (hereinafter, the 'Order').
2. Judgment In A Civil Case, Dkt. # 14, at 1, *United States of America v. Lipay Nation of Santa Ysabel*, 14-cv-02855-AJB-NLS (Dec. 12, 2016).
3. Order, at 34.
4. Order Dismissing Breach of Compact Claim and Closing Case, Dkt. # 81, at 1, *California v. Lipay Nation of Santa Ysabel*, No. 14-cv-2724-AJB-NLS (Jan. 4, 2017).
5. Judgment In A Civil Case, Dkt. # 82, at 1, *California v. Lipay Nation of Santa Ysabel*, No. 14-cv-2724-AJB-NLS (Jan. 4, 2017).
6. 'Technologic aids' to a Class II game are permissible under 25 C.F.R. § 502.3(a).
7. A tribe must enter into a Tribal-State Compact with the State to offer Class III games. 25 U.S.C. § 2710(d)(1)(C).

8. Order, at 12 n.12.
9. *Ibid.* at 13.
10. 25 C.F.R. § 502.7(b)(1) & (3).
11. 25 C.F.R. § 502.8.
12. Order, at 3, 12–13.
13. *Ibid.* at 2 (citing 31 U.S.C. § 5362(10)(A)).
14. *Ibid.* at 2.
15. *Ibid.* at 23 (citing *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032–33 (2014)).
16. *Ibid.* at 23.
17. *Ibid.* at 2.
18. 25 U.S.C. § 2710(b).
19. 31 U.S.C. § 5362(10)(C); see also Order, at 19.
20. Order, at 13–14.
21. *Ibid.* at 14.
22. See e.g., David Palermo, *Santa Ysabel Tribe Loses Court Battle, But Remains Hopeful In War For California Online Poker And Bingo*, ONLINE POKER REPORT (28 December 2016, 5:36 p.m.), <http://www.onlinepokerreport.com/23304/santa-ysabel-court-ruling/>

proceedings of the off-site administrative authority¹⁵." The gaming activity at issue, then, "is the patrons' act of selecting the denomination to be wagered, the number of games to be played, and the number of cards to play per game"¹⁶. The import of this holding is that "patrons must be physically present on Indian lands when a bet is initiated for gaming to comply with both IGRA and UIGEA"¹⁷.

Although the defendant is unlikely to be consoled by their partial victory in the midst of an overall defeat, the Court's ruling on the State's breach of compact claim may set a critical precedent for Class II gaming moving forward. The import of the Court's holding on the breach of compact claim is to clarify that internet bingo constitutes Class II gaming under the IGRA, and is therefore subject to NIGC oversight but not state regulation¹⁸. Read within the context of the Court's ruling on the UIGEA claim, it becomes clear that under the Court's ruling, tribes may offer online bingo if the player is located on the tribe's Indian lands (e.g., a tribe's casino) the entire time. Moreover, as noted by the Court, UIGEA exempts from its reach bets or wagers that are, among other things, exclusively initiated and received on Indian lands, meaning that tribes may partner with one another to offer online bingo in a manner that allows the patrons of each tribe to play against one another¹⁹.

What remains uncertain

What remains uncertain under the Court's ruling, however, is how online poker would be classified by the Court. The Court's finding that bingo

offered through the Tribe's VPNAPS is Class II gaming was predicated, in large part, upon the very specific and narrow exemption in Section 502.8 of the NIGC's regulations that exempts 'bingo, lotto, and other games similar to bingo' from the definition of electronic or electromechanical facsimile if the game 'broadens participation by allowing multiple players to play with or against each other rather than with or against a machine'²⁰. The Court recognised that "it is beyond dispute that if a game 'incorporate[s] [sic] all of the characteristics of the game,' then it is a facsimile for IGRA classification purposes," but that "the definition goes on to exempt bingo from this primary definition"²¹.

While technology that allows poker to be played over the internet will undoubtedly 'broaden[...] participation by allowing multiple players to play with or against each other rather than with or against a machine,' it will not fit within Section 502.8's exemption for 'bingo, lotto, and other games similar to bingo.' Based on the phrasing of the Court's ruling, it is possible that it would view internet poker as an electronic or electromechanical facsimile.

What also remains to be seen is whether the Court's order will encourage tribes to begin offering online bingo to patrons at their brick-and-mortar casinos, or to embolden tribes to offer internet poker to those same patrons. Finally, the Tribe has not yet decided whether to appeal, but has stated that the decision is a financial one, and not one to be made on the merits of the case²².