

Arguments for the NIGC Proposals:

The "Consultation" Process

First The Port Gamble S'Klallam Tribe would like to make note that the "consultation" with the tribes is simply inadequate. A true consultation would mean that the opinions of the tribe(s) are valued. This means that we are given adequate time to prepare comments, especially in light of the fact that the technical standards have yet to be published. These consultations need to be held in geographic locations with affected tribes.

Given the details of the proposed changes, the invitations for consultations must be sent earlier, with the procedure for confirmation clearly described. Adequate time must be allowed so that the technical standards and classification standards can be viewed together. This will allow tribes to understand the full context of the entire package of regulations presented. And thought must be given to smaller tribes who may not have sufficient staffing to generate arguments quickly. Above all, the NIGC must not allow the comment period on the classification standards to expire until after publication of the technical standards and a sufficient review period.

We at the Port Gamble S'Klallam Tribe feel that no full consultation/comment period is complete without a public hearing. A hearing is needed to fully address all of the very complex issues. We feel that these issues are in depth and complex since there have been many attempts at "clarifying" these definitions as well as several cases in litigation.

Once a public hearing has been scheduled we require proper time to prepare our comments. Proper time means time to review the entire regulatory package; technical, classification, and definitions.

All of the comments from all of the tribes, manufacturers, and tribal representatives must be made part of the public record and disseminated to all tribes operating casinos.

Until a meaningful and collaborative consultation process is developed, meetings held by NIGC are merely comment meetings.

Game Classification

IGRA defines class two games with the following sentences:

(7) (A) The term "class II gaming" means -

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) -

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, ~~and~~

We at Port Gamble feel it is important to understand IGRA for both what it says and what it does not say. ~~In subsection II~~ IGRA states that the "holder" covers cards when objects with

in the definition of class II

numbers or symbols are “drawn or electronically determined.” There is no mention that the numbers must occur in sequence nor is there any ban on “auto daubing.” We also note that there is no time limit set for allowing players to daub their card(s).

To us, it is quite clear that the Senate intended IGRA to allow for technological advancement to the game of bingo. In fact, a Senate Report that accompanied the bill that became IGRA indicated that:

“tribes should be given the opportunity to take advantage of modern methods of conducting Class II games and the language regarding technology is designed to provide maximum flexibility.”

So we do not share the confusion that the NIGC has over what constitutes a class II bingo game. The Port Gamble S’Klallam agree with the plain language understanding that if the underlying game is bingo then the whole game is class II. Simply put, no matter what the outside looks like, if the game is bingo then the machine is class II.

The difference between a technological aid which is designed to aid the play and an electromechanical facsimile must be determined. However, this distinction is not so difficult to establish. Electronic, computer or other technologic aids include, but are not limited to, machines or devices that:

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.

With that understanding, we must look at the term facsimiles. A facsimile is by definition, a copy of something else, a replica. In terms relevant to class II gaming, a facsimile must be a replica of bingo (or games similar to bingo) and not bingo itself. Therefore in order for a “bingo” game to be a facsimile, it must look like “bingo” but not actually be “bingo.” This means that any game that is bingo is therefore not a facsimile. Going by the established definition in IGRA, so long as there are prizes that players compete for and there is a card with numbers or symbols and so long as the holder of the card covers such numbers or designations when similar numbers or designations are drawn or electronically determined and the game is won by the first person to cover the symbols in a previously designated arrangement, then the game itself is bingo. And if the game is bingo, then it cannot be a facsimile of bingo.

Again, if there are players with cards, and there are actual numbers or symbols being drawn and those players must mark their cards (manually or automatically) and they compete with each other to win prizes, then that game is bingo, no matter how it is presented. No other standard is needed. How the machine looks on the outside, the size of the letters that indicate that the machine is bingo or the size of the bingo card or even how long it takes the numbers to come out before being “daubed” is irrelevant. Phil Hogen ~~himself~~ wrote in a letter to the Oklahoma tribes that:

"The theme of a game, and the name and graphics that go with that theme, are not the determining factors in whether a particular game can be played. The graphics and the theme are merely cosmetic features, and [the] list of possible names would be endless. ~~Just because a vendor comes up with a new name and new graphics to replace the name of a game listed in the [NIGC] decision does not mean that the device can be played lawfully in the absence of a compact. The game themes and names can be easily changed, sometimes in a manner of minutes.~~"

Therefore it doesn't matter how the game looks, if it is bingo, it is class II. This understanding has been upheld in at least five circuit court of appeals decisions:

United States v. 103 Electronic Gambling Devices, 223 F.3d 1091 (9th Cir. 2000)

United States v. 162 MegaMania Gambling Devices, 231 F.3d 713 (10th Cir. 2000)

Diamond Game Enterprises v. Reno, 290 F.3d 365 (D.C. Cir. 2000)

United States v. Santee Sioux Tribe of Nebraska, 324 F.3d 607 (8th Cir. 2003)

Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission, 327 F.3d 1019 (10th Cir. 2003)

All of these court decisions rejected the NIGC's definitions, ^{THE COURTS DECIDED} deciding that the games in question were indeed class II. In *United States v. 103 Electronic Gambling Devices*, the court wrote:

"All told...the definition of bingo is broader than the government would have us read it. We decline the invitation to impose restriction on its meaning besides those Congress explicitly set forth in the Statute. Class II bingo is not limited to the game we played as children."

Disagreeing with the court decisions of *United States v Santee Sioux* and *Seneca-Cayuga Tribe v. National Indian Gaming Commission*, the Department of Justice filed a Petition for Writ of Certiorari with the Supreme Court for each case. The Supreme Court has denied both Petitions. ^{seersheori}

The Port Gamble S'Klallam Tribe feels that the courts were correct in their reading of IGRA and do not see the need for the NIGC to continue to reclassify games that it had already approved, ^{did not take cert} in the past.

Economic Impact

The mission statement of the NIGC is:

The Commission's primary mission is to regulate gaming activities on Indian lands for the purpose of shielding Indian tribes from organized crime and other corrupting influences; to ensure that Indian tribes are the primary beneficiaries of gaming revenue; and to assure that gaming is conducted fairly and honestly by both operators and players.

The ^{value for P65T} most strongly held is the notion of self-determination. Should the changes proposed by the NIGC go through, then many tribes will be unduly injured economically. At the very least the opportunity to grow and to negotiate with the State Gambling Commission will be hindered here in Washington, but ~~that is little compared to the Tribes that rely sole on class II gaming.~~ Those tribes might even face bankruptcy. ^{we still fare better than those}

Phil Hogen knows of the importance of Indian Gaming to the tribes across the country. In an address to the Senate Committee on Indian Affairs ^{given} September 21, 2005 Hogen said:

^{given}

"In the years since the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 et seq., was passed, Indian gaming has grown exponentially from \$100 million in revenue to over \$19.4 billion in 2004. Approximately 80% of this revenue comes from the higher stakes, Class III gaming. Revenues from Indian gaming have built roads, schools and health centers on reservations across the country, and greatly reduced reservation unemployment in many areas."

- OVER 22.6 BILLION

The NIGC website states that for the year 2005 tribes earned \$22,629,575,000 in revenues. Using the figure of 20% Hogen attributes to class II gaming that still leave more than 4.4 billion dollars in revenue that must be taken into account. And more than just directly affecting the tribe and its ability to function, there is the economic circle of each person employed both directly and indirectly by the gaming of that tribe.

This circle must take into account the life of each employee as they purchase goods and services in their communities. Moving further out in our economic circle, we must take into account the businesses that have grown due to the tribal casinos including but not limited the lending institutions that the tribes still owe. Should a tribe suddenly have all of its machines determined to be illegal and it cannot function, who will ~~be~~ paying the loans that the tribe still owes? Furthermore if the NIGC can determine a game to be illegal at any time in the future, what manufacturer will want to invest in such an unstable market? To conclude, a true study of the economic impact must be conducted and published before any proposals can be finalized.

We do thank you for the time you have allowed for us to voice our concerns. We hope that you appreciate the time, thought, and effort we have put into this discussion. We also hope that this discussion will be ongoing until the concerns of the tribes can be properly addressed.

Thank you